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Table with 5 columns: APPLICATION NO., FILING DATE, FIRST NAMED INVENTOR, ATTORNEY DOCKET NO., CONFIRMATION NO.
13/550,636 07/17/2012 Lindsay Roberson 2012P00477US 1251

46726 7590 07/14/2017
BSH Home Appliances Corporation
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NEW BERN, NC 28562

EXAMINER

HAWN, PATRICK D

ART UNIT PAPER NUMBER

3631

NOTIFICATION DATE DELIVERY MODE

07/14/2017

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LINDSAY ROBERSON and ANDREW ROBERSON

Appeal 2015-007624
Application 13/550,636
Technology Center 3600

Before JOHN C. KERINS, WILLIAM A. CAPP, and
ARTHUR M. PESLAK, *Administrative Patent Judges*.

CAPP, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellants seek our review under 35 U.S.C. § 134 of the non-final rejection of claims 15–23, 28, 34–36, 38, and 43 as unpatentable under 35 U.S.C. § 103(a) over Peretz (US 4,589,556, iss. May 20, 1986) and Fiocca (US 3,752,322, iss. Aug. 14, 1973), and of claims 1–4, 6–14, 24, 25, 27, 37, and 42 over Peretz, Fiocca, and Planeta (US 2,708,037, iss. May 10, 1955).¹ We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART and REMAND this case to the Examiner for further action.

¹ The rejection of claims 5, 26, and 39–41 have been withdrawn. Ans. 3.

THE INVENTION

Appellants' invention relates to dishwasher racks. Spec. ¶¶ 1-5.

Claim 15, reproduced below, is illustrative of the subject matter on appeal.

15. A dishwasher rack comprising:
at least one side wall having an inner surface facing an interior of the rack; and
a stemware holder attached to the at least one side wall, the stemware holder comprising:
a central shaft; and
a holding portion adapted to suspend stemware at a non-zero angle with respect to a vertical plane, the holding portion including a first set of prongs extending from the central shaft in a first direction.

OPINION

*Unpatentability of Claims 15–23, 28, 34–36, 38, 41 and 43
over Peretz and Fiocca*

Claim 15 and 34

Appellants argue independent claims 15 and 34 together. Appeal Br. 5–11. We select claim 15 as representative. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2016).

The Examiner finds that Peretz discloses the invention substantially as claimed except for being configured to hold stemware at an inclined (non-vertical) orientation. Non-Final Action 3–4. The Examiner relies on Fiocca as disclosing dishwasher racks with angled bottom and side walls. *Id.* at 4. The Examiner concludes that it would have been obvious to a person of ordinary skill in the art at the time of the invention to modify Peretz with angled dishwasher racks as taught by Fiocca to achieve the claimed invention. *Id.* According to the Examiner, a person of ordinary skill in the art would have done this to hold the stemware at an angled orientation. *Id.*

Appellants traverse the Examiner's rejection by arguing that a person of ordinary skill in the art would not have combined Peretz and Fiocca in the manner proposed by the Examiner. Appeal Br. 7–8, 11. Appellants note that the glassware of Fiocca is supported by the bottom of the rack and is not supported by a component on the top of the rack sidewall. *Id.* Appellants argue that Fiocca fails to disclose that the top of Fiocca's rack is inclined. *Id.* at 9.

In response, the Examiner states that Fiocca was added to the proposed combination to teach holding of glassware at an inclined orientation. Ans. 4–5.

In reply, Appellants argue that the Examiner's treatment of Peretz and Fiocca with respect to claim 15 is inconsistent with the Examiner's treatment of Fiocca and Planeta with respect to claim 1. Reply Br. 2–3.

Appellants' argument concerning Planeta with respect to claim 15 is not persuasive. Planeta is not applied art to the rejection of claim 15. Instead, claim 15 is rejected over the combination of Peretz and Fiocca. Non-Final Action 3. Thus, Appellants' arguments concerning Planeta in connection with the rejection of claim 15 are irrelevant and do not apprise us of Examiner error.

Appellants' argument that the top of Fiocca is not angled is not persuasive. Fiocca discloses holding glassware at an angled orientation. Fiocca, Figs. 2, 3. Peretz discloses holding stemmed glassware at the top of a rack. *Peretz*, Figs. 1, 3. Peretz and Fiocca, taken in combination, teach all of the elements of claim 15. We agree with the Examiner that a person of ordinary skill in the art would have found it obvious to combine Peretz and Fiocca to achieve the subject matter of claim 15. Here, claim 15 merely

takes a stemware holder, such as taught by Peretz, and changes the angle at which the stemware is disposed within the dishwasher rack. When a patent “simply arranges old elements with each performing the same function it had been known to perform” and yields no more than one would expect from such an arrangement, the combination is obvious. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007), quoting *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273, 282 (1976).

Next, Appellants argue that Peretz’s gripping elements would be inoperative if positioned at a non-vertical angle. Appeal Br. 10. Appellants argue that the gripping assemblies are in an inoperative position when they are not “somewhat horizontal.” *Id.*, citing Peretz, Fig. 4, col. 4, ll. 28–42. This argument is not persuasive. The passage relied on by Appellants is discussing the gripping assemblies being in either a deployed or stowed position. *Id.* Appellants are confusing modifying Peretz by Fiocca to angle the stemware holder with stowing Peretz’s holder to a non-deployed position. Thus, Appellants’ argument mischaracterizes the Examiner’s proposed combination and does not apprise us of Examiner error.

Finally, Appellants’ argue that the Examiner’s rationale for combining Peretz and Fiocca is conclusory. Appeal Br. 10–11. In response, the Examiner explains that there are many reasons to combine the two references that would have been readily apparent to a person of ordinary skill in the art. One reason, according to the Examiner, would have been to simply add an additional stem holder to Fiocca.² Ans. 6. Another reason would have been to increase capacity within the dishwasher. *Id.* One of

² We presume the Examiner intended the additional stem holder to be disposed at the top of the rack as taught by Peretz.

ordinary skill in the art would understand that angling a tall, thin object away from vertical will alleviate a space restriction in the vertical dimension. We consider the Examiner's reasons to be adequate to support the Examiner's combination and conclusion of obviousness.

In view of the foregoing discussion, we determine the Examiner's findings of fact are supported by a preponderance of the evidence and that the Examiner's legal conclusion of unpatentability is well-founded. Accordingly, we sustain the Examiner's unpatentability rejection of claims 15 and 34 over Peretz and Fiocca.

Claims 16–23, 28, 34–36, 38, and 43

Appellants do not argue for the separate patentability of claims 16–23, 28, 34–36, 38, and 43 apart from arguments presented with respect to claim 15, which we have previously considered. Accordingly, we sustain the rejection of these claims. *See* 37 C.F.R. § 41.37(c)(iv) (failure to separately argue claims).

*Unpatentability of Claims 1–4, 6–14, 24, 25, 27, 37, and 42
over Peretz, Fiocca, and Planeta*

Claims 1–4, 6–14, and 42

Claim 1 is an independent claim that is narrower in scope than claim 15 in that, among other things, it is directed to a stemware holder for a dishwasher rack instead of a dishwasher rack. Claims App. Claims 2–4, 6–14, and 42 depend, directly or indirectly, from claim 1. *Id.*

Contemporaneous with their Reply Brief, Appellants filed a Statement of the Substance of the Interview indicating that the Examiner is now willing to allow independent claim 1 without amendment. In their Reply Brief, Appellants make the following statement:

As discussed in Appellants' Statement of the Substance of the Interview (filed concurrently with this Reply Brief), in the June 12, 2015 and June 25, 2015 Examiner-initiated interviews, the Examiner agreed that claim 1, in its current form, was allowable.

Reply Br. 2. Thereafter, Appellants offer no further arguments in traverse of the Examiner's rejection of claim 1.

Under the circumstances, we do not sustain the rejection of claim 1 or the rejection of claims 2–4, 6–14, and 42 that depend therefrom. Rather we REMAND this case to the Examiner for further action that the Examiner deems appropriate in light of the statements made by Appellants in the Reply Brief and the accompanying Statement of the Substance of the Interview. 37 C.F.R. § 41.50(a)(1).

Claims 24, 25, 27, 37

Claim 24 depends from claim 15 and adds a limitation: “wherein the stemware holder is removably attached to the side wall.” Claims App. Claim 25 depends from claim 24. *Id.* Claim 37 depends directly from claim 36 and indirectly from claim 34 and adds a limitation: “wherein the stemware holder is removably attachable to the dishwashing rack.” *Id.*

Due to the substantial similarity in the claimed subject matter of claims 24, 25, and 37 in relation to claim 1 and, further in view of the developments related above in connection with the Statement of the Substance of the Interview, it is unclear to us whether the Examiner intends to maintain the rejection of these claims.

Claim 27 depends from claim 26. Claims App. The Examiner previously indicated that the rejection of claim 26 has been withdrawn. Ans. 3. Under the circumstances, it is unclear to us whether the Examiner intends to maintain the rejection of claim 27.

Consequently, we REMAND this case to the Examiner for further action that the Examiner deems appropriate in light of the Examiner's statement in the Answer withdrawing the rejection of claim 26, the statements made by Appellants in the Reply Brief, and the accompanying Statement of the Substance of the Interview. 37 C.F.R. § 41.50(a)(1).

DECISION

The decision of the Examiner to reject claims 15–23, 28, 34–36, 38, and 43 as unpatentable over Peretz and Fiocca is AFFIRMED.

The decision of the Examiner to reject claims 1–4, 6–14, 24, 25, 27, 37, and 42 as unpatentable over Peretz, Fiocca, and Planeta is REMANDED to the Examiner for further action. 37 C.F.R. § 41.50(a)(1).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART