

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

| | | |
|---------------------------|---|---------------------------|
| GOODMAN BALL, INC., |) | |
| |) | |
| Plaintiff(s), |) | No. C07-1148 BZ |
| |) | |
| v. |) | |
| |) | ORDER OF DISMISSAL |
| CLEAR WATER USA, INC., et |) | |
| al., |) | |
| |) | |
| Defendant(s). |) | |
| _____ |) | |

Following a Court ordered mediation which resulted in a reported settlement, on February 29, 2008, the Court dismissed this patent infringement case with prejudice, subject to the condition that any party could restore the case to the calendar in 60 days if the settlement was not consummated. No party filed a request to reopen by April 30, 2008.

Instead, on December 3, 2008, plaintiff moved to reopen the case, asking to be relieved of its prior default under Rule 60(b). Plaintiff represented to the Court that the case should be reopened because defendants had fraudulently entered into the settlement and fraudulently induced it into believing that the settlement would be consummated. Surprisingly, no

1 defendant filed an opposition. Accordingly, on January 6,
2 2009, I granted plaintiff's motion to reopen the case.

3 On May 15, 2009, defendants Mach II Aviation, Inc. and
4 Escape Velocity of Tampa Bay, Inc., represented by new
5 counsel,¹ filed a motion pursuant to Fed. R. Civ. Proc. 60(b),
6 requesting relief for their failure to have opposed
7 plaintiff's earlier motion. The moving defendants filed a
8 series of declarations, which essentially state that following
9 the mediation, they had carried out the settlement agreement
10 by paying the first two installments required by the
11 settlement (totaling \$60,000.00), and would have paid the
12 remaining \$45,000 had plaintiff not moved to reopen the case.
13 The declarations further stated that the only party who had
14 not consummated its part of the settlement was SolarDiesel
15 Corporation, which earlier had been dismissed from this suit
16 for lack of personal jurisdiction and which had filed a
17 Chapter 11 bankruptcy proceeding on June 13, 2008.²

18 In its opposition, plaintiff does not deny having
19 received \$60,000.00 from the moving defendants or explain why
20 it did not inform the Court of this fact when it filed its
21 motion. Plaintiff's counsel also admits that he was aware of

23 ¹ In the interim, I granted the motion of previous
24 counsel to withdraw on the grounds that Caryl E. Delano, the
25 partner handling this matter, had become a bankruptcy judge
26 shortly before plaintiff filed its motion, and her partner
27 Michael C. Addison, had never represented the defendants, had
28 no knowledge of this dispute, and was not admitted to practice
in this Court.

² Though it had been dismissed for lack of
jurisdiction, it appears that SolarDiesel voluntarily
participated in the mediation.

1 Ms. Delano becoming a bankruptcy judge and that on April 16,
2 2008, he sent a notice of default to Ms. Delano. What
3 plaintiff failed to do was request the Court to reopen this
4 case or ask for an extension of the 60 day period. Instead,
5 commencing in June 2008, counsel for plaintiff engaged in a
6 series of email communications with Michael Carey, a Florida
7 attorney who represents the moving defendants in Florida,
8 which can be fairly characterized as non-productive. That
9 December, plaintiff filed its motion for relief from its
10 failure to reopen the case prior to April 30.

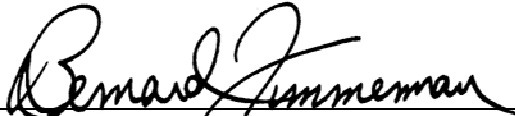
11 Having the complete record before me, I conclude that the
12 moving defendants' motion should be **GRANTED**. Had I had a
13 complete record, I would not have granted plaintiff's motion
14 for relief since it appears that far from repudiating the
15 settlement, the only remaining defendants had honored it. The
16 Memorandum of Understanding signed by the parties does not
17 provide for the Court retaining jurisdiction to enforce the
18 settlement and was not spread on the minutes of the Court. It
19 does state that in the event a final settlement agreement is
20 not signed, "this term sheet is intended to be, and shall
21 serve as, a valid and enforceable contract." Absent a
22 provision reserving jurisdiction, any breach of a settlement
23 agreement requires that the aggrieved party sue for breach of
24 contract, this court having lost jurisdiction of the case once
25 it was dismissed. See Kokkonen v. Guardian Life Ins. Co. of
26 Am., 511 U.S. 375, 378 ("Enforcement of the settlement
27 agreement, however, whether through award of damages or decree
28 of specific performance, is more than just a continuation or

1 renewal of the dismissed suit, and hence requires its own
2 basis for jurisdiction").

3 When the Court lost jurisdiction over this case on April
4 30, 2008, the moving defendants had made the payments required
5 of them. To the extent that on that date SolarDiesel was in
6 default, it was not a defendant in this action. Moreover,
7 SolarDiesel has entered bankruptcy, which has the effect of
8 staying any proceeding against it in this Court. Under the
9 circumstances, it appears to be in the interests of justice to
10 require moving defendants to make the final two payments
11 required by the settlement and for plaintiff to pursue its
12 claims against SolarDiesel in the bankruptcy proceeding in
13 Florida.

14 **IT IS THEREFORE ORDERED** that defendants' motion is
15 **GRANTED**, on condition that they pay plaintiff the final two
16 installments totaling \$45,000 by **August 15, 2009**. Upon
17 defendants filing proof of payment, a final judgment will be
18 entered dismissing this case for lack of jurisdiction. I find
19 no need for argument and vacate the hearing scheduled for
20 **August 12, 2009**.

21 Dated: August 5, 2009

22 
23 _____
24 Bernard Zimmerman
25 United States Magistrate Judge

26 G:\BZALL\BZCASES\GOODMAN BALL\ORDER OF DISMISSAL.wpd