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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2017 TMOB 123

Date of Decision: 2017-09-11

IN THE MATTER OF A SECTION 45 PROCEEDING

Goubuli Group Co., Ltd.

Requesting Party

and

Qiang Zhang

Registered Owner

**TMA838,836 for Go Believe/GBL
Design**

Registration

[1] At the request of Goubuli Group Co., Ltd. (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on February 3, 2016 to Qiang Zhang, the registered owner of registration No. TMA838,836 for the trade-mark GO BELIEVE/GBL Design (the Mark), shown below:



[2] The Mark is registered for use in association with the following goods and services:

GOODS

Steamed buns stuffed with minced meat and/or vegetables, dumpling, garlic, condiments, soy sauce, tofu, soy milk.

SERVICES

Restaurant services, inn, hotel services, coffee and tea bars, canteen services, snack-bars, cocktail lounge services, motel, bed and breakfast.

[3] The notice required the registered owner to furnish evidence showing that the Mark was in use in Canada, in association with each of the goods and services specified in the registration, at any time between February 3, 2013 and February 3, 2016. If the Mark had not been so used, the registered owner was required to furnish evidence providing the date when the Mark was last used and the reasons for the absence of use since that date.

[4] The relevant definitions of “use” are set out in sections 4(1) and 4(2) of the Act as follows:

4(1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

4(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[5] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with each of the goods and services specified in the registration during the relevant period.

[6] In response to the Registrar’s notice, Mr. Zhang attempted to file evidence himself by way of letters received by the Registrar on February 19, 2016; March 11, 2016; March 30, 2016; and April 14, 2016. These attempts were not made of record as evidence in this proceeding.

[7] On April 29, 2016, through Mr. Zhang's representative and trade-mark agent, the Registrar received an affidavit properly sworn by Mr. Zhang. This affidavit was sworn on April 26, 2016 in Montreal, and consists of 17 paragraphs with four exhibits, A through D.

[8] On May 3, 2016, Mr. Zhang furnished a second sworn affidavit with the Registrar, identified by Mr. Zhang in a covering letter as "an update version" of the first affidavit. It consists of 20 paragraphs, and was sworn on May 2, 2016, also in Montreal. Although this second affidavit includes the entirety of the first affidavit, it omits Exhibits A through D. Instead, two additional exhibits, Exhibits E and F, are attached.

[9] Both parties filed written representations; an oral hearing was not requested.

[10] In their representations, both parties focus on the April 26, 2016 affidavit and treat the May 3, 2016 affidavit of Mr. Zhang as not of record. However, this second affidavit was properly sworn and was received by the Registrar prior to the expiry of the registered owner's deadline for filing evidence. As such, for purposes of this decision, I will treat this second affidavit as part of the evidentiary record. In any event, per the analysis below, this second affidavit does not impact the ultimate disposition in this case.

THE EVIDENCE

[11] In his affidavits, Mr. Zhang asserts that, during the relevant period, he used the Mark in association with the registered "steamed buns..." goods in Canada in the normal course of trade. His evidence can be summarized as follows:

- During the relevant period, Mr. Zhang was a partner of Baifoo Express Restaurant, located in Montreal.
- His GO BELIEVE steamed buns were offered as part of the restaurant's dim sum menu and were made in the restaurant's kitchen.
- The Baifoo Express Restaurant was licensed by Mr. Zhang to use the Mark in association with such steamed buns; pursuant to the license, Mr. Zhang maintained care and control over the nature and quality of the steamed buns made.

- Mr. Zhang also controlled the manner in which the GO BELIEVE steamed buns were advertised at the restaurant.
- The steamed buns were advertised through various means at the restaurant: on menus, on napkins, on teapots, and on small placards placed on each table in the restaurant.
- The GO BELIEVE steamed buns were also available for take-out; the take-out containers bore the Mark.
- Mr. Zhang's GO BELIEVE steamed buns were also sold at Café Langelier, the Sorgho Rouge Restaurant, and through the Dim Sum Montreal food truck, all located in Montreal. Mr. Zhang maintained care and control over the nature and quality of such buns, as well as the manner in which the buns were advertised by these businesses, through frequent visits and spot checks.
- At the Café Langelier and Sorgho Rouge Restaurant, the Mark appeared on steamer baskets. It also appeared on all takeout containers in which the GO BELIEVE buns were sold by all three businesses. Mr. Zhang attests that such display of the Mark was in the same manner as display of the Mark at the Baifoo Express Restaurant.

[12] In support, Mr. Zhang attaches the following exhibits to his first affidavit:

- Exhibit A is a photograph of a food basket, which Mr. Zhang confirms is an order of his GO BELIEVE steamed buns that had been prepared for a customer at Baifoo Express Restaurant during the relevant period. The Mark appears on the side of the basket. Mr. Zhang attests that the photograph is representative of the manner in which GO BELIEVE steamed buns were served “in-house” during the relevant period.
- Exhibit B is a photograph of a table setting that Mr. Zhang attests was taken at the Baifoo Express Restaurant during the relevant period. As indicated above, the Mark appears on a menu, a napkin, a teapot and a placard on the table. Again, Mr. Zhang attests that the photograph is representative of the manner of advertising for his steamed buns at every table in the Baifoo Express Restaurant during the relevant period.

- Exhibit C is a photograph showing a sign displaying the Mark. Mr. Zhang attests that the photograph is of the inside of the Baifoo Express Restaurant taken during the relevant period. Mr. Zhang attests that such signs are representative of the manner of advertisement for his GO BELIEVE steamed buns during the relevant period.
- Exhibit D consists of 11 cheques from various individuals that Mr. Zhang attests were paid to him for his GO BELIEVE steamed buns. The cheques are all dated within the relevant period. Mr. Zhang explains that “the proceeds from the sale of my GO BELIEVE Steamed Buns during the relevant time period were paid to me directly.”

[13] In his second affidavit, Mr. Zhang adds that “the sign of my logo is displayed on the windows of the restaurant where I worked including Baifoo Express Restaurant, Café Langelier, Sorgho Rouge Restaurant and the Dim Sum Montreal food truck.”

[14] In support, attached to his second affidavit are the following exhibits:

- Exhibit E is a photograph of a restaurant window, which Mr. Zhang attests is of the Baifoo Express Restaurant taken during the relevant time period. Although the photograph is of poor quality, the Mark appears to be displayed on a sign in the window. Mr. Zhang attests that this photograph is representative of the manner in which “my Go Believe & DESIGN mark was advertised on all the windows in the Baifoo Express Restaurant during the relevant time period”.
- Exhibit F is a photograph of a restaurant employee which Mr. Zhang attests shows a uniform displaying the Mark. Mr. Zhang explains that this kind of uniform was worn by him and by wait staff in the Baifoo Express Restaurant during the relevant period.

ANALYSIS – USE WITH RESPECT TO GOODS

[15] In its written representations, the Requesting Party questions the credibility of the Mark being displayed on the basket depicted in Exhibit A. In this respect, attached to its representations is a printout from a Wikipedia entry for “Goubuli” (as noted in the registration, the transliteration of the foreign characters appearing in the Mark is GOUBULI). Also attached are photographs of steamed buns purportedly offered at a restaurant in Toronto.

[16] These attachments are apparently intended to support the Requesting Party's assertion that attaching a piece of paper to the side of a steamed bun basket – as depicted in Exhibit A – is “never possible”.

[17] However, statements in an affidavit must be afforded substantive credibility, and I am not prepared to take notice that the manner of display of the Mark as depicted in Exhibit A is “absolutely untrue”, as asserted by the Requesting Party. In this respect, evidence in a section 45 proceeding may only be furnished by the registered owner. As such, I have not considered the attachments to the Requesting Party's representations as evidence in this proceeding.

[18] Otherwise, the Requesting Party submits that advertising alone does not constitute use of a trade-mark in association with goods in the normal course of trade.

[19] However, in this case, it is clear that the Mark is displayed by various means to customers at the time of transfer of the goods. Although Mr. Zhang does not provide an example of display of the Mark on take-out containers, I accept that display of the Mark on the menu, placards and other mediums at tables in the restaurants would provide the requisite notice of association between the Mark and the goods at the time of ordering [see, for example, *Gowling Lafleur Henderson LLP v Padcon Ltd*, 2014 TMOB 125 and *Blake, Cassels & Graydon LLP v Sir Royalty Limited Partnership*, 2015 TMOB 99 for similar conclusions].

[20] This is the case even if I were to disregard Exhibit A, which clearly shows the Mark displayed on the side of a serving basket, which Mr. Zhang attests is representative of the manner in which his steamed buns were served to customers.

[21] Furthermore, Mr. Zhang evidences transfers of such steamed buns at Exhibit D, and references a particular sale to a customer during the relevant period. In view of the evidence as a whole, I consider it reasonable to conclude that the GO BELIEVE steamed buns were not merely available for sale during the relevant period but were, in fact, sold to customers in the normal course of trade.

[22] As such, I am satisfied that the registered owner has demonstrated use of the Mark in association with the registered goods within the meaning of sections 4 and 45 of the Act.

ANALYSIS – USE WITH RESPECT TO SERVICES

[23] With respect to the registered services, the Requesting Party notes that Mr. Zhang asserts use only in association with the goods “steamed buns”. Indeed, in neither of his affidavits does Mr. Zhang assert use of the Mark in association with any of the registered services.

[24] Nevertheless, in its written representations, the registered owner submits that the registration should be maintained with respect to “restaurant” services, in addition to the “steamed buns” goods.

[25] Presumably, it was with such “restaurant” services in mind that Mr. Zhang furnished his second affidavit. In it, he provides evidence that the Mark was displayed on employee uniforms, in restaurant windows, and on various advertisement mediums.

[26] However, in my view, display of the Mark in the restaurant window and on employee uniforms appears to be in the nature of the display of the Mark on menus, napkins, placards and the like as attested to by Mr. Zhang – *i.e.*, they constitute advertisement of the GO BELIEVE steamed bun goods only. In other words, the signage and display of the Mark on uniforms amounts merely to an advertisement, that GO BELIEVE steamed buns are sold at the restaurant. Absent further particulars from Mr. Zhang, it is not clear that the Mark would have been associated with the restaurant services more generally at any of the aforementioned locations.

[27] In view of all of the foregoing, I am not satisfied that the registered owner has demonstrated use of the Mark in association with the registered services within the meaning of sections 4 and 45 of the Act.

[28] As there is no evidence of special circumstances before me, the registration will be amended accordingly.

DISPOSITION

[29] In view of all of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, the

registration will be maintained with respect to the registered goods and will be amended to delete the statement of services.

Andrew Bene
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

No Hearing Held

AGENTS OF RECORD

Riches, McKenzie & Herbert LLP

For the Registered Owner

Dan Yang-Hoffman

For the Requesting Party