Specht et al v. Google Inc et al Doc. 354

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ERICH SPECHT, an individual and doing business as ANDROID DATA CORPORATION, and THE ANDROID'S DUNGEON INCORPORATED,	)	
Plaintiffs/Counter-Defendants,	)	
v.	)	Civil Action No. 09-cv-2572
GOOGLE INC.,	)	Judge Harry D. Leinenweber
Defendant/Counter-Plaintiff.	)	

MARTIN MURPHY'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION TO STRIKE [ECF 333] GOOGLE'S POST JUDGMENT MOTION FOR SANCTIONS [ECF 314]

NOW COMES Martin Murphy, attorney for Plaintiffs, Erich Specht, an individual and doing business as Android Data Corporation and The Android's Dungeon Incorporated (collectively, "Plaintiffs"), and for his reply in support of his motion to strike [ECF 333] states as follows:

I. THE FILING OF A NOTICE OF APPEAL MAY HAVE DIVESTED THIS COURT OF JURISDICTION TO ENTERTAIN GOOGLE'S MOTION FOR SANCTIONS

Before the Court may act on Google's motion, it must first ascertain whether or not is has jurisdiction over the subject matter. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 US 694 (1982). In *Ireland*, the Court held that:

> Subject-matter jurisdiction … functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, California v. LaRue, 409 U. S. 109 (1972), principles of estoppel do not apply, American Fire & Casualty Co. v. Finn, 341 U. S. 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject-matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires

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> this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record."

Id.

Under the criteria set forth in *Overnite Transp. Co. v. Chicago Indus. Tire Co.,* 697 F.2d 789, 792 (7th Cir. 1983), it appears that this Court does not have jurisdiction over Google's motion. "It is a well established general rule that the perfection of an appeal "vests jurisdiction in the court of appeals [and] further proceedings in the district court cannot then take place without leave of the court of appeals." *Overnite Transp. Co.*at 792 citing *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir.1972). It is undisputed that no motions were pending before this Court at the time the Notice of Appeal was filed. Thus, under the holding in *Overnite,* it appears that the Court does not have jurisdiction to entertain Google's § 1927 motion. It is also important to note that the Court permitted Novack and Macey LLP and Andrew Fleming to withdraw from this case on February 3, 2011, without objection and without reservation. At no time did Google ever ask the Court to reserve any right to file motions for sanctions against any of the attorneys.

Accordingly, Google's motion must be stricken for lack of subject matter jurisdiction and prior notice. If, for any reason, the Court finds that it does have subject matter jurisdiction, then the Court should find that Google's motion for sanctions against Martin Murphy is insufficient as a matter of Law, as set forth in the motion to strike and below.

II. GOOGLE'S MOTION FOR SANCTIONS IS INSUFFCIENT TO STATE A CLAIM

Google claims that "Murphy cites no authority for the proposition that Google is required to provide such a breakdown [of excess costs, expenses, and attorneys' fees allegedly incurred],

and no such authority exists." [Google Reply Memo.[1] At p. 6]. Google is clearly wrong. Authority for "Murphy's" claim rests, first, with the plain language of § 1927 itself. Section 1927 provides, in relevant part, that:

> Any attorney … who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

Applying the plain language of the statute, Google must: identify the attorney it is seeking to have sanctioned; detail the specific conduct of that attorney that allegedly unreasonably and vexatiously multiplied the proceedings; and specify the amount of excess costs, expenses and fees reasonably incurred. Because Google's motion fails to do any of the foregoing, it fails to meet even the most basic pleading requirements under § 1927. By grouping all of the attorneys and parties together as a collective whole, Google's motion does not identify with any particularity, capable of an informed response, what party or attorney it is complaining of. (See, for e.g., this Court's dismissal *sua sponte* of the Corporate Defendants in this case. *Specht v. Google, Inc.,* 660 F. Supp. 2d 858, 865 (ND IL, 2009. The Court said that "the Plaintiffs treat the numerous Defendants (other than Google) as a collective whole and do not identify any specific act of infringement by any single Defendant or any service rendered or product provided by any single Defendant … The FAC, thus, fails to place each Defendant on notice as to its alleged wrongful conduct."). While it is proper to group partners as a collective whole, the same does not apply in this case where liability is individual and not vicarious. In its motion Google is improperly attempting to group the plaintiffs and attorneys as a "collective

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[1] Although titled a "Reply" Google Inc.'s Reply Memorandum in Support of its Motion for Attorney's Fees and Sanctions ("Google Reply") is actually a reply in support of its motion [ECF 314] and a response to the motions to strike [ECF 332, 333].

whole" and not identifying the specific acts of each party or attorney which it claims to have unreasonably and vexatiously multiplied the proceedings.

In addition, Google, without citing to any authority for its preposterous position, argues that the Court may award costs and fees against Plaintiffs and their attorneys jointly and severally. (Google's Reply Memo. at 6). The law on this issue is crystal clear. Liability of an attorney under § 1927 is direct, not vicarious. See, for e.g., *FM Industries, Inc. v. Citicorp Credit Services, Inc.,* 614 F.3d 335, 340-341 (7th Cir. 2010). Also, attorney fees may only be awarded against a party in 'exceptional' cases under the Lanham Act. See, for e.g., Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC, 626 F.3d 958 (7th Cir. 2010). As set forth previously, this is not an exceptional case warranting an award of attorneys' fees against Plaintiffs. Thus, under the holdings in *Nightingale* and *FM Industries,* attorneys' fees may not be awarded against an attorney under the Lanham Act or against a party as a sanction under § 1927.

Under the plain reading of § 1927, Google's $1 million request is neither specific enough to permit or warrant a response, nor reasonable enough to warrant consideration by this Court.

In addition to the plain language of § 1927, The Supreme Court in *Roadway Express,* cited in the motion to strike [ECF 333], also requires that "fair notice" be given before attorney fees can be awarded by a Court. *Roadway Express, Inc. v Piper,* 447 U.S. 752, 767 (1980). Without setting forth specific allegations of misconduct against the parties or attorneys, Google has failed to provide fair notice.

Accordingly, Google's absurd statement that "There is no reason that both Plaintiffs and their counsel cannot be responsible for the same fees – albeit on different bases," (Google Reply at p. 6) does not hold water.

III. GOOGLE'S MOTION FOR SANCTIONS IS UNTIMELY UNDER RULE 54 (d) (2)

For the first time, in its response to the motions to strike, Google now argues that its motion for sanctions is a Rule 54 (d)(2) motion. See, for e.g., "Indeed, Rule 54(d)(2)(C) expressly provides that the Court "may decide issues of liability for fees before receiving submissions on the value of services," (Google's Reply at p. 6) and "Rule 54(d)(2)(C) merely requires that the Court "give an opportunity for adversary submissions on the motion." (Google's Reply Memo. at pp. 7-8).

A Rule 54(d)(2) motion for fees is untimely, as set forth more fully in Plaintiffs' motion to strike [ECF 332], Plaintiffs Response in Opposition to Google's Motion for Attorneys' Fees [ECF 347] and Plaintiffs' Reply in Support of Motion to Strike (filed contemporaneously with this Reply). Google's motion for sanctions is predicated upon issues that were decided before the Court entered Summary Judgment on December 17, 2010. Under Rule 54(d) any motion for attorney fees and nontaxable costs must be filed no more than 14 days after entry of judgment. Again, Google's motion was not filed until March 11, 2011, 84 days after summary judgment was entered. Accordingly, Google's motion for attorney fees and costs as a sanction is untimely.

IV. SANCTIONS SHOULD NOT BE AWARDED WITHOUT AN OPPORTUNITY FOR A HEARING ON THE RECORD

The right to a hearing with witnesses is consistent with the Due Process and Confrontation clauses of the Fifth and Sixth Amendments. Also, the Supreme Court in *Roadway* stated that attorneys' fees should not be awarded under § 1927 without fair notice and an opportunity for a hearing on the Record. *Roadway,* at 767. As previously set forth, Google's motion does not provide fair notice. If, for some reason, the Court were to hold that Google's motion meets the fair notice requirements, then a hearing on the record is required in this case.

Unlike a motion for attorneys' fees under the Lanham Act, which is not a lawsuit, a motion for sanctions is in essence a tort suit. Google is asking the Court to award it damages based upon the alleged misconduct of Plaintiffs' attorneys. The alleged misconduct is not part of the record; rather it depends upon the introduction of evidence and testimony not previously brought before the Court.

Google also claims that "Murphy has not identified any evidence that is relevant to the issues before the Court." (Google Reply Memo. at p. 8). As set forth in the Response [ECF 348], this statement is not true. Although not previously spelled out in its motion, Google is now accusing Martin Murphy of the following conduct:

a) Wrongfully naming the OHA Members as defendants;

b) Wrongfully naming Android, Inc. as a defendant;

c) Wrongfully naming Android co-founders, Rubin, White, Miner, and Sears as defendants;

d) Moving for a TRO and preliminary injunction without legal basis: and

e) Wrongfully seeking the deposition of Page and Brin;

Nowhere does Google allege that any of the above actions delayed the case or caused Google to incur any excess costs and fees. Instead Google argues that it should be awarded $1 million without regard for the law. None of the above actions delayed the case, the OHA members, Android, Inc., and the four individuals were dismissed by the Court at the same time it denied Google's motion to dismiss. As set forth in the responses and below, the dismissals were based upon perjured declarations. They did not delay the case or cause Google to incur any unreasonable costs. The motion for TRO and injunction were withdrawn after Google's attorneys persistently demanded a multi billion dollar bond. The motion for leave to take the

deposition of Page was denied after Google's objected. No subpoena or notice of deposition was ever sent and it was actually Google's objection that delayed the start of depositions for two weeks. Accordingly, Google cannot legitimately argue that any of the alleged actions caused it any delay or to incur any excess costs.

Google's allegations are facially untrue and were knowingly pursued in bad faith by Google's attorney Herb Finn. Google's attorney, Mr. Finn has signed the motion and accompanying memorandums in bad faith and must be sanctioned under Rule 11 for his unconscionable conduct. As set forth in Martin Murphy's Response to Google's Motion for Sanctions [ECF 348], there is a good faith basis for naming the OHA members, Android, Inc., the Android founding members; moving for the deposition of Page; and seeking a TRO and preliminary injunction, because:

a. The OHA Is A Partnership As Alleged In The First Amended Complaint

Google now argues that "Murphy's "partnership" argument is nothing more than an after-the-fact argument concocted by Murphy." (Google's Reply Memo. at p. 15). That is not true. The FAC clearly alleged that the OHA is a partnership and the OHA members were partners. (See for e.g. *Specht* at 862 "On November 5, 2007, Google and the OHA, "a ***partnership*** or business alliance of 47 firms," including the Corporate Defendants, launched a software product called "Android." FAC ¶ 26." (Emphasis Added). Thus, Google statement is patently false and misleading and should be condemned.

b. Contrary To Their Sworn Declarations, The Four Individuals Are Personally Profiting From Google's Acquisition And Use Of Android

Google argues that the decision to add Android, Inc. and the four individuals was unreasonable and vexatious because Plaintiffs only named them to get more damages. (See Google's Reply Memo. at p. 16). It was Martin Murphy's duty as a lawyer to obtain all of

Plaintiffs damages. An attorney that does not pursue damages that his client is entitled to would be guilty of malpractice. The four individuals were and are still personally profiting from the sale of Android devices. The four individuals sold a bankrupt company to Google for $71 million with $59 million of that purchase price directly related to the sale of Android devices. With a complete disregard for Plaintiffs trademark rights, the individuals used and encouraged Google and the OHA members to use the name Android for their operating system. The payments to the individuals were contingent on the sale of Android products culminating in the sale of 50 million phones. Andy Rubin proudly admits that the decision to use the name Android was his. Two of the other three individuals admitted that they were complacent with Andy making all of the naming decisions.

Google's argument, that it was wrong to name the individuals, ignores the fact that the only reason the Court dismissed Android, Inc. and the four individuals was based upon the perjured statements of the four individuals. Thus, Andy Rubin, Chris White, Nick Sears and Rich Miner need to explain the false statements they made to this Court. The four individuals personally sold Android to Google for $71 million and falsely declared to this Court that they were not personally involved in the sale. [ECF 348, Exhibit 7]. By falsely alleging that they were improperly named as defendants and filing false declarations, they are material fact witnesses and their attendance should be compelled to appear and answer for their illegal conduct. [ECF 75-2, 75-3, 75-4, 75-5, and 314 at p. 2, item (c)]. In his declaration to this Court, Rubin also declared that Android, Inc. has no assets of its own and carries on no business as a corporation. However, this declaration directly conflicts with the corporate filings made by Android, Inc. a little more than a month before this lawsuit was filed.

c. According to The Annual Report Filed With The California Secretary of State, Google Was Operating Android Through Its Wholly Owned Subsidiary, Android, Inc.

Android, Inc. was properly named a defendant in the FAC. Android, Inc. is a subsidiary of Google which according to its March, 2009, corporate filings with the California Secretary of State was in the MOBILE OPERATING SYSTEM AND APPS business. In March 2009, Android, Inc. filed a corporate report with the California Secretary of State. The report was signed under oath and stated that Android, Inc. is in the. MOBILE OPERATING SYSTEM AND APPS business [ECF 348, Exhibit 6]. The report lists Google' Mountain View, California, address as Android, Inc.'s principal place of business. Android Inc.'s corporate filing identifies three officers of Android, Inc., including Google's General Counsel, John Kent Walker, as president/secretary; Lloyd Martin, Google's Finance Director, as chief financial officer; and Donald S. Harrison, Deputy General Counsel at Google, as assistant secretary. The corporate filing is signed under oath by Donald S. Harrison, Assistant Secretary. Accordingly, at the time the complaint was filed, a good faith basis existed for believing that Android, Inc. was a functioning entity and that Google was operating its Android business through Android, Inc..

d. According To Google's Own E-Mails, Sergey Brin and Larry Page Approved The Android Name

Whether directly sanctioning it or by passively approving it, Sergey Brin and Larry Page approved the Android mark. Despite the fact that no notice of deposition or subpoena was ever issued to these two individuals, Google now complains that these two high level executives were improperly singled out for deposition. As discovery showed, Page and Brin were properly identified and are material fact witnesses to Google' adoption of the Android mark. Contrary to what Google is now arguing, Brin and Page personally participated in the decision to name Android and are relevant fact witnesses to this motion. Larry Page is now the CEO of Google.

Page was personally involved in the negotiations to purchase Android. Page and Brin were the most senior executives at the Android naming meeting along with six lower level employees. As the most senior executives personally involved in the branding decision, their testimony is relevant to the issues raised by Google. Specifically: Were Mr. Page and Mr. Brin involved in Google's selection or adoption of its Android trademark?" The allegation that they were not contradicts the e-mail from Google dated October 17, 2007, that states that Page and Brin were involved. [ECF 347, Exhibit 8] The two individuals bear responsibility for the decision to name Android. By singling out Page and Brin, in its motion for sanctions, and lying about their involvement in Google's adoption of the Android mark, Google has made them material fact witnesses and their attendance at the hearing should be compelled. [ECF 314 at p. 2, item (b)]. Mr. Finn's allegations to the contrary are a further attempt to mislead the Court and again should be condemned.

e. Richard Harris, Google's Attorney's Outrageous Multi-Billion Dollar Bond Demands Made It Clear That Google Would Not Be Open to Any Attempts To Compromise On A TRO And Preliminary Injunction

As previously stated, the purpose of the TRO and Preliminary Injunction was to stop Google from representing that it owned the Android mark and promoting the Android mark at an upcoming convention. The motion was subsequently withdrawn in part because of misrepresentations made to the Court by Mr. Harris, Google's attorney, in an attempt to inflate the size of the bond into the stratosphere. From the outset, Google made it clear that it was going to be all or nothing. Mr. Harris' insisted that Android was a multi billion dollar business and nothing less than a bond in the area of a "TARP" installment would stop Google from claiming complete ownership of the name. Google would not agree to any compromise, not even a disclosure on its website that there was pending litigation regarding the mark. (May 21, 2009

Trans. of Proc. at 5:5-13). Google's all or nothing ultimatum, eventually convinced Plaintiffs that Google would never be reasonable. Interestingly though, Google has attempted to distance itself from the factual admissions made by its attorney that Android is a hugely profitable multi-billion dollar business. Google has denied any knowledge of the factual basis for its attorney's representations to this Court. The following is just one of several examples where Mr. Harris, an officer of the Court, made a representation to the Court that Google denied:

> **Mr. Harris:** There are millions of products out there that when you fire the up specifically say "Powered by Android" or talk about the Android OS, or operating system, or software …

May 21, 2009 Transcript of Proceedings at 5:2.

Contrast Mr. Harris' representation, to the Court, with Google's answer to the Second Amended Complaint:

> 48. There are millions of products on the market that specifically say "Powered by Android" or otherwise mention Google's Android products and/or services.
>
> **Answer:** Google has neither knowledge nor information sufficient to form a belief as to the allegations of this paragraph and consequently denies the same.

At the second deposition of Martin Murphy, Google's attorney and Mr. Harris' co-counsel, Cameron Nelson, quoting ¶ 48 of the SAC, asked; what was the factual basis for the allegation in ¶ 48 that "There are millions of products on the market that specifically say "Powered by Android" or otherwise mention Google's Android products and/or services?" When Martin Murphy answered that it was a quote from Mr. Harris, Mr. Nelson looked over to Mr. Finn who just shrugged. It is not clear whether Mr. Harris' representations to the Court were lies or whether Google lied when it denied any information regarding the admission. Either way, there is a factual dispute regarding the propriety of Plaintiffs' motion for a TRO and the

subsequent withdrawal of that motion and Mr. Harris a material fact witness on that issue and should be compelled to testify at any hearing on the motion for sanctions.

Google has made an issue of this matter and Mr. Harris should be compelled to answer for his lie or explain why he did not share the information he knew with Google, his co-counsel, or Plaintiffs.

WHEREFORE, for the reasons set forth above and in the Motions to Strike, Google's motion for sanctions against Martin Murphy should be stricken or denied. If for any reason, the Court is considering entertaining Google's motion for sanctions, then Martin Murphy requests that a hearing with relevant witnesses and evidence be conducted on the record.

Respectfully submitted,
Martin Murphy

By: /s/Martin J. Murphy

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CERTIFICATE OF SERVICE

Martin J. Murphy, an attorney, certifies that he caused copies of the foregoing to be served by electronically filing the document with the Clerk of Court using the ECF system this _ _9_ day of June, 2011.

/s/ Martin J. Murphy