

UNITED STATES PATENT AND TRADEMARK OFFICE  
Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

Via Fax: November 9, 2004

Opposition No. 91153755

WALTERS GARDENS, INC.

v.

PRIDE OF PLACE PLANTS, INC.

**Cheryl Goodman, Interlocutory Attorney:**

This case now comes up on applicant's motion to suspend proceedings for three months, filed via certificate of mailing on October 25, 2004 and applicant's consented motion to extend applicant's testimony period for two weeks, filed via certificate of mailing on October 27, 2004.

Applicant's consented motion to extend applicant's testimony period until November 13, 2004 is granted.

The Board now turns to applicant's motion to suspend. In support of its motion, applicant states that it scheduled the testimonial deposition of Rick Sorenson, owner of Pride of Plants, for October 15, 2004; that on October 6, 2004, Mr. Sorenson informed applicant's counsel that he was ill and unable to attend the scheduled deposition; that applicant's counsel informed opposer of Mr. Sorenson's illness and requested a three month suspension of proceedings to allow Mr. Sorenson to recover from his

illness; that opposer denied the request; and that the requested suspension is necessary to allow Mr. Sorenson time to recover from his illness before being required to attend his testimonial deposition.

In response, opposer states that the notice of deposition was mailed to opposer on October 6, 2004, the same day applicant's counsel stated they received notice that Mr. Sorenson was unable to attend; that on October 8, 2004, opposer asked applicant's counsel for confirmation the deposition would go forward; that on October 11, 2004, applicant confirmed that Mr. Sorenson would attend the deposition; that opposer acknowledged the confirmation on October 11, 2004, to which applicant's counsel further responded; that opposer notes that applicant's counsel admits in his motion that he knew Mr. Sorenson was not going to attend the deposition scheduled for October 15, 2004 but instead of giving notice of cancellation to opposer, applicant's counsel "mislead opposer's counsel up through the end of the business day on October 11, 2004"; that the unavailability of "one witness out of many" is an insufficient basis for postponing these proceedings; that the testimony of applicant's other witnesses can take place while Mr. Sorenson recovers; that Mr. Sorenson's doctor's letter only states that Mr. Sorenson is not in a position to travel but does not indicate that Mr. Sorenson is

"unconscious, cannot speak or is otherwise incompetent to testify"; and that opposer requests that applicant continue with the taking of testimony from its other witnesses and that the testimony of Mr. Sorenson take place at or near his residence in Canada.

In reply, applicant's counsel states that it "inadvertently indicated" in its motion that Mr. Sorenson informed counsel of its illness on October 6, 2004, when "in fact" it did not receive Mr. Sorenson's message until late in the day on October 11, 2004 after confirming the date of Mr. Sorenson's testimonial deposition with opposer's counsel; that upon receiving the notice, applicant's counsel immediately informed opposer of the cancellation; that despite opposer's willingness to travel to Mr. Sorenson for the testimonial deposition, Mr. Sorenson's "poor health prevents him from attending any testimonial deposition, regardless of the location"; that Mr. Sorenson is "extremely ill and unfit to give coherent testimony" as indicated by the declaration of Mr. Sorenson's wife; that applicant is incapable of attending a testimonial deposition at this time, regardless of opposer's willingness to travel to Mr. Sorenson; and therefore, suspension of these proceedings is appropriate.

The standard for suspending proceedings is good cause. Trademark Rule 2.117(c).

Applicant's request to suspend is based on the illness of Pride of Place Plants Inc.'s owner, Mr. Sorenson. The letter from Mr. Sorenson's doctor's states that Mr. Sorenson has a chronic illness and is unfit to travel. The letter also states that the "duration of the incapacity is unclear." The information provided by Mr. Sorenson's doctor with regard to Mr. Sorenson's health status is vague, and the time period for the duration of the illness is also vague. The Board also notes that Mr. Sorenson's note to its counsel states that he has been suffering from this illness for six months prior to October 2004. The physician's letter combined with Mr. Sorenson's note only refer to Mr. Sorenson's apparent chronic illness and his inability to travel, but nothing in these documents explain how Mr. Sorenson's illness makes him incapable to testify.<sup>1</sup>

Opposer has indicated it can travel to Mr. Sorenson, so that any need for travel by Mr. Sorenson is eliminated, and opposer has also indicated a willingness to grant an extension with regard to Mr. Sorenson's testimony so that Mr. Sorenson can recover. We also note that a telephonic deposition is an available option for Mr. Sorenson as is a

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<sup>1</sup> Mrs. Sorenson's assertions regarding Mr. Sorenson's condition as provided in her declaration are not supported by Mr. Sorenson's doctor's letter. The doctor's letter neither describes the symptoms involved with Mr. Sorenson's condition nor does the letter state that the condition prevents Mr. Sorenson from testifying.

deposition on written questions. *See Hewlett-Packard Co. v. Healthcare Personnel Inc.*, 21 USPQ2d 1152 (TTAB 1991) (in appropriate cases telephone depositions should be liberally granted in Board proceedings) and Trademark Rule 2.123(a).

Applicant has not indicated that Mr. Sorenson is the only witness remaining for its scheduled testimony period, and as opposer has pointed out, Mr. Sorenson's illness does not impact the ability of applicant's other witnesses to proceed with testimony. Accordingly, the Board finds that applicant has not established good cause to suspend these proceedings, and applicant's request to suspend proceedings for three months is denied. However, the Board will reset applicant's remaining two-week testimony period, taking into account the Thanksgiving holiday. With regard to Mr. Sorenson, the Board will allow applicant to take Mr. Sorenson's testimony outside of applicant's scheduled testimony period sometime during the month of December. Trademark Rule 2.121(a). Opposer's rebuttal period will open in January 2005.

The remaining trial schedule is set forth below:

Applicant's testimony to close: November 30, 2004

15-day rebuttal period  
scheduled to close: January 17, 2005

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

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on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

No mailed order of this copy will follow.