IN THE COURT OF APPEALS OF IOWA

No. 0-620 / 99-1905
Filed December 22, 2000

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CLERK SUPREME COURT

GAMBLE HILL HOUNDS, a Nebraska Corporation,
Plaintiff-Appellee,

vs.

DARYL HAMMER and MARCIA HAMMER,
Defendants-Appellants.

Appeal from the Iowa District Court for Harrison County, James Heckerman, Judge.

The defendants appeal from a district court order granting summary judgment in favor of the plaintiff in the plaintiff's action for permanent injunction regarding the use of a tradename. **REVERSED AND REMANDED.**

William T. Early of Kohorst Law Firm, Harlan, and G. Brian Pingel of Pingel & Templer, West Des Moines, for appellant.

William F. McGinn of McGinn, McGinn, Jennings & Springer, Council Bluffs, for appellee.

Considered by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

The defendants, Daryl and Marcia Hammer, appeal from a district court order granting summary judgment in favor of the plaintiff, Gamble Hill Hounds, Inc. (GHHI), a Nebraska corporation, in its action for permanent injunction regarding the use of the Gamble Hill Hounds trademark. The Hammers contend the district court erred in granting summary judgment because they had a common law right to use the trademark. We reverse and remand.

I. Factual Background and Proceedings. A reasonable person could find the following facts in the summary judgment record. In 1993, the Hammers moved from South Carolina to Harrison County, Iowa, intending to form a twelve-hound foxhound pack and start a foxhound hunting program. In furtherance of their plans, they leased equipment, established a bank account, and sought recognition from a national foxhound association while using the name Gamble Hill Hounds during the Spring of 1993. In November of the same year, they formed Gamble Hill Hounds, an Iowa corporation. The corporation was named after the land the Hammers live on in Harrison County. The entity's board of directors included several other individuals who were interested in starting a foxhound hunt in Iowa. Hammers failed to file an annual corporate report in 1995 and the corporation ceased to exist on December 4, 1995. The Hammers maintain although the corporation no longer exists, they have continuously used the name Gamble Hill Hounds in connection with their foxhunt business since 1993. The Hammers never sold, assigned, or otherwise relinquished their rights to use the name Gamble Hill Hounds.

In December of 1995, Jeff and Sue Ketzler formed GHHI. They registered the name and mark of the corporation in Iowa in July of 1998. GHHI is a recognized member of the Masters of Foxhounds Association of American, the national organization that regulates foxhound groups and hunts throughout the country.

GHHI filed a petition for permanent injunction on May 25, 1999, requesting the district court enjoin the Hammers from using the name "Gamble Hill Hounds" or the initials "GHH." GHHI filed a motion for summary judgment on July 14, 1999. On August 13, 1999, the Hammers filed both a counterclaim for permanent injunction and a motion for summary judgment. After a hearing on the motions for summary judgment, the district court granted GHHI's motion for summary judgment and denied the Hammers' motion. The Hammers appeal, asserting the district court erred in failing to find they had a common law right to the trademark "Gamble Hill Hounds" and erred by granting GHHI's motion for summary judgment.

II. Standard of Review. A request for an injunction invokes the court's equitable jurisdiction. *See* Iowa R. Civ. P. 320. Therefore, our review would generally be de novo. *See* Iowa R. App. P. 4; *Comes v. City of Atlantic,* 601 N.W.2d 93, 95 (Iowa 1999). However, this case was resolved on summary judgment so we must examine the district court's ruling for correction of errors at law. *See W. States Ins. Co. v. Cont'l Ins. Co.,* 602 N.W.2d 360, 362 (Iowa 1999); *Baratta v. Polk County Health Servs.,* 588 N.W.2d 107, 109 (Iowa 1999). Summary judgment is appropriate when the moving party has shown no genuine

issues of material fact exist and the party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *Schumacher Elec., Inc. v. DeBruyn,* 604 N.W.2d 39, 41 (Iowa 1999). When examining whether a genuine issue of fact exists we view the evidence and record in the light most favorable to the non-moving party. *Id.* Summary judgment is inappropriate if reasonable minds would differ on how the issue should be resolved. *Keystone Elec. Mfg. v. City of Des Moines,* 586 N.W.2d 340, 345 (Iowa 1998).

III. Merits. "An injunction is an extraordinary remedy which should be granted with caution and only when clearly required to avoid irreparable damage." *Planned Parenthood of Mid-Iowa v. Maki,* 478 N.W.2d 637, 639 (Iowa 1991). The party seeking an injunction must establish: (1) an invasion or threatened invasion of a right; (2) substantial injury or damages will result unless the request for an injunction is granted; and (3) there is no adequate legal remedy available. *Sear v. Clayton County Zoning Bd. of Adjustment,* 590 N.W.2d 512, 515 (Iowa 1999). To succeed on a common-law trademark infringement claim and to obtain injunctive relief, a plaintiff must prove (1) it has a valid trademark or a protectable proprietary right in the name it seeks to exclude others from using, and (2) there has been infringement of that right. *Commercial Sav. Bank v. Hawkeye Fed. Sav. Bank,* 592 N.W.2d 321, 326 (Iowa 1999).

After careful review of the record provided to us on appeal, we disagree with the district court's determination there is no genuine issue of material fact to be resolved in this case. We recognize GHHI is a valid Nebraska corporation recognized by the State of Iowa and it has registered both its name and its mark

with the Iowa Secretary of State. However, the Hammers assert a common law right to use the name and mark and have shown substantial evidence indicating they have continuously used both since 1993. The affidavit of Marcia Hammer and other exhibits in the record viewed in a light most favorable to the defendants would support a finding the Hammers have continuously used the Gamble Hill Hounds trademark since early 1993. We further conclude the formation of the Iowa corporation in November of 1993, and its dissolution in December of 1995, does not require judgment in GHHI's favor as a matter of law. When viewed in the light most favorable to the Hammers, the affidavit of Marcia Hammer tends to prove they never assigned the trademark to the Iowa corporation. For this reason, the dissolution of that corporation cannot be said to conclusively defeat the Hammers' claim of continuous use of the trademark since early 1993.

Therefore, we conclude genuine issues of material fact exist with respect to (1) the merits of the parties' respective claims to use the name and trademark of Gamble Hill Hounds, and (2) whether there has been an invasion or infringement of such a claim by either GHHI or the Hammers. The judgment of the district court is reversed and the case is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.