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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

SLEP-TONE ENTERTAINMENT CORPORATION, Plaintiff, vs. BACKSTAGE BAR AND GRILL, et al., Defendants.	Case No.: CV11-08305 ODW (PLAx) **DEFENDANTS KELLY C. SUGANO AND TAKA-O'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO SLEP-TONE'S MOTION FOR RECONSIDERATION** Hearing Date: March 18, 2013 Time: 1:30 p.m. Courtroom: 11 Complaint Filed : Oct. 6, 2011

I. INTRODUCTION

On February 12, 2013, Plaintiff Slep-tone Entertainment Corporation ("Slep-tone") filed a motion asking this Court to reconsider its order of January 15, 2013 ("Order") awarding attorneys' fees to Defendants Kelly C. Sugano and Taka-O ("Defendants"). Slep-tone, however, did not oppose the underlying motion or object to any of the evidence advanced at the time by Defendants and thus waived its opportunity. According to the Local Rules and Federal Rules of Civil Procedure, Slep-tone may not do so now.

Additionally, Slep-tone and its attorneys continue to violate the Local Rules. Slep-tone failed to follow the Local Rule requiring at least five days to pass after a meet and confer before filing a motion, the instant motion was initially filed by an attorney not admitted to the bar of this Court, and the motion sets forth authority that is not new and does not explain why it could not have been presented earlier. Furthermore, had Slep-tone timely presented this authority, it would not have been applicable or persuasive.

This motion is entirely frivolous and was brought for the purpose of harassing Defendants and/or for purposes of delay, both of which are improper. The motion should be denied. Sanctions should issue.

II. ARGUMENT

A. Slep-Tone and Its Counsels Continue to Flout Local Rules

Remarkably, Slep-tone and its Los Angeles-based counsel cannot be burdened to follow the Local Rules. [See Dkt. No. 104.] This trend continues.

The Local Rules require a meet and confer at least five days (in this case at least 10 days) before a party may file the motion. L.R. 7-3. On February 12, 2013, Slep-tone's counsel made a surprise telephone call to counsel for Defendants and indicated Slep-tone's intention to move for reconsideration. Less than four hours

later, the instant motion was filed. [See McLaughlin Decl., ¶ 3; Notice of Motion - Dkt. Nos. 105, 106-1.] Slep-tone violated L.R. 7-3. The motion should be denied.

What is also apparent is that the instant motion was actually written and signed by Mr. James Harrington, Esq., a North Carolina attorney who has never made application to this Court for admission to make an appearance. [See Dkt. No. 105.] Realizing that Mr. Harrington was not admitted to the Central District, Slep-tone's Los Angeles counsel thereafter filed a notice of errata merely substituting Mr. Chen's signature for Mr. Harrington's in all respects. [Compare Dkt. Nos. 105 and 106-1.] Perhaps both counsels should be called before the Court to account for this further violation of the Local Rules.[1] L.R. 83-2.8.2.

There is yet another local rule Slep-tone and its counsel failed to abide here. Indeed, Slep-tone and its counsel ignored Local Rule 7-18 which states:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

[1] Mr. Harrington has represented Slep-tone in many of its cases as part of Slep-tone's nationwide scheme to bilk shakedown settlement money from Slep-tone's own customers of its karaoke discs who it sued and intimidated, as here, by alleging millions of dollars in damages from each of them for infringement of Slep-tone's Sound Choice trademarks. As Defendants' motion for fees had pointed out, Mr. Harrington was sanctioned in such a case by U.S. Magistrate Judge Charles J. Khan, Jr. of the Northern District of Florida (Case No: 5:11cv32/RS/CJK) finding "that the actions taken by plaintiff's counsel, following the issuance of the fee order, are unreasonable, and contemptuous of the court's authority." [See instant Dkt. #97-2, Ex. 6.] It is further troubling that Slep-tone's Los Angeles counsel of record continues to merrily go along with the scheme by filing this frivolous motion written by him. Previously, the same Los Angeles-based counsel had filed a frivolous *ex parte* application seeking an extension of time to file the opposition *after* the date for opposition had passed. [Order at 1:18-20.]

Here, Slep-tone does not present anything that would meet any of the criteria warranting a request for reconsideration. Slep-tone bases its motion on authority that is not only inapplicable and unpersuasive, but it also has existed for over a decade. Slep-tone declined to explain why it could not have been presented earlier. The instant motion is entirely frivolous.

B. Slep-tone's Motion to Reconsider Is Groundless

Slep-tone filed the instant motion "pursuant to Rule 60(b)(6), or, in the alternative, Rule 59(e)." [Memo. at 1:4-5.] Similar to Local Rule 7-18, Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker* (2008) 554 U.S. 471, 485, 128 S.Ct. 2605, 2617, fn. 5. Here, Slep-tone fails to set forth any facts for the Court to consider why Slep-tone could not have raised the meritless arguments it does now in an opposition to Defendants' motion for fees.

Moreover, a motion for attorneys' fees raises legal issues collateral to the main cause of action and, thus, is not even within the purview of Rule 59(e). *White v. New Hampshire Dept. of Employment Sec.* (1982) 445, 451, 102 S.Ct. 1162, 1166; *McCalla v. Royal MacCabees Life Ins. Co*., 369 F3d 1128, 1130 (9th Cir. 2004). Here, Slep-tone challenges the Court's grant of an award of attorneys' fees to Defendants. Accordingly, Rule 59(e) has no application here. To ground its motion thereon was frivolous.

Additionally, if it is filed more than 10 days after entry of judgment, a motion for reconsideration is considered a motion seeking relief from the judgment under Rule 60(b). *American Ironworks & Erectors Inc. v. North American Construction Corp.*, 248 F3d 892, 898-899 (9th Cir. 2001); *Allstate Ins. Co. v. Herron*, 634 F3d 1101, 1111 (9th Cir. 2011). Yet here, Slep-tone fails to present

any grounds or evidence to justify vacating the Order under Rule 59(e) or under Rule 60(b).

Slep-tone avers that Rule 60(b)(6) applies. Yet this subsection of the rule is a catchall provision used sparingly and only where extraordinary circumstances prevented a party from taking action in a timely manner to prevent or correct an erroneous judgment. Indeed, "relief may not be had where the party seeking reconsideration has ignored normal legal recourses." *US v. Alpine Land & Reservoir, Co.*, 984 F. 2d 1047, 1050 (9th Cir. 1993). To be sure, extraordinary circumstances can hardly exist "with respect to an original judgment rendered by consent." *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981).

Here, Slep-tone was provided ample opportunity, as provided by the Local Rules, to oppose Defendants' motion for fees. Slep-tone, however, elected not to file an opposition. As the Court pointed out in its Order, "Slep-tone's failure to timely oppose Defendants' Motion may be deemed consent to the granting of the Motion. L.R. 7-12; *see* L.R. 7-9." [Order at 1:23-25.] See also *Gwaduri v. I.N.S.*, 362 F.3d 1144, 1146-1147, n. 3 (9th Cir. 2004) (noting that courts have the authority to grant unopposed motions); *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (the failure to file an opposition to a motion in violation of a local rule is a proper ground to grant the motion).

As in its frivolous *ex parte* application for additional time to oppose, Slep-tone fails here too to set forth any evidence to justify its failure to oppose Defendants' fee motion. Slep-tone had waived its opportunity to oppose at that time. Nothing it presents here overcomes the waiver. This motion is frivolous too.

C. Slep-tone's Authority Is Not Persuasive or Applicable Here

Slep-tone's motion suffers from yet additional infirmities. Slep-tone premises its motion on authority that has nothing to do with the standards to

support a finding of a prevailing party or of an exceptional case under the Lanham Act. Unlike the authority cited by Slep-tone, the Court's determination of the prevailing party was not under the ADA or under 42 U.S.C. § 1988 nor did it involve any "catalyst theories" that benefit the public. Slep-tone cites no authority pertaining to any such "behavior modification" standard in connection with the Lanham Act.

Under the Lanham Act, which governs this action, "the court may in exceptional cases award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a). An exceptional case is one that is "either groundless, unreasonable, vexatious, or pursued in bad faith." *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1156 (9th Cir. 2002) (fee award under Lanham Act of $2,308,000 to prevailing defendant affirmed).

In its Order, the Court found Slep-tone to have acted in bad faith and to be vexatious. Slep-tone, however, wholly ignores the Court's finding that Slep-tone's suit was a "shakedown" and that its conduct demonstrated bad faith when it "takes trolling to the next level and essentially ignored all requests for discovery, explanations of exculpability, and requirements to act in good faith." [Order at 2:8-10.]

Not unlike its approach to the underlying motion for fees, Slep-tone here does not deny or even challenge the evidence that supported these findings. Rather than focus on zero success on the merits of any of its sought after remedies, including requesting millions in damages,[2] Slep-tone premises the instant motion on an illusory "settlement agreement" where Slep-tone took Defendants' money, but failed in additional bad faith to file a dismissal as required.[3] Compared to its allegations of damage, $5,000 was a miniscule amount and acceptance thereof by

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[2] See Complaint, 24:19 – 25:5.

[3] Slep-tone, however, continues to enjoy the $5,000 paid by Defendants while also continuing to refuse to comply with the Court's Order. Not unlike flouting the Local Rules, Slep-tone has failed to pay so much as a nickel.

Slep-tone for dismissal, albeit illusory, is evidence itself that Slep-tone knew its case against Defendants was worth nothing more than nuisance value. Indeed, it did not challenge this characterization by Defendants in the fee motion. It still doesn't. This is further evidence that Slep-tone acted in bad faith and that Defendants should be and were properly considered prevailing parties.

That Slep-tone now points to Defendants' nuisance value expenditure to stop its own bleeding that was caused by Slep-tone's bad faith lawsuit and litigation conduct, is an argument that in equity is not maintainable, let alone can in good faith be credibly asserted to support vacating the fee award. *Universal City Studios, Inc. v. Nintendo Co. Ltd.*, 615 F.Supp. 838, 864 (S.D.N.Y.1985) (fees awarded to defendant under 15 U.S.C. § 1117(a) in trademark case that was "initiated for reasons other than a sincere belief in the merits of the underlying claims, and the investigation, or lack thereof, that preceded filing the complaint was designed to avoid discovery of the lack of substance of the complaint").

Here, there were five pages of undisputed evidence presented by Defendants in the underlying motion for fees and cited in the Order of Slep-tone's bad faith. [Order at 2:10.] Indeed, it was undisputed that Slep-tone asserted privilege in bad faith response to Defendants' requests in discovery for *facts* to support Slep-tone's claims. It was undisputed that Slep-tone attempted in bad faith to extract its own discovery in response Defendants' requests under illusory conditions. It was undisputed that Slep-tone failed, in bad faith, to accept Defendants' invitation to examine exculpatory evidence. However, by its own failure to file an opposition or objection, any issue Slep-tone's may have had with such proof was waived.

"To insist upon the relinquishment of a right as a condition of discontinuing a frivolous claim and then not oppose a motion for summary judgment necessitated thereby is surely to multiply proceedings unreasonably and vexatiously." *Viola Sportswear, Inc. v. Mimun*, 574 F. Supp. 619, 621 (E.D.N.Y. 1983). Analogously, Slep-tone insisted upon payment of $5,000 to discontinue its bad faith shakedown

lawsuit against Defendants and then declined to oppose Defendants' fee motion. The equities grossly disfavor Slep-tone here. Slep-tone's condition is self-inflicted. It should not be allowed to use this Court or be allowed to abuse the court system to profit from its bad faith conduct or its shakedown activity.

D. Slep-tone and Its Counsel Should Pay Defendants' Fees for Opposing This Frivolous Motion

The instant motion is more evidence that Slep-tone has not altered its behavior. Already found to be a vexatious litigant, by filing this frivolous motion, Slep-tone and its counsel have unreasonably and vexatiously multiplied proceedings. Sanctions should issue.

"[A]ny attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. "If a court may assess counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who willfully abuse judicial process." *Viola Sportswear*.

"Sanctions pursuant to section 1927 must be supported by a finding of subjective bad faith." *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent." *Id*. (quoting *Estate of Blas*, 792 F.2d 858, 860 (9th Cir.1986)). See also *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir.1983) (filing a frivolous appeal solely for purposes of delay constitutes bad faith).

Here, Slep-tone intentionally filed the instant knowingly meritless motion under Rules 59(e) and 60(b) for the specific purpose of delay - to extend the time to appeal. See Fed.R.Civ.Proc. 59(e) and FRAP 4(a)(4)(A)(vi). Indeed, it was filed 28 days after the Order was entered, the last day of the period available for appeal.

Given that the instant motion violates so many local rules, that counsel continues to ignore them, and that the motion is wholly frivolous too, there is simply no other reasonable explanation for the motion to have been filed other than to harass Defendants and/or to delay proceedings, each of which constitute additional bad faith.

Slep-tone and its counsel should be ordered to pay Defendants' attorneys' fees for requiring this opposition. [McLaughlin Decl., ¶ 4.] Liability for such fees should be jointly and severally extended to all counsel responsible for filing it whether or not admitted to this Court. [Dkt. No. 105.]

III. CONCLUSION

For all the reasons set forth above, Slep-tone's motion to reconsider should be denied and attorneys' fees should be awarded to Defendants for being forced to oppose it.

Respectfully submitted,

Dated: February 22, 2013

Law Office of Craig McLaughlin
By: /s/Craig McLaughlin
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