

United States District Court,
D. Kansas.

POWER LIFT FOUNDATION REPAIR OF KANSAS, INC.,

Plaintiff.

v.

KANSAS CONCRETE LEVELING, INC.; John Lambert; and Darren Martin,

Defendants.

No. 00-1015-WEB

Jan. 14, 2002.

Memorandum and Order

WESLEY E. BROWN, Senior District Judge.

This matter is before the court on plaintiff's objections to the Report and Recommendation of U.S. Magistrate Judge Donald W. Bostwick filed on October 12, 2001. The Report and Recommendation addressed the parties' cross-motions for interpretation of U.S. Patent Number 5,154,539 ("the '539 patent"). The patent relates to a device for lifting and stabilizing foundations of structures. Plaintiff contends the Magistrate erred in construing several terms in the patent. The court concludes that oral argument would not assist in deciding the issues presented.

The case background, the context of plaintiff's objections and the relevant standards of claim interpretation are all set forth in the Magistrate's Report and will not be repeated here. See Doc. 110. The court will address plaintiff's objections in the order they are raised in plaintiff's memorandum. See Doc. 111. Inasmuch as claim construction presents a question of law, the court considers the issues presented under a de novo standard of review. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed.Cir.1995).

1. Claim 1.

Plaintiff first objects to the Magistrate's recommended interpretation of the "transmitting means" in Claim 1 of the '539 patent. The "transmitting means" is claimed as the last element of a combination under Claim 1 as follows: "[M]eans, engaging the bottom of said bracket at a location between the structure and the piling, for transmitting pile driving reaction forces to said bottom of said support bracket to lift and stabilize the structure, said means for transmitting attached to said upright members for upward movement therewith."

In construing this term, the Report and Recommendation states as follows:

The "transmitting means" is the structure by which the pile driving generated reaction forces [are] transmitted through the upright members to the supporting bracket which is then liftingly engaged to the bottom surface of the structure to be lifted or supported. Claim 3 indicates that the "transmitting means"

comprises a "laterally extending cradle means." Thus, the "cradle means" structure limits the "transmitting means" element. The "cradle means" structure, as set forth in claim 3, includes a transverse lifting member having an upper surface that liftingly engages the bottom surface of the support bracket. The "cradle means" additionally includes a pair of attachment means that extend from opposite sides at the outer ends of the transverse lifting member to reach either upright member. Claim 11 instructs that the attachment means on either end of the transverse lifting member comprises a pair of plates that are affixed on opposite sides and to both faces of the transverse lifting member. The plates are thus spaced apart such that the upright members are placed between the plates. Claim 4 instructs that the outer plates on either side of the transverse lifting member include aligned aperture to receive a pin to attach the "cradle means" to the upright members. Said pins thus extend through the outer plates and a corresponding aperture in the upright members and may include keys to prevent unwanted removal of the pins. The court finds that the term "transmitting means" is limited to the "cradle means" structure as interpreted immediately above.

Doc. 110 at 9-10. Plaintiff argues this interpretation erroneously reads limitations from dependent claims into the independent claim from which they depend. Specifically, plaintiff says the interpretation engrafts limitations in dependent claims 3, 4 and 11 into independent claim 1. FN1 Plaintiff argues this is contrary to the doctrine of claim differentiation (citing *Karlin Tech., Inc., v. Surgical Dynamics, Inc.*, 177 F.3d 968 (Fed.Cir.1999)), and contrary to the principle that each claim defines a separate invention that must be examined on its own merits. Citing *Jones v. Hardy*, 727 F.2d 1524 (Fed.Cir.1984). Plaintiff argues a better interpretation of the "transmitting means" element of Claim 1 is "a structure to transmit pile driving reaction forces to the bottom of the support bracket."

FN1. Plaintiff argues that, contrary to the findings in the Report and Recommendation, Claim 1 does not include the limitation of a "cradle means," a "laterally extending cradle means," or the "outer ends of the cradle means."

The court agrees that it is generally inappropriate to read limitations from dependent claims into the independent claim from which they depend. See *Comark Communications Inc. v. Harris Corp.*, 156 F.3d 1182, 1187 (Fed.Cir.1998). To the extent the Report and Recommendation indicates that the "transmitting means" in Claim 1 contains various structural limitations by virtue of dependent claims 3, 4 and 11, the court agrees with plaintiff that such an assertion is incorrect. Nevertheless, as will be explained below, the Report's ultimate interpretation of this term is essentially correct, albeit for different reasons. Specifically, the interpretation of the "transmitting means" to include the cradle means structure detailed by the Magistrate comes not from the dependent claims, but from the specification. Cf. *The Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1538 (Fed.Cir.1991).

The "transmitting means" element in Claim 1 is expressed in means-plus-function language as permitted by 35 U.S.C. s. 112(6). That section provides in part:

An element in a claim for combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

A means-plus-function limitation contemplated by this section recites a function to be performed rather than definite structure or materials for performing the function. *Chuiminatta Concrete Concepts v. Cardinal*

Industries, 145 F.3d 1303, 1307 (Fed.Cir.1998). Such a limitation must be construed to cover the corresponding structure, material or acts described in the specification and equivalents thereof. Id. at 1307-08.

The "transmitting means" in Claim 1 recites no related structure except to provide that the means must "engag[e] the bottom of said [support] bracket at a location between the structure and the piling, for transmitting pile driving reaction forces to said bottom of said support bracket to lift and stabilize the structure...." Col. 7, L. 52-56. The court concludes that this recitation does not prevent a means-plus-function interpretation, although it does serve as a limitation on the structures that perform the means claimed.

"Claim construction of a s. 112 para. 6 limitation includes identifying the claimed function and determining the corresponding structure or act disclosed in the specification...." IMS Tech., Inc. v. Haas Automation, Inc., 206 F.3d 1422, 1430 (Fed.Cir.2000). The function claimed here is transmitting pile driving reaction forces to the bottom of the support bracket to lift and stabilize the structure. Column 7, Lines 52-56. According to the terms of Claim 1, the means must "engag[e] the bottom of said [support] bracket at a location between the structure and the piling" and must transmit "pile driving reaction forces to said bottom of said support bracket to lift and stabilize the structure," said means attached to the upright members for upward movement therewith. *Id.* There are two "transmitting means" structures purportedly disclosed in the specification: (1) a lifting cradle having a transverse member that liftingly engages the bottom surface of the support bracket, with the lifting cradle attached to the upright members such that the transverse member is disposed between the piling and the foundation during a lifting operation, with the lifting force being transmitted to a foundation by the engagement of the top surface of transverse lifting member and bottom surface of the support bracket, (Col. 4, L. 65-70, Col. 5 L. 1-5, Col. 6, L. 1-37), as shown in the preferred embodiment in Figures 1-3; and (2) a means that includes an integral support and lifting bracket, with a pair of laterally extending mounting or lifting plates that are attached to and extend outwardly from opposite sides of the guide means, with the lifting plates having a substantially planar configuration and the support arm having an I-beam configuration, with the "lifting plate rigidly attached to the upright members" wherein "the lifting force will be transmitted through the plate to the support bracket and then to the structure to be stabilized," Col. 2, L.63-68, Col. 3, L. 1-4, Col. 6, L. 38-68, Col. 7, L. 1-3, as shown in Figures 4-7.

Although the first structure discussed above corresponds with the "transmitting means" in Claim 1, the second disclosed structure does not. The second structure does not "engage" the bottom of the support bracket, nor does it transmit the pile driving reaction forces to the bottom of the support bracket to lift the structure as required by Col. 7, L. 52-56. Cf. Micro Chem., Inc. v. Great Plains Chem. Co., 194 F.3d 1250, 1257-58 (Fed.Cir.1999) (the scope of the means-plus-function limitations at issue is limited to the structures disclosed in the written description that correspond to the recited functions, plus their equivalents). See also Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc., 145 F.3d 1303, 1308-09 (Fed.Cir.1998) (Structural features that do not actually perform the recited function do not constitute corresponding structure and thus do not serve as claim limitations.). In this case, the only structure disclosed in the specification performing the claimed function and meeting the limitations thereof is the cradle means structure identified by the Magistrate.

Relying on the doctrine of claim differentiation, plaintiff argues the "transmitting means" in Claim 1 must be construed more broadly than the structures disclosed in Claims 3, 4 and 11, apparently because the former is expressed in means-plus-function language. This argument is unpersuasive. "Claim differentiation

is a guide, not a rigid rule. If a claim will bear only one interpretation, similarity will have to be tolerated." Autogiro Co. of America v. United States, 384 F.2d 391, 404 (1967). In this case, the only structure disclosed in the specification meeting the transmitting means limitations includes the cradle means structure. A means-plus-function limitation is not made open-ended by the presence of another claim specifically claiming the disclosed structure which underlies the means clause or an equivalent of that structure. Laitram Corp. v. Rexnord, Inc., 939 F.2d 1533, 1538 (Fed.Cir.1991). "Thus, claim differentiation will not be applied to a situation where, as here, a dependent claim recites the only structure disclosed in the specification that could correspond to the means claimed in the independent claim." See Kudlacek v. DBC, INC., --- F.3d ---- (Table, Text in WESTLAW), Unpublished Disposition, 2001 WL 1646654 (Fed. Cir., Dec 21, 2001).

In sum, the court finds that the "transmitting means" in Claim 1 comprises a "laterally extending cradle means" and the structures associated therewith, including a transverse lifting member having an upper surface that liftingly engages the bottom surface of the support bracket at a location between the structure and the piling, as found by the Magistrate in his Report and Recommendation, together with structural equivalents thereof.

2. Claim 18.

Plaintiff next objects to the Magistrate's recommended interpretation of Claim 18. Plaintiff notes the Magistrate concluded that Claim 18 properly covered the alternative design of an integral support bracket, but further found:

However, protection of the alternative embodiment is limited to the extent that claim 18 requires a cradle means with a transverse lifting segment which is not integral to the support bracket and which becomes engaged with the bottom surface of the support bracket only through the application of vertical forces applied via the transverse lifting segment's affixation to the upright members.

Plaintiff argues this interpretation is wrong for two reasons. First, because it requires an unworkable assembly, and thus runs contrary to the proposition that a claim should be construed, if possible, to sustain the patent's validity. And second, because the Magistrate erroneously rejected a means-plus-function interpretation for the "transmitting means" claimed in Claim 18.

These arguments are unavailing. First, although the Magistrate's interpretation may indeed require an unworkable assembly, that result is a function of limitations arising from the plain language of the patent. Specifically, the last clause of Claim 18 clearly requires the laterally extending cradle means which plaintiff contends renders the assembly unworkable. No amount of interpretation can overcome the plain language of the claim. Secondly, the court concludes the Magistrate correctly determined that the structure cited in the last clause of Claim 18 was sufficient to prevent a means-plus-function interpretation of that element. Although the mere recitation of some structure does not preclude applicability of s. 112(6), "the presumption that s. 112, para. 6 applies is overcome if the claim itself recites sufficient structure or material for performing the claimed function." Al- Site Corp. v. VSI Int'l., 174 F.3d 1308, 1318 (Fed.Cir.1999). See also Sage Prods., Inc. v. Devon Indus., Inc., 126 F.3d 1420, 1427-28 (Fed.Cir.1997) ("where a claim recites a function, but then goes on to elaborate sufficient structure, material, or acts within the claim itself to perform entirely the recited function, the claim is not in means-plus-function format."). In this case, the last clause in Claim 18 recites a complete description of the structure necessary to perform the function of the transmitting means. Accordingly, the Magistrate did not err in rejecting plaintiff's argument for a s. 112(6) interpretation.

The Magistrate pointed out that the last clause of Claim 18 "infused claim 18 with structural terminology that clearly points out and claims the preferred embodiment, as described in claim 3," and cogently explained why this clause will not bear the interpretation suggested by plaintiff. Among other things, plaintiff's suggested interpretation of the "outer ends" of the cradle means required by that clause, the "transverse segment," and how the segment "engages" the bottom of the support bracket cannot reasonably be stretched to the point suggested by plaintiff. The court concludes that the interpretation of Claim 18 recommended by the Magistrate is legally correct, and the court will therefore adopt it.

Conclusion.

Plaintiff's objection to the Magistrate's recommended interpretation of "transmitting means" in Claim 1 is sustained in part to the extent set forth above. Otherwise, plaintiff's objections are overruled, and the balance of the Magistrate's Report and Recommendation interpreting the claims of the '539 patent is hereby adopted by the court.

IT IS SO ORDERED this day of January, 2002, at Wichita, Ks.

D.Kan.,2002.

Power Life Foundation Repair of Kansas, Inc. v. Kansas Concrete Leveling, Inc.

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