

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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No. 13-3015

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Sep 03, 2013
DEBORAH S. HUNT, Clerk

G.G. MARCK AND ASSOCIATES, INC.,)
)
Plaintiff-Appellee,)
)
v.)
)
JAMES PENG; PHOTO U.S.A.)
CORPORATION; NORTH AMERICAN)
INVESTMENTS CORP.; PHOTO USA)
ELECTRONIC GRAPHIC, INC.,)
)
Defendants-Appellants.)

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

Before: ROGERS, SUTTON and MCKEAGUE, Circuit Judges.

PER CURIAM. This case gives settlements a bad name. The parties, mug manufacturers, purported to settle their underlying controversy—whether James Peng and his companies violated G.G. Marck’s rights under trademark and unfair competition law—about three months after the lawsuit was filed in 2005. The parties have devoted the last eight years to litigating the meaning and validity of the settlement. The case has already made a couple of trips to our court. Because our opinions in those cases discuss most of the relevant facts, *see* 309 F. App’x 928 (6th Cir. 2009) (*Marck I*); 465 F. App’x 515 (6th Cir. 2012) (*Marck II*), we will sketch only an outline here.

After reaching an agreement to settle the case in 2005, the parties read its “substance” into the trial court record. R. 16 at 2–3. The parties agreed to a mutual release of claims, and Peng

No. 13-3015

G.G. Marck & Assocs. v. Peng

agreed to be bound by an injunction under which an independent organization would (for at least three years) monitor his compliance with federal customs, importation and transportation laws. *Id.* at 3. The district court entered the agreed-upon injunction and retained jurisdiction over the case “to interpret and enforce the settlement agreement.” *Marck I*, 309 F. App’x at 930. But disputes broke out over whether the parties had complied with the settlement and eventually over whether the settlement itself should be set aside. In the proceedings that led to our latest opinion, the district court vacated the settlement and accompanying injunction. We sent the case back, however, with instructions “to reinstate the injunction” and “to enforce the settlement.” *Marck II*, 465 F. App’x at 518–19. The district court responded by entering an agreement and an injunction, from which Peng now appeals.

In this, the third appeal in the case, Peng makes a lot of arguments, some developed, some not, and many of them frivolous. We have considered all of them and will address only the most substantive ones here. First, Peng objects to the imposition of a new monitoring period in the new injunction. The root of the problem is this: Peng agreed that his business would be independently monitored for compliance with the law—not forever, but for three years, with the clock restarting every time Peng had “been determined to have violated any terms and conditions” of the injunction. R. 35 at 4–5. The clock was last reset in February 2009; Marck was therefore entitled to a monitoring period that ran until at least February 2012. But the district court incorrectly *vacated* the original injunction in October 2009, depriving Marck of a little more than 27 months of monitoring to which it had been entitled. We instructed the district court to “reinstate” its injunction. The

No. 13-3015

G.G. Marck & Assocs. v. Peng

district court took this to mean that it should order a new monitoring period to make up for what Marck had wrongly lost. Peng, by contrast, thinks “reinstate” meant *retroactively* reinstate—so that the district court should only have held that its seemingly vacated injunction had actually been in force since October 2009.

Peng’s interpretation makes little sense. The settlement agreement entitled Marck to monitoring of Peng’s business, yet from October 2009 onwards (as Peng’s lawyer conceded below) no such monitoring occurred. Judges have a lot of powers, but time travel is not among them. So if “reinstate” meant “retroactively reinstate”—if the district court was supposed to declare that monitoring that did not take place *should* have taken place—then our opinion would have commanded nothing. The district court’s far more plausible interpretation of our opinion, the only plausible interpretation, is right.

Second, Peng complains that, when the district court entered the new settlement agreement and the new injunction, it added a handful of terms (to the injunction and agreement) to which the parties never agreed. The challenged provisions range from the trivial (one says who gets a copy of the court’s order) to the more substantial (one authorizes Marck’s lawyer to conduct discovery in order to ascertain compliance with the injunction).

Some of the challenged terms, however, are not new. Take the discovery provision just mentioned. The new injunction, it is true, allows Marck’s lawyer “to independently monitor compliance with this Order by all . . . lawful means, including, but not limited to . . . [c]onducting

No. 13-3015

G.G. Marck & Assocs. v. Peng

discovery.” R. 432 at 8. But the old injunction contained a similar provision blessing “all . . . lawful means, including but not limited to . . . [o]btaining discovery . . . with further leave of court based upon good cause shown and after due notice to defendants.” R. 35 at 7. The new injunction does not explicitly require leave of court, good cause and due notice, but in light of the interpretive principle that a reading that validates outweighs a reading that invalidates, we conclude that such a requirement is implicit in the new injunction’s text.

Admittedly, other challenged terms (like the term that says who gets a copy of the order) go further than the original version of the injunction and the original record of the agreement. But when the parties originally entered their settlement into the record in 2005, they discussed only the agreement’s basic framework. They outlined their settlement—stating, for example, that Peng had agreed to “a three-year monitoring program”—then clarified that they had put on the record only “the substance” of their agreement. R. 16 at 2–3. The district court was thus on solid ground in concluding that the record contained only “the agreement’s bare essential terms,” with “additional terms” remaining to be specified. R. 431. The parties, however, never got around to writing down those additional terms. Nor could the parties agree about what they had agreed to, even though the district court urged them to work these differences out themselves. The parties thus saddled the district court with the unsought responsibility of figuring out just what the unrecorded terms of the parties’ settlement were. We can discern no clear error in the district court’s execution of this factual task—and Peng’s appellate briefs offer no basis for finding one.

For these reasons, we affirm.