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Federal Circuit Patent Bulletin: *Nova Chems. Corp. v. Dow Chem. Co.*

May 15, 2017

"[T]he filing of an action to set aside a prior judgment, without more, does not render a case exceptional per se."

On May 11, 2017, in *Nova Chems. Corp. v. Dow Chem. Co.*, the U.S. Court of Appeals for the Federal Circuit (Prost,* Dyk, Hughes) affirmed the district court's $2.5 million attorney fees award to Dow under 35 U.S.C. § 285 in a case involving U.S. Patents No. 5,847,053 and No. 6,111,023, which related to ethylene polymer films. The Federal Circuit stated:

An exceptional case under § 285 is "simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated." "District courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." . . .

NOVA argues that the district court committed legal error, and thus abused its discretion, by looking to NOVA's pursuit of the equity action as "[t]he overriding factor," rather than considering the totality of the circumstances, and also erred in finding that the filing of an equity action—regardless of its merit—could be subject to a fee award. . . . We agree with NOVA to the extent that the filing of an action to set aside a prior judgment, without more, does not render a case exceptional per se.

Due to the applicable Rule 60(b)(3) time-bar and other circumstances, NOVA is correct that the pursuit of a separate action in equity was "the only federal court option" available for it to set aside the 2010

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judgment. Dow submits that rather than file the equity action, NOVA could have requested additional discovery in the infringement action or filed a motion under Federal Rule of Civil Procedure 60(b)(4) on grounds that the 2010 judgment was void for lack of standing. But those suggestions are unhelpful. Dow conceded at oral argument that even armed with additional evidence from further discovery, NOVA would have still been required to file a separate action to set aside the 2010 judgment. And Dow's suggestion of filing a Rule 60(b)(4) motion relates only to raising a lack of standing; it does not necessarily allow NOVA to also challenge how the infringement determination was previously procured.

A party whose only option for relief from a prior judgment is to file a separate action in equity should not be disincentivized from doing so if that party has a plausible basis for relief. Therefore, despite the extraordinary nature of relief that NOVA sought, the district court erred to the extent it based its exceptional-case determination on NOVA's filing of the equity action itself.

But that does not end our review of the district court's exceptional-case determination. The district court did not base its analysis solely, or even primarily, on the fact that NOVA filed an equity action. Rather, it expressly relied on alternative grounds, holding the case to be "exceptional, both in the substantive strength of NOVA's litigating position and in the manner in which the case was litigated." At a minimum, the court did not abuse its discretion in concluding that the case was exceptional due to the substantive strength of NOVA's litigating position.

The substantive strength of a party's litigating position can—i.e., whether it is objectively baseless—independently support an exceptional-case determination. Thus, "a case presenting . . . exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award." In this regard, "[i]t is the 'substantive strength of the party's litigating position' that is relevant to an exceptional case determination, not the correctness or eventual success of that position."

NOVA's allegations of fraud in this case mainly rested on "purportedly conflicting testimony" from the Louisiana action and the Canadian action. But as explained by the district court, the arguable inconsistencies in those other actions, even if proven, were immaterial to the 2010 judgment. . . . NOVA's allegations of fraud regarding the infringement determination are just as baseless, if not more. . . . NOVA contends that the district court "compound[ed]its error" by relying on the extensiveness of NOVA's pre-suit investigation to support the exceptional-case determination. . . . We agree, as a general matter, that the extent of a party's pre-suit investigation or how fervently it believed in its allegations does not affect the objective strength of that party's litigating position. At a minimum, the district court did not abuse its discretion in holding that NOVA's litigating position was objectively baseless.

NOVA also argues that the district court legally erred by "consider[ing] this case in comparison to the full panoply of patent cases." According to NOVA, the court should have considered whether the equity action stood out from other actions to set aside a prior judgment, rather than considering whether the equity action stood out from other patent cases more generally. Otherwise, it contends, an action to set aside a prior judgment would always be exceptional because, "[b]y necessity," it would "stand out" from the traditional patent infringement case." NOVA's argument is unavailing. NOVA fails to cite any legal precedent to support

its position that a district court's baseline for comparison is so restricted in a § 285 analysis. One could always search for more similar cases for comparison. Taken to its logical conclusion, continuing to narrow the universe of comparators to cases resolved on similar procedural postures, legal grounds, or facts would leave few or no comparators remaining. We decline to hold that the district court erred in comparing this case to other patent cases more generally.

Any concern regarding the district court's comparison is tempered because, again, it did not hold that this case stood out merely because NOVA requested that a prior judgment be set aside for fraud whereas many other patent cases do not present such circumstances. The equity action was a direct extension of, and intertwined with, the prior infringement action. Requiring the district court in this circumstance to narrow its comparison to other independent actions requesting relief from judgment would run counter to the Supreme Court's general instruction that "[d]istrict courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." The district court therefore did not commit reversible error in comparing this case to patent cases more generally.