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Paper No. 9
RFC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Florida Tan Center, Inc.**

Serial No. 75/543,289

Dean E. McConnell of Brinks Hofer Gilson & Leone for
Florida Tan Center, Inc.

Tami Cohen Belouin, Trademark Examining Attorney, Law
Office **108** (David Shallant, Managing Attorney).

Before Cissel, Quinn and Hairston, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On August 27, 1998, applicant filed the above-
identified application to register the mark "FLORIDA TAN
CENTRES" on the Principal Register for "tanning salon
services," in Class 42. The application was based on
applicant's claim that it had used the mark since September
of 1994 and had used the mark in interstate commerce since
at least as early as February of 1995.

The Examining Attorney refused registration under Section 2(e)(3) of the Lanham Act on the ground that applicant's mark is primarily geographically deceptively misdescriptive. She also required applicant to disclaim the descriptive terminology "TAN CENTRES" apart from the mark as shown.

Applicant submitted an amendment with the requested disclaimer, along with argument that its mark is not primarily geographically deceptively misdescriptive within the meaning of Section 2(e)(3) of the Act.

The Examining Attorney was not persuaded by applicant's arguments, however, and the refusal to register was made final in her second Office Action. Submitted in support of the refusal with that action were copies from various Florida telephone directories wherein a number of tanning salons in Florida are promoted. She also submitted excerpts from articles retrieved from the Nexis® database of publications wherein tanning salons in Florida are discussed. Particularly noteworthy in this regard is the excerpt from the Palm Beach Post newspaper, July 9, 1999 edition. The article states that "[d]espite year-round rays and shores galore, Florida--with 1,768 salons--ranks 10th among states for indoor tanning. Ohio is No. 1 with 2,635, and Hawaii is last with 15."

Applicant timely filed a Notice of Appeal. Both applicant and the Examining Attorney filed appeal briefs, but applicant did not request an oral hearing before the Board.

The sole issue presented by this appeal is whether the mark "FLORIDA TAN CENTRES," as used in connection with tanning salon services, is primarily geographically deceptively misdescriptive within the meaning of the Act. Based on careful consideration of the record and arguments before us, we find that the refusal to register is well taken.

The test for determining whether a mark is primarily geographically deceptively misdescriptive has three parts. First, we must ask whether the primary significance of the mark is geographic. The next issue is whether purchasers would likely think that the services originate in the place named in the mark, i.e., that they would make an association between the place and the services. If the first two questions are answered in the affirmative, the third question is whether the services do in fact originate in the place named in the mark. If they do not, then the mark must be considered to be primarily geographically deceptively misdescriptive within the meaning of Section

2(e)(3) of the Lanham Act. In re Kimpton Hotel and Restaurant Group, Inc., 55 USPQ2d 1154 (TTAB 2000).

In the case at hand, the first part of the test is satisfied because the primary significance of the mark is geographic. In this regard, the disclaimed, descriptive term "TANNING CENTRES" does not alter the primary significance of "FLORIDA" as the name of a well-known geographic location. Applicant does not contest this point.

The second part of the test is whether consumers will make an association between the place named in the mark and the services set forth in the application. The Examining Attorney does not need to establish that the named place is famous for the services in issue. Her burden is only to make a prima facie showing that a public association exists between the services and place. In re Loew's Theaters, Inc., 769 F.2d 764, 226 USPQ 865 (Fed. Cir. 1985).

In the case at hand, the Examining Attorney has met her burden with respect to the second part of the test as well. The evidence submitted by the Examining Attorney establishes that prospective purchasers of tanning salon services would make an association between "FLORIDA" and tanning salon services. It shows that Florida ranks very high among states in terms of the number of tanning salons

doing business within the state. Not only do tourists avail themselves of these services when the natural environment of the Sunshine State does not cooperate, but the evidence indicates that many natives partake of these services because they want the tanned appearance of people who spend time outdoors, but they simply do not have the time to get tans the natural way.

The third and final part of the test for registrability under Section 2(e)(3) of the Act is whether the services do, in fact, come from the place named in the mark. The mark is obviously not misdescriptive if it accurately names the place from which the services emanate. In the instant case, the record makes it clear that applicant is an Indiana corporation located in Terre Haute, Indiana. Its services are in no way connected with the state of Florida.

The mark would lead people to believe that applicant's services come from, originated in, or have some connection with Florida, but they do not. All three parts of the test are therefore satisfied, so we must conclude that the mark is geographically deceptively misdescriptive within the meaning of the Act.

Applicant's arguments to the contrary are not persuasive. Applicant argues that the Examining Attorney

failed to prove that Florida is well known for tanning salons. As the Examining Attorney points out, however, she was only required to make a prime facie showing that a public association exists between tanning salon services and Florida. See *In re The Cookie Kitchen, Inc.*, 228 USPQ 873 (TTAB 1986). The evidence she submitted accomplished this. She established not just that these services are widely available in Florida, but in addition, that Florida is a place where they are more available than they are in eighty per cent of the country. The requirement for "something more" laid out in *In re Municipal Capital Markets, Corp.*, 51 USPQ2d 1369 (TTAB 1999), does not apply in the case at hand because tanning salon services are not "ubiquitous" services in the sense that restaurant services were held to be in that case. Moreover, even if we were to apply that test to the facts in the case at hand, this evidence of the relative popularity of these services in the location named in the mark would satisfy the requirement.

It is significant that responsive to the Examining Attorney's showing, applicant did not submit any evidence which established that the significance the term sought to be registered is not primarily geographical or that there

is no association between Florida and tanning salon services.

Applicant contends that the public is not likely to believe that applicant's services originate in Florida because tanning salons provide tans by means of electronic tanning beds and not direct sunlight, for which Florida is famous. As the Examining Attorney points out, her refusal is not based on a premise that consumers would believe that the tans they are getting from applicant's tanning beds are a result of Florida sunshine, or that the tanning beds in applicant's salons are necessarily products of Florida. The refusal is based on the fact that consumers would believe applicant's salon business itself originates from or is otherwise related in some way to Florida. See *In re Kimpton Hotel and Restaurant Group, Inc.*, supra. It is likely that consumers would believe that applicant services are provided through a chain of tanning salons based or originating in Florida, where, as indicated by the evidence of record, tanning by means of tanning salons is more popular than it is in most of the rest of the country.

Decision: The refusal to register under Section 2(e)(3) of the Lanham Act is affirmed.

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