

APR 23 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOMMY BAHAMA GROUP, INC.,

Plaintiff-Counterdefendant -
Appellee,

v.

RICHARD SEXTON,

Defendant-Counterclaimant -
Appellant.

No. 10-15005

D.C. No. 3:07-cv-06360-EDL

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Elizabeth D. Laporte, Magistrate Judge, Presiding

Argued and Submitted April 16, 2012
San Francisco, California

Before: SCHROEDER, O'SCANNLAIN, and GRABER, Circuit Judges.

Richard Sexton appeals from the district court's grant of summary judgment in favor of Tommy Bahama. The facts are known to the parties and will not be recounted here.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before the district court, Sexton did not introduce sufficient evidence to counter Laura Case's declaration that the shirts he sold in 2004 were counterfeit. Nor did he specifically call into question Case's credibility. Thus, viewing the evidence in the light most favorable to Sexton, the nonmoving party, there was no genuine issue of material fact as to whether the shirts he sold in 2004 were authentic. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986). Accordingly, the district court did not err in granting summary judgment to Tommy Bahama on its infringement claims.¹

It was Sexton's burden to "overcome th[e] strong presumption" against the application of laches. *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1138–39 (9th Cir. 2006). The district court did not abuse its discretion or commit clear error in concluding he did not meet that burden. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 833–34 (9th Cir. 2002).

Because the record supports a finding that Sexton "has failed diligently to pursue discovery" during this litigation, *Emp'rs Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1130 (9th Cir. 2004) (internal

¹ Since Case's declaration is sufficient to affirm the district court's grant of summary judgment, we do not address Sexton's argument that it was improper for the magistrate judge herself to conduct a comparison of Sexton's eBay listings and Tommy Bahama catalogues.

quotation marks omitted), it was not an abuse of discretion for the district court to deny Sexton's request for a continuance of Tommy Bahama's summary judgment motion, *Visa Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986).

AFFIRMED.