STATE OF MICHIGAN

COURT OF APPEALS

BENCHMARK FINANCIAL, LTD.,

Plaintiff-Appellee,

v

JOHN E. MAYER d/b/a BENCHMARK FINANCIAL ADVISORS,

Defendant-Appellant.

UNPUBLISHED
February 2, 1999

No. 206087
Oakland Circuit Court
LC No. 94-487848 CB

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

This is a common law trademark infringement and unfair competition case.[1] Defendant appeals as of right from the trial court's orders denying his motion for summary disposition and permanently enjoining him from using the name Benchmark Financial Advisors. We affirm.

In 1979, plaintiff incorporated its life insurance business in Michigan under the name Benchmark Financial, Ltd., and has been conducting business under that name ever since. In early November 1994, plaintiff learned that defendant was selling life insurance under the name Benchmark Financial Advisors. When defendant refused plaintiff's request to cease using that name, plaintiff sued for damages and injunctive relief.[2] The court granted plaintiff's request for a temporary restraining order and, subsequently, a preliminary injunction.

The case mediated in August of 1995 for $5,000. Although plaintiff timely accepted the mediation award, defendant failed to respond within 28 days. Thus, pursuant to MCR 2.403(L)(1), defendant was deemed to have rejected it. However, after notice of rejection was entered, defendant moved to set aside his rejection on the grounds that his acceptance had been untimely due a delay in the mail. The trial court agreed.

Plaintiff then moved for entry of partial judgment under MCR 2.602(B)(3) arguing that, at mediation, everyone had agreed that plaintiff's claim for injunctive relief was being reserved for trial. The trial court agreed and entered judgment on the mediation award as to plaintiff's claim for damages

only. Defendant then filed a motion for summary disposition, arguing that there was no issue of material fact left for trial because mediation had disposed of the entire case. The court disagreed, finding that defendant's motion was barred by its decision to grant plaintiff's motion for entry of partial judgment. A lengthy evidentiary hearing followed on the question of equitable relief, and a permanent injunction was entered.

On appeal, defendant first argues that the trial court erred in finding that plaintiff's claim for injunctive relief had not been submitted to mediation. Under the unique circumstances of this case, we find that the issue is moot.

The general rule is that, "absent a showing that less than all issues were submitted to mediation, a mediation award covers the entire matter and acceptance of that mediation award settles the entire matter." *Reddam v Consumers Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990); see also MCR 2.403(A)(1). On the other hand, where, as here, a trial court exercises its discretion to allow a party to amend its deemed rejection of a mediation award to an acceptance, the court must afford the other party the opportunity to reiterate its acceptance or change it to a rejection. *Rieth v Keeler*, 230 Mich App 346, 349-350; 583 NW2d 552 (1998). This the trial court failed to do.

Here, therefore, because the parties were in dispute concerning the scope of the mediation award, the trial court should have held an evidentiary hearing -- not simply oral argument -- to settle the issue. The trial court should have then allowed plaintiff to change its acceptance of the award to a rejection. If the trial court had found that the mediation award had settled even equitable issues, plaintiff would have rescinded its acceptance and the court would have had to decide the entire case. Conversely, if the trial court had found that mediation had decided only liability and damages, not equitable issues, plaintiff would have reaffirmed its acceptance and the trial court would still have had to decide whether plaintiff was entitled to a permanent injunction. Thus, regardless of the outcome of the evidentiary hearing on the scope of the mediation award, the trial court would have had to decide whether plaintiff was entitled to a permanent injunction. Given the fact that the trial court went on to decide that very issue, we find that it would be a waste of judicial resources to remand this case for an evidentiary hearing concerning the scope of the mediation award.

We therefore move on to defendant's argument that the trial court abused its discretion in granting plaintiff a permanent injunction. Specifically, defendant argues that, although both he and plaintiff sell life insurance, they are not in direct competition because life insurance sales are only a portion of defendant's business, which he claims is largely financial planning, and because defendant caters to a more exclusive clientele. Defendant further argues that there is little likelihood of confusion, and that any confusion occurring thus far has been the result of carelessness. Finally, defendant argues that plaintiff has not shown an actual injury or the probability of irreparable harm. We disagree.

A trial court's decision to grant or deny injunctive relief is reviewed for abuse of discretion. *Schadewald v Brule*, 225 Mich App 26, 39; 570 NW2d 788 (1997). Injunctive relief is an extraordinary remedy which may be granted only when (1) justice requires it; (2) there is no adequate remedy at law; and (3) there is a real and imminent danger of irreparable harm. *Peninsula Sanitation, Inc v Manistique*, 208 Mich App 34, 43; 526 NW2d 607 (1994); *Lyon Charter Twp v Lazechko*,

197 Mich App 681, 682; 495 NW2d 839 (1992). The decision to grant injunctive relief must be tailored to the facts of the particular case. *Soergel v Preston*, 141 Mich App 585, 590; 367 NW2d 366 (1985). We note that, because mediation has settled the issue of liability in this case, we will only examine the elements of an action for common law trademark infringement for guidance in determining whether the requirements for an injunction have been met.

Injunctive relief may be granted where a business competitor has adopted a name which is confusingly similar to one already being used by another business and the similarity results in a likelihood or probability of confusion among consumers who are using ordinary care.[3] *Boron Oil Co v Callanan*, 50 Mich App 580, 584; 213 NW2d 836 (1973); see also *Thrifty Acres, Inc v Al-Naimi*, 119 Mich App 462, 466-469; 326 NW2d 400 (1982); *Educational Subscription Service, Inc v American Educational Services, Inc*, 115 Mich App 413, 431; 320 NW2d 684 (1982). "Actual confusion of customers, clients, or the public at large does not need to be shown; it is sufficient if the acts of the defendant indicate that probable confusion will occur." *Boron, supra*, 50 Mich App at 584. The likelihood of confusion must be evaluated in terms of the particular facts of each case. *Boron, supra*, 50 Mich App at 584. However, as a matter of law, "[c]orporate names are confusingly similar when the first two words of a compound name are identical and in the same sequence." *Educational Subscription Services, supra*, 115 Mich App at 421.[4]

Here, the trial court found that, on its face, "Benchmark Financial Advisors" was confusingly similar to "Benchmark Financial, Ltd." See *Educational Subscription Services, supra*, 115 Mich App at 421. The trial court rejected defendant's claim that he was appealing to a different clientele, and found instead that there was a likelihood of confusion among consumers and a strong possibility that such confusion would result in irreparable harm to plaintiff's business. The court relied on the similarity of the names, on the fact that both parties sell life insurance, on several instances of actual confusion, and on defendant's statement that, had he known about plaintiff's business, he would have chosen a different name. The trial court concluded that there was no adequate remedy at law and that justice required that a permanent injunction be issued. On this record, we find no abuse of discretion in granting plaintiff a permanent injunction. *Schadewald, supra*, 225 Mich App at 39.

Lastly, defendant argues that the injunction is overbroad because it prohibits him from using the name throughout the state of Michigan, the home base of his multi-state business. However, defendant makes no argument nor cites any authority in support of his position. Thus, we find the issue abandoned on appeal. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997).

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Jane E. Markey

[1] Although the trial court's opinion finds that defendant violated MCL 450.1212; MSA 21.200(212), plaintiff's complaint alleges only common law claims.

[2] A related action was filed in federal court.

[3] When parties are not in direct competition, plaintiff must show that its trademark has acquired "secondary meaning;" the court must then consider the "length of use of the symbol or mark, nature and extent of popularizing and advertising the symbol, and the efforts expended by plaintiff in promoting the connection in the minds of the general public of his mark or symbol with a particular product." *Boron Oil Co v Callanan*, 50 Mich App 580, 583-584; 213 NW2d 836 (1973); see also *Frisch's Restaurants, Inc v Elby's Big Boy of Steubenville, Inc,* 670 F2d 642, 648 (CA 6, 1982) (federal law).

[4] On the other hand, a plaintiff is not entitled to an injunction where the similarity of names is "so slight as to be unlikely to confuse others than the careless or indifferent or they involved banks or insurance companies or concerns doing business with a specialized field." *220 Bagley Corp v Julius Freud Land Co*, 317 Mich 470, 473; 27 NW2d 59 (1947). "There is probably greater latitude allowed to banks and insurance companies in the similarity of corporate names than in the case of ordinary mercantile corporations." *220 Bagley*, *supra*, 317 Mich at 473-474; *Central Mutual Auto Ins Co v Central Mutual Ins Co of Chicago*, 275 Mich 554, 560; 267 NW 733 (1936). The parties in this case, however, are insurance agents, not insurance companies. Compare *Central Mutual*, *supra*, 275 Mich at 558-561 (substantial weight given to fact that commissioner of insurance granted defendant permission to do business in Michigan under that name). Further, as stated before, the issue of liability was settled by mediation.