NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

TRACY NIXON,
Plaintiff-Appellant

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee

2021-1120

Appeal from the United States District Court for the Eastern District of Texas in No. 2:19-cv-00287-JRG-RSP, Chief Judge J. Rodney Gilstrap.

ON MOTION

PER CURIAM.

O R D E R

Tracy Nixon responds to the court's order to show cause and moves to "reinstate appeal."

Mr. Nixon's underlying complaint alleges that General Motors Corporation ("GM") infringed his design "before the plaintiff could patent the invention for sale to the public." Compl. at 4, *Nixon v. Gen. Motors Corp.*, No. 19-cv-00287

(E.D. Tex. Aug. 26, 2019), ECF No. 1. Mr. Nixon moved the district court to enter a default judgment against GM, which the court denied on the basis that GM was not properly served. Mr. Nixon filed objections to the order, which the district court overruled in an order dated August 14, 2020. Mr. Nixon subsequently moved the district court to certify the August 14th order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

While that motion was pending, Mr. Nixon filed a request for permission to appeal at the United States Court of Appeals for the Fifth Circuit and a separate request which was docketed at this court as the above-captioned matter. On November 4, 2020, the Fifth Circuit denied his request because "[t]he district court's order denying the motion for default judgment is not a final order . . . [and] the order has not been certified for immediate appeal under 28 U.S.C. § 1292(b) by the district court." *Nixon v. Gen. Motors Corp.*, No. 20-90032 (5th Cir. Nov. 4, 2020). On December 1, 2020, the district court denied Mr. Nixon's motion to certify the order for interlocutory appeal.

Our jurisdiction extends to cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 809 (1988); 28 U.S.C. § 1338; 28 U.S.C. § 1295(a)(1). It has long been held that "no suit can be maintained by the inventor against any one for using [the invention] before the patent is issued." *Gayler v. Wilder*, 51 U.S. 477, 493 (1850). Thus, although the complaint purports to allege infringement, it fails to present a non-frivolous claim arising under the patent laws and is hence outside of our limited jurisdiction. *Cf. Jim Arnold Corp. v. Hydrotech Sys., Inc.*, 109 F.3d 1567, 1578-79 (Fed. Cir. 1997).

We also see no basis to transfer this case to another court of appeals pursuant to 28 U.S.C. § 1631. That statute states that "[w]henever . . . an appeal . . . is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such . . . appeal to any other such court . . . in which the . . . appeal could have been brought at the time it was filed or noticed[.]" An appeal to the appropriate regional circuit, here the Fifth Circuit, could not have been brought at the time it was noticed because, as the Fifth Circuit itself has explained, no final judgment has been issued and the district court has not certified that immediate appeal of any order is appropriate.

Accordingly,

IT IS ORDERED THAT:

(1) The appeal is dismissed.

(2) All pending motions are denied.

(3) Each side shall bear its own costs.

FOR THE COURT

January 21, 2021
Date

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

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