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Mailed: May 2, 2003

Paper No. 17
ejs

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Avatar Retirement Communities, Inc.

Serial No. 76/084,220

Richard W. James, Jeffrey M. Gitchel and Sabrina J. Hudson
of Kirkpatrick & Lockhart LLP for Avatar Retirement
Communities, Inc.

Brian D. Brown, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Seeherman, Hohein and Drost, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Avatar Retirement Communities, Inc. has appealed from
the final refusal of the Trademark Examining Attorney to
register YOUR LIFE YOUR WAY as a mark for the following
services, as amended:

Construction of homes as part of an
age-restricted community; planning and
laying out of residential facilities,

recreational facilities, social and community facilities, and meeting centers in age-restricted communities; construction services for age-restricted communities, namely, planning, laying out and custom construction of age-restricted residences, recreational facilities, social and community facilities, and commercial buildings (Class 37); and

Providing recreational services in the nature of golf, walking trails, biking, arts and crafts, swimming facilities and exercise facilities, all in connection with the age-restricted communities (Class 41).¹

Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark YOUR HOME YOUR WAY, previously registered for "construction services, namely, planning, laying out and construction of residential communities,"² that, if used in connection with applicant's identified services, it is likely to cause confusion or mistake or to deceive.

The appeal has been fully briefed; an oral hearing was not requested.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative

¹ Application Serial No. 76/084,330, filed July 5, 2000, based on an asserted bona fide intention to use the mark in commerce.

² Registration No. 2,070,683, issued June 10, 1997; Section 8 affidavit accepted; Section 15 affidavit received.

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facts in evidence that are relevant to the factors set forth in **In re E. I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. **Federated Foods, Inc. v. Fort Howard Paper Co.**, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the services, applicant's services in Class 37 are in part identical and in part closely related to the registrant's services. Specifically, applicant's services include planning and laying out of residential facilities in age-restricted communities, and the cited registration is for planning and laying out of residential communities. Although applicant's services are limited to age-restricted communities, the registrant's services must be deemed to encompass such communities as well since the identification carries no restriction. Applicant's construction of homes as part of an age-restricted community, and custom construction of age-restricted residences are also encompassed within the cited registration's construction of residential communities. Similarly, because the registration covers planning, laying out and construction of residential communities, such activities either encompass or are closely related to

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applicant's planning, laying out and custom construction of age-restricted recreational facilities and social and community facilities.

Applicant's recreational services in the nature of golf, walking trails, arts and crafts, etc. in connection with the age-restricted communities (Class 41) are closely related to the services in the cited registration, which are essentially for the building of residential communities. Such communities which are planned and constructed by registrant could well include recreational facilities, such that applicant's services and the registrant's services can be considered complementary. Moreover, the Examining Attorney has made of record certain third-party registrations in which the entities have registered their marks for both construction services and recreational services of the type identified in applicant's Class 37 application. See, for example, Registration No. 2,330,623 for, inter alia, construction of recreational, social, residential and commercial facilities, and recreational services in the nature of golf, walking trails, biking, arts and crafts, pool and sport and fitness; Registration No. 2,459,403 for, inter alia, planning, laying out and building of residential communities and recreational services and facilities,

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namely, golf, swimming, fitness and exercise facilities, walking trails and arts and crafts; and Registration No. 1,996,394 for, inter alia, planning and laying out residential communities and recreational services in the nature of swimming facilities. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See **In re Albert Trostel & Sons Co.**, 29 USPQ2d 1783 (TTAB 1993).

This brings us to a consideration of the marks. Applicant's mark is YOUR LIFE YOUR WAY; the cited mark is YOUR HOME YOUR WAY. There are clear similarities between the marks. Applicant's mark not only uses three of the four words of the registrant's mark, but the marks are constructed in the same manner. There is, thus, a similarity in appearance and pronunciation. Moreover, there is a similarity in connotation. The registered mark suggests that one can have the home one wants; the applied-for mark suggests that one can have the lifestyle one wants.

Applicant argues that YOUR HOME YOUR WAY is a highly suggestive mark which is entitled to a very narrow scope of

protection.³ Applicant asserts that the protection to be accorded the mark should be limited to the use of the substantially identical mark for substantially similar goods and services. Thus, applicant contends that its mark and services differ sufficiently from the cited registration that the scope of protection of the registration does not extend to prevent the registration of applicant's mark.

In support of its position applicant has submitted a number of third-party registrations for marks containing the phrase YOUR HOME or YOUR WAY or having a YOUR _____, YOUR WAY construction. We do not find these registrations to be persuasive. The registrations for YOUR HOME marks differ in commercial impression, as well as in services in many instances, from the cited mark. See, for example, YOUR HOME FOR HOME IMPROVEMENT for on-line retail store services featuring home improvement products and providing information in the field of home improvement and home improvement goods and services via an on-line global computer network⁴; YOUR HOME IS WHERE OUR HEART IS for

³ Applicant also asserts that the cited mark is merely descriptive, but such an assertion represents an impermissible collateral attack on validity of the registration, and has not been considered. Similarly, applicant's suggestion that the registrant may have abandoned its mark for failure to police its use is an impermissible collateral attack.

⁴ Registration No. 2,509,139.

underwriting warranty programs in the field of residential homes; pest control; cleaning homes, commercial and industrial buildings and their contents; lawn care; tree and shrub care⁵; and YOUR HOME LOAN CENTER for mortgage brokerage.⁶ Even the closest registration, or at least the one highlighted by applicant in its brief (YOUR HOME. BUILT EXACTLY THE WAY YOU WANT IT. for custom home building services⁷) conveys a commercial impression which is different from applicant's mark. The third-party registrations for YOUR WAY marks are similarly unpersuasive. See, for example, DINING YOUR WAY for restaurant guides⁸; DRINK IT YOUR WAY for restaurant and carry out food services⁹; and SPANISH YOUR WAY for, inter alia, audio tapes for language instruction and language instruction books.¹⁰

As for the YOUR ____ YOUR WAY marks, they are for different goods and services than those at issue herein. See, for example, YOUR PC YOUR WAY for, inter alia, installation and maintenance of personal computers and retail store services in the field of personal computers¹¹;

⁵ Registration No. 1,910,411.

⁶ Registration No. 2,355,252.

⁷ Registration No. 2,021,078.

⁸ Registration No. 2,430,343.

⁹ Registration No. 2,150,855.

¹⁰ Registration No. 2,049,688.

¹¹ Registration No. 2,370,602.

YOUR WEB. YOUR WAY. for computer services, namely, providing search engines for obtaining data on a global computer network¹²; YOUR BANK. YOUR WAY. for banking services¹³; and YOUR SOFA. YOUR WAY. for retail furniture store services.¹⁴

This is not to say that YOUR HOME YOUR WAY does not have a suggestive meaning. As we stated above, the plain meaning of the words, as applied to residential communities construction services, indicates that one can get the home that one wants. Reinforcing our view that the term has a suggestive connotation is the evidence applicant has submitted of third parties which use the phrase in their advertising. See, for example, the heading "YOUR HOME YOUR WAY" in the www.kingbridgehomes.com website for Kingbridge Homes, in which the company is identified as builders and developers; the subheading "Your Home Your Way" in the www.smbuildersohio.com website of Schmid & McCathern Builders, above a paragraph stating that "Our homes are as individual as you"; and the subheading "Your Home Your Way" above a paragraph touting "Spacious residences with

¹² Registration No. 2,318,365.

¹³ Registration No. 2,467,091.

¹⁴ Registration No. 1,553,331.

exciting details..." in the www.bestfieldhomes.com website of Bestfield Homes.

The phrase is also used in certain newspaper articles which applicant has made of record. The only relevant ones dealing with home construction are an article in the April 26, 2002 issue of "The Columbian," in which "Your Home, Your Way: Being Your Own General Contractor" is listed as being on the schedule for Clark Public Utilities' 11th annual Home & Garden Idea Fair, and an article taken from the Internet version of "The Washington Times" which mentions "Winchester Homes' 'Your Home. Your Way' program." ¹⁵

Although the website material and newspaper articles show that YOUR HOME YOUR WAY is not a unique term, and that it has a suggestive meaning, we do not consider it to be as highly suggestive as does applicant, who characterizes it as being, if not merely descriptive, as bordering on descriptive. Thus, we do not believe that the scope of protection to be accorded it is as limited as applicant contends. As a result, we do not consider the cases relied on by applicant to compel a finding of no likelihood of

¹⁵ Most of the articles in which the phrase is used are about interior decorating, while one appears to be from a foreign publication, and therefore is not relevant to show how the phrase would be perceived in the United States.

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confusion in the present situation. In particular, this case differs from cases such as **In re Bed & Breakfast Registry**, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986), in which the only term common to both marks was descriptive. On the contrary, the only descriptive term in the cited mark, the word HOME, is the one word that differs from applicant's mark.

Because of the similarity of the marks, including the manner in which they are constructed, and the fact that the services are legally identical in part, and otherwise related, we believe that consumers would view YOUR LIFE YOUR WAY as a variation of the mark YOUR HOME YOUR WAY, and will assume that the owner of the YOUR HOME YOUR WAY mark for construction of residential communities is using this mark to suggest consumers are being offered the entertainment/lifestyle services they want within the residential communities. Thus, the slight difference between applicant's mark and the cited mark is not sufficient to distinguish the marks.

We would also point out that that the "third-party use" of the phrase YOUR HOME YOUR WAY in the materials submitted by applicant are not, in fact, use of this phrase

as a mark.¹⁶ The phrase is used in advertising, or sometimes simply as part of general text referring to various services, but it is not trademark use. Thus, the evidence submitted by applicant does not go to the duPont factor of "the number and nature of similar marks in use on similar goods [or services]," and the cases relied on by applicant are inapposite. This is not a situation where consumers are so exposed to different parties using very similar marks that they have come to rely on subtle differences between the marks to distinguish them.

Applicant also has noted that the Office has allowed the registration of the mark PARKSIDE for, inter alia, "construction for others of residences in planned residential communities principally for families, utilizing proprietary designs and concepts,"¹⁷ despite the existence of a registration for the identical mark for "development and construction of senior housing communities, congregate care facilities, independent and assisted living facilities, other senior care facilities and alzheimer's disease care facilities."¹⁸ Applicant points to these

¹⁶ The only arguable trademark reference is that in "The Washington Times" Internet article discussed above, but that reference is not enough to show widespread third-party trademark use.

¹⁷ Registration No. 2,567,675.

¹⁸ Registration No. 2,466,952.

registrations to support its position that the construction of senior citizen-focused housing communities is a separate and distinct service from general construction services. However, as noted above, because the registrant's services of constructing residential communities is not limited to a particular age group, and therefore may include senior citizen focused housing, the distinction that applicant seeks to make is not relevant to our determination herein.

Although not argued by applicant, we think it necessary to address an additional duPont factor, that of the care with which the purchase is made. Because applicant's and the registrant's services affect whether a consumer will purchase a home or otherwise decide where to live, the purchasing decision is necessarily made with care. However, this factor is not sufficient to avoid confusion. We assume that consumers will note the difference between the marks YOUR HOME YOUR WAY and YOUR LIFE YOUR WAY. However, because they are likely to regard the marks as variants of each other, but indicating a single source for the services, confusion is likely if applicant were to use its mark for its identified services.

Finally, we are guided by the well-established principle that, to the extent there is any doubt on the issue of likelihood of confusion, that doubt must be

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resolved in favor of the registrant and prior user. **In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes**, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal of registration is affirmed.