

United States District Court,
C.D. California.

BAUSCH & LOMB SURGICAL, INC,
Plaintiff.

v.

OASIS MEDICAL, INC,
Defendants.

No. CV 00-11298MRP

July 16, 2001.

David R. Clonts, Gregory M. Hasley, John F. Luman, III, Lester L. Hewitt, Akin Gump Strauss Hauer & Feld, Houston, TX, Donald L. Morrow, Jay C. Gandhi, Paul Hastings Janofsky & Walker, Costa Mesa, CA, Steven D. Allison, Hodel Briggs Allison and Winter, Irvine, CA, for Plaintiff.

Andrew Eliseev, Greenberg Traurig, Santa Monica, CA, Ben M. Davidson, Michael Albert Backstrom, Richard J. Coddling, Howrey Simon Arnold & White, Los Angeles, CA, for Defendants.

MEMORANDUM OF DECISION AND PRELIMINARY CLAIM CONSTRUCTION

PFAELZER, J.

On November 22, 2001, defendant filed motions for both Summary Judgment of Noninfringement and for Sanctions. On July 16, 2001, the Court heard oral argument and took the matter under submission.

BACKGROUND

This dispute deals with the technology of vision correction, specifically the procedure known commercially as LASIK. In a LASIK surgical procedure, vision is corrected by laser sculpting of the inner cornea, which is exposed by the cutting and folding back of a hinged corneal flap. This initial cutting is performed by a precise instrument known as a microkeratome. Bausch & Lomb ("B & L") markets a pivoting head microkeratome, the Hansatome(R), that laterally oscillates a blade while at the same time driving it forward in an arcuate path. U.S. Patent No. 6,051,009 ("the '009 patent") claims a microkeratome blade assembly that can be oscillated in the pivoting head of such a pivoting head microkeratome. The claimed assembly comprises a cutting blade and a blade holder.

Because sterility and consistency of cut are important in LASIK surgery, microkeratome blades are generally designed to be disposable. Oasis Medical, Inc. ("Oasis") has designed and is offering for sale replacement blades for the Hansatome(R) pivoting head microkeratome. B & L sued Oasis for patent infringement based on these blade assemblies, alleging initially that these products infringed at least claim 54 of the '009 patent.

Taking the zealous position that it has undisputedly engineered around the claims of the '009 patent, Oasis has moved both for summary judgment of noninfringement on claim 54 and for sanctions based on B & L's refusal to dismiss its case in light of what Oasis considers to be a clear absence of an essential claim element: a "rear edge."

ANALYSIS

I. CLAIM CONSTRUCTION.

Claim 54 of the '009 patent reads, in relevant part, as follows:

54. A cutting blade assembly ..., said ... assembly comprising:

a) a cutting blade having:

i) a front portion, said front portion including a sharp, forward cutting edge;

ii) a rear, trailing portion including a rear edge;

iii) a pair of side edges interconnecting said front portion and said rear trailing portion;

iv) at least one of said side edges being at least partially tapered; and

b) a blade holder[.]

Oasis contends that its replacement blade, the rear portion of which terminates in a triangular point, cannot infringe claim 54, which requires that rear trailing portion include a "rear edge." FN1 According to Oasis' very brief memorandum, Oasis relies exclusively on what it believes will be the conclusion of the Court: that the rear point of the accused blade is not, either literally or by equivalents, a "rear edge" as properly construed.

FN1. Although Oasis did not mention the doctrine of equivalents until its Reply, Oasis has sufficiently set out its noninfringement contentions that the Court will consider, if necessary, noninfringement under the doctrine of equivalents as well.

In its two paragraph claim construction argument, Oasis only cites to Webster's dictionary, urging a construction of "edge" as "a line or line segment that is the intersection of two plane faces (as of a pyramid), or of two planes." Oasis contends that this is the ordinary English meaning for the term. B & L counters that the term must be looked at through the eyes of one of ordinary skill in the art, and offers expert testimony to guide the Court to the following proposed construction:

The claim element "rear, trailing portion including a rear edge" means the non-cutting face on the rear of the blade and a portion of the blade adjacent to this face. The rear edge can be, but is not required to be, generally parallel to the forward cutting edge of the front portion of the blade. The rear trailing portion can be generally trapezoidal or have other shapes.

The Court rejects both parties' proposals. While the meaning of "edge" in the claim is not as simple as Oasis suggests, it is not particularly esoteric. Looking to the intrinsic evidence and relying on common understanding and usage, the Court finds that the proper construction lies somewhere between the facile and the abstruse.

Part of the parties' difficulty in properly construing "rear edge" is caused by the fact that the limitation "edge" can itself have different meanings depending upon the context in which it is used. While in some instances, "edge" may describe the actual physical margin of intersection between two surfaces (e.g., "she cut herself on the sharp edge of the blade"), "edge" can also simply define the surface boundary created by

that margin of intersection (e.g., "the quarter rolled off the edge of the table"). In the context of the relevant claim (Claim 54), "edge" is used in both senses.

Claim 54 specifies that the blade has three types of "edge": "cutting edge," "side edge," and "rear edge." While each type of "edge" must be interpreted individually, the nuances are clear from the context in which each type is used.

The "cutting edge" in claim 54 is described in both physical and relational boundary terms. It is a structure "includ[ed]" in the "front portion" of the blade and is described physically as "sharp". It is also, however, described relationally: with respect to the rest of the blade it is "forward." Thus, not only is the "cutting edge" a physical structure, but it is a relational boundary that, by defining what will be considered the forward part of the blade, establishes the orientation for all of the other parts.

Likewise, the "rear edge" of the blade has dual meaning. In claim 54, the "rear edge" is physical, and is described as being "includ[ed]" in the "rear portion" of the blade. In the '009 patent specification, it is also described in relational terms. The specification explains that in the preferred embodiment, the rear edge is "generally parallel to the forward cutting edge." Col. 11, Ins. 26-28. This statement would be meaningless unless the drafter meant to describe the two dimensional relationship between the front and rear *surface borders*. It must be noted that, in the relational, "border" sense, neither the specification nor claim 54 appear to place any shape limitations on the "rear edge." See col. 11, Ins. 49-51. Thus, the surface border defined by the rear margin may be any shape (e.g., linear, curved, triangular, scalloped, jagged) so long as at least some part of the surface border defined by the rear margin is at the rearmost point of the blade.FN2

FN2. Note as well that while the specification leaves the "rear edge" open to not being parallel to the forward edge at all, the fact that all edges are defined in reference to the forward border supports a construction in which the forward cutting edge must by definition be perpendicular to what is considered to be the forward direction.

In contrast to the "cutting edge" or the "rear edge," the "side edges" of the blade are only ever described in relational terms. Both in the specification and the claims, the description of the "side edges" only makes sense if "edge" is interpreted as the border created by the margin of intersection, and not the margin itself. In claim 54, the "side edges" are described to be "at least partially tapered." In the context of the claims, the written description, the drawings and the prosecution history, it is clear that "tapered" only has meaning in describing the surface border of the blade as one looks from the forward portion to the rear portion of the blade. The drafter clearly meant to describe the shape of the blade's surface, not the shape of the margin of intersection. Another example of this kind of use is col. 11, Ins. 36-39, in which a preferred embodiment is described as having "rounded" side edges. The figure to which this passage refers (Fig.7) confirms that the drafter meant "border," not "margin of intersection" (*See Fig. 7, showing that rounded side edges are ones in which the side borders of the blade surface lack sharp corners*).

While it might be argued that the drafter could have better described the invention by using separate words for either "border" or "margin of intersection," the Court finds that the differing meanings for "edge" in claim 54 can nonetheless be properly interpreted from context of the intrinsic evidence.

Thus, having considered the Motions, the papers filed in support of and in opposition to the Motions, the other pleadings and papers on file, as well as the evidence presented and the arguments of counsel at hearing, the Court arrives at this preliminary construction:

1. INCLUDING A SHARP, FORWARD CUTTING EDGE means "having a sharp margin of intersection between the top and bottom surfaces of the blade, in which the surface border defined by that margin also defines the forward most point of the blade."

2. A PAIR OF SIDE EDGES INTERCONNECTING SAID FRONT PORTION AND SAID REAR TRAILING PORTION means "the two surface borders, on each side of the blade, that are defined by the margin of intersection between the top and bottom surfaces of the blade and are adjacent to and/or continuous with the front and rear trailing portions of the blade."

3. INCLUDING A REAR EDGE means "having a margin of intersection between the top and bottom surfaces of the blade in which at least some part of the surface border defined by that margin is at the rearmost point of the blade. There is no limitation on the shape of the surface border defined by the margin of intersection."

II. INFRINGEMENT ANALYSIS

Because Oasis has merely asked the Court to evaluate whether the "point" of the accused blade can be the same as or equivalent to the "rear edge" of claim 54, the Court's analysis is straightforward.

Looking to the accused blade, the Court finds that, though the border of the rear trailing portion is not linear or parallel to the forward, cutting edge, the triangular top and bottom surfaces of the rear portion do have a margin of intersection in which at least some part of the surface border defined by that margin, namely the tip of the triangle, is at the rearmost point of the blade. B & L has therefore made out a prima facie case for infringement of claim 54 of the '009 patent.

CONCLUSION

In light of the Court's preliminary claim construction, B & L has made a prima facie showing of infringement that would defeat a current finding of noninfringement. Having considered the Motions, the papers filed in support of and in opposition to the Motions, the other pleadings and papers on file, and the evidence, defendant's motions are hereby DENIED.

IT IS SO ORDERED.

C.D.Cal.,2001.

Bausch & Lomb Surgical, Inc. v. Oasis Medical, Inc.

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