UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: January 13, 2012

Opposition No. 91151254
(parent case)
Opposition No. 91151404

ONEIDA LTD.

v.

ONEIDA INDIAN NATION OF NEW YORK

Jennifer Krisp, Interlocutory Attorney:

These consolidated proceedings are before the Board for consideration of opposer's motion (filed December 19, 2011) for a 60-day extension of its rebuttal testimony period. The motion is fully briefed.

The Board may, upon its initiative, resolve a motion filed in an inter partes proceeding by telephone conference. *See* Trademark Rule 2.120(i)(1); TBMP § 502.06(a) (3d ed. 2011). On January 12, 2012, the Board convened a telephone conference to resolve the issues presented in the motion. Participating were opposer's counsel Craig Fochler, Esq., applicant's counsel David Kelly, Esq., and the assigned interlocutory attorney.

The Board has reviewed the parties' arguments and submissions, but for efficiency does not restate them

herein. This order summarizes applicable authorities and findings based on the briefs, as well as any amplifications or clarifications provided during the conference.[1]

Analysis

By operation of the Board's November 4, 2011 order adopting the parties' stipulation of October 18, 2011, applicant's 10-day testimony period was reset to close November 19, 2011, and opposer's rebuttal period was reset to close December 28, 2011. Five days into its rebuttal period, opposer moved for a 60-day extension. As opposer states at page 1 of its motion, the only remaining testimony period is opposer's 15-day rebuttal period.

In its motion, opposer specifies that it seeks time "to adequately evaluate the pending settlement agreement or, alternatively, prepare and submit rebuttal testimony, schedule depositions of Applicant's testimony declarants and to complete other necessary preparations associated with its trial preparation" (opposer's brief, p, 4). Regarding the depositions, opposer seeks time for "taking the cross examination deposition of two of the Applicant's declarants" (opposer's brief, p. 3). By operation of the Board's

[1] The Board, in its discretion, and to avoid further delay to these proceedings, considers the merits of opposer's motion prior to the time for filing a reply brief thereon. *See* TBMP § 502.02(b)(3d ed. 2011); *Cf.* TBMP § 502.06(a)(3d ed. 2011); *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 13 USPQ2d 1719, 1720 n.3 (TTAB 1989).

September 30, 2008 order, granting opposer's request to reset applicant's testimony period for the limited purpose of allowing opposer to cross examine two of applicant's declarants, opposer was to take said cross examination during applicant's 10-day testimony period, as reset.

To the extent that opposer seeks additional time to take action that was to be taken during applicant's testimony period, namely, cross examination of applicant's declarants, its motion is one to reopen applicant's 10-day testimony period, and is governed by Fed. R. Civ. P. 6(b)(1)(B). *See also* TBMP § 509.01(b)(3d ed. 2011).

In applying the excusable neglect standard, the factors to be considered, within the context of all the relevant circumstances, are: 1) the danger of prejudice to the non-moving party; 2) the length of the delay and its potential impact on judicial proceedings; 3) the reason for the delay, including whether it was within the reasonable control of the moving party; and 4) whether the moving party has acted in good faith. *See Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership,* 507 U.S. 380, 395 (1993). These factors do not carry equal weight. *See FirstHealth of the Carolinas Inc. v. CareFirst of Maryland Inc.*, 479 F.3d 825, 81 USPQ2d 1919, 1921-22 (Fed. Cir. 2007). The third factor has been found to be of paramount importance. *See Old Nutfield Brewing Co. v. Hudson Valley*

Brewing Co., 65 USPQ2d 1701, 1702 (TTAB 2002), citing *Pumpkin Ltd. v. The Seed Corps,* 43 USPQ2d 1582, 1586, fn.7 (TTAB 1997).

Here, the reasons for the delay under consideration have been within opposer's own control. Regarding the acquisition and change in management that was underway during applicant's 10-day testimony period, opposer has not articulated why these events prevented it from scheduling and taking cross examination, or moving for an extension on or before November 19, 2011. To the extent that opposer did not respond to attempts to schedule the cross examination, determined that settlement negotiations justified its inaction, deferred review of applicant's testimony, or assumed that applicant would consent to a further extension, opposer acted decisively and unilaterally. In summary, the circumstances leading to opposer's request to reopen applicant's limited testimony period were within its reasonable control.

The record does not indicate that allowing opposer to reopen applicant's testimony period would directly prejudice applicant's ability to prepare its own case. Nevertheless, because opposer did not pursue cross examination as allowed, and settlement negotiations were eventually unfruitful, applicant was placed in a position to reasonably expect that trial would advance to a close. Moreover, it is noted that

applicant expended resources in attempting to schedule the cross examination at issue.

The length of the recent delay has not been inordinate, given the protracted history of these proceedings and the Board's leniency in acknowledging settlement efforts by way of granting numerous motions to extend filed by both parties. Extending trial by sixty days, however, would amount to undue and unnecessary delay, and would essentially allow opposer a trial preparation period that the Rules of Procedure do not contemplate; thus, such an extension would impact these proceedings.

The record does not evidence that opposer, in seeking an extension, has acted in bad faith. Nevertheless, certain inactions, such as the failure to respond to applicant's repeated requests to schedule cross examination, suggest an indifference to the consequences of not pursuing a testimony opportunity that the parties' stipulation, and the Board's September 30, 2008 order, offered to opposer.

On balance, upon consideration of all the relevant circumstances, opposer has not established that it acted with excusable neglect such as would to justify reopening applicant's limited testimony period. In view thereof, the motion to reopen is denied.

To the extent that opposer seeks additional time to take action that was to be taken during its rebuttal testimony

period, such as reviewing applicant's testimony and evidence and otherwise preparing rebuttal testimony, its motion is one to extend, the good cause standard of Fed. R. Civ. P. 6(b)(1)(A) applies, and opposer must demonstrate that its request is not necessitated by its own lack of diligence or unreasonable delay in taking the required action. *See also* TBMP § 509.01(a)(3d ed. 2011).

On this point, although opposer has articulated that an acquisition and resulting change in top management took place, apparently at least in part during applicant's 10-day testimony period, and that the parties continued some settlement efforts, opposer provided no reason why these events or circumstances prevented, or prospectively would prevent it from preparing its rebuttal testimony during its assigned time. Opposer has been long aware of the timeframe allowed by the Rules of Procedure, and has not substantiated its assertion that reviewing applicant's testimony and evidence poses an undue burden that cannot be met in the established timeframe.

Inasmuch as opposer failed to establish good cause for the 60-day extension it seeks, its motion to extend is denied. In its discretion, the Board resets opposer's remaining 10-day rebuttal testimony period to close February 1, 2012.

Schedule

In accordance with the ruling set forth herein, opposer's remaining 10-day rebuttal testimony period is hereby reset to close February 1, 2012. The Board will consider no further unconsented motion(s) to extend the trial period or to extend or suspend proceedings, with the exception of a motion seeking time to allow applicant to cross examine any witness or declarant offered by opposer during its testimony period, as provided for under the parties' stipulation.

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.l25.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.