

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PLASTWOOD SRL,

Plaintiff,

v.

ROSE ART INDUSTRIES, INC.,

Defendant.

CASE NO. C07-0458JLR

ORDER DENYING MOTION
FOR ATTORNEYS' FEES

Before the court is Defendant Rose Art Industries, Inc.'s ("Rose Art") motion for attorneys' fees (Dkt. # 70). For the following reasons, the court DENIES the motion.

PlastWood SRL ("PlastWood") filed this lawsuit against Rose Art contending, in part, that many of the structures advertised on Rose Art's Magnetix packaging cannot be built and collapse under their own weight giving rise to a false advertising claim pursuant to the Lanhan Act, 15 U.S.C. § 1125. PlastWood also brought a Lanham Act claim based on the allegation that Rose Art advertised its toys as safe for ages "3 to 100," when in fact they were not, an unjust enrichment claim, and a claim for violation of the Delaware Deceptive Trade Practices Act. On October 22, 2007, on Rose Art's motion to dismiss, the court dismissed all but one of the Lanham claims for failure to state a claim, including

1 PlastWood's Lanham Act claim based on the statement that Magnetix were intended for
2 "Ages 3 to 100." (*See* Dkt. # 30.) The parties conducted discovery on the remaining
3 Lanham Act claim and Rose Art moved for summary judgment to dismiss it on July 31,
4 2008.

5 Rose Art's motion for summary judgment was based primarily on its contention
6 that the three structures identified by PlastWood as "unbuildable" could indeed be
7 constructed with Rose Art's Magnetix. After requesting supplemental briefing on the
8 motion for summary judgment, including requesting supplemental expert reports on
9 whether the structures could be built, and holding a hearing on the motion, the court
10 granted Rose Art's motion for summary judgment. (*See* Dkt. # 68.) In its order, the court
11 determined that PlastWood did not have any evidence that Rose Art's advertisement was
12 literally false and that "no reasonable jury could conclude that the structures on the
13 Magnetix box [could not] be built as represented on the box." (December 5, 2008 Order
14 (Dkt. # 70) at 8.)
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16 Rose Art now seeks recovery of its reasonable attorneys' fees because it contends
17 that this is an "exceptional" case under 15 U.S.C. § 1117(a). The Lanham Act permits an
18 award of reasonable attorneys' fees to prevailing plaintiffs for violations of 15 U.S.C. §
19 1125(a) and § 1125(d) in "exceptional cases." 15 U.S.C. § 1117(a). The Ninth Circuit
20 defines "exceptional" as "malicious, fraudulent, deliberate or willful." *Gracie v. Gracie*,
21 217 F.3d 1060, 1068 (9th Cir. 2000) (citation omitted); *see Lindy Pen Co., Inc. v. Bic Pen*
22 *Corp.*, 982 F.2d 1400, 1409 (9th Cir. 1993). Typically, these claims are brought by the
23 plaintiff but courts have recognized that a defendant may properly recover attorneys' fees
24 in a Lanham Act case where the plaintiff's claims are either "groundless, unreasonable,
25 vexatious, or pursued in bad faith." *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1156
26 (9th Cir. 2002) (quotations omitted).
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1 Rose Art asserts that this is an exceptional case because (1) PlastWood's age label
2 claim was baseless; (2) PlastWood's collapsing structure claim was baseless; and (3)
3 PlastWood lacked good faith in pursuing these claims. (Mot. (Dkt. # 70) at 8-11.)
4 Although PlastWood's Lanham Act claims were ultimately unsuccessful, the court does
5 not find that the claims were baseless.

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7 The court dismissed the age label claim early on in the case because the court
8 determined that enforcing PlastWood's allegations regarding safety labeling as a Lanham
9 Act claim would be incongruent with the safety labeling requirements set forth by the
10 Consumer Product Safety Commission ("CPSC"). (October 23, 2007 (Dkt. # 30) Order.)
11 The court did not find the claim "baseless;" rather, it found that the claim was better
12 addressed by the CPSC. The court granted summary judgment on the remaining Lanham
13 Act claim after discovery and a number of expert reports revealed that the alleged
14 collapsing structures could be built supporting Rose Art's claim that its advertisements
15 were not literally false. The court likewise does not find that this claim was a "baseless"
16 claim but rather a well-litigated claim that ultimately favored Rose Art.

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18 Finally, as for Rose Art's allegations of bad faith, the court is not convinced that
19 PlastWood engaged in a "blatant effort to capitalize on publicity relating to the tragic
20 death of a child attributable to Rose Art." (Mot. at 11.) Rose Art points to a pre-lawsuit
21 email from one of PlastWood's attorneys noting that bringing a claim against Rose Art
22 under the Lanham Act would be difficult due to an absence of actual evidence of
23 damages. (Declaration of Alycia Regan Benenati (Dkt. # 71), Ex. A.) The author goes on
24 to suggest that a lawsuit could represent a marketing opportunity for PlastWood because
25 it would show its customers that it was a "protector of the consumer's interest." (*Id.*)
26 Rose Art asks the court to conclude that the case was brought in bad faith based on this
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1 email. The court does not find that one lawyer's recitation of the pros and cons of
2 bringing this lawsuit amounts to a finding that the lawsuit was brought in bad faith.

3 For the reasons stated above, the court does not find that this case represents an
4 "exceptional" case under the Lanham Act such that Rose Art would be entitled to its
5 attorneys' fees. The court therefore DENIES Rose Art's motion for attorneys' fees (Dkt.
6 # 70).
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8 DATED this 4th day of February, 2009.

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11 JAMES L. ROBART
12 United States District Judge
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