Ferring Pharm., Inc. v. Watson Pharm., Inc.
765 F.3d 205 (3d Cir. 2014)

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BACKGROUND

Plaintiff-appellant, Ferring Pharmaceuticals, Inc. (Ferring), is an internationally recognized biopharmaceutical company that manufactures the prescription progesterone product Endometrin. Defendant-appellee, Watson Pharmaceuticals, Inc. (Watson), manufactures the progesterone product Crinone, which directly competes with Ferring in the prescription progesterone market. The progesterone hormone products that the parties manufacture are used to aid women in the process of achieving pregnancy by assisted reproductive technology.

The dispute between Ferring and Watson derived from two webcast presentations that Watson hosted in September of 2012. During the webcast presentations, a Watson consultant, Dr. Kaylen M. Silverberg, made three invalid statements about Ferring's progesterone product with which Ferring takes issue: (1) he referenced a non-existent "Black Box" warning on Endometrin's package insert; (2) he misspoke when referring to a patient survey involving the comparison of Endometrin and Crinone; and (3) he improperly characterized the results of an Endometrin effectiveness study.[1] Based on the false statements made by the Watson consultant, Ferring filed a complaint alleging violations of § 43(a) of the Lanham Act, the New Jersey Consumer Fraud Act, and New Jersey common law.[2]

PROCEDURAL HISTORY

In September 2012, Ferring brought suit against Watson for inaccurate statements made during two webcast presentations. Two months later, Ferring filed for a preliminary injunction to stop Watson from continuing to make false statements regarding Ferring's Endometrin product. In April 2013, the U.S. District Court for the District of New Jersey decided that "Ferring was not entitled to a

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1. Ferring Pharm., Inc. v. Watson Pharm., Inc., 765 F.3d 205, 207 (3d Cir. 2014).
2. *Id.* at 209.

presumption of irreparable harm."[3] Without a presumption of irreparable harm, the district court held that Ferring had not presented enough evidence to show a likelihood of irreparable harm, and denied Ferring's motion for a preliminary injunction. Ferring disagreed with the district court's ruling and appealed to the Third Circuit Court of Appeals.

ISSUE

The Third Circuit Court of Appeals addressed two issues: (1) whether Ferring's motion for a preliminary injunction, pursuant to a Lanham Act claim for false advertising, is entitled to a presumption of irreparable harm; and (2) whether the district court abused its discretion and erred by denying Ferring a preliminary injunction.[4]

DECISION

The Court of Appeals affirmed the district court's decision in two parts. First, the Court of Appeals found that Ferring's motion for a preliminary injunction, pursuant to a Lanham Act false advertising claim, was not entitled to a presumption of irreparable harm. Second, it held that Ferring failed to establish that there was a likelihood of irreparable harm caused by Watson's actions. The Court of Appeals' holding in this case furthered a significant split between jurisdictions about plaintiffs' entitlement to presumptions of irreparable harm when seeking injunctions for Lanham Act claims.

REASONING

The court began its analysis by discussing the importance of preliminary injunctive relief, stating that injunctions are "extraordinary remed[ies], which should be granted only in limited circumstances."[5] Relying on two Supreme Court cases, *eBay Inc. v. MercExchange, L.L.C.*[6] and *Winter v. Natural Resources Defense Council, Inc.*,[7] the court analyzed the issue from a traditional equity principle viewpoint. Ferring attempted to argue that this case was not the same as *eBay*, because the *eBay* case involved an injunction for a patent, whereas this case involved an injunction for a Lanham Act claim. Ferring wanted the court to agree that patents are viewed differently under the traditional equity principles than Lanham Act claims, and find that the district court was wrong in its decision to

3. *Id.*

4. *Id.* at 206 (quoting Novartis Consumer Health, Inc. v. Johnson & Johnson–Merck Consumer Pharm. Co., 290 F.3d 578, 586 (3d Cir. 2002)).

5. *Id.* at 210.

6. 547 U.S. 388 (2006).

7. 555 U.S. 7 (2008).

deny injunctive relief. The court dismissed Ferring's argument, stating that there was no precedent on this issue and the district court had proper authority to decide whether patents, copyrights, and Lanham Act claims could be viewed similarly regarding preliminary actions and the presumption of irreparable harm. The court found that Lanham Act claims were subject to the equitable discretion of the courts, and thus the district court's decision to deny Ferring's motion for preliminary injunction was admissible.

After acknowledging the importance of preliminary injunctions and clarifying that Lanham Act claims were to be analyzed by the same traditional equity principles as patents claims, the court listed four elements courts must consider when ruling on preliminary injunctions. The test examines whether the plaintiff seeking preliminary injunctive relief (1) is likely to succeed on the merits, (2) is likely to suffer irreparable harm in the absence of preliminary relief, (3) can show that the balance of equities tips in his favor, and (4) can show that the injunction is in the public's interest. Failure to establish any of these four elements bars a plaintiff from injunctive relief. The court found that Ferring was not able to satisfy the second factor, likelihood of suffering irreparable harm, because Watson had taken steps to entirely rectify the issues surrounding the false statements that were made. In light of Ferring not being able to show all four factors, the court found that Ferring was not entitled to injunctive relief.

Overall, the Third Circuit Court of Appeals' holding furthered a jurisdictional split regarding presumptions of irreparable harm in preliminary injunction cases. With this decision, the Third Circuit joined the Ninth Circuit in rejecting the presumption of irreparable harm for preliminary injunctions in Lanham Act claims. Some courts have yet to opine on this matter, but it seems that this topic will continue to appear in courts across the country.