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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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The Cool Girls, Inc.
v.
Idea Nuova, Inc.

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Opposition No. 91120915
to application Serial No. 75729470
filed on June 15, 1999

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Steven M. Dorvee of Arnall Golden Gregory for The Cool Girls, Inc.

Roberta Jacobs-Meadway and Paul G. Gagne of Akin, Gump, Strauss, Hauer & Feld for Idea Nuova, Inc.

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Before Seeherman, Quinn and Mermelstein, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed to register the mark COOL GIRLS for "lamps and novelty lighting fixtures" in International Class 11.[1]

The Cool Girls, Inc. opposed registration. Although opposer did not specifically cite to Section 2(d) of the Trademark Act, it is apparent that opposer is claiming a

[1] Application Serial No. 75729470, filed June 15, 1999, alleging first use anywhere and first use in commerce on April 1, 1999.

likelihood of confusion pursuant to this section. In that connection, opposer makes the following pertinent allegations:

> Opposer has used the term COOL GIRLS in connection with educational and recreational services, namely, conducting a girls club for low income and underprivileged girls offering various programs including workshops in the field of self-esteem, personal safety, cultural awareness, conflict resolution, sexuality, courtesy, career choices, personal hygiene, and tutoring and distribution of course materials in connection therewith since 1991. Opposer filed its application for registration of the term COOL GIRLS on November 26, 1996. It received a federal trademark registration for this mark, Registration No. 2,121,454, on December 16, 1997.
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> Pursuant to 15 U.S.C. § 1063(a), Opposer believes it will be damaged by Applicant's registration of its COOL GIRLS mark because such mark is identical to Opposer's COOL GIRLS mark, and the use and registration by Applicant of the mark COOL GIRLS in connection with lamps and novelty lighting is likely to cause confusion, deception, and mistake among consumers.

Applicant, in its answer, denied the salient allegations of the notice of opposition.

The record consists of the pleadings and the file of the involved application. Neither party took testimony nor filed any other evidence. When opposer failed to file a brief on the case at final hearing, the Board issued a show

cause order under Trademark Rule 2.128(a)(3). Opposer filed an untimely response wherein it requested leave to file a late brief on the case. Opposer alleged that a brief was not timely filed because the parties had essentially settled the case, and that while applicant had agreed to sign the settlement agreement, it was never signed.[2] The Board granted the motion to file a late brief as conceded, and the brief was accepted and entered.[3] Applicant did not file a

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[2] According to the papers filed by opposer in response to the show cause order, opposer last contacted applicant in a letter dated February 14, 2003, that is, ten days before the close of opposer's testimony period on February 24, 2003. Opposer's counsel wrote "[w]e sent a written agreement to you on December 30, 2002 and we are surprised that there has been no response from your client yet." Applicant's counsel, in a letter dated February 19, 2003 and sent by facsimile and regular mail, apologized for applicant's delay. Applicant's counsel went on to indicate that his client was traveling overseas and that "[o]ur client hopes to be able to review and execute the agreement...in the next couple of days. We will forward the agreement...to you as soon as we receive it from the client." Notwithstanding applicant's nonresponsiveness, opposer took no follow-up action to preserve its testimony period. See Old Nutfield Brewing Co. v. Hudson Valley Brewing Co., 65 USPQ2d 1701 (TTAB 2002) [a party that fails to timely move for extension or suspension of dates on the basis of settlement does so at its own risk, and should not expect that such relief will be granted retroactively].

[3] The Board, in its order accepting the brief, also responded to opposer's "Motion to Enforce Settlement." More specifically, opposer asserted that the parties negotiated and finalized a settlement agreement in this case. Correspondence between the parties' attorneys and a copy of the unexecuted agreement accompanied the motion. Opposer stated that applicant had not executed or performed under the agreement "even though the parties had a meeting of the minds with regards to the settlement" and that the "only remaining matter is that the settlement agreement needs to be executed and performed." In denying the motion, the Board cited to TBMP § 605.03 (2d ed. rev. 2004) and stated that the Board has no jurisdiction to order the parties to enter into a settlement agreement or to enforce such an agreement. The settlement agreement remains unexecuted by the parties.

brief.[4]

Section 13(a) of the Trademark Act allows for opposition to the registration of a mark by anyone "who believes that they would be damaged by the registration of a mark..." The party seeking to oppose the registration of the mark must prove two elements: (1) that it has standing, and (2) that there is a valid ground to prevent the registration of the opposed mark. Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998). As indicated above, opposer made absolutely no evidence of record during its testimony period. Thus, the opposition must fail for lack of proof of standing and lack of proof of the ground of likelihood of confusion. Our reasons follow.

Statements made in pleadings cannot be considered as evidence in behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony. Times Mirror Magazines, Inc. v. Sutcliff, 205 USPQ 656, 662 (TTAB 1979); and TBMP § 704.06(a) (2d ed. rev. 2004). Further, applicant did not

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[4] While generally a defendant, if it believes that the plaintiff has failed to sustain its burden of proof in the case, will file a brief indicating the inadequacy of the plaintiff's case, there is no requirement that a defendant do so. Trademark Rule 2.128(a)(3); and TBMP §801.02 (2d ed. rev. 2004) ["The filing of a brief on the case is optional, not mandatory, for a party in the position of defendant."]. Consequently, it cannot be said that applicant has conceded the issues herein by failing to file a brief on the case. Nor does it validate opposer's claim that "[a]pplicant appears to have ceased to use the mark." (opposer's memorandum in support of its motion to be allowed to file brief out of time, p. 2).

make any admissions in its answer that would excuse opposer from having to prove its standing and a ground for relief.

Opposer attached exhibits to its final brief on the case. Evidentiary material attached to a brief on the case can be given no consideration unless it was properly made of record during the testimony of the offering party. Plus Products v. Physicians Formula Cosmetics, Inc., 198 USPQ 111, 112 n.3 (TTAB 1978); and TBMP § 539 (2d ed. rev. 2004). Because opposer neither took testimony nor introduced any other evidence, the exhibits attached to the brief obviously are not of record. Thus, this material has not been considered.

Lastly, opposer's brief contains numerous factual allegations in support of its claim. However, factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value. Electronic Data Systems Corp. v. EDSA Micro Corp., 23 USPQ2d 1460, 1462 n.5 (TTAB 1992); and TBMP § 704.06(b) (2d ed. rev. 2004).

The record is devoid of any testimony or evidence in support of opposer's claim. Opposer has the burden of coming forward with evidence to support its case. It is manifestly clear that opposer has not done so here.

Decision: The opposition is dismissed.