

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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General Contact Number: 571-272-8500

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Mailed: April 22, 2015

Opposition No. 91215049

Alliance Powersports Inc.

v.

Hammer Brand LLC dba Wolf Brand
Scooters

Before Kuhlke, Taylor, and Hightower,
Administrative Trademark Judges.

By the Board:

Hammer Brand LLC dba Wolf Brand Scooters (“Applicant”) seeks to register the mark WOLF for “Motorized scooters and structural parts therefor” in International Class 12.¹

Alliance Powersports, Inc. (“Opposer”) opposes registration of Applicant’s mark on the ground of likelihood of confusion with its previously used mark WOLF for scooters. Opposer alleges common law rights in the mark and alleges it is the owner

¹ Application Serial No. 86037963, filed August 14, 2013, based on use in commerce under Trademark Act Section 1(a), alleging April 1, 2013 as the date of first use and first use in commerce.

of pending Application Serial No. 86130449 for the mark WOLF for “scooters” in International Class 12.²

Applicant, in its answer, denied the salient allegations in the notice of opposition.

This case now comes up for consideration of Applicant’s motion (filed December 17, 2014) for summary judgment in its favor on the issue of priority.³

Summary judgment is only appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). The Board may not resolve issues of material fact; it may only ascertain whether a genuine dispute regarding a material fact exists. *See Lloyd’s Food Products, Inc. v. Eli’s, Inc.*, 987 F.2d 766, 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Olde Tyme Foods, Inc. v. Roundy’s, Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods, Inc.*, 22 USPQ2d at 1544.

After reviewing the parties’ arguments and supporting evidence, we conclude that disposition of this matter by summary judgment is not appropriate because, at a minimum, there exists a genuine dispute of material fact with respect to priority.

² Such application, which is currently suspended pending disposition of Applicant’s application, alleges that Opposer has used the mark since at least August 2011.

³ Applicant’s motion also argues that summary judgment on the issue of fraud should also be made in its favor. We observe, however, that in the Board’s order of December 2, 2014 Opposer’s claim of fraud was struck from the notice of opposition.

That is, whether Opposer established “proprietary rights in the term he relies upon ... by prior use of a technical ‘trademark,’ prior use in advertising, prior use of a trade name, or whatever other type of use may have developed a trade identity” prior to Applicant’s first use of its mark.⁴ *See Otto Roth & Co., Inc. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981).

In view thereof, Applicant’s motion for summary judgment is hereby denied.⁵

Proceedings herein are resumed. Dates are reset as follows:

Expert Disclosures Due	5/31/2015
Discovery Closes	6/30/2015
Plaintiff's Pretrial Disclosures Due	8/14/2015
Plaintiff's 30-day Trial Period Ends	9/28/2015
Defendant's Pretrial Disclosures Due	10/13/2015
Defendant's 30-day Trial Period Ends	11/27/2015
Plaintiff's Rebuttal Disclosures Due	12/12/2015
Plaintiff's 15-day Rebuttal Period Ends	1/11/2016

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served 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 Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

⁴ The fact that we have identified and discussed only one genuine dispute of material fact as a sufficient basis for denying the motion for summary judgment should not be construed as a finding that this is necessarily the only dispute which remains for trial.

⁵ The parties should note that the evidence submitted in connection with the motion for summary judgment is of record only for consideration of the motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. *See Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).