

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

GAMESA EOLICA, S.A.,

Plaintiff,

v.

GENERAL ELECTRIC COMPANY,
D/B/A GE WIND ENERGY,

Defendant.

OPINION AND
ORDER

04-C-43-C

Plaintiff Gamesa Eolica, S.A. and defendant General Electric Company d/b/a GE Wind Energy are in the business of designing, manufacturing and selling wind turbines. Plaintiff has brought a claim of patent infringement against defendant, alleging that defendant is selling a 1.5MW wind turbine that infringes claims 1 and 2 of U.S. Patent No. 4,695,736. Plaintiff has filed two motions for summary judgment, one on defendant's affirmative defense and the other on the issue of infringement. Defendant has filed a cross motion for summary judgment on the issue of infringement. Defendant submitted a combined brief in support of its own motion and in opposition to plaintiff's motion on infringement. Plaintiff filed a brief in reply in support of its own motion and a second brief

in response to defendant's motion. Defendant then filed a brief in reply in support of its motion. Now before the court is plaintiff's motion to strike defendant's reply brief either in whole or in part or for leave to file a sur-reply brief. Plaintiff contends that defendant's reply brief improperly responded to plaintiff's reply brief in support of its own motion and not to plaintiff's response brief in opposition to defendant's motion. In addition, plaintiff argues that defendant's reply brief raises new arguments, improperly responds to plaintiff's proposed findings of fact and unfairly allows defendant to have the "last word."

In defendant's combined brief, defendant argued that its variable speed wind turbine does not infringe the '736 patent because its turbine does not meet the limitation in claim 1 that the turbine have "a variable speed wind turbine controller, responsive to the sensed signals indicative of generator speed and generator power output, for providing a generator torque command signal for commanding maneuvers of the generator speed according to a function defining generator speed versus generator electrical power output"

Specifically, defendant argued that its turbine controller (1) does not provide generator torque command signals "according to a function defining generator speed versus generator electrical power output" or (2) use sensed power signals in generating torque command signals. As to this second point, defendant raised three sub-arguments about why the claim language should be construed to require a turbine controller that uses actual power signals for the purpose of generating torque command signals. (In support of its own motion for

summary judgment, plaintiff had advocated a construction of the claim language that would require only that a turbine have a controller that is responsive in any fashion to any signals from which power might be calculated.)

Plaintiff responded to all of these arguments in its reply brief in support of its own motion. However, in its response brief in opposition to defendant's cross motion, plaintiff addressed only its first argument and one of the three sub-arguments. Plaintiff noted that it did not construe the other two sub-arguments to be part of defendant's cross motion. However, to hedge its bet, plaintiff referred to the treatment of these arguments in its reply brief to the extent that defendant contended that they were relevant to its cross motion. Plaintiff effectively integrated its reply brief into its response brief and now contends that defendant had no business doing the same. Obviously, this argument goes nowhere; plaintiff is not entitled to respond to all of defendant's arguments but limit defendant's right to reply by manipulating the briefs in this fashion. All of defendant's arguments support its assertion that its turbine does not meet one of the limitations of the only independent claim of the '736 patent, so they are relevant to defendant's cross motion and its opposition to plaintiff's motion equally. If one of the claim limitations is not met, defendant is entitled to summary judgment. Thus, it is not clear why plaintiff thinks that arguments that help show that a claim limitation has not been met would not be relevant to defendant's cross motion.

Second, plaintiff contends that defendant's brief contains new arguments, which are

not appropriate in a reply brief. Although plaintiff is correct that arguments raised for the first time in a reply brief are considered waived, Carter v. Tennant Co., 383 F.3d 673, 679 (7th Cir. 2004), I do not agree with its assessment that defendant has raised any new arguments in its reply brief. Instead, defendant has included some new support for the same arguments it had already raised.

Third, plaintiff takes issue with the fact that defendant included a discussion about the materiality of some of plaintiff's proposed facts. In plaintiff's reply brief, it argued at length that defendant had improperly placed arguments about the materiality of certain proposed facts in the response to the proposed facts rather than in a brief. (Ironically, challenges to the propriety of a response to a proposed finding of fact should ordinarily be put in the reply in support of the proposed finding, but I will excuse this minor deviation and treat these arguments as if they had been so raised.) Now, plaintiff contends that because these arguments relate to its proposed findings of fact, they should have been raised in defendant's brief in opposition to plaintiff's motion and are not appropriate in a brief that purportedly relates only to defendant's cross motion. This argument is unavailing. The same facts govern both parties' motions for summary judgment and thus, materiality determinations affect both. Accordingly, I will not strike this portion of defendant's brief.

Finally, plaintiff contends that defendant has unfairly received the "last word" because it moved for summary judgment after the deadline for filing dispositive motion had passed

(with leave of the court). So that plaintiff does not feel as though it is being unfairly disadvantaged, I will construe pages 5 through 18 of plaintiff's motion to strike as a sur-reply brief. These pages address the merits of the arguments defendant made in its reply brief. However, the trial date is fast approaching and there is no need for plaintiff to file a fifth brief on the issue of infringement. Accordingly, I will deny plaintiff leave to file a (second) sur-reply brief and for the other reasons stated herein, I will not strike any part of defendant's reply brief.

ORDER

IT IS ORDERED that the motion of plaintiff Gamesa Eolica, S.A. to strike the reply brief of defendant General Electric Company d/b/a GE Wind Energy or in the alternative for leave to file a sur-reply brief is DENIED.

Entered this 9th day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge