



ARX Fit, LLC v. Outstrip Equipment, LLC et al

2019 | Cited 0 times | W.D. Texas | March 19, 2019

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION ARX FIT, LLC, § § Plaintiff, § § v. § § OUTSTRIP EQUIPMENT, LLC; CRAZY § 1:18-CV-848-RP TRAIN, LLC; ROUND TO FIT, LLC; § RANDY RINDFLEISCH; and ARIEL § HUSKINS; § § Defendants. §

ORDER Before the Court are several motions related to the second motion to dismiss filed by Defendants the . (Dkt. 37). Instead of responding to that ; a motion to extend their deadline to respond, (Dkt. 43); and a motion for jurisdictional discovery, (Dkt. 44). The Court will

I. MOTION TO STRIKE In their motion to dismiss, the Huskins Defendants argue both that venue is improper here and that this Court lacks personal jurisdiction over them. (See Dkt. 37). ARX seeks to strike only one of the arguments pertaining to venue from that motion venue is improper under 28 U.S.C. § 1400(b). (Mot. Strike, Dkt. 45, at 1).

Huskins Defendants waived that argument by not raising it in their first motion to dismiss. (Id. at 3 7). The Huskins Defendants respond that it would be awkward and unfair if arguments in their

second motion to dismiss could be deemed waived based on the content of their first motion to

cited authority. (Id. at 3 7). The Court agrees with ARX that the Huskins Defendants waived their

improper-venue defense based on Section 1400(b). A party waives an improper-venue defense under Federal Rule of Civil Procedure 12(b)(3) by omitting it under the circumstances described in Rule 12(g). Fed. R. Civ. P. 12(h)(1)(A). Rule 12(g)(2) bars a party from raising a defense or objection in a Rule 12 motion if that defense or objection was available to the party but omitted from an earlier Rule 12 motion. Fed. R. Civ. P. 12(g)(2). There is no dispute that the Huskins Defendants omitted their Section 1400(b) defense from their first motion to dismiss. (See Dkt. 21, at 11 19 (arguing only that venue is improper under 28 U.S.C. § 1404(a))). There is also no dispute that their Section 1400(b) defense was available to them when they filed their first motion Section 1400(b) provides venue rules for patent and - and copyright-infringement claims appeared in its original complaint. (Orig. Compl., Dkt. 1, at 11 13). The only dispute is whether a defense that would otherwise be waived in a subsequent Rule 12 motion is preserved by the filing of an amended complaint that moots the prior Rule 12 motion. (See Resp. Mot. Strike, Dkt. 52, at 7). While the Court is not aware of a Fifth Circuit opinion directly addressing this issue, district See Stoffels ex rel., SBC Concession Plan v. SBC



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Comm ns, Inc., 430 F. Supp. 2d 642, 647-48 (W.D. Tex. 2006) (quoting 5C FED. PRAC. & PROC. CIV. § 1388 (3d ed.)) (The filing of an amended complaint will not revive the right to present by motion defenses that were available but were not asserted in timely fashion prior to the am); Law v. Sessions, 4:16-CV-2799, 2017 WL 2405331, at *2 (S.D. Tex. June 2, 2017) (quoting 5C FED. PRAC. & PROC. CIV. § 1388 (3d ed.)) (same); Thompson v. Capstone Logistics, L.L.C., CV H-15-2464, 2016 WL 4570817, at *4 (S.D. Tex. Aug. 31, 2016) (quoting Stoffels, 430 F. Supp. 2d at 647-48) (same); Cunningham v. Nationwide Sec. Sols., Inc., 3:17-CV-337-S-

BN, 2018 WL 4575005, at *8 (N.D. Tex. Aug. 31, 2018) (citing Stoffels, 430 F. Supp. 2d at 647-48) (concluding filing of a second amended complaint did not afford [the defendant] the opportunity to contest venue when [it] should have done so previousl , report and recommendation adopted, 3:17-CV-337-S-BN, 2018 WL 4568803 (N.D. Tex. Sept. 24, 2018). Moreover, this application of Rule 12 is consistent with the rule Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909 (5th Cir. 1993). And contrary to

ng unfair about this application of Rule 12 the Huskins Defendants could have protected themselves from waiver by raising their Section 1400(b) defense in their initial motion to dismiss. unfairly penalize plaintiffs for amending a complaint by reviving waived defenses. The Court will strike that defense from second motion to dismiss, but it will consider the other arguments raised in that motion.

II. MOTION FOR JURISDICTIONAL DISCOVERY 6). ARX argues that the

ertain factual premises that should be investigated and resolved. (Mot. Discovery, Dkt. 44, at 4). For example, the Huskins Defendants

Dismiss, Dkt. 37, at 15), and id. at 18).

Monkton Ins. Servs., Ltd. v. Ritter, 768 F.3d 429, 434 (5th Cir. 2014) (citation omitted). ARX can meet its burden by

the Huskins Defendants and the forum state. Fielding v. Hubert Burda Media, Inc., 415 F.3d 419, 429 (5th Cir. 2005) (citation and quotation marks omitted). District courts

Wyatt v. Kaplan, 686 F.2d 276, 284 (5th Cir. 1982). ARX has met its burden. It alleges that Huskins formed Outstrip with Randy Rindfliesch, owner of a Texas company that holds the two patents at issue in this case. (Am. Compl., Dkt. 29, at 6). It alleges that Outstrip sold its first machine to an Austin, Texas resident, Alex Charfen, and asked Charfen to promote Outstrip products at Austin events and through his Austin business. (Id. at 7-8). It alleges that Outstrip sold a machine to an Austin resident who was, at the time, an ARX customer. (Id. at 8). Huskins leased ARX machines for use in her exercise business R2Fit. (Id. at 6). T breach-of-contract claim, allegedly contains a forum



ARX Fit, LLC v. Outstrip Equipment, LLC et al

2019 | Cited 0 times | W.D. Texas | March 19, 2019

selection clause providing for jurisdiction and venue in Texas. (Id. at 14). These allegations suggest with reasonable particularity the possible existence of minimum contacts 1

between the Huskins Defendants and Texas. ARX should therefore be permitted jurisdictional discovery.

III. CONCLUSION For the reasons given above, IT IS ORDERED motion to extend their deadline to respond, (Dkt. 43), and motion for jurisdictional discovery, (Dkt.

44), are each GRANTED. Specifically, it is ordered as follows:

§ 1400(b) is STRICKEN from their second motion to dismiss, (Dkt. 37).

1 has purposefully availed himself of the benefits and protections of the forum state by establishing minimum contacts with the forum state, and (2) exercise of jurisdiction over that defendant does not offend traditional notions of fair play Walk Haydel & Assocs., Inc. v. Coastal Power Prod. Co., 517 F.3d 235, 243 (5th Cir. 2008) (citing Panda Brandywine Corp. v. Potomac Elec. Power Co., 253 F.3d 865, 867 (5th Cir.2001)).

The parties may conduct any discovery authorized by the Federal Rules of Civil

Procedure until May 31, 2019, subject to the condition that such discovery shall be specific personal jurisdiction over the Huskins Defendants. extended to and includes June 14, 2019.

In their briefing, the parties should indicate whether they seek resolution of the Huskins

prima facie burden or whether they would like an evidentiary hearing. See Walk Haydel, 517 F.3d at 241 42. SIGNED on March 19, 2019.

ROBERT PITMAN

UNITED STATES DISTRICT JUDGE

