

THIS OPINION
IS NOT A PRECEDENT OF
THE TTAB

Hearing:
11/09/10

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6/27/11

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

StonCor Group, Inc.
v.
Les Pierres Stonedge Inc.

Opposition No. 91181621
to application Serial No. 76650832
filed on November 22, 2005

Request for Reconsideration

Charles N. Quinn of Fox Rothschild for StonCor Group, Inc.

James R. Menker of Holley & Menker for Les Pierres Stonedge
Inc.

Before Quinn, Wellington and Wolfson, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

The Board, on May 17, 2011, dismissed the opposition.
Opposer now requests reconsideration of this decision.

We have carefully considered opposer's request, but we
remain of the opinion that the evidentiary record
introduced by opposer falls short of proving its likelihood

of confusion claim. To reiterate, the only evidence of record on opposer's behalf comprises status and title copies of its pleaded registrations.

Even though the parties' goods may be, at best, complementary, the goods are distinctly different. As we indicated in our decision, any conjoint use of the involved goods, in and of itself, is an insufficient basis in this case upon which to find that the goods are sufficiently related for purposes of our likelihood of confusion analysis, especially where, as here, the marks are also different. As we stated: "There simply is no evidence to even suggest that the goods are of a type that ever emanate from a common source, much less that purchasers would expect them to, especially when, as in this case, the marks are different." (Opinion, p. 18). We stand by the conclusion set forth in the opinion:

Based on the sparse record introduced by opposer, comprising only its pleaded registrations, and keeping in mind that opposer has the burden of proof of establishing its likelihood of confusion claim by a preponderance of the evidence, we see opposer's likelihood of confusion claim as amounting to only a speculative, theoretical possibility. The cumulative differences between each of the parties' marks and the goods sold thereunder, coupled with the suggestiveness of the STON(E)- portions of the marks, persuade us that

confusion is unlikely to occur among consumers in the marketplace. (Opinion, pp. 20-21).

Accordingly, the request for reconsideration is denied, and the Board's decision dated May 17, 2011 stands.

We also note that opposer has filed a second request to file a supplemental brief "addressing the issue of attachment of a presumption of administrative correctness to trademark registration applications approved for publication of the marks approved for opposition by the [USPTO]." (p. 1). Opposer states that its "rebuttal testimony and documentary evidence were admissible to rebut a presumption of administrative correctness to which the [USPTO] action of approving [applicant's] application was entitled, just as in any essentially final action of any administrative agency." (p.2).

The Board has inherent authority to manage its own proceedings. See TBMP §§101; 102.03; and 702.03 (3d ed. 2011). To that end, the Board has long-standing practices and procedures, as well as the Trademark Rules of Practice, that govern inter partes proceedings. The present case is no exception. As we indicated in our original decision, opposer, during its testimony period, neither took nor offered any other evidence. Nevertheless, opposer, during its rebuttal testimony, took a deposition, at which

applicant objected "on the grounds that it's improper rebuttal." Applicant, in its brief, renewed its objection.

Even a cursory review of the "rebuttal" testimony makes it clear that it is in the nature of testimony that was appropriate for introduction during opposer's case-in-chief. On that basis alone, the rebuttal is improper. But, even more specifically in the context of this proceeding, *applicant did not take testimony or introduce any other evidence*. Thus, there was *nothing* for opposer to rebut. When the defendant in a Board inter partes proceeding does *nothing* during its testimony period, there is *nothing* for the plaintiff to rebut. So as to be clear, such a situation does not present the plaintiff with a second chance to take testimony or offer other evidence during rebuttal that was proper for introduction in support of its case-in-chief. Opposer's argument that its testimony and evidence is admissible to rebut "the presumption of administrative correctness" accorded to the Office's "approval" of the involved application by having published the mark for opposition is ill-founded; to reiterate, Mr. Jewell's deposition comprises classic case-in-chief testimony. See *Visual Info. Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179, 182-83 (TTAB 1980); and *General Electric Co. v. Graham Magnetics*, 197 USPQ 690, 692 n.5

(TTAB 1977). To take opposer's position to the extreme, it would allow a plaintiff in a Board procedure to do nothing during its testimony period, with the plaintiff then seeing what the defendant does (or does not do), and then having the plaintiff proceed, during rebuttal, to put on its case-in-chief under the guise of "rebutting a presumption of administrative correctness to which the [USPTO] action of approving [applicant's] application was entitled." Board practice and procedure governing inter partes proceedings neither allow nor contemplate such action by a plaintiff.

Thus, we see no reason to allow opposer to file a supplemental brief, arguing a position that clearly is contrary to established Board practice and procedure governing proper rebuttal in an inter partes proceeding. Accordingly, opposer's request is denied.