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

Mailed: September 10, 2015

Opposition No. 91222493

Westlake Chemical Corporation

v.

Westlake Plastics Company

Before Bucher, Kuhlke, and Goodman,
Administrative Trademark Judges.

By the Board:

This case now comes before the Board for consideration of Applicant's motion (filed July 29, 2015) for judgment on the pleadings. The motion is fully briefed.

Background

Westlake Plastics Company ("Applicant") seeks to register the mark LIFE IN POLYMERS, in standard characters, for "wholesale and online wholesale store services featuring compression molded, extruded, injection molded, 3D printed and machined polymers to others" in International Class 35.[1]

On June 23, 2015, Westlake Chemical Corporation ("Opposer") filed a notice of opposition opposing the registration of Applicant's mark on the ground of likelihood of confusion under Section 2(d) of the Trademark Act. In support of its asserted

[1] Application Serial No. 86414422, filed on October 3, 2014, based on an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

claim, Opposer pleads ownership of several pending applications each for the mark ENHANCING YOUR LIFE EVERY DAY used in connection with, *inter alia*, various plastic products, including polymers, as well as consulting services, namely, engineering for others in the field of plastic products. Opposer also alleges prior common law use of its tradename "Westlake Polymers, LLC," as well as a conjoined version of its tradename and the mark identified in its pleaded pending applications.

On July 29, 2015, Applicant filed its answer to the notice of opposition denying the salient allegations asserted therein. Applicant also asserted the following affirmative defenses: (1) Opposer has failed to state a claim upon which relief may be granted; (2) the notice of opposition fails on account of distinct differences in the sound, appearance, and connotation of the respective marks; and (3) Applicant reserves the right to raise additional affirmative defenses and to supplement those asserted herein upon discovery of further information and investigation in the [sic] Opposer's claims.

Applicant's Motion for Judgment on the Pleadings

Applicant has moved for judgment on the pleadings on the grounds that the marks at issue are so dissimilar in sight, sound, and meaning, making confusion amongst prospective consumers impossible.

In response, Opposer contends that the marks at issue are confusingly similar insofar as Applicant's LIFE IN POLYMERS and Opposer's pleaded ENHANCING YOUR LIFE EVERY DAY share the common, dominant term LIFE. Opposer also maintains that Applicant's involved mark and Opposer's pleaded trade name, i.e.,

Westlake Polymers, LLC, share an identical term, namely, POLYMERS and, therefore, provide the same commercial impression. Opposer further contends that the goods identified in Applicant's application and those identified in Opposer's pleaded pending applications are not so different as to exclude the possibility of a likelihood of confusion.

In reply, Applicant reargues that the marks at issue are so dissimilar that confusion is not likely. Additionally, Applicant argues that Opposer, in response to Applicant's motion, has improperly introduced facts outside the pleadings. By way of example, Applicant contends that Opposer makes statements about (1) the relative size and productivity of its company, (2) the fame of its pleaded marks, (3) its position in the marketplace as a "well-known" manufacturer of plastics, (4) settlement negotiations that occurred between Applicant and Opposer in a separate proceeding, and (5) references to various websites. Applicant maintains that these facts are not part of the record and, therefore, should be given no consideration.

Decision

A motion for judgment on the pleadings is designed to provide a means of disposition of a case when the material facts are not in dispute and judgment on the merits can be achieved by focusing on the pleadings. See Fed. R. Civ. P. 12 (c). For purposes of the motion, all well-pleaded factual allegations of the nonmoving party are assumed to be true, and the inferences drawn therefrom are to be viewed in a light most favorable to the nonmoving party. *Wright & Miller, Federal Practice and Procedure: Civil 3d* Section 1368 at 524 (2012). A motion for judgment on the pleadings will only be granted when the moving party establishes that no material

issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *See, e.g., Baroid Drilling Fluids, Inc. v. Sun Drilling Products*, 24 USPQ2d 1048 (TTAB 1992). An unresolved material issue of fact may result from an express conflict on a particular point between the parties' respective pleadings or from defendant's pleading of new matter and affirmative defenses in its answer. *Wright & Miller,* Section 1368, at 527. Further, according to Fed. R. Civ. P. 7(a), a plaintiff is not required to reply to affirmative defenses or new matter appearing in the answer, and, under Fed. R. Civ. P. 8(b)(6), averments in a pleading to which no response is required are considered denied. Thus when material issues of fact are raised by the answer and the defendant seeks judgment on the pleadings on the basis of this matter, the motion cannot be granted. *Id.*

Upon consideration of the parties' arguments and the pleadings, we find that genuine disputes of material fact are raised by the express conflict between the parties' pleadings, as well as by Applicant's pleading of affirmative defenses in its answer. Applicant's motion and brief do not dispose of all genuine disputes of material fact raised by the pleadings. While, for purposes of this motion, we take as true all well-pleaded factual allegations of the *nonmoving party*, we take the allegations set forth in Applicant's answer (to which Opposer was not required to respond) as denied, under Fed. R. Civ. P. 8(b)(6). Accordingly, we do not take as established the allegation that "the notice of opposition fails on account of distinct differences in the sound, appearance, and connotation of the respective marks." *See* Affirmative Defense No. 2 in Applicant's answer.

Viewing the pleadings in this light and while acknowledging that "one *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks," *see Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998), we nonetheless find, based on the pleadings before us, that there are material facts in dispute as to the similarities of the marks at issue. In view of the foregoing, Applicant's motion for judgment on the pleadings is hereby **DENIED**.

As a final matter, as noted above, Applicant has asserted certain affirmative defenses in its answer. With regard to Applicant's affirmative defense that Opposer's pleading fails to state a claim upon which relief may be granted, the Board notes that this asserted defense is not a true affirmative defense because it relates to an assertion of the insufficiency of the pleading of Opposer's claim rather than a statement of a defense to a properly pleaded claim. In view thereof, and in the absence of a formal motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), this asserted defense will not be considered as such. *See Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1738 n.7 (TTAB 2001).

Following a careful review of Opposer's notice of opposition, however, the Board finds that Opposer's pleading is legally sufficient to the extent that it clearly contains allegations which, if proven, would establish Opposer's standing, as well as its asserted ground for opposition. In view thereof, Applicant's defense that Opposer's pleading fails to state a claim upon which relief may be granted is hereby

sua sponte **stricken** from Applicant's answer. *See* Fed. R. Civ. P. 12(f); TBMP § 506.01.

Applicant's affirmative defense that the notice of opposition fails on account of distinct differences in the sound, appearance, and connotation of the respective marks sets forth allegations which appear to go to the merits of the case. The defendant in a Board proceeding should not argue the merits of the allegations in a complaint but rather should state, as to each of the allegations contained in the complaint, that the allegation is either admitted or denied. *See* Trademark Rule 2.106(b)(1); TBMP § 311.02. Notwithstanding the foregoing, inasmuch as Applicant's allegations give Opposer a more complete notice of its position, the Board treats Applicant's allegations as amplifications of its denials and sees no harm in allowing this affirmative defense to remain as part of Applicant's answer. *See Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995); *Harsco Corp. v. Electrical Sciences, Inc.*, 9 USPQ2d 1570 (TTAB 1988).

Finally, with regard to Applicant's affirmative defense that it reserves the right to raise additional defenses at a later date, the Board notes that this is not an affirmative defense but merely an advisory statement that Applicant may amend its pleading at some future date after conducting discovery in this matter. A defendant cannot reserve unidentified defenses since it does not provide a plaintiff fair notice of such defenses. Whether or not Applicant may, at some future point, add an affirmative defense would be resolved by way of a motion for leave to amend for

Board approval. As such, this affirmative defense is also *sua sponte* **stricken** from Applicant's answer. *See* Fed. R. Civ. P. 12(f); TBMP § 506.01.

Trial Schedule

Proceedings are resumed. Trial dates, beginning with the deadline for the parties' required discovery conference, are reset as follows:

Deadline for Discovery Conference	**9/30/2015**
Discovery Opens	**9/30/2015**
Initial Disclosures Due	**10/30/2015**
Expert Disclosures Due	**2/27/2016**
Discovery Closes	**3/28/2016**
Plaintiff's Pretrial Disclosures Due	**5/12/2016**
Plaintiff's 30-day Trial Period Ends	**6/26/2016**
Defendant's Pretrial Disclosures Due	**7/11/2016**
Defendant's 30-day Trial Period Ends	**8/25/2016**
Plaintiff's Rebuttal Disclosures Due	**9/9/2016**
Plaintiff's 15-day Rebuttal Period Ends	**10/9/2016**

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 Trademarks Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.