UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 08-61862-CIV-HURLEY/HOPKINS

MICHAEL S. POWELL, an individual,

Plaintiff,

v.

THE HOME DEPOT U.S.A., INC., a Delaware corporation; and INDUSTRIAPLEX, INC., a Delaware corporation,

Defendants.

_____/

DEFENDANT INDUSTRIAPLEX'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Defendant Industriaplex, Inc. (ñIndustriaplexò), by and through undersigned counsel, respectfully submits this memorandum, in support of its motion for summary judgment [DE 21], and in reply to Plaintiffôs memorandum in opposition [DE 29].

I. INTRODUCTION

The Plaintiff has failed to point to the existence of any factual allegations that would distinguish the complaint in this later-filed action, which alleges misappropriation of trade secrets (ñ*Powell II*ò), from the complaint in the earlier filed action, which unsuccessfully alleged tortious interference with a business relationship (ñ*Powell I*ò). Accordingly, the Plaintiff has implicitly acknowledged that the two cases are based on the same series of transactions and the same factual predicate. Because the claim-splitting analysis pertinent here borrows from claim-preclusion principles, and because the Eleventh Circuit has adopted the Restatementôs transactional approach, and has approved of the ñfactual allegationsò approach for determining claim preclusion, it follows that summary judgment is warranted in favor of Industriaplex. *Powell II* is based on the same series of transactions as *Powell I*, and a comparison of the factual allegations in both complaints leads to the undeniable conclusion that they are based on the same factual predicate. *See, e.g., In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1551 (11th Cir. 1990)

(adopting § 24 of the Restatement (Second) of Judgments, and stating ó[c]laims are part of the same cause of action when they arise out of the same transaction or series of transactions.ò); and, *First Ala. Bank v. Parsons Steel, Inc.*, 747 F.2d 1367, 1370 (11th Cir. 1984), reversed on other grounds, 474 U.S. 518 (1986) (ñIn a well-reasoned opinion, the federal district court found that the federal BHCA action and the state action were based on the same factual allegations and the damages claimed in each suit were substantially the same. The district court held that any additional state claims relating to the fact situation could have, and should have been raised in federal court under the doctrine of pendent jurisdiction.ò).

Defendant Industriaplex has also moved for summary judgment on the bases set forth in the motion for summary judgment and memorandum of law filed by the Defendant The Home Depot, USA, Inc. (ñHome Depotò), and hereby incorporates the reply memorandum filed by Home Depot in support of its motion for summary judgment, as well as, its reply to the Plaintiffôs Statement of Facts [DE 31, 32].

Plaintiff's Statement of Facts

The Plaintiff has filed a ñStatement of Facts as to Which There is a Genuine Issue to be Triedò [DE 28], which is devoid of ñspecific references to pleadings, depositions, answers to interrogatories, admissions, and affidavitsò, as required by S.D. Fla. L.R. 7.5(C). For this reason, the Plaintiffôs Statement of Facts should be stricken, or at the very least, given no weight.

In that filing, as well as in his memorandum in opposition, the Plaintiff has falsely represented that Industriaplex knew of the existence of the state court action at some early date. The truth is that Industriaplexôs counsel was provided a copy of the state court action, for the first time, on September 30, 2008 (over three months after its filing, and 6 days prior to an October trial setting), when a legal assistant for the law firm of Tripp Scott, P.A., forwarded the original version of the state court complaint by email. *See* Declaration of John Cyril Malloy, III, attached as Exhibit A. Although the action was filed on June 27, 2008, 37 days prior to a trial setting, Plaintiff did not file the notice required by S.D. Fla. L. R. 3.8. On December 1, 2008, this Court denied all pending motions to amend in *Powell I*, including motions that were filed prior to June 27, 2008, the date the Plaintiff filed *Powell II*. This Court should not look favorably on Plaintiffôs conduct, nor allow him to run an end-around the rules of procedure or this Courtôs case administration orders, which would be the result should this Court decide to either consolidate the two actions or allow this later-filed action to proceed.

II. MEMORANDUM OF LAW

A. Summary Judgment is Warranted Because It is Undisputed That the Complaint in Powell II is Based on the Same Factual Predicate as the Complaint in Powell I.

There can be little doubt that the complaints filed in *Powell I* and *Powell II* are based on the identical factual predicate and alleged wrongdoing by Industriaplex. Like the tortious interference claim brought in *Powell I*, the later-filed complaint for misappropriation of trade secrets is founded on allegations that Industriaplex copied the Plaintiffôs Safe Hands unit in 2004. Despite this, in the memorandum in opposition, the Plaintiff states that *Powell II* is ñbased on entirely distinct underlying factsò and relates to ñdistinct categories of damagesò *vis-à-vis* the tortious interference claim that was dismissed in *Powell I*. However, the memorandum does not elaborate upon the supposed distinct facts or damages. Both complaints are indeed based on the same factual predicate, and both claims (tortious interference with a business relationship and misappropriation of trade secrets) sought the same types of damages, i.e., Plaintiffôs damages, and a disgorgement of Defendantôs profits. In short, Plaintiff has not countered the comparison of the complaints contained in Defendantôs memorandum.

Undermining the Plaintiffôs argument to the contrary, a mere side by side comparison of the complaints filed by Plaintiff clearly demonstrates the identical factual predicate for the tortious interference claims of *Powell I*, and the trade secret claims of *Powell II*. Instances where the two complaints are similar, if not identical, include the following:

- Plaintiff began working to develop a mechanism to enhance the safety of the radial arm saws in Home Depotôs stores.
- Less than one week later, Plaintiff successfully developed a prototype of what he termed ñSafe Handsò, a safety top apparatus designed to enhance the safety of the radial arm saws used by Home Depot.
- In the meantime, Plaintiff started the patent application process for his mechanism. (both complaints referencing same Exhibit A).
- Approximately one week later, Plaintiff demonstrates his safety device to Home Depot representatives. (both complaints referencing same Exhibit B).
- After the demonstration, Home Depot issued eight purchase orders for the Plaintiffôs units.

- Plaintiff produced eight units and marked them with the terms ñPatent Pendingò. (both complaints referencing same Exhibit C).

- Around this time, Home Depot directs Industriaplex to copy the ñSafe Handsò unit and produce it for Home Depot.ò

- Ed Heck, a Home Depot employee involved in the saw guard project, and who interacted with the Plaintiff, later became employed by Industriaplex.

DE 22; SOF 12; See Ex. A, Complaint in *Powell I*; and, Ex. F & H, Complaint and Amended Complaint in *Powell II*.

ñAccording to the claim splitting doctrine, a district court as part of its general power to administer its docket, has the authority to stay or dismiss a suit that is duplicative of another case then pending in federal court.ò *Zephyr Aviation III, L.L.C. v. Keytech Ltd.*, 2008 U.S. Dist. LEXIS 21944, *3, n. 4 (M.D. Fla. Mar. 19, 2008). In the claim-splitting context, ñ[c]ourts borrow from the test for claim preclusion and consider whether to bar the second suit if it involves "the same parties or their privies" and "arises out of the same transaction or series of transactions" as the first suit. *Id.*

In the instant case, then, the proper analysis requires a determination as to whether, once final judgment has been rendered in *Powell I*, would *Powell II* be precluded under the doctrine of claim preclusion, also known as *res judicata*. If the answer to this question is yes, then the Plaintiff has improperly split his claim between *Powell I* and *Powell II*, and, accordingly, the Court may dismiss *Powell II*. *See Id.* Because the parties involved in *Powell I* and *Powell II* are identical, this analysis simply requires the Court to determine whether the claims asserted in *Powell I* and *Powell II* would be considered part of the same ñclaimò or ñcause of actionò for purposes of *res judicata*. *See e.g. Kaiser Aerospace & Elec. Corp. v. Teledyne Indus. (In re Piper Aircraft Corp.)*, 244 F.3d 1289, 1296-1297 (11th Cir. 2001); *Korman v. IRS*, 2007 U.S. Dist. LEXIS 91046, **18-19 (S.D. Fla. 2007).

The Eleventh Circuit has adopted the Restatementôs transactional approach for determining whether two claims are the same. *See, e.g., In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1551 (11th Cir. 1990) (adopting § 24 of the Restatement (Second) of Judgments, and stating ó[c]laims are part of the same cause of action when they arise out of the same transaction or series of transactions.ò); *Kaiser Aerospace & Elec. Corp. v. Teledyne Indus. (In re Piper Aircraft Corp.)*, 244 F.3d 1289, 1296-1297 (11th Cir. 2001) (ñIt is now said, in general, that if a

case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same 'claim' or 'cause of action' for purposes of *res judicata*."); and, *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999). The Eleventh Circuit has also approved of the factual allegations test that has been utilized in other circuits, which determines whether two claims are the same by comparing their factual allegations. *See First Ala. Bank v. Parsons Steel, Inc.*, 747 F.2d 1367, 1370 (11th Cir. 1984), reversed on other grounds, 474 U.S. 518 (1986).

In order to make this determination, the Court need only look to the allegations set forth in the pleadings of *Powell II*, as compared to *Powell I*, and take note that they are both based on the same alleged acts of misappropriation, regardless of the Plaintiffôs newly asserted legal theory in support of *Powell II*. Plaintiff cannot avoid the application of the basic principles of *res judicata* merely by applying a different legal theory in *Powell II*, than was asserted in *Powell I*. Rather, "*res judicata* applies not only to the precise legal theory presented in the prior case, but to all legal theories and claims arising out of the same nucleus of operative fact.ò *NAACP v. Hunt*, 891 F.2d 1555, 1561 (11th Cir. 1990); *see also Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 634 (9th Cir. 1990) (principles of *res judicata* apply where in first action counsel ñdid not happen to think of the theory he now advances,ò because ñoversight erects no bar of *res judicata* with respect to those claims that could have been pursued in the earlier litigationò).

In the instant case, a comparison of the allegations asserted against Industriaplex in the complaints of *Powell I* and *Powell II* clearly demonstrate that the actions asserted arise out of the same nucleus of operative facts, or ñtransactions or series of transactions,ò such that the doctrine of claim-splitting warrants dismissal of *Powell II*. *See* SOF 12; *Compare* Exhibit A, Complaint in *Powell I*, ¶¶ 19, 23-26, 28-29, 32, 38-39, and Exhibit H, Amended Complaint in *Powell II*, ¶¶ 13, 17-20, 22-24, 26, 28. For example, the pleadings in *Powell I* and *Powell II* both include, *inter alia*, allegations that Home Depot directed Industriaplex to copy the ñSafe Handsò unit and produce it for Home Depot, and that Ed Heck, a Home Depot employee involved in the saw guard project, and who interacted with the Plaintiff, later became employed by Industriaplex. *Id.* The instant case, namely, *Powell II*, should be dismissed because Plaintiff has improperly split his claim, by asserting a ñnewò legal theory for the alleged misappropriation of the Plaintiffôs ñSafe Handsò unit, which should have been asserted in *Powell I*, if at all.

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