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

Mailed: August 17, 2016

Opposition No. 91221846

Shenandoah Valley Campgrounds, LLC

v.

Falling Waters, Inc.

Before Quinn, Lykos and Gorowitz,
Administrative Trademark Judges.

By the Board:

This case now comes before the Board for consideration of Falling Waters, Inc.'s ("Applicant") April 25, 2016 combined motion to strike Shenandoah Valley Campgrounds, LLC's ("Opposer") April 11, 2016 evidence as improper, and for involuntary dismissal pursuant to Trademark Rule 2.132(a), 37 C.F.R. § 2.132(a), on the ground that Opposer has failed to prosecute this case. The motion is fully briefed.

Applicant has applied to register the mark SHENANDOAH VALLEY CAMPGROUND in standard characters on the Principal Register for "providing campground facilities" in International Class 43.[1] Applicant has asserted a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), as to the mark in its entirety, (with a

[1] Application Serial No. 86406309 was filed September 25, 2014 based upon an allegation of first use anywhere and in commerce of September 15, 2008 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

disclaimer of "Campground"), based solely on a statement of at least five years of continuous and substantially exclusive use.

Opposer filed a notice of opposition on May 7, 2015 opposing the registration of Applicant's mark, as noted in the ESTTA coversheet,[2] on the grounds that the mark is descriptive under Section 2(e)(1) of the Trademark Act and primarily geographically descriptive under Section 2(e)(2) of the Trademark Act.[3] Opposer also alleges that Applicant's mark is so "highly descriptive" that a statement of five years of use alone is insufficient to justify registration under Section 2(f) and that Applicant cannot claim "substantially exclusive" use because of Applicant's knowledge of Opposer's use. 1 TTABVUE pp. 2-3. Applicant, in its answer, admitted Opposer's standing to bring this case, admitting that Opposer "currently uses the mark 'SHENANDOAH VALLEY CAMPGROUND' to brand and name its campground facilities and services," but denied the remaining salient allegations in the notice of opposition. 4 TTABVUE ¶ 2; *see Empresa Cubana Del Tabaco v. Gen. Cigar*

[2] The ESTTA coversheet indicates descriptiveness and primarily geographically descriptive as grounds for opposition. In the body of the complaint, however, Opposer only asserts descriptiveness as its ground for opposition. Opposer also uses the term "generic" in the notice of opposition but does not include any allegations regarding genericness.

[3] The notice of opposition is accompanied by an exhibit. Except in limited circumstances not present here, an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence as an exhibit during the testimony period. Trademark Rule 2.122(c). *See Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1846 n.6 (TTAB 2004). *See also* TBMP §§ 317 and 704.05(a) (2016). Accordingly, this exhibit is not of record.

Co., 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

In support of its motion, Applicant asserts that the only evidence submitted by Opposer,[4] the Saville declaration and accompanying exhibit, should be stricken from the record because the parties have not agreed to submit testimony by declaration. Applicant further requests judgment be entered against Opposer and the opposition be dismissed with prejudice under Trademark Rule 2.132(a).

In response, Opposer, in addition to arguing the merits of its claims, argues that the Saville declaration and accompanying exhibit are intended as impeachment evidence and should not be stricken from the record. Opposer did not move to reopen its testimony period.

Pursuant to Trademark Rule 2.132(a):

> If the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may … move for dismissal on the ground of the failure of the plaintiff to prosecute.

By written agreement of the parties, the testimony of any witness or witnesses of any party may be submitted in the form of an affidavit or declaration by such witness or witnesses. Trademark Rule 2.123(b) (emphasis added). *See, e.g.*, *Joel Gott Wines LLC v. Rehobeth Von Gott, Inc.*, 107 USPQ2d 1424, 1427 (TTAB 2013); *Calypso Technology Inc. v. Calypso Capital*

[4] On the last day of Opposer's testimony period, April 11, 2016, Opposer filed the declaration of David Saville, Manager of Opposer, along with an exhibit thereto.

Management LP, 100 USPQ2d 1213, 1216-19 (TTAB 2011); *Tri-Star Marketing LLC v. Nino Franco Spumanti S.R.L.*, 84 USPQ2d 1912, 1914 (TTAB 2007); *Order Sons of Italy in America v. Memphis Mafia Inc.*, 52 USPQ2d 1364, 1366 n.3 (TTAB 1999). Further, "documents and other exhibits may not be introduced in connection with the declaration or affidavit of a witness unless the parties have mutually agreed to accept same in lieu of testimony." *Joel Gott Wines LLC*, 107 USPQ2d at 1427 (citing Trademark Rule 2.123(b)); *Tri-Star Marketing LLC v. Nino Franco Spumanti S.R.L.*, 84 USPQ2d 1912, 1914 (TTAB 2007); TBMP § 703.01(b)) (2016).

Upon review of the record, the only evidence of record submitted by Opposer during its testimony period[5] is the Saville declaration and accompanying exhibit. Despite Opposer's characterization of the Saville declaration as impeachment evidence, the declaration is intended to introduce witness statements and evidence and is therefor, testimony. *See Testimony*, Black's Law Dictionary (10th ed. 2014) ("Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition."). Inasmuch as the Saville declaration and exhibit thereto were submitted without a written

[5] In its response to Applicant's motion, Opposer includes a declaration from its attorney and various exhibits thereto. To the extent Opposer is attempting to enter evidence on the record in support of its opposition, its testimony period has expired and thus, the evidence is untimely and will be given no further consideration. *See* Trademark Rule 2.121(a)(1); *Baseball America Inc.*, 71 USPQ2d at 1846 n.8 (documentary evidence submitted outside assigned testimony period given no consideration).

stipulation signed by both parties to submit testimony by declaration, the Saville declaration and accompanying exhibit are improper and inadmissible.

In view thereof, Applicant's motion to strike the Saville declaration and accompanying exhibit is **granted**.

Opposer has not properly submitted any evidence or testimony in support of its asserted claims nor has Applicant made any admissions in its answer, except, as noted, to admit Opposer's standing. As such, Applicant's motion for involuntary dismissal under Trademark Rule 2.132(a) is **granted** and the notice of opposition is accordingly dismissed with prejudice.