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OF THE TTAB

Mailed: 2/6/2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

NAFCO-Inc.
v.
Choice Decals Corporation

Cancellation No. 92042118

Paula C. Nafziger for NAFCO-Inc.

Dennis Williams for Choice Decals Corporation.

Before Quinn, Walters and Drost, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

NAFCO-Inc. has petitioned to cancel a registration owned by Choice Decals Corporation of the mark CHOICE DECALS for "license plate decals and stickers featuring state related symbols."[1]

The entirety of the petition for cancellation is set forth below.

> The above-identified petitioner believes that it will be damaged by the above-identified registration, and hereby petitions to cancel the same.

[1] Registration No. 2002356, issued September 24, 1996; Section 8 affidavit accepted, Section 15 affidavit acknowledged.

> The grounds for cancellation are as follows:
>
> 1 Choice Decals is not a legal entity, therefore does not have legal standing to own a mark or to file an application for registration. Section 1604.07(b) See Exhibit "A"
>
> 2 Registration was obtained fraudulently. See Exhibit "B"
>
> 3 Registration was abandoned. See Exhibit "C"
>
> 4 Registrant does not control, or is not able legitimately to exercise control over the use of such mark.
>
> 5 Section 8 and 15 was requested and obtained fraudulently.
>
> 6 No clear chain of title from the original owner. Section 1604.07(d)

Respondent filed an "answer" which states, in relevant part, as follows:

> It is obvious based on the reasons stated for the request of removal of the said trademark that time is being wasted along with patience. The reasons stated by Ms. Nafziger [petitioner's president] are absolutely erroneous and incorrect. Based in chronological order, my reasons for objection are as stated:
>
> 1. Choice Decals was a corporation at the time of registration. Ms. Nafzigger [sic] request for this motion is denied.
>
> 2. Ms. Nafziger claims fraud. What is she referring to? How can this registration be fraudulently obtained when it was issued from Department of Commerce and filed by my attorney? Ms. Nafzigger [sic] request for this motion is denied.

> 3. The registration was abandoned due to change in State Laws within Texas. Choice Decals did not file a post registration for reasons just stated.
>
> 4. Letters from my attorney state I was a Corporation at time of trademark. How can Ms. Nafzigger [sic] state that I had no control over the mark when I was the original Registrant of the mark. Ms. Nafzigger [sic] request for this motion is denied.
>
> 5. Section 8 and 15 were never obtained, so how can this be fraud? Ms. Nafzigger [sic] request for this motion is denied.
>
> 6. Since Choice Decals is the original owner of the mark Choice Decals, how can there not be a clear chain of title? Her motion is not clear. Ms. Nafzigger [sic] request for this motion is denied.

The record consists of the pleadings[2] and the file of the involved registration. By way of a notice of reliance, petitioner introduced at trial official records obtained from the Office of the Secretary of State, State of Texas, relating to respondent and its dissolution; the results of a public records search conducted by Collin County, State

[2] Exhibits attached to pleadings are not evidence on behalf of the party to whose pleading they are attached unless identified and introduced in evidence as an exhibit during the period for the taking of testimony. Trademark Rule 2.122(c); and TBMP § 317 (2d ed. rev. 2004). The document listed as "Exhibit A" subsequently was introduced into the record. The other two exhibits attached to the pleading were not properly made of record. We hasten to add that, in any event, these two exhibits are merely cumulative of other documents that were properly introduced at trial. Further, it should be noted that none of the exhibits attached to the petition for cancellation has any relevance to petitioner's standing.

of Texas relating to respondent; and a page printout, retrieved from the USPTO TARR database, relating to respondent's registration. Respondent did not take any testimony or introduce any other evidence. Only petitioner filed a brief.[3] An oral hearing was not requested.

Section 14 of the Trademark Act, 15 U.S.C. § 1064, allows for cancellation of a registration of a mark by "any person who believes that he is or will be damaged...by the registration...." The party seeking cancellation of a registration of a mark must prove two elements: (1) that it has standing, and (2) that there is a valid ground to cancel the registration of the mark. Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998).

The standing question is an initial and basic inquiry made by the Board in every inter partes case. TBMP § 309.03(b) (2d ed. rev. 2004). That is, standing is a threshold inquiry to prevent mere intermeddlers from bringing a proceeding before the Board. Standing is an essential element of a petitioner's case which, if it is not proved at trial, defeats a petitioner's claims. See Lipton

[3] While it is indeed the better practice for a defendant, if it believes that the plaintiff has failed to sustain its burden of proof in the case, to file a brief indicating the inadequacy of the plaintiff's evidence and arguments, there is no requirement that a defendant do so. Trademark Rule 2.128(a)(3); and TBMP § 801.02 (2d ed. rev. 2004) ["The filing of a brief on the case is optional, not mandatory, for a party in the position of defendant."]. Consequently, it cannot be said that respondent has conceded the issues herein, including petitioner's standing, by failing to file a brief on the case.

Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); and No Nonsense Fashions, Inc. v. Consolidated Foods Corp., 226 USPQ 502 (TTAB 1985). See also Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); and Ritchie v. Simpson, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). A plaintiff in a Board proceeding is required to show that it has a "real interest" in the outcome of the proceeding, and a "reasonable basis for its belief of damage."

In the present case, the petition for cancellation is devoid of any proper allegations of petitioner's standing. Moreover, respondent did not make any admissions in its answer that would excuse petitioner from having to prove, as an element of its case in chief, its standing to be heard in this proceeding.

More significantly, petitioner failed, at trial, to take any testimony or introduce any other evidence to prove its standing to bring this cancellation proceeding. All of petitioner's evidence introduced by its notice of reliance relates to respondent and respondent's business activity; that is, the evidence pertains solely to the grounds upon which relief is sought. The evidence is devoid of any facts and/or documents that bear on petitioner's standing.

Throughout the entire proceeding, the only instance where petitioner even touched on its standing to be heard

occurred after trial in its brief on the case. In the "Recitation of the Facts," petitioner alleged, inter alia, that it has been selling decals since 1987, and that petitioner began using "Choice Decals," "Vinyl Choice Decal(s)" and "Clear Choice Decals" in 2000-2001. (Brief, pp. 10-11, paragraphs VI-X).[4] These factual statements, if proven, would establish petitioner's standing. The problem is that allegations alone do not establish standing. Ritchie v. Simpson, supra at 1029 ["Of course, a petitioner's allegations alone do not conclusively establish standing...the facts alleged which establish standing are part of the petitioner's case, and...must be affirmatively proved."]. Factual statements in a party's brief have no evidentiary value and can be given no consideration unless they are supported by evidence properly introduced at trial. TBMP § 704.06(b) (2d ed. rev. 2004). See Electronic Data Systems Corp. v. EDSA Micro Corp., 23 USPQ2d 1460, 1462 n. 5 (TTAB 1992).

Because petitioner has not proven its standing, the petition for cancellation must be denied. In view thereof, we elect not to consider the merits of the pleaded grounds. See American Paging Inc. v. American Mobilphone Inc., 13

[4] Each of the other allegations in the "Recitation of the Facts" is accompanied by a reference to documents relied upon in the notice of reliance. The paragraphs bearing on petitioner's own use of its marks are conspicuous for their failure to cite to any evidence of record.

USPQ2d 2036 (TTAB 1989), *aff'd*, 923 F.2d 869, 17 USPQ2d 1726 (Fed. Cir. 1990); and American Forests v. Sanders, 54 USPQ2d 1860, 1864 (TTAB 1999).

Decision: The petition for cancellation is denied.