

**THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Augustine's Spiritual Goods, Inc.
v.
Augustine's Eternal Gifts, LLC

Cancellation No. 92049453

Glenn W. Smith of Bensinger, Cotant & Menkes, P.C. for
Augustine's Spiritual Goods, Inc.

William T. McGrath of Davis McGrath LLC for Augustine's
Eternal Gifts, LLC.

Before Grendel, Zervas and Bergsman, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Augustine's Spiritual Goods, Inc. ("petitioner") has filed a petition to cancel Registration No. 3438761 for the mark AUGUSTINE'S, in standard character form, for "novelty items having a religious theme, namely, incense, perfume oils and scented oils used to produce aromas when heated," in International Class 3, owned by Augustine's Eternal Gifts, LLC ("respondent"). As grounds for cancellation, petitioner alleged priority of use and likelihood of confusion. However, the essence of the dispute between the parties is whether respondent purchased the trademark

AUGUSTINE'S SPIRITUAL GOODS and the goodwill associated therewith from petitioner trademark in an asset purchase agreement dated October 17, 2002.

The Record

By operation of Trademark Rule 2.122, 37 CFR §2.122, the record includes the pleadings and the registration file for respondent's mark. The record also includes the following testimony and evidence:

A. Petitioner's Evidence.

1. Testimony deposition of Alice Pulaski, petitioner's owner, with attached exhibits;
2. Rebuttal testimony deposition of Alice Pulaski; and
3. Rebuttal testimony deposition of Frank J. Pulaski, the husband of Alice Pulaski, with attached exhibits.

B. Respondent's Evidence.

Testimony deposition of Carolyn Hennes, the owner of respondent, with attached exhibits.

Facts

Alice Pulaski was the owner operator of AUGUSTINE'S SPIRITUAL GOODS, a retail store.¹ She started her business in 1992.² In 2002, the city of Chicago exercised its right

¹ Frank Pulaski Dep., p. 41; Alice Pulaski Testimony Dep., p. 15.

² Alice Pulaski Testimony Dep., p. 15.

of eminent domain and claimed the building where AUGUSTINE'S SPIRITUAL GOODS retail store was located.³ In lieu of relocating, Ms. Pulaski decided to sell her business.⁴

Carolyn Hennes agreed to purchase the assets of AUGUSTINE'S SPIRITUAL GOODS retail store. Ms. Pulaski and her husband Frank Pulaski drafted the asset purchase agreement.⁵ The agreement provides, in pertinent part, the following:⁶

For this price of \$30,000.00 Carolyn Hennes will receive:

- 1.) Training in practice and procedure in the day to day operations of the business, which includes knowledge of special wash formulas and oil mixtures.
- 2.) A list of all our wholesale business suppliers and access to them, training on how and when to order merchandise.
- 3.) Exposure to the store's customer base and the right to solicit them for future business.
- 4.) All equipment and fixtures pertaining to the running of the business. However, all equipment and fixtures will be delivered to Carolyn Hennes (buyer) as is, used, and Alice Pulaski (seller) does not guarantee the equipments future performance. Items of equipment to be listed by Carolyn Hennes (buyer) on the day she places a deposit on the store.
- 5.) The remaining inventory of our store, it's stock, of which will not be less than one hundred dollars in value (\$100.00). Carolyn Hennes (buyer) also understands that Alice Pulaski (seller) will not place any new orders for stock forty five (45) days prior to the transfer of the business to Carolyn Hennes (buyer).
- 6.) The good name of Augustine's Spiritual Goods, which has an 11 year reputation. Carolyn Hennes understands that although she will be using the name Augustine's Spiritual Goods that it is not a transfer or sale of the corporation, Augustine's Spiritual Goods Inc., nor is it a transfer or sale of Augustine's Spiritual Goods Inc. city business license and state tax exempt number. It is Carolyn Hennes (buyer) responsibility to incorporate, if she chooses, and her sole responsibility to procure her own business license and tax exempt number.

³ Frank Pulaski Dep., pp. 4, 26, 41; Alice Pulaski Testimony Dep., p. 14.

⁴ Alice Pulaski Testimony Dep., pp. 14-15.

⁵ Frank Pulaski Dep., pp. 7, 40, 44; *see also* Alice Pulaski Testimony Dep., p. 40.

⁶ Alice Pulaski Testimony Dep., Exhibit 12; Carolyn Hennes Dep., Exhibit 1.

The above-identified contract was the entire agreement.

Q. Was [the agreement] meant to be a total integration of your agreement or were there, you know, little contingencies and side things going on, such as she could use the name to get on her feet?

A. No. Outside of that, that was it.

Q. That was pretty much it?

A. Yeah.⁷

Six months after selling the assets of the AUGUSTINE'S SPIRITUAL GOODS retail store to Carolyn Hennes, petitioner opened a store in Hancock, Michigan.⁸ The name of the new store is AUGUSTINE'S CURIOUS GOODS.⁹ However, petitioner uses AUGUSTINE'S SPIRITUAL GOODS on its website.¹⁰

Standing

Petitioner operates a retail store named AUGUSTINE'S CURIOUS GOODS in Hancock, Michigan, and it also uses a website with the name AUGUSTINE'S SPIRITUAL GOODS. This is sufficient to demonstrate that petitioner has a real interest in this proceeding, and therefore has standing. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

⁷ Alice Pulaski Testimony Dep., Exhibit 31.

⁸ Frank Pulaski Dep., p. 38; see also Alice Pulaski Dep., p. 14 ("we just decided we were going to move to Michigan - - move the business to Michigan").

⁹ Frank Pulaski Dep., pp. 39-40, 42.

¹⁰ Frank Pulaski Dep., p. 42.

Priority

In order for petitioner to prevail on its Section 2(d) claim, it must prove that it has a proprietary interest in the mark AUGUSTINE'S SPIRITUAL GOODS and that interest was obtained prior to either the filing date of respondent's application for registration or respondent's date of first use. *Herbko International Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002); *Otto Roth & Co., Inc. v. Universal Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981); *Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 USPQ2d 1711, 1714 (TTAB 1993). The determination of these facts hinges on the meaning of the sales contract between the parties because the essence of respondent's defense is that it acquired the mark from petitioner. If respondent acquired the mark from petitioner, then respondent as the successor company acquired all the rights which the petitioner had in the mark. *Educational Development Corp. v. Educational Dimensions Corp.*, 183 USPQ 492, 495 (TTAB 1974); see also *Morgan Services Inc. v. Morgan Linen Services Inc.*, 12 USPQ2d 1841, 1842 (TTAB 1989) (assignee "stands in the shoes" of assignor); *Transamerica Financial Corp. v. Trans-American Collections, Inc.*, 197 USPQ 43, 50 (TTAB 1977) (successor in interest succeeds to all rights in a particular designation acquired by its predecessor).

In reviewing the contract between the parties, we may not interpret the contract based "on the subjective intentions of the parties." We must focus "on the objective words of the agreement." *Duramax Marine LLC v. R.W. Fernstrum & Co.*, 80 USPQ2d 1780, 1789 (TTAB 2006), quoting *Novamedix Ltd. v. NDM Acquisition Corp.*, 166 F.3d 1177, 49 USPQ2d 1613, 1616 (Fed. Cir. 1999), relying on *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971).

Because the contract between the parties was negotiated and signed in Chicago, Illinois and it involved the transfer of common law rights in the AUGUSTINE'S SPIRITUAL GOODS service mark for the retail store, we must look to the law of Illinois to interpret the provisions of the contract. *Old Swiss House, Inc. v. Anheuser-Busch, Inc.*, 569 F.2d 1130, 196 USPQ 808, 809 (CCPA 1978); see also *Duramax Marine LLC v. R.W. Fernstrum & Co.*, 80 USPQ2d at 1790 (interpreting settlement agreement under the laws of Louisiana); *Stockpot, Inc. v. Stock Pot Restaurant, Inc.*, 220 USPQ 52, 58 (TTAB 1983) (interpreting license under the law of Massachusetts).

The construction of a contract is a matter of law. *Gallagher v. Lenart*, 226 Ill.2d 208, 219, 874 N.E.2d 43, 50 (Ill. 2007). The primary objective in construing a contract is to give effect to the intent of the parties. In so doing, the court must initially look to the language of the

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contract alone because the language, given its plain and ordinary meaning, is the best indication of the parties' intent. *Gallagher v. Lenart*, 226 Ill.2d at 232, 874 N.E.2d at 58; *Lease Management Equipment Corp. v. DFO Partnership*, 392 Ill.App.3d 678, 685, 910 N.E.2d 709, 715 (Ill. 2009).

[A]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence.

Air Safety, Inc. v. Teachers Realty Corporation, 185 Ill.2d 457, 462, 706 N.E.2d 882, 884 (Ill. 1999), quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill.2d 287, 291, 186 N.E.2d 285, 287 (Ill. 1962).

If the language of the contract is unambiguous, then the court may interpret the contract as a matter of law.

Air Safety, Inc. v. Teachers Realty Corporation, 185 Ill.2d 462, 706 N.E.2d at 884. On the other hand, if the language of the contract is susceptible to more than one meaning, it is ambiguous. If the language is ambiguous, the court may consider extrinsic evidence to ascertain the intent of the parties. *Gallagher v. Lenart*, 226 Ill.2d at 232, 874 N.E.2d at 58.

A contract is not rendered ambiguous merely because the parties disagree on its meaning. The court will consider

only reasonable interpretations of the language and will not strain to find an ambiguity where none exists. *Rich v. Principal Life Insurance Co.*, 226 Ill.2d 359, 372, 875 N.E.2d 1082, 1090 (Ill. 2007).

The contract must be construed most strongly against the party that prepared it. *Western Illinois Oil Co. v. Thompson*, 26 Ill.2d at 291, 186 N.E.2d at 287; see also *Rich v. Principal Life Insurance Co.*, 226 Ill.2d at 371, 875 N.E.2d at 1090 ("If the words used in an insurance policy are reasonably susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy").

We find that there is no ambiguity in the terms of the agreement. For the consideration paid by Carolyn Hennes, she received "[t]he good name of Augustine's Spiritual Goods, which has an 11 year reputation"; in other words, Hennes acquired the AUGUSTINE'S SPIRITUAL GOODS trademark.¹¹ There are no restrictions or limitations ascribed to the sale of the name. In fact, petitioner, through Frank and Alice Pulaski, the drafters, made clear that although Hennes would be using the mark AUGUSTINE'S SPIRITUAL GOODS, Hennes was not acquiring the corporation, Augustine's Spiritual

¹¹ Frank Pulaski testified that the value in "[t]he good name of Augustine's Spiritual Goods" "was in Alice's and my reputation," thereby corroborating that petitioner transferred the goodwill associated with the mark. (Pulaski Dep., p. 47).

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Goods, Inc., or any of the licenses in that entity's name. Accordingly, the initial use of the mark AUGUSTINE'S SPIRITUAL GOODS in 1992 by petitioner through the October 17, 2002 sale of the mark to respondent, inures to the benefit of respondent by virtue of the sale of assets between the parties. In other words, the record shows that respondent may claim first use of the mark in 1992 through its predecessor-in-interest, petitioner. The earliest date of first use on which petitioner may rely is when it opened its store in Hancock, Michigan, six months after the sale of the assets. In view of the foregoing, petitioner has failed to prove that it has a proprietary interest in AUGUSTINE'S SPIRITUAL GOODS prior to that of respondent, and therefore petitioner's Section 2(d) claim fails.

Decision: The petition for cancellation is dismissed with prejudice.