

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

OUT RAGE LLC,

Plaintiff,

v.

NEW ARCHERY PRODUCTS
CORPORATION,

Defendant.

OPINION AND ORDER

13-cv-240-bbc

At the conclusion of the evidentiary hearing held on May 2, 2013 on plaintiff Out RAGE LLC's motion for a preliminary injunction, I denied the motion in an oral ruling, concluding that plaintiff had not made the necessary showing for the injunction. For the benefit of the parties, I have prepared a brief amplification of the ruling.

Plaintiff's motion for a preliminary injunction was based upon its reissued patent, RE No. 44,144, which issued on April 9, 2013. The patent is directed to "rearwardly deploying broadheads." (Broadheads are arrowheads with blades and are used in hunting large prey.) Both parties manufacture these rearwardly deploying broadheads, which are touted for their aerodynamic qualities and their ability to kill prey quickly by creating a large and lethal hole at entry. Plaintiff contends that defendant copied its patented design for the RAGE broadhead. Defendant contends that it uses its own design for its product, the Killzone, on which it received a patent on March 13, 2013, that plaintiff's patent is invalid as obvious,

that plaintiff delayed unreasonably in filing its provisional patent application, that plaintiff omitted one of the inventors of the patent and that plaintiff has no standing to sue because it has not proved it owns the patent in dispute.

Plaintiff is seeking a preliminary injunction to keep defendant's allegedly infringing devices off the market and halt an erosion of its own market share. To obtain a preliminary injunction, plaintiff must show that it has at least a slight chance of prevailing ultimately on the merits, that it will suffer irreparable harm if the injunction does not issue, that the balance of harms tips in its favor and that an injunction is in the public interest. In this case, it was clear from the outset that plaintiff had a daunting task. Just to get past the first factor, it had to show that it had standing to bring an infringement case, that it was likely to prevail on that infringement case and that it was likely to defeat defendant's claims of invalidity. It failed to make this showing, except as to invalidity, but even if it had, it would have foundered on the necessary showing of irreparable harm.

A. Likelihood of Ultimate Success

1. Standing

Standing to sue for patent infringement is governed by the Patent Act, 35 U.S.C. § 281. Enovsys LLC v. Nextel Communications, Inc. 614 F.3d 1333, 1341 (Fed. Cir. 2010). To establish standing, a plaintiff must present evidence of its right to sue. This evidence might take the form of an exclusive license to the patent on which the plaintiff is attempting to sue or a showing that the plaintiff has an ownership interest in the patent. Propat

International Corp. v. Rpost, Inc., 473 F.3d 1187, 1193 (Fed. Cir. 2007); EMD Crop Bioscience Inc. v. Becker Underwood, Inc., 750 F. Supp. 2d 1004, 1011 (W.D. Wis. 2010).

The only evidence that plaintiff introduced on the subject was a signature on a document filed in connection with a motion for a change of attorney signed by a person holding himself out as assignee of the patent rights. File wrapper, dkt. #37-5 at 141. (Plaintiff is also shown as assignee on the patent, dkt. #4.) Plaintiff did not file anything showing that the assignor had made the assignment or, more important, what the scope of the assignment was.

2. Likelihood of prevailing on infringement claims

In light of the patent office's determination that both parties' rearwardly deploying broadheads qualified for patent protection, it is not surprising that the question of infringement is a close one. Two issues were in play at the hearing: (1) whether the '144 patent disclaims linked blades, as defendant contends, or whether it is silent on that point, as plaintiff contends; and (2) the alleged camming surface on defendant's allegedly infringing product, the Killzone broadhead. (Both parties agree that "camming surface" refers "to the unsharpened surface of the blade that, in connection with the pin, controls the relative motion between the blades and the pin as the blades move rearwardly after impact. The path of the motion is dictated by the geometry of the camming surface and generally serves to transform the linear, backward motion of the blades into an outward, radial motion." Pedersen Decl., dkt. #14, ¶ 35.)

On the first issue, it remains unclear to me whether the '144 patent should be read as disclaiming any requirement that the blades be linked. Both sides have strong arguments on this point. Plaintiff argues that the patent says nothing about the need for linking and that the blades of the accused Killzone move relative to one another, which it says is sufficient for infringement. Defendant argues that the applicants disclaimed linking in the '144 patent when they told the examiner that in their invention each of the blades “operate[s] separately and independently of each other, and are not linked together,” Dft.’s Br., dkt. #39, at 14 (citing file wrapper, Swanson decl., exh. 3 at 714). Moreover, defendant denies that its own product has any such linking. If defendant is correct about the effective disclaimer by plaintiff or about the absence of linking in its own products, plaintiff will be unable to show at trial that the Killzone is infringing.

The issue of the camming surfaces on the Killzone is an equally close one: defendant performed die tests that it contends show that camming does not occur on the blades of its product; plaintiff maintains that its expert’s gel tests showed conclusively that camming does occur. However, defendant’s witness, Robert Mizek testified persuasively that the Killzone does not have a camming surface that is used to facilitate outward expansion of the blades. Instead, on the Killzone, the impact edge of the blades is exposed. As the broadhead makes direct contact with the target, the force of impact dislodges the bearing surface of the rear end of the blade from the sidewall of the slot and opens the blades before they make contact with the rear of the slot. If this is true, the Killzone uses an entirely different mechanism from the one used as the opening mechanism in the RAGE broadhead.

3. Defendant's claims of invalidity

At this stage of the case, defendant has failed to show that plaintiff's patent is invalid. It had no evidence from a person of ordinary skill in the art that it would have been obvious to combine features of previously issued patents to create plaintiff's rearwardly deploying broadhead. It failed as well to show that Robert Mizek was an inventor who should have been named in plaintiff's '144 patent and that plaintiff delayed unreasonably in prosecuting the patent. Plaintiff has shown a likelihood of ultimate success on the issue of invalidity.

B. Irreparable Harm

As I noted in my oral ruling, the deciding factor is plaintiff's inability to show that it would suffer irreparable harm if the injunction did not issue. On this issue it offered evidence in only two forms. The first was the declaration of its CEO, Richard Krause, who gave opinions in his declaration on a variety of topics, including market share, market share erosion and loss of shelf space and purchase orders in 2010, but never explained the basis for his opinions or attempted to quantify his speculative opinion on market share erosion. He did not perform any economic analyses of data and he does not hold himself out as a person with the skills to do so. He did not testify at the hearing.

Plaintiff did not introduce any exhibits that would have served as a foundation for Krause's opinions and never explained the relevance of loss of shelf space in 2010 to a patent that issued in April 2013. Moreover, it never demonstrated why money damages would be

inadequate to compensate it for any lost profits. Its attempt to prove price erosion through its hearing exhibits ##4 & 5 fell short; the exhibits showed only that on one occasion, online sellers had discounted prices. Plaintiff produced no exhibit or witness to explain the significance of this discounting to Krause's theory of price erosion.

Plaintiff tried to show that it would be harmed irreparably if the court did not issue a preliminary injunction because defendant did not have the financial resources to satisfy a judgment should plaintiff ultimately prevail on its claims. Defendant's sole stockholder testified persuasively that funds would be available to compensate plaintiff if it won a judgment in its favor. This testimony was enough to show that defendant's financial situation is not a ground for granting plaintiff an injunction.

C. Remaining Factors

Plaintiff was unable to show that the harm it would suffer if no injunction issued outweighed the harm defendant would suffer if an injunction did issue. The parties agree that they are head-to-head competitors. They both own patents to competing technology in the form of rearwardly deploying broadheads (assuming that plaintiff does own the '144 patent, a showing it has not yet made). The potential harms are in equipoise.

The public interest is neither enhanced nor diminished by failing to issue an injunction in this situation like this one in which the movant has not shown its entitlement to an injunction.

ORDER

IT IS ORDERED that plaintiff Out RAGE LLC's motion for a preliminary injunction, dkt. #6, is DENIED. The court will set a prompt preliminary pretrial conference at which the parties can discuss a trial date.

Entered this 8th day of May, 2013.

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