

Mailed:

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

March 31 2005
GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Sleepcare, Inc.
v.
Sleepco, Inc.

Opposition No. 91157829 to application Serial No. 76471331
filed on December 2, 2002

Andrew J. Campanelli of Perry & Campanelli, LLP for Sleepcare,
Inc.

James R. Leavy, Esq. for Sleepco, Inc.

Before Hohein, Bucher and Drost, Administrative Trademark Judges.
Opinion by Hohein, Administrative Trademark Judge:

Sleepco, Inc. has filed an application to register the
mark "THE SLEEP CARE PLACE PRODUCTS TO HELP YOU SLEEP" and design,
as reproduced below,



for "retail store services, on-line retail store services,
catalog and mail order services and mall kiosk retail services

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all featuring products designed, created or formulated to help people sleep."¹

Sleepcare, Inc. has opposed registration on the ground that it "manufactures, markets and sells mattresses and box springs for contracts, retail stores and individual consumers throughout the United States"; that since its incorporation in 1991, opposer "has been using the trade name and trademark 'Sleepcare' in connection with production, marketing and sale of mattresses in interstate commerce"; that mattresses and box springs manufactured by opposer "are labeled with the 'Sleepcare' trademark, have been widely advertised and extensively offered throughout the United States"; and that applicant's use of its "THE SLEEP CARE PLACE PRODUCTS TO HELP YOU SLEEP" and design mark in connection with its services "causes [a] likelihood of confusion, deception and mistake."

Applicant, in its answer, has in essence denied the salient allegations of the opposition.

The record consists solely of the pleadings and the file of the involved application. Only opposer filed a brief on the case and neither party requested an oral hearing. While it is noted that opposer, with its brief, belatedly submitted as its case-in-chief the affidavit, with exhibits, of Lisa Salbo, no consideration can be given thereto. As stated in TBMP §801.01 (2d ed. rev. 2004) (footnote omitted), "[a] brief may not be used

¹ Ser. No. 76471331, filed on December 2, 2002, which is based on an allegation of a date of first use anywhere and in commerce of November 4, 2002. The word "PLACE" and the phrase "PRODUCTS TO HELP YOU SLEEP" are disclaimed.

as a vehicle for the introduction of evidence." In particular, TBMP §539 (2d ed. rev. 2004) provides in pertinent part that "[e]videntiary material attached to a brief on the case can be given no consideration unless it was properly made of record during the testimony period of the offering party." Likewise, TBMP §704.05(b) (2d ed. rev. 2004) states in relevant part that "evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony." Furthermore, as set forth in TBMP §704.06(b) (2d ed. rev. 2004), "[f]actual 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."

Trademark Rule 2.121(a)(1) provides that "[n]o testimony shall be taken except during the times assigned, unless by stipulation of the parties approved by the Board, or, upon motion, by order of the Board." In addition, Trademark Rule 2.121(b)(1) states, in particular, that the Board "will schedule a testimony period for the plaintiff to present its case in chief." Here, opposer presented no testimony or other evidence during its initial testimony period and has offered no reason, much less a showing of excusable neglect as required by Fed. R. Civ. P. 6(b) to reopen such period, for its failure to timely submit the evidence attached to its brief. Moreover, while Trademark Rule 2.123(b) provides in pertinent part that, "[b]y written agreement of the parties, the testimony of any witness ... may be submitted in the form of an affidavit by such witness"

(and also states that "[t]he parties may stipulate in writing what a particular witness would testify to if called, or the facts in the case of any party may be stipulated in writing"), there is no indication that applicant agreed in writing to the submission of the Salbo affidavit and the exhibits thereto. Thus, and inasmuch as Trademark Rule 2.123(1) specifies that "[e]vidence not obtained and filed in compliance with" the rules of practice "will not be considered," there is no evidence which is properly of record in this proceeding on behalf of opposer.

Accordingly, because opposer, as the party bearing the burden of proof in this proceeding,² has failed to submit proper proof of the salient allegations of the notice of opposition, it cannot prevail on its claim of priority of use and likelihood of confusion.

Decision: The opposition is dismissed.

² See, e.g., *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 143 F.3d 1373, 47 USPQ2d 1459, 1464 (Fed. Cir. 1998) (Michel, J. concurring); *Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1007 (Fed. Cir. 1988); *Sanyo Watch Co., Inc. v. Sanyo Elec. Co., Ltd.*, 691 F.2d 1019, 215 USPQ 833, 834 (Fed. Cir. 1982); and *Clinton Detergent Co. v. Proctor & Gamble Co.*, 302 F.2d 745, 133 USPQ 520, 522 (CCPA 1962). It remains opposer's obligation to satisfy its burden of proof, irrespective of whether applicant offers any evidence.