

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AVITECH, LLC :
v. : Civil No. WMN-04-3082
EMBREX, INC. :

MEMORANDUM

Now pending before the Court is Defendant Embrex, Inc.'s motion for summary judgment on antitrust claims, Paper No. 124. The motion is fully briefed. Upon a review of the pleadings and applicable case law, the Court determines that no hearing is necessary (Local Rule 105.6) and that the motion will be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

This consolidated patent infringement action involves claims that Avitech infringes Defendant Embrex's U.S. Patent No. 5,136,979 (the '979 Patent). The '979 Patent is entitled Modular Injection System for Avian Embryos and relates to an apparatus used for injecting a vaccine into poultry eggs. This Court previously denied cross-motions for summary judgment as to patent infringement. See Dec. 21, 2006, Mem. Op. (Paper No. 113).

Avitech also asserts antitrust claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, and Md. Code Ann., Com. L. § 11-204(a)(2), arguing that Embrex has a monopoly in the American market for "automated in ovo injection machines" and that Embrex initiated this patent infringement action to maintain its

monopoly.¹

The facts as relevant to the instant motion, viewed in a light most favorable to Avitech, are as follows. Avitech and Embrex market competing egg injection systems for vaccinating poultry eggs. Embrex markets the Inovoject® egg injection system and Avitech markets the Intelliject® system. While Embrex has been marketing the Inovoject® for many years and the vast majority of hatcheries in the United States utilize its system, Avitech is a relatively new entrant into the market.²

According to Avitech, Embrex has utilized numerous anticompetitive tools to try to drive it and other competitors out of the in ovo injection market, including exclusive leases, preventing side-by-side competitive trials of the Inovoject® and Intelliject® machines by customers, and increasing prices for existing machines when a customer leases a competitive machine. These techniques have been successful according to Avitech in that the only two other competitors, Brueil, S.A. and

¹Avitech is aligned as the Plaintiff because it initiated this case as a declaratory judgment action. Subsequently, Embrex's patent infringement action, which had been previously filed in the United States District Court for the Middle District of North Carolina, was transferred to this Court and the two cases were consolidated.

²Competition in the market was not possible until 2002 because Embrex held the exclusive license to a U.S.D.A. patent, the Sharma patent, covering the process of in ovo vaccination. The Sharma patent expired in 2002 and, at that time, competitors began marketing alternative delivery methods for in ovo vaccines.

ServoSystems USA, have been driven out of the market. Embrex also sued one of those companies, Brueil, for patent infringement.³

In 2003, shortly after Avitech entered the market, it began a campaign to win a contract with one of Embrex's largest customers, Perdue Farms. In July of 2004, Perdue decided to lease several Intelliject® machines from Avitech. On August 3, 2004, Embrex filed its patent infringement suit in the District Court for the Middle District of North Carolina. As noted earlier, that action later was transferred and consolidated with Avitech's declaratory judgment action in this Court.

According to Avitech, Embrex knew at the time that it filed suit that its claim of infringement was objectively baseless and that its purpose was not to succeed on the merits, but to dissuade customers - including Perdue - from leasing Intelliject® machines and to otherwise maintain its monopoly in violation of the Sherman Act. Embrex moves for summary judgment, arguing that it is entitled to Noerr-Pennington immunity from any antitrust liability premised on the filing of this suit and that, in any event, Avitech cannot prove a violation of the Sherman Act or its state law counterpart.

II. STANDARD OF LAW

³The lawsuit resulted in a default judgment for Embrex. Brueil is now essentially bankrupt.

Summary judgment is proper if the evidence before the court, consisting of the pleadings, depositions, answers to interrogatories, and admissions of record, establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A party seeking summary judgment bears the initial responsibility of informing the court of the basis of its motion and identifying the portions of the opposing party's case which it believes demonstrate the absence of a genuine issue of material fact. Id. at 323. The non-moving party is entitled to have "all reasonable inferences . . . drawn in its respective favor." Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1129 (4th Cir. 1987).

If the movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to summary judgment as a matter of law, the non-moving party must, in order to withstand the motion for summary judgment, produce sufficient evidence in the form of depositions, affidavits or other documentation which demonstrates that a triable issue of fact exists for trial. Celotex, 477 U.S. at 324. Unsupported speculation is insufficient to defeat a motion for summary judgment. Felty, 818 F.2d at 1128 (citing Ash v. United Parcel Serv., Inc., 800 F.2d 409, 411-12 (4th Cir. 1986)). Furthermore, the mere existence of some factual dispute is insufficient to defeat a motion for summary judgment; there must be a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477

U.S. 242, 247-48 (1986). Thus, only disputes over those facts that might affect the outcome of the case under the governing law are considered to be "material." Id.

III. DISCUSSION

In two cases, Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and United Mine Workers v. Pennington, 381 U.S. 657 (1965), the Supreme Court held that private parties are immune from antitrust liability for exercising their First Amendment right to petition the government. This includes the pursuit of litigation. See California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972). Thus, a patentee who sues for infringement generally is immune from liability for antitrust violations premised on the instigation of the litigation.

An exception to this rule exists, however, where the lawsuit is merely a "sham." See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 51 (1993) ("PRE"). Litigation is sham if it is a cover for "an attempt to interfere directly with the business relationships of a competitor." Id. at 56 (quoting Noerr, 365 U.S. at 144). A two-pronged inquiry is necessary to determine if litigation falls within the sham exception. First, a court must determine if the litigation is "objectively baseless," meaning that "no reasonable litigant could realistically expect success on the merits." Id. at 60. The Supreme Court has analogized this to the determination of whether probable cause exists to file suit in the common law tort

of malicious prosecution. Id. at 62. "Probable cause to institute civil proceedings requires no more than a 'reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication[.]'" Id. (quoting Hubbard v. Beatty & Hyde, Inc., 178 N.E.2d 485, 488 (Mass. 1961)).

If challenged litigation fails the objective prong of the test, a court may go on to consider the subjective intent behind the litigation to determine if it was an "attempt to interfere directly with the business relationships of a competitor through the use [of] the governmental process - as opposed to the outcome of that process - as an anticompetitive weapon[.]" Id. at 60-61 (internal citations and quotations omitted). Even if both prongs of the exception are met, a party still must prove a substantive antitrust violation. Id. at 61.

Embrex contends that it is immune from antitrust liability because its patent infringement action was not objectively baseless as a matter of law. This is so because this Court already has denied Avitech's motion for summary judgment on patent infringement and a claim that survives summary judgment cannot be objectively baseless. Avitech responds that there is a genuine dispute of material fact as to whether the lawsuit was objectively baseless and subjectively designed to interfere with Avitech's business at the time it was initiated.

A review of the caselaw cited by both parties persuades the Court that Embrex's patent infringement action cannot be deemed objectively baseless as a matter of law. In Harris Custom

Builders, Inc. v. Hoffmeyer, 834 F. Supp. 256 (N.D. Ill. 1993), the plaintiff initiated an action for copyright infringement. The defendant counterclaimed, alleging in part that the litigation was motivated by anticompetitive intent and constituted an antitrust violation. The Court dismissed the antitrust counterclaim, concluding that because the copyright claim had twice survived summary judgment, it could not be objectively baseless as a matter of law. The Court reasoned that "[a]n action that is well enough grounded, factually and legally, to survive a motion for summary judgment is sufficiently meritorious to lead a reasonable litigant to conclude that they had some chance of success on the merits." Id. at 261-62.

A majority of courts considering the issue have reached the same result. See Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1080 (8th Cir. 1999) (in a malicious prosecution action, denial of motion for judgment as a matter of law in underlying litigation was fatal to argument that there was no probable cause for bringing certain counterclaims); Beckman Instruments, Inc. v. LKB Produkter AB, 892 F.2d 1547, 1551 (Fed. Cir. 1989) ("we find it difficult to agree that the inequitable conduct defense was 'baseless' when it survived a motion for summary judgment"); Twin City Bakery Workers and Welfare Fund v. Astra Aktiebolag, 207 F. Supp. 2d 221, 224 (S.D.N.Y. 2002) (concluding that a patent infringement action could not be objectively baseless as a matter of law where two patent claims survived summary judgment and two others went unchallenged to trial); Gen-Probe, Inc. v. Amoco

Corp., Inc., 926 F. Supp. 948, 958 (S.D. Cal. 1996) ("A denial of summary judgment means that the nonmoving party has produced enough evidence that a rational jury could find in its favor. A party with sufficient evidence to support a jury finding in its favor has probable cause to bring a lawsuit."); Nobelpharma AB v. Implant Innovations, Inc., 930 F. Supp. 1241, 1255 (N.D. Ill. 1996) (denial of motion for summary judgment "foreclosed" the argument that the patent infringement lawsuit was objectively baseless); Skinder-Strauss Assocs. v. Massachusetts Continuing Legal Educ., 870 F. Supp. 8, 11 (D. Mass. 1994) (suggesting that if the plaintiff survived summary judgment on its copyright claims, it would be entitled to judgment on defendant's antitrust counterclaims based on Noerr-Pennington immunity).

Avitech contends that Federal Circuit law is controlling on this issue⁴ and that the Federal Circuit has rejected the premise that a patent claim that survives summary judgment is not objectively baseless as a matter of law. The only Federal Circuit case cited by Avitech in support of this argument, FilmTec Corp. v. Hydranautics, 67 F.3d 931 (Fed. Cir. 1995), does not stand for that proposition, however. In FilmTec, one of the issues before the Court was whether a motion to amend an answer to a patent infringement action to add a counterclaim for antitrust violations properly was denied on grounds of futility.

⁴See NobelPharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1067-68 (Fed. Cir. 1998) ("whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law").

The court reasoned that if the patent infringement suit was not objectively baseless, amendment would have been futile because the plaintiff would have been immune under Noerr-Pennington.

The court looked to the history of the patent infringement action, noting that the district court initially granted a preliminary injunction in favor of the plaintiff, but that the injunction was vacated on appeal. The district court later granted judgment in favor of the plaintiff, but that judgment also was vacated on appeal based on the appellate court's holding that the plaintiff did not hold title to the patent. The court noted that PRE made clear that an ultimate loss on the merits of the underlying litigation does not necessarily render the lawsuit a sham. Id. at 938. Neither, however, did a plaintiff's "preliminary success on the merits" preclude "a court from concluding that the litigation was baseless." Id.

The court held that, despite the fact that it had found for the defendant on the patent infringement claim, it could not conclude that the action was objectively baseless. In reaching this result, the court noted that "the trial judge, after full consideration, ruled for [the plaintiff]" on the issue of ownership of the patent. Id. at 939. Even though that ruling was reversed on appeal, it nevertheless "support[ed] the conclusion that [the plaintiff]'s theory was more than a sham." Id.

This Court declines to read FilmTec as rejecting the proposition accepted by the majority of federal courts that an

action that survives summary judgment is not objectively baseless as a matter of law.⁵ That issue was not before the FilmTec Court, which was concerned with whether a patentee, having won on the merits only to lose on appeal, was deprived of Noerr-Pennington immunity. The court's ultimate conclusion, that the litigation did not fall within the sham exception, further supports the premise that success on a full summary judgment record - regardless of the eventual outcome of the case - generally precludes a finding that a case is objectively baseless. Moreover, in an analogous context, the Federal Circuit has opined that surviving summary judgment is an indicator that a claim is not baseless. See Beckman Instruments, Inc., 892 F.2d at 1551 (in determining whether the trial court erred in awarding attorneys' fees based on a finding of vexatious litigation, noting that a claim that survived summary judgment was difficult to characterize as baseless).

In the instant case, this Court denied both parties' motions

⁵Avitech cites one case, In re Wellbutrin SR Antitrust Litig., 2006-1 Trade Cases P 75,158, 2006 WL 616292 (E.D. Pa. Mar. 9, 2006), in which the district court rejected a "per se rule" that any action that survives summary judgment cannot be objectively baseless as a matter of law. That Court recognized the authority to the contrary, but relying in part on FilmTec, concluded that such a rule was unsupported by the controlling authority. This Court respectfully disagrees with the Wellbutrin Court's reasoning, but, in any event, recognizes that there might be unique circumstances where success at the summary judgment stage might not preclude a finding of objective baselessness. See, e.g., In re Relafen Antitrust Litigation, 360 F. Supp. 2d 166, 181 (D. Mass 2005) (concluding that the "specific circumstances" therein presented required a departure from the general rule that an action that survives summary judgment is not objectively baseless). This case does not present such circumstances.

for summary judgment. With respect to Avitech's motion, this Court opined that "a reasonable jury could find that the Intelliject® machine provides a function identical to that described in the '979 Patent and that the structure of the Intelliject® machine is either identical or equivalent to the corresponding structure in the specification." Dec. 21, 2006, Mem. Op. at 28 (Paper No. 113) (internal quotation omitted). It follows, in keeping with the weight of authority, that a reasonable jury could not find that Embrex could not have held a reasonable belief that there was a chance that its infringement claim would succeed. Accordingly, the Court must conclude that Embrex had probable cause to bring suit and is entitled to Noerr-Pennington immunity as a matter of law.

IV. CONCLUSION

For all of the foregoing reasons, Defendant's motion for summary judgment will be granted. A separate order will issue.

_____/s/_____
William M. Nickerson
Senior United States District Judge

Dated: August 19, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

AVITECH, LLC :
v. : Civil No. WMN-04-3082
EMBREX, INC. :

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 19th day of August, 2008, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendant Embrex, Inc's motion for summary judgment on antitrust claims, Paper No. 124, is hereby GRANTED; and

2. That the Clerk of the Court shall transmit copies of the accompanying Memorandum and this Order to all counsel of record.

/s/

William M. Nickerson
Senior United States District Judge