

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

OUT RAGE, LLC,

Plaintiff,

v.

NEW ARCHERY PRODUCTS CORPORATION,

Defendant.

ORDER

13-cv-240-bbc

In an order entered April 11, 2013, I set a hearing and a briefing schedule for plaintiff Out Rage, LLC's motion for a preliminary injunction. Defendant New Archery Products Corporation has now filed a motion to stay the preliminary injunction hearing and briefing until the United States Patent and Trademark Office rules on defendant's request for ex parte reexamination of U.S. Patent RE44,144. Defendant's motion will be denied.

Defendant's motion for ex parte reexamination was filed only two days ago and the PTO is unlikely to issue a decision for at least two months. Dkt. #31-3 (statistics for time from filing to order). The statutory deadline is three months. 35 U.S.C. § 303(a). Defendant's arguments that a stay will simplify issues in this case are purely speculative. If defendant was concerned that simultaneous proceedings before this court and the PTO would create procedural difficulties, it should have considered those concerns before filing its request for ex parte reexamination. Moreover, the '144 patent was reissued after a six

year prosecution, in which defendant participated and could have raised any of the invalidity arguments that it now raises in its request for reexamination.

Defendant is effectively asking me to deny plaintiff's motion for a preliminary injunction without full briefing or a hearing, which I will not do. Procter & Gamble Co. v. Kraft Foods Global, Inc., 549 F.3d 842, 847-48 (Fed. Cir. 2008) (holding district court abused its discretion by staying preliminary injunction motion during reexamination because stay denied preliminary injunction without considering likelihood of success, irreparable harm or balance of hardships). Defendant may raise its arguments about plaintiff's need for a preliminary injunction, the posture of the ex parte reexamination and the likely validity of the '144 patent in its opposition to the preliminary injunction. Id.

ORDER

Defendant New Archery Products Corporation's "Motion to Stay the Preliminary Injunction Motion and Hearing Pending a Decision on Request for Ex Parte Reexamination," dkt. #30, is DENIED. Plaintiff's motion to expedite the briefing schedule, dkt. #15, is DENIED as moot in light of the court's order setting a briefing schedule.

Entered this 17th day of April, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge