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

J0HN MEZZALINGUA ASSOC. INC,
Plaintiff.
v.
CABEL-CON, INC,
Defendant.

No. 94-CV-815 (RSP/GJD)

April 7, 1997.

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MEMORANDUM-DECISION AND ORDER

POOLER, District Judge.

Defendant Cabel-Con, Inc ("Cabel-Con") moved for partial summary judgment pursuant to Fed.R.Civ.P. 56. Plaintiff John Mezzalingua Assoc. Inc. ("Mezzalingua") opposed the motion. I heard oral argument on January 22, 1996.

BACKGROUND

Mezzalingua is the owner of two patents, U.S. Patents Nos. 4,990,106 (the " '106 patent") and 5,073,129 (the " '129 patent"), which are the subjects of this patent infringement action. Both patents describe coaxial cable end connectors of the type typically used in the cable television industry.

This lawsuit concerns a particular part of those end connectors, the ribs on the cylindrical second sleeve. Raw cable is attached to end connectors by inserting the cable into the second sleeve, then, with the help of a crimping tool, crimping the sleeve around the wire to form a firm, water-tight connection. In the course of this crimping, the ribs on the sleeve are generally crushed and deformed by the crimping tool.

Mezzalingua filed the complaint giving rise to this action on June 29, 1994. Mezzalingua alleges that Cabel-Con's design of its EPA connectors infringe upon claims 1, 2 and 4 of the '106 patent, and claims 1, 2, 4, 6, 8, 10, and 11 of the '129 patent. On November 7, 1995, Cabel-Con moved for partial summary judgment pursuant to Fed.R.Civ.P. 56 claiming that its device does not literally infringe on Mezzalingua's patents.

DISCUSSION

I. Standard

I may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party has the burden of identifying the evidence that it believes demonstrates the absence of a genuine issue of material fact. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Which facts are material is determined by the substantive law at issue. *See* Anderson, 477 U.S. at 248. In determining whether summary judgment is appropriate, I resolve all ambiguities and draw all reasonable inferences against the moving party. *See* Cifarelli v. Village of Babylon, 93 F.3d 47, 51 (2d Cir.1996). In the case at hand, I may grant partial summary judgment for Cabel-Con only if no reasonable finder of fact could find by a preponderance of the evidence that the accused product infringes on every limitation set forth in the patent claim. Wolverine World Wide Inc., v. Nike Inc., 38 F.3d 1192, 1196 (Fed.Cir.1994).

II. Literal Patent Infringement

At issue in this litigation is the shape of the axially spaced ribs on the crimp sleeves of Cable-Con's product. Mezzalingua's patents describe "axially spaced circular ribs." Cabel-Con claims that while its end connectors include axially spaced ribs, those ribs are hexagonal, not circular, and thus literal infringement cannot exist. Cabel Con also argues that because Mezzalingua's patent describes "axially spaced circular ribs" which are "deformable into a hexagonal configuration," whereas Cabel Con's connectors are initially hexagonally shaped, but deformable into a circular shape upon crimping, that Cabel-Con's devices do not literally infringe upon either of Mezzalingua's patents.

A. Patent Infringement Standards

An accused product infringes on a claim either by literally infringing on every limitation set forth in that claim, or by incorporating the substantial equivalent of every limitation in the claim. *See id*.

In determining a claim of patent infringement, literal or otherwise, there are several steps I must take. First, I must construe the relevant claims to determine its scope and meaning. I construe the scope and meaning of a claim as a matter of law, see Markman v. Westview Instruments. Inc., 52 F.3d 967, 979 (Fed.Cir.1995) (in banc), *aff'd,* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996), and without reference to the accused device, *see* SRI Int'l v. Matsushita Elec. Corp. of Am., 775 F.2d 1107, 1118 (Fed.Cir.1985).

In construing a claim, I look to the claims themselves, the specifications, and the prosecution history. *See* Markman, 52 F.3d at 979. The specification contains a description that would "enable one of ordinary skill in the art to make and use the invention." *Id*. This description may serve to aid me in defining the terms of the claims, see ill, although terms must be given their customary meaning unless the specifications, prosecution history, and other claims indicate a different meaning, *see* Nike Inc. v. Wolverine World Wide. Inc., 43 F.3d 644, 646 (Fed.Cir.1994). I also must be careful not to further limit claim language by incorporating features of preferred embodiments or examples used in the specifications into claim definitions. *See* Transmatic, Inc. v. Gulton Indus., Inc., 53 F.3d 1270, 1277 (Fed.Cir.1995). I may also look to extrinsic evidence to arrive at a correct understanding of claim language, including expert and inventor testimony, dictionaries and learned treatises. *See* Markman, 52 F.3d at 980.

Once the claim's language has been construed, "the accused device must be compared to the claim language as interpreted." Read Corp. v. Portec. Inc., 970 F.2d 816, 821 (Fed.Cir.1992). At that point, the question of infringement is a question of fact. *See* SRI Int'l, 775 F.2d at 1125.

B. The Claims

A patent does not protect everything it describes, but rather only the innovations set forth in its claims. *See* 35 U.S.C. s. 112. Each claim in a patent is either independent or dependent. A dependent claim incorporates all of the limitations of the independent claim upon which it depends. *See id*. Therefore, an accused product can only infringe upon a dependent claim if it is first found to infringe upon the independent claim. *See* Wolverine World Wide, 38 F.3d at 1199. Mezzalingua claims infringement by Cabel-Con's products of claims 1, 2 and 4 of the '106 patent, of which only claim 1 is independent. Mezzalingua also claims infringement of claims 1, 2, 4, 6, 8, 10 and 11 of its '126 patent, of which only claims 1, 4 and 8 are independent.

C. Construing and Applying the Claim Terms

Each of the independent claims includes directly or by incorporation a description of the "axially spaced circular ribs" on the crimp sleeves. (*See, e.g.,* Glazer Aff. Ex. A). The claims also indicate that the circular ribs, or at least some of them, are "deformable into a hexagonal configuration." (*See, e.g., id*.). For example, Claim 1 of the '106 patent provides as follows:

1. An end connector for connecting a coaxial cable to a port, said cable being of the type having an electrical inner conductor surrounded by and spaced inwardly from an electrical outer conductor, with a dielectric insulator interposed between said inner and outer conductors, and with a dielectric jacket surrounding the outer conductor, said end connector comprising:

....

a tubular body supported on the front end of said post at a location adjacent to said fastener means, said body having a cylindrical second sleeve surrounding and spaced radially from said first sleeve to define an annular chamber there between, said second sleeve having an open rear end leading to said annular chamber, said second sleeve having discrete axially spaced circular grooves in its interior surface defining a plurality of discrete axially spaced circular serrations and having grooves in its exterior surface defining a plurality of axially spaced *circular ribs,*

....

said ribs being *deformable into a hexagonal configuration* with an accompanying inward twisting deformation of said circular serrations toward said first sleeve and indented mechanical engagement with said jacket.

(*Id*.) (emphasis added). "Circular" is not defined in the specification or elsewhere in the patent, and thus that term must be "given [its] ordinary and accustomed meaning." Nike, 43 F.3d at 646.

Cabel-Con argues that "circular," both in common usage and as used in Mezzalingua's claims, means round or having the form of a circle. Cabel-Con cites Webster's New Collegiate Dictionary for this definition. In

addition, Cabel-Con notes that the claim description states that the circular ribs are deformable to a hexagonal configuration, which suggests that circular does not mean hexagonal. Cabel-Con claims also that the specifications refer to "diameters," and diameter is a quintessential feature of a circle. Cabel-Con also notes that the '106 patent inventor has conceded that Figure 5 of the '106 patent defines a perfect or reasonably perfect circle before the sleeves are crimped.

Mezzalingua, on the other hand, relies on Webster's Third New International Dictionary, which defines "circular" as "having the exact or approximate form or outline of a circle: Round." Mezzalingua argues that an object such as a "circular saw" is not perfectly circular, but rather approximates the form of a circle. Mezzalingua also contends that Cabel-Con cannot use the illustration in Figure 5 as evidence of meaning, because that illustration is just a preferred embodiment. *See* Transmatic, 53 F.3d at 1277.

As a preliminary point, I reject Cabel-Con's "diameter" argument. The fact that both Cabel-Con's and Mezzalingua's devices have specified diameters is largely irrelevant to the meaning of "circular ribs". Clearly, Cabel-Con cannot effectively argue that Mezzalingua's designation of a diameter for its device means that its device is shaped in a perfect circle, and at the same time contend that its device, which also has a diameter in its specifications, is not in a circular shape. Moreover, neither party seems to grasp the fact that diameter is a measurement applicable to many geometric shapes besides circles. *See Webster's Third New International Dictionary of the English Language Unabridged* 623 (1981) (diameter is "a chord passing through the center of a figure or body (as a circle, conic section, sphere, cube)") (emphasis added). FN1

FN1. For similar reasons, I reject Mezzalingua's alternative argument that because Cabel-Con's devices have diameters, they literally infringe on Mezzalingua's device. I also reject plaintiff's argument that Cabel-Con's description of its rib as a ring means it is circular. The definition of "ring" include circular, but is not limited to circular. *Websters Third New International Dictionary* 1958 (1993).

Next, I must construe the meaning of "circular" in Mezzalingua's claims. One definition of "circular", that to which Mezzalingua refers, is "having the exact or approximate form or outline of a circle." *Webster's Third New International Dictionary of the English Language Unabridged* 409. Another dictionary defines "circular" as "in the form of a circle; round; as, the sun appears to be *circular*." *Webster's New Universal Unabridged Dictionary* 368 (2d ed.1983). Cabel-Con relies on a definition of "circular" as "having the form of a circle: ROUND [or] moving in or describing a circle or spiral." *Webster's New Collegiate Dictionary* 200 (1979). Another common dictionary defines "circular" as "of or pertaining to a circle" and "having the form of a circle; round." *The Random House College Dictionary* 244 (rev. ed.1984).

Although it is apparent from the various definitions that an object need not be in the exact form of a circle to be circular, it also is clear that an object is not circular just because it has a continuous edge around it. For example, a square, though the four sides are drawn around it, cannot be circular, at least not as "circular" is commonly understood. Mezzalingua appears to contest this observation, noting that "[t]hings are commonly called circular when their peripheral edges do not form exact circles." Pl.'s Opp. Def's Mot. Part. Summ. J. at 6. Citing a prominent dictionary's use of "exact or approximate form or outline of a circle" in its definition of circular, Mezzalingua seems to place great reliance on the word "approximately." However, Mezzalingua's specifications strongly support a reading of "circular" that is far from approximate.

As used in Mezzalingua's claims, "circular" must refer to a shape perceivable to the ordinary eye as a circle, and not merely any shape which proceeds around an empty center. *But see* Monroe Eng'g Prods., Inc. v.

J.W. Winco. Inc., 915 F.Supp. 901, 906 (E.D.Mich.1996) (holding that it could not conclude as a matter of law that an octagonally-shaped coupling element did not literally infringe a patent describing a coupling element with an "annular configuration," because "annular" meant in the form of a ring, or circular in shape, though not necessarily forming a perfect circle, and a question of material fact existed as to whether an equilaterally-sided octagon product was in the form of a ring). As Cabel-Con notes, Figure 5 to the '106 patent and the description that accompanies it depict the ribs as perfect circles deformable into hexagons. The ribs clearly are perfectly circular in Figure 1 as well. While I am wary not to rely on the preferred embodiments that are frequently depicted in specifications, see Transmatic, 53 F.3d at 1277, there is little question from the figures and the language of the claims that the ribs are in the shape of perfect circles. These products are designed and presumably described by scientists and engineers. We must assume that they use mathematical and geometric descriptors carefully and intentionally. To argue that a hexagonal ring is a circular pattern plays loose with geometry. While a hexagon may be closer to resembling a circle than a pentagon or a square, to say that it literally is a circular shape would reduce the world of equally-sided polygons to circles. This is not an appropriate result, nor one fair to geometry and the English language.

Furthermore, I am persuaded by the fact that any other reading would render the distinctions in the claim itself nonexistent. If a hexagon is a circular pattern for the purposes of the claim, then deforming the circular pattern into a hexagon would be redundant.

Applying this definition to Cabel-Con's products, a reasonable finder of fact could not find literal patent infringement. Cabel-Con's products have end connectors with external ribs, much like Mezzalingua's products, but Cabel-Con's ribs are essentially hexagonal prior to crimping, then more circular once crimped. The crimp sleeve ribs on Mezzalingua's products are circular prior to crimping, then more or less hexagonal after crimping. Regardless of how these distinctions would fare under the doctrine of equivalents, they are enough as a matter of law to defeat literal infringement.

CONCLUSION

For the foregoing reasons, Cabel-Con's motion pursuant to Rule 56 is granted.

IT IS SO ORDERED.

N.D.N.Y.,1997.
John Mezzalingua Assoc. Inc. v. Cabel-Con, Inc.