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Fed. Circ. Throws Out Nissim Appeal In ClearPlay Patent Case

By **Michael Lipkin**

Law360, Los Angeles (March 14, 2014, 6:00 PM ET) -- A Federal Circuit panel on Friday rejected Nissim Corp.'s attempt to enforce a settlement with ClearPlay Inc. in a long-running dispute over a licensing agreement for patents censoring objectionable content from DVDs, ruling Nissim's appeal was based on nonfinal orders.

Judge Todd Hughes, writing for the panel, found that Nissim had appealed two rulings on summary judgment, which were not final orders despite Nissim's claims that they were "sufficiently firm" for review. Nissim had argued that ClearPlay could use the interlocutory rulings as the basis for an issue preclusion argument in future cases, but the court held that it did not have authority to review the lower court's rulings.

"Because Nissim explicitly waived its right to challenge the only final judgment properly on appeal, we dismiss the appeal for lack of jurisdiction," the opinion said.

The dispute traces back to 2004, when Boca Raton, Fla.-based Nissim sued ClearPlay for patent infringement, alleging it violated patents relating to technology for editing video programs based on content.

On the eve of trial, the parties entered into a settlement and license agreement giving ClearPlay a license to sell DVD players with objectionable-content filters, provided they substantially complied with Nissim's content-coding specifications.

When ClearPlay released purportedly noncomplying products in 2007, Nissim moved to enforce the settlement agreement in court, and also sent letters to retailers like Target Corp. and Best Buy Co. Inc. and manufacturers such as Samsung alleging noncompliance and warning of an infringement action.

After their settlement, the district court had retained jurisdiction to enforce the agreement. But the lower court later withdrew its jurisdiction and dismissed the case. Nissim appealed to the Federal Circuit, arguing that in two unrelated orders denying summary judgment the district court misinterpreted the settlement and ignored ClearPlay's admission of noncompliance.

But those orders denying summary judgment were not final orders that the appellate court could review, Friday's opinion said. The panel also addressed Nissim's concerns over issue preclusion, ruling that the lower court's summary judgment orders are unreviewable on appeal, which should "preclude the application of collateral estoppel," the opinion said.

The panel also held that ClearPlay conceded during oral arguments that collateral estoppel would not apply in related proceedings, and that the summary judgment orders were not necessary to the outcome of the case.

Nissim's litigation to enforce the settlement, along with its letters to retailers, prompted ClearPlay to file a complaint of its own, alleging tortious interference with contractual relationships, breach of contract and violations of Florida's Deceptive and Unfair Trade Practices Act.

The U.S. Supreme Court in June **declined to hear ClearPlay's appeal** that asked the high court to find that the company's licensing agreement with Nissim was akin to a covenant not sue each other.

The Supreme Court let stand a lower court's dismissal of ClearPlay's claims that Nissim breached the settlement and license agreement when it sent letters to retailers and Samsung Electronics America Inc. stating ClearPlay's DVD players didn't comply with the agreement.

Nissim's threats of litigation "destroyed" ClearPlay's business relationship with Samsung and left the company "financially ruined," ClearPlay said. ClearPlay alleged that Nissim was hell-bent on destroying the company and misrepresented to ClearPlay's business partners the terms of the settlement agreement between the companies in order to achieve its objective.

In December 2011, U.S. District Judge Paul C. Huck **dismissed all of ClearPlay's remaining claims** against its adversary. Judge Huck found that Nissim's communications with ClearPlay's business partners had not violated the parties' settlement agreement.

In a one-page ruling, the Eleventh Circuit in November affirmed Judge Huck's grant of summary judgment in the case.

An attorney for Nissim, John C. Cary of Carey Rodriguez Greenberg & O'Keefe LLP, said Nissim did not appeal the lower court's final order because the settlement agreement had already expired. The company believed, however, that the withdrawal of jurisdiction was an abuse of discretion, Cary said.

Representatives for ClearPlay did not immediately respond Friday to requests for comment.

Judges Pauline Newman, Kimberly Moore and Todd Hughes sat on the panel that reached Friday's decision.

Nissim is represented by John C. Carey of Carey Rodriguez Greenberg & O'Keefe LLP.

ClearPlay is represented by Eric Storm of The Storm Law Firm PLLC.

The case is Nissim Corp. v. ClearPlay Inc. et al., case number 13-1429, in the U.S. Court of Appeals for the Federal Circuit.

--Additional reporting by Jonathan Randles, Dan Prochilo and Zach Winnick. Editing by Chris Yates.

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