

Board, p. 3. In its decision, the Board noted that Applicant did “not provide an adequate explanation of why the motion for relief from default judgment was delayed for nearly a year.” Opinion by the Board, p. 5. The Board continued by stating that Applicant’s “unsupported and nebulous statements in its motion are inadequate to explain the delay” and “[w]ithout more specific dates and facts, these statements do not support a six-month delay in filing a motion for relief from default judgment, particularly in a case where the firm terminated the employment of the attorney handling the case.” Opinion by the Board, pp. 5-6. Also, the Board noted that “even for the period *prior* to the termination of the employment of the firm’s original attorney, there is insufficient evidence to indicate what happened during that period.” Opinion by the Board, p. 6 (emphasis in original).

Despite these significant problems with Applicant’s explanation as to why it unreasonably delayed filing a motion for relief from default judgment, Applicant again returns to the Board asking for relief. This time, Applicant attempts to fill in what should have been obvious holes in its reasons for delay in filing for relief from default judgment. However, Applicant’s newest explanation still does not justify its unreasonable delay. On the contrary, Applicant’s repeated attempts to add “factual” material to the record simply strengthens Opposer’s argument, and one of the Board’s rationales for its decision, that there must be finality of litigation. See Opinion by the Board, p. 10; Bell v. Eastman Kodak Co., 214 F.3d 798, 801-02 (7th Cir. 2000) (Rule 60(b) attacks on the finality of decisions are disfavored due to the social interest in expedition and finality in litigation).

As part of its latest explanation, Applicant alleges that Craig Miller had been responsible for numerous matters before the U.S. Patent and Trademark Office. According to Applicant, Miller’s cases were prioritized after his departure. Requesting relief from default judgment was

given a low priority solely because the response period required “a reasonable time” standard. In other words, Applicant purposely delayed filing a request for relief from final judgment even though it was aware that a default judgment had been entered nearly a year earlier.

Applicant states that from mid-December 2000 through March 2001, over four hundred hours were spent addressing the “irregularities” in Craig Miller’s work. While again not truly defining what these “irregularities” consisted of, a defect noted in the Board’s decision, Applicant states that this workload prevented Applicant from filing for relief for months. Such a workload may have been onerous if Oldham & Oldham consisted solely of Craig Miller and Mark Watkins. However, according to Martindale-Hubbell’s Law Directory for 2001, Oldham & Oldham employed at least ten attorneys. See Oldham & Oldham Co., L.P.A.’s entry in Martindale-Hubbell’s Law Directory, attached hereto as Exhibit 1. Distributing Miller’s work to each of these ten attorneys would have resulted in an additional week’s work for each attorney. Certainly, with ten attorneys working on the case load of one departing attorney, Applicant and its chosen attorneys should have been able to request relief from default judgment before nearly an entire year had passed.

Finally, Applicant points to the fact that on January 21, 2001, Applicant filed a lawsuit alleging attorney malpractice based on Craig Miller’s conduct, naming both Miller and Oldham & Oldham as defendants. Applicant alleges that a significant amount of Mr. Watkins’ time was consumed by the lawsuit, thereby further delaying Applicant’s request for relief from final judgment. Watkins Aff. at ¶ 7. While Applicant’s lawsuit for legal malpractice is Applicant’s proper remedy for Oldham & Oldham’s failure to file an answer to the Notice of Opposition and failure to timely request relief from default judgment, it is certainly not grounds to excuse Applicant’s failure to conduct proper motion practice. “The exclusive remedy for legal

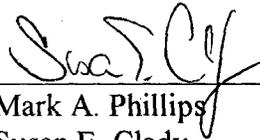
malpractice in a civil case . . . is a suit for malpractice or for breach of fiduciary duty.” Bell v. Eastman Kodak Co., 214 F.3d at 802; see also Link v. Wabash R.R. Co., 370 U.S. 626, 634, 82 S.Ct. 1386, 1390 (1962). (“[I]f an attorney’s conduct falls substantially below what is reasonable under the circumstances, the client’s remedy is against the attorney in a suit for malpractice”). Whether that failure was the result of Applicant’s direct instructions or Miller’s omissions is irrelevant. As the Board properly noted, “It is well settled that the party and its counsel share a duty with respect to a case, and a party is accountable for the acts or omissions of its chosen counsel. . . . This is because the selection of counsel is wholly within the control and discretion of a party.” Opinion of the Board, p. 7, n.3 (citations omitted). Malpractice may be a good reason to recover from the offending attorney, but it does not justify prolonging or renewing litigation against the original adversary. United States v. 7108 West Grand Ave., 15 F.3d 632, 633 (7th Cir. 1994). Accordingly, the Board properly noted that with respect to this case, there was no reason to not hold Applicant accountable for the acts or omissions of its chosen counsel, i.e., Oldham & Oldham. Opinion of the Board, p. 7, n.3.

Because it was Applicant that chose to file for attorney malpractice, Applicant actually created its own delay. This self-inflicted delay should not stand as an excuse for failing to file for relief in a reasonable time period. Moreover, Applicant’s references to excusable delay due to the work required for Applicant’s pending *and new* matters is far from acceptable. Applicant knew of the default judgment decision but chose to prioritize other *and new* matters ahead of any request for relief. Such action does not constitute reasonable delay.

As noted by the Board in its decision, relief from final judgment is an extraordinary remedy to be granted only in exceptional circumstances. Opinion by the Board, p. 9; Djeredjian v. Kashi Co., 21 U.S.P.Q. 2d 1613, 1615 (TTAB 1991). “The vacation of a default judgment

duly entered without fraud or overreaching, is not an action which the court should take arbitrarily or as a courtesy or favor to the losing party.” 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2692, n.20 (2d ed. 1998). Because Applicant has failed, even in light of its latest excuses, to present evidence demonstrating that Applicant’s delay in filing for relief from default judgment was reasonable, Applicant’s motion requesting reconsideration of the Board’s final decision should be denied.

Respectfully submitted,

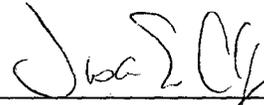


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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Opposer Pet Zone Products Ltd.'s Brief in Response to Applicant's Motion Requesting Reconsideration of a Final Decision Pursuant to 37 C.F.R. 2.129(c) and Brief in Support Thereof was served via U.S. mail, first-class postage prepaid, this 22nd day of February, 2002 on Mark A. Watkins, Esq. and Eryn R. Ace, Attorneys for Applicant, Hahn Loeser + Parks LLP, formerly Oldham & Oldham Co., L.P.A., Twin Oaks Estate, 1225 West Market Street, Akron, Ohio 44313-7188.



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