IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HEALTHSPOT, INC.,	)	**CASE NO. 1:14 CV 804**
	)	
Plaintiff,	)	
	)	
v.	)	**JUDGE DONALD C. NUGENT**
	)	
COMPUTERIZED SCREENING, INC.,	)	
	)	
	)	**ORDER**
Defendant.	)	

This matter is before the Court on the Motion for Award of Attorneys' Fees and Costs filed by Plaintiff, HealthSpot, Inc., on September 17, 2015. (Docket #106.) Pursuant to Fed. R. Civ. P. 54, 35 U.S.C. § 285, and 28 U.S.C. § 1927, and this Court's inherent authority, HealthSpot asks this Court for an award of its attorneys' fees and costs, approximately $829,500.00 against Defendant, Computerized Screening.

In its Motion for Award of Attorneys' Fees and Costs, HealthSpot argues that it is the prevailing party in this action for purposes of Fed. R. Civ. P. 54, as Computerized Screening conceded non-infringement on the basis of the absence of the limitation of "controller;" that this case is exceptional and warrants an award of fees under 35 U.S.C. § 285, alleging Computerized Screening failed to conduct an adequate pre-filing investigation; and, that Computerized Screening knew, or should have known, that its claim was frivolous, as contemplated under 28 U.S.C. § 1927. On October 5, 2015, Computerized Screening filed its Response in Opposition to

HealthSpot's Motion. (Docket #109). On October 15, 2015, HealthSpot filed its Reply Brief. (Docket #110.)

Discussion

I. 35 U.S.C. § 285.

The Patent Statute authorizes this Court to award "reasonable attorney fees to the prevailing party" in "exceptional cases." 35 U.S.C. § 285. As set forth by the United States Supreme Court in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct 1749 (2014):

> The Patent Act does not define "exceptional," so we construe it "'in accordance with [its] ordinary meaning.'" *Sebelius v. Cloer*, 569 U.S. ___, ___, 133 S. Ct. 1886, 1889, 185 L. Ed. 2d 1003, 1009 (2013); see also *Bilski v. Kappos*, 561 U.S. 593, ___, 561 U.S. 593, 130 S. Ct. 3218, 3226, 177 L. Ed. 2d 792, 801 (2010) ("In patent law, as in all statutory construction, '[u]nless otherwise defined, "words will be interpreted as taking their ordinary, contemporary, common meaning" '"). In 1952, when Congress used the word in § 285 (and today, for that matter), "[e]xceptional" meant "uncommon," "rare," or "not ordinary." Webster's New International Dictionary 889 (2d ed. 1934); see also 3 Oxford English Dictionary 374 (1933) (defining "exceptional" as "out of the ordinary course," "unusual," or "special"); Merriam-Webster's Collegiate Dictionary 435 (11th ed. 2008) (defining "exceptional" as "rare"); *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant*, 771 F.2d 521, 526, 248 U.S. App. D.C. 329 (CADC 1985) ®. B. Ginsburg, J., joined by Scalia, J.) (interpreting the term "exceptional" in the Lanham Act's identical fee-shifting provision, 15 U. S. C. § 1117(a), to mean "uncommon" or "not run-of-the-mill").
>
> We hold, then, that an "exceptional" case is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated. District courts may determine whether a case is "exceptional" in the case-by-case exercise of their discretion, considering the totality of the circumstances. As in the comparable context of the Copyright Act, "'[t]here is no precise rule or formula for making these determinations,' but instead equitable discretion should be exercised 'in light of the considerations we have identified.'" *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994).

Id. at 1756. In evaluating whether a case is exceptional, the Court may consider a "'nonexclusive' list of 'factors,' including 'frivolousness, motivation, objective unreasonableness

(both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.'" *Id.* (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)). Entitlement to fees under Section 285 must be proven by a preponderance of the evidence, rather than the clear and convincing evidence standard applied previously. *Id.* at 1758. "Section 285 demands and simple discretionary inquiry; it imposes no specific evidentiary burden, much less such a high one." *Id.* at 1758.

While technically the prevailing party in this lawsuit, HealthSpot's prevailing party status is the result of Computerized Screening conceding non-infringement on the basis of the current construction of the term "controller." Computerized Screening conceded non-infringement in order to facilitate an appeal and avoid the unnecessary expenditure of resources by the Parties and the Court. The mere fact that Computerized Screening conceded non-infringement after HealthSpot filed its Motion for Summary Judgment of Non-Infringement does not entitle HealthSpot to attorneys' fees. Further, HealthSpot has failed to demonstrate Computerized Screening's position in this case was objectively baseless or frivolous.

A claim is objectively baseless when "no reasonable litigant could reasonably expect success on the merits." *Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1327 (Fed. Cir. 2013). An infringement claim is not objectively baseless merely because the plaintiff is unsuccessful on the merits of the infringement claim. *See iLOR, LLC v. Google, Inc.*, 631 F.3d 1372, 1380 (Fed. Cir. 2011). This Court granted HealthSpot's Motion for Summary Judgment of Non-Infringement based on Computerized Screening's concession that the HealthSpot Station does not infringe under the current – but disputed – construction of the term "controller," but noted that "genuine issues of material fact persist in this case with regard to the 'logic' involved in the devices at issue." If the Court's construction of the term "controller" had been different,

the case would likely have proceeded to trial. Computerized Screening's position in this case was not objectively baseless.

HealthSpot also argues that Computerized Screening failed to conduct adequate pre-suit investigation, alleging that no one from Computerized Screening ever received an adequate demonstration of its kiosk prior to claiming infringement of its Patent. However, Computerized Screening maintains that its employee, Charles Bluth, a named inventor of the Patent, received a demonstration of the HealthSpot Station at a Las Vegas trade show; that Counsel for Computerized Screening reviewed public marketing materials, including videotaped demonstrations of the HealthSpot Station from Plaintiff's website; and, that Counsel prepared a claim chart comparing the Patent to the HealthSpot Station based on the videos and marketing materials that were publicly available before it contacted HealthSpot regarding infringement. While HealthSpot denies that Mr. Bluth received a proper demonstration of the kiosk and denies that Counsel for Computerized Screening conducted an adequate investigation or prepared a claim chart, there is simply no basis upon which to find Computerized Screening is being untruthful in its representations to the Court.

HealthSpot also emphasizes a September 18, 2013 email from Charles Bluth of Computerized Screening to Steven Cashman of HealthSpot, in which Bluth states "Again ... I am not absolutely certain what you are doing on your kiosks, but based upon information shown on your website, it appears you are in violation of our 436 Patent." (Docket #1, Exhibit C.) This statement is insufficient to prove that Computerized Screening failed conduct adequate pre-suit investigation prior to the time HealthSpot filed this lawsuit against Computerized Screening, seven months later, in April 2014.

Finally, while HealthSpot argues that Computerized Screening unnecessarily prolonged

proceedings in this case, or failed to comply with certain deadlines and/or requirements under the Local Patent Rules, the alleged insufficiencies and missed deadlines are not exceptional. This case was not transferred to the undersigned until after HealthSpot's Motion for Summary Judgment had been filed. However, based on the briefing submitted by the Parties and a review of the Docket in this case, it appears that the alleged deficiencies and missed deadlines complained of by HealthSpot are the direct result of discovery difficulties attributable to both Parties, coupled with an efficient discovery and briefing schedule set by Judge Gwin, not frivolous or unreasonable conduct on the part of Computerized Screening.

Considering the totality of the circumstances, HealthSpot has failed to demonstrate that this is an exceptional case warranting an award of fees under Section 285.

II. 28 U.S.C. § 1927.

Under 28 U.S.C. § 1927, "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." In the Sixth Circuit:

> [a] court may sanction an attorney under § 1927 for unreasonably and vexatiously multiplying the proceedings even in the absence of any conscious impropriety. The proper inquiry is not whether an attorney acted in bad faith; rather, a court should consider whether an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims. An award of fees under the statute thus requires a showing of something less than subjective bad faith, but something more than negligence or incompetence.

Hall v. Liberty Life Assur. Co. of Boston, 595 F.3d 270, 275-76 (6th Cir. 2010) (citations and quotation marks omitted). Section 1927 "does not authorize the imposition fo sanctions on a represented party, nor does it authorize the imposition of sanctions on a law firm." *BDT Prods.,*

Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 750 (6th Cir. 2010) (quoting *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 396 n.6 (6th Cir. 2009) (internal quotation marks omitted)).

For the reasons stated above, there is no basis upon which to find Computerized Screening, or any of its attorneys, unreasonably and/or vexatiously multiplied proceedings in this case or pursued a claim frivolous claim. *Hall v. Liberty Life Assur. Co. of Boston*, 595 F.3d 270, 275-76 (6th Cir. 2010.) Accordingly, to the extent HealthSpot seeks fees and costs under Section 1927, its Motion also fails.

III. Conclusion

For the reasons state above, and finding no other basis upon which to award fees and costs, HealthSpot's Motion for Award of Attorneys' Fees and Costs (Docket #106) is hereby DENIED.

IT IS SO ORDERED.

s/Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: December 4, 2015