

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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HOWMEDICA OSTEONICS CORP., a  
subsidiary of STRYKER  
CORPORATION,  
Plaintiff,

v.

ZIMMER, INC., et al,  
Defendant.  
\_\_\_\_\_

**Hon. Dennis M. Cavanaugh**

**OPINION**

Civil Action No. 11-1857(DMC)(JAD)

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the court upon Motion Pursuant to FED. R. CIV. P. 65.1 by Defendants Zimmer, Inc., Zimmer US, Inc., Zimmer Spine, Inc. (Collectively, “Zimmer Corporate Defendants”) (May 31, 2012, ECF No. 300). Pursuant to FED. R. CIV. P. 78, no oral argument was heard. After carefully considering the submissions of the parties, and based upon the following, it is the finding of this Court that Defendant’s Motion is **denied**.

**I. BACKGROUND**

On April 1, 2011, Plaintiff filed a Complaint and Emergency Motion for Temporary Restraining Order (“TRO”) and Preliminary Injunction. (ECF No. 1, 4, 5). The Honorable Judge Katherine S. Hayden entered an Order to Show Cause with Temporary Restraints requested by Plaintiffs. (ECF No. 7). On April 11, 2011, Zimmer Corporate Defendants and Defendant Giebelhaus filed an Emergency Motion to Dissolve or Modify the TRO and requested a preliminary injunction hearing. (ECF No. 23). The Court denied that motion on April 18, 2011,

and Defendants filed Notices of Appeal to the United States Court of Appeals for the Third Circuit that same day. (ECF No. 39, 42, 43).

On May 6, 2011, the Third Circuit held that the TRO had expired as a matter of law on April 15, 2011. This case was consequently remanded for further proceedings at a preliminary injunction hearing on May 9 and 10, 2011. Howmedica Osteonics Corp. v. Zimmer, Inc., et al, Nos. 11-2016 & 11-2017, slip op. at \*2 (3d Cir. May 6, 2011).

On May 13, 2011, after a two-day hearing, the Court entered an Order awarding Preliminary Injunction sought by Plaintiff, implementing competition restrictions against the Zimmer Corporate Defendants and each of the 10 individual Defendants. (ECF No. 98). The Court did not order Plaintiff to post a bond to secure the Preliminary Injunction.

The Zimmer Corporate Defendants and Defendants Graveline and Giebelhaus appealed the Preliminary Injunction to the Third Circuit. The appeal was consolidated with an appeal brought by the other Defendants. Howmedica Osteonics Corp. v. Zimmer, Inc., et al, Nos. 11-2342 & 11-2343, 2012 WL 477624 (3d Cir. Feb 15, 2012). The Third Circuit vacated the Preliminary Injunction in whole against four of the individual Defendants: Graveline, Giebelhaus, Rowan and Poulemanos. The Third Circuit also vacated portions of Paragraphs A and F of the Preliminary Injunction, holding that those portions were impermissibly and overly broad and inequitably restricted Defendants from fairly competing for business in the marketplace against Plaintiffs. The Third Circuit remanded the case back to this Court to impose an appropriate injunction bond as required by FED. R. CIV. P. 65.

On February 28, 2012, Defendants filed an Emergency Motion for Imposition of a Bond to secure Plaintiff's Preliminary Injunction. (ECF No. 257). On March 12, 2012, after a full

hearing, this Court granted the Motion. (ECF No. 265). Plaintiff posted a bond in the amount of \$6 million on March 30, 2012. (ECF NO. 273).

## **II. DISCUSSION**

FED. R. CIV. P. 65(c) requires an injunction bond “in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” The “purpose of the bond requirement is to protect the enjoined party in the event the injunction should not have been imposed.” Howmedica, 2012 WL 477624 at \*5. Rule 65.1 establishes a procedure for collecting damages on the posted bond.

“No liability can arise on an injunction bond unless there is a final judgment in favor of the party enjoined.” American Bible Soc. v. Blount, 446 F. 2d 588, 594 (3d Cir. 1971); Clark v. K-Mart Corp., 979 F. 2d 965, 969 (3d Cir. 1992) (“It is settled that one can recover on an injunction bond only after a trial and final judgment on the merits.”) In order for damages to be awarded, the enjoined party must establish that they “had a right all along to do what they were enjoined from doing.” Latuszewski v. Valic Fin. Advisors, Inc., No. 03-0540, 2007 WL 4462739 (W.D. Pa. Dec. 19, 2007) aff’d, Latuszewski v. VALIC Fin. Advisors, Inc., 393 F. App'x 962 (3d Cir. 2010).

Zimmer Corporate Defendants argue that they are entitled to, “at a minimum, \$1,403,218 on the bond posted by Plaintiff, for damages sustained by virtue of being wrongfully restrained by the TRO.” (Pl.’s Br. 1, May 31, 2012, ECF No. 300). Defendants argue that their Motion is timely because it follows a final determination of the merits, citing to an unpublished case from the Northern District of Illinois.<sup>1</sup> While the Third Circuit did in fact vacate the injunction as to

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<sup>1</sup>Triumph v. Ward, No. 11-C-7927, 2011 WL 6754044 at \*3 (N.D. Ill. Dec. 22, 2011) (“A final determination may take the form of a decree dismissing the suit [or] a total or partial dissolution of the injunction.”)

certain individual Defendants, the Court only narrowed the scope of the Preliminary Injunction with regards to Zimmer Corporate Defendants. The Third Circuit did not determine whether the injunction was unlawful nor that the Zimmer Corporate Defendants were wrongfully enjoined. A determination as to whether the Zimmer Corporate Defendants were unlawfully enjoined cannot be made until “there is final judgment in favor of” Zimmer Corporate Defendants. American Bible Soc., 446 F. 2d at 594. In Sprint Communications Co. L.P v. CAT Communications Intern., Inc., 335 F. 3d 235, 242 (3d Cir. 2003), the Third Circuit affirmed the dissolution of a previously granted injunction. Yet in doing so, the Court clarified that “in affirming the dissolution of the preliminary injunction” it was “not suggest[ing] that the injunction was improvidently granted by the judge.” Id. at 242 n. 9. Likewise, the Third Circuit’s vacating certain portions of Paragraph A and F of the Preliminary Injunction as to Zimmer Corporate Defendants is not the same as a final decision on the merits. Thus, Zimmer Corporate Defendant’s Motion is premature and are not entitled to damages against the injunction bond.

**III. CONCLUSION**

For the foregoing reasons, Zimmer Corporate Defendant’s Motion Pursuant to FED. R. CIV. P. 65 is **denied**. An appropriate Order accompanies this Opinion.

  
DENNIS M. CAVANAUGH, U.S.D.J.

Dated: Dec 6, 2012  
cc: Hon. Joseph A. Dickson, U.S.M.J.  
Counsel of Record  
File