

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

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AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Odessa Bowden
v.
Timothy Jones

Opposition No. 91168545
to application Serial No. 78590458

Odessa Bowden, pro se.¹

Jill M. Pietrini of Manatt, Phelps & Phillips, LLP for
Timothy Jones.²

Before Grendel, Drost, and Mermelstein, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

Applicant, Timothy Jones, has applied to register the
mark NOBODY JONES (standard character drawing) on the

¹ Opposer has electronically filed a paper with a cover sheet that describes the submission as "Brief on Merits for Plaintiff." The cover sheet is dated May 15, 2008. The four-page document included with the cover sheet is actually entitled "Notice of Opposition." The paper is dated May 14, 2008, and it reads like a notice of opposition although it is not a copy of opposer's original notice of opposition.

² Applicant has not submitted a brief.

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Principal Register under the intent-to-use provision of the Trademark Act for:

Clothing, namely, t-shirts, shorts, pants, sweatshirts, sweatpants, scarves, aprons, jackets, jean jackets, tank tops, vests, neckties, hockey jerseys, soccer jerseys, fashion knit shirts, button-down shirts, basketball jerseys, long sleeve t-shirts, sweaters, baseball jerseys, girl's t-shirts, polo shirts, wind resistant jackets, muscle t-shirts, baby rompers, toddler t-shirts, allover, mock turtle necks, track pants, ponchos, boxer shorts, bandanas, swimwear, bathrobes, beachwear, lingerie, shirts, rainwear, socks, night shirts, and hooded shirts; headwear; and footwear in Class 25.

Serial No. 78590458 filed March 18, 2005.

After the mark was published for opposition, on January 11, 2006, Odessa Bowden, opposer, filed an opposition to the registration of applicant's mark. Opposer alleges that:

Since at least September 5, 2001, Odessa Bowden has owned and conducted a clothing business using the name "Nobody Jones." Ms. Bowden has three Nobody Jones clothing boutique stores in the Los Angeles area where she has conducted business under this name for years...

Although Ms. Bowden has attempted to register her mark, she has been unable to because of the applicant's pending application.³

The applicant's mark is identical to Ms. Bowden's mark. Both companies using the marks are involved in the clothing industry in the same city, county, and state and will advertise and conduct business in the same retail market. Ms. Bowden has used her mark for years. Therefore, the actual confusion of consumers is apparent. Consumers would be sufficiently confused as not to be able to discern the difference between the two marks...

Based upon the foregoing, the office should deny registration of the mark to Timothy Jones and permit registration to Odessa Bowden.

³ No evidence concerning this application was introduced.

Applicant denied the salient allegations of the notice of opposition.

Discussion

The record includes the pleadings and the file of the involved application. Opposer also submitted two documents entitled "Testimony of Plaintiff," one filed on May 25, 2007, and the other on May 26, 2007. On July 23, 2007, applicant sought dismissal under 37 CFR § 2.132(a) on the grounds that opposer "did not (1) file evidentiary materials with the Board with a notice of reliance; (2) did not provide Applicant with the evidentiary materials during Opposer's testimony period, and only served this materials three weeks after Opposer's testimony period expired; and (3) Opposer did not properly introduce and demonstrate the relevance of the evidentiary materials." Amended Motion for Dismissal at 5.⁴ Exhibit A to applicant's motion is opposer's letter and enclosures. Opposer's letter begins with the following sentence: "This letter serves as delivery of copies of the evidence submitted to the United States Patent and Trademark Office in reference to the opposition of your client['s] use of the 'Nobody Jones' trademark."

⁴ This is the last paper applicant filed in the case.

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We set out below the documents attached to opposer's two "Testimony for Plaintiff" filings and we compare them to Exhibit A that applicant has attached to his motion, which purports to be the service copies of those documents.⁵ Other than the cover sheet, the first "Testimony for Plaintiff" contained the following documents with brackets explaining any differences between the documents opposer filed and those served on applicant:

California State Seller's Permit (Nobody Jones/Nobody Jones.com 7/1/2003 date)
[Applicant's Exhibit included an additional Seller's Permit with a 9/15/2002 date]

City of Los Angeles Tax Registration Certificate to Odessa A. Bowden, start date 10-31-03

Signal Tribune Receipt for "Fictitious [sic] Name Publishing Fee" dated 11/4/2003 for Nobody Jones

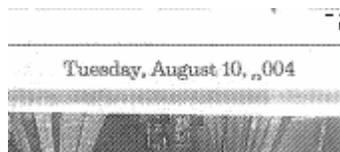
Register.com receipt for nobodyjones.com dated January 9, 2006

A Nobody Jones Boutique website page

Press releases dated December 13, 2003 and March 1 and June 28, 2004 for Nobody Jones

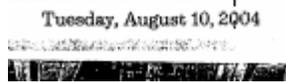
Los Angeles Times article entitled "Taking the next step" dated August 10, 2004.

In opposer's copy, the "2004" date in the newspaper article appears as:



In applicant's copy, the "2004" date of the newspaper article appears as:

⁵ Applicant did not submit any evidence.



L.A. Watts Times articles dated May 20, 2004

Wave Community Newspapers article dated June 24, 2004

California Apparel News article dated May 21-27, 2004

Today's Black Woman article dated February/March 2005

Los Angeles Wave article dated April 12, 2007

Our Weekly article dated April 27 - May 3, 2006

L.A. Focus on the Word articles dated July 2004 and
May, June and August 2006

aARTsCape article Vol. 1 Issue 3

2 pages of ads from an unidentified publication

Photographs of a vehicle with NobodyJones.com lettering
on it

The second "Testimony of Plaintiff" contained the
following documents in addition to the cover sheet:

A letter from opposer's former counsel to applicant's
counsel

14 pages of Invoices/orders of Nobody Jones from
American Apparel.net
[6 pages are not included in applicant's Exhibit A]

Photographs of women setting up a room
{These photographs are not included in applicant's
Exhibit A}

The last item in the second "Testimony for Plaintiff"
is an unsigned narrative, apparently by Odessa Bowden,
describing her marketing activities. The paper includes the
statement that: "All of these things have been and continue

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to be done in the name of Nobody Jones." This narrative is not attached to applicant's Exhibit A.

Applicant's motion to dismiss also included certain documents with its Exhibit A that are not attached to either of opposer's documents entitled "Testimony for Plaintiff."⁶

These documents include:

6 pages from the website www.nobody-cares.org apparently associated with Timothy Jones (applicant)

A typed page with a list entitled "Companies that Identify Odessa Bowden as/or DBA Nobody Jones"

A memo and envelope from Wells Fargo dated November 10, 2003

A page of photographs with a sign that reads "People Coordinated Services"

A letter to applicant's counsel from opposer's former counsel dated January 10, 2006.

A newspaper article concerning Victoria's Secret

On September 6, 2007, in its order (p. 2), the board denied the motion to dismiss where, "as here, a plaintiff presents evidence other than Patent and Trademark Office records, the Board will not entertain any motion for judgment but, rather, will wait until final hearing and examine the evidence."

⁶ These documents were never introduced into evidence during either party's testimony period. We have considered them only in the context of determining whether the documents attached to opposer's "Testimony for Plaintiff" may be considered evidence submitted by a notice of reliance.

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The important preliminary question is whether we can consider any of opposer's evidence. Obviously, opposer has not actually submitted the "testimony of plaintiff" despite the heading of her filings. The only thing that resembles testimony is the document that appears to be the unsigned, unidentified statement of plaintiff/opposer. It is not clear if applicant was even served with this document and there has been no stipulation to submit testimony by affidavit or any other form. *Boyd's Collection Ltd. v. Herrington & Co.*, 65 USPQ2d 2017, 2020 (TTAB 2003) ("[P]arties may stipulate to the entry of testimony by affidavit. However, in the absence of such a stipulation, an affidavit or declaration is not admissible under a notice of reliance") (citations omitted). Therefore, we will not consider this statement. TBMP § 702 (2d ed. rev. 2004).

The Trademark Rules provide that certain types of documents may be submitted by a notice of reliance:

Printed publications, such as books and periodicals, available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding, and official records, if the publication or official record is competent evidence and relevant to an issue, may be introduced in evidence by filing a notice of reliance on the material being offered. The notice shall specify the printed publication (including information sufficient to identify the source and the date of the publication) or the official record and the pages to be read; indicate generally the relevance of the material being offered; and be accompanied by the official record or a copy thereof whose authenticity is established under the

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Federal Rules of Evidence, or by the printed publication or a copy of the relevant portion thereof.

37 CFR § 2.122(e).

The Trademark Trial and Appeal Board Manual of Procedure further explains that: "A notice of reliance is essentially a cover sheet for the materials sought to be introduced. This cover sheet is entitled 'notice of reliance' and it serves, as the title suggests, to notify opposing parties that the offering party intends to rely on the materials submitted thereunder in support of its case. The notice of reliance must include a description of the proffered materials and, in some instances, must indicate the relevance of those materials to the case." TBMP § 704.02.⁷

Opposer has failed to comply with the requirements for submission of a notice of reliance. Opposer's paper, which was not identified as a notice of reliance, did not specify the printed publications (including information sufficient to identify the source and the date of the publication for many),⁸ nor did it specify the general relevance of the material being offered. We also are uncertain what documents were served on applicant. The documents applicant received apparently included some documents that opposer did

⁷ The narrative statement concerns opposer's activities and it is not a description of the proffered materials or an indication of the relevance of the material being offered.

⁸ Opposer's cryptic list of attachments for her "Testimony for Plaintiff" submissions, e.g. "Website," "Press_kit.pdf" and "Articles.pdf," is not a sufficient identification in this case.

not file with the board while others that were filed with the board were apparently not served on applicant. Additionally, applicant objected to the documents entitled "Testimony of Plaintiff" after he discovered that opposer had filed her documents with the board without serving him.⁹ Therefore, we decline to consider the evidence that opposer submitted with her "Testimony of Plaintiff" to be of record. As a result, opposer has submitted no admissible evidence in this case.

Opposer, as plaintiff in the opposition proceeding, bears the burden of proving, by a preponderance of the evidence, her priority of use and likelihood of confusion. *See Cervecería Centroamericana, S.A. v. Cervecería India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). Inasmuch as opposer cannot establish her priority or likelihood of confusion without evidence, she cannot prevail in this proceeding.

Conspicuously missing from petitioner's pleadings and the record is proof of petitioner's ownership of either a trademark registration or of a common-law mark. The grounds for cancellation set out in the petition are

⁹ Also, we cannot hold that there has been any implied agreement by the parties to submit evidence in this fashion. *See Original Appalachian Artworks Inc. v. Streeter*, 3 USPQ2d 1717, 1717 n.3 (TTAB 1987 ("In this case, applicant, an individual acting pro se, filed neither evidence nor a brief on the case; we cannot say, therefore, that as the result of any action or statement, he treated as being of record the material improperly offered by notice of reliance").

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likelihood of confusion and false suggestion of a connection with petitioner's marks.

Although petitioner pleaded ownership of common-law marks in the petition to cancel, such matters were denied in respondent's answer, and are therefore subject to proof. Without such evidence, petitioner can prove neither its standing nor its substantive claims. Even if the documents attached to petitioner's notice of reliance were admissible (which they are not), they would not be sufficient to establish petitioner's ownership and prior use of the asserted marks. The documents are not admissible to prove the truth of any matters asserted therein and, in any event, there is no clear indication of whether they were ever circulated to the public (and if so, when) in such a manner as to create the prior trademark rights asserted in the petition.

Boyd's Collection, 65 USPQ2d at 2020 n.10.

Therefore, it is appropriate to dismiss this opposition.

Despite this determination, we do not hesitate to add that even were we to consider the evidence attached to opposer's "Testimony for Plaintiff" to the extent it could have been considered with a proper notice of reliance, opposer would still not prevail. Opposer's documents include copies of photographs, the letter of its counsel, invoices, a website page, and receipts that may not be submitted by a notice of reliance. 37 CFR § 2.122(e); *Hard Rock Cafe Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1403 (TTAB 1998) ("Printed publications do not include press releases by or on behalf of a party; press clippings, which are essentially compilations by or on behalf of a party of article titles or abstracts of, or quotes from, articles;

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studies prepared for a party; affidavits or declarations; or product information") (footnote omitted); *Glamorene Products Corp. v. Earl Grissmer Co.*, 203 USPQ 1090, 1092 n.5 (TTAB 1979) ("Private promotional literature is not presumed to be publicly available in the sense of being readily accessible for inspection in libraries open to the public or of such currency that the other party is presumably familiar with it"); *Cadence Industries Corp. v. Kerr*, 225 USPQ 331, 332 n.2 (TTAB 1985) (Letters between counsel not proper subject matter for a notice of reliance); and *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370 (TTAB 1998 ("The element of self-authentication which is essential to qualification under Rule 2.122(e) cannot be presumed to be capable of being satisfied by Internet printouts"). Opposer's advertising excerpts from an unspecified publication are also not admissible. *Hard Rock Cafe*, 48 USPQ2d at 1405 (A "proffered excerpt from a newspaper or periodical is lacking in foundation and, thus, is not admissible as evidence to the extent that it is an incomplete or illegible copy ... or is not fully identified as to the name and date of the published source").

Furthermore, opposer's California seller's permit and tax registration certificate are not admissible under a notice of reliance because they are not properly authenticated. 37 CFR § 2.122(e); *Hovnanian Enterprises*,

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Inc. v. Covered Bridge Estates, Inc., 195 USPQ 658, 664 (TTAB 1977) ("The notice of reliance filed by respondent also identified two 'official records', one being a deed of realty and the other a confirmatory assignment. Apart from considerations of their admissibility under the rules of evidence, these documents were not authenticated as required by Trademark Rule 2.122(c) and therefore have not been considered as part of respondent's record"). Even if we were to consider the evidence of the California Seller's Permit and the Los Angeles Tax Registration Certificate, this evidence does not demonstrate that opposer actually used the mark NOBODY JONES for retail stores or on clothing items. Also, the receipt for "Fictitious [sic] Name Publishing Fee" contains an excerpt entitled "Fictitious Business Name Statement" for NOBODY JONES that includes the sentence: "The registrant has not yet begun to conduct business under the fictitious business name or names listed herein." The date of this receipt is after any date on the Seller's Permit (7/1/2003) or tax registration certificate (10/31/03). These documents also do not show any type of actual use that would support an argument of priority based on trade name or use analogous to trademark use. *Liqwacon Corp. v. Browning-Ferris Industries, Inc.*, 203 USPQ 305, 308 (TTAB 1979) ("Thus, in any controversy involving the ownership of a particular mark or priority therein, the

right thereto accrues to the party first to use the mark in trade and not to the first adopter but subsequent user of the term in trade").

Newspaper articles are proper subject matter for a notice of reliance and they could be considered as evidence for plaintiff. While newspaper articles like other printed publications may be made of record by notice of reliance under 37 CFR § 2.122(e), they are admissible and probative only for what they show on their face, not for the truth of the matters contained in the document, unless a competent witness has testified to the truth of these matters. *Logicon, Inc. v. Logisticon, Inc.*, 205 USPQ 767, 768 n.6 (TTAB 1980) ("The magazine articles and the article from Barron's are hearsay in nature and thus are probative not for the truth of the matters contained therein but rather only for what they show on their face"); *Food Producers, Inc. v. Swift & Company*, 194 USPQ 299, 301 n.2 (TTAB 1977) ("The probative value of the publications has been confined in our consideration of petitioner's record to what they show on their face rather than for the truth of the matter contained therein since there is no opportunity to ascertain the source and/or basis for the information or for respondent to confront and cross-examine the individual or individuals responsible therefore"); and *Exxon Corp. v. Fill-R-Up Systems, Inc.*, 182 USPQ 443, 445 (TTAB 1974) (To "the extent that those

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articles have been offered by opposer-petitioner without further testimony for the truth of their contents, namely, that the events and activities mentioned therein did occur or take place as related, they constitute inadmissible hearsay"). Therefore, we cannot rely on these documents that are apparently about opposer's business to prove the truth of the matter asserted in those articles.¹⁰

Therefore, even if we considered opposer's "Testimony for Plaintiff" only the newspaper articles would be of record and they cannot be used to prove the truth of the matter asserted. As a result, even if we assume opposer has standing, we have no evidence that establishes opposer's ownership and priority of use of the mark NOBODY JONES for any goods or services. Upon this record, opposer cannot prevail.

Decision: The opposition is dismissed.

¹⁰ We also note that opposer's brief primarily discusses her goods while the documents attached to the "Testimony for Plaintiff" are primarily directed to her retail services.