Paper No. 21
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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Vienna Sausage Manufacturing Company
v.
Bernard Levy

Opposition No. 95,759
to application Serial No. 74/436,005
filed on September 13, 1993

Fred S. Lockwood of Lockwood, Alex, Fitzgibbon & Cummings for Vienna Sausage Manufacturing Company.

Bernard Levy, pro se.

Before Hairston, Chapman and Wendel, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

An intent-to-use application has been filed by Bernard Levy to register the mark VIENERS on the Principal Register for "vegetable, legumes, and processed grains sausages; vegetable, legumes, and processed grains frankfurters" in Class 29, and "vegetable, legumes, and processed grains based sandwiches" in Class 30.

Vienna Sausage Manufacturing Company has opposed registration of the mark, alleging that continuously since long prior to applicant's filing date (September 13, 1993), opposer has been "primarily engaged in the manufacture and sale of processed meats and sausages with pure beef wieners being its leading product"; that also continuously since long prior to applicant's filing date opposer has operated a fast-food restaurant in Chicago, Illinois, wherein it sells and serves hot dog sandwiches for consumption on or off the premises; that the term "VIENERS" is confusingly similar to the term "wieners," which is and has been universally used and understood to refer to hot dogs, frankfurters and wieners made with meat; that if applicant obtains a registration, applicant will be enabled to divert opposer's meat customers to applicant's non-meat goods; and that the term "VIENERS" is deceptively misdescriptive of applicant's non-meat goods pursuant to Section 2(e)(1) of the Trademark Act.

Applicant, in his answer, admitted that "opposer owns and operates a fast-food restaurant in Chicago where it sells and serves hot dogs for on- and off-premises consumption"; and applicant otherwise denied the salient allegations of the notice of opposition.[1]

[1] Applicant also set forth several supposed "affirmative defenses" in 15 numbered paragraphs. Inasmuch as applicant did nothing other than plead these "defenses," they must fail.

The record consists of the pleadings[2]; the file of the involved application; and opposer's testimony (with exhibits) of James Eisenberg, currently co-chairman of opposer. Applicant did not take any testimony or offer any other evidence. Only opposer filed a brief.[3] An oral hearing was not requested by either party.

The issue before the Board is whether applicant's mark VIENERS, when used in connection with applicant's goods, vegetable, legumes, and processed grains sausages, frankfurters and sandwiches, is deceptively misdescriptive thereof.[4]

Opposer bears the burden of proof in this case, and must establish its claim by a preponderance of the evidence. See Cerveceria Centroamericana, S.A. v. Cerveceria India Inc., 892 F.2d 1021, 13 USPQ2d 1307 (Fed. Cir. 1989).

Mr. Eisenberg testified that opposer produces processed

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[2] Statements made in pleadings cannot be considered as evidence in behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony. See Kellogg Co. v. Pack'Em Enterprises Inc., 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991); and Times Mirror Magazines, Inc. v. Sutcliff, 205 USPQ 656 (TTAB 1979). See also, TBMP §706.01.

[3] Factual 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. See BL Cars Ltd. v. Puma Industria de Veiculos S/A, 221 USPQ 1018 (TTAB 1983); and Abbott Laboratories v. TAC Industries, Inc., 217 USPQ 819 (TTAB 1981). See also, TBMP §706.02.

[4] On pages 2-4 of opposer's brief on the case, opposer listed several additional issues, including unfair competition and violation of 21 U.S.C. §331(a) misbranding of products. The Board has no jurisdiction over such matters. See Section 17 of the Trademark Act; and TBMP §102.01.

beef products, and the leading product is sausages, such as frankfurters, hot dogs, and wieners;[5] that for over 100 years opposer has operated a restaurant in Chicago where it serves hot dogs; that opposer sells its products throughout the United States, Asia and Europe; and that it sells to distributors who then sell to chain stores and restaurants. He further testified that total sales for the last five years were around $90 million (60 million pounds of meat), and of that the total figures were $50 million (30 million pounds) for wieners only.[6]

Further, Mr. Eisenberg testified that the Department of Agriculture (USDA) regulates meat products, and in 9 CFR §319.180 (titled "Subpart G-Cooked Sausage") sets forth the "standard of identity" (dep., p.15) for, inter alia, frankfurters, hot dogs and wieners, which must include raw skeletal meat (a copy of pages 294 – 296 of this regulation were introduced into the record as an exhibit); and that under this regulation, one cannot sell frankfurters, hot dogs or wieners in interstate commerce which do not contain skeletal meat. When asked if he could foresee how opposer would be damaged if applicant commences use of his mark

[5] He also testified that in advertisements for this type of meat product, most of opposer's competitors use the word "wiener," while opposer generally uses the words, "frankfurter" or "hot dog."

[6] He did not specify whether these figures included the United States, Asia and Europe, or if they were for United States sales only.

VIENERS on vegetarian or meat-free products, Mr. Eisenberg answered that opposer sells a pure beef meat product, “and for someone to use the name that is closely associated with our name and at the same time use a name that is closely associated with wieners, which is under the USDA’s standard of identity a meat product, the public isn’t going to know what they’re buying.” (dep., p. 17). He further explained that in his opinion the public would confuse the term “VIENERS” with the word “wieners.”

Mr. Eisenberg stated on page 20 of his deposition that “It’s my contention that you cannot label a product that does not have meat with the name of a standard of identity that is a meat standard of identity.” In applicant’s answer to opposer’s interrogatory No. 25 applicant stated that when he commences use of his mark, he will identify his goods on packaging, literature, and in advertisements as “meat-free hot dogs,” “vegetarian hot dogs,” “vegetarian frankfurters and wieners,” and “non-animal product hot dogs.” (This interrogatory answer was read into the record as part of a question posed by opposer’s attorney at page 17 of the deposition.)

In view of Mr. Eisenberg’s testimony about opposer’s business of producing frankfurters, hot dogs and wieners, as well as opposer’s operation of a restaurant selling hot dogs

(the latter being admitted by applicant), opposer has proven its standing to maintain this opposition.

The test for determining whether a term is deceptively misdescriptive as applied to the goods involves a two-part determination of (1) whether the matter sought to be registered misdescribes the goods, and (2) whether anyone is likely to believe the misrepresentation. See In re Quady Winery, Inc., 221 USPQ 1213 (TTAB 1984).

According to McCarthy, "A mark may be "deceptively misdescriptive" under §2(e) if it misrepresents any fact concerning the goods that may materially induce a purchaser's decision to buy."; and "the probable reaction of buyers is the key issue." 2 J. McCarthy, McCarthy on Trademarks and Unfair Competition, §§11:56 and 11:60 (4th ed. 1999).

The problem we have with opposer's position in this case is that applicant does not seek to register the term "wieners," rather, he seeks to register the term VIENERS; and applicant does not seek to register his mark for meat products, rather the identification of goods is specifically limited to vegetarian-based sausages, frankfurters and sandwiches.

The cited USDA regulation on frankfurters, hot dogs and wieners does not indicate that vegetarian-based products are covered in any way. To the contrary, the regulation sets a

"standard of identity" only for certain sausage meat products. Moreover, the considerations for the USDA's "standard of identity" regulations of meat products are distinctly different from those involving registration of trademarks. This Board must determine applicant's right to register his mark based upon the provisions of the Trademark Act, and the interpretations thereof by the courts and the Board. We must independently determine the registrability of the involved mark for the identified goods.

The evidence submitted by opposer (Mr. Eisenberg's testimony and a copy of the USDA regulation of "cooked sausage") to prove that the term VIENERS is deceptively misdescriptive of applicant's goods as identified is simply not convincing. The mark makes no misrepresentation about the goods. Rather, the purchasing public would perceive the mark VIENERS as presumably a play on the "v" in "vegetable" or "vegetarian." Further, these purchasers would not be deceived that they are purchasing meat products, when they are specifically purchasing "vegetable, legumes and processed grains based sausages, frankfurters and sandwiches." That is, the average reasonable purchaser encountering applicant's products in the marketplace would not believe that vegetarian sausages, frankfurters and sandwiches sold under the mark VIENER are made of meat. See U.S. West Inc. v. BellSouth Corp., 18 USPQ2d 1307 (TTAB

1990) (THE REAL YELLOW PAGES held not merely descriptive or deceptively misdescriptive when applied to classified directories); In re Lyphomed Inc., 1 USPQ2d 1430 (TTAB 1986) (P.T.E. held not deceptively misdescriptive or deceptive when applied to a pediatric mixture of injectable trace element additives for intravenous nutrition); R.J. Reynolds Tobacco Company v. Brown & Williamson Tobacco Corporation, 226 USPQ 169 (TTAB 1985) (NEW LOOK held not merely descriptive or deceptively misdescriptive when applied to cigarettes); In re Perfect Fit Industries, Inc., 223 USPQ 92 (TTAB 1984) (COTTAGE CRAFTS held not deceptively misdescriptive when applied to pillows, pillow covers, shams, quilts, quilted bedspreads, comforters, bed ruffles and draperies); In re Econoheat, Inc., 218 USPQ 381 (TTAB 1983) (SOLAR QUARTZ held not merely descriptive or deceptively misdescriptive when applied to electric space heaters); and The Norwich Pharmacal Company v. Chas. Pfizer & Co., Inc., 165 USPQ 644 (TTAB 1970) (UNBURN held not merely descriptive or deceptively misdescriptive when applied to a medical preparation for minor skin irritations, burns and injuries). Cf. The American Meat Institute et al. v. Horace W. Longacre, Inc., 211 USPQ 712 (TTAB 1981) (BAKED TAM held deceptively misdescriptive when applied to a chopped, formed turkey meat product.)

On the basis of the record herein, we find that the mark VIENERS is not deceptively misdescriptive when used in connection with applicant's vegetable, legumes and processed grain sausages, frankfurters and sandwiches.

Decision: The opposition is dismissed.

P. T. Hairston

B. A. Chapman

H. R. Wendel
Administrative Trademark Judges,
Trademark Trial and Appeal Board