

VIRGINIA Lawyers Weekly

Fabricated evidence results in dismissal

By: Virginia Lawyers Weekly ◉ June 3, 2022

Where a company suing for trademark infringement willfully fabricated evidence to support its claims, resulting in prejudice to the defendant and the judicial process, the lawsuit was dismissed and the defendants were awarded their attorneys' fees and costs spent investigating and litigating the misconduct.

Background

The defendants in this trademark infringement case have moved for sanctions based on fabricated evidence submitted in support of an amended complaint filed by For Life Products LLC, or FLP. Based on supporting expert opinion, the defendants contend that the amended complaint contained false photoshopped exhibits of the plaintiff's earlier products, as well as other misrepresentations, in an effort to show that it had senior rights to the trademark.

Given the seriousness of the allegations, one might expect FLP to offer a full-throated rebuttal, or at least put forth some plausible explanation for its actions, but that is not the case. FLP does not dispute any of these facts. At the hearing, FLP's counsel insisted that the declaration of FLP's president, Robert Baylis, provided an adequate explanation. But Baylis' declaration is hardly sufficient.

Baylis explains only that FLP has historically generated multiple "pitch" catalogs, and catalogs designated for specific trade shows, and that prior counsel inadvertently used the wrong catalogs in the first amended complaint. This explanation, of course, contradicts FLP's earlier representations to the defendants and this court that the product catalogs contained all FLP's products made available in a given year. More importantly, FLP has not provided any independent supporting evidence that would corroborate this pitch-catalog theory. The little evidence that FLP does provide only exposes the extent of its wrongdoing even further.

Worse, he completely ignores the damning labeling evidence or the Amazon.com fabrication. And at the hearing, counsel made no effort to account for the records' shortcomings by offering more of an explanation. Unfortunately, the plaintiff's litigation misconduct does not appear to be an isolated incident. Rather, it is consistent with a pattern of fraudulent and misleading behavior that has been demonstrated throughout the litigation.

Analysis

"[B]efore exercising the inherent power to dismiss a case, a court must consider the following factors: (1) the degree of the wrongdoer's culpability; (2) the extent of the client's blameworthiness if the wrongful conduct is committed by its attorney, recognizing that we seldom dismiss claims against blameless clients; (3) the prejudice to the judicial process and the administration of justice; (4) the prejudice to the victim; (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons and deterring similar conduct in the future and (6) the public interest."

In conclusory fashion, FLP claims that dismissal is not warranted because it did not act in bad faith. The record does not support that conclusion. To the contrary, the plaintiff has repeatedly demonstrated its bad faith in this case. The only real dispute is FLP's intent. Here again, the record evidence convincingly points to bad faith. When confronted by the evidence of its own misconduct, FLP never owned up to its mistake. Rather, FLP continued to mislead this court.

FLP's attempted explanation of the fabrications and proposed amendments to the complaint are added proof of bad faith, and a general lack of appreciation for the seriousness of the misconduct. On this record, there is no doubt that FLP willfully fabricated evidence. This factor therefore cuts in favor of dismissal.

The second is the degree to which the client was at fault, or whether the litigation misconduct was perpetrated by its attorneys. This factor also cuts in favor of dismissal. It is not contended that FLP’s former attorneys are responsible for creating the fabricated evidence. All-in-all, it is apparent that the fault lies solely with FLP.

The third and fourth factors are the prejudice to the judicial process and to the victim. These factors also favor dismissal. It is difficult to imagine a greater prejudice to the judicial system than the fabrication of evidence. The defendants also are prejudiced.

Other courts have considered striking the fabricated evidence from the record or providing a limiting instruction to the jury. I find that such alternatives would be inadequate in this case. Striking the fabricated exhibits would hardly be a punishment, as FLP seeks to withdraw them from the second amended complaint. It is also unclear what sort of limiting instruction would be applicable on these facts.

Regardless, I find that the gravity and extent of the misconduct demonstrated in this case demands the severe sanction of dismissal with prejudice. Given the breadth of litigation misconduct in this case, I find that the defendants are entitled to attorneys’ fees and costs spent investigating and litigating FLP’s misconduct.

Defendant’s motion for sanctions granted.

For Life Products LLC v. Virox Technologies Inc., Case No. 1:20-cv-00016, May 25, 2022. WDVA at Abingdon (Jones). VLW 022-3-221. 31 pp.

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JUDGE JAMES P. JONES

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