

Federal Court



Cour fédérale

Date: 20131002

Docket: T-1056-11

Citation: 2013 FC 1006

Ottawa, Ontario, October 2, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

**MEDOS SERVICES CORPORATION
MARATHON MEDICAL INC.
ALEXANDER VLASSEROS**

Applicants

and

RIDOUT AND MAYBEE LLP

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Unlike other pieces of intellectual property, if a trade-mark is not used, it may be expunged from the register. Section 45 of the *Trade-Marks Act* provides that the Registrar may, on request of anyone who pays the prescribed fee, give notice to the registered owner of the trade-mark requiring him to furnish within three months an affidavit or statutory declaration showing, with respect to each of the wares or services specified in the registration, whether the trade-mark was in use during

Canada at any time in the previous three years and, if not, the date when it was last used and the reason why it has not been used since.

[2] On 23 December 2010, the Registrar of Trade-marks, at the request of the law firm Ridout & Maybe LLP, mailed a letter by Express Post to Medos Services Corporation, the owner of the trade-mark MEDOS. As no reply was received, the trade-mark was expunged on 26 April 2011. Medos, its principal Alexander Vlasseros, and a related corporation, Marathon Medical Inc., have appealed that decision. They make much of the fact that the letter from the Registrar was unclaimed, and returned. However, it was addressed to the last address on file, and indeed Mr. Vlasseros used the same address in a subsequent affidavit.

[3] Decisions of the Registrar may be appealed to the Federal Court. Unlike other appeals and judicial reviews, s. 56 of the *Trade-Marks Act* provides that on such appeals additional evidence may be adduced. The appellants have proffered evidence which they submit establishes use of the trade-mark within the three years at issue. Thus it is not necessary to consider whether there was a valid reason for non-use. The trade-mark was for services being the “operation of a wholesale and retail business dealing in the distribution and sale of medical and healthcare supplies and equipment through multiple distribution centers.” The respondent submits that the evidence does not establish use of the trade-mark by anyone.

[4] In the alternative, if the Court is satisfied that there was use of the trade-mark, it was used by Marathon Medical Inc. Use by Marathon only constitutes use within the meaning of Section 50 of

the Act if it was licensed by Medos who nevertheless maintained control of the character or quality of the service. The respondent submits there is no evidence to support this proposition.

[5] Mr. Vlasseros, who is not a lawyer, was given leave to represent his Medos and Marathon corporations.

NATURAL JUSTICE

[6] There is no basis for Mr. Vlasseros' submission that the appellants were not afforded natural justice. Apart from the fact that no explanation has been given as to why the Section 45 letter was unclaimed, the law provides him a perfectly adequate recourse, an appeal with new evidence. This is what has happened in similar cases such as *Promotions CD Inc v Mcburney*, 2008 FC 1071, 71 CPR (4th) 63. Neither counsel for the respondent nor I am aware of any instance in which an expungement in these circumstances was sent back to the Registrar for reconsideration.

THE EVIDENCE

[7] The burden upon the appellants to establish use is not high. The matter before the Registrar is not a civil trial where both side adduce evidence and the matter is decided on the balance of probabilities. As Mr. Justice Hugessen noted in *Meredith & Finlayson v Canada (Registrar of Trade Marks)* (1991), 40 CPR (3d) 409, 138 NR 379 (FCA), at paragraph 4:

Subsection 45(2) is clear: the Registrar may only receive evidence tendered by or on behalf of the registered owner. Clearly it is not intended that there should be any trial of a contested issue of fact, but

simply an opportunity for the registered owner to show, if he can, that his mark is in use or if not, why not.

[8] Evidence of use can take the form of a single commercial transaction in the ordinary course of business (*Sols R Isabelle Inc v Stikeman Elliott LLP*, 2011 FC 59, 92 CPR (4th) 83).

[9] Mr. Vlasseros proffered four forms of evidence:

- a. a series of bills from Rogers addressed to Medos Services Corporation;
- b. correspondence with foreign suppliers;
- c. receipts addressed to Mr. Vlasseros, Medos Services Corporation and Marathon Medical Inc. for rent of office, warehouse and repair space; and
- d. invoices from Marathon Medical Inc. to the Société de l'assurance automobile du Québec (SAAQ), with respect to certain patients. The invoices cover repair of hospital beds, hydrostatic safety tests, refills, masks and tubing, and annual inspections.

[10] It is not enough to say that a trade-mark has been used. It must be shown that it has been used (*Curb v Smart & Biggar*, 2009 FC 47, 72 CPR (4th) 176, and cases cited therein).

Rogers Bills

[11] The Rogers bills appear to be telephone bills, no more, no less. They do not evidence use of the trade-mark. Mr. Vlasseros tried to explain that these invoices covered yellow page advertisements, although they certainly do not say so. The respondent, who had noted many

procedural irregularities, but who did not rely upon them, objected to what was tantamount to evidence. I maintained that objection. A self-represented litigant can no more testify in an appeal by way of application than a party represented by counsel. As Lord Atkins said in *Evans v Bartlam* [1937] AC 473, [1937] 2 All ER 646, at page 479:

The fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.

Correspondence with Foreign Suppliers

[12] The correspondence with foreign suppliers indicates that Mr. Vlasseros was seeking business. No mention was made of the Medos trade-mark. He suggests that if these inquiries had borne fruit, he could have put the Medos trade-mark on the equipment imported into Canada. Not only is this outright speculation, it certainly does not evidence use of the Medos trade-mark.

Rental Receipts

[13] Nor are the rental receipts helpful. There is no evidence of the Medos name being used for advertising purposes as set out in s. 4 of the Act.

Invoices to SAAQ

[14] The closest that one comes to possible evidence of use are the invoices from Marathon to the SAAQ. It is noteworthy that the word "Medos" does not appear anywhere. Mr. Vlasseros, under objection, tried to explain that there were Medos stickers on the hospital beds and that Marathon,

authorized by Medos, was carrying out post-sale maintenance. I doubt that maintenance relates to the services covered by the trade-mark being the “operation of a ... business dealing in the distribution and sale ... of medical and healthcare supplies...”

[15] Furthermore, the trade-mark was issued in 1990 based on a claim that the Medos trade-mark had been used in Canada since at least August 1983. These invoices do not establish use because there is not even a mention of Medos. If Medos medical equipment had been sold, it may have been sold decades before.

[16] As there is no evidence of use of the Medos trade-mark by anyone within the three years in question, it is not necessary to determine whether Marathon or Mr. Vlasseros was licensed within the meaning of s. 50 of the Act.

[17] Mr. Vlasseros provided copy of a letter from the Registrar dated 16 August 2013 expunging the trade-mark. This letter must have been issued in error as one cannot expunge what has already been expunged.

COSTS

[18] Counsel for the respondent sought costs. The Court prefers, when feasible, to order lump sum costs. Counsel left it to me to issue an order, realizing that I would be conservative. Counsel had to travel from Toronto to Montreal for the appeal. Apart from the appeal itself, there were a few

interlocutory motions. The appeal was not difficult, and so I base myself on Tariff B, Colum 2. I shall fix costs at \$2,500, all inclusive, realizing that if taxed costs would be higher.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT'S JUDGMENT is that:

1. The appeal from the decision of the Registrar of Trade-marks is dismissed.
2. Costs are fixed at \$2,500, all inclusive.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1056-11

STYLE OF CAUSE: MEDOS SERVICES CORPORATION ET AL v
RIDOUT AND MAYBE LLP

PLACE OF HEARING: MONTREAL, QUEBEC

DATE OF HEARING: SEPTEMBER 25, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:**

HARRINGTON J.

DATED: OCTOBER 2, 2013

APPEARANCES:

Alexander Vlasseros

FOR THE APPLICANTS

Paul D. Tackaberry

FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A

FOR THE APPLICANTS

Ridout & Maybe LLP
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Toronto, Ontario

FOR THE RESPONDENT