IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8283
(Summary Calendar)

THE SCOTT FETZER COMPANY,
THE KIRBY COMPANY DIVISION,

Plaintiff-Appellee,

versus

DWIGHT KRZYWONSKI, An Individual,
and DISCOUNT VACUUM & APPLIANCE,
INC., A Texas Corporation,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(W-91-CA-222)

(November 1, 1993)

Before SMITH, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendants-Appellants Brazos Distributors, Inc., d/b/a Discount Vacuum & Appliance, Inc., a Texas corporation (Brazos), and its owner, Dwight Krzywonski (collectively, "Appellants"),

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeal the issuance of an injunction by the district court in favor of Plaintiff-Appellee, The Scott Fetzer Company, The Kirby Company Division (Kirby), in connection with Appellants' violations of 15 U.S.C. §§ 1114, 1125, civil conspiracy, and pendent state law claims of tortious interference with contracts. Specifically, Appellants claim that the district court's injunction violated Federal Rule of Civil Procedure 65(d), and that it was overbroad. As we do not consider the Fed. R. Civ. P. 65(d) allegation because it was raised for the first time on appeal, and as we find no abuse of discretion in the breadth of the injunction as issued, we affirm.

I

FACTS AND PROCEEDINGS

The following facts are from the findings made by the district court after trial, and are not challenged on appeal. Kirby is a Delaware corporation which sells and manufactures Kirby home cleaning systems. Brazos, located in Waco, Texas, is a national wholesale and local retail business which sells many types of household appliances, including vacuum cleaners. Kirby commenced this action against Appellants, alleging unfair competition and trademark infringement under the Lanham Act, a civil RICO claim, and a state law claim of tortious interference with contract. Kirby sought damages and injunctive relief.

Kirby owns the trademark depicting the name KIRBY and has the exclusive right to use it in connection with the sale of electric vacuum cleaners and parts to the public. For over 75 years, Kirby

has manufactured and sold new cleaning systems and related products through a nationwide system of distributors. Each Kirby distributor executes a distributor agreement in which the distributor contracts to sell new Kirby products only to "end-use consumers after in-home demonstration." The terms of the distributor agreement prohibit the sale by a distributor to unauthorized third-party resellers. This distribution system is designed to prevent unauthorized sales of Kirby products and to protect Kirby's reputation for superior performance and service with the consuming public.

Appellants are not now and have never been authorized to distribute Kirby products. In 1987, a Texas jury found that Appellants had engaged in tortious interference with one of Kirby's distributorship contracts. See Dwight's Discount Vacuum Cleaner City v. The Scott Fetzer Co., 860 F.2d 646, 648 (5th Cir. 1988), cert. denied, 490 U.S. 1108 (1989). Despite the result of that litigation, Appellants continued to make unauthorized purchases of Kirby products, buying several shipments of Kirby home cleaning systems in 1990 and 1991 from an individual named Tim Woods, who is not affiliated with Kirby. Several of the machines thus purchased had been taken apart and had their serial numbers removed with a metal grinder. This process can harm the performance of the machines and cause potential safety hazards. Krzywonski knew of the condition of those machines and of Kirby's safety concerns, but still offered them for sale as new. Some Kirby machines with the serial numbers removed were later returned as defective.

Appellants also listed their business in the Waco telephone directory as "Kirby Vacuums" and "Kirby Vacuums--Independent," causing public confusion between Appellants and the authorized Kirby dealer for that trade area. Appellants also participated in schemes with distributors to falsify Kirby warranty cards. Between 1987 and 1992, Appellants solicited to purchase new Kirby products for resale from authorized distributors, and held themselves out in a national trade magazine as authorized Kirby dealers. In this same magazine, Appellants placed advertisements offering to purchase entire inventories of all types of vacuum cleaners from retiring dealers, inducing some Kirby distributors to breach their distributorship agreements.

Following a two-day trial, the district court issued its findings and concluded that Appellants had violated 15 U.S.C. §§ 1114, 1125, and were liable to Kirby for trademark infringement and unfair competition. The court also determined that Appellants engaged in tortious interference with Kirby's distributor contracts, and civil conspiracy. The court enjoined Appellants

> from placing advertising in any medium that it or Krzywonski is a Kirby dealer, and Krzywonski and any entity in which he has a 10% or larger interest will be enjoined from buying or selling any Kirby product except machines that are, and are clearly designated and marked as "used" machines. Used machines mean machines which have previously been sold to a legitimate end-user, and then found its [sic] way back into the stream of commerce by trade-in or some other legitimate means.

The court also awarded Kirby $85,456 in damages, subject to reduction based on the value of 100 Kirby machines Appellants

retained. The court ordered Appellants to return the machines to Kirby for inspection and determination of value. The court stated it would deduct a reasonable amount from the damages award to account for the return of these machines. In light of these additional proceedings, the court delayed entry of final judgment and order granting injunction. In its final amended judgment and order granting injunction, the court reduced the amount of damages and reiterated the injunction set forth in its prior order.

II

ANALYSIS

A. Compliance with Rule 65(d)

Kirby correctly points out that Appellants did not advance their Rule 65(d) argument in the district court. We will not consider legal arguments that have not been presented to the district court and are raised for the first time on appeal. Pacific Mut. Life Ins. Co. v. First RepublicBank Corp., 997 F.2d 39, 45 (5th Cir.), petition for cert. filed, 62 U.S.L.W. 3165 (Aug. 26, 1993). Thus, we need not and shall not consider the Rule 65(d) argument. See Danny Kresky Enter. Corp. v. Magid, 716 F.2d 206, 214-15 (3d Cir. 1983) (refusing to consider Rule 65(d) argument not raised in district court).

B. Scope of the Injunction

Appellants argue that the injunction is overbroad insofar as it restrains them from buying or selling "any Kirby product" except used machines. Appellants contend this restriction goes too far because it forbids the purchase of parts as well as new cleaning

systems, and the Kirby distributor agreement does not limit the sale of Kirby parts. Appellants also insist that the injunction is overbroad in prohibiting them from lawfully purchasing inventories of Kirby products from retiring distributors.

We review "the district court's decision to grant an injunction for an abuse of discretion." Villar v. Crowley Maritime Corp., 990 F.2d 1489, 1499 (5th Cir. 1993). "When fashioning an injunction in a suit such as this, the court must give careful consideration to the possibility that a defendant found to have either infringed the plaintiff's mark or unfairly competed with the plaintiff will modify his behavior ever so slightly and attempt to skirt the line of permissible conduct." Conan Properties, Inc. v. Conans Pizza, Inc., 752 F.2d 145, 154 (5th Cir. 1985). This admonition seems particularly apt here, as Appellants twice have gone over the line of permissible conduct. Therefore, the district court did not abuse its discretion by framing its injunction broadly, even though it might prohibit conduct that, standing alone, would not justify relief. See United States v. Loew's, Inc., 371 U.S. 38, 53, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962); Chevron Chem. Co. v. Voluntary Purchasing Groups, 659 F.2d 695, 705 (5th Cir. 1981), cert. denied, 457 U.S. 1126 (1982).

AFFIRMED.