

2nd Circ Won't Revive False Ad Suit Against McGraw-Hill

By Joe Van Acker

Law360, New York (January 7, 2016, 5:56 PM ET) -- The Second Circuit on Thursday affirmed a win for McGraw-Hill Cos. Inc. over a rival's false advertising claims, finding that their mutual construction data customers took the company's statements about its relative superiority — including some statements that may have literally been false — with a grain of salt.

In a summary order, the appellate court rejected Reed Construction Data Inc.'s allegations that McGraw-Hill lured would-be clients with bogus statements about the amount of data it offered in an effort to corner the market, upholding a New York federal judge's ruling.

"Discovery revealed only one customer who arguably relied upon McGraw-Hill's advertising in deciding between Reed and McGraw-Hill, while numerous other customers testified that they discounted the companies' representations as to their own products and conducted independent evaluations," the court said.

Based on the "overwhelming" evidence that customers didn't base their decisions on McGraw-Hill's ads, the Second Circuit said that no reasonable jury could find that the company violated the Lanham Act, which in turn undercut Reed's monopolization claim under the Sherman Act.

Reed provides data to manufacturers and others involved in construction work, allowing them to track the progress of various projects across the country to see if additional products and supplies are needed, according to court filings.

In 2009, Reed alleged that McGraw-Hill Construction Dodge, its primary competitor, engaged in "brazen industrial espionage" by posing as fictitious customers to access Reed's trade secrets, then used that ill-gotten knowledge to create an inaccurate report to influence clients.

U.S. District Judge J. Paul Oetken ruled in favor of McGraw-Hill in September 2014, finding that the report didn't prove to be material to customers, which sunk all of Reed's allegations, including its claim for tortious interference.

The Second Circuit accepted Judge Oetken's reasoning, and said that the lone customer who relied on McGraw-Hill's allegedly misleading statements lived in Georgia.

That state's Trade Secrets Act barred Reed's interference claim because it had freely provided its information through free trial subscriptions, meaning it couldn't have been a trade secret under the law, according to the appellate court.

In the end, Reed couldn't overcome the fact that regardless of its intent, McGraw-Hill was unable to use its marketing statements to lure customers away from Reed, the Second Circuit said.

“Although McGraw-Hill’s internal correspondence among its marketing professionals professed great enthusiasm for the advertising campaign at issue, the evidence from consumers makes clear that the market of sophisticated consumers relying largely on face-to-face sales was unmoved,” the court said.

Saul Shapiro of Patterson Belknap Webb & Tyler LLP, an attorney representing McGraw-Hill, told Law360 that he was "pleased" with the ruling.

“We are pleased that the Second Circuit agreed with the district court that the marketing materials at issue here had no impact on the marketplace,” Shapiro said. “Today’s decision cements McGraw-Hill’s victory after six years of litigation, and we are happy to have this behind us.”

Attorneys for Reed didn’t immediately respond to requests for comment on Thursday.

Reed is represented by William N. Withrow Jr., Alan Bakowski, James Andrew Lamberth and Kevin Gregory Meeks of Troutman Sanders LLP.

McGraw-Hill is represented by Saul B. Shapiro, Michelle Cohen and Joshua Goldberg of Patterson Belknap Webb & Tyler LLP.

The case is Reed Construction Data Inc. v. McGraw-Hill Companies Inc., case number 14-4022, in the U.S. Court of Appeals for the Second Circuit.

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