

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ARDISAM, INC., d/b/a YUKON TRACKS
and SPRING FORM, INC.,

Plaintiffs,

v.

AMERISTEP, INC., HUNTER'S VIEW, LTD.
and EASTMAN OUTDOORS,

Defendants.

ORDER

03-C-553-C

After discovering that this court had entered judgment in favor of defendants on June 3, 2005, without addressing the outstanding counterclaims, I entered an order on June 10, 2005, vacating the judgment. I then dismissed all of the counterclaims except one because they had been mooted by this court's August 2, 2004 holding that defendants' products did not infringe the '812 patent. However, I advised the parties that it did not appear that the August 2 opinion and order had mooted defendant Ameristep's claim against plaintiffs of "intentional interference with contractual relations." Therefore, I directed defendant Ameristep to advise the court no later than June 15, 2005, whether it intended to pursue this claim "against plaintiff Spring Form, Inc." Regrettably, I overlooked the fact that

defendant's counterclaim of intentional interference with contractual relations had been lodged against both plaintiffs. Defendant Ameristep has written to advise the court that it is agreeable to the dismissal of its counterclaim against plaintiff Spring Form, Inc., "without prejudice." It, too, has overlooked the fact that even if I were to accept its notice of voluntary dismissal against plaintiff Spring Form, Inc., I cannot enter final judgment in this case until the claims against *all* of the parties have been resolved.

Moreover, when a motion for voluntary dismissal of a claim is filed after an answer or motion for summary judgment has been filed such as in this case, Rule 41(a)(2) provides that the action may be dismissed "only upon order of the court and upon such terms and conditions as the court deems proper." Even if defendant Ameristep had advised this court that it is willing to dismiss its counterclaim of intentional interference with contractual relations against both plaintiffs, I would not be inclined to grant the request unless the dismissal is with prejudice. See, e.g., Silicon Image, Inc. v. Genesis Microchip (Delaware) Inc., 395 F.3d 1358, 1363 (Fed. Cir. 2005) ("Final dismissal of all claims with prejudice acts as a full adjudication on the merits and renders the controversy ripe for appeal.")

If defendant Ameristep is not agreeable to a dismissal of its remaining counterclaim against both plaintiffs with prejudice, it should withdraw its motion for voluntary dismissal no later than 12:00 noon on Wednesday, June 22, 2005. Alternatively, defendant Ameristep may file the stipulation of both plaintiffs to a dismissal of the counterclaim without prejudice

no later than 12:00 noon on Thursday, June 23, 2005. I express no opinion whether a stipulation will be sufficient to allow the United States Court of Appeals for the Federal Circuit to accept jurisdiction over an appeal from a judgment from this court that dismisses one of the claims “without prejudice.” See, e.g., Chamberlain Group, Inc. v. Skylink Technologies, Inc., 381 F.3d 1178, 1189 (Fed. Cir. 2004) (Federal Circuit lacks jurisdiction to hear appeal if district court dismisses all patent claims without prejudice, leaving parties in “same legal position with respect to [all] patent claims as if they had never been filed”) (quoting Nilssen v. Motorola, Inc., 203 F. 3d 782, 785 (Fed. Cir. 2000)).

ORDER

IT IS ORDERED that a decision is STAYED on defendant Ameristep’s request for voluntary dismissal of its counterclaim for intentional interference with contractual relations against plaintiffs Spring Form, Inc.

Further, IT IS ORDERED that

1. Defendant Ameristep, Inc. may have until 12:00 noon on Wednesday, June 22, 2005, in which to withdraw its notice of dismissal or amend it to indicate that it is dismissing its counterclaim for intentional interference with contractual relations against *both* plaintiffs with prejudice; or

2. Defendant Ameristep, Inc. may have until 12:00 noon on Thursday, June 23,

2005, in which to file a stipulated dismissal of the remaining claim against both plaintiffs
“without prejudice.”

Once defendant Ameristep, Inc. responds to the directives above, I will enter an
amended judgment in the case.

Entered this 21st day of June, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge