

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

**Brown**

Mailed: September 18, 2008

Opposition No. 91176701

Gas Pump Heaven, Inc.

v.

Anderson, Scott d/b/a  
Time Passages, Ltd.

**Before Hohein, Rogers and Cataldo, Administrative Trademark  
Judges.**

**By the Board:**

This case now comes before the Board for consideration of applicant's motion (filed March 10, 2007) to dismiss this proceeding for failure to prosecute under Trademark Rule 2.132(a).<sup>1</sup> For the reasons discussed below, applicant's motion is granted.

In a Board proceeding, the burden is on the opposer to prove, by a preponderance of the evidence, both its standing to oppose as well as the existence of a valid pleaded ground

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<sup>1</sup> Although applicant's motion to dismiss for failure to prosecute was not filed before the opening of its testimony period as required by Trademark Rule 2.132(c), the Board, as permitted by that rule, has exercised its discretion and considered the motion. See *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710 (Fed. Cir. 1991). In addition, given opposer's submission of a responsive brief, the fact that applicant did not serve a copy of its motion to dismiss for failure to prosecute on opposer until "specifically asked to do so" is immaterial to this decision on the merits of the motion.

for refusal of registration. See *Young v. AGB Corp.*, 47 USPQ2d 1752 (Fed. Cir. 1998). Thus, under Trademark Rule 2.132(a), when a plaintiff fails to offer testimony or other evidence during its assigned testimony period, the defendant may move for dismissal for failure to prosecute. Absent a showing of good and sufficient cause why judgment should not be rendered against it, judgment will be entered against plaintiff. See Trademark Rule 2.132(a).

In this case, opposer argues that applicant's motion to dismiss for failure to prosecute is not only untimely, but in any event, when read together, the notice of opposition and applicant's answer establish a prima facie case and entitle opposer to a judgment in its favor on the merits.

As noted previously, the Board has considered the timeliness of applicant's motion and decided to consider the motion on the merits. Reviewing the record, the Board further finds, however, that opposer's reliance upon the allegations contained in the notice of opposition as well as certain admissions made by applicant in its answer as constituting a valid basis for this case to proceed on the merits, is misplaced.

Here, the notice of opposition consists of ten (10) numbered paragraphs. As to the salient allegations contained therein, opposer asserts in Paragraph No. 8 that applicant's mark "is used as an ornamental feature of the

gas pump replicas, placed as it would have appeared on the original antique gas pump, in order to produce an accurate replica," and in Paragraph No. 10, opposer states that both parties are "entitled to fair use" of the mark.

In its answer, however, applicant unequivocally "denied" both of those allegations in their entirety and as a result, applicant has never admitted for the record that its mark constitutes an aesthetic or ornamental feature of the replica goods identified in the application. In addition, applicant "denied" the allegations contained in Paragraphs Nos. 1 and 9 in full, and given the limited admissions provided by applicant in answers to Paragraph Nos. 3, 4, 5, 6 and 7, applicant's admissions at most are sufficient to constitute proof of opposer's standing to bring this proceeding. Without any additional evidence or testimony, the pleadings fail to constitute proof of the sole pleaded ground for opposition, specifically, that the mark applicant seeks to register fails to function as a mark for its replica goods.

Furthermore, a plaintiff, absent an amendment, is restrained by the grounds pleaded in the notice of opposition. Inasmuch as a pleading should include enough detail to provide a defendant with fair notice of the basis for an asserted claim, the Board will not consider grounds which a plaintiff fails to raise in the notice of opposition

unless presented in a timely motion to amend. See *Ohio State University v. Ohio University*, 51 USPQ2d 1464 (TTAB 1993).

Thus, to the extent that opposer, on page 3 of its brief in opposition to applicant's motion to dismiss, asserts in the alternative that there is a "likelihood of confusion" between the respective marks, the Board finds that opposer has not made a proper pleading of priority of use and likelihood of confusion. Moreover, even if the Board were to generously interpret opposer's above-noted statement as a motion for leave to amend, opposer is also constrained by Fed. R. Civ. P. 15(a), which provides that an amendment to a pleading must be made in a timely fashion and, if necessary, include any explanation of the reasons for any delay in moving to amend. See *International Finance Corp. v. Bravo Co.*, 64 USPQ2d 1597, 1604 (TTAB 2002). On the record before us, even if we were to construe opposer's allegations as a motion to amend the notice of opposition, any such constructive amendment filed in response to a motion to dismiss under Trademark Act 2.132 would be untimely.

In closing, since applicant has denied the only properly pleaded ground in this case and opposer has failed, during its assigned testimony period, to introduce any evidence or testimony to support its claim that applicant's

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mark fails to function as an indicator of source for the replica goods identified in the application, it is clear that opposer has not carried the burden of proving its case. In view of the foregoing and in the interest of finality, the Board finds no valid reason for this case to proceed any further.

Accordingly, applicant's motion to dismiss this opposition under Trademark Rule 2.132(a) for failure to prosecute is granted. With further proceedings rendered unnecessary by this order, the opposition is hereby dismissed with prejudice.