

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 2:16-cv-00371-SVW-MRW

Date 7/17/2020

Title *Cap Export, LLC v. Zinus, Inc. et al*

Present: The Honorable STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz

N/A

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

N/A

N/A

Proceedings: ORDER DENYING MOTION FOR RECONSIDERATION, MOTION FOR RESTITUTION, MOTION FOR A MORE DEFINITE STATEMENT, AND MOTION TO AMEND COMPLAINT AND MOTION FOR INTERLOCUTORY APPEAL [296], [297], [298], [299]

1. Zinus' Motion for Reconsideration or Interlocutory Appeal

The Court addresses the arguments raised in Zinus' motion for reconsideration below, in the detail necessary to respond to Zinus' new arguments. The Court will not cite to the evidentiary record in detail with regard to its conclusions, because the evidentiary record that existed at the time the Court issued its Order is discussed at length in that Order. Dkt. 295.

a. Zinus overstates Ninth Circuit precedent on Rule 60(b)(3)'s unwritten "diligence" requirement.

Zinus argues that a lack of diligence in any regard by Cap Export's counsel during litigation creates an outright bar on Rule 60(b)(3) relief. *See* Dkt. 299-1 ("Rule 60(b)(3) does excuse all misrepresentations by an opposing party in all circumstances where alternate means of discovery would have uncovered the misrepresentations"). The Court disagrees. There is no support in Ninth Circuit caselaw for such a rule.¹

¹ The Court notes that Zinus does not appear to dispute the Court's decision to apply Ninth Circuit caselaw to Cap Export's

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The sole Ninth Circuit case discussing Rule 60(b)(3) that Zinus relies on in its motion is *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004), which states that “Federal Rule of Civil Procedure 60(b)(3) require[s] that fraud ... not be discoverable by due diligence before or during the proceedings.” *Id.* (quotations and citations omitted). But the alleged fraud in *Casey* was a discovery issue—defendant Albertson’s “failure to respond to a request for production” of another employee’s employment records. *Id.* The Ninth Circuit noted that “this is not a case in which it is alleged that Albertson’s possessed Smith’s employment records *but falsely denied having them*, or the like.” *Id.* (emphasis added). Deeming this a “run-of-the-mill discovery problem for which the rules provide remedies,” the Ninth Circuit found that it did not constitute fraud, and that in any event, the plaintiff failed to file a motion to compel production of those records after Albertson’s failed to comply with the production request. *Id.*

Casey does not support Zinus’ argument that the Court cannot “consider the likelihood of uncovering Mr. Lawrie’s alleged misrepresentations had Cap Export diligently pursued various courses of discovery.” Dkt. 299-1 at 10-11. The Ninth Circuit’s relevant diligence analysis indicates only that a party’s failure to compel production of records in discovery constitutes a lack of adequate diligence to support a Rule 60(b)(3) motion. *See, e.g.* Dkt. 295 at 17 (collecting relevant cases analyzing the diligence requirement in various contexts). The case before the Court, centering on affirmative misrepresentations by Lawrie, is markedly different from each of the cases the Court has reviewed. The misrepresentations here extend far beyond a “run-of-the-mill discovery problem” and the appropriate diligence analysis cannot focus solely on Cap Export’s alleged deficiencies in that area.²

Rule 60 motion, because the motion “does not turn on substantive issues unique to patent law.” Dkt. 295 at 11.

² Similarly, the only relevant district court case Zinus cites addressed alleged misrepresentations related to an evidentiary issue that the defendants “were aware of . . . and had multiple opportunities to address” before that court issued a judgment. *See United States for Use & Benefit of Nasatka Barrier, Inc. v. Int’l Fid. Ins. Co.*, 2019 WL 6971381, at *2 (C.D. Cal. Apr. 2, 2019). For the reasons discussed at length in the Court’s prior Order, the circumstances before this Court are profoundly different.

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b. *Zinus’ new evidence could have been produced by reasonable due diligence, and cannot be considered by this Court under Local Rule 7-18.*

Local Rule 7-18 states that:

A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

The Court held two hearings on Cap Export’s motion to vacate the judgment, and afterward specifically requested supplemental briefing concerning Cap Export’s prior due diligence in this matter. Dkt. 281. In its supplemental brief, Zinus devoted considerable effort to its argument that Cap Export’s failure to seek affirmative disclosure of all prior art possessed by Zinus constituted a lack of diligence that barred Rule 60(b)(3) relief. *See* Dkt. 286 at 3-4, 6-7. Zinus did not present any evidence that “Zinus California” (the Zinus entity that owns the ‘123 patent and is a party to this lawsuit) actually possessed information relevant to the purchases Lawrie made via his Canadian company (Jusama) from Woody Furniture in Malaysia. The Court concluded that because Lawrie made his purchases through Jusama rather than Zinus, Zinus’ argument that additional discovery requests to Zinus would have unearthed the deception was implausible because Jusama (not Zinus) would have possessed such information, and Cap Export had been denied knowledge of Jusama’s existence or its relevance to this litigation. Dkt. 295 at 18.

Zinus has now presented extensive email documentation attempting to establish that Zinus did possess email communications referencing Lawrie’s purchases from Woody Furniture

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through Jusama.³ Dkt. 299-3. An employee of Zinus declared that he gathered this evidence through several hours of work beginning on December 19, 2019, approximately two weeks after the Court vacated its third planned hearing on this issue and took Cap Export's motion under submission after reviewing Zinus and Cap Export's supplemental briefing. Dkt. 299-2 at 1.

This new evidence cannot be considered under Local Rule 7-18. The Court specifically requested briefing on the diligence issue, and Zinus raised this precise issue in its responsive brief, without providing any similar evidence on this point. Cap Export filed its motion on September 29, 2019, and the Court and the parties devoted substantial time to review new evidence, taking court-ordered depositions, and holding hearings on this issue. Zinus' attempt to introduce new evidence following this Court's ruling on the motion, which it acknowledges was procured in a matter of hours and was available to Zinus at the time this Court ruled on Cap Export's motion, is not permitted by Local Rule 7-18.

c. Substantively, Zinus' new evidence does not alter this Court's conclusion.

As the Court previously explained, Ninth Circuit caselaw on Rule 60(b)(3) does not support the conclusion that any lack of diligence in litigation bars vacating a judgment procured through fraud, misrepresentation, or misconduct unrelated to that lack of diligence. Zinus' evidence is intended to show that if Cap Export simply asked Zinus to make certain discovery disclosures, Zinus would have produced each of these emails.⁴ In effect, Zinus contends that while it had abundant evidence of the misrepresentations by its president, it was simply awaiting a discovery request that never arrived to present this information to Cap Export.

³ Because the Court finds both procedural and substantive issues with Zinus' newly-available evidence, it declines to also address the evidentiary issues raised by Cap Export.

⁴ Zinus appears to have primarily produced these emails by searching for the terms "HQV" and "bed," although the Zinus employee responsible for the searches does not specify which terms he used to gather the emails presented to the Court. *See* Dkt. 299-2 at 1 (describing search for emails that contain "certain search terms" without articulating precisely which terms were used). But it is unclear why Cap Export would have specifically sought discovery of emails related to those terms, unless Cap Export had a *definite reason* to believe beds sold by HQV were relevant to the underlying patent dispute— but it was Lawrie's misrepresentations that denied Cap Export an opportunity to pursue further inquiry on that topic.

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First, Zinus argues that a discovery request seeking “production of documents calling for Zinus to produce any emails in its possession relating to any on-sale prior art activity” would have unearthed the emails discussed above. Dkt. 299-1 at 9. The Court is not persuaded that such a request would realistically have resulted in production of the documents possessed by Zinus. In its briefing on the motion to set aside the judgment, Zinus previously argued that the purchases made by Jusama from Woody “w[ere] not qualifying prior art under any category of prior art defined in 35 U.S.C. § 102.” Dkt. 255 at 16. Zinus specifically argued that the beds delivered by Woody Furniture to Jusama before the ‘123 patent was filed were not qualifying prior art for purposes of the on-sale bar. *Id.* at 15-17. The Court does not find plausible Zinus’ argument (in hindsight) that it would have identified each of the emails now presented to the Court as “relat[ed] to any on-sale prior art activity” when it very recently argued that similar evidence presented by Cap Export detailing these purchases was not related to any qualifying prior art as defined in 35 U.S.C. § 102. *Id.* at 16.

Additionally, the Court finds that the volume of emails regarding the “bed in a box” purchases made by Jusama in the possession of Zinus demonstrates an even closer relationship between these entities. Given Lawrie’s position as president of Zinus, his 50% ownership of Jusama, and his misrepresentations regarding the Woody “bed in a box” purchases when deposed, the Court does not find it likely that Zinus itself would be forthcoming in response to a hypothetical prior art discovery request by Cap Export. Zinus’ counsel asserts that “[u]pon being served with the request for production of documents, [he] would have fulfilled [his] ethical obligation to identify all responsive documents in the custody, possession or control of Zinus, would have analyzed them for privilege, and would have produced all responsive documents.” Dkt. 299-6. The Court does not doubt this assertion but notes that any response to discovery requests, particularly of an electronic nature like email documentation, would require the assistance of Zinus’ employees in conducting the search. *See, e.g.* Dkt. 299-2 (declaration of Zinus employee assisting Zinus’ counsel in conducting a search for email communications). The Court is not suggesting that Zinus’ counsel would not have acted ethically, simply that Lawrie’s conduct while president of Zinus strongly suggests that Zinus would not have produced this evidence related to the purchases of the Woody beds.

Finally, the Court notes as it did in its prior Order, that Zinus’ argument ignores the diligence Cap Export did undertake during the prior litigation. It deposed Lawrie, asked him relevant questions regarding his knowledge of similar “bed in a box” products on multiple occasions, and undertook

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numerous prior art searches that failed to reveal evidence of the Woody Furniture purchases. *See* Dkt. 295 at 18. Without reiterating the Court's prior analysis, it finds that in this specific factual context, any lack of due diligence by Cap Export in making certain discovery requests does not bar Rule 60(b)(3) relief, even in light of the evidence now produced by Zinus.

d. *The "note-passing" dispute.*

The Court first notes that the reference to "note-passing" in its prior Order was in no way essential to the logic of that Order and declines to analyze at length the extensive arguments presented by the parties regarding alleged seating arrangements at the disputed 2016 deposition of Lawrie. The Court also notes that the relevant portion of the deposition transcript states as follows:

Q. What was the name of the business?

A. HQV.

Q. HQ- -- V like Victor?

A. Yes.

Q. What did that stand for, if anything?

A. Nothing really.

Q. Colin, I do want to caution you, you're not really supposed to be -- they're passing notes to each other. You're not supposed to be reading while we're doing discussion, while we're doing the deposition. So if you're going to be tempted to look over I'll have them move down a little bit more. But if you want to talk to them at any point, you can, we'll just go off the record.

Dkt. 249-2, Ex. 13 at 21-22. Zinus' lawyers made no response on the record to the comments made by Cap Export's former counsel at the time of the deposition. *Id.* In a declaration dated October 18, 2019, Zinus' counsel, Darien Wallace, stated that neither he nor his co-counsel passed any notes to Lawrie during the 2016 deposition. Dkt. 258-1 at 2. To the extent that the Court relied on the contemporaneous transcript of the deposition rather than the declaration by Zinus' counsel denying any note-passing, the Court will retract the references to Lawrie exchanging notes with his attorneys during the deposition, and does not base its decision in any part on this portion of the evidentiary record. *See* Dkt. 295 at 5-6, 16.

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e. *Zinus’ motion in the alternative for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).*

Zinus requests that the Court, in the event it declines to reconsider its prior Order, certify Zinus’ preferred framing of the relevant legal question to the Federal Circuit for interlocutory appeal. Dkt. 299-1 at 23-25. The Court finds it unnecessary to do so, because appeal of the Court’s prior Order is available to Zinus as of right. Under 28 U.S.C. § 1292(a)(1) and (c)(1), the Federal Circuit has jurisdiction over appeals from “[i]nterlocutory orders of the district courts . . . dissolving injunctions” The Stipulated Judgment and Permanent Injunction this Court vacated via its prior Order expressly included a permanent injunction enjoining Cap Export from further infringement of the ‘123 patent. Dkt. 243 at 4-6. The Federal Circuit regularly hears appeals of such orders that have the “practical effect” of altering a permanent injunction such as the one this Court vacated.⁵ See *Yufa v. TSI, Inc.*, 730 F. App’x 905, 907 (Fed. Cir. 2018); *ePlus, Inc. v. Lawson Software, Inc.*, 789 F.3d 1349, 1354 (Fed. Cir. 2015). Moreover, the language of 28 U.S.C. § 1292(b) appears to expressly preclude certifying an interlocutory appeal under that subsection if an order is “otherwise appealable under this section,” as the Court’s Order vacating a permanent injunction appears to be. Zinus’ motion in the alternative for interlocutory appeal is DENIED.

2. Cap Export’s Motion to Amend the Complaint

Cap Export seeks to amend its operative Complaint to add a total of four new defendants, including Lawrie, Zinus Korea, Zinus Canada, and Keith Reynolds. Dkt. 298. Cap Export seeks to assert

⁵ Because the Court’s prior Order *dissolved* a permanent injunction, it does not believe that *Woodard v. Sage Prod., Inc.*, 818 F.2d 841, 842 (Fed. Cir. 1987) precludes interlocutory review here. See also *Cross Med. Prod., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1301 (Fed. Cir. 2005) (finding that *Woodyard*’s holding extends only to orders that have “the practical effect of granting or denying injunctions”); cf. *C.R. Bard, Inc. v. Interventional Techs., Inc.*, 39 F.3d 1195 (Fed. Cir. 1994) (finding that where a district court granted Rule 60 relief, but the underlying judgment did not include a permanent injunction, no interlocutory review was possible of the order).

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five additional causes of action against these new defendants, including False Advertising, Unfair Competition, Trade Libel, and Product Disparagement pursuant to the Lanham Act, False Advertising under California law, tortious interference with existing and prospective economic advantage, common law trade libel and product disparagement, and unfair competition under California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* Dkt. 299-1, Ex. 1.

The Court does not find that amending the Complaint and joining four additional parties would be appropriate at this advanced stage in the litigation. This case has been litigated since January 2016, and the sole focus has always been the patent claims disputed between Zinus and Cap Export. As Zinus points out in its Opposition brief, the inclusion of four new defendants would require substantial additional motion practice, additional discovery, and require the Court to delay resolution of the underlying validity of the '123 patent. At this advanced stage in the litigation, permitting such a broad expansion of the scope of this litigation would not be in the interests of justice and would cause prejudice to Zinus and the proposed defendants. Cap Export's motion is DENIED.

3. Cap Export's Motion for Restitution

Cap Export seeks restitution of the \$330,000 it already paid to Zinus pursuant to the stipulated judgment the Court vacated. Dkt. 297. In response, Zinus argues that the Court should instead delay ordering any restitution until Zinus has a chance to appeal this Court's prior Order vacating the stipulated judgment. Dkt. 301.

"What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution." *United States v. Morgan*, 307 U.S. 183, 197 (1939). "The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done." *Caldwell v. Puget Sound Elec. Apprenticeship & Training Tr.*, 824 F.2d 765, 767 (9th Cir. 1987) (quoting *Baltimore & Ohio R.R. v. United States*, 279 U.S. 781, 786 (1929)).

Zinus' argument that it should not be required to pay back the proceeds of the vacated judgment until after the conclusion of any appeal of that Order is not supported by the caselaw it relies on. *See*

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Baltimore & Ohio R.R., 279 U.S. at 786-787 (reversing the decision of the district court to deny restitution, and stating that once an “invalid order [is] set aside,” restitution of payments made under the order is required); *Watts v. Pinckney*, 752 F.2d 406, 408-10 (9th Cir. 1985) (no indication in the text of the opinion when the restitution affirmed by the Ninth Circuit was actually ordered); *Broadcom Corp. v. Qualcomm Inc.*, 585 F. Supp. 2d 1187, 1189-91 (C.D. Cal. 2008) (restitution ordered by the district court after the underlying judgment was vacated on appeal).

However, restitution is an equitable remedy in the vein of unjust enrichment. *See Caldwell*, 824 F.2d at 767; *Broadcom*, 585 F. Supp. 2d at 1189. The Court finds that the unique procedural posture of this case, especially the fact that the Court vacated the prior judgment but has not yet ruled on the merits of the underlying causes of action regarding patent validity and infringement, justifies a denial of Cap Export’s motion at this juncture. The Court has set a deadline of September 7, 2020, for the parties to file any motions for summary judgment following the reopening of discovery. Dkt. 295 at 21. Any trial (if necessary) will proceed before the end of 2020. Because the Court has denied Zinus’ motion for interlocutory appeal and will resolve the merits of the underlying claims in a timely fashion, it believes that maintaining the status quo and ordering restitution in conjunction with the final adjudication of the underlying claims is the proper approach in these circumstances.

At that point, unless the ultimate result in this litigation is a jury verdict in favor of Zinus that exceeds the sum of \$330,000 plus accumulated interest, the Court will order restitution of the appropriate sum to Cap Export. In the event that either trial in this case or the final briefing on summary judgment is postponed into 2021, the Court will permit Zinus to file a renewed motion seeking restitution. Cap Export’s motion is DENIED on this basis, and because the Court denies that motion, it must also necessarily DENY Cap Export’s accompanying motion for sanctions and attorneys’ fees incurred in bringing this motion. Dkt. 297 at 8-10.

4. Zinus’ Motion for a More Definite Statement

In the Court’s prior Order, it made substantial factual findings in support of its decision to vacate the judgment and permanent injunction. Zinus’ motion for a more definite statement is DENIED.

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