

United States District Court,
C.D. California.

SCHOLLE CORPORATION,
Plaintiff.

v.

LIQUI-BOX CORPORATION,
Defendant.

No. CV 98-3559 DDP (VAPX0

June 22, 2000.

**ORDER: (1) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; AND (2)
DENYING PLAINTIFF'S MOTIONS TO STRIKE**

[Motions filed on 5-22-00 and 6-5-00]

PREGERSON, District J.

The defendant's motion for summary judgment and the plaintiff's motions to strike came before the Court for oral argument on June 19, 2000. After reviewing and considering the materials submitted by the parties and hearing oral argument, the Court adopts the following Order.

I. Background

This is a patent infringement dispute. The plaintiff, Scholle Corporation, is the owner of United States Patent No. 4,445,550 for "Flexible Walled Container Having Membrane Fitment for Use with Aseptic Filling Apparatus" (the " '550 Patent"), issued in 1984. (Mattes Decl. Ex. 2.) The defendant, Liqui-Box Corporation, manufactures a similar device called the "Graves Fitment." Both devices are typically used by commercial food processors to store soft foods such as tomato paste.

The invention described and claimed in the '550 Patent is a plastic bag with attached plastic fitment (the " '550 Fitment"), which connects to an aseptic filling machine. In its preferred embodiment, the fitment consists of a single plastic piece, including the fitment body and a rupturable membrane. The membrane is disc-shaped, with eight molded grooves radiating from the center of the membrane to the fitment neck. The membrane is designed to break along the molded grooves, so that the membrane segments fold in while remaining attached to the rigid neck of the fitment. In typical use, a filling machine sterilizes the fitment surface and ruptures the membrane with a metal fill tube. The machine then fills the bag with food product and installs a seal across the fitment.

The defendant's product, the Graves Fitment, is designed for the same uses as the '550 Fitment. The Graves Fitment consists of two plastic pieces; the fitment body, which is attached to a plastic bag, and a separate disc-shaped plug. The plug is rigid and unrupturable, and is intended to remain permanently attached to the

inside bottom wall of the bag. In typical use, a filling machine sterilizes the fitment surface and pushes the plug away from the fitment body and into the bag. The machine then fills the bag with food product and installs a seal across the fitment.

On May 8, 1998, the plaintiff filed a complaint in this Court alleging patent infringement. Pursuant to a stipulation, the plaintiff has agreed that it will not assert literal infringement in this action. (Mattes Decl. para. 10 & Ex. 214.)

The defendant now moves for summary judgment of noninfringement. The defendant argues that the defendant's Graves Fitment does not infringe the plaintiff's '550 Patent under the doctrine of equivalents. The plaintiff also moves to strike certain declarations submitted in support of the defendant's motion.

II. Evidentiary Objections & Motions to Strike

A. Declaration of Samuel L. Belcher

As part of its opposition, the plaintiff submitted a motion to strike the declaration of the defendant's expert, Samuel L. Belcher. In response, the defendant noted that the plaintiff's motion was improperly noticed. However, in the interest of resolving the summary judgment motion, the Court shall address the merits of the plaintiff's objections.

1. General Objections

The plaintiff first argues that the declaration should be stricken in its entirety for various reasons. The plaintiff notes that the declaration does not state that the declarant has personal knowledge of the facts stated therein. However, the declaration states Mr. Belcher's qualifications as an expert and the basis for his expert opinions. The plaintiff also alleges that the declaration is filled with speculation and includes opinions not contained in Mr. Belcher's expert report. However, the plaintiff sets forth no basis for these allegations. Accordingly, the Court denies the plaintiff's request to strike the declaration in its entirety.

2. Specific Objections

The plaintiff objects to the statement that the " '550 Fitment is manufactured as a single piece," as a misstatement of fact. (Belcher Decl. para. 4.) In the section "Description of a Preferred Embodiment," the '550 Patent describes an "alternate, two piece" foil disk membrane which would be heat sealed to the fitment before attachment of the plastic bag, and which "[i]n all other respects ... would operate as the preferred integral membrane." (Mattes Decl. Ex. 2 at 47.) However, the plaintiff has elsewhere admitted that "[t]he '550 fitment is a single piece." (*Id.* Ex. 213 at 75.) Moreover, the plaintiff submits no evidence that the alternate membrane has been manufactured, and the only '550 Fitment in evidence is a single-piece fitment. (Def.'s Ex. 91.) Accordingly, the Court overrules this objection.

The plaintiff also objects to the following statements: (1) that "the additional seal [between the Graves plug and the inside of the plastic bag] is a substantial difference between the '550 and Graves fitments;" (2) that "the possibility exists that membrane fragments [in the '550 Fitment] will break away from the membrane during its rupture and fall into the product inside the bag;" (3) that "[t]he presence of these membrane segments obstruct the opening of the fitment;" and (4) that "the '550 fitment may allow food particles to be deposited on the final sealing surface of the neck of the fitment" in various ways. (Belcher Decl. para. para. 5-8.) The plaintiff argues that these statements were made without scientific basis, in violation of *Daubert v.*

Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). However, the statements are the opinions of a qualified expert based on a review of relevant materials. Accordingly, the Court overrules these objections.

The plaintiff next objects to Mr. Belcher's opinions that, based on his experience with injection molding, the term "rupturable" means "permanently deformable" and the term "membrane" "does not include a plug." (Belcher Decl. para. 9.) The plaintiff argues that these statements are irrelevant, because a court should construe claim terms in accordance with their ordinary meaning rather than by expert testimony. However, absent indication that the inventor intended otherwise, claim terms are given "their ordinary meaning to one of skill in the art." *Quantum Corp. v. Rodime*, 65 F.3d 1577, 1580 (Fed.Cir.1995). Accordingly, the Court overrules this objection.

Finally, the plaintiff objects to statements referring to experiments with the '550 Fitment, and to a description of a videotape. (Belcher Decl. para. 10, 12, 13.) The Court need not address these objections, because the recommendations below do not rely on this evidence.

For the reasons discussed above, the Court denies the plaintiff's motion to strike the declaration of Samuel L. Belcher.

B. Declaration of Stewart Graves

The plaintiff also submitted a motion to strike the declaration of the defendant's vice president, Stewart Graves. Again, although the motion was improperly noticed, the Court shall address the merits of the plaintiff's objections.

The plaintiff objects to the declaration in its entirety, as well as to certain statements about alleged problems with the '550 Fitment. (Graves Decl. para. 3-6.) The plaintiff argues that the statements were made without foundation and without personal knowledge. The plaintiff also argues that alleged problems with the '550 Fitment are irrelevant to the issue of infringement. The Court need not address these objections, because the recommendations below do not rely on the disputed evidence. Accordingly, the Court denies the plaintiff's motion to strike the declaration of Stewart Graves as moot.

C. Declaration of Glenn Beall

Finally, the defendant submitted objections to the declaration of the plaintiff's expert, Glenn Beall. The defendants object to statements that: (1) Mr. Beall was informed of a lack of complaints about the '550 Fitment; and (2) Mr. Beall observed a sample '550 Fitment with a ruptured membrane that had undergone the process described in the '550 Patent. (Beall Decl. para. 4.) The Court need not address these objections, because the recommendations below do not rely on the disputed evidence. Accordingly, the Court denies the defendant's evidentiary objections as moot.

III. Motion for Summary Judgment

A. Legal Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*,

Inc., 477 U.S. 242, 248 (1986). Thus, the "mere existence of a scintilla of evidence" in support of the nonmoving party's claim is insufficient to defeat summary judgment. *Id.* at 252. In determining a motion for summary judgment, all reasonable inferences from the evidence must be drawn in favor of the nonmoving party. *Id.* at 242.

In a patent case, an infringement analysis involves two steps. "The first step is determining the meaning and scope of the patent claims asserted to be infringed. The second step is comparing the properly construed claims to the device accused of infringing." *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed.Cir.1995) (internal citations omitted), *aff'd*, 517 U.S. 370 (1996). The first step, claim construction, is a matter of law to be decided by the Court. *See id.* at 979. The second step, determination of infringement, is a question of fact. *See Strattec Sec. Corp. v. General Automotive Specialty Co.*, 126 F.3d 1411, 1416 (Fed.Cir.1997). The patentee bears the burden of proof, by a preponderance of the evidence, to establish factual issues relating to infringement. *See Chisum on Patents* s. 18.06 at 18-531 (2000).

B. Claim Construction

Claim construction is a matter of law that may be determined on summary judgment. *See Wolverine World Wide, Inc. v. Nike, Inc.*, 38 F.3d 1192, 1197 (Fed.Cir.1994). In interpreting a claim, the Court must first examine intrinsic evidence: the patent claims, the specification, and, if in evidence, the prosecution history. *See Vitronics Corp. v. Conceptor, Inc.*, 90 F.3d 1576, 1582 (Fed.Cir.1996). If intrinsic evidence does not resolve an ambiguity in a disputed term, the Court may also consider extrinsic evidence such as expert testimony. *See id.* at 1583. Absent indication that the inventor intended otherwise, claim terms are given their ordinary meaning to those skilled in the art. *See Athletic Alternatives, Inc. v. Prince Mfg., Inc.*, 73 F.3d 1573, 1578 (Fed.Cir.1996); *Quantum Corp.*, 65 F.3d at 1580.

The defendant asks the Court to construe Claims 1, 14, and 15 of the '550 Patent. Each of these claims asserts, among other elements, a "fitment member" with a "rupturable membrane." (Mattes Decl. Ex. 2 at 52-53.) Claim 1 is representative and provides, in pertinent part:

1. For use with an aseptic [sic] filling apparatus having a filling chamber..., an aseptic [sic] container for the storage of flowable food product comprising: gas impermeable walls, a rigid fitment member sealed to one of said walls and detachably receptive in the opening of the filling chamber to effect sealed connection therebetween; a rupturable membrane closing said fitment member and located axially inwardly of the outer end thereof, ... said membrane being rupturable by the filling means for the introduction of flowable food product to the container's interior.

(*Id.* at 52.)

The defendant asks the Court to adopt the following claim constructions: (1) that "fitment" means a fitment comprising a single piece; (2) that "rupturable" means permanently deformable; and (3) that "membrane" means a membrane and not a plug. The plaintiff does not oppose or even address the proposed claim constructions in its opposition.

1. Fitment

The defendant argues that the term "fitment" in the '550 Patent should be construed to mean a fitment comprising a single piece. The defendant notes the plaintiff's admission that "[t]he '550 fitment is a single piece." (Mattes Decl. para. 5 & Ex. 213.)

In addition, although not raised by the parties, the Court notes that language in the '550 Patent supports this construction, Claims 1 and 15 describe the claimed product as comprising a "rigid fitment member" and a "rupturable membrane." (Mattes Decl. Ex. 2 at 52, 53.) This language, although suggesting that the fitment and membrane are separate elements, is ambiguous as to whether the elements are separate pieces. However, Claim 14 clearly describes a "fitment member ... comprising ... aseptic rupturable membrane means." (*Id.* at 53.) The section "Objects of the Invention" also describes the claimed device as having "a fitment including a rigid neck and a frangible membrane." (*Id.* at 45.) Finally, Claims 7-10 clearly describe a membrane "joined," "sealed to" and "formed integrally with" the other portions of the fitment member. Accordingly, the defendant's construction of the term "fitment" is consistent with the patent claims.

In a separate motion to strike, although not in its opposition, the plaintiff notes that the '550 Patent specification describes an "alternate two piece type of membrane." (Mattes Decl. Ex. 2 at 47.) However, this phrase does not imply that the term "fitment" composes two pieces. As described in the specification, the alternate membrane is a separate polyethylene foil disk which, apparently during manufacturing of the fitment, is heat sealed to the fitment neck *prior to* joinder of the fitment to the plastic bag. (*Id.* (emphasis added).) The preferred and alternate membranes operate the same "[i]n all other respects." (*Id.*) Thus, although the alternate membrane would be formed separately, the fitment would function as a single, inseparable piece.

2. Rupturable

The defendant argues that the term "rupturable" in the '550 Patent should be construed to mean permanently deformable. The defendant argues that the process described in the '550 Patent involves an irreversible breaking of the membrane. The defendant also cites evidence that this construction accords with the ordinary meaning of the term "rupture" to those skilled in the art of injection molded plastics. (Belcher Decl. para. 9.) The Court also notes that this construction is consistent with the ordinary lay meaning of the term.

3. Membrane

The defendant argues that the term "membrane" in the '550 Patent should be construed as not including a plug. The defendant notes the plaintiff's admission that "[t]he Graves plug is not a membrane." (Mattes Decl. para. 5 & Ex. 213.) The defendant also cites evidence that, to those skilled in the art of injection molded plastics, the ordinary meaning of the term "membrane" is a relatively thin covering and does not include a plug. (Belcher Decl. para. 9.) The Court also notes that this construction is consistent with the ordinary lay meaning of the term.

These proposed constructions are reasonable and supported by relevant evidence, and are not opposed by the plaintiff. Accordingly, the Court adopts the proposed constructions as a matter of law.

C. Infringement under Doctrine of Equivalents

Even if a product does not literally correspond to the terms of a patent claim, infringement may be found under the doctrine of equivalents if the accused product contains an equivalent of each claimed element of the patent. *See Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 21, 39 (1997). To establish infringement under the doctrine, a plaintiff must show that the defendant's product contains an element performing substantially the same function, in substantially the same way, to achieve substantially the same result, as each element of the patented product. *See id.* at 38-40; *Graver Tank & Mfg. Co. v. Linde*

Air Prods. Co., 339 U.S. 605, 607 (1950); *Chisum on Patents* s. 18.04 at 18-242. Alternatively, under the more vaguely-defined "insubstantial differences" approach, the plaintiff must show that respective elements of the two products play substantially the same roles. *See* Warner-Jenkinson, 520 U.S. at 39-40.

The Supreme Court has cautioned that, to avoid unduly expanding the scope of the patent claims:

the doctrine of equivalents must be applied to individual elements of the claim, not to the invention as a whole. It is important to ensure that the application of the doctrine, even as to an individual element, is not allowed such broad play as to effectively eliminate that element in its entirety.

Warner-Jenkinson, 520 U.S. at 29. The doctrine requires an objective inquiry, to which the alleged infringer's intent to copy or design around a patent claim is irrelevant. *See id.* at 35-36, 40.

The patent owner bears the burden of proving infringement under the doctrine of equivalents. *See Chisum on Patents* s. 18.06[1][a] at 18-531. Summary judgment of noninfringement under the doctrine of equivalents is proper if "no reasonable jury could determine two elements to be equivalent." Warner-Jenkinson, 520 U.S. at 39 n.8. For example, the Court must enter a judgment of noninfringement "if a theory of equivalence would entirely vitiate a particular claim element." *Id.*

The defendant argues that the Graves Fitment does not infringe the '550 Patent for the following independent reasons: (1) the Graves Fitment is not equivalent to a single-piece fitment; (2) the Graves plug is not equivalent to a "rupturable" membrane; (3) the Graves plug is not equivalent to a "membrane;" (4) the Graves Fitment, and each of its components, performs in a substantially different way than the '550 Fitment; and (5) the Graves Fitment obtains a substantially different result than the '550 Fitment.

1. Fitment

The defendant first argues that the two-piece fitment in the Graves product is not equivalent to the single-piece "fitment" claimed in the '550 Patent. The defendant submits evidence that, in developing the '550 Patent, the inventors considered and rejected the concept of a two-piece fitment as unsuitable. The defendant argues that this difference is more than insubstantial.

The plaintiff argues that "[w]hether the membrane is one piece or two pieces ... really makes no difference in terms of the objective of the invention." (Opp'n at 10.) The plaintiff does not address the function-way-result test as to this element. However, the plaintiff submits evidence that the integral or heat-sealed membrane described in the '550 Patent and the separable plug in the Graves Fitment both function as plastic barriers that provide a sterile seal prior to filling. (Beall Decl. at 9; Tschanen Dep. at 34.) A reasonable jury could find that whether the plastic barrier is an integral part of a one-piece fitment, or a separable part of a two-piece fitment, is an insubstantial difference. Accordingly, the Court finds that the plaintiff has raised a triable issue as to the equivalence of the "fitment" element.

2. "Rupturable" Membrane

The defendant next argues that the Graves Fitment does not contain an equivalent to the rupturable membrane claimed in the '550 Patent. As noted above, the Court construes the term "rupturable" to mean permanently deformable. The defendant cites evidence showing that, unlike the rupturable element claimed in the '550 Patent, the plug in the Graves Fitment was designed to remain intact when displaced.

The plaintiff argues that there is a triable issue as to whether a rupturable membrane and an intact plug are equivalent under the function-way-result test. The plaintiff cites testimony that the '550 membrane and the Graves plug perform the same function with the same result, i.e., providing a sterile barrier prior to filling. (Tschanen Dep. at 34; Davis Dep. at 19.) The plaintiff also argues that, despite their structural differences, the two elements perform in substantially the same manner. The plaintiff cites its expert's opinion that the substitution of a plug for a membrane would be obvious to one skilled in the art. (Beall Decl., Exp. Discl. St. at 9.) The plaintiff's expert also notes that both elements are "displaced from their original closed position during the aseptic filling operation" and are "breached in order to allow product to flow into the container." (*Id.*; Beall Decl., Exp. Suppl. Discl. St. at 1.)

The Court finds that the plaintiff has failed to raise a triable issue as to the equivalence of this element. Unlike the membrane claimed in the '550 Patent, the Graves plug is never ruptured or permanently deformed by the filling tube. Rather, the plug is displaced from the fitment neck to the bottom of the bag. Although the two elements may perform the same function to achieve the same result, they operate in a very different manner. *Cf. Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133 F.3d 1473, 1480-81 (Fed.Cir.1998) (upholding finding that "degradable" envelope does not perform in substantially the same way as envelope that bursts open). No reasonable jury could find that the elements are equivalent, because such a finding would vitiate the "rupturable" limitation in the '550 Patent. Accordingly, the Court finds, as a matter of law, that the defendant's product does not infringe the '550 Patent under the doctrine of equivalents.

3. Other Issues

The defendant also argues that the Graves plug is not equivalent to a "membrane," and that the Graves Fitment, including its components, performs in a substantially different way and achieves a substantially different result than the product claimed in the '550 Patent. In light of the conclusion above, the Court need not address these issues.

IV. Conclusion

For the reasons discussed above, the Court GRANTS the defendant's motion for summary judgment and DENIES the plaintiff's motions to strike.

IT IS SO ORDERED.

C.D.Cal.,2000.

Scholle Corp. v. Liqui-Box Corp.

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