

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

DS Advanced Enterprises, Ltd. v. Lowe’s Home Centers, LLC

DS Advanced · No. 3:23-cv-01335-CAB-JLB · Decided February 24, 2025

SUMMARY

The United States District Court for the Southern District of California denied Lowe’s Home Centers, LLC’s motion for attorneys’ fees and expenses under 35 U.S.C. § 285 and 35 U.S.C. § 1927. Although the court found that DS Advanced’s proposed claim construction was incorrect and strained the plain meaning of the patent, it did not find the case exceptional or conclude that plaintiff’s counsel acted in bad faith or unreasonably multiplied the proceedings. The order was issued after summary judgment of non-infringement and was dated February 24, 2025.

CASE DETAILS

COURT	United States District Court for the Southern District of California
WRITING FOR THE COURT	Cathy Ann Bencivengo
JURISDICTION	United States District Court for the Southern District of California
DECIDED	February 24, 2025
DOCKET	3:23-cv-01335-CAB-JLB
DISPOSITION	other
PROCEDURAL POSTURE	Defendant, the prevailing party after obtaining summary judgment of non-infringement, moved for attorney fees and expenses under 35 U.S.C. § 285 and for fees against plaintiff's counsel under 28 U.S.C. § 1927. The district court denied both requests.
STANDARD OF REVIEW	A district court determines whether a case is exceptional under 35 U.S.C. § 285 through a case-by-case exercise of discretion based on the totality of the circumstances. The fee applicant must establish exceptionality by a preponderance of the evidence. A fee award under 28 U.S.C. § 1927 requires intentional, bad-faith conduct that unreasonably and vexatiously multiplies the proceedings.
PRECEDENTIAL VALUE	unpublished district court order

TOPICS

- attorney fees
- patent infringement
- patent law
- sanctions
- remedies

PRACTICE AREAS

patent litigation

attorney fees

sanctions

civil procedure

QUESTIONS PRESENTED

1. Whether the patent infringement action was exceptional under 35 U.S.C. § 285 because DS Advanced pursued an objectively unreasonable claim construction or litigated in an unreasonable manner.
2. Whether Lowe's motion for attorney fees under 35 U.S.C. § 285 was timely despite being filed before entry of final judgment.
3. Whether DS Advanced's counsel intentionally and in bad faith unreasonably and vexatiously multiplied the proceedings within the meaning of 28 U.S.C. § 1927.

HOLDINGS

1. Lowe's motion for attorney fees was timely because the court had not yet entered final judgment and had specifically contemplated an exceptional-case determination after final judgment.
2. The case was not exceptional under § 285, and Lowe's was not entitled to attorney fees and expenses, because DS Advanced's unsuccessful claim construction, although strained and objectively weak, was not shown to have been asserted in bad faith or for an improper purpose when the totality of the circumstances was considered.
3. Lowe's was not entitled to fees against DS Advanced's counsel under § 1927 because the record did not establish that counsel intentionally and in bad faith unreasonably multiplied the proceedings.

KEY QUOTATIONS

“An exceptional case is simply one that stands out from others with respect to the substantive strength of a party’s litigating position . . . or the unreasonable manner in which the case was litigated.” (at 1)

“Under the totality of the circumstances however the Court is not convinced that DS Advanced knowingly and intentionally asserted a meritless position for improper purposes. It was just wrong.” (at 3)

“The Court also does not find that DS Advanced’s counsel intentionally and in bad faith unreasonably multiplied the proceedings justifying a fee award pursuant to 35 U.S.C. 1927.” (at 4)

FACTUAL BACKGROUND

DS Advanced alleged that Lowe's accused devices infringed the only independent claim of its patent. In its infringement contentions, DS Advanced advanced an expansive construction of the claim limitation "metal housing" that the court rejected as contrary to the claim's plain meaning and specification, ultimately granting Lowe's summary judgment of non-infringement. Although the court described the proposed construction as strained and nearly frivolous, it found no evidence that DS Advanced asserted the position knowingly, intentionally, or for an improper purpose. Counsel also violated a protective order, but the court had previously found those violations careless and unjustified rather than undertaken in bad faith.

PROCEDURAL HISTORY

DS Advanced filed the patent infringement action on July 21, 2023, later amended its complaint, and voluntarily dismissed additional defendants. The court denied Lowe's motion to dismiss the willfulness allegations, and Lowe's answered. After the parties entered scheduling and protective orders, Lowe's moved for summary judgment of non-infringement. The court construed the patent term "metal housing" against DS Advanced's proposed construction and granted summary judgment of non-infringement on September 30, 2024, while postponing final judgment pending resolution of a sanctions matter. Lowe's then moved for exceptional-case fees and fees against counsel; the court decided the motion on the papers and denied both requests.

DISPOSITION

other

CASES CITED

- Dragon Intellectual Prop. v. Dish Network, 101 F.4th 1366, 1369-70 (Fed. Cir. 2024)
- Octane Fitness LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 554 (2014)
- OneSubsea IP UK Ltd. v. FMC Tech., Inc., 68 F.4th 1285, 1294 (Fed. Cir. 2023)
- Extremity Medical, LLC v. Nextremity Solutions, Inc., 2024 WL 4384202, at *2 (D. Del. Oct. 3, 2024)

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF
CALIFORNIA 10 11 DS ADVANCED ENTERPRISES, Ltd., Case No.: 3:23-cv-01335-CAB-JLB
12 Plaintiff, ORDER ON DEFENDANT’S 13 v. MOTION FOR ATTORNEYS’ FEES AND
RELATED EXPENSES 14 LOWE’S HOME CENTERS, LLC, 15 Defendant. [Doc. No. 77] 16
17 18 Before the Court is a motion brought by defendant Lowe’s Home Centers, LLC 19 (“Lowe’s
HC”) as the prevailing party in this litigation, for the Court to find this case 20 exceptional
pursuant to 35 U.S.C. § 285, and to award defendant its reasonable attorney 21 fees and expenses
against plaintiff DS Advanced Enterprises, Ltd. (“DS Advanced”).

22 Lowe’s HC also seeks an award of fees and expenses against plaintiff’s counsel pursuant 23 to
35 U.S.C. § 1927, asserting that counsel’s bad faith conduct unreasonably multiplied the 24
proceedings. [Doc. No. 77.] DS Advanced filed an opposition. [Doc. No. 81.] Lowe’s 25 HC filed
a reply. [Doc. No. 84.]

The Court determined this motion could be decided on 26 the papers. Civ.LR 7.1.d.1. 27 A district
court in exceptional cases may award reasonable attorney fees and non- 28 taxable costs to the
prevailing party. 35 U.S.C. § 285. “An exceptional case is simply one 1 that stands out from others
with respect to the substantive strength of a party’s litigating 2 position... or the unreasonable
manner in which the case was litigated.” Dragon 3 Intellectual Prop. v. Dish Network, 101 F.4th
1366 1369-70 (Fed.

Cir. 2024) citing *Octane 4 Fitness LLC v. ICON Health & Fitness, Inc.* 572 U.S. 545, 554 (2014).
5 A district court may determine whether a case is exceptional in the case-by-case 6 exercise of its discretion considering the totality of the circumstances. *OneSubsea IP UK 7 Ltd. v. FMC Tech., Inc.*, 68 F.4th 1285, 1294 (Fed. Cir. 2023). A party seeking fees under 8 § 285 must prove the case is exceptional by a preponderance of the evidence.

Id., citing 9 *Octane Fitness*, 572 U.S. at 554.1 10 As an initial matter the Court finds that Lowe's HC's fee motion was submitted 11 timely. Although the Court granted Lowe's HC's summary judgment of non-infringement 12 on September 30, 2024, the order specifically stated final judgment would not be entered 13 until a pending motion for sanctions was resolved.

[Doc. No. 67.] Further on October 15, 14 2024, the Court issued a scheduling order for the filing of an exceptional case determination 15 after entry of final judgment, which still has not occurred. [Doc. No. 74.] That order 16 notwithstanding, Lowe's HC filed its motion on October 23, 2024, in advance of the entry 17 of final judgment. DS Advanced's contention that the motion should be deemed waived 18 as untimely is rejected.

19 The briefing on this motion by both parties highlights that this has been an 20 acrimonious litigation with both sides hurling assertions of bad faith and misconduct. 21 Lowe's HC accuses DS Advanced and its counsel of harassing litigation tactics and shifting 22 frivolous infringement contentions. DS Advanced accuses Lowe's counsel of making false 23 statements to the Court and violations of Rule 11.

24 25 26 27 1 Counsel for DS Advanced erroneously argued that the standard to prove the exceptional nature of the case is clear and convincing evidence [Doc. No. 81, at 6], citing to case law that preceded the Supreme 28 1 The Court in assessing whether this case merits an exceptional case finding considers 2 only the matters before it.

As evidence of plaintiff's bad faith and harassment, Lowe's HC 3 references other litigations in other districts filed by DS Advanced against other Lowe's 4 entities or affiliates regarding the same patent at issue in this litigation. These matters are 5 not before this Court and will be left to those district judges to determine if they were 6 improvidently or maliciously filed.

7 Lowe's HC also references a violation by counsel for DS Advanced of the Protective 8 Order entered in this case. That discovery matter was addressed by the magistrate judge 9 in a Report and Recommendation made to this Court. [Doc. No. 99.] Counsel's violations 10 were found to be unjustified, careless failures to adhere to the terms of the Protective Order 11 but not bad faith, and counsel has already been sanctioned.

12 The Court focuses on the history of this case and the litigation position of DS 13 Advanced. The case was filed on July 21, 2023. [Doc. No. 1.] Lowe's HC contends that 14 DS Advanced improperly named multiple defendants without justification, however DS 15 Advanced voluntarily

dismissed those parties on August 21, 2023, before any substantial expense or inconvenience was incurred.

[Doc. No. 5.] DS Advanced filed an amended complaint on October 16, 2023. [Doc. No. 17.] Lowe's HC filed a motion to dismiss willfulness allegations which the Court denied finding that, based only on the allegations of the complaint, DS Advanced plausibly stated a claim for willful infringement. [Doc. No. 24.] Lowe's HC then filed its answer on January 29, 2024.

[Doc. No. 27.] In March 2024, the parties entered into a Scheduling Order [Doc. No. 31] and a Protective Order [Doc. No. 33]. Nothing else appears on the docket until Lowe's HC filed its motion for summary judgment of non-infringement on June 10, 2024. [Doc. No. 34.] After receipt of DS Advanced's infringement contentions, Lowe's HC presented its motion to the Court for summary judgment of non-infringement.

Based on proposed constructions of three limitations of the patent's only independent claim, Lowe's HC argued for a finding of non-infringement asserting that the aspects of the accused devices that DS Advanced contended satisfied those claim elements could not as a matter of law infringe. [Id.] Lowe's HC briefed the three claim limitations.

The Court after construing the "metal housing" limitation found it unnecessary to reach the two other challenged limitations. DS Advanced proposed a construction for "metal housing" that it contended encompassed the accused devices.

The Court rejected the proposed construction as contrary to the plain meaning of the claim term and the specification. [Doc. No. 67.] Lowe's HC correctly states that the Court was highly skeptical of the construction being proffered by DS Advanced and remarked that it was "almost frivolous." The question before the Court now is whether DS Advanced's interpretation of the claim limitation was so objectively unreasonable that the circumstances support an exceptional case finding.

The construction of "metal housing" was put before the Court relatively early in the litigation, just three months after the entry of the Scheduling Order and Protective Order. DS Advanced appears to have consistently identified in its infringement contentions the aspects of the accused device it alleged met this claim limitation based on its expansive interpretation of the claim.

The Court does not find that DS Advanced asserted its construction in bad faith or for an improper purpose, such as to extract a settlement. See *Extremity Medical, LLC v. Nextremity Solutions, Inc.* 2024 WL 4384202, *2 (Oct. 3, 2024, D.Del.) (pursing baseless litigation for a quick pay day). DS Advanced failed to convince the Court of its interpretation of the patent and the Court found the proposed construction strained the plain reading of the claim.

Under the totality of the circumstances however the Court is not 23 convinced that DS Advanced knowingly and intentionally asserted a meritless position for 24 improper purposes. It was just wrong. 25 Lowe's HC's motion to find the case exceptional and request for an award of 26 attorneys' fees and expenses pursuant to 35 U.S.C. § 285 is DENIED. 27 The Court also does not find that DS Advanced's counsel intentionally and in bad 28 faith unreasonably multiplied the proceedings justifying a fee award pursuant to 35 U.S.C. 1 1927.

Counsel has a litigation style that is perhaps overly aggressive and at times 2 reflected a somewhat condescending attitude toward the Court, but the Court does not find 3 was intentionally harassing or advanced in bad faith.

The request for a fee award against 4 || counsel is also DENIED.” 5 It is SO ORDERED. 6 Dated: February 24, 2025 € ZL 7 Hon. Cathy Ann Bencivengo 8 United States District Judge 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 > The sanction award against counsel for DS Advanced for his violations of the Protective Order however remains affirmed.