NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

In re: INTEX RECREATION CORP., INTEX TRADING LTD., THE COLEMAN COMPANY, INC., BESTWAY (USA), INC.,
Petitioners

2018-131

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas in No. 2:17-cv-00235-JRG, Judge J. Rodney Gilstrap.

ON PETITION

Before LOURIE, O'MALLEY, and STOLL, *Circuit Judges*.

STOLL, *Circuit Judge*.

O R D E R

Petitioners Intex Recreation Corp. and Intex Trading Ltd. (collectively, "Intex"), the Coleman Company, Inc., and Bestway (USA), Inc., intervened in this patent infringement case brought against several Wal-Mart enti-

ties (collectively, "Wal-Mart"[1]). They now seek a writ of mandamus directing the United States District Court for the Eastern District of Texas to grant their motions to transfer or, in the alternative, address the merits of their motions. We deny their petition.

BACKGROUND

Petitioners manufacture air mattresses and airbed products and supply their products to Wal-Mart for resale. Petitioners contractually agreed to indemnify Wal-Mart against patent infringement claims relating to their supplied products.

In March 2017, Team Worldwide Corporation ("TWW") sued Wal-Mart in the Eastern District of Texas, alleging infringement of three TWW patents based on the importation, sale, and/or offers for sale of Petitioners' products as well as at least sixteen other brands of products supplied to Wal-Mart by other companies.

Petitioners subsequently moved to intervene as of right or with the district court's permission. In their motions, Petitioners argued that they were the "true defendants" in this suit against Wal-Mart because they designed and manufactured several of the accused products. Petitioners informed the district court that if it granted their motion, they would immediately seek to move for misjoinder, to sever the claims against Petitioners, and to transfer their respective claims to different district courts while staying proceedings in this case against Wal-Mart in the Eastern District of Texas.

In December 2017, the district court granted Petitioners' motions to intervene but stated that it was "puzzled"

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[1] The Wal-Mart entities include Wal-Mart Stores, Inc., Wal-Mart Stores Texas, LLC, Wal-Mart.com USA LLC, and Sam's West, Inc. d/b/a Sam's Club.

by Petitioners' plan to challenge venue, as "a person intervening on either side of the controversy may not object to improper venue." Mem. Op. & Order at 13 n.4, *Team Worldwide Corp. v. Wal-Mart Stores, Inc.*, No. 2:17-cv-00235-JRG (E.D. Tex. Dec. 7, 2017) (internal quotation marks and citations omitted). Soon after, Petitioners filed their answers, asserting affirmative defenses of non-infringement and invalidity, but no counterclaims. TWW chose not to amend its complaint to add Petitioners as defendants.

Each of the Petitioners also filed motions making three related requests. Invoking 35 U.S.C. § 299 and Rules 20 and 21 of the Federal Rules of Civil Procedure, Petitioners moved to sever the claims among the various competitor suppliers, arguing that Wal-Mart was merely a "peripheral" defendant and that the design, development, and manufacture of the accused products were unrelated to each other. Invoking Rule 21 and 28 U.S.C. §§ 1400(b), 1406, and 1404(a), they moved to sever "claims" against Wal-Mart from "claims" against Petitioners and transfer the claims against Petitioners to their chosen transferee districts.[2] Finally, they each moved to stay the case against Wal-Mart in the Eastern District of Texas.

On February 13, 2018, the district court denied Petitioners' motions. The district court first rejected Petitioners' reliance on § 299 and Rule 20 for severance, holding they did not apply because Petitioners entered the case through intervention, not joinder. The district court also rejected Petitioners' requests to sever, transfer, and stay, concluding that Petitioners automatically waived their

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[2] Intex sought transfer to the Central District of California, Coleman sought transfer to the Northern District of Illinois, and Bestway sought transfer to the District of Arizona.

ability to object to venue by intervening in the case and "cannot now question the propriety or convenience of a venue they chose to enter." Mem. Op. & Order at 15, *Team Worldwide Corp. v. Wal-Mart Stores, Inc.*, No. 2:17-cv-00235-JRG (E.D. Tex. Feb. 13, 2018). This petition for a writ of mandamus followed.

DISCUSSION

A party seeking a writ bears the heavy burden of demonstrating to the court that it has no "adequate alternative" means to obtain the desired relief, *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989), and that the right to issuance of the writ is "clear and indisputable," *Will v. Calvert Fire Ins.*, 437 U.S. 655, 662 (1978) (internal quotation marks omitted). Even when those requirements are met, the court must still be satisfied that the issuance of the writ is appropriate under the circumstances. *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 381 (2004). Petitioners have not met their burden here.

First, Petitioners have not established that they lack "adequate alternative" means to obtain relief. Petitioners' request for relief regarding its improper venue defense can be addressed on appeal by this court after a final judgment is reached in the case. *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 379–84 (1953). We also note that Petitioners could have filed declaratory judgment actions in their chosen districts and asked to enjoin or to stay this proceeding. *See In re Google Inc.*, 588 F. App'x 988, 992 (Fed. Cir. 2014) (granting mandamus directing the district court to stay patent infringement proceedings against the phone manufacturer defendants pending the outcome of Google Inc.'s action for a declaration of non-infringement and invalidity concerning the operating system that was used in the accused products and at the heart of the infringement case against Google's custom-

ers). Petitioners chose not to and instead voluntarily intervened in this action.

Second, Petitioners have not shown a clear and indisputable right to relief. Neither the United States Court of Appeals for the Fifth Circuit nor this court has spoken on the issue of whether a party that voluntarily enters a case through intervention may raise a venue defense.[3] This issue and the analogous issue of waiver of personal jurisdiction have divided the circuit courts. *Compare In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1248 (11th Cir. 2006) (stating that "by filing a successful motion to intervene, [the intervenor] acquiesced to . . . jurisdiction"), *with SEC v. Ross*, 504 F.3d 1130, 1149–50 (9th Cir. 2007) (stating that "[i]f the third party is intervening of right, . . . we see little reason to deprive him of any of his procedural defenses merely because the original plaintiff failed to name him as a defendant or because no other party sought to have him joined"); *see also Gradel v. Piranha Capital, L.P.*, 495 F.3d 729, 731 (7th Cir. 2007) (holding that "the receiver intervened in the Chicago suit and by doing so submitted himself to the jurisdiction of the court in which that suit was pending."); *Cty. Sec. Agency v. Ohio Dep't of Commerce*, 296 F.3d 477, 483 (6th Cir. 2002) (holding that intervenor "attempted in his motion to intervene to reserve his right to object to the

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[3] For purposes of transfer under § 1404(a), we would look to the laws of the Fifth Circuit to decide this issue. *See In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008); *Storage Tech. Corp. v. Cisco Sys., Inc.*, 329 F.3d 823, 836 (Fed. Cir. 2003). As to whether a party has waived an objection under §§ 1400(b) and 1406, it does not appear that this court has decided whether issues of waiver of venue not directly tied to § 1400(b) would be governed by Federal Circuit law or regional circuit law, and we need not resolve that issue here.

district court's exercise of personal jurisdiction. This attempt, however, was unsuccessful, because a motion to intervene is fundamentally incompatible with an objection to personal jurisdiction."); *Trans World Airlines, Inc. v. C.A.B.*, 339 F.2d 56, 63–64 (2d Cir. 1964) ("Venue is a privilege personal to a defendant in a civil suit and a person intervening on either side of the controversy may not object to improper venue."); Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1918 (3d ed.) ("The intervenor cannot question venue. By voluntarily entering the action the intervenor has waived the privilege not to be required to engage in litigation in that forum."). Given the substantial amount of authority supporting the district court's decision, we cannot say that Petitioners' entitlement to relief is clear and indisputable.

Petitioners also argue that the district court abused its discretion by declining to sever the patent infringement claims against each competitor's products. We do not reach the merits of Petitioners' severance arguments at this time. Such arguments can be adequately addressed on appeal after final judgment. We note, however, that even if 35 U.S.C. § 299 is not applicable, Rule 21 provides that a "court may also sever any claim against a party." And we have stated that a district court should examine whether keeping claims together in a single case "would comport with the principles of fundamental fairness or would result in prejudice to either side." *In re Nintendo Co.*, 544 F. App'x 934, 939 (Fed. Cir. 2013) (internal quotation marks and citation omitted); *cf. In re EMC Corp.*, 677 F.3d 1351, 1360 (Fed. Cir. 2012) (explaining that a court may sever "in the interest of avoiding prejudice and delay, ensuring judicial economy, or safeguarding principles of fundamental fairness") (internal quotation marks and citation omitted). While Petitioners appear to have raised such issues in their motions, the district court did not expressly address them in its opinion considering whether the claims against Wal-Mart should

be severed into separate actions based on Petitioners' products. While a writ of mandamus is not warranted, the district court should consider whether such concerns warrant severance for the purposes of adjudicating the merits of the case.

For the foregoing reasons, Petitioners have failed to meet their burden of demonstrating that they have no "adequate alternative" means to obtain the desired relief, and that the right to issuance of the writ is "clear and indisputable."

Accordingly,

IT IS ORDERED THAT:

(1) The petition is denied.

(2) All pending motions are denied as moot.

FOR THE COURT

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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