THIS OPINION IS NOT A PRECEDENT OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

gcp/jk

Mailed: May 1, 2008

Opposition No. 91173009

TRACIE MARTYN, INC.

v.

TRACY ARTMAN

Before Quinn, Holtzman and Walsh,
Administrative Trademark Judges.

By the Board:

Tracy Artman ("applicant") seeks to register the mark TRACY'S TREATS NATURAL PRODUCTS FOR REMARKABLE SKIN and design for "soap bars, foaming soap, shea butter cosmetic creams, shea butter lotion bars, shea butter lotion melts, scented linen and room sprays, fragrant body splash, dead sea bath salts, Mediterranean sea salt body scrubs, lip balm, whipped shea butter lotion," in International Class 3.[1]

On September 20, 2006, Tracie Martyn, Inc. ("opposer") filed a notice of opposition to registration of applicant's mark. As grounds for opposition, opposer alleges that

[1] Application Serial No. 78652615, filed June 16, 2005, based on an allegation of use of the mark in commerce under Trademark Act Section 1(a), and alleging a date of first use and date of first use in commerce of March 1, 2005.

applicant's mark, when used on the identified goods, so resembles the following of opposer's previously used and pleaded registered marks as to be likely to cause confusion, mistake or to deceive:

(1) TRACIE MARTYN, in standard characters, for "skin care treatment salon services and cosmetic and color analysis, namely, analysis of the color, tone, texture and appearance of the skin and underlying tissues and the care and treatment of the skin and tissue through electrical stimulation of nerves, tissues, and muscle as well as traditional methods of skin care treatment and makeup application,"[2]

(2) TRACIE MARTYN, in standard characters, for "skin care products namely, facial cleansers, facial creams, facial emulsions, facial masks, facial scrubs, body lotions, astringents for cosmetic purposes, cosmetic pads, eye makeup remover, skin cleansing lotion, skin conditioners, skin cleansing cream, skin cream, skin and face lotions, skin moisturizer, skin clarifiers, skin cleansers, skin emollients, skin lighteners, skin masks, skin moisturizer masks, skin soap, skin toners, skin whitening cream, wrinkle removing skin care preparations,"[3]

(3) RESCULPTING BODY TREATMENT BY TRACIE MARTYN, in standard characters, for "skin care services, namely, providing skin and body care treatment and massage,"[4] and

(4) RESCULPTING SERUM BY TRACIE MARTYN, in standard characters, for "cosmetic and skin care products namely, facial creams, facial emulsions, skin cream, skin and face lotions, skin moisturizer, skin clarifiers, skin emollients, skin lighteners, skin whitening cream, wrinkle removing skin care preparations,"[5]

---

[2] Registration No. 2569005, registered May 14, 2002, Section 8 and 15 affidavits accepted December 6, 2007.

[3] Registration No. 2845161, registered May 25, 2004.

[4] Registration No. 2763314, registered September 16, 2003.

[5] Registration No. 2840732, registered on May 11, 2004.

On June 6, 2007, opposer filed a motion for leave to amend its notice of opposition concurrently with a copy of its amended notice of opposition. The Board granted opposer's motion to amend, as conceded, on October 24, 2007. In its amended notice of opposition, opposer repeated the grounds for opposition based on likelihood of confusion, and set forth an additional ground for opposition, namely, that applicant, Tracy Artman was not the owner of the trademark TRACY'S TREATS NATURAL PRODUCTS FOR REMARKABLE SKIN on June 16, 2005, the filing date of the subject application.

On December 7, 2007, opposer filed a motion for summary judgment on the ground that the subject application was void as filed. In particular, opposer asserts that the application was void *ab initio* due to an error in execution which cannot be corrected by amendment or assignment after the filing date. Opposer relies on applicant's answer to certain paragraphs, namely, paragraphs 17 and 18, in the amended notice of opposition wherein applicant admitted the following allegations:

> 17. On June 16, 2005, Tracy Artman was the president of Tracy's Treats Inc.
>
> 18. On June 16, 2005, Tracy's Treats Inc. was the owner of the trademark TRACY'S TREATS NATURAL PRODUCTS FOR REMARKABLE SKIN for use in connection with the goods set out in the subject application.

In response, applicant asserts that § 512.04 of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP")

allows applicant, by amendment, to correct the misidentification in her application, that Tracy Artman, President of Tracy's Treats Inc. mistakenly signed the subject application as the owner of the mark therein, when in fact the corporation, Tracy's Treats Inc. owns the mark, and that the mistake "is easily remedied by filling out a form online and paying a $40 filing fee."[6]

Summary judgment is appropriate when the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). A dispute as to a material fact issue is genuine only if a reasonable fact finder viewing the entire record could resolve the dispute in favor of the nonmoving party. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). In deciding a motion for summary judgment, the Board must view the evidence in the light most favorable to the nonmovant and must draw all reasonable inferences from underlying facts in favor of the nonmovant. *Id.*

A party seeking summary judgment bears the initial burden of informing the Board of the basis for its motion and identifying those portions of the record which it

---

[6] Inasmuch as the USPTO fee for recording the assignment of a trademark is $40, pursuant to Trademark Rule 2.6(b)(6), we construe this as an assertion on applicant's part that the mistake at issue can be remedied by the recordation of assignment documents with the USPTO.

believes demonstrates the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). 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 burden shifts to the nonmoving party to demonstrate the existence of specific genuinely disputed facts which must be resolved at trial. The nonmoving party may not rest on mere allegations of its pleadings and assertions of counsel, but must designate specific portions of the record, or produce additional affidavit evidence, showing the existence of a genuine issue of material fact for trial. If the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered in the moving party's favor. See Fed. R. Civ. P. 56(e).

At issue here is the validity of Application Serial No. 78652615 as of its filing date, *i.e.*, June 16, 2005. The Lanham Trademark Act, 15 U.S.C. § 1051, provides as follows (emphases added):

> (a) Application for use of trademark
>
> (1) *The owner* of a trademark … may request registration

The statute requires that an application to register a mark

be filed with the Patent and Trademark Office by the owner thereof. The Board cannot waive this statutory requirement, and does not have the authority to excuse noncompliance with it. *See Huang v. Tzu Wei Chen Food Co. Ltd.*, 7 USPQ2d 1335, 1336 (Fed. Cir. 1988).

Moreover, Section 1201.02(b) and (c) of the *Trademark Manual of Examining Procedure*, 5th Edition ("TMEP") explains, in pertinent part, as follows:

> **1201.02(b) Application Void if Wrong Party Identified as the Applicant**
>
> An application must be filed by the party who is the owner of (or is entitled to use) the mark as of the application filing date. *See* TMEP §1201.
>
> An application based on use in commerce under 15 U.S.C. §1051(a) must be filed by the party who owns the mark on the application filing date. If the applicant does not own the mark on the application filing date, the application is *void*. 37 C.F.R. §2.71(d).

When an application is filed in the name of the wrong party, such that the application is void, this defect cannot be cured by amendment or assignment. 37 C.F.R. §2.71(d); TMEP § 803.06. However, if the application was filed by the owner, but there was a *mistake* in the manner in which the applicant's name was set forth in the application, this may be corrected.

TMEP § 1201.02(c) provides examples of both "Correctable Errors" and "Non-Correctable Errors" in the manner in which an

application identifies an applicant, and gives the following example of a correctable error:

> *Inconsistency in Original Application as to Owner Name or Entity.* If the original application reflects an inconsistency between the owner name and the entity type, e.g., an individual and a corporation are each identified as the owner in different places in the application, the application may be amended to clarify the inconsistency.

In the same vein, the TMEP provides the following example (emphasis added) of a non-correctable error:

> *President of Corporation Files as Individual.* If the president of a corporation is identified as the owner of the mark when in fact the corporation owns the mark, <u>and there is no inconsistency in the original application between the owner name and the entity type</u> (such as a reference to a corporation in the entity section of the application), the application is void as filed because the applicant is not the owner of the mark.

Application Serial No. 78652615 does not evidence an inconsistency either between the owner name and the entity type, or in any other manner. The entity "Tracy's Treats Inc." appears nowhere on the subject application form, and the application includes no apparent *mistake* in the manner in which it sets forth the applicant for and owner of the mark TRACY'S TREATS NATURAL PRODUCTS FOR REMARKABLE SKIN. The applicant is identified as "Artman, Tracy." The legal entity of the applicant is given as an individual United States citizen. The application includes the electronic signature of this named individual with no reference to or mention of her capacity as an officer of Tracy's Treats Inc.

Thus, inasmuch as we find no inconsistency in the application itself which would constitute a correctable mistake, and inasmuch as the record in the opposition proceeding before us indicates that Tracy's Treats Inc. was the owner of the trademark on June 16, 2005, we must deem the application void as filed because the applicant identified therein, Tracy Artman, was not, on that date, the owner of the mark. Accordingly, on the issue of whether the subject application is void *ab initio*, we find that opposer has demonstrated that it is entitled to judgment as a matter of law.

With respect to applicant's argument that her application is correctable pursuant to TBMP § 512.04 (2d ed. rev. 2004), we note that this provision is inapplicable. In particular, TBMP § 512.04 governs situations where a party to a Board proceeding is misidentified at the institution of or during the course of such Board proceeding. The cited section does not provide applicant with an avenue through which she can now correct the information provided in her application filed on June 16, 2005.

In view of our finding, opposer's motion for summary judgment is granted, the opposition is sustained on the sole ground that the application is void *ab initio*, and registration to applicant is refused.

As a final matter, noting that the opposition before us sets forth the additional ground for opposition based on priority and likelihood of confusion, we acknowledge that opposer might potentially find itself in the position of asserting these same grounds for opposition against a future application for the same mark and the same goods, if filed. In the interest of judicial economy, the Board exercises its inherent authority to effectuate a just result and allows opposer thirty days from the mailing date of this order in which to inform the Board whether it wishes to further pursue this opposition and seek a determination on the merits of its likelihood of confusion claim, or withdraw its likelihood of confusion claim without prejudice as moot in light of the Board's finding that the subject application is void *ab initio*. *See, e.g., C.H. Guenther & Son Inc. v. Whitewing Ranch Co.,* 8 USPQ2d 1450, 1452 (TTAB 1988) (upon finding that the expiration of respondent's involved registration, for failure to renew, was the result of unintentional inadvertence or mistake, Board determined that petitioner was entitled to elect whether it preferred to dismiss its petition for cancellation without prejudice, or to go forward with the proceeding to obtain a determination of the pleaded issues); *Bank of America National Trust & Savings Association v. The First National Bank of Allentown*, 220 USPQ 892, 894 n. 6 (TTAB 1984) (opposed application was

held void *ab initio* due to applicant’s concession that use of mark was not made until after filing date, but proceedings were continued based upon opposer's election to adjudicate the pleaded issues).

In the event that the Board receives no response from opposer on this point, the likelihood of confusion claim will be dismissed as moot.