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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91223971
Party	Defendant Vatche Kiwanian DBA US Batta
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Date	09/13/2016
Attachments	91223971 MSJ.pdf(1488547 bytes)

Before the:

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

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("Opposer's Attorney")

University City Studios, LLC

v.

Vatche Kiwanian DBA US Batta

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("Applicant's Attorney")

USPTO Proceeding #91223971

Opposed Mark: **Fast & Furious**
Application Serial # 86-479,908

Answer Filed: November 2, 2015

Email and Copy mailed to Opposer's Attorney

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 2.132(a) and (b) of the Trademark Rules of Practice, 37 C.F.R.§2.132(a) and (b), Applicant Vatche Kiwanian ("Applicant"), through Applicant's Attorney, moves for Summary Judgment on the grounds that Opposer Universal City Studios, LLC ("Opposer") has failed to prosecute this Opposition. Specifically, the period for Discovery has closed and Opposer has failed to take any testimony in this matter and has failed to introduce any evidence in support of its Opposition.

FACTS

On September 21, 2015, Opposer filed its Notice of Opposition, No. 91223971, against Applicant's Application No. 86-479,908. Applicant filed its answer on November 2, 2015, within the time set for Applicant to do so by the Board's original case schedule. Pursuant thereto, a Rule 26 conference for this Opposition as well as Opposition No. 91224148 ("Case 91224148"), was conducted by phone between Applicant's Attorney and Tristam Falls, the attorney who is representing Opposer for Case 91224148 and who is also from the same firm as Opposer's Attorney. The attorneys discussed settlement possibilities for this Opposition and Case 91224148. On December 8, 2015, Opposer filed a motion to extend discovery for this Opposition and Case 91224148 in order to explore settlement, which was agreed to by Applicant, extending the Board's original case schedule. On December 10, 2015, Applicant tendered a non-binding settlement offer by email to Opposer for Applicant to drop its Application, as well as for the application in Case 91224148 in exchange for a settlement amount with a deadline of December 31, 2015 to accept. On December 28, Applicant made another attempt to contact Opposer by email and phone to find out if the settlement was accepted. No answer was ever received. No further communication has occurred between the parties or their attorneys.

With the extended case schedule, Opposer's Expert Disclosures were due by July 29, 2016, but never received. Discovery closed August 28, 2016; yet, Applicant has never received any disclosure requests. Initial Disclosures from Opposer were never received. Opposer's Pre-trial Disclosures are due on October 12, 2016.

ARGUMENT

Rule 2.132(a) provides that a party may obtain an involuntary dismissal for failure of the party in position of Opposer to take any testimony or offer any other evidence. In this case,

Opposer has not obtained any discovery or taken any testimony. As Opposer has presented no record evidence or testimony establishing its case, it has shown no right to relief. Accordingly, Applicant moves for judgment under 37 C.F.R. §2.132(a).

Likewise, Opposer's Opposition is dismissible for failure to take testimony under 37 C.F.R. §2.132(b). Subsection (b) of Rule 2.132 provides that if no evidence other than trademark registrations are offered into evidence, an applicant can move for dismissal "on the ground that upon the law and the facts the party in the position of opposer has shown no right to relief".

In this case, the Disclosure period is closed. Opposer has made no discovery request, and Applicant is no longer under any duty to provide discovery nor will Applicant voluntarily do so. Finally, Opposer cannot even assert expert disclosures as that period has also closed. As such, Opposer can offer no other evidence other than its own trademark registrations. As 37 C.F.R. §2.132(b) clearly states:

> "If no evidence other than a copy or copies of Patent and Trademark Office records is offered by any party in the position of opposer, any party in the position of Applicant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground that upon the law and the facts the party in the position of opposer has shown no right to relief."

The Board has often ruled under 37 C.F.R. §2.132(b) that when the only evidence in the record is an opposer's registration(s), the applicant is entitled to dismissal. Please refer to Hyde Park Footwear v. Hampshire-Designers, Inc., 197 USPQ639 (TTAB1977) as proof of such assertion. In that case, the applicant's trademark, SEAL HARBOUR, was alleged to create a likelihood of confusion, mistake or deception by virtue of the similarity of the mark to the opposer's mark, Hyde Park Footwear. The Board stated:

> "The registrations alone are incompetent to establish any facts with regard to the nature or extent of opposer's use and advertising of its trademarks or any reputation they enjoy or what purchaser's reactions to them may be... however, when there is a difference between the marks or between the goods, or both, it is incumbent upon the opposer to persuade us that there is a reasonable likelihood of confusion."

Id. at 641.

In reviewing the decision by the Board in Ston Cor Group, Inc. v. Cupa Materiales, S.A., Opposition No. 91190420 (TTAB 2012), the Board held that absent other evidence other than pleaded registrations, dissimilarity of the marks and goods between the opposer and applicant in that case was sufficient for the Board to grant a motion to dismiss.

In this case, Applicant concedes that the Opposed Mark is identical in appearance only to Opposer's numerous registrations. However, a quick search of USPTO records shows that Opposer has no applications or registrations, identical or related, for the International Class 033 goods for which Applicant filed, specifically:

> Alcoholic beverage produced from a brewed malt base with natural flavors; Alcoholic beverages containing fruit; Alcoholic beverages except beers; Alcoholic beverages of fruit; Alcoholic beverages, namely, Arak; Alcoholic carbonated beverages, except beer; Alcoholic mixed beverages except beers; Flavored brewed malt beverage; Liquor and liqueur beverages, namely, Arak; Rum; Spirits; Wine-based beverage, namely, piquette

As such, the examining attorney rightfully approved the Opposed Mark for publication, seeing no cause for a 15 U.S.C. §1052(d), likelihood of confusion rejection. In summary, the examining attorney has found no confusion, and Opposer can offer no further proof, testimony or evidence, other than its unrelated registrations to show any confusion with the Opposed Mark. Therefore, Opposer has failed to meet its burden under the Opposition, and Applicant's motion under Rule 2.132(b) should be granted.

WHEREFORE, Applicant asks that Applicant's Motion for Summary Judgment be granted, that Opposer's claim of opposition be denied with prejudice, and that the Opposed Mark be allowed to proceed to registration. This Motion for Summary Judgment has been filed through ETAS and a copy emailed and mailed to Opposer's attorney.

Respectfully submitted,

Curt Handley, Esq

Curt Handley, Esq.
Applicant's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Answer has been served on September 12, 2016, via First Class Mail, postage prepaid to Opposer's Attorney:

Lawrence C. Hinkle II
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Lawrenceville, NJ 08648

Curt Handley, Esq.

Dated: 9/12/16

Curt Handley, Esq.
Applicant's Attorney