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Civil Cases

Lou v. Otis Elevator Co., 77 Mass. App. Ct. 571 (Sept. 3, 2010)

by Michael R. Justus

ABSTRACT

In a question of first impression, a three-judge panel for the Massachusetts Appeals Court affirmed a multimillion-dollar jury verdict against Otis Elevator Co. for liability as a trademark licensor under the "apparent manufacturer" doctrine for injuries resulting from an escalator accident in China, despite the fact that defendant did not sell or manufacture the escalator. The court held that there was ample evidence for a jury to find that defendant "participated substantially in the design or manufacture of the escalator," as required under the court's interpretation of the apparent manufacturer doctrine, by licensing its trademarks and providing product-design information, production-method rights, technical know-how, and managerial support to the manufacturer.

CASE SUMMARY

FACTS

In October 1998, while traveling with his family to visit his grandparents in China, four-year-old plaintiff Kevin Lou caught his hand between the skirt panel and treads of a department store escalator. Lou was dragged down the escalator and his hand was almost completely severed at the mid-palm, resulting in a thirty-one percent whole-body impairment.

The escalator was manufactured and sold in China by China Tianjin Otis Elevator Co. ("CTO") under license from defendant Otis Elevator Co. ("Otis"). CTO was a joint venture formed among Otis and two Chinese companies for the manufacture of elevators and escalators in China pursuant to Otis design standards and bearing the Otis trademark. Otis and CTO entered into (1) a trademark license agreement allowing CTO to use the Otis trademark in China, and (2) a technical cooperation agreement whereby Otis would supply, among other things, product-design information, production-method rights, technical know-how, and managerial support to CTO related to its manufacture and sales of elevators and escalators in China under the Otis trademark.

Lou and his family sued Otis for breach of warranty and loss of consortium in Massachusetts Superior Court, and after a lengthy jury trial, they were awarded over $3 million in damages plus prejudgment interest. Otis appealed the jury verdict based on, among other things, the trial court's jury instructions regarding application of the “apparent manufacturer” doctrine.

ANALYSIS

In a question of first impression, a three-judge panel for the Massachusetts Appeals Court analyzed whether the apparent manufacturer doctrine, as embodied in the Restatement (Third) of Torts: Products Liability § 14, comment d, reflected the law of Massachusetts. The Restatement provides that “[t]rademark licensors are liable for harm caused by defective products distributed under the licensor’s trademark or logo when they participate substantially in the design, manufacture, or distribution of the licensee’s products.” Otis argued on appeal that the trial court’s jury instructions regarding application of this language improperly expanded the scope of the apparent manufacturer doctrine.

The court first analyzed case law from other jurisdictions and found that a “clear majority” of jurisdictions, including Massachusetts, recognized the apparent manufacturer doctrine in some form. The court identified a split among those jurisdictions regarding application of the doctrine to nonseller trademark licensors, as Otis was in this case, and separated the relevant case law into three categories. The first category consisted of cases holding that a nonseller trademark licensor could be liable under the doctrine if it exercised substantial control over the production of the product. The second category included cases holding that a nonseller trademark licensor could be liable under the doctrine despite having little or no involvement in the production of the product if users of the product would rely on the trademark as an assurance of quality. The third category consisted of cases reaching the opposite result of the cases in the second category (i.e., nonseller trademark licensors could not be liable under the doctrine where they had little or no involvement in the production of the product).

The court concluded that the Restatement language was designed to resolve the inconsistency between the second and third categories by limiting, rather than expanding, application of the doctrine to cases where the defendant licensor had participated substantially in the production of the product. In other words, according to the court, the Restatement language was intended to preclude application of the doctrine to nonseller trademark licensors who had little or no involvement in the design or manufacture of the product, while preserving application of the doctrine to cases in which the licensor participated substantially in the design or manufacture of the product.

Turning to the case at hand, the court held that there was ample evidence for the jury to find that Otis “participated substantially in the design or manufacture of the escalator,” as required under the court’s analysis of the apparent manufacturer doctrine. Specifically, Otis licensed its trademarks to CTO and provided product-design information, production-method rights, technical know-how, and managerial support to CTO in its manufacture of escalators in China.

The court rejected Otis’s argument that application of the doctrine would ignore the separate corporate identities involved in the case (i.e., Otis and CTO), stating that, “[t]o the contrary, a trademark licensor who is held liable by virtue of its substantial participation in design, manufacture, or distribution of a product is held liable as a result of its own role in placing a dangerous product in the stream of commerce.” The court also distinguished the cases relied upon by Otis, holding that they did not involve situations in which there was sufficient evidence that the defendant licensor participated substantially in the design or manufacture of the product.

Accordingly, the appeals court concluded that the trial judge correctly instructed the jury on the apparent manufacturer doctrine as embodied in the Restatement, and affirmed the jury’s multimillion-dollar verdict in favor of Lou.

CONCLUSION

This case serves as a stark example of the potential product liability risk inherent in trademark licensing arrangements in which the licensor participates substantially in the licensee's manufacturing process. The apparent manufacturer doctrine can subject trademark licensors to liability arising from products bearing the licensor's mark despite the fact that the licensor did not actually manufacture or sell the product.

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Civil Cases

***Tiffany (NJ) Inc. v. eBay, Inc.*, 2010 WL 3733894 (S.D.N.Y. Sept. 10, 2010)**

by Danny M. Awdeh

ABSTRACT

The Southern District of New York ruled against Tiffany on its final remaining claim for false advertising in its long-running litigation against eBay over the sale of counterfeit Tiffany products on eBay's website. Tiffany alleged that eBay's advertisement of Tiffany products available on its website constituted false advertising under the Lanham Act because eBay knew that a large portion of those products were counterfeit. The court rejected Tiffany's claim, finding that it had failed to present any evidence showing that eBay's advertisements were likely to mislead or confuse consumers.

CASE SUMMARY

FACTS

Prior to 2003, eBay, Inc. ("eBay") actively promoted the availability of Tiffany (NJ) Inc. ("Tiffany") jewelry on its website, including through sponsored-link advertisements on various search engines. One sponsored-link advertisement that appeared on a search engine read "Tiffany on eBay. Find Tiffany items at low prices." In 2003, Tiffany complained to eBay about its sponsored-link advertisements and, shortly thereafter, eBay ceased placing the ads.

In 2004, Tiffany sued eBay for the sale of counterfeit Tiffany jewelry, asserting direct and contributory trademark infringement, unfair competition, contributory trademark dilution, and false-advertising claims.

In 2008, the Southern District of New York ruled in favor of eBay on all claims. The decision was affirmed by the Second Circuit in April 2010, except for Tiffany's false-advertising claim, which was remanded for further consideration.

ANALYSIS

To prove a claim for false advertising under Section 43(a)(1)(B) of the Lanham Act, the advertisement must be either (1) literally false, or (2) likely to mislead or confuse consumers. If the advertisement is literally false, the court may issue an injunction without considering extrinsic evidence regarding the advertisement's impact on the consuming public. If the advertisement is not literally false, however, the plaintiff must prove through extrinsic evidence that the advertisement is likely to mislead or confuse consumers and that “a statistically significant part of the commercial audience holds the false belief allegedly communicated by the challenged advertisement.”

The Second Circuit had upheld the district court’s ruling that eBay’s “Tiffany on eBay” advertisement was not literally false, but disagreed with the district court’s reasoning as to why the advertisement was not likely to mislead or confuse consumers. In its 2008 decision, the district court had rejected Tiffany’s false-advertising claim because it found that (1) eBay’s advertisements were making a nominative fair use of Tiffany’s mark, (2) eBay did not know which particular listings on its website offered counterfeit Tiffany goods, and (3) if eBay’s advertisements were misleading, that was only because the sellers of counterfeits made them so by offering inauthentic Tiffany goods. The Second Circuit found that none of these rationales answered the question of whether Tiffany’s extrinsic evidence indicated that the challenged advertisements were misleading or confusing, and remanded the case to the district court for the limited purpose of deciding whether the extrinsic evidence presented by Tiffany was sufficient to prove that eBay’s advertisement was likely to mislead or confuse consumers.

In support of its claim, Tiffany presented (1) three declarations from consumers who believed they had purchased counterfeit Tiffany products on eBay’s website, (2) testimony from a Tiffany employee about the numerous emails the company had received from consumers complaining about the counterfeit products they had purchased on eBay’s website, and (3) 125 emails sent by customers to eBay complaining of counterfeit Tiffany products. None of this evidence, however, indicated how the public perceived eBay’s advertisements. In fact, Tiffany’s evidence made *no* reference to eBay’s ads whatsoever. The court thus concluded that Tiffany had failed to substantiate its claim that consumers were likely to be misled or confused by eBay’s advertisements.

After conceding that the evidentiary record could not support an empirical finding that consumers had been or were likely to be misled or confused, Tiffany next argued that eBay had nevertheless engaged in false advertising because (1) its advertisements necessarily implied that all Tiffany products sold on eBay’s website were genuine, and/or (2) eBay ran its advertisements with an intent to deceive the public about the authenticity of Tiffany products offered on its website. Considering the first argument, the court reasoned that “the false by necessary implication doctrine is simply a means of analyzing whether an advertisement is literally false.” As such, because the court and the Second Circuit had already ruled that eBay’s advertisement was not literally false, Tiffany could not succeed on its claim for implied falsity.

The court also rejected Tiffany’s argument that eBay had intentionally sought to deceive the public about the authenticity of Tiffany products offered on its website for two primary reasons. First, the court concluded that Tiffany had waived the argument by failing to raise it before, during, or after trial or on appeal. Second, Tiffany failed to present evidence that “rises to the high level” of “egregious misconduct” required to prove that eBay had an intent to deceive. Indeed, although eBay was aware that a portion of Tiffany products sold on its website were counterfeit, nothing in the record indicated that eBay intentionally sought to deceive consumers. To the contrary, eBay had undertaken steps to detect and prevent the sale of counterfeit products, including through a fraud engine that sought out counterfeiters and a trust and safety department to combat infringements.

CONCLUSION

This case highlights the importance of extrinsic evidence in proving false-advertising claims where the advertised claim is not literally false. The case also offers further insight into how that evidence may be scrutinized by the court in assessing the misleading nature of an advertised claim.

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TTAB Cases

M.C.I. Foods, Inc. v. Bunte, Canc. No. 92046056 (TTAB Sept. 13, 2010)

by Linda K. McLeod and Stephanie H. Bald

ABSTRACT

Petitioner cross-petitioned to cancel Registrant's registration for the mark CABO PRIMO & Design for various Mexican-style food products, including tortilla chips, on the ground of fraud based on Registrant's alleged nonuse of the mark in connection with tortilla chips. Registrant had relied on the advice of counsel in filing its application for the CABO PRIMO mark, and there was no evidence presented at trial that counsel had advised against filing for goods that were not in use, such as tortilla chips. The TTAB found that Registrant had made a false representation when it filed its application to register the CABO PRIMO mark by claiming use on tortilla chips, but that Registrant did not intend to deceive the PTO when it filed that application. Specifically, because Registrant filed its application to register the CABO PRIMO mark with the advice of counsel, the overly expansive description of goods, while a false statement, fell short of constituting a fraudulent statement (which carries with it an actual or implied intent to deceive the PTO).

CASE SUMMARY

FACTS

M.C.I. Foods, Inc. ("M.C.I.") filed a petition to cancel Brady Bunte's registration for the mark CABO CHIPS for "processed snack foods formed from corn, namely, chips" on the grounds of priority of use and likelihood of confusion. M.C.I. pleaded ownership of three federally registered marks: CABO PRIMO & Design for various Mexican-style food products, including tortilla chips; LOS CABOS & Design for similar goods (but not chips); and CABO CLASSICS for similar goods (but not chips). Bunte denied the salient allegations of the petition to cancel and filed a separate petition to cancel M.C.I.'s CABO PRIMO & Design registration on the ground of fraud. Specifically, Bunte alleged that M.C.I. had never used the mark CABO PRIMO in connection with tortilla chips and that representatives of M.C.I. signed the application with the knowledge of this false representation. M.C.I. denied the salient allegations in Bunte's petition for cancellation.

ANALYSIS

With respect to Bunte's fraud claim, the TTAB reiterated the *Bose* fraud standard as follows: "Fraud in procuring a trademark registration or renewal occurs when an applicant knowingly makes false, material representations of fact in connection with his application." *In re Bose Corp.*, 91 U.S.P.Q.2d 1938, 1939 (Fed. Cir. 2009) (citation omitted). The TTAB further explained that there is "a material legal distinction between a 'false' representation and a 'fraudulent' one, the latter involving an intent to deceive, whereas the former may be occasioned by a misunderstanding, an inadvertence, a mere negligent omission, or the like." A trademark registration is obtained fraudulently only if the applicant knowingly makes a false, material representation with the intent to deceive the PTO.

In this case, M.C.I.'s president testified that M.C.I. had used the CABO PRIMO mark only on burritos. However, he also testified that although M.C.I. had not sold any tortilla chips in connection with its CABO PRIMO mark, it had used the mark in connection with tortilla chips in sales presentations. Moreover, M.C.I. had applied to register the CABO PRIMO mark for an expansive list of Mexican foods to obtain a broad scope of protection for the future and had discussed this registration strategy with its counsel.

Based on this testimony, the TTAB found that M.C.I. made a false representation when it filed its application to register the CABO PRIMO mark by claiming use on goods other than burritos. But, the TTAB further found that M.C.I. did not intend to deceive the PTO when it filed that application. Specifically, because M.C.I. filed its application to register the CABO PRIMO mark with the advice of counsel, the overly expansive description of goods, while a false statement, fell short of constituting a fraudulent statement, which carries with it an actual or implied intent to deceive the PTO. There was no evidence or testimony indicating that M.C.I. was advised that it could not or should not apply for Mexican-food products not in use for its CABO PRIMO mark. Thus, the TTAB explained that it would not draw an inference that M.C.I. acted with the intent to deceive the PTO without some factual basis for drawing such an inference. It was incumbent on Bunte to establish such a factual basis by, for example, eliciting further testimony as to the actual advice M.C.I. received from counsel and whether and to what extent M.C.I. relied on such advice. Because Bunte had not done so, the TTAB found that M.C.I. had not committed fraud. The TTAB did, however, restrict the description of goods in M.C.I.'s CABO PRIMO registration to its burrito products.

The TTAB emphasized that its finding does not mean that the mere assertion that one acted on "advice of counsel" will make out a good defense to a charge of fraud. Rather, it explained that its finding should be taken as an indication that the charging party must be able to show at trial that the defense is inapplicable or inappropriate under the particular circumstances of the case.

CONCLUSION

Where a party has relied on the advice of counsel in filing an allegedly fraudulent trademark application, this decision indicates that the party alleging fraud will have to be able to show at trial that the defense of "advice of counsel" is inapplicable or inappropriate under the particular circumstances of the case (e.g., by establishing that counsel advised against the allegedly fraudulent activity and applicant proceeded anyway).

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TTAB Cases

Super Bakery, Inc. v. Benedict, Canc. No. 92047859 (TTAB Sept. 16, 2010)

by Linda K. McLeod and Stephanie H. Bald

ABSTRACT

Respondent failed to timely respond to Petitioner's discovery requests on multiple occasions, including in violation of two TTAB orders. After the TTAB issued its second order directing Respondent to respond to Petitioner's requests, Respondent filed a summary judgment motion (but still did not respond to Petitioner's discovery requests). Petitioner filed a motion for default judgment as a sanction. The TTAB granted Petitioner's motion and denied Respondent's motion for summary judgment as moot. Respondent appealed on the ground that the proceeding should have been automatically suspended upon the filing of his summary judgment motion. The Federal Circuit vacated the default judgment and remanded the case to the TTAB for a determination of whether the case should have been automatically suspended under the Trademark Rules. The TTAB held that suspension was not automatic and was inappropriate under the circumstances. Accordingly, judgment was reentered against Respondent.

CASE SUMMARY

FACTS

Super Bakery, Inc. ("Petitioner") filed a combined motion to compel discovery responses and request for suspension. Ward E. Benedict ("Respondent") did not respond to the motion and the TTAB issued an order granting the motion to compel as conceded. Pursuant to that order, Respondent was allowed thirty days to serve full and complete responses without objection to Petitioner's outstanding discovery requests. Again, Respondent failed to serve any discovery responses, prompting Petitioner to file a motion for default judgment as a sanction.

Shortly thereafter, Respondent filed a motion for reconsideration of the TTAB's order compelling Respondent to respond to the outstanding discovery requests. The TTAB denied Respondent's motion as untimely because it had been filed almost two months after the TTAB's order issued, and a request for reconsideration must be filed within one month of the issuance of the order or decision. The TTAB also ordered Respondent to again provide full and complete responses to Petitioner's discovery requests without objection within thirty days.

Notwithstanding this order, Respondent still did not respond to any of Petitioner's discovery requests.

Instead, one day before the discovery response deadline, Respondent filed a motion for summary judgment. The TTAB suspended the proceedings pending determination of Respondent's motion.

In responding to Respondent's motion for summary judgment, Petitioner filed a second motion for sanctions, asking the TTAB to enter judgment against Respondent for his failure to comply with the TTAB's order. Because Respondent had failed to respond to Petitioner's discovery requests as twice ordered, the TTAB granted Petitioner's motion, entering default judgment against Respondent and denying Respondent's motion for summary judgment as moot.

Respondent appealed the TTAB's decision on the ground that Respondent's obligation to comply with the TTAB's discovery sanctions should have been deemed suspended upon the filing of Respondent's motion for summary judgment. The Federal Circuit vacated the default judgment and remanded the case for consideration of the application of Trademark Rule 2.127(d) to the facts of the case.

CONCLUSION

The TTAB will not automatically suspend a TTAB proceeding upon the filing of a motion for summary judgment, but rather a decision to suspend will be determined based on the particular facts of a case. Suspension may be inappropriate, for example, where a party has filed a motion for summary judgment in an attempt to avoid compliance with a previous TTAB order or to otherwise frustrate the discovery process.

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Unregistrable

Even Cowgirls Get the Trademark Blues

by Robert D. Litowitz

Trade dress disputes come in all shapes and sizes. But what if the alleged trade dress involves no dress at all? That's the case in an ongoing Big Apple brouhaha being played out on the streets of Times Square and the federal courthouse. For the last ten years, Robert Burck, a.k.a the "Naked Cowboy," has donned white briefs, cowboy boots, and a cowboy hat; strapped on an acoustic guitar; and then set out to serenade tourists and traffic-dodgers beneath the bright lights of the big city in the heart of Manhattan's theater district. And he's given the Postal Service a run for its money in the "neither snow, nor rain, nor gloom of night" department—braving the elements without so much as a scarf or earmuffs added to his otherwise skimpy ensemble.

But while his mother might bemoan his lack of good sense in the wardrobe department, she no doubt would marvel at his trademark savvy. In 2009, Burck sued Clear Channel Communications after discovering that one of its radio stations had outfitted an employee in Naked Cowboy garb and then posted 51 videos of the ersatz unclad troubadour on YouTube. He also sued candy titan Mars, Inc. over an animated billboard in Times Square that showed anthropomorphic M&Ms decked out in white underpants, cowboy hat, and boots. Both cases settled out of court.

Now, a former stripper and comedian named Sandra Brodsky, a.k.a. Sandy Kane, is the latest target of Burck's Naked ambitions. Following in the Naked Cowboy's well-trodden boot steps, Kane's been seen traipsing through Times Square wearing nothing but a red, white, and blue bikini, boots, hats, and a guitar bearing the words "I ♥ Naked Cowgirl." Bystanders and passers-by have been amused. Burck is not.

First, he sent his distaff counterpart a cease-and-desist letter demanding that she either take a license from the Naked Cowboy franchise or put some clothes on and drop the Naked Cowgirl name. She refused. So Burck did what any red-blooded American cowboy would do: he rounded up a posse of lawyers and sued to protect his property—intellectual property, that is.

In a complaint filed in the Southern District of New York, the Naked Cowboy lays bare a passel of IP claims running the gamut from straight trademark infringement to dilution of an allegedly famous trademark. According to Burck, Kane's activities, including posing for a photo while making an obscene gesture, have tarnished the Naked Cowboy brand and have resulted in a likelihood of confusion.

When he decided to take Kane to court, Burck probably was thinking of Henry Fonda's classic line from *Once upon a Time in the West*: "People scare better when they're dying." Or, in this case, when they're sued. But like a gunslinger staring down the law at high noon, Sandy Kane remained undaunted and shot back with claims of her own. Raising the stakes by trying to strip Burck of his mark, Kane alleges that Burck applied to register the Naked Cowboy trademark on a corral full of goods and services that he never had any intention to offer, such as circuses and online computer games. Kane also alleges that the Naked Cowboy mark is generic. That's one big hand for the little lady to play.

In *Cowgirl in the Sand*, Neil Young sings of a woman who's "old enough now to change [her] name." Sandy Kane may very well be old enough to change hers, but as the Naked Cowboy is learning the hard and expensive way, Sandy Kane is one cowgirl who's not about to change hers without a fight.

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