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

GREENHECK FAN CORPORATION,

Plaintiff,

v.

LOREN COOK COMPANY,

Defendant.

REPORT AND RECOMMENDATION

08-cv-335-jps

REPORT[1]

In this action for patent infringement, plaintiff Greenheck Fan Corporation contends that products produced by defendant Loren Cook Company infringed on one of plaintiff's patents for an in-line centrifugal fan. In its answer to plaintiff's complaint, defendant asserted counterclaims and four affirmative defenses. Plaintiff has moved to strike defendant's third and fourth affirmative defenses as insufficient pursuant to Fed. R. Civ. P. 12(f). For the reasons stated below, I am recommending that the court strike both affirmative defenses, but allow defendant the opportunity to amend its answer with a short and plain statement of the grounds for the defense. Fed. R. Civ. P. 8(b).

BACKGROUND

On June 6, 2008, plaintiff commenced this action for patent infringement against defendant Loren Cook Company . Defendant filed an answer and four affirmative defenses to plaintiff's complaint on July 29, 2008. Defendant's third and fourth affirmative defenses state:

[1] As explained to the parties upon reassignment of this case to Judge Stadtmueller, throughout this case I will be ruling directly on motions within the power of an Article I judge to decide and issuing reports and recommendations on everything else.

Third Defense: Laches

Plaintiff's claims for relief are barred in whole or in part by the equitable doctrine of laches.

Fourth Defense: Estoppel

Plaintiff's claims for relief are barred in whole or in part by the equitable doctrine of estoppel.

ANALYSIS

Plaintiff contends that defendant's third affirmative defense for laches should be stricken because it fails to allege unreasonable delay on the part of plaintiff or material prejudice to defendant. In addition, plaintiff moves to strike defendant's fourth affirmative defense for estoppel on the ground that it fails to allege any action by plaintiff that would lead defendant to believe plaintiff would not enforce its patent.

Although the statements supporting defendant's affirmative defenses inform plaintiff of the legal theories defendant intends to raise, these statements do not convey the grounds for these defenses. Defendant argues that under Rule 12(f) the court may strike the defenses only if they that are not proper legal defenses to a patent infringement. I disagree. The issue is not whether laches or estoppel are proper legal defenses but whether plaintiff has been placed on notice of defendant's grounds for raising the defense.

Rule 12(f) provides that a court "may strike from a pleading an insufficient defense." Fed. R. Civ. P. 12(f). Because affirmative defenses are pleadings, *Heller Financial, Inc. v. Midwhey Powder Co. Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989), they are governed by Rule 8's requirement of a short and plain statement of the defense. *Heller*, 883 F. 2d at 1294 (citing Fed. R. Civ. P.

8(a)); *see also* Fed. R. Civ. P. 8(b)(1)(A)(defendant must "state in short and plain terms its defenses"). Although a motion to strike pleadings or affirmative defenses is generally disfavored because it consumes scarce judicial resources, *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 727 (7th Cir. 2006), and "potentially serve[s] to delay", *Heller*, 883 F. 2d at 1294, a pleading or affirmative defense may be stricken if it fails to give the opposing party fair notice of the defense and the non-moving party's grounds for the claim. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct 1955, 1964-65 (2007); *Hefferman v. Bass*, 467 F.3d 596, 600 (7th Cir. 2006) ("In federal court under Rule 8, the rules are simple: Notice is what counts. Not facts; not elements of 'causes of action'; not legal theories.").

Defendant has failed to comply with Rule 8 because it has not given plaintiff sufficient notice. Defendant's affirmative defenses are most accurately categorized as legal theories with implied elements. *See Twombly*, 127 S.Ct. At 1964-65 (plaintiff need not plead detailed factual allegations but must provide more than labels and conclusions and recitation of elements of cause of action).

Even if the affirmative defenses are found legally insufficient, the defendant contends that plaintiff must show that failing to strike will result in prejudicial harm, citing Judge Crabb's order in *Silicon Graphics, Inc. v. ATI Technologies ULC*, No. 06-C-611-C, 2007 WL 5312633, at *1 (W.D. Wis., Mar. 12, 2007)(Crabb, C.J.), in support of their argument. The affirmative defenses challenged in *Silicon Graphics* did not merely recite legal theories, but offered a concise statement of defendant's defense. *Id.* Therefore, plaintiff in *Silicon Graphics* was given sufficient notice of the grounds for defendant's claims. In this case, defendant Loren Cook has not offered sufficient information to place the plaintiff on notice. Failing to properly notify is prejudice.

Thus, by establishing that the defendant's affirmative defenses failed to comply with Rule 8, plaintiff has made the necessary showing of harm.

As a final matter, defendants are not without recourse. Just as the rules taketh, they giveth. Because affirmative defenses are governed by the rules of pleadings, defendant can amend its affirmative defenses "as a matter of course" pursuant to Rule 15. Fed. R. Civ. P. 15(a). In the pre-trial conference report on August 28, 2008, this court set the deadline for parties to amend their pleadings as October 3, 2008. I will add two weeks to this deadline–that is, until October 17, 2008–to account for the time allowed for objections and mailing.[2] Defendant also has the option of filing an amended pleading now and foregoing objections to this report and recommendation. It's their call.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that plaintiff Greenheck's motion to strike pursuant Fed. R. Civ. P. 12(f) to defendant Loren Cook Company's third and fourth affirmative defense be GRANTED.

Entered this 25th day of September, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

[2] This extension is a *fait accompli* because I have direct scheduling authority over this lawsuit.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN
120 N. Henry Street, Rm. 540
Post Office Box 591
Madison, Wisconsin 53701

Chambers of
STEPHEN L. CROCKER
U.S. Magistrate Judge

Telephone
(608) 264-5153

September, 2008

ALL COUNSEL

Re: Greenheck Fan Corporation v. Loren Cook Company
Case No. 08-cv-335-jps

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before October 6, 2008, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by October 6, 2008, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

/s/

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable J.P. Stadtmueller, District Judge

MEMORANDUM REGARDING REPORTS AND RECOMMENDATIONS

Pursuant to 28 U.S.C. § 636(b), the district judges of this court have designated the full-time magistrate judge to submit to them proposed findings of fact and recommendations for disposition by the district judges of motions seeking:

(1) injunctive relief;
(2) judgment on the pleadings;
(3) summary judgment;
(4) to dismiss or quash an indictment or information;
(5) to suppress evidence in a criminal case;
(6) to dismiss or to permit maintenance of a class action;
(7) to dismiss for failure to state a claim upon which relief can be granted;
(8) to dismiss actions involuntarily; and
(9) applications for post-trial relief made by individuals convicted of criminal offenses.

Pursuant to § 636(b)(1)(B) and (C), the magistrate judge will conduct any necessary hearings and will file and serve a report and recommendation setting forth his proposed findings of fact and recommended disposition of each motion.

Any party may object to the magistrate judge's findings of fact and recommended disposition by filing and serving written objections not later than the date specified by the court in the report and recommendation. Any written objection must identify specifically all proposed findings of fact and all proposed conclusions of law to which the party objects and must set forth with particularity the bases for these objections. An objecting party shall serve and file a copy of the transcript of those portions of any evidentiary hearing relevant to the proposed findings or conclusions to which that party is objection. Upon a party's showing of good cause, the district judge or magistrate judge may extend the deadline for filing and serving objections.

After the time to object has passed, the clerk of court shall transmit to the district judge the magistrate judge's report and recommendation along with any objections to it.

The district judge shall review de novo those portions of the report and recommendation to which a party objects. The district judge, in his or her discretion, may review portions of the report and recommendation to which there is no objection. The district judge may accept, reject or modify, in whole or in part, the magistrate judge's proposed findings and conclusions. The district judge, in his or her discretion, may conduct a hearing, receive additional evidence, recall witnesses, recommit the matter to the magistrate judge, or make a determination based on the record developed before the magistrate judge.

NOTE WELL: A party's failure to file timely, specific objections to the magistrate's proposed findings of fact and conclusions of law constitutes waiver of that party's right to appeal to the United States Court of Appeals. ***See United States v. Hall,*** **462 F.3d 684, 688 (7th Cir. 2006).**