

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

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Mailed: January 27, 2009

Cancellation No. 92046965

Gander Mountain Company

v.

ELM Development, LLC

**Before Seeherman, Bucher, and Cataldo,
Administrative Trademark Judges.**

By the Board:

Petitioner seeks to cancel respondent's registration for the mark THE GANDERGUNMEN¹ for "entertainment services, namely, production and distribution of a hunting show" in International Class 41.

As grounds for cancellation, petitioner alleges that respondent's mark is likely to cause confusion with its previously used and registered marks² GANDER MOUNTAIN and GANDER MTN. for the same or similar goods and services under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), that the involved registration was fraudulently obtained, and that respondent's designation fails to function as a mark.

¹ U.S. Registration No. 3086200, issued April 25, 2006, reciting September 9, 2002 as the date of first use and date of first use in commerce.

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Respondent, in its answer, denies the salient allegations in the petition for cancellation.

This case now comes up for consideration of petitioner's motion for summary judgment on the grounds that the involved registration was fraudulently obtained and that respondent's designation THE GANDERGUNMEN fails to function as a mark.³ The motion is fully briefed.

In support of its motion, petitioner submitted, among other things, excerpts from the Fed. R. Civ. P. 30(b)(6) deposition of respondent's founder and president, Mr. Eric L. Marhoun, taken on December 12, 2007. Petitioner contends that Mr. Marhoun has testified "that respondent never used the mark in connection with the stated services, including on the date alleged as the date of first use in commerce." In opposition thereto, respondent has submitted additional portions of Mr. Marhoun's December 12, 2007 deposition, the declaration of Mr. Marhoun, the declaration of his "friend and colleague," Mr. Pierce Smith, as well as supporting exhibits. The declaration of Mr. Marhoun purportedly contradicts his deposition testimony.

Summary judgment is an appropriate method of disposing of any case that has no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See

² Petitioner pleads ownership of several registrations including U.S. Registration Nos. 1335489, 1927194, 2564297, 286302, 2923383, 3305893, and 3305894.

³ Petitioner does not seek summary judgment on its likelihood of confusion claim.

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Fed. R. Civ. P. 56(c). The party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). The evidence must be viewed in a light favorable to the non-moving party, and all justifiable inferences are to be drawn in the non-movant's favor. *Lloyd's Food Products, Inc. v. Eli's, Inc.*, 987 F.2d 766, 767, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 852, 23 USPQ2d 1471 (Fed. Cir. 1992).

After reviewing the arguments and supporting evidence, we conclude that disposition of this matter by summary judgment is not appropriate because, at a minimum, genuine issues of material fact exist as to whether respondent made a false representation to the Office in an effort to obtain its registration and as to whether respondent has used THE GANDERGUNMEN mark as a service mark for the recited services.⁴

We acknowledge petitioner's argument that respondent's opposition to the motion is nothing but "a last ditch attempt to manufacture genuine issues of material fact" and the several

⁴ The fact that we have identified and discussed only a few genuine issues of material fact as a sufficient basis for denying the motion for summary judgment should not be construed as a finding that these are necessarily the only issues which remain for trial.

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inconsistencies petitioner points out between Mr. Marhoun's deposition and his declaration. Petitioner correctly asserts that respondent "cannot create a genuine issue of material fact by trying to revise deposition testimony through affidavit." Nevertheless, because respondent has provided an adequate explanation for the discrepancy and/or inconsistency in Mr. Marhoun's statements in the declaration and his prior deposition testimony, we find Mr. Marhoun's declaration acceptable to show that there is a genuine issue. See *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806, 119 S. Ct. 1597 (1999) and cases collected therein (wherein the Court observed that the lower federal courts have held "with virtual unanimity" that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting its previous sworn statement without explaining the contradiction or attempting to resolve the disparity). See also, *Sinskey v. Pharmacia Ophthalmics, Inc.*, 982 F.2d 494, 25 USPQ2d 1290 (Fed. Cir. 1992) ("Where ... a party has been examined extensively at deposition and then seeks to create an issue of fact through a later, inconsistent declaration, he has a duty to provide a satisfactory explanation for the discrepancy ..."). In particular, we note that as part of their distribution of work, Mr. Smith, and not Mr. Marhoun, allegedly provides most of the editing and production services under the subject mark. We also note that in addition to Mr. Marhoun's and Mr. Smith's declarations,

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respondent has submitted evidence in support of its position which attempts to resolve the discrepancy.

In view thereof, petitioner's motion for summary judgment is denied.⁵

Proceedings are hereby resumed. Discovery is closed. Trial dates are reset as follows.

Plaintiff's 30-day testimony period to close: **March 26, 2009**

Defendant's 30-day testimony period to close: **May 25, 2009**

Plaintiff's 15-day rebuttal testimony period to close: **July 9, 2009**

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.

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); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1983); *American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).