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CEW

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sage Dining Services, Inc.

Serial No. 75/789,623

Vito Petretti of Wolf, Block, Schorr and Solis-Cohen for
Sage Dining Services, Inc.

Tracy Whittaker-Brown, Trademark Examining Attorney, Law
Office 111 (Craig Taylor, Managing Attorney).

Before Hohein, Walters and Rogers, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Sage Dining Services, Inc. has filed an application
to register the mark SPLASHES on the Principal Register
for "food services and dining services, namely, non-

alcoholic beverage station services offered on-site to public and private businesses and institutions.”¹

The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant’s mark so resembles the previously registered marks, owned by different parties, SPLASHES, for restaurant services,² and FRUIT SPLASHES, for fruit drinks and fruit juices,³ that, if used on or in connection with applicant’s services, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E. I. du Pont de Nemours and*

¹ Serial No. 75/789,623, in International Class 42, filed September 1, 1999, based on use in commerce, alleging first use and use in commerce as of January 1991.

² Registration No. 1,303,278 issued in International Class 42 on October 30, 1984, to Amway Hotel Corporation and has been assigned to Regency Properties L.P. (“Regency”). [Sections 8 and 15 affidavits accepted and acknowledged, respectively.]

³ Registration No. 2,224,407 issued in International Class 32 on February 16, 1999, to Baskin-Robbins Incorporated (“Baskin-Robbins”).

Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

The Examining Attorney contends that applicant's mark, SPLASHES, is identical to Regency's mark, SPLASHES, and substantially similar to Baskin-Robbins' mark, FRUIT SPLASHES. Regarding the latter mark, the Examining Attorney notes that FRUIT is disclaimed in the registration; that fruit is the significant ingredient in the identified drinks and juices; and that, because of the highly descriptive nature of the term FRUIT, the term SPLASHES is the dominant portion of Baskin-Robbins' mark. The Examining Attorney contends that, in view of the insignificance of FRUIT in Baskin-Robbins' mark, the three marks involved in this appeal are "virtually identical" in connotation, sound and appearance.

The registration includes a disclaimer of FRUIT apart from the mark as a whole.

The Examining Attorney argues that applicant's services are closely related to Regency's restaurant services, which she contends are encompassed by applicant's identified food and dining services; that beverage station services are offered within the context of restaurant services; and that, in fact, applicant's identified services are an integral part of its overall restaurant services, as shown on its specimens of record. She also argues that Baskin-Robbins' identified goods, fruit drinks and fruit juices, are identical to the goods provided within the context of applicant's beverage station services. Thus, Baskin-Robbins' goods and applicant's services are also closely related.

In support of her position that the identified goods and services may emanate from the same source, the Examining Attorney submitted copies of third-party registrations and excerpts of articles contained in the LEXIS/NEXIS database. One group of third-party registrations includes marks identifying, *inter alia*, "restaurant services, namely, juice bar"; "restaurants featuring juice drinks and smoothies"; "restaurant services in the area of beverages, especially juice drinks"; "restaurant services, featuring coffee, espresso, juice, and food"; and "restaurant and beverage

services." The record also includes numerous multiple class registrations that include both restaurant services and various non-alcoholic beverages. The numerous LEXIS/NEXIS articles excerpted refer to drink stations or beverage stations in various restaurants, and drink stations or beverage stations that offer fruit drinks and juices.

The Examining Attorney contends, further, that while applicant may have limited its channels of trade, in part, to public and private businesses and institutions, neither registrant has limited its trade channels and, thus, applicant's channels of trade overlap both registrants' channels of trade. Finally, the Examining Attorney disputes applicant's contention that the purchasers of its services are sophisticated, claiming that the average consumer is the ultimate user of applicant's services; and noting that applicant submitted no evidence to establish the level of sophistication of its purchasers.

With respect to the cited SPLASHES registration owned by Regency, applicant does not dispute that the marks are identical, but contends that its services are substantially different from the restaurant services offered by Regency under its mark. Applicant notes that

its services are offered exclusively to businesses and other institutions, explaining that once it contracts with an institution for a complete dining solution, as part of its service applicant offers a SPLASHES station that serves beverages, including juices. Applicant argues that the only similarity between its services and restaurant services is the fact that beverages may be served; that the channels of trade differ; that the services are not competing; and that the purchasers of applicant's services are sophisticated businesses making a carefully considered decision.

With respect to the cited FRUIT SPLASHES registration owned by Baskin-Robbins, applicant contends that the addition of the word FRUIT to the cited mark makes the marks visually and phonetically different. Applicant states that the marks suggest completely different concepts and convey different commercial impressions because applicant's mark "is possibly suggestive of a drink 'splashing' in a glass" (brief, p. 10), whereas Baskin-Robbins' mark "is descriptive of [its] goods because of the use of the word FRUIT [which] clearly indicates that the good is fruit based..." (id.). Applicant contends that the goods and services are completely different because "applicant offers a highly

specific food preparation and dining service, not typical restaurant services and certainly not anything similar to ice cream parlor services" (brief, p. 11). Applicant also contends that the channels of trade differ; that the goods and services are not competing; and reiterates that the purchasers of applicant's services are sophisticated businesses making a carefully considered decision.

Before beginning our analysis, we note that, as exhibits to its brief, applicant submitted excerpts from Internet web sites purportedly sponsored by applicant and the two cited registrants to support its position that the involved goods and services are different. The Examining Attorney correctly objected to this evidence as untimely. Inasmuch as the evidentiary record in an application must be complete prior to the filing of the notice of appeal, we sustain the objection and we have not considered the exhibits accompanying applicant's brief. See, 37 CFR 2.142(d); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

We consider, first, the issue of likelihood of confusion with respect to Regency's cited registration for the mark SPLASHES for restaurant services. Clearly, the marks are identical. Thus, the essential inquiry is into the similarity or relationship, if any, between

applicant's food and dining services in the nature of non-alcoholic beverage station services offered on-site to public and private businesses and institutions and Regency's restaurant services. It is well established that when the marks at issue are the same or nearly so, the goods or services in question do not have to be identical to find that confusion is likely. As we stated in *In re Concordia International Forwarding Corp.*, 222 USPQ 352, 356 (TTAB 1983), ". . . the greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the products or services on which they are being used in order to support a holding of likelihood of confusion." It is sufficient that the goods or services are related in some manner and that their character or the circumstances surrounding their marketing are such that they are likely to be encountered by the same people in situations that would give rise to the mistaken belief that the producer was the same. *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

With respect to the goods and services involved in this case, the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the

goods or services recited in each of the registrations, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion.

Applicant's services are limited to beverage stations serving non-alcoholic beverages. Applicant explains that its services are part of a full dining service; and that applicant contracts to operate these services with businesses and institutions on their premises. As such, applicant's food and dining services would appear to be in the nature of restaurant or cafeteria services, albeit for a subset of the general public, e.g., the contracting business' or institution's employees. While applicant presumably contracts to render its on-site dining services with a professional representing the institution or business, its SPLASHES beverage station is clearly offering beverages to the end

consumer. Regency's recitation of services, restaurant services, is extremely broad and encompasses both beverage stations as part of a restaurant or other food or dining service, and dining services offered to a limited sector of the general population, such as to businesses and institutions. We find applicant's identified services to be encompassed by the services recited in the Regency registration. Even if such services are found not to be encompassed by "restaurant services," the identified beverage station services are closely related to restaurant services, especially because these services are part of a larger dining service offering a full meal including beverages.⁴ The excerpts of articles from the LEXIS/NEXIS database show numerous references to drink stations located in restaurants. Further, the third-party registrations submitted by the Examining Attorney, which are based on use in commerce and which individually cover both restaurant services and juice bars or beverage stations, serve to suggest that the listed services are of a type

⁴ Applicant cited the decision in *Jerrico v. Jerry's, Inc.*, 376 F.Supp. 1079, 183 USPQ 278 (S.D. Fla. 1974) in support of its position. However, that case, involving plaintiff's registered JERRY'S mark for restaurant services and defendant's JERRY'S mark for airline catering services and restaurants in airports was decided on very specific facts that are not before us in this proceeding. Thus, we find the decision to be inapposite.

which may emanate from a single source. See: *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Therefore, with respect to the cited registration owned by Regency, we conclude that in view of the identity of the two SPLASHES marks, their contemporaneous use on the overlapping and/or closely related services involved in this case is likely to cause confusion as to the source or sponsorship of such services.

We consider, next, the issue of likelihood of confusion with respect to Baskin-Robbins' cited registration of the mark FRUIT SPLASHES for fruit drinks and fruit juices.

Applicant does not dispute that fruit drinks and juices are among the items served at its beverage stations. Thus, it is reasonable to conclude that Baskin-Robbins' goods, fruit juices and fruit drinks, could be among the non-alcoholic beverages offered at applicant's beverage stations. As such, if identified by substantially similar marks, consumers familiar with registrant's drinks are likely to believe that a beverage station serving, *inter alia*, fruit drinks and juices is sponsored by the fruit drink manufacturer, *i.e.*, the beverage station originates from the same source as the similarly identified drinks.

To determine whether applicant's mark is substantially similar to the mark in the Baskin-Robbins registration, we must consider whether applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

Both marks contain the term SPLASHES. The registered mark also is prefaced by the merely

descriptive, if not generic, term FRUIT. In this context, the term FRUIT is likely to be perceived as modifying the term SPLASHES, *i.e.*, describing the nature of the splashes. We conclude that the marks are substantially similar in commercial impression, particularly when considered in connection with the identified goods and services. It is highly likely that FRUIT SPLASHES for fruit drinks and juices would be perceived as the fruit beverages available at SPLASHES beverage stations.

Therefore, with respect to the cited registration owned by Baskin-Robbins, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, SPLASHES, and Baskin-Robbins' mark, FRUIT SPLASHES, their contemporaneous use on the closely related goods and services involved in this case is likely to cause confusion as to the source or sponsorship of such goods and services.

Decision: The refusal under Section 2(d) of the Act is affirmed with respect to each of the cited registrations.