Federal Court  Cour fédérale

Date: 20160419

Docket: T-212-16

Citation: 2016 FC 431

Ottawa, Ontario, April 19, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

VIORGANICA LABORATORIES INC.

Applicant

and

SOCIÉTÉ DE PRODUITS NESTLÉ

Respondent

ORDER AND REASONS

[1] The Respondent, Société de Produits Nestlé [Nestlé] brings this motion for an order striking the secondary relief sought in paragraph 2 of the notice of application [the application] brought by the Applicant, Viorganica Laboratories Inc. [Viorganica].

[2] The primary relief sought in paragraph 1 of the application is an appeal of the Registrar of Trademarks' [Registrar] decision dated July 23, 2015 expunging Viorganica's trademark BELLA FLORA registered under Registration Number TMA663,029.

[3] The secondary relief sought in paragraph 2 of Viorganica's application is for "[a]n Order refusing the Application No. 1,645,153, for registration of the trade-mark BELLA."

[4] This application by Nestlé is presently the subject of a pending opposition brought by Viorganica pursuant to section 38 of the *Trade-marks Act*, RSC, 1985, c T-13 [the Act] before the Registrar.

[5] In regards to the opposition proceeding, Viorganica argues that Nestlé has no case in seeking to register its trademark BELLA. It submits that it would not be distinctive and would be confusing with its BELLA FLORA trademark, use of which it claims Nestlé has purportedly admitted. The Court was not directed to any evidence in support of Viorganica's argument.

[6] Nestlé argues that because the question of whether BELLA will be registered is still before the Registrar, the Court has no jurisdiction to issue an order refusing its trademark registration application. It therefore submits that Viorganica's claim in paragraph 2 of the application seeking refusal of the trademark registration should be struck. I agree.

[7] I am satisfied that the Court has the jurisdiction to strike or summarily dismiss all or part of a notice of application where the matter is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v Pharmacia Inc.* [1994] FCJ No 1629 (FCA) citing with approval *Cyanamid Agricultural de Puerto Rico, Inc. v Commissioner of Patents* (1983), 74 CPR (2d) 133 FC TD [*Cyanamid*]. In *Cyanamid*, Justice Mahoney dismissed an application "for want of jurisdiction in the Trial Division to grant any of the relief sought."

[8] The Registrar has the jurisdiction pursuant to subsection 38(8) of the Act to make a decision with respect to Viorganica's opposition to the BELLA registration. Pursuant to subsection 39(1) of the Act, if the opposition has been decided in favour of the Applicant, the Registrar shall allow the application. The Registrar's decision would then be subject to an appeal to the Federal Court pursuant to section 56 of the Act.

[9] I conclude that the Court does not have jurisdiction to refuse the registration of the BELLA mark because it does not have original jurisdiction over trademark registration in Canada. This jurisdiction is bestowed exclusively on the Registrar by the Act. The Court's only jurisdiction is in respect of an appeal from the Registrar's decision to register a trademark.

[10] The Applicant is in effect attempting to challenge a decision over which the Court has no jurisdiction because the decision has not yet been made.

[11] I further conclude that the Court's jurisdiction could not somehow be implicitly based upon section 57 of the Act. It bestows jurisdiction on the Court "to order that any entry in the register be struck out." Until Nestlé's BELLA mark is registered, there is no mark for the Court to strike out.

[12] Even if I am incorrect in respect of my conclusion that the Court does not have jurisdiction to hear the issue refusing the BELLA trademark, I would nevertheless strike the impugned paragraph of the application in the exercise of my discretion based on my conclusion that an adequate alternative remedy exists in the form of the ongoing opposition proceedings:

Harelkin v University of Regina, [1979] 2 SCR 561; *Fast v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 368. Among other factors, it would be a waste of judicial resources to refuse a decision that may eventually turn out to be in the Applicant's favour.

[13] Accordingly, I allow the Respondent's motion to strike paragraph 2 in the application described above.

[14] I further allow Nestlé an extension of time of 30 days from the issuance of this order for service of its evidence in this application.

[15] Nestlé is entitled to its costs in this matter, which upon hearing the parties, I fix at $1,000.

ORDER

THE COURT ORDERS that paragraph 2 of the notice of application is struck and that the Respondent is awarded costs in the amount of $1,000.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-212-16
STYLE OF CAUSE:	VIORGANICA LABORATORIES INC. v SOCIÉTÉ DE PRODUITS NESTLÉ
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