

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PASS & SEYMOUR, INC.

Plaintiff,

Civil Action No.

v.

LEVITON MFG. CO., INC.,

JURY TRIAL DEMANDED

Defendant.

DECLARATORY JUDGMENT COMPLAINT

Plaintiff Pass & Seymour, Inc., by and through its attorneys, Bond, Schoeneck & King, PLLC, hereby alleges as its Complaint against the defendant Leviton Manufacturing Co., Inc. as follows:

JURISDICTION AND VENUE

1. This is a declaratory judgment action for invalidity and non-infringement of a patent, brought under the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202, and the Patent Act, 35 U.S.C. §§ 271 *et seq.*

2. This Court has subject matter jurisdiction in this action pursuant to 28 U.S.C. § 1331 and 1338(a), and §§ 2201(a) and 2202.

3. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c) and § 1400(b).

PARTIES

4. Plaintiff P&S (“P&S”) is a corporation organized and existing under the laws of the State of New York and having a principal place of business at 50 Boyd Avenue, Syracuse, New York 13211.

5. Upon information and belief, defendant Leviton Manufacturing Co., Inc. (“Leviton”) is a corporation organized and existing under the laws of the State of Delaware and having offices at 59-25 Little Neck Parkway, Little Neck, New York 11362-2591.

COUNT I DECLARATORY JUDGMENT OF NON-INFRINGEMENT

6. P&S manufactures and distributes electrical devices throughout the United States, including a series of rocker switches collectively known as the Pass and Seymour DecoratorTM (“the Decorator switches”), for example, P&S catalog number TM8111-LACC.

7. Sometime in July 2004, Leviton notified P&S that the Decorator switches infringe U.S. Patent No. 5,749,459 (“the ’459 patent”).

8. In subsequent correspondence, Leviton expressly asserted that the Decorator switches infringe one or more claims of the ’459 patent.

9. The Decorator switches do not contain each and every element of any one claim of the '459 patent, either literally or under the doctrine of equivalents. As a result, the making, using, selling, offering for sale, and/or importing of the Decorator switches by P&S does not constitute infringement under 35 U.S.C. § 271.

10. P&S continues to manufacture and distribute the Decorator switches.

11. Although P&S has attempted in good faith to explain to Leviton why the Decorator switches do not infringe any of the claims of the '459 patent, Leviton continues to assert that the Decorator switches infringe the '459 patent.

12. In correspondence dated September 16, 2004, Leviton repeated its assertion that the Decorator switches infringe one or more claims of the '459 patent and rejected P&S's explanation of why the Decorator switches do not infringe.

13. Leviton has stated that it is willing to pursue infringement litigation against P&S and has patent litigation counsel prepared to take on the case should negotiations fail.

14. Based on Leviton's threats of infringement and the fact that negotiations have recently reached an impasse, P&S has a reasonable apprehension that it may face an infringement lawsuit.

15. In light of P&S's continued manufacture and sale of the Decorator switches and Leviton's express threats of infringement and willingness to proceed with a patent infringement lawsuit, an actual case or controversy exists between Leviton and P&S.

16. P&S is entitled to a declaratory judgment that the making, using, selling, offering for sale, and/or importing of the Decorator switches by P&S does not constitute patent infringement under 35 U.S.C. § 271.

17. P&S has no adequate remedy at law.

COUNT II
DECLARATORY JUDGMENT OF INVALIDITY

18. P&S repeats and realleges the allegations contained in paragraphs “1” through “17” as if fully set forth herein.

19. Upon information and belief, the claims of the '459 patent are invalid for failing to meet the requirements of patentability under 35 U.S.C. §§ 101, 102, 103, and/or 112.

20. P&S is entitled to a declaratory judgment that the '459 patent is invalid and/or unenforceable against P&S.

PLAINTIFF DEMANDS A TRIAL BY JURY

WHEREFORE, the plaintiff prays that the Court:

(a) Enter a declaratory judgment that the making, using, selling, offer for sale, or importing of the P&S rocker switches known as the Decorator is not an infringement of U.S. Patent No. 5,749,459;

(b) Enter a declaratory judgment that the claims of U.S. Patent No. 5,749,459 are invalid and/or unenforceable under the Patent Act, 35 U.S.C. §§ 101, 102, 103, and/or 112.

(c) Enter judgment that this is an exceptional case under 35 U.S.C. § 285.

(d) Award the plaintiff its prejudgment interest, costs and attorneys' fees; and

(e) Grant the plaintiff such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Dated: October 5, 2004

By: s/George R. McGuire
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