

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

eSPEED, INC.; CANTOR FITZGERALD, L.P.; and CFPH, L.L.C.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 03-612-KAJ
)	
BROKERTEC USA, L.L.C.; BROKERTEC GLOBAL, L.L.C.; GARBAN, LLC; ICAP PLC; OM AB; and OM TECHNOLOGY (U.S.), INC.,)	
)	
Defendants.)	

MEMORANDUM ORDER

I. Introduction

Presently before me is a motion (Docket Item ["D.I."] 530) filed by eSpeed, Inc., Cantor Fitzgerald, L.P., and CFPH, L.L.C. (collectively "eSpeed") seeking reconsideration of the October 25, 2004 Memorandum Opinion and Order in which I ruled that prosecution history estoppel barred eSpeed from asserting the doctrine of equivalents in this case (D.I. 527, 528 at 9-12). Also before me is a motion (D.I. 531) filed by BrokerTec USA, L.L.C., Garban, L.L.C., ICAP Technology AB, and OM Technology (US), Inc. (collectively "BrokerTec") seeking reconsideration of the same Opinion and Order to the extent that I denied their motion for Summary Judgment of Non-Infringement (D.I. 527, 528). I have jurisdiction over this case pursuant to 28 U.S.C. § 1331. For the reasons that follow, the motions will be denied.

II. Background

Because the factual and procedural history of this case has been previously set forth (see D.I. 527), it will not be repeated here.

III. Standard of Review

Motions for reconsideration should be granted only "sparingly." *Karr v. Castle*, 768 F. Supp. 1087, 1090 (D. Del. 1991). In this district, motions for reconsideration are granted only if it appears that the court has patently misunderstood a party, has made a decision outside the adversarial issues presented by the parties, or has made an error not of reasoning, but of apprehension. *Brambles USA, Inc. v. Blocker*, 735 F. Supp. 1239, 1240 (D. Del. 1990) (citing *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). "Courts should be particularly vigilant that motions for reargument or reconsideration are not used as a means to argue new facts or issues that inexcusably were not presented to the court in the matter previously decided." *Id.*

Further, a district court should grant a motion for reconsideration which alters, amends, or offers relief from a judgment only when: (1) there has been an intervening change in the controlling law; (2) there is newly discovered evidence which was not available to the moving party at the time of judgment; or (3) there is a need to correct a legal or factual error which has resulted in a manifest injustice. See *Max's Seafood Café by Lou Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (citation omitted).

IV. Discussion

A. eSpeed's Motion for Reconsideration

eSpeed argues that I should reconsider and vacate the October 25, 2004 Memorandum Opinion and Order because I “misapprehended key facts about patent prosecution practice.” (D.I. 530 at 2.) Specifically, eSpeed argues that I misunderstood that the common policy used when filing a divisional application is to submit the original claims of a parent application and then cancel those claims by preliminary amendment. (*Id.*) eSpeed also argues that I “misapprehended a key point of law” related to rebutting the presumption that a narrowing amendment surrendered a particular equivalent. (*Id.*) Taking the last argument first, it simply asks that I reverse my interpretation of the law. Since I do not believe my legal conclusions or analysis were in error, I decline to reverse them. No further discussion of this point is necessary. See *Max's Seafood Café*, 176 F.3d at 677 (holding that reconsideration is reserved for clear errors of law).

With respect to eSpeed's argument about the effect of filing a preliminary amendment, eSpeed asserts that a preliminary amendment is made before any substantive action is taken by the Patent and Trademark Office. (*Id.*) eSpeed cites 37 C.F.R. § 1.53(b) to show that it is proper to submit the original claims of a parent application when filing a divisional application. (*Id.* at 4.) They then go on to say that, because a continuing application ignores the prosecution history of the parent, it is necessary to add any earlier prosecution through the use of a preliminary amendment, if one wishes to retain such prosecution in the new file. (*Id.* at 5.) These assertions, however, are simply beside the point. The question is whether the inventor narrowed his claims. In this case, I have concluded that the answer to that question is yes

because the inventor filed amendments to his original claim that restricted the scope of the claim in question.

eSpeed also asserts that I am not aware of the procedure for numbering claims upon issuance of a patent. (*Id.*) Consequently, they argue I compared two “wholly unrelated claims simply because they had the same number at different times.” (*Id.*) It is true that the two claims I compared for the purpose of determining if prosecution history applied coincidentally are numbered identically and that before the patent issued they were not. Nowhere in my opinion, however, is this numbering coincidence relied on as a basis for my decision. Rather, the numbers are included to aid the parties in referencing the claims. What I did rest my opinion on was the fact that claim 20, as issued, contained the limitations at issue and the original claims did not contain such limitations. Accordingly, eSpeed’s motion seeking reconsideration of the October 25, 2004 Memorandum Opinion and Order is denied.

B. BrokerTec’s Motion for Reconsideration

BrokerTec argues that reconsideration of the May 18, 2004 Memorandum Order should be granted because I misapprehended the workings of the BrokerTec ETN and the Garban ETC/ETN and their relationship to each other. (D.I. 531at 1-3.) BrokerTec makes several arguments for why I should have granted Summary Judgment as to certain aspects of the case. The most direct answer to those assertions is that BrokerTec did not file a summary judgment motion fairly calling those aspects of the case into question.

As to BrokerTec’s specific assertion that “there was no operative ‘intertwining’ whatsoever between the BrokerTec ETN and Garban ETC/GTN systems ... prior to

September 15, 2003” (D.I. 531 at 7), that may be true, but it does not address the question of infringement after that date. The proposed temporal limitation was never argued. Also, the issue of limiting the summary judgment motion to a particular system was only raised in BrokerTec’s reply (D.I. 510 at 11), and eSpeed was not properly put on notice of BrokerTec’s. Consequently, BrokerTec’s motion for reconsideration is also denied.

V. Conclusion

Accordingly, IT IS HEREBY ORDERED that both eSpeed’s and BrokerTec’s motions for reconsideration (D.I. 531, 530) are DENIED.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

January 11, 2005
Wilmington, Delaware