UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Cataldo

Mailed: March 29, 2005

Opposition No. **91159160**

International Exhibitions, Inc.

v.

A.S.P. Inc.

Before Hohein, Bucher and Holtzman, Administrative Trademark Judges.

By the Board:

Applicant, A.S.P. Inc., has filed an application to register the mark **BUILDING A BETTER HOME SHOW** for "arranging and conducting trade shows in the field of home and garden products and services."[1] Opposer, International Exhibits, Inc., asserts in its notice of opposition that it is the owner of the following marks:

> **FORT WORTH HOME & GARDEN SHOW** for "promoting and conducting trade shows and expositions at which products and services for the home and yard are displayed and sold;"[2]

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[1] Application Serial No. 78262476 was filed on June 13, 2003, reciting January 1, 1996 as the date of first use of the mark anywhere and in commerce in connection with the services.

[2] Registration No. 1,757,358, issued to Friends Productions, Inc. on March 9, 1993 under Section 2(f) of the Trademark Act and reciting February 1981 as the date of first use and date of first use in commerce in connection with the recited services. The

DALLAS HOME & GARDEN SHOW for "promoting and conducting trade shows and expositions at which products and services for the home and yard are displayed and sold;"[3]
TEXAS HOME & GARDEN SHOW for "promoting and conducting trade shows and exhibitions at which products and services for the home and yard are displayed and sold;"[4]
VACATION LEISURE & OUTDOOR SHOW BY IEI and design, as shown below, for "promoting and conducting trade shows and exhibitions in the field of sports vacations, leisure sports and outdoor sports;"[5]

TEXAS HOME & GARDEN LIVING for "magazines relating to home and garden matters;"[6] and

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word "SHOW" is disclaimed apart from the mark as shown. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

[3] Registration No. 1,757,359, issued to Friends Productions, Inc. on March 9, 1993 under Section 2(f) of the Trademark Act and reciting May 30, 1980 as the date of first use and date of first use in commerce in connection with the recited services. The word "SHOW" is disclaimed apart from the mark as shown. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

[4] Registration No. 2,328,397, issued to opposer on March 14, 2000 under Section 2(f) of the Trademark Act and reciting 1986 as the date of first use and date of first use in commerce in connection with the recited services. The wording "HOME & GARDEN SHOW" is disclaimed apart from the mark as shown.

[5] Registration No. 2,434,739, issued to opposer on March 13, 2001 reciting 1992 as the date of first use and date of first use in commerce in connection with the recited services. The wording "VACATION, LEISURE & OUTDOOR SHOW" is disclaimed apart from the mark as shown.

[6] Registration No. 2,594,873, issued to opposer on July 16, 2002 and reciting November 7, 2000 as the date of first use and date of first use in commerce on the goods. The wording "TEXAS HOME & GARDEN" is disclaimed apart from the mark as shown.

HOUSTON HOME SHOW for "conducting trade shows and expositions in the field of home and garden products and services."[7]

Opposer, in its notice of opposition, further alleges in essence that it is a leading producer of home and garden trade shows in the United States; that opposer has made prior, and continuous, use of its above referenced family of "HOME SHOW" marks; that the wording "HOME SHOW" in applicant's mark is identical to opposer's marks; that the parties' services are identical; and that, as a result of the foregoing, confusion, mistake, and deception are likely among consumers as to the source of those services.

Applicant, in its answer, denies the salient allegations of the notice of opposition, and asserts certain affirmative defenses.

On November 8, 2004, applicant filed a motion for summary judgment on the ground of likelihood of confusion. Opposer has filed a brief in opposition thereto. In addition, applicant has submitted a reply brief. We find, however, that the reply is not warranted and, therefore, it has been given no further consideration.[8]

[7] Registration No. 2,662,190, issued to opposer on December 17, 2002 under Section 2(f) of the Trademark Act and reciting September 12, 1985 as the date of first use and date of first use in commerce in connection with the recited services. The wording "HOME SHOW" is disclaimed apart from the mark as shown.

[8] Consideration of reply briefs is discretionary on the part of the Board. *See* Trademark Rule 2.127(e)(1).

In support of its motion for summary judgment, applicant argues that contrary to opposer's allegations, the marks in opposer's pleaded registrations do not form a family of "HOME SHOW" marks; that the wording "HOME SHOW" is generic; that generic terms cannot form the basis of a likelihood of confusion claim; that only one of opposer's pleaded registrations (HOUSTON HOME SHOW) contains the wording "HOME SHOW"; that, however, opposer's HOUSTON HOME SHOW mark and applicant's mark have in common only the generic wording "HOME SHOW"; that opposer's marks are otherwise dissimilar to that of applicant; and that, as a result of the foregoing, none of the marks in opposer's pleaded registrations is confusingly similar to applicant's applied-for mark. Applicant has submitted printed copies of articles from Internet web sites on the subject of home shows; copies of newspaper and magazine articles from the Nexis database on the subject of home shows; lists of State and Federal trademarks from the Lexis database containing the wording "HOME SHOW"; and printed copies of third-party trademark registrations from the Office's TARR database containing the wording "HOME SHOW." In addition, applicant has submitted the unverified statement of its attorney in support of the foregoing.

In response, opposer argues that while the wording "HOME SHOW" may be generic, its marks, when considered in

their entireties, are confusingly similar to applicant's applied-for mark; that its family of "HOME SHOW" marks is famous after a long and continuous period of use; that, in addition, applicant's services are identical or closely related to opposer's goods and services; that because the services rendered under the parties' marks are identical, they "are deemed to travel in the same channels of trade to the same purchasers"; that opposer and applicant are direct competitors in the same geographic areas; that applicant's intent in adopting its mark is to trade on the goodwill of opposer; that the purchasers of the parties' services are not sophisticated; and that applicant's evidence of third-party registration of "HOME SHOW" marks is not probative of third-party use thereof. Opposer has submitted the affidavit of Mr. Demos Markantonis, one of its officers, in support of the foregoing.

As has often been stated, summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of demonstrating the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed.

Cir. 1987). When the moving party's motion is supported by evidence sufficient, if unopposed, to indicate that there is no genuine issue of material fact, and that the moving party is entitled to judgment, the nonmoving party may not rest on mere denials or conclusory assertions, but rather must proffer countering evidence, by affidavit or as otherwise provided in Fed. R. Civ. P. 56, showing that there is a genuine factual dispute for trial. *See* Fed. R. Civ. P. 56(e); *Copelands' Enterprises Inc. v. CNV Inc*., 945 F.2d 1563, 20 USPQ2d 1295 (Fed. Cir. 1991); and *Octocom Systems Inc. v. Houston Computer Services Inc*., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).

Turning first to the issue of priority, it appears that applicant, for purposes of its motion, concedes that opposer is the owner of subsisting registrations for the marks pleaded in the notice of opposition. Thus, priority is not in issue in this case. *See King Candy Co., Inc. v. Eunice King's Kitchen, Inc.* 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Turning now to likelihood of confusion, it is well settled that the determination of whether a likelihood of confusion exists is made by evaluating and balancing the pertinent *du Pont* evidentiary factors. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In other words, not every factor is equally

important to the likelihood of confusion analysis in every case. Indeed, our principal reviewing court and this Board frequently has held, in appropriate cases, that a single *du Pont* factor may be dispositive of the likelihood of confusion analysis. *See, e.g., Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998)(dissimilarity of the marks under the first *du Pont* factor held dispositive); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989)(dissimilarity of the marks dispositive); *Sears Mortgage Corp. v. Northeast Savings F.A.*, 24 USPQ2d 1227 (TTAB 1992)(dissimilarity between the marks dispositive); and *Kellogg Co. v. Pack 'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), aff'd, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991)(dissimilarity of the marks dispositive).

After a careful review of the record in this case, we believe that application of the first *du Pont* factor, i.e., the similarity or dissimilarity of the marks in their entireties, is dispositive of this proceeding. Opposer's pleaded marks are FORTH WORTH HOME & GARDEN SHOW; DALLAS HOME & GARDEN SHOW; TEXAS HOME & GARDEN SHOW; VACATION, LEISURE & OUTDOOR SHOW BY IEI and design; TEXAS HOME & GARDEN LIVING; and HOUSTON HOME SHOW, while applicant's mark is BUILDING A BETTER HOME SHOW. We find that the marks, when viewed in their entireties, and giving appropriate

weight to the features thereof, are dissimilar in sound, appearance and meaning, and convey distinctly different commercial impressions. The only matter shared by applicant's mark and those of opposer is the highly descriptive, if not generic, wording "HOME SHOW" in one of opposer's registrations, and the terms "HOME" and/or "SHOW" individually in opposer's other pleaded registrations.[9] The record shows there is no genuine issue of fact that such terms are, at best, descriptive for the parties' goods and services. Thus, the remaining portions of the parties' marks are the dominant portions upon which purchasing customers would rely to distinguish the source of their respective goods and services. Those dominant portions of the parties' marks are completely dissimilar and readily distinguishable in all respects. We are, therefore, of the opinion that the marks, when considered in their entireties, are so dissimilar in appearance, sound, and meaning that there is no likelihood of confusion as a matter of law. Moreover, opposer has not disclosed any evidence that it could produce at trial which would reasonably be expected to

[9] We find in addition that opposer has failed to establish that it owns a family of marks. First, the asserted family feature, i.e., the wording "home show," is only present in opposer's HOUSTON HOME SHOW mark. Second, and as noted above, the term "home show" is at least descriptive of opposer's goods and services, and opposer has failed to make a showing of secondary meaning in the term. *See Norwich Pharmacal Co. v. Salsbury Laboratories,* 168 USPQ 250 (TTAB 1970); and *Fort Howard Paper Co. v. Nice-Pak Prods., Inc.,* 127 USPQ 431 (TTAB 1960).

cause us to reach a different conclusion. The first *du Pont* factor simply outweighs all of the others that might be relevant in this case.

In view of the foregoing, applicant is entitled to summary judgment in its favor on the issue of likelihood of confusion as a matter of law. *See* Fed. R. Civ. P. 56(c) and (e). Applicant's motion for summary judgment is hereby granted and the opposition is dismissed with prejudice.