UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: February 2, 2005

Cancellation No. 92043657

Anderson-L'Carttier, Inc., d/b/a Arise & Shine Herbal Products

v.

George G. Speer, III

Before Seeherman, Quinn, and Bucher, Administrative Trademark Judges

By the Board:

George G. Speer, III owns U.S. Registration No. 2,783,501 for the mark CLEANSE AND PURIFY.COM and Design,[1] as shown below,

for "on-line retail store services featuring dietary supplements, vitamins, mineral and herbal supplements" in International Class 35. On August 30, 2004, Anderson-L'Carttier, Inc., d/b/a Arise & Shine Herbal Products, filed a petition to cancel the registration, claiming a likelihood

of confusion with its U.S. Registration No. 2,480,013 for the mark THE CLEANSE THYSELF PROGRAM[2] for "healthcare counseling and planning utilizing herbal, nutritional, mineral and dietary supplements to aid in the removal of toxins and waste material produced in the body" in International Class 42.

This case now comes up on respondent's motion for summary judgment filed October 13, 2004. As grounds for his motion, respondent alleges *res judicata* or claim preclusion. Petitioner filed its opposition to respondent's motion for summary judgment on November 3, 2004, and respondent filed a reply.[3]

In support of his motion for summary judgment, respondent asserts Opposition No. 91150364, "Arise & Shine Herbal Products, Inc. v. George G. Speer, d/b/a New Horizons Body, Mind & Spirit", as the basis for the claim of *res*

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[1] Issued November 18, 2003, claiming dates of first use and first use in commerce of September 18, 1999, and September 30, 1999, respectively.

[2] Issued August 21, 2001, claiming dates of first use and first use in commerce of December 1, 1996.

[3] The parties have also filed supplemental submissions. Respondent filed a motion to strike petitioner's exhibits to its opposition to the motion for summary judgment, as they were not supported by an affidavit. Petitioner subsequently filed a surreply that is being treated as a response to the motion to strike. In its response, petitioner points out that it had filed an affidavit. However, the supporting affidavit does not properly introduce petitioner's exhibits, and therefore the exhibits have not been considered by the Board. Even if the Board had considered the exhibits, the result would be the same, as they do not address the issue of claim preclusion before the Board. The motion to strike is denied.

judicata. Respondent argues that the previous opposition involved the same claim, namely a likelihood of confusion between the same marks; that while the prior proceeding was dismissed for failure to prosecute, judgment by default is just as conclusive for purposes of *res judicata*; and that petitioner had a full opportunity to litigate the same claim and an adverse final judgment was entered. To establish his allegation that the claims involved are identical, respondent compares the allegations in Opposition No. 91150364 with the current petition to cancel, and concludes that the issues presented in the prior proceedings are the same as the ones raised here. To establish his allegation that the parties, in particular, the party in the position of plaintiff, are identical or in privity with petitioner, respondent provides copies of articles of incorporation for Anderson-L'Carttier, Inc., articles of merger with Arise & Shine Herbal Products, Inc., and the plan of merger, all executed on July 1, 2003.

In its opposition to the motion for summary judgment, petitioner argues that "the doctrine of issue preclusion requires a prior and valid final judgment 'on the merits'" (Br. at 5), and because the prior opposition was based on a motion for judgment for failure to prosecute, the issue of

"likelihood of confusion was 'never actually litigated and necessary to the judgment' of dismissal". (Br. at 6).

The ground for respondent's motion for summary judgment rests upon an issue of law: whether petitioner is precluded from bringing this action based on *res judicata*. *Res judicata* is a doctrine of claim preclusion that operates between the parties simply by virtue of a final judgment on the merits by one court that merges the claim if the plaintiff prevails, or works as an absolute bar to a later identical suit, if the defendant prevails. *See*, Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4402. For the doctrine to apply, the final judgment must be entered on the merits, and the second suit must involve the same parties or their privies and the same cause of action. The doctrine applies even in those cases where the prior judgment was the result of a default or consent. *See International Nutrition Co. v. Horphag Research Ltd.,* 220 F.2d 1325, 55 USPQ2d 1492, 1494 (Fed. Cir. 2000). On the other hand, collateral estoppel, or issue preclusion, differs from *res judicata*. Under collateral estoppel, an issue must be determined by a court of competent jurisdiction; it does not apply when a default judgment issues.

A review of the evidence in this proceeding shows that the previous opposition and this cancellation involve the

same claim. Both proceedings challenged Mr. Speer's eligibility to register the CLEANSE & PURIFY.COM mark based on a likelihood of confusion with petitioner's THE CLEANSE THYSELF PROGRAM registration. The evidence further shows that opposer, Arise & Shine Herbal Products, Inc., was merged into petitioner Anderson-L'Carttier, Inc., d/b/a Arise & Shine Herbal Products, on July 1, 2003, during the litigation of Opposition No. 91150364, the final decision in that case having issued on August 21, 2003. And finally, the opposition resulted in final judgment against opposer, Arise & Shine, and in favor of respondent herein, George G. Speer III. Thus, respondent has established that there was a final judgment on the merits in the prior proceeding, and the second suit involves the same parties or their privies and the same cause of action. Thus, under the doctrine of claim preclusion, the second suit is barred or the judgment merged.

Based on our finding that the parties involved in Opposition 91150364 and this proceeding are the same, that the act or occurrence involved in both cases is the same, and that judgment has been entered in the prior proceeding in favor of defendant, respondent is entitled to judgment as a matter or law based on the doctrine of claim preclusion and, accordingly, his motion for summary judgment is hereby granted.

The petition to cancel is hereby dismissed.

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