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

Proceeding	92028142
Party	Plaintiff IOB REALTY, INC.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

I.O.B. REALTY, INC. Plaintiff, v. PATSY'S BRAND, INC., Defendant.	)	Cancellation No. 92028142
PATSY'S BRAND, INC., Plaintiff, v. I.O.B. REALTY, INC., Defendant.	)	Cancellation No. 92029614

MOTION FOR FINAL ORDERS IN CANCELLATION PROCEEDINGS

I.O.B. Realty, Inc., requests the T.T.A.B. issue separate final orders for each of the two cancellation proceedings. These final orders are required in order to permit I.O.B. Realty to appeal the final orders to the United States District Court for the Eastern District of New York in accordance with 15 U.S.C. 1071(b). It is anticipated that any appeal to the United States District Court for the Eastern District of New York will be consolidated with currently pending Civil Action Numbers 06-cv-0587 (DLI-RER) and 06-cv-0729 (DLI-RER).

The procedure of the two cancellation proceedings before the T.T.A.B. was very irregular. The TTABVUE system on the USPTO website identifies Cancellation No. 92029614

as terminated, yet the Board never responded to briefs filed in mid-2003 in response to the Board's Order to Show Cause of May 12, 2003. Further, Cancellation No. 92028142 is identified by TTABVUE as remaining active.

A brief memorandum supporting this motion follows. This motion is based upon public records currently available to counsel for I.O.B. Realty. Counsel attempted to acquire certified copies of the cancellation proceedings and was informed on January 18, 2007, by Mrs. Cathy Fowler of the PTO Document of Public Records that the cancellation proceedings are "not available."

MEMORANDUM IN SUPPORT OF MOTION FOR FINAL ORDERS

The public records of at least the cancellation proceedings appear incomplete. Judge Irizarry of the United States District Court for the Southern District of New York directed counsel for I.O.B. Realty at a hearing on January 18, 2007, to serve a subpoena on the USPTO to obtain complete records. The subpoena accompanies this motion. Discovery before Judge Irizarry terminates on Friday, January 26, 2007.

A Revocation and Substitution of Power of Attorney is filed concurrently with this motion.

No fees are believed due by these papers. However, if any fee is due, please charge Deposit Account Number 12-1210.

1. Introduction

The Parties to these cancellation proceedings have engaged in various inter partes activities for approximately seven years. The original activity was a trademark infringement action before Judge Martin of the United States District Court for the Southern District of New York. This action has become known as the "tomato sauce case" (Civil Action No. 99-civ-10175). This district court decision was appealed to the Second Circuit Court of Appeals, which was decided on January 16, 2003.

During the "tomato sauce case," these cancellation proceedings were filed. Concurrently with these cancellation proceedings, Patsy's Brand, Inc. ("Patsy's Brand") filed two trademark applications for the mark PATSY'S for use with restaurant services. The Trademark Office

refused registration of these two applications because of I.O.B. Realty's U.S. Registration Numbers 1,975,110 and 2,213,574 for restaurant services.

I.O.B. Realty maintains that at least its Registration No. 2,213,574 was improperly canceled by the Trademark Office. The cancellation of the two registrations owned by I.O.B. Realty resulted in the issuance of U.S. Registration Nos. 3,009,836 and 3,009,866 for restaurant services to Patsy's Brand.

Patsy's Brand brought Civil Action Nos. 06-cv-05857 (DLI-RER) and 06-cv-00729 (DLI-RER) asserting that I.O.B. Realty and its licensees infringe the two registrations held by Patsy's Brand, even though I.O.B. Realty is the senior user of the mark. I.O.B. Realty asserts a counterclaim that Patsy's Brand's two registrations should be cancelled by the district court.

The District court has expressed considerable interest in the procedural anomalies that occurred before the T.T.A.B. in the two cancellation proceedings. I.O.B. Realty believes that this motion is proper and that no final decision was ever issued by the board in either cancellation proceeding based upon the known facts as explained below. I.O.B. Realty seeks a final decision from the T.T.A.B. so as to appeal the Board's final orders to the district court.

2. The Plaintiffs' Counsel Apparently Knowingly Permitted I.O.B. Realty's Registration to Be Improperly Canceled

Counsel for I.O.B. Realty at a hearing on November 7, 2006, before the United States District Court for the Southern District of New York stated words to the effect that counsel for Patsy's Brand, Inc. et al. ("Patsy's Brand"), while not being unethical, knowingly permitted the

Trademark Trial and Appeal Board ("T.T.A.B.") to improperly cancel I.O.B. Realty's trademark registration.

Counsel for Patsy's Brand, Cooper & Dunham, first obtained an Entry of Judgment on September 4, 2002, from the T.T.A.B. based **only upon submissions of Judge Martin's district court decisions**. It appears that prior to this Entry of Judgment, Cooper & Dunham made no effort to inform the T.T.A.B. of the Second Circuit appeal.

Cooper & Dunham then appears to have knowingly taken advantage in 2002 and 2003 of the disarray, which began in 2001, between I.O.B. Realty and its counsel, Pennie & Edmonds LLP. The most relevant dates are as follows. (Actions involving the T.T.A.B. are in bold type and italics.)

December 20, 1999	***Levy & Grandinetti submitted Power of Attorney with the T.T.A.B. to appear on behalf of I.O.B. Realty in the cancellation proceeding.***
June 21, 2000	***T.T.A.B. (Mr. Mermelstein) consolidated and suspended the cancellation proceedings.***
December 1, 2000	***T.T.A.B. (Mr. Mermelstein) granted withdrawal of Levy & Grandinetti and sent copies to Mr. Brecevich and Mr. Saunders of Pennie & Edmonds. The T.T.A.B. noted that Mr. Saunders did not enter an appearance with the T.T.A.B. and gave I.O.B. 30 days to enter a notice that it was proceeding pro se or to identify new counsel.***
December 29, 2000	***I.O.B. Realty filed Power of Attorney for Mr. Saunders of Pennie & Edmonds at T.T.A.B.***
April 18, 2001	Pennie & Edmonds withdrew as counsel before Judge Martin because it was sanctioned by Judge Martin and had a conflict of interest prohibiting any further representation of I.O.B. Realty. Pennie & Edmonds obtained separate counsel to represent Pennie & Edmonds in the sanctioning

	proceeding before Judge Martin. The Plaintiffs' counsel had direct knowledge that the interests of Pennie & Edmonds were in direct conflict with the interests of I.O.B. Realty.
May 15, 2001	***T.T.A.B. accepted the appearance of Pennie & Edmonds (Mr. Saunders). T.T.A.B. records do not identify which entities or persons were served.***
October 4, 2001	Judge Martin issued Amended Final Judgment in the District Court "tomato sauce action."
October 15, 2001[1]	***Cooper & Dunham filed Request for Reinstatement & Motion for Entry of Judgment with T.T.A.B. Cooper & Dunham (Mr. Zivin) signed Certificate of Service on Pennie & Edmonds (Mr. Saunders).***
October 26, 2001	Appeal filed by I.O.B. Realty with Second Circuit.
September 4, 2002	***T.T.A.B. (Mr. Mermelstein) issued Entry of Judgment, granting cancellation of I.O.B. Realty's U.S. Registration No. 1,975,110 as "conceded." T.T.A.B. service appears to have been on Pennie & Edmonds and Cooper & Dunham. This Entry of Judgment was based solely on Judge Martin's District Court decision.*** (T.T.A.B. Entry of Judgment.)

[1] Cooper & Dunham (Mr. Zivin) informed the T.T.A.B., "The District Court's final judgment (Exhibit A) is final for the purposes of these proceedings." Oddly, only state law and not federal trademark law is cited. Cooper & Dunham further states, "At this time, I.O.B. Realty has not appealed the District Court's judgment, but even if it does so, the judgment is executory." (Cooper & Dunham's Request for Reinstatement of Proceedings and Motion for Entry of Judgment of October 15, 2001.)

September 11, 2002[2]	Oral arguments were heard before the Second Circuit. Cooper & Dunham (Mr. Zivin) argued against I.O.B. Realty's new counsel Torys LLP (Mr. Thomas J. Sheridan) and Mr. Andrew J. Spinnell.
January 16, 2003	Second Circuit Decided.
March 28, 2003[3]	***T.T.A.B. (Ms. Omelko) issued to I.O.B. Realty an Order to Show Cause Why Judgment Should Not Be Entered. Again, this judgment was based upon Judge Martin's District Court decision. T.T.A.B. service appears to have been on Pennie & Edmonds and Cooper & Dunham.***
April 18, 2003[4]	***Cooper & Dunham (Mr. Zivin) filed Communication to T.T.A.B. wherein the Second Circuit Decision is provided for the first time. Cooper & Dunham (Mr. Zivin) signed a certificate of service on Pennie & Edmonds (Mr. Saunders).***

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[2] Mr. Zivin stood before the Second Circuit on this date next to the attorneys who represented I.O.B. Realty for approximately the previous year and a half knowing that the T.T.A.B. **seven days earlier** issued an Entry of Judgment to cancel I.O.B. Realty's registration based solely on **Judge Martin's District Court decision**. Mr. Zivin knew on this date that the Entry of Judgment was still being sent by the T.T.A.B. to Pennie & Edmonds.

[3] The T.T.A.B. Order states "The September 4, 2002 order stands." The basis for this statement is stated as "WHEREAS the United States ***District Court for the Southern District of New York*** has enjoined I.O.B. Realty . . ." (emphasis added) (T.T.A.B. Order to Show Cause of March 28, 2003).

[4] Cooper & Dunham stated that "[a]lthough the Second Circuit vacated the portion of the permanent injunction which ordered the cancellation of Registration No. 1,975,110, the registration nonetheless should be cancelled. The Second Circuit held that Patsy's Italian Restaurant Inc., an affiliated company of Patsy's Brand, has an equal and long-established right to use the mark PATSY'S for restaurant services. Thus, Registrant I.O.B. falsely claimed that it had exclusive rights in the mark when it obtained its registrations. Further, I.O.B. has not opposed Patsy's Brand's motion for entry of judgment and, ***thus, has lost interest in this case***." (Cooper & Dunham Communication of April 18, 2003 (emphasis added)). Mr. Zivin made this statement knowing that I.O.B. Realty was opposing every attack in other forums on its trademark rights that were known to it.

April 24, 2003	***I.O.B. Realty (Mr. Brecevich) sent letter to T.T.A.B. (Ms. Omelko) regarding the Order to Show Cause and identified the order as "recently received" from former attorneys Pennie & Edmonds.***
April 28, 2003	***Reg. No. 2,213,574 for the mark PATSY'S PIZZERIA canceled.***
May 12, 2003	***T.T.A.B. acknowledged that I.O.B. Realty "has not lost interest" and grants 30 days for briefs in response to an Order to Show Cause.***
May 22, 2003	***I.O.B. Realty's law firm, Torys LLP (Mr. Thomas I. Sheridan), responded to a letter from Cooper & Dunham (Mr. Maldonado) (no copy available) of the same date (references Mr. Maldonado's letter of May 22nd). Torys stated that I.O.B. is pro se before T.T.A.B. and noted the T.T.A.B. Order of December 1, 2000.***
May 27, 2003[5]	***T.T.A.B. sent the notice of cancellation of I.O.B. Realty's Registration No. 1,975,110 to Levy & Grandinetti.***
May 27, 2003	***Registration No. 1,975,110 for the mark PATSY'S canceled.***
June 9, 2003	***I.O.B. Realty timely submits brief pursuant to May 12, 2003, Order to Show Cause.***
June 11, 2003	***Levy & Grandinetti files Notice of Misdirected Mail – T.T.A.B. erroneously identifies Levy & Grandinetti as counsel for Patsy's Brand and Cooper & Dunham as counsel for I.O.B. Realty.***
June 11, 2003	***Patsy's Brand submits response brief to May 12, 2003, Order to Show Cause – argues that September 4, 2002, entry of judgment should stand with prejudice.***
June 24, 2003	***I.O.B. Realty files reply brief.***

[5] The best records available indicate that the notice was forwarded by Levy & Grandinetti on or about June 6, 2003, to I.O.B. Realty without comment or explanation. Note the continued confusion of the T.T.A.B. regarding counsel. **This notice identifies Cooper & Dunham as counsel for I.O.B. Realty**.

If these records are correct, Cooper & Dunham appears to have carefully manipulated information and masterfully caused the demise of I.O.B. Realty's registrations.

Cooper & Dunham on October 15, 2001, filed the District Court decision with the T.T.A.B. and sought Entry of Judgment based upon that decision. Cooper & Dunham served a copy of this motion on Pennie & Edmonds even though Cooper & Dunham knew since at least April 18, 2001, that Pennie & Edmonds ***could no longer represent*** I.O.B. Realty because of a significant conflict of interest. Further, Cooper & Dunham did not inform the T.T.A.B. eleven days later of the notice of appeal filed with the Second Circuit on October 26, 2001.

The T.T.A.B. entered judgment on September 4, 2002, granting cancellation of I.O.B. Realty's registration as being "conceded." Yet, Cooper & Dunham knew that I.O.B. Realty did not concede this matter in any other forum. Mr. Zivin of Cooper & Dunham was standing in front of the Second Circuit ***seven days later*** on September 11, 2002, arguing (and losing) this very point against I.O.B. Realty's new attorneys.

The T.T.A.B. issued an Order to Show Cause on March 28, 2003, upholding its September 4, 2002, decision which was **based solely on** Cooper & Dunham's presentation of **Judge Martin's District Court decision**. Cooper & Dunham waited six weeks until April 18, 2003, which was well after the 20 days granted by the T.T.A.B. for a response to the order, before it notified the T.T.A.B. of the Second Circuit decision. Again, Cooper & Dunham served this paper on Pennie & Edmonds. Over four weeks later, Cooper & Dunham confirmed with I.O.B. Realty's "new" counsel (Torys LLP), who had represented I.O.B. Realty in litigation for

approximately the previous year and a half, that I.O.B. Realty was not represented by counsel before the T.T.A.B. Yet, Cooper & Dunham apparently took no action to inform the T.T.A.B. of the fact or to inform I.O.B. Realty of the matters pending before the T.T.A.B.

The T.T.A.B. issued an Order to Show Cause on May 12, 2003, inviting the Parties to file briefs. The T.T.A.B. granted I.O.B. Realty 30 days to file such a brief. I.O.B. Realty timely filed its brief on June 9, 2003. During this 30 days period the Board cancelled I.O.B. Realty's Registration No. 1,975,110. The Board apparently cancelled I.O.B. Realty's Registration No. 2,213,574 on April 28, 2003, prior to the Order to Show Cause. The Board does not appear to have notified I.O.B. Realty of these cancellations on the dates that these cancellations were entered into the record, but it did issue a notice of cancellation on May 27, 2003.

Regardless of the overlapping briefing schedule and cancellation of I.O.B. Realty's marks, Patsy's Brand filed a response brief on June 11, 2003, wherein it acknowledged the Board's acts of cancelling I.O.B. Realty's registrations but treated the cancellation proceedings as still pending in view of the Order to Show Cause of May 12, 2003.

This very irregular procedural history before the T.T.A.B. did not produce any final order from the T.T.A.B. that are known to counsel for I.O.B. Realty. The electronic records presented by TTABVUE indicate the cancellation proceeding 92029614 is terminated, and cancellation proceeding no. 92028142 remains pending, even though the two proceedings were consolidated.

Conclusion

I.O.B. Realty asks the T.T.A.B. to issue separate final decisions in both cancellation proceedings.

22 January 2007
Date

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing MOTION FOR FINAL ORDERS IN CANCELLATION PROCEEDINGS was served this date via first class mail, postage prepaid, on counsel for plaintiffs Patsy's Italian Restaurant, Inc., and Patsy's Brand, Inc., as follows:

Mr. Norman H. Zivin
Mr. Robert Thomas Maldonado
Ms. Tonia A. Sayour
COOPER & DUNHAM LLP
1185 Avenue of Americas
New York, New York 10036

23 January 2007
Date

Rebecca J. Stempien