

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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BUO

Mailed: October 31, 2014

Opposition No. 91208911

Fox Rest. Concepts LLC

v.

Sunshine C & C, Inc.

Before Quinn, Ritchie and Adlin, Administrative Trademark Judges.

By the Board:

On June 10, 2014, the Board issued an order denying Fox Restaurant Concepts LLC's ("Opposer") motion for summary judgment, filed January 4, 2014, in light of Sunshine C & C, Inc.'s ("Applicant") withdrawal of its deemed admissions.¹ However, the Board directed Applicant to serve complete responses to all three sets of Opposer's requests for admission within thirty days of the issuance of that order. The Board cautioned Applicant that if it failed to properly respond to the requests in the allotted time the Board would reconsider the motion for summary judgment in light of the deemed admissions. The Board also noted that priority remained an issue

¹ The Board construed Applicant's contentions in its response to Opposer's motion for summary judgment as "an implicit motion to withdraw its admissions."

in this proceeding inasmuch as Opposer had not properly made of record current “status and title” copies of its pleaded registrations.

Now before the Board is Opposer’s motion, filed July 17, 2014, alleging that Applicant failed to comply with the Board’s June 10, 2014 order, and requesting entry of summary judgment based upon the deemed admissions and newly asserted “independent factual support.” Applicant’s response to this motion, filed July 19, 2014: (1) admits that Applicant failed to comply with the Board’s order; (2) indicates that Applicant lacks funds to comply with the order or respond to the requests for admission; and (3) states that Applicant “welcomes the possibility of a Summary Judgment from the Board.”

Requests for Admission

Requests for admission (“RFAs”) require a party to stipulate to or deny factual assertions and are a means of reducing issues for trial. Fed. R. Civ. P. 36(a); TBMP § 407.02 (2014). An admission in response to an RFA “conclusively establishe[s]” the matter that is the subject of that request. Fed. R. Civ. P. 36(b). “This conclusive effect applies to those admissions made affirmatively and those established by default, even if the matters admitted relate to material facts that defeat a party’s claim.” *Am. Automobile Ass’n v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 19 USPQ2d 1142, 1144 (5th Cir. 1991) (citing *United States v. Kasuboski*, 834 F.2d 1345, 1350 (7th Cir. 1987); see also *Fram Trak Indus. Inc. v. WireTracks LLC*, 77

USPQ2d 2000, 2005 (TTAB 2006) (“Respondent failed to respond to petitioner’s requests for admission and failed to file a motion to amend or withdraw those admissions. Accordingly, those requests for admission are deemed admitted and conclusively established.”).

Fed. R. Civ. P. 36(a)(3) provides that requests for admissions are deemed admitted unless written answers or objections thereto are received by the requesting party within thirty days of service of the requests. In this case, Applicant was allowed an additional thirty day period by the Board, following the denial of Opposer’s initial motion for summary judgment. However, Applicant failed to avail itself of this remedy, did not serve the required responses on Opposer and has not requested that the deemed admissions resulting from Applicant’s failure to comply with the Board’s prior order be withdrawn. The first time we were presented with Applicant’s failure to respond, we generously permitted the deemed admissions to be withdrawn, but our patience is exhausted, and there is no basis upon which to again allow Applicant to withdraw the deemed admissions, especially where it “welcomes” summary judgment.

The requests are therefore deemed admitted as a result of Applicant’s failure to serve timely responses. Applicant may not rest merely on “reaffirming” prior contentions regarding the merits of the case as they relate to these admissions as it did in its response brief. An admission that is not withdrawn or amended cannot be rebutted by contrary argument or

testimony. *See Tex. Dep't of Transp. v. Tucker*, 95 USPQ2d 1241, 1244 (TTAB 2010); *AAA Legal Clinic of Jefferson Crooke*, 19 USPQ2d at 1144.

In view thereof, the Board finds that the facts set forth in each of Opposer's RFAs have been conclusively established.

Summary Judgment

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to material facts, thus allowing the case to be resolved as a matter of law. *See Fed. R. Civ. P. 56(c)*. In deciding motions for summary judgment, the Board must follow the well-established principles that, in considering the propriety of summary judgment, all evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. The Board may not resolve disputes of material fact; it may only ascertain whether such disputes exist. *See Lloyd's Food Prods. Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA Inc. v. Great Am. Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

The notice of opposition alleges that there is a likelihood of confusion between the involved mark ZEN BURGER, in standard character format and with BURGER disclaimed, for "veggie burger patties," in International Class

29, and “restaurant and hotel services,” in International Class 43,² and Opposer’s previously used and registered marks:



and ZINBURGER, in standard character format,⁵ (collectively the “ZINBURGER marks”) for “hamburger sandwiches,” in International Class 30, “wine bar services and cafe services featuring sit down service of gourmet burgers made with meat,” and “full service restaurant services featuring sit down service of wine and gourmet burgers made with meat,” in International Class 43, under Trademark Act § 2(d), 15 U.S.C. 1052(d). Notice of Opposition, ¶¶ 3, 23, 26 and 32.

² Application Serial No. 85677047, filed July 13, 2012, alleging Applicant’s intent to use the mark in commerce under Trademark Act Section 1(b).

³ Registration No. 3578742, issued February 24, 2009, from an application filed December 19, 2007. The registration includes a disclaimer of the term “WINE & BURGER BAR.”

⁴ Registration No. 3582319, issued March 3, 2009, from an application filed December 19, 2007. The registration includes a disclaimer of the term “WINE & BURGER BAR.”

⁵ Registration Nos. 3620050, issued May 12, 2009, from an application filed August 9, 2007; and 4098996, issued February 14, 2012, from an application filed July 5, 2011.

In support of its initial motion for summary judgment, adopted by incorporation into its renewed motion for summary judgment, Opposer introduced evidence of purported actual consumer confusion regarding the source of the goods and services provided by Applicant and Opposer. Opposer also attached to its renewed motion for summary judgment copies of printouts from the Trademark System for Document Retrieval (“TSDR”), showing the current status and title of its pleaded Registrations Nos. 3578742, 3582319, 3620050, and 4098996.

Opposer’s standing has been established by its filing of current status and title copies of its pleaded registrations. These registrations and the goods and services listed therein suffice to establish a direct commercial interest and therefore Opposer’s standing to bring this proceeding. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1408 (TTAB 2010).

Furthermore, by properly making its pleaded registrations of record, Opposer has removed Section 2(d) priority as an issue as to the marks and goods and services covered by those registrations. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

Further, as a consequence of Applicant’s failure to respond to Opposer’s requests for admission as ordered by the Board, Applicant, by operation of

law, has effectively admitted such central issues as (i) the similarity of the marks, RFA No. 54; (ii) the relatedness of the goods, RFA Nos. 34-40; and (iii) instances of actual confusion, RFA No. 56.

In a likelihood of confusion analysis, two key factors are the degree of similarity of the parties' marks and the degree to which their respective goods or services are related. *See In re Viterra Inc.*, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Additionally, a showing of instances of actual confusion weighs heavily in support of finding a likelihood of confusion. *In re E.I. du Pont de Nemours*, 177 USPQ at 567.

With regard to Opposer's pleaded marks and Applicant's involved mark, Applicant effectively admitted that the terms ZEN BURGER and ZINBURGER are "substantially similar." *See* RFA No. 54. We note, too, that the marks are similar in sound as they share a common structure, substituting similarly sounding vowels "E" and "I," and including an inconsequential space. Thus, no genuine dispute of material fact exists that the parties' marks are similar.

Applicant further effectively admitted that its goods offered under its mark are similar to, related to, or are legally identical to Opposer's goods offered under its marks. *See* RFA Nos. 34-40. By its admission Applicant admits to offering "burgers other than veggie burgers," which are legally identical to Opposer's hamburgers. Additionally, the application identifies

“restaurant ... services,” which encompass, and are thus legally identical to, Opposer’s “full service restaurant services.” Thus, there is no genuine dispute of material fact that the parties’ respective goods and services, as recited, are legally identical.

When a moving party's motion for summary judgment is supported by evidence sufficient to indicate that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment, the burden then shifts to the non-moving party to demonstrate the existence of at least one genuine dispute as to a material fact that requires resolution at trial. The non-moving party may not rest on the mere allegations of its pleadings and assertions, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute as to a material fact for trial. *See Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1739 (TTAB 2001) (“applicant has produced no evidence, or raised any expectation that at trial it could produce evidence”); *S & L Acquisition Co. v. Helene Arpels Inc.*, 9 USPQ2d 1221, 1225 n.9 (TTAB 1987).

Applicant, falling well short of this burden, has offered no more than a “reaffirmation” of its contention that the marks hold “different connotations and should not be considered as detrimental one to the other in a normal market place.” Nevertheless, similarity in sound and appearance alone are enough in this case to establish likelihood of confusion despite any perceived

differences in connotation, where, as here, the overall commercial impression of the marks remains similar. *See Ava Enters. v. Audio Boss USA, Inc.*, 77 USPQ2d 1783, 1785 (TTAB 2006); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). This is especially true because Applicant has admitted that the marks are “substantially similar.” Indeed, Applicant notes its own “acquiescence” to this motion, and indicates that it “has already expended more funds than should have been necessary and does not have additional for the amount of attorney fees that appear to be required to maintain the legal responsibility of presenting its case.” Applicant did not attempt to refute Opposer’s motion in any other meaningful manner.

Based on Applicant’s admissions, and viewing these admitted facts, as we must, in a light favorable to Applicant, we conclude nonetheless that there are no genuine disputes of material fact and that a likelihood of confusion exists in this case.

Because we find on this record that no genuine disputes of material fact remain as to Opposer’s standing, its claim of priority, or its asserted claim of likelihood of confusion, and that Opposer is entitled to judgment as a matter of law on that ground, Opposer’s motion for summary judgment is **GRANTED**. Accordingly, judgment is entered against Applicant, the opposition is **SUSTAINED**, and registration is refused.