EXHIBIT 9

REARDEN LLC, et al., Plaintiffs, v. REARDEN COMMERCE, INC., Defendant.

No. C 06-07367 MHP

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 15590

February 25, 2009, Decided
February 26, 2009, Filed

PRIOR HISTORY: *Rearden LLC v. Rearden Commerce, Inc., 597 F. Supp. 2d 1006, 2009 U.S. Dist. LEXIS 14836 (N.D. Cal., 2009)*

COUNSEL: [*1] For Rearden LLC, a California limited liability company, Rearden Productions LLC, a California limited liability company, Rearden Studios LLC, a California limited liability company, Rearden Inc, a California corporation, Rearden Properties LLC, a California limited liability company, Plaintiffs: Jason A. Yurasek, LEAD ATTORNEY, Perkins Coie LLP, San Francisco, CA; John Thomas McCarthy, LEAD ATTORNEY, Morrison & Foerster LLP, San Francisco, CA; Monty Agarwal, LEAD ATTORNEY, Arnold & Porter, San Francisco, CA; Ronald L. Johnston, LEAD ATTORNEY, Rachel Lena Chanin, Trenton Herbert Norris, Arnold & Porter LLP, San Francisco, CA; Brian Lawrence Levine, Palo Alto, CA; David Joseph Perez, Greenberg Traurig LLP, East Palo Alto, CA; Douglas L. Hendricks, Morrison & Foerster, San Francisco, CA; Herbert Harris Finn, Greenberg Traurig, LLP, Chicago, IL; Shylah R. Alfonso, PRO HAC VICE, Perkins Coie LLP, Seattle, WA;

For Rearden Commerce Inc, a California coroporation, Defendant: Daniel Todd McCloskey, Greenberg Traurig, LLP, Palo Alto, CA; David Joseph Perez, Greenberg Traurig LLP, East Palo Alto, CA; Herbert Harris Finn, Greenberg Traurig, LLP, Chicago, IL; James J Lukas, Jr., PRO HAC VICE, Greenberg [*2] Traurig, LLP, Chicago, IL; Kevin John O'Shea, Richard Daniel Harris, Greenberg Traurig LLP, Chicago, IL.

JUDGES: MARILYN HALL PATEL, United States District Court Judge.

OPINION BY: MARILYN HALL PATEL

OPINION

MEMORANDUM & ORDER

Re: Plaintiff's Motion for Leave to Seek Reconsideration of Grant of Summary Judgment

On January 27, 2009, the court entered an order that granted a summary judgment motion filed by defendant Rearden Commerce, Inc., and denied a summary judgment motion filed by plaintiffs Rearden LLC, et al. See Docket No. 235 (Amended Order). On February 9, 2009, plaintiffs requested leave to seek reconsideration of that order. Plaintiffs attempt to "specifically show . . . manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before [the Court issued an] interlocutory order" and thus meet the requirements of Civil Local Rule 7-9(b)(3). Plaintiffs advance four arguments.

Plaintiffs contend that the court erroneously failed to consider *non-consumer* confusion, relying in particular upon *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc., 457 F.3d 1062, 1078 n.11 (9th Cir. 2006)*. See Docket No. 243 (Mot.) at 2 & 4. That case does not license courts [*3] to base their infringement analysis upon the sorts of non-consumer confusion relied upon by plaintiffs, e.g., confusion of investors, partners, acquirers and potential employees. It merely restates the uncontroversial rule of law that *post-consumer* confusion (e.g., confusion arising when a potential consumer sees an item of clothing on the street) can establish likelihood of confusion under the Lanham Act. *Id. at 1077-1078*. Neither in their briefing nor at oral argument did plaintiffs present a viable theory of post-consumer confusion. The irrelevance of Au-Tomotive is highlighted by the fact that plaintiffs did not bother to cite it in their moving papers. See Docket No. 127 (Pf.'s MSJ) at iii; Docket No. 202 (Pf.'s Reply) at ii; Docket No. 174 (Pf.'s Opp. to Def.'s MSJ) at iii.

Second, plaintiffs read *Thane Int'l, Inc. v. Trek Bicycle Corp., 305 F.3d 894 (9th Cir. 2002)*, as holding that "the correct question in this Circuit is whether a reasonable person might assume that Rearden Commerce or its technology was incubated or sponsored by, or otherwise associated or affiliated with, Rearden." Mot. at 2, see also 5-7. The Thane court did not reverse the lower court's grant of summary judgment simply [*4] because some reasonable person could think the two parties were affiliated; rather, the court found that in that case a reasonable jury could find that there was a likelihood of consumer or post-consumer confusion. *Id. at 903*. As with Au-Tomotive, plaintiffs failed to cite Thane until the instant motion. See Pf.'s MSJ at iv; Pf.'s Reply at iii; Pf.'s Opp. to Def.'s MSJ at vi.

It is also argued that the court erred by granting defendant's motion for summary judgment without any consideration of the Rule 56(f) declaration plaintiffs filed with their opposition brief. See Docket No. 174 (Yurasek Rule 56(f) Dec.). Plaintiffs filed their sixteen-page Rule 56(f) declaration along with 947 other pages of declarations and exhibits. See Docket No. 175 (Yurasek Opp. Dec.) (including 102 separate exhibits) & Docket No. 176 (Perlman Opp. Dec.) (including 85 separate exhibits). The fact that the court did not specifically mention a particular declaration or exhibit in its order does not mean it was not considered.

In their opposition brief, plaintiffs did not explain the significance of the Rule 56(f) declaration to plaintiffs' ability to oppose summary judgment. Plaintiffs' sole reference to the [*5] declaration in their brief was included in a footnote asserting that defendant had generally failed to meet its discovery obligations. See Pf.'s Opp. to Def.'s MSJ at 21 n.18; see also Docket No. 244 (Levine Dec.), Exh. 10 (excerpt from March 27, 2008, hearing transcript in which court instructs plaintiffs' counsel to explain discovery needed in context of opposition brief). The declaration itself was another litany of hyperbolic accusations and petty grievances. While charging defendant with every possible form of discovery abuse, the declaration failed to demonstrate prejudice to plaintiffs. The declaration specifically focused on defendant's purported failure to comply with discovery requests that plaintiffs postulated would bring to light incidents of actual consumer or post-consumer confusion. Plaintiffs had over a year and a half between the time they chose to file their complaint and the time that they filed their opposition to conduct and produce scientifically valid surveys of their purported consumers or produce other evidence of consumer confusion. Plaintiffs' heavy reliance upon supposedly relevant discovery from defendant merely highlighted plaintiffs' own failure to produce [*6] evidence relevant to actual confusion. Unlike *Garrett v. City and County of San Francisco, 818 F.2d 1515, 1519 (9th Cir. 1987)*, in which a Title VII claimant requested specific documents that only the city possessed, information about consumer confusion is not in the "sole possession of the opposing party." Id. (citation omitted). In ruling upon the motions, the declaration was considered and discounted, as plaintiffs did not show that further discovery would produce anything meaningful.

Finally, plaintiffs are correct that the court's order misstated the applicable standard for infringement in one phrase that referred to "a *strong* likelihood of confusion." Amended Order at 20 (emphasis added). Yet the order set forth the correct standard at the outset of the Sleekcraft analysis, see id. at 10, and the court used such standard throughout its analysis and decision-making. As the court's analysis demonstrates, no reasonable jury could find that defendant's use of "Rearden" creates a likelihood of confusion.

In summary, plaintiffs have failed to show a manifest failure that would entitle them to leave to file a motion for reconsideration pursuant to Civil *Local Rule 7-9*. Plaintiffs' motion [*7] is therefore DENIED.

IT IS SO ORDERED.

Dated: February 25, 2009

/s/ Marilyn Hall Patel

MARILYN HALL PATEL

United States District Court Judge

Northern District of California