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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Kajane McManus
v.
Steven G. Lisa, Ltd.

Opposition No. 91166249
to application Serial No. 78436516
filed on June 16, 2004

Kajane McManus, *pro se*.

Jon. E. Kappes for Steven G. Lisa, Ltd.

Before Quinn, Cataldo and Ritchie de Larena, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Steven G. Lisa, Ltd. filed an application to register
the mark PATENT IT! ("PATENT" disclaimed) for "legal
services."¹

Kajane McManus, in an amended notice of opposition,
opposed registration under Section 2(d) of the Trademark
Act, 15 U.S.C. §1052(d), on the ground that applicant's
mark, when used in connection with applicant's services, so

¹ Application Serial No. 78436516, filed June 16, 2004, alleging
first use anywhere and first use in commerce on January 29, 1994.

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resembles opposer's previously used mark PATNTIT for intellectual property law services as to be likely to cause confusion.

Applicant, in its answer, denied all of the allegations in the amended 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 during their respective testimony periods. At the briefing stage, after the expiration of the testimony periods, opposer contemporaneously filed a "Trial Brief" and "Opposer's First Notice of Introduction of Evidence Under Rule 2.122" (with accompanying materials). Applicant then filed its brief wherein it argues that the opposition should be dismissed due to opposer's failure to take testimony or introduce any other evidence. Opposer filed a reply brief wherein she indicates that she "did not take testimony for the simple reason that, in its replies to Opposer's discovery papers, Applicant could not prove a date of first use prior to that of Opposer." (Reply Brief, p. 1). Opposer goes on to state:

Opposer is a patent agent. As such, her knowledge of Trademark Trial and Appeal Rules, etc. is minimal, at best. Opposer earnestly has endeavored, to the best of her ability, to follow the vague and rather confusing guidelines available to her in regard to trademark oppositions, but this is not her forte, and she is probably way out of her league, so to speak, in this matter,

where her errors which may be deemed minor in nature compared to the overall outcome of this matter, may only harm her and not any other party. Opposer read pertinent rules of practice in this matter and tried to apply them to the best of her ability based on her knowledge of procedures in patent matters. Patent matters are all she has thorough knowledge of, as she has been a patent agent for almost 25 years. Therefore, Opposer submits she has not in any manner ignored the rules, but may have followed them imperfectly due to her lack of expertise in this field, outside of her day to day endeavors in patent matters. Opposer believes she has met her burden of proof and she should not have her opposition go to the wayside because she may not have understood all the rules...She should not lose her right to what was hers first, due to her confusion in studying the rules. The law is to provide justice, more than it is to provide for proper form, from an individual. Surely, one cannot be denied justice based on minor "pro forma" discrepancies. (Reply Brief, p. 3).

Section 13(a) of the Trademark Act, 15 U.S.C. §1063(a), 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

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must fail for lack of proof of standing and lack of proof of the ground of likelihood of confusion. Our reasons follow.

The Board, early on in this proceeding in a pre-trial order dated January 17, 2007, stated the following:

"[S]trict compliance with the Trademark Rules of Practice and where applicable, the Federal Rules of Civil Procedure is expected of all parties before the Board, whether or not they are represented by counsel," and "[o]pposer should also familiarize herself with the Trademark Rules of Practice."

Despite this admonition, opposer, as plaintiff and having the burden of proof, has failed to follow the rules in meeting her burden. A party may represent itself as opposer did in this proceeding but, as expected of all parties, whether or not represented by counsel, they are charged with familiarity with the rules governing practice and procedure before the Board.

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

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In reviewing the file we note that the parties submitted voluminous materials in connection with various motions (and responses thereto). The materials include affidavits and discovery responses. None of these materials, however, was later introduced at trial. In denying applicant's motion for summary judgment, the Board clearly stated:

The parties should note that the evidence submitted in connection with the motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1993); *American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).

Opposer submitted exhibits, as indicated above, at the time she filed her final brief on the case. Evidentiary material accompanying 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 evidence submitted with the brief obviously is not of record. Thus, this material has not been considered.

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Lastly, opposer's brief contains numerous factual allegations in support of her 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.