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EXAMINER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL
AND APPEAL BOARD

Ex parte CATHRYN FRITZ-JUNG, DEBORAH AUER,
HIBA KAKISH, and AMANDA B. THOMAS

Appeal 2011-010308
Application 11/462,539
Technology Center 1700

Before LINDA M. GAUDETTE, MICHAEL P. COLAIANNI, and
DONNA M. PRAISS, *Administrative Patent Judges*.

PRAISS, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134 the final rejection of claims 1-25 and 27-30. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

We AFFIRM. However, for the reasons explained below, we denominate the affirmed rejections as NEW GROUNDS OF REJECTION pursuant to 37 C.F.R. § 41.50(b).

Appellants' invention is said to be directed to a method of reducing the amount of bake time required for a pizza (Spec. para. [0001]).

Claim 1 is illustrative (bracketed steps added and key limitation italicized):

1. A method comprising:

[step 1] preparing an at least partially baked pizza crust;

[step 2] adding at least one topping to said at least partially baked pizza crust;

[step 3] *covering said at least partially baked pizza crust and said at least one topping with a moisture impermeable cover to maintain a moisture content of said at least partially baked pizza crust and said at least one topping;*

[step 4] heating said covered at least partially baked pizza crust and said at least one topping at a holding temperature above ambient temperature;

[step 5] removing said moisture impermeable cover after said heating said covered at least partially baked pizza crust and said at least one topping; and

[step 6] baking said at least partially baked pizza crust and said at least one topping in an oven to complete baking thereof after said removing said moisture impermeable cover.

Appellants appeal the following rejections:

1. Claims 1-7, 10-13, 15-19, and 21-23 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Kimple (US 5,775,208, issued Jul.

- 7, 1998) in view of Casale (US 5,279,392, issued Jan. 18, 1994) and further in view of Lamonica (US 4,649,053, issued Mar. 10, 1987).
2. Claims 8-9, 20, and 29 are rejected under 35 U.S.C. §103(a) as being unpatentable over Kimple in view of Casale and Lamonica and in further view of Owens (US 6,121,578, issued Sep. 19, 2000).
 3. Claims 25, 27-28, 12, and 23 are rejected under 35 U.S.C. §103(a) as being unpatentable over Kimple in view of Casale and Lamonica and in further view of Peleg (US 5,260,070, issued Nov. 9, 1993).
 4. Claim 29 is rejected under 35 U.S.C. §103(a) as being unpatentable over Kimple in view of Casale and Lamonica and Peleg in further view of Owens.
 5. Claim 30 is rejected under 35 U.S.C. §103(a) as being unpatentable over Kimple in view of Casale and Lamonica and Peleg in further view of Moreth (US 6,146,677, issued Nov. 14, 2000).
 6. Claims 14 and 24 are rejected under 35 U.S.C. §103(a) as being unpatentable over Kimple in view of Casale and Lamonica and in further view of Moreth.

With regard to rejections (1) and (3), Appellants limit their arguments to the subject matter common to claims 1, 15, and 25 (App. Br. 14-27). We select claim 1 as representative. Appellants separately argue the subject matter of dependent claim 7 (*id.* at 27-28).

Instead of separately arguing rejections (2), and (4)-(6), Appellants rely on arguments made regarding claims 1, 15, and 25 (*id.* at 27). Accordingly, the rejections of claims 2-6, 8-14, 16--24, and 27-30 will stand or fall with claim 1, 15 or 25.

ISSUES

1. Did the Examiner reversibly err in determining that since Casale partially bakes then pre-heats pizza in a device that introduces moisture prior to adding additional toppings and completely baking while Kimple and Lamonica both seal pre-prepared pizza to retain moisture before completing baking, it would have been obvious to one of ordinary skill in the art to actively heat a partially baked pizza crust with a moisture impermeable cover to maintain the moisture content of the pizza prior to completely baking? We decide this issue in the negative.
2. Did the Examiner reversibly err in determining that it would have been obvious to one of ordinary skill in the art to increase the temperature at which pre-heating is taught by Casale from 125°F to between 140°F and 150°F as recited in claim 7 to further decrease the time needed to prepare and finally bake the pizza product? We decide this issue in the negative.

FINDINGS OF FACT AND ANALYSES

Issue 1: Claims 1-6, 8-25, and 27-30

The Examiner finds that both Kimple and Casale teach pre-heating frozen pizza prior to baking and that pre-heating maintains the moisture content, therefore both the benefit of maintaining desired moisture and decreasing the final cooking time is provided (Ans. 6). The Examiner also finds that Lamonica teaches the importance of retaining moisture of a pizza using a substantially sealed container and specifically teaches removing the

cover for final baking (*id.* at 6-7). The Examiner finds that it would have been obvious to remove the cover prior to final baking in order to reduce material costs since removing the cover means it would not have to withstand oven temperatures (*id.* at 7).

Appellants argue that Kimple's disclosure of placing uncooked dough or dough plus toppings in a pan system, cooking the same, then storing the cooked pizza in the pan system, does not meet the limitations of claim 1 because claim 1 requires that "the pizza crust has been at least partially baked prior to the addition of the at least one topping" (App. Br. 18). Appellants assert that Kimple's uncooked dough "is *never* at least partially cooked or fully cooked prior to the addition of toppings." *Id.* at 20. Appellants further contend that the lid on Kimple's pan system "does not inherently result in a 'moisture impermeable cover'" (App. Br. 19).

Appellants do not dispute that Lamonica teaches a plastic container to retain moisture of a prepared pizza and removing the pizza from the container prior to baking. Appellants argue, instead, that the combination of Lamonica with Kimple obviates the purpose of Kimple to use a "'strong and durable lid' capable of withstanding the temperatures at which the pizza is baked" for the benefit of "eliminating the pizza crust edge and prevent pizza toppings from oozing over the edge of the crust" (*id.* at 22-23).

Appellants next argue that Casale "does not teach preparing an at least partially baked pizza crust." App. Br. 23. Appellants do not dispute that Casale teaches partially baking a pizza dough shell with sauce and cheese toppings to 60 to 90 percent of their cooking completion (*id.*). Appellants contend that the evaporative unit of Casale into which the partially baked pizzas are placed is not equivalent to using a "moisture impermeable cover"

to retain moisture because the evaporative unit device “actively introduces moisture” (*id.* at 24). Appellants do not dispute that the evaporative unit of Casale heats the pizza at 125°F until ready for final preparation when the pizza is taken out of the evaporative unit, requested toppings are added to the partially baked pizza, and then baking is completed in an oven (*see id.* at 23-25, 27-28).

The Examiner responds that “Casale teaches adding toppings both prior to pre-baking and after partial baking.” (Ans. 18). The Examiner then identifies the same process disclosed in Casale that Appellants do not dispute. (*Id.*; *see* App. Br. 23). Nevertheless, Appellants continue to argue that because Casale adds toppings to uncooked dough, it does not teach or suggest the claimed method. (Reply Br. 13-14). We do not find Appellants’ argument persuasive. Appellants’ distinction over Casale does not appear to take into consideration that the transitional language “comprising” in claim 1 does not preclude the addition of a topping being present on the pizza crust when pre-heated in the first step nor do Appellants address why the second step is not met when additional toppings are added before final baking in the Casale process. (*See* Reply Br. 13-14).

Thus, Appellants’ distinction over Casale *vis-à-vis* the subject matter of claim 1 boils down to Casale’s use of an evaporative unit to provide to the partially cooked pizza both (1) moisture during the interim pizza warming stage of the process and (2) heat during the interim warming stage of the process. (*See* App. Br. 24; Reply Br. 14-15). Stated in another way, Casale discloses an evaporative unit to perform steps three and four as set out in claim 1. The Examiner’s response is that it would have been obvious to one of ordinary skill in the art to actively heat a pizza with toppings on it while

maintaining moisture with the use of a container that is a barrier to moisture because Kimple discloses heating a pizza in a sealed pan to retain moisture. (*See* Ans. 19-20). The Examiner's stated reason for combining Kimple and Casale is because "both recognize and teach the desire to preheat the frozen food prior to baking." (Ans. 20). However, we find that even Casale's embodiment that does not freeze the pre-prepared pizza before placing in an evaporative unit (Casale, col. 11, l. 27 – col. 12, l. 5) recognizes the need to maintain moisture of the pizza during the cooking process.

We are unpersuaded by Appellants argument that the evaporative unit of Casale is not a moisture impermeable cover because "moisture must be continually introduced into the evaporative unit." Appellants' argument misses the purpose for which Casale and Kimple are cited by the Examiner. Casale is cited for, among other things, teaching the steps of maintaining moisture content of the pizza and heating the pizza prior to final baking (Ans. 6; Casale, col. 11, ll. 20-26) while Kimple is cited for covering pizza in an air tight container that can be heated (Ans. 4-5, 18; Kimple col. 3, ll. 53-67).

Furthermore, the Examiner relies upon Lamonica's teaching to retain moisture of the pizza dough by placing it in a "substantially sealed enclosure . . . such that air flow to the pizza dough 17 is sufficiently small so that the pizza dough is not dried out during storage." (Lamonica, col. 3, ll. 10-25; *see* Ans. 6). The sealed enclosure of Lamonica also retains moisture during storage of a cooked pizza. (Lamonica, col. 4, ll. 43-47; *see* Ans. 18). Appellants have not directed us to any evidence that the substitution of the moisture retaining enclosure disclosed in Kimple or Lamonica for the evaporative unit in the interim heating step disclosed in Casale would do

more than yield a predictable result of keeping the pizza moist and heated. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 416 (2007) (citing *United States v. Adams*, 383 U.S. 39, 40 (1966)).

Issue 2: Claim 7

Dependent claim 7 specifies a temperature of “between 140 and 150°F” at which “heating” occurs in step 4 of claim 1. Appellants argue that the 125°F temperature of the evaporative unit of Casale does not suggest the temperature range of claim 7 because the temperature of Casale “is merely intended to defrost and humidify.” (App. Br. 27-28). The Examiner responds that it would have been obvious to one of ordinary skill to specify a holding temperature in the range of 140 to 150°F and above the temperature of 125°F taught by Casale for the reason that a higher temperature would further reduce the pizza preparation time. Ans. 21. Appellants’ argument is unpersuasive because it does not address how the 125°F temperature of Casale does not constitute “heating”. We agree with the Examiner that the adjustment of temperature to reduce preparation time would have been within the ordinary creativity of one skilled in the art. *See KSR*, 550 U.S. at 420 (“A person of ordinary skill is also person of ordinary creativity, not an automaton.”).)

On this record and for the above reasons, we affirm the Examiner’s rejections of claims 1-25 and 27-30. Because our affirmance is based on findings and explanations which differ from those of the Examiner, we denominate the above-listed grounds of rejection 1-6 as a new grounds of rejection pursuant to our authority under 37 C.F.R. § 41.50(b). *See, e.g., In*

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re Stepan Co., 660 F.3d 1341, 1346 (Fed. Cir. 2011); *In re Leithem*, 661 F.3d 1316, 1319 (Fed. Cir. 2011).

DECISION

The Examiner's decision is affirmed and we denominate the above-listed grounds of rejection 1-6 as new grounds of rejection.

This decision contains new grounds of rejection pursuant to 37 C.F.R. § 41.50(b). This section provides that “[a] new ground of rejection . . . shall not be considered final for judicial review.”

37 C.F.R. § 41.50(b) also provides that the Appellants, **WITHIN TWO MONTHS FROM THE DATE OF THE DECISION**, must exercise one of the following two options with respect to the new grounds of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

ORDER

AFFIRMED; 37 C.F.R. § 41.50(b)

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