

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

May 28, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

AGCO Corporation

v.

Scott Snyder

Cancellation No. 25,003

Michael D. Hobbs, Jr. of Troutman Sanders LLP for AGCO
Corporation.

Scott Snyder, pro se.

Before Simms, Quinn and Hairston, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

AGCO Corporation (petitioner) has sought cancellation
of Registration No. 1,928,690, issued October 17, 1995, for
the mark FARMHAND for consultation services in the field of
agricultural information, namely, recommending proper usage
of agricultural chemicals, fertilizers and seed. The

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registration is held by Scott Snyder (respondent). In the petition for cancellation, petitioner asserts ownership of Registration No. 963,394, issued July 10, 1973 (renewed), for the mark FARMHAND for "agricultural and material-handling equipment—namely, loaders [and] grinder-mixer mills." In the petition for cancellation, petitioner asserts use through its predecessor-in-interest since as early as September 1940. Petitioner alleges that respondent's use of his registered mark is likely to cause confusion with petitioner's mark. The petition is accompanied by a status and title copy of the pleaded registration showing ownership in petitioner and current validity. In his answer, respondent denied the essential allegations of the petition.

During the course of this proceeding, petitioner filed a motion for summary judgment along with certain materials, including respondent's answers to petitioner's discovery requests and a declaration of its vice president and general counsel, Michael Swick. On November 6, 1997, the Board denied petitioner's motion for summary judgment, concluding that there were genuine issues of material fact as to the channels of trade of the respective goods and services, the nature and extent of any relationship or connection between petitioner's goods and respondent's

services, and the appropriate class of consumers for petitioner's goods. The Board reset trial dates.

On the last day for submitting testimony and evidence, petitioner filed a "brief in support of cancellation." In this brief, petitioner refers to a number of items which it apparently thought were of record. For example, petitioner refers to the declaration of Mr. Swick, submitted in connection with its motion for summary judgment.

Petitioner also refers to respondent's discovery responses in a number of instances. However, evidence submitted in connection with a motion for summary judgment is of record only for purposes of that motion. See Trademark Rule 2.127(e)(2) and TBMP §528.05(a). Indeed, in its ruling on petitioner's motion for summary judgment, the Board noted in a footnote that certain materials were being considered for purposes of ruling on that motion only. For purposes of trial, the summary judgment evidence does not form part of the evidentiary record to be considered by the Board at final hearing unless it is properly introduced in evidence during the appropriate trial period. Id.

Here, petitioner took no testimony, and the only evidence of record is petitioner's pleaded registration. During petitioner's testimony period, petitioner only filed

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its brief. The only evidence of record, therefore, is petitioner's registration.

During his testimony period, respondent, then acting pro se, submitted a one-page letter arguing that confusion is not likely because petitioner's farm equipment is different from respondent's consulting services.

Respondent submitted no evidence and took no testimony.

During petitioner's rebuttal testimony period, petitioner filed a one-page response denominated "Petitioner's Rebuttal Testimony in Support of Cancellation."

Because petitioner's registration long predates any date upon which respondent may rely, there is no question that petitioner has priority in this case. Also, the marks of the parties are identical. The only question before us is whether, on this record, petitioner has established, by its registration alone, a sufficient relationship between its goods and respondent's services such that consumers would believe that the respective goods and services come from the same source. We find that petitioner has failed to meet its burden of proof.

While petitioner argues that the public will assume that a manufacturer of farm equipment will also provide consultation services relating to farming activities, there is simply no evidence to support this statement. While it

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is true that the respective goods and services may, of course, be offered to the same individuals--farmers--we do not believe that this fact alone is sufficient for us to conclude that those individuals will believe that respondent's consultation services relating to agricultural chemicals, fertilizers and seed offered under the mark FARMHAND emanate from or are sponsored by the source of loaders and grinder-mixer mills. If there were evidence of record, such as testimony that petitioner or other farm equipment manufacturers offered both farm equipment and consultation services of the nature that respondent offers, or other evidence tending to support the argument that potential consumers would associate respondent's consulting services with petitioner's loaders and grinder-mixer mills, then we may have reached a different conclusion.

Similarly, while petitioner maintains that it has fifty years of continuous use of its pleaded mark and that its mark is "extremely well-known" (brief, 2) and is one of the best known in the agricultural industry, there is simply no support in this record to establish those facts. Finally, while petitioner asserts that respondent's conduct evidences "willful bad faith intent to create confusion" (brief, 13), this record is barren of evidence with respect to any bad faith on respondent's part. We conclude that

petitioner has failed to meet its burden of proof on the issue of likelihood of confusion.

We should point out that, had we construed petitioner's brief as a "notice of reliance" on material previously submitted that is subject to reliance by notice (such as respondent's discovery responses),¹ we would have reached the same result. That is to say, there is nothing in those responses which would cause us to believe that consumers of the respective goods and services are likely to believe that petitioner is the source of respondent's services.²

¹ See Trademark Rule 2.120 (j)(3)(i).

² Respondent's discovery responses reveal the following information and admissions. With respect to his services, respondent indicates that he provides services such as supplying recommendations on fertilizers, pesticides, calibrations for sprayers and planters, and scouting fields for weeds, insects and other growing problems. Respondent states that his services are solicited by contacting growers by means of computer, mailers, radio and newspaper advertisements, and agents. Respondent says that his services are offered to customers that own agricultural equipment including those that may own petitioner's FARMHAND agricultural equipment. Respondent indicates that he first used his mark on December 14, 1993, in connection with his services. Concerning petitioner's use, respondent admits that petitioner's use preceded respondent's registration and that loaders and grinder-mixer mills are used in the agricultural industry. Respondent states that he is aware of no instances of actual confusion. (The Swick declaration is not subject to reliance by notice.)

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Decision: The petition for cancellation is dismissed with prejudice.

R. L. Simms

T. J. Quinn

P. T. Hairston
Administrative Trademark
Judges, Trademark Trial
and Appeal Board