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United States District Court, S.D. New York.

FRUIT OF THE LOOM, INC., Plaintiff,
v.
AMERICAN MARKETING
ENTERPRISES, INC., Defendant.

No. 97 Civ. 3510(HB). | July 22, 1999.

Opinion

MEMORANDUM AND ORDER

BAER, J.

***1** Fruit of the Loom, Inc. ("FOL") brought this action for trademark infringement against American Marketing Enterprises, Inc. ("AME"). At trial, the jury found for the plaintiff, and judgment on the verdict was later entered. By order dated March 25, 1999, I denied as untimely the defendant's renewed motion for judgment as a matter of law, and granted the plaintiff's motion for attorney's fees. The defendant now moves for reconsideration, pursuant to Rule 59 of the Federal Rules of Civil Procedure. For reasons stated below, the defendant's motion is GRANTED, and the Court adheres to its prior decision in its entirety.

I. *BACKGROUND*

The issues in this case, trademark infringement on, and abandonment of, the plaintiff's "Underoos" trademark were tried to a jury from April 27, 1998 to May 1, 1998. On May 4, 1998, the jury found that the plaintiff had not abandoned its trademark and that the defendant had, in bad faith, infringed on FOL's trademark. Judgment was entered on July 6, 1998. On August 26, 1998, the plaintiff filed a motion for attorney's fees and the defendant claims to have filed, on that same day, its renewed motion for a judgment as a matter of law. By order dated March 25, 1999, I denied the defendant's renewed motion for judgment as a matter of law since, according to the Clerk of Court, the motion was never filed, let alone within the 10–day post-judgment time period proscribed by Rule 50(b). In that same order, I granted the plaintiff's motion for attorney's fees under the Latham Act, based on the jury's finding that AME's infringement on FOL's trademark was done in bad faith.

A hearing was scheduled for March 31, 1999 to determine the amount of fees to be awarded. At the defendant's request, the hearing was adjourned, presumably to allow the parties to agree upon a reasonable attorney's fee. Shortly thereafter, however, the defendant filed the motion currently before this Court.

II. *DISCUSSION*

A. *Standards on a Motion for Reconsideration*

To prevail on a motion for reconsideration brought pursuant to Fed.R.Civ.P. 59(e), the movant must show "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Morales v. Quintiles Transnational Corp.*, 25 F.Supp.2d 369, 372 (S.D.N.Y.1998) (citing *Doe v. New York City Department of Social Services*, 709 F.2d 782, 789 (2d Cir.1983)). "The motion is not a substitute for appeal," *Id.*, and the standard is a difficult one so as to "dissuade repetitive arguments on issues that have already been considered fully by the Court." *Enzo Biochem, Inc. v.. Johnson & Johnson*, 866 F.Supp. 122, 123 (S.D.N.Y.1994).

A. *Timeliness of Motion*

As discussed in my previous opinion in this case, the Federal Rules of Civil Procedure, the Advisory Committee Notes thereto, and case law in the Second Circuit are all clear as to the strict 10 day post-judgment limitation for *filing*—not merely serving—motions for reconsideration. *See* Fed.R.Civ.P. 50(b); Fed.R.Civ.P. 50 advisory committee's note (discussing 1995 Amendments to Rule 50(b)). The defendant's failure to timely file its motion prevents this Court from reviewing it. *See Rodick v. City of Schenectady*, 1 F.3d 1341, 1346 (2d Cir.1993) ("Fed.R.Civ.P. 6(b) makes [the 10 day post-judgment limitation] jurisdictional so that the failure to make a timely motion divests the district court of power to modify the trial verdict.").

***2** However, one argument raised by the defendant warrants brief discussion. AME makes much of the apparent conflict between my individual rules and the Federal Rules. Rule 2D of my individual rules provides that:

> No motion papers shall be filed until the motion has been fully briefed. Each party shall file its motion papers on the date the last reply memorandum is due. The moving

party is further obligated to furnish to chambers a *full* set of courtesy copies of the motion papers. [1]

Thus, according to AME, "under the Court's Rule, the motion could not have been filed within the 10 day post-judgment period unless AME's brief, FOL's brief in opposition and AME's reply brief could be submitted simultaneously—a clear impossibility." (Def. Mem. Supp. Recons. at 6.)

Based on the assumption that this conflict did exist at the time—and that AME refrained from filing its motion within the 10 day period because of it—the defendant cites *Morgan Distributing Co., Inc. v. Unidynamic Corp.*, for the proposition that "[t]he interpretation of local rules is left, to a large extent, to the district court that adopted them." 868 F.2d 992, 996 (8 th Cir.1989). With this principle in mind, AME states, "[i]ndeed, at no time—during [the post-verdict record] or otherwise—did the Court indicate that the Court's Rules, which state that 'no motion papers shall be filed until the motion has been fully briefed' would be set aside for purposes of post-trial motions." (Def. Mem. Supp. Recons. at 6.) While I fully agree with the quoted proposition from *Morgan*, it would only be relevant for purposes of this motion if AME had requested and been denied permission to file its motion in contravention of my individual rule. Indeed, unlike the movant in *Morgan*, no such permission was sought, let alone clarification or other inquiry, in the case at bar. Regardless, this line of reasoning is inapplicable and moot since the defendant failed to file its motion *at all*, let alone within the 10 day post-judgment window. *Rodick*, 1 F.3d at 1346.

B. *Attorney's Fees*

As I determined in my earlier opinion on this matter, the jury's finding of bad faith by AME in its infringement on FOL's trademark not only qualifies this case as "exceptional", *see Twin Peaks Productions, Inc. v. Publications International, LTD.*, 996 F .2d 1366, 1383 (2d Cir.1993); *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 194 (2d Cir.1996), but also effectively negates AME's purported good faith defense of reliance on the advice of counsel. Accordingly, it is squarely within this Court's discretion to award attorney's fees, *see* 15 U.S.C. § 1117(a) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party."); *Conopco*, 95 F.3d at 194 ("The decision to award attorneys' fees fall[s] well within the district court's discretion ....") (quotations and citation omitted); *Quaker State Oil Refining Corporation v. Kooltone, Inc.*, 649 F.2d 94, 95 (2d Cir.1981) ("trial judges are given considerable discretion in awarding reasonable attorney's fees"), notwithstanding the decision by other courts in this district to exercise this same discretion by *not* making such awards. *See Simon & Schuster, Inc. v. Dove Audio, Inc.*, 970 F.Supp. 279 (S.D.N.Y.1997); *Lurzer GMBH v. American Showcase, Inc.*, 1998 WL 915894 (S.D.N.Y. Dec. 30, 1998). Moreover, while other courts may have decided not to award attorney's fees where no money damages have been shown, the failure to prove actual damages does not preclude an award of attorney's fees. *See Spring Mills, Inc. v. Ultracashmere House, LTD.*, 724 F.2d 352, 356–7 (2d Cir.1983) (finding that attorney's fees could still be properly awarded despite the prevailing party's failure to prove any lost sales).

III. *CONCLUSION*

***3** For the reasons set forth above, the defendant's motion for reconsideration is GRANTED, and the Court adheres to its prior decision in its entirety. I have referred this case to Magistrate Judge Eaton for post-trial proceedings, and the parties should contact his chambers regarding a hearing to determine the fees plaintiff's counsel shall be awarded in accordance with this opinion. No additional arguments regarding my decision to award attorney's fees will be heard at that time. If, however, one or both sides contacts my chambers within 10 days from the date hereof, noting a preference for a hearing before me, I will schedule a hearing for the week of August 22, 1999.

SO ORDERED.

Footnotes

1 AME argues that it is this version of Rule 2D, which became effective July 1998, that should control for purposes of this motion. FOL argues that an earlier version of Rule 2D, which became effective December 1997 and carved out an exception to this rule for motions made pursuant to Rule 50(b), should control. This dispute is immaterial for the reasons discussed herein.