

THIS OPINION IS NOT
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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Skoro

Mailed: August 4, 2010

Cancellation No. 92051279

Red Hen Bread LLC

v.

Norm Oeding

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

By the Board:

Norm Oeding (hereinafter "respondent") owns U.S. Reg. No. 3614763, issued on May 5, 2009, on the Principal Register for the mark LITTLE RED HEN BAKERY for "Fresh baked bread products, namely, bread, buns, bagels, rolls and baguettes" in Class 30.

On July 27, 2009, Red Hen Bread LLC (hereinafter "petitioner") filed a petition to cancel the registration claiming that it has made prior use of the mark RED HEN BREAD for various bakery products; that it is the owner of a trademark application for the mark RED HEN BREAD for various bakery products;¹ that such application has been refused registration under Section 2(d) of the Trademark Act based upon a likelihood of confusion with respondent's involved

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registration; and that respondent's continued use and registration of LITTLE RED HEN BAKERY in connection with the identified goods is likely to cause confusion and interfere with petitioner's use of its mark.

Respondent denied the salient allegations.

This case now comes up on petitioner's motion for summary judgment, filed April 15, 2010. As grounds for the motion,² petitioner contends that there are no genuine issues of material fact in that petitioner has standing; priority of use; the marks are substantially similar; and the goods are identical and sold in the same channels of trade. Respondent has responded, also arguing that there are no genuine issues of material fact,³ but while he agrees that the products are the same, he argues that the marks should be given a narrow scope of protection given the nature and number of "red hen" marks used for bakeries; that

¹ Application Serial No. 77707868.

² In support of its motion for summary judgment, petitioner has submitted a declaration from Robert Piccietti, its president, attesting to petitioner's use of the mark to identify its bakery products since December 9, 1996, as well as exhibits of an advertisement, packaging and petitioner's website. Petitioner also submitted a declaration from its attorney providing a copy of an office action refusing registration to petitioner; and two news articles discussing petitioner.

³ In support of his response to the summary judgment motion, respondent has submitted his declaration attesting that he owns the challenged registration; that he did not know of petitioner prior to its filing of the petition to cancel; that none of his customers has told him of petitioner and that he does not sell bakery products in Chicago or Illinois. Respondent also submitted the declaration of his attorney, Robert Blinn, providing printouts of webpages from two websites to support his

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the two subject marks are sufficiently different so as not to cause confusion; and that petitioner has provided no evidence of actual confusion. Because respondent agrees that there are no genuine issues of material fact, we treat his arguments that there is no likelihood of confusion as a cross-motion for summary judgment.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial 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). The evidence of record and any inferences which may be drawn from the underlying undisputed facts must be viewed in the light most favorable to the nonmoving party. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). In considering the propriety of summary judgment, the Board may not resolve issues of material fact against the non-moving party; it may only ascertain whether such issues are present. *See Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471

argument that there are other uses of "red hen" in relation to baked goods.

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(Fed. Cir. 1993); and *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993).

After a review of the evidence, we find that respondent has raised genuine issues of material fact as to the strength of the RED HEN BREAD mark, and the scope of protection it should be afforded. Put another way, as the moving party, petitioner has not shown an absence of a genuine issue that its RED HEN BREAD mark is strong. As for respondent's cross-motion, while respondent has provided some instances of third-party use of "red hen" marks, the evidence is limited and there is no evidence as to how extensive the uses are and whether they are active and continuing at this time. Thus, there are genuine issues of material fact⁴ as to the strength of the marks, in particular, how extensive third-party use is and the scope of protection petitioner's mark is to be afforded. Accordingly, the issue of a likelihood of confusion between respondent's LITTLE RED HEN BAKERY mark and petitioner's RED HEN BREAD mark is unsuitable for resolution on summary judgment and the motions are hereby denied.

Proceedings are resumed and trial dates are reset as indicated below.

⁴ The fact that we have identified only certain genuine issues of material fact as sufficient bases for denying the motions for summary judgment should not be construed as a finding that these are necessarily the only issues that remain for trial.

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Discovery Closes	August 31, 2010
Plaintiff's Pretrial Disclosures	October 15, 2010
Plaintiff's 30-day Trial Period Ends	November 29, 2010
Defendant's Pretrial Disclosures	December 14, 2010
Defendant's 30-day Trial Period Ends	January 28, 2011
Plaintiff's Rebuttal Disclosures	February 12, 2011
Plaintiff's 15-day Rebuttal Period Ends	March 14, 2011

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.

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