Heartland Recreational Vehicles LLC v. Forest River Inc Doc. 117

UNITED STATES DISTRICT COURT

Northern District of Indiana
South Bend Division

HEARTLAND RECREATIONAL VEHICLES, LLC, Plaintiff,	)	
v.	)	CASE NO.:3:08-cv-490 TLS - CAN
FOREST RIVER, INC., Defendant.	)	JURY DEMAND

FOREST RIVER'S REPLY TO HEARTLAND'S RESPONSE IN OPPOSITION TO FOREST RIVER'S OBJECTIONS TO MAGISTRATE'S ORDER (DE#107)

By this Reply, Forest River responds to one allegation of fact and two arguments made by Heartland in its Response.

1. In its Response to this motion, Heartland alleged:

"Baker & Daniels also searched its records for evidence of a prior art search, and it found no such evidence. None of the information yielded by this extensive discovery indicates that the alleged prior art search occurred." Response, pg. 2.

However, it is undisputed that the 14 patents did exist and that they were put into Mr. Cooper's files by someone, that someone found them prior to putting them there, and that someone had instructions or a plan in order to find them in the first place. By definition then, the search did occur and someone did it. If you find a body with a bullet in it, then you know that someone fired a shot.

Moreover, since the source of the 14 patents was not revealed to Mr. Cooper and it is extremely abnormal for documentary evidence to appear mysteriously and unknowingly into an

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attorney's files, someone was obviously trying to keep Mr. Cooper ignorant of the search. That "cultivation of ignorance" is indicative of inequitable conduct. *FMC Corp. v. Hennessy Ind., Inc.*, 836 F. 2d 521, 526 (Fed. Cir. 1987).[1]

Substantively, the question to the Court is simply: were Forest River's discovery requests of Heartland and its counsel "reasonably calculated to lead to the discovery of" the identity of the person who did the search and an explanation of what else the search involved? In that regard, Forest River sought the information from the persons most likely to have known about the 14 patents. Neither Baker & Daniels nor Heartland has made an unequivocal representation to the Court that they have no information at all about the search that led to the discovery of the 14 patents or about how those patents came to be found. Accordingly, we are left with trying to find documents which may point us to the missing information. That is an eminently reasonable course of action for Forest River to take.

2. In its Response to this motion, Heartland argued:

"Because there are no rules outlining the proper procedure governing surreply briefing, Forest River cannot contend that the Magistrate Judge acted contrary to law by allowing Heartland to provide it with new information useful to its determination." Response, pg. 4. However, Heartland ignores Local Rule 7.1.

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[1]However, Forest River notes that on April 26, 2010 the Court of Appeals for the Federal Circuit agreed to review the inequitable conduct standards en banc in *Therasense, Inc. v. Becton, et al*. See Exhibit F hereto. Accordingly, a revision or clarification of the rules of law in this area may be forthcoming. To the undersigned counsel's knowledge, this would be the first en banc ruling on inequitable conduct standards since 1988 and may unify various "inconsistent" panel standards.

Heartland filed a Motion for Leave to File Surreply. DE#101. Local Rule 7.1 should have controlled briefing of that motion, allowing Forest River 15 days in which to respond. Unfortunately, Forest River was not given that time, and was not permitted to point out why the surreply would not be appropriate. Had Local Rule 7.1 been adhered to, the Magistrate Judge may not have relied upon the representations made in the surreply and may not have denied Forest River's motion to compel.

3. In its Response to this motion, Heartland argued:

> "Forest River ignores the concluding sentence of Heartland's surreply, which states unequivocally, that "even if the Court were to order Heartland to produce all billing records related to a professional prior art search **in connection with the '650 patent,** Heartland would have nothing to produce." . . . The scope of this representation is clearly not limited to prior art searches related to the prosecution of the '650 patent." Response, pg. 5.

However, Heartland's omission of the word "Thus" from the language it quotes illustrates the type of wordsmithing that is in issue here.

The surreply at page 2, DE#101-1,starts with factual representations to the Court:

> "Since filing the Response, Heartland's Chief Financial Officer has searched its 2004 billing records and sorted through the file folders associated with each Heartland supplier. Heartland's Chief Financial Officer did not locate a bill for research services related to the prosecution of the '650 patent."

The surreply then goes on to draw the conclusion (not a representations of fact) as follows:

> "Thus, even if the Court were to order Heartland to produce all billing records related to a

professional prior art search in connection with the '650 patent**,** Heartland would have nothing to produce."

Contrary to Heartland's assertion, Forest River did not ignore that conclusion. Instead, Forest River focused on the "facts," the actual representations themselves, and drew different conclusions more accurately from those facts.

Perhaps the real problem here is that Heartland has actually produced no admissible evidence to contradict the facts and evidence which Forest River has presented. All Heartland has given is attorney representations and argument. It is well established that "representations" as such, even if made by a party's attorney, can be admissible evidence as "admissions against interest" and binding upon the party involved. However, mere attorney "argument" is nothing but that. Where in the morass of Heartland's briefing do we draw the line?

For example, Heartland states "Heartland and Baker & Daniels have no documents related to such a search to produce." Response, pg. 7. If that is a representation of fact, so be it: the search obviously did exist, but no documents remain today that are related to that search. Accordingly, the Court should find that as a "fact" which is part of the "law of the case," and Forest River could be entitled to all the legal presumptions as to spoilation and all the inferences that the trier of fact may draw from that fact as to "cultivation of ignorance."

On the other hand, was that a mere conclusion or argument? If so, then Heartland and Baker & Daniels should have no legitimate objection to complying with an order to compel since if no such documents exist, then there is no burden imposed by an Order to produce them if they exist. Either way, the issue can be closed for purposes of discovery, and the parties can move on to what the lack of documentation about the 14 patents means in the context of inequitable conduct (the body with

the bullet is still there).

Assuming, of course, that no such documents do exist.

Accordingly, Forest River requests that the Court establish the issue definitively either way - find as a fact that Heartland and Baker & Daniels represented that none of the requested documents exist at present or order that those parties are required to produce such documents if they exist.

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Respectfully submitted,

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Certificate of Service

I certify that on May 10, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF system, which sent notification of such filing to all of the parties through at least the following counsel of record:

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