

United States District Court,
W.D. Michigan, Southern Division.

PETTER INVESTMENTS, INC,
Plaintiff.

v.

HYDRO ENGINEERING, INC., and Hydro Engineering Equipment & Supply Co., LLP,
Defendants.

April 1, 2009.

Eugene J. Rath, III, Jason Leonard Budd, Matthew Gipson, Price Heneveld Cooper Dewitt & Litton, Grand Rapids, MI, Christopher E. Tracy, Mary Lankton Pate, Honigman Miller Schwartz and Cohn LLP, Kalamazoo, MI, for Plaintiff.

Brett L. Foster, Mark A. Miller, Holland & Hart LLP, Salt Lake City, UT, Richard A. Gaffin, Miller Canfield Paddock & Stone PLC, Grand Rapids, MI, for Defendants.

ORDER ADOPTING PROPOSED CLAIM CONSTRUCTION

GORDON J. QUIST, District Judge.

The Court held a Markman Hearing on February 26, 2009, for Plaintiff Petter Investments, Inc. (Petter) and Defendants Hydro Engineering, Inc., and Hydro Engineering Equipment & Supply Co., LLP (collectively, "Hydro"), to construe the disputed terms of Hydro's patents, U.S. Patent Nos. 6,799,591 and 7,258,749 (the "'591 patent" and "'749 patent," respectively). On February 5, 2009, the Court had provided a proposed construction of the disputed claim terms the parties agreed were most likely to be dispositive. (Docket no. 154-2). The Court adopts its proposed construction for the reasons given below and in its proposed construction.

At the hearing, Petter argued that "ridges and sloped groves" in claim 1 of the '591 patent should be construed as "narrow." It argued this in its brief as well, (Docket no. 117 at 10-14), but at the hearing it augmented its previous argument. (2nd Markman Hr'g Tr. at 6:13-10:5, 13:14-14:25, Feb. 26, 2009.) Petter noted that the Examiner initially rejected certain claims of the '591 patent because they were anticipated in a prior art, the Gross patent. (Id. at 8:8-9.) Petter claimed that Hydro distinguished the Gross patent by arguing that the Gross patent did not prevent debris accumulation on the pad, whereas Hydro's invention did. (Id. at 8:10-15.) According to Petter, Hydro persuaded the Examiner by arguing that its "narrow ridges and grooves" ensured the free flow of wastewater and debris. (Id. at 8:13-15.) Petter also argued that Hydro's invention would not effectively remove debris if the ridges and grooves were wide. (Id. at 9:5-10:2.)

In its brief, Petter did not argue Hydro's distinction of Gross. There, Petter argued that "the words 'ridge' and 'groove' are never discussed elsewhere in the prosecution history of the '591 patent. Thus, the patentee did not expressly define these terms in the prosecution history." (Docket no. 117 at 13-14.) Petter made no other reference in its brief to the prosecution history regarding the width of the ridges and grooves. Consequently, the Court had not considered this argument when it developed its proposed construction.

The Court is not persuaded by Petter's new argument. Hydro did not distinguish Gross on the basis of the

width of the ridges and grooves. The Examiner noted,

[r]egarding the Gross reference, [Hydro] argued the top surface of Gross is not impervious ... [m]oreover, [Hydro] argued, ... that the trough is at a site offset from the pad ... so as to allow access to removed drained materials from the trough without interference of a cleaning operation when a vehicle is on the pad. In view of these arguments, the Examiner agreed to withdraw the Gross reference.

(Docket no. 118-3 at 25; *see also* Docket no. 118-3 at 22.) The Examiner's assessment reveals that Hydro distinguished Gross on the basis of Hydro's impervious surface and the location of its trough, not the width of the ridges and grooves. Examination of Hydro's response to the Examiner's Office Action also reveals that Hydro did not distinguish Gross on that basis. (Docket no. 118-2 at 98-100.)

Hydro distinguished Gross, in part, by arguing that its invention effectively removed debris, but Gross did not. However, the Court is not persuaded that the functionality of Hydro's invention *requires* that the ridges and grooves be narrow. The effective removal of debris depends on other factors in addition to the width of the ridges and grooves, including the shape of the ridges, the degree and direction of the wash pad's inclination, the slipperiness of the surface and the nature of the debris. Furthermore, the dependence of the pad's effectiveness on the size of the ridges and grooves is one of degree; changing their width might make it more or less efficacious, but there is no discrete measure below which the debris does not flow at all, and above which it flows effortlessly. Modification of the pad's slope and coefficient of friction should allow it to remain reasonably effective through a range of ridge and groove widths.

The Oxford English Dictionary reveals that ridges are typically narrow. But the meaning of the term "ridges" must be considered in light of the patent itself. The '591 patent reveals that the ridges are elevated portions of the impervious top which support the weight of the vehicle or other item being washed. The grooves are lowered portions into which the effluent drains. The ridges must be capable of supporting the vehicle and permitting the fluid to drain. Their width is of little moment. The Court concludes that when the term is read through the eyes of one skilled in the art and in light of their intended purpose and the specification, a limitation on width is not requisite.

Although the Court has spent considerable time reviewing it, further discussion of the Court's reasoning would simply reiterate the proposed construction. For the aforementioned reasons and those given in the proposed construction, the Court adopts the February 5, 2009, proposed construction, (docket no. 154-2), as its construction of the disputed terms of Hydro's '591 and '749 patents.

Therefore,

IT IS HEREBY ORDERED that the proposed construction of the disputed terms of Hydro's '591 and '749 patents, docket no. 154-2, is hereby **ADOPTED** as this Court's construction of those terms.

W.D.Mich.,2009.

Petter Investments, Inc. v. Hydro Engineering, Inc.

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