UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

G. LOOMIS, INC.,

Plaintiff,

v.

GARY A. LOOMIS, et al.,

Defendants.

Case No. C10-5467BHS

ORDER GRANTING IN PART DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND REQUIRING ADDITIONAL BRIEFING

This matter comes before the Court on Defendants Gary Loomis and North Fork Composites, LLC's (collectively "Defendants") motion for attorneys' fees. Dkt. 72. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants in part Defendants' motion and requires additional briefing for the reasons stated herein.

I. FACTUAL AND PROCEDURAL HISTORY

In 1997 Defendant Gary Loomis sold his entire interest in G. Loomis, Inc. ("G. Loomis") to Shimano American Corporation. Dkt. 21 at 2. G. Loomis is in the business of selling fishing rods, among other things. Gary Loomis worked for G. Loomis until May of 2008. Later that year, G. Loomis filed a lawsuit against Gary Loomis asserting trademark infringement claims which ended in a settlement agreement between the parties ("Settlement Agreement"). *See* Dkt. 23-2. Three months later G. Loomis filed a second suit against Defendants which resulted in Gary Loomis discontinuing use of a certain decal and G. Loomis voluntarily dismissing the suit. Dkt. 21 at 5.

The current dispute began when G. Loomis received an email on June 24, 2010, from one of its retailers and an email from that retailer's customer inquiring about fishing rods he heard were being sold in Russia bearing trademarks owned by G. Loomis. Dkt. 12-14 at 1-2. The customer stated that he heard these rods were made using Defendants' blanks (a component of a fishing rod) and manufactured in the same factory as G. Loomis's rods. *Id*. The customer included pictures of the rods he wrote about in the email which included fishing rods bearing Defendant GLTPRO's ("GLT") mark. Dkt. 12-14 at 3-7.

GLT and its owner Andrey Velikanov ("Velikanov") are former distributors for G. Loomis products in Eastern Europe and currently distribute other fishing products in Eastern Europe.

On June 28, 2010, counsel for G. Loomis sent a letter to Defendants' former counsel requesting confirmation within three days that Defendants would enter into a consent agreement and permanent injunction regarding Defendants' use of trademarks and Gary Loomis's signature, among other things. Dkt. 12-15. G. Loomis did not receive a response within three days and filed the complaint in this action on July 2, 2010. Dkt. 1.

On July 7, 2010, G. Loomis filed its motion for a temporary restraining order ("TRO"). Dkt. 10. Prior to the TRO hearing, the parties attempted to reach a stipulated preliminary injunction. Dkt. 75 at 3. The parties could not agree on Gary Loomis's right to use his signature on fishing rods or related products. *Id*.

On July 12, 2010, the Court held a hearing on G. Loomis's motion for a TRO in which oral arguments were presented by counsel for G. Loomis and counsel for Defendants. The Court denied G. Loomis's motion and set a preliminary injunction hearing for August 10, 2010. Dkt. 26.

On August 4, 2010, Defendants filed a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Dkt. 57. Also on August 4, 2010, Velikanov executed a declaration stating that because he lacked the funds to contest this case, he and GLT would no longer use any of the infringing trademarks and that

GLT would change its name. Dkt. 60 at 5. According to G. Loomis, "[w]ithout GLT and Velikanov to manufacture and promote the infringing products, the entire infringing enterprise, including [Defendants'] infringement, was also at an end." Dkt. 78 at 5.

On August 6, 2010, G. Loomis filed a notice of voluntary dismissal without prejudice pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure. Dkt. 62. Also on August 6, 2010, Velikanov filed an answer. Dkt. 66.

On August 20, 2010, Defendants filed their motion for attorneys' fees. Dkt. 72. On September 7, 2010, G. Loomis responded (Dkt. 78) and on September 10, 2010, Defendants replied (Dkt. 81). On September 14, 2010, G. Loomis filed objections to Defendants submitting new matter in their reply and evidentiary objections to the supplemental declaration of Jon S. Bial (Dkt. 82), counsel for Defendants. Dkt. 83.

II. DISCUSSION

A. Prevailing Party

In general, federal courts apply state law in interpreting an attorneys' fees provision in a contract. *Franklin Financial v. Resolution Trust Corp.*, 53 F.3d 268, 273 (9th Cir. 1995). In *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn. 2d 863, 868 (1973), the Washington Supreme Court held that "the general rule pertaining to voluntary nonsuits, that the defendant is regarded as having prevailed, should be applied . . . ." *See also Hawk v. Branjes*, 97 Wn. App. 776, 781 (1999) (stating that "under the general rule, the defendant is regarded as having prevailed when the plaintiff obtains a voluntary dismissal); *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288 (1990) (same). In interpreting the term "prevailing party" in a contract, the intentions of the parties are to be given effect. *Hawk*, 97 Wn. App. at 780.

Here, section 17 of the parties' Settlement Agreement states that "[t]his Agreement will be governed by and interpreted in accordance with Washington law without regard to conflicts of law principles." Dkt. 23-2 at 9. Thus, Washington law applies to the issue of

Defendants' right to attorneys' fees under the Settlement Agreement. Section 15 of the Settlement Agreement is titled "Attorneys' Fees" and states:

> In any action or other proceeding between the Parties, or any of them for relief arising out of this Agreement, or the breach thereof, the prevailing party shall be awarded, in addition to any other relief awarded or granted, its reasonable costs and expenses, including attorneys' fees, incurred in the proceeding.

Id. Thus, the issue is whether Defendants, following GLI's voluntary dismissal of the action, are the prevailing party within the meaning of the Settlement Agreement.

G. Loomis argues that the intent of the parties in including the term "prevailing party" in the attorneys' fee provision of their Settlement Agreement was to award such fees to a party "in whose favor a judgment is rendered." Dkt. 78 at 6 (quoting Black's Law Dictionary 1145 (7th ed. 1999)). G. Loomis cites two Ninth Circuit cases involving federal copyright claims to support its position that a defendant is not a prevailing party following a voluntary dismissal by a plaintiff. *Id*. (citing *Cadkin v. Loose*, 569 F.3d 1142, 1145 (9th Cir. 2009); *Oscar v. Alaska Dep't of Educ. & Early Dev.*, 541 F.3d 978, 981 (9th Cir. 2008)).

The parties purposely included a choice of law provision in their Settlement Agreement, which explicitly states that Washington law will govern any disputes arising out of the Settlement Agreement. *See* Dkt. 23-2 at 9. Although G. Loomis attempts to argue that it intended the definition of prevailing party to be that found in certain Ninth Circuit cases and in the current Black's Law Dictionary definition, Washington case law defines the term differently. The general rule in Washington is that a voluntary dismissal by a plaintiff results in the defendant being the prevailing party. *Andersen*, Wn. 2d at 868. If G. Loomis, who agreed that Washington law would apply to the Settlement Agreement, intended a different definition of prevailing party, such as a party in whose favor a judgment is rendered (Dkt. 78 at 6), then it it should have included that definition in the Settlement Agreement. Because the parties chose Washington law to apply and because there is no indication from the language of the Settlement Agreement that the parties intended any

specific definition of prevailing party, the Court concludes that here, where G. Loomis voluntarily dismissed the action, Defendants are the prevailing party.

B. Court's Discretion

Defendants request that, as an independent basis, the Court exercise its discretion to grant attorneys' fees based on their assertion that G. Loomis prosecuted this case in bad faith. Dkt. 72 at 12-13. The Court finds that Defendants have not presented sufficient evidence to show that G. Loomis acted in bad faith in pursuing this action.

G. Loomis requests that, even if the Court concludes that Defendants are the prevailing party, the Court exercise its discretion to deny attorneys' fees as inequitable and unreasonable. Dkt. 78 at 12. The Court finds that G. Loomis has not presented sufficient evidence to show that an award of fees, as provided for in the Settlement Agreement, would be an inequitable or unreasonable result.

Therefore, the Court concludes that it will not exercise its discretion either to award fees to Defendants based on G. Loomis's alleged bad faith or to deny an award of attorneys' fees based on G. Loomis's argument that an award would be inequitable and unreasonable.

C. Amount of Attorneys' Fees

The Court has concluded that Defendants' only basis for attorneys' fees results from the attorneys' fees provision contained in the parties' Settlement Agreement. Defendants state in their motion for attorneys' fees that

> it is not possible or necessary to segregate the fees incurred on the contract claim versus on the trademark-based claims, because the claims are so inextricably intertwined and arise from the same identical set of facts, *i.e.*, if Mr. Loomis or GLT had actually breached the Settlement Agreement such breach would be an infringement of Plaintiff's trademarks. Therefore, the Claims are not mutually exclusive in any respect–factually or legally–and need not be apportioned.

Dkt. 72 at 11 (citing *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 615-16 (9th Cir. 2010). G. Loomis states in its response that Defendants' calculation of their attorneys' fees is problematic because they have failed to distinguish between fees incurred in connection with the breach of contract claim from those incurred in connection with the

trademark infringement claims. Dkt. 78 at 13. G. Loomis argues that Defendants' failure is particularly troublesome because not all of the trademarks at issue in the case are subject to the Settlement Agreement. *Id*.

The Court concludes that, based on the current briefing, Defendants have failed to show that the contract claim and the trademark claims are so inextricably intertwined to the extent that the fees incurred in connection with claims should not be segregated. Therefore, the Court directs Defendants to submit additional briefing in which they either offer sufficient support for their lack of segregation of the breach of contract and trademark claims or submit the attorneys' fees incurred in connection with the claims governed by the Settlement Agreement. In the additional briefing, Defendants shall also provide greater detail of their billing to support their assertion that the fees were necessary and reasonable. G. Loomis may file a response.

D. New Material in Defendants' Reply and Evidentiary Objections

G. Loomis filed objections to Defendants' reply to their motion for attorneys' fees and the declaration of Jon. S. Bial filed in support of the reply. Dkt. 83. G. Loomis maintains that the Court should disregard matters that were brought by Defendants for the first time in their reply brief. Dkt. 83 at 2 (citing *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief."). The Court agrees. G. Loomis had the opportunity to bring all of the arguments they had in their motion for attorneys' fees. Thus, the Court will disregard the arguments brought for the first time in Defendants' reply brief, including their arguments that: (1) G. Loomis's notice of voluntary dismissal was improper[1]; (2) G. Loomis's

[1] The Court notes that even if Defendants had brought the argument regarding G. Loomis's voluntary dismissal in their original motion, there is no evidence that Velikanov's answer was actually filed before G. Loomis's notice of voluntary dismissal. *See* Dkts. 62 & 66. Rather, the docket indicates that G. Loomis's dismissal was filed first. *See id*. Moreover, Defendants do not dispute that they had not filed an answer at the time G. Loomis filed its notice of voluntary dismissal. Therefore, if there were an issue regarding the timing of the parties' filings, Velikanov is

dismissal was with prejudice; (3) G. Loomis failed to achieve its objective; and (4) there must be a prevailing party in an action.

In addition, G. Loomis objects to certain statements contained in Jon Bial's supplemental declaration (Dkt. 82) filed in support of Defendants' reply. G. Loomis argues that under the Federal Rules of Evidence, statements made by Bial in his declaration are irrelevant and constitute inadmissible parol evidence. Because the Court did not need to consider Bial's declaration (Dkt. 82) in reaching its decision on Defendants' motion for attorneys' fees, the Court need not reach the issue of whether such statements should be disregarded under the Federal Rules of Evidence.

III. ORDER

Therefore, the Court **ORDERS** that Defendants' motion for attorneys' fees (Dkt. 72) is **GRANTED in part** to the extent that they are entitled to attorneys' fees under the parties' Settlement Agreement. The Court further **ORDERS** that Defendants submit additional briefing, no more than ten pages in length, as discussed above, on or before **November 3, 2010,** and that G. Loomis may submit a response, no more than ten pages in length, on or before **November 10, 2010**. The motion for attorneys' fees is renoted to November 10, 2010.

DATED this 20th day of October, 2010.

BENJAMIN H. SETTLE
United States District Judge

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the party with standing to challenge G. Loomis's dismissal as to him. *See* Fed. R. Civ. P. 41(a)(1)(A).