4/16/02
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UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Kuhlke/rc

Mailed: April 16, 2002

Cancellation No. 40,059

Raymond F. Holland

v.

Scandinavian Natural Health & Beauty Products, Inc.

Before Cissel, Hairston and Chapman, Administrative Trademark Judges.

By the Board:

This petition for cancellation was filed on August 13, 2001 against Registration No. 2,058,599, for the mark TICK PICK in typed form on the Principal Register for a "hand-operated instrument for removal of ticks and other insects from animals and humans" in Class 8 issued on May 6, 1997 and claiming a date of first use of September 1, 1994. As grounds for the petition to cancel, petitioner states that he "petition[s] to cancel US Registration No. 2,058,599 under the provisions of 15 USC Section 1052(d)

and section 1064." Further, petitioner alleges a first use date of "June 1, 1994" in connection with his mark "TIK PIK" for a "device used in removing ticks from animals."

This case now comes up for consideration of respondent's motion (filed on October 16, 2001) for summary judgment based on the doctrines of res judicata and estoppel, and the affirmative defense of laches.[1] The motion has been fully briefed.

In a motion for summary judgment, the moving party has the burden of establishing the absence of any genuine issues of material fact and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). A genuine issue with respect to material fact exists if sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. *See Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). Thus, all doubts as to whether any factual issues are genuinely in dispute must be resolved against the moving party and all

inferences must be viewed in the light most favorable to the non-moving party. *See Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

[1] Respondent's motion was filed prior to respondent's due date for filing an answer.

We turn first to respondent's assertion of res judicata. In support of its motion, respondent states that "[o]n May 7, 1996 an opposition [Opposition No. 101,573] to [respondent's underlying application of the subject registration] was filed by Raymond F. Holland who is the petitioner in the instant petition to cancel." Further, respondent states that after the Board dismissed the opposition with prejudice, Raymond F. Holland, petitioner, "never sought rehearing or reconsideration" nor did he "file an appeal," rather he has "been silent for nearly five years." Respondent argues that the "petition to cancel is barred by the doctrine of res judicata" based on the entry of judgment against petitioner (as opposer) in the prior opposition proceeding. Respondent's motion is supported by a copy of the Board's March 21, 1997 order in Opposition No. 101,573 entering judgment against Raymond F. Holland for failure to prosecute.

Petitioner, on the other hand, essentially argues that the claims in the opposition were not litigated because the case was decided by default. Petitioner also states that the rules are very confusing and that there is no prejudice against respondent in retrying the case. In its petition to cancel, petitioner included an

attachment titled "Background Information for Cancellation of Mark No. 2058599" where he raises four points of dispute concerning the previous opposition.

In reply, respondent states that petitioner is attempting to relitigate the opposition proceeding as evidenced by his referrals to the adjudicated case. Respondent also states that being pro se is "not an excuse...to ignore or overlook the procedural rules of this Board."

The doctrine of claim preclusion (or res judicata) precludes the relitigation of a claim which was litigated in a prior proceeding involving the same parties or their privies for which a final judgment "on the merits" has been entered. *Treadwell's Drifters Inc. v. Marshak*, 18 USPQ2d 1318, 1321 (TTAB 1990).

Default judgments can give rise to res judicata. *See International Nutrition Co. v. Horphag Research Ltd.*, 220 F.3d 1325, 55 USPQ2d 1492 (Fed. Cir. 2000); *Wells Cargo, Inc. v. Wells Cargo, Inc.*, 606 F.2d 961, 963, 203 USPQ 564, 566 (CCPA 1979). *See also* Marc A. Bergsman, *TIPS FROM THE TTAB: The Effect of Board Decisions in Civil Actions; Claim Preclusion and Issue Preclusion in Board Proceedings*, 80 TMR 540, 546 (1990) ("An involuntary dismissal generally operates as an

adjudication upon the merits and will preclude a subsequent action based on the same cause of action. The most common involuntary dismissal in a Board proceeding is the failure to prosecute.")

There is no doubt about the identical nature of the claim in this proceeding and Opposition No. 101,573. Both proceedings involve the same parties, Raymond F. Holland and Scandinavian Natural Health & Beauty Products, Inc., and the same Section 2(d) likelihood of confusion claim regarding the same marks and goods, as conceded by petitioner.

With regard to the decision in the opposition proceeding, the Board rendered final judgment against opposer by dismissing the case with prejudice for failure to prosecute.[2]

As noted above, a dismissal for failure to prosecute operates as an adjudication on the merits for purposes of claim preclusion. *See International Nutrition Co. v. Horphag Research Ltd., supra; La Fara Importing Co. v. F. Lli de Cecco di Filippo Fara S. Martino S.p.a.*, 8 USPQ2d 1143 (TTAB 1988). Thus, petitioner is barred by the

[2] The Board's decision was based on applicant's motion to strike opposer's testimony and for judgment. Applicant's motion was granted as well taken under Trademark Rule 2.132(a), and as conceded under Trademark Rule 2.127(a).

principle of claim preclusion from relitigating this Section 2(d) claim.

Accordingly, respondent's motion for summary judgment is granted and the petition to cancel is dismissed with prejudice.[3]

[3] In view of our decision granting respondent's summary judgment motion under the doctrine of claim preclusion, we need not reach the issues of estoppel and laches.