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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). | March 26, 1999.

Opinion

MEMORANDUM AND ORDER

BAER District J. [1]

***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. The defendant purports to move for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, and the plaintiff moves for attorney's fees pursuant to 15 U.S.C. Section 1117(a). For reasons stated below, the defendant's motion is DENIED, and the plaintiff's motion is GRANTED.

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, and on May 4, 1998, the jury found that 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.

II. DISCUSSION

A. *AME's Renewed Motion for Judgment as a Matter of Law*

The facts surrounding the defendant's motion are strange, to say the least. The Clerk of Court has no physical nor electronic record of this motion being filed at all, let alone within the 10–day post-judgment time period proscribed by Rule 50(b). The Clerk's complete file, housed in the "Closed Records" office, contains only the plaintiff's motion for attorney's fees, filed on August 26, 1998, and no record of the defendant's Rule 50(b) motion. Chambers did receive, however, courtesy copies of the defendant's motion on August 26, 1998. Unfortunately for the defendant, these facts cannot qualify the motion as proper pursuant to the Federal Rules of Civil Procedure.

Rule 50(b) states that a "movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment ...." Fed.R.Civ.P. 50(b). The Advisory Committee Notes to the Rule read, in relevant part:

> [Subsection (b)] also retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment. The renewed motion must be served *and filed* as provided by Rule 5.

Fed.R.Civ.P. 50(b) Advisory Committee's Note (emphasis added). As indicated above, however, there is no evidence to show that this motion was filed with the Clerk of this Court. [2]

The Second Circuit is strict in regards to the timing for filing of motions, especially renewed motions for judgment as a matter of law. "Fed.R.Civ.P. 50(b) ... requires that a motion for a judgment as a matter of law be made 'not later than 10 days after the entry of judgment." ' *Rodick v. City of Schenectady,* 1 F.3d 1341, 1346 (2d Cir.1993). "Fed.R.Civ.P. 6(b) makes [this limitation] jurisdictional so that *the failure to make a timely motion divests the district court of power to modify the trial verdict.*" *Id.* (emphasis added). *See also Johnson v. New York, N.H. & H.R. Co.,* 344 U.S. 48, 50 (1952) ("[I]n the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment.") "[T]he rule against the discretionary enlargement of certain time periods is mandatory and jurisdictional and ... cannot be circumvented regardless of excuse." *Meriwether v. Coughlin,* 879 F.2d 1037, 1041 (2d Cir.1989) (internal quotations and citations omitted).

***2** In light of the facts and applicable case law cited above, the defendant's motion cannot be entertained, and is, in effect, DENIED.

B. *FOL's Motion for Attorney's Fees*

The plaintiff moves for attorney's fees pursuant to the Lantham Act, and this Court is authorized to grant an award of such fees in its discretion under the Act. 15 U.S.C. § 1117(a) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party"). FOL argues that the jury's finding that the defendant infringed the plaintiff's trademark in bad faith justifies an award of attorney's fees. I agree.

As a general rule in cases involving the Lanham Act, attorney's fees should be awarded to the prevailing party only in "exceptional cases" and "only on evidence of fraud or bad faith." *Gordon and Breach Science Publishers S.A. v. American Institute of Physics,* 166 F.3d 438, 439 (2d Cir.1999) (citations omitted); *see also Conopco, Inc. v. Campbell Soup Co.,* 95 F.3d 187, 194 (2d Cir.1996)("[the Lanham Act] allows recovery of reasonable attorney's fees only ... on evidence of fraud or bad faith") (internal quotations and citations omitted). In the Second Circuit, a finding of bad faith by the jury qualifies a case as exceptional. *See generally Conopco,* 95 F.3d at 187; *Twin Peaks Productions, Inc. v. Publications International, LTD,* 996 F.2d 1366, 1383 (2d Cir.1993) ("[Attorney's] fees should be awarded only on evidence of fraud or bad faith.").

At trial, the jury found that AME's infringement on FOL's trademark was done in bad faith. Accordingly, this case is deemed exceptional, and it is well within this Court's discretion [3] to award FOL its reasonable attorney's fees. I should note that the Court finds AME's "good faith" reliance on counsel defense to be unpersuasive, particularly since the jury was instructed on this matter and still found that the defendant acted in bad faith.

Accordingly, attorney's fees seem to me appropriate at this juncture. If, however, the defendant has additional arguments to the contrary, AME is welcome to present them at the hearing on this matter.

III. CONCLUSION

For the reasons set forth above, the defendant's renewed motion for judgment as a matter of law is DENIED, and the plaintiff's motion for attorney's fees is GRANTED. A hearing will be held on March 31, 1999 at 9:30 a.m. to determine the fees plaintiff's counsel shall be awarded in accordance with this opinion.

SO ORDERED.

Footnotes

1 Sean Serpe, a second-year student at Fordham Law School, assisted in the research and preparation of this decision.

2 To be sure, Rule 5(e) also allows the "filing of papers" with the judge, if permitted. *See* Fed.R.Civ.P. 5(e). Even if I were to retroactively allow the defendant's courtesy copies to function as a proper "filing" under this Rule, such courtesy copies were not received in chambers until August 26, 1998, well beyond the 10–day post-judgment period proscribed by the Rule. This Court is forbidden to ignore or extend the proscribed deadlines for filing. *See Rodick,* 1 F.3d at 1346 ("Rule 6(b) also denies to district courts the power to enlarge the ten-day limit under [Rule 50].")

3 AME, citing Judge Sand's decision not to award attorney's fees to the prevailing party—despite a showing of willful infringement by the losing litigant—in *Simon & Schuster, Inc. v. Dove Audio, Inc.,* 970 F.Supp. 279 (S.D.N.Y.1997), argues that this Court should do the same. Just as reasonable minds may disagree, however, it is within my discretion to grant here the plaintiff's motion as it was Judge Sand's discretion not to do so in *Simon & Schuster*.