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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92053060
Party	Defendant David M. Green
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Date	07/12/2011
Attachments	Opposistion to Trademark Cancellation Proceeding 92053060.pdf (10 pages)(209545 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL and APPEAL BOARD

Douglas Deitch,	)	
	)	
Petitioner	)	Mark: FREEMLSLISTING.COM DESIGN
	)	
vs.	)	Cancellation Proceeding No. 92053060
	)	
David M. Green,	)	
	)	
Defendant	)	

Defendant's Motion In Opposition To Summary Judgment

David Green moves the court to dismiss petitioner's motion for summary judgment.

1. FACTS

The Petition to cancel on grounds the unregistered mark FREEMLS had prior use and will cause confusion in violation of Lanham Act is incorrect and false and was not admitted by defendant.

Defendant's mark is for a graphical image logo and NOT a mark on the words. The petitioner appears to be oddly implying for unknown reasons that I have a registered trademark on the words FREE MLS LISTING but I do not have such a trademark and only claim a mark on the logo image and not the words.

That major point makes this entire proceeding basically moot since petitioner is falsely claiming better rights than myself to the words FREEMLS but I do not have a trademark on FREEMLS word(s), or would I apply for one on such an extremely well known real estate term which petitioner obviously has no valid right to own exclusively.

More important information: An extremely important point is in petitioner's rejected FREE MLS trademark application number 776344; filed March 16, 2009 he states the FREEMLS mark was first used anywhere as early as January 31, 2008, and first used in commerce as early as January 31, 2008.

However, defendant's logo mark on FREEMLSLISTING.COM trademark application was dated 30-days prior on January 1, 2008. That appears to be major evidence the cancelation is without merit since petitioner admits they did not start using the mark until AFTER defendant's trademark application was filed. Therefore, based on that and other factors it is clear that respondent/defendant has clear priority.

The reason defendant was unable to complete the forms sent Feb 8 2011 is as a non-attorney I found the forms completely overwhelming and beyond my expertise to complete as a pro-se. In addition, the too intrusive questions were important violations of my privacy and confidentiality, such as questions about my income and assets, etc. Also, Attorney T.D. Foster hung-up the phone on me a few times when I called to discuss the case over past few months. In addition, Mr. Foster told me to not contact him again by phone. That is all contrary to the rules which state the two sides should work together to resolve issues.

I was unable to hire an attorney to answer due to the fact attorneys wanted substantial retainer fees of $xx,xxx which was impossible for me to pay due to a significant decline in our business income over the economy and a poor real estate market, resulting in a very sharp income reduction.

Page 2, Section A

That is DENIED. There are in fact major and genuine issues.

Page 2, Section B

Defendant believes registration is not likely to cause confusion since there are about 6,090,000 results for FREEMLS in Google and 132,000,000 results for FREE MLS.

The petitioner knows very well FREEMLS or FREE MLS (with a space) is an extremely common term with many 1,000s of websites using the famous generic real estate term.

In defendant's opinion the petitioner is merely trying to basically pull off a fast-one and deceive the Trial and Appeal Board into cancelling my rights to my trademark on the made-up ground of confusion and prior use, and without mentioning the fact the petitioners earlier trademark application for 'FREEMLS' was refused by the USPTO on the grounds it was too generic and somehow conflicted with my graphical logo mark

Page 3, Section 1.

Deny what Petitioner said that it has standing. In fact, petitioner has no standing and has no registered trademark. Contrarily, their application for a trademark was rejected by the USPTO to a large degree on the grounds it was too generic.

Petitioner also hopes to disguise that fact in this proceeding and also hopes that by cancelling my mark the USPTO will reconsider their trademark application since my mark was also an issue in the denial in addition to FREEMLS being generic. The above was freely admitted to me by attorney Thomas D Foster during at least 3 conversations.

Page 3, Section 2.

Deny. Petitioner does not have priority. In fact, in petitioner's application for US Trademark on FREEMLS he states a date of first use 30-days AFTER the date of my own approved trademark application. Thus there is concrete evidence in petitioners own words that he does NOT have priority.

There is a dispute. That was not admitted by defendant.

Page 4, Section 3.

My registration is not likely to cause confusion. It's not true defendant has admitted that. It will.

Page 5, Section I.

Deny. I never admitted to it. That is false. There is NO SIMILARITY since petitioner has no mark at all and my mark is for the graphical logo and not a mark in the words.

Page 5, section II.

My mark is for the logo graphic design and not the words so there is no similarity by definition. I never admitted that. That's a falsification.

Page 5, Section III.

There is no similar channel of trade since my mark is a graphical logo only and not a word mark. I never admitted that. That's false information.

Page 6, Section IV.

There is not a conflict on purchasing conditions. I never admitted that. That is false.

Page 6, Section, V

Petitioner has NO fame or strength. FREEMLS has been used by 1000s of real estate firms for many decades and Mr. Douglas Ditch and his FREEMLS.com is a relatively obscure small player in the business and just one of 1000s of participants. They have no fame at all. I never said they did. It's false that I said they do.

Page 6, Section VI.

There is not an extent of potential confusion since the term FREEMLS is not used primarily by petitioner and petitioner is just an obscure minor player using that generic term. I never admitted this.

Additional Evidence:

Regarding Page 1 Section 1, Admit with an explanation my FREEMLSLISTING.com domain name was first registered Mach 8, 2000 and used in commerce on the Internet for several years prior to the first use in commerce date of Nov 14 2009 which date was based on Intent to Use date and not an actual first use date, with the first use in a newspaper advertisement being Nov 14 2009.

"Free MLS" has many 100s or 1000s of websites using the generic term. It is completely absurd for the Petitioner to claim the public has come to know, rely upon and recognize the services of Petitioner by such mark.

It is also absurd that consumers and the trade can be confused by concurrent use what with the millions of results for "free mls" in Google and the generic terms extremely heavy use by 100s or 1000s of other websites.

Consumers would not consider freemls as emulating from freemlslisting.com as the names, websites and product details are different.

No cloud will be placed on Petitioner's title and its alleged trademark. In fact, Petitioner does not have a trademark and their application for a registered trademark has been denied by the USPTO on the grounds it was descriptive and other reasons.

Respondent David M. Green will be greatly damaged if his trademark is cancelled and prays that Petitioner's Cancellation Attempt be denied.

The FREEMLSLISTING.com domain name was first registered March 8, 2000 and used in connection with my Internet sites for several years prior to the first tangible use in commerce date of Nov 14, 2009, which date was based on first use in a newspaper advertisement being Nov 14, 2009. My FREEMLSLISTING.COM registered mark was in wide and extensive use both on the internet and elsewhere years earlier than the newspaper advertisement re its Intent To Use date of Nov 14, 2009.

Based on a review of the Petitioner's trademark application, it appears that Petitioner originally claimed a use date of no earlier than January 31, 2008 at the time

the Petitioner filed for trademark. Petitioner is now proposing to allegedly falsely change the date of first use to an earlier date -- to a date prior to the date the Petitioner originally used when submitting his trademark application submitted under oath as true.

If the Petitioner was using this term "long prior" to the filing date of January 1, 2008, then why did Petitioner claim a first use date of January 31, 2008 when Petitioner filed for a trademark? Respondent has no insight to explain this discrepancy in Petitioner's behavior.

Again, an extremely important point is in petitioner's FREE MLS trademark application number 776344, filed March 16, 2009 they state the FREEMLS mark was first used anywhere as early as January 31, 2008, and first used in commerce as early as January 31, 2008. However, FREEMLSLISTING.COM mark application was dated January 1, 2008. That appears to be major evidence the cancelation is without merit since petitioner admits they did not start using the mark until AFTER defendant's trademark application was filed. Therefore, based on that and other factors it is clear that respondent/defendant has clear priority.

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Based on a review of the Petitioner's application file, it appears that not only is Petitioner's application being rejected because of the priority of Respondent's application, but also because the USPTO examiner has rejected the Petitioner's proposed use of the mark as being merely "descriptive." Respondent does not see why a valid and USPTO-approved registered trademark, with seniority, should be cancelled due to a trademark application that is not only subsequent to the approved trademark, but thus far its registration appears to have been rejected by the USPTO as well?

"Free MLS" is used by many 100s or 1000s of third party webpages and websites using the completely generic term. It is totally absurd for the Petitioner to claim the public has come to know, rely upon and recognize the services of Petitioner by such mark. Based on the office actions issued by the USPTO examiner, it appears that the

USPTO also shares this view, which is why the examiner has rejected the proposed use of the term as "descriptive."

It is also absurd to claim that consumers and the trade can possibly be confused by concurrent use what with the more than 4 million results for "Free MLS" in Google and the generic terms extremely heavy use by 100s or 1000s of webpages and websites belonging to other parties. Further, if the Petitioner expended "considerable sums and effort" in promoting this mark prior to the originally claimed first use date of January 31, 2008, then why didn't the Petitioner provide evidence of such expenditures and claim an earlier first use date?

Consumers would not consider "Free MLS" as emulating from “freemlslisting.com” as the two business names, domain names, the websites and product/services are different. Further, even if there were to be unlikely confusion, then one would think that the senior trademark holder FREEMLSLISTING.COM would have good reason to file for damages rather than the unapproved trademark applicant who filed with a late use date. If someone were to start marketing a cell phone called an "iPhone" (and claim that they thought of the name in 2006 and file for a trademark which is rejected) and then demand damages from Apple based on their "lost sales," they would probably be laughed out of court. Apple would be the one who should claim damages because Apple has a prior, approved trademark.

No cloud will be placed on Petitioner's title and its alleged trademark. In fact, Petitioner does not have a registered trademark. Petitioner's application for a registered trademark has thus far been denied by the USPTO on the grounds it was descriptive and other reasons.

Petitioner's prior TM application appears to have been rejected as descriptive. Also, even if it were not, please see the example concerning Apple and iPhone above. Trademarks and similar intellectual property are explicitly designed to benefit the party

with a registered and approved mark by preventing a potential competitor from subsequently applying for a trademark on the same term or providing products with a similar mark.

If the subsequent potential competitor complains that they are unable to get a trademark or sell products because of the prior approved trademark, then this is not a "problem," this is exactly the intent of the whole trademark system and intellectual property system in general. Intellectual property law protects the rights of trademark holders against subsequent potential competitors. For a subsequent potential competitor to claim that they are "injured" by the proper functioning of the trademark system is just not right.

Defendant and Respondent David M. Green will be greatly damaged if his trademark is cancelled and prays that Petitioner's Cancellation Attempt be denied.

CONCLUSION:

This is one giant size twisted and mostly fabricated case with petitioner and attorney Thomas Foster allegedly attempting to confuse the Trial and Appeal Board in a blatant but disguised attempt to get the USPTO to approve the already rejected trademark of petitioner on the generic term FREEMLS by eliminating the objection that freemlslisting .com was too similar to FREEMLS.

Attorney Thomas Foster is allegedly making up much of this case to get the Trial and Appeal Board to believe FREEMLS is a generic term owned by petitioner so my trademark on the graphical logo is cancelled and he then intends to go back to the USPTO to resurrect the clients denied trademark n the generic term FREEMLS. That plan was admitted to me during phone calls with Mr. Foster over the past few months.

Once again the truth is petitioner has no more rights to use the term FREEMLS than any of the over one million Realtors, many of whom have various websites numbering in the 1000s devoted to at least in-part or fully to the concept of doing FREEMLS listings (which are common flat fee real estate no commission MLS listings).

For the foregoing reasons petitioner's motion for summary judgment should be denied and my registration not cancelled.

Respectfully submitted,

/David Green/

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