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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Quintessential Chocolates Co., Inc.
v.
Shelley B. Wright

Opposition No. 91163336
to application Serial No. 78256728
filed on June 2, 2003

Steven B. Lehat of Customs, International Trade, and
Administrative Law Practice for Quintessential Chocolates
Co., Inc.

Shelley B. Wright, pro se.

Before Quinn, Bucher and Zervas, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Shelley B. Wright to
register the mark shown below



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for "retail chocolate shop services specializing in hand-crafted chocolates" in International Class 35.¹

Quintessential Chocolates Co. Inc., doing business as Chocolat, opposed registration of the mark. The "notice of opposition" is a poorly drafted pleading, signed by Lecia Duke, opposer's president, that would have been dismissed had it been challenged for failure to state a claim upon which relief can be granted.² Be that as it may, the paper states that opposer is opposed to the registration sought and that it is entitled to relief. Opposer alleges that it specializes "in the creation and production of American made Liqueur Praline (liquid center chocolates)," and that opposer opened "a retail store" under the name CHOCOLAT. Opposer claims that its mark is the subject of a copyright registration and is identical to the logo mark sought to be registered by applicant. Opposer further claims that it first used the designations in November 2002. Opposer's paper concludes with the following: "My company would suffer more serious damage to our unique business if that application is completed. I respectfully submit this plea

¹ Application Serial No. 78256728, filed June 2, 2003, alleging a bona fide intention to use the mark in commerce. The term "CHOCOLAT" is disclaimed. The application includes a statement that "[t]he foreign wording in the mark translates into English as chocolate."

² Opposer originally appeared pro se, subsequently retaining counsel. Opposer's original counsel, who represented opposer during trial, withdrew as attorneys for opposer. Mr. Lehat was appointed counsel shortly before the briefing stage, and he prepared opposer's briefs at final hearing.

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for opposition, requesting that our common law prior use of this trademark be considered and I request that this (#78256728) application be cancelled or withdrawn."

We are construing opposer's statements as encompassing a pleading of prior use of the designations CHOCOLAT and CHOCOLAT and design (identical to the logo mark sought to be registered) for retail candy store services. Further, although a claim of likelihood of confusion under Section 2(d) was not pleaded, opposer indicates in its final brief that the issue is exactly that.

Applicant, for her "answer," filed a rambling, detailed narrative, contending that she "created and commercially used the Logo for my own benefit and profit." The answer does not comply with Fed. R. Civ. P. 8(b); this failure, however, was brought on by opposer's poor pleading. See TBMP §§ 311.01-311.02(d) (2d ed. rev. 2004). In any event, the gist of applicant's allegations is that she, and not opposer, is the owner of the mark. Several exhibits accompany this "answer."

The record consists of the pleadings and the file of the involved application. In addition, opposer filed a notice of reliance on twenty-seven documents comprising advertisements, articles from printed publications, and copies of official records. According to opposer, the parties did not conduct any discovery. Neither party took

testimony or introduced any other evidence. Both parties filed briefs.³

Before turning to the merits, we first address some evidentiary points. As indicated above, applicant attached several exhibits to its "answer." Trademark Rule 2.122(c) provides that except in a limited situation that does not apply here, an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced as an exhibit during the period for the taking of testimony. *Hard Rock Café Intl. (USA) Inc. v. Elsea*, 56 USPQ2d 1504, 1511 (TTAB 2000). Thus, the documents attached to the answer are not of record and, accordingly, have not been considered. TBMP § 317 (2d ed. rev. 2004).

Further, 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).

Applicant likewise attached several exhibits to her final brief on the case; opposer has objected to this evidence as being improperly submitted. Evidentiary

³ Opposer's motion to strike applicant's brief as untimely is denied.

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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 applicant 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, applicant's brief contains numerous factual allegations relating to her purported ownership of the involved mark. 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).

In sum, inasmuch as applicant did not take any testimony or properly introduce any other evidence, the exhibits attached to her pleading and her brief, and the factual allegations made in her pleading and her brief based thereon, have not been considered.

Notwithstanding that applicant did not properly introduce testimony or evidence in support of her position, the burden of proof remains with opposer in this opposition proceeding. In Board proceedings, the plaintiff must

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establish its pleaded case (in this case, priority and likelihood of confusion), and must do so by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). In order for a plaintiff to prevail on a claim of likelihood of confusion, opposer must prove it has proprietary rights in the term it relies upon to demonstrate likelihood of confusion as to source. If its claim of likelihood of confusion is based, as in this case, on ownership of an unregistered mark, the mark must be distinctive, inherently or otherwise, and plaintiff must show priority of use. *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981).

As we indicated above, opposer has pleaded use of CHOCOLAT and CHOCOLAT and design. Opposer's word designation is substantially similar to applicant's mark, and the logo designation is identical to applicant's mark. It is obvious that in the present case the contemporaneous use of the parties' marks in connection with identical services is likely to cause confusion as contemplated by Section 2(d) of the Trademark Act.

Thus, priority is the central issue in this case. In most cases, the issue of priority is raised by two competing parties who adopted and began using their marks without knowledge of the other party. In the present case, however,

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although there is no properly introduced evidence on this point, it would appear that, at some point in time, the parties had some relationship in this candy business endeavor. Inasmuch as both parties are claiming rights to the identical mark for identical services, it would appear that the crux of this controversy involves ownership of the mark. Accordingly, the issue of priority in this case is dependent on ownership of the mark. Priority and ownership are closely related issues because ownership in and to a mark arises from prior use of the mark in connection with a particular product or service. *E. I. duPont de Nemours & Co. v. G. C. Murphy Co.*, 199 USPQ 807, 812 (TTAB 1978); and *La Maur Inc. v. International Pharmaceutical Corp.*, 199 USPQ 612, 616 (TTAB 1978).

Unfortunately, the record introduced by opposer does not shed any light on the ownership issue. The entirety of opposer's evidence solely comprises examples of how opposer used its marks. We are at a complete loss to determine whether opposer's use was as the owner of the mark or whether opposer was acting as the manufacturer for applicant, or whether applicant was acting as a retailer for opposer, or if some other business relationship bearing on ownership existed between the parties. There simply is no testimony or any other evidence regarding the issue of ownership.

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As the plaintiff in this proceeding, it was incumbent upon opposer to submit evidence to demonstrate its proprietary rights in its claimed marks. Opposer, having the burden of proof herein, failed to meet its burden in this regard, and thus cannot prevail on its claim of likelihood of confusion based on the marks.

Decision: The opposition is dismissed.