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HONG'S, INC., DOING BUSINESS AS CHINA BUFFET, APPELLANT, V. GRAND CHINA BUFFET, INC., ET AL., APPELLEES.

805 N.W.2d 90

Filed November 8, 2011. No. A-11-165.

1. **Injunction: Damages: Appeal and Error.** In actions seeking both injunctive relief and damages, the standard of review applicable in reviewing questions of fact is de novo.
2. **Names: Proof.** In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution.
3. ____: ____. If the similarity in trade names is such as to mislead purchasers or those doing business with a company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief.
4. **Names.** Competition between enterprises is thought to be a desirable objective; trade names allow the public to distinguish between the goods and services of merchants, and merchants may reap the benefits or suffer the consequences of their efforts. Thus, the evil sought to be eliminated by trade name protection is confusion.
5. ____. No precise rules can be laid down to determine whether trade name confusion exists or is likely to arise. Among the considerations are: (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names.
6. **Names: Proof.** The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party.
7. **Names.** One trade name is not an infringement on another trade name if ordinary attention of persons would disclose the difference.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Patrick M. Flood and Michael R. Peterson, of Hotz, Weaver, Flood, Breitkreutz & Grant, for appellees.

IRWIN, CASSEL, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Hong's, Inc., doing business as China Buffet (Hong's), appeals from an order of the district court for Douglas County dismissing its claim for relief under Nebraska's Trademark Registration Act. Hong's challenges the court's finding that the name "China Buffet" was generic and descriptive, and therefore not entitled to protection under the Trademark Registration Act, as well as the finding that the name was not likely to cause confusion. Based on the reasons that follow, we affirm.

BACKGROUND

On March 17, 2010, Hong's filed an application for a preliminary injunction enjoining Grand China Buffet, Inc.; Ying Chun Jiang; and Does 1 through 100 (collectively the defendants), from using the name "Grand China Buffet." A hearing regarding the application by Hong's for preliminary injunction was conducted in the district court on April 2. The court issued an order on April 5 denying the injunction.

On March 17, 2010, Hong's also filed a complaint for declaratory and injunctive relief pursuant to the Trademark Registration Act, Neb. Rev. Stat. § 87-126 et seq. (Reissue 2008), against the defendants. The matter was tried in the district court for Douglas County on October 29. At trial, the parties agreed to enter into a stipulation to submit a transcript of the proceedings from the April 2 hearing and reoffered the exhibits presented at that hearing.

The March 17, 2010, complaint filed by Hong's sought injunctive relief and damages for violation of the Trademark Registration Act, interference with a business relationship, and civil conspiracy. On March 18, Grand China Buffet's attorney filed an application for registration of trade name with the Nebraska Secretary of State.

The China Buffet restaurant, originally owned by China Buffet, Inc., opened in 1993 in a leased space located at 756 North 120th Street in Omaha, Nebraska. Hong Xeng, president

and part owner of China Buffet, testified that in 2000, he set up a corporation, "Hong's, Inc.," to purchase assets, including the trade name "China Buffet," from China Buffet, Inc. After the purchase, the China Buffet restaurant moved to 737 North 114th Street in Omaha, where it currently operates.

Hong's alleged that on March 25, 2004, it filed a registration of a service mark on "China Buffet" pursuant to the Trademark Registration Act, which registration was accepted for filing by the Secretary of State. Hong's further alleged that it spent close to $80,000 advertising the China Buffet name. Hong's alleged it had been vigilant in preserving and protecting the integrity of the service mark by issuing cease-and-desist letters to other operators of Chinese buffet restaurants attempting to use names similar to or the same as "China Buffet."

Grand China Buffet filed articles of incorporation with the Secretary of State on February 8, 2010. In February 2010, Hong's became aware of Grand China Buffet's intention to open a Chinese buffet restaurant under the name "Grand China Buffet" at 11226 Chicago Circle in Omaha. This location is within 1 mile of the China Buffet restaurant's 737 North 114th Street location. On February 3, Hong's sent Grand China Buffet a letter to inform the latter of the "China Buffet" service mark. This letter was returned not deliverable. On March 9, Hong's sent Grand China Buffet another letter via certified mail. On March 11, Grand China Buffet's attorney replied to the letter, stating his client was unwilling to abandon the use of the trade name, and the restaurant opened as planned. The evidence shows Hong's sent similar letters to other Nebraska businesses, including "Top of China Buffet" in Omaha, and "China Buffet" in Plattsmouth, Nebraska. Hong's did not send a letter to "Great China Buffet" operating in Lincoln, Nebraska, because it was open years before Hong's purchased China Buffet in 2000.

Xeng testified at the hearing on April 2, 2010, that the restaurant offers an all-you-can-eat buffet for a single price or customers may order off the menu. The buffet features Chinese food, an all-you-can-eat Mongolian grill, a salad bar, and a dessert bar. He stated concerns about confusion of his customers, the "illusion of mark," and his advertising costs. Hong testified

that a customer asked why the China Buffet restaurant moved to another location down the street.

Simon Dong is the manager and part owner of Grand China Buffet. Dong's real estate agent, Feng Ping Chen, recommended that Dong open a Chinese restaurant business in Omaha using the name "Grand China Buffet." Chen emphasized the word "grand" because it reflected the large size of the restaurant, the selection of food, and the seating capacity of 300 to 650 customers. Grand China Buffet is located in a former car dealership building, and the space is approximately 11,000 square feet. Like China Buffet, Grand China Buffet offers a buffet with a Mongolian grill. Grand China Buffet has a larger list of menu items available, and the offerings include daily seafood and sushi options.

Chen testified that nine of his clients have used the name "Grand China Buffet" across the United States. At the hearing, Chen said that he ate at China Buffet while in Omaha and that "[i]t was a very small restaurant, only have two buffet stand, very small buffet stand. And our concept of a super buffet is to provide a huge variety of selections." Chen noted Grand China Buffet has about four times more selections than the China Buffet location he visited.

The trial court considered the transcript of the April 2, 2010, hearing; the evidence offered at that hearing; the stipulation of the parties; and the parties' briefs. Ultimately, the court determined Hong's failed to carry the burden of proof showing that the use of "Grand China Buffet" was intended to cause confusion in the marketplace or usurp China Buffet's goodwill or that it did in fact cause confusion among customers or potential customers. The court also determined the "China Buffet" service mark was not protectable under the Trademark Registration Act, because it was generic and descriptive. The trial court's order, issued February 4, 2011, dismissed the complaint.

Hong's timely appealed.

ASSIGNMENTS OF ERROR

Hong's alleges the court erred in finding the defendants did not violate the Trademark Registration Act and finding the

name "Grand China Buffet" is not likely to cause confusion with China Buffet.

STANDARD OF REVIEW

[1] In actions seeking both injunctive relief and damages, the standard of review applicable in reviewing questions of fact is de novo. *ADT Security Servs. v. A/C Security Systems*, 15 Neb. App. 666, 736 N.W.2d 737 (2007).

ANALYSIS

Hong's alleges the court erred in finding the defendants did not violate the Trademark Registration Act and finding the name "Grand China Buffet" is not likely to cause confusion with China Buffet.

[2] In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution. *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994).

We focus now on the question of whether there is substantial similarity resulting in actual or probable deception or confusion to determine whether Hong's is entitled to relief.

[3] If the similarity in trade names is such as to mislead purchasers or those doing business with a company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief. *Equitable Bldg. & Loan v. Equitable Mortgage*, 11 Neb. App. 850, 662 N.W.2d 205 (2003).

[4] As stated in *Dahms v. Jacobs*, 201 Neb. 745, 272 N.W.2d 43 (1978), competition between enterprises is thought to be a desirable objective; trade names allow the public to distinguish between the goods and services of merchants, and merchants may reap the benefits or suffer the consequences of their efforts. Thus, the evil sought to be eliminated by trade name protection is confusion. *Id.*

[5] No precise rules can be laid down to determine whether trade name confusion exists or is likely to arise. Among the considerations are: (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names. *Dahms v. Jacobs, supra.*

We first turn to the degree of similarity between the products offered for sale by both parties. Both offer buffet-style Chinese food, a Mongolian grill, and the option to order off the menu. However, Grand China Buffet is a substantially larger restaurant, covering 11,000 square feet, while China Buffet is 6,000 square feet. In addition, Grand China Buffet has a larger menu and offers seafood and sushi options on a daily basis.

Next, we must consider the geographic separation. It is undisputed that the two restaurants are located in close proximity to one another and that the trade areas therefore overlap. This fact, on its own, is not sufficient to prove actual or probable confusion, but it is a factor which must be considered in the ultimate determination of this case.

The next factor, the extent to which the businesses are in actual competition, should be considered to determine how much weight should be given to the trade overlap. Hong's alleges that both restaurants share "virtually identical" services and concepts. Brief for appellant at 23. While it is true that both restaurants offer similar food, Grand China Buffet has made an attempt to add options such as seafood and sushi to set itself apart from China Buffet. Still, the two businesses offering a Chinese food menu and buffet options are likely to be in competition with one another. As previously noted, the *Dahms* court stated that competition is a desirable objective and ultimately benefits the customer and that thus, the evil sought to be eliminated is confusion.

We now consider the duration of the use of a name without actual confusion. In this situation, Hong's provided little to no evidence of actual confusion caused by the name "Grand China Buffet." The original complaint filed by Hong's alleged use of

the name "Grand China Buffet" caused and would continue to cause confusion among customers and potential customers, but Hong's failed to provide sufficient evidence of actual or even probable confusion. The only evidence provided by Hong's in the lower court was Xeng's testimony that customers had asked why the restaurant moved into a new location. The trial court's order following the motion by Hong's for preliminary injunction indicated there was "no substantiated evidence of confusion between the names of the parties." At trial, Hong's could have called customers to demonstrate their confusion regarding the relationship or lack thereof between the two businesses. Instead, Hong's offered the same exhibits and testimony that was previously ruled insufficient to demonstrate confusion.

[6] Hong's could also have demonstrated confusion not just of customers, but those likely to do business with China Buffet, including wholesalers, banks, utility providers, and so on. In *ADT Security Servs. v. A/C Security Systems*, 15 Neb. App. 666, 688, 736 N.W.2d 737, 760 (2007), the court stated: "'The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party.'" In *ADT Security Servs.*, the record showed vendors and customers sent invoices and checks intended for A/C Security Systems, Inc. (A/C), to ADT Security Services, Inc. (ADT). The administrative manager for ADT also testified that the Internal Revenue Service sent ADT materials intended for A/C and that customers telephoned ADT complaining of being double-billed by ADT and A/C. The court determined there was clear evidence of actual confusion in that case.

The court in *Personal Finance Co. v. Personal Loan Service*, 133 Neb. 373, 275 N.W. 324 (1937), indicated that either actual or probable deception, or confusion, could be shown to entitle a plaintiff to relief. However, Hong's failed to present sufficient evidence that its customers were likely to be misled. Absent a showing of fact, or the likelihood of confusion, we cannot conclude Grand China Buffet's name is likely to deceive actual or potential customers.

Finally, we must look at the actual similarity between the trade names. In previous cases, the Nebraska courts have determined business names were distinguishable where careful examination of the words would prevent the public from being deceived, although the two businesses were located in the same town and dealing in similar businesses.

[7] In *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994), the court concluded that one trade name is not an infringement on another trade name if ordinary attention of persons would disclose the difference. This means, if the average customer could conclude upon reasonable examination of the name, size, location, and style of the two restaurants that they are distinguishable, then there is no infringement.

While the two names are similar, in the instant case, there are distinguishing features in both the names and business models that set the two apart. Grand China Buffet has an additional word in its title, and that word describes the size of the restaurant and the selection of food offered. In addition, the location of the two restaurants in a relatively close proximity would suggest to the average customer that the two businesses are not related. Finally, the outward appearance of the two buildings and signage are dissimilar enough that customers and potential customers acting with reasonable caution are unlikely to be misled.

CONCLUSION

Hong's has failed to meet its burden to show, by a preponderance of the evidence, either actual or probable confusion in the use of the trade names "China Buffet" and "Grand China Buffet." We therefore affirm the judgment of the district court.

AFFIRMED.