

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

Skoro

Mailed: April 15, 2009

Opposition No. 91181621

StonCor Group, Inc.

v.

Les Pierres Stonedge Inc.

**Before Walters, Zervas and Mermelstein,
Administrative Trademark Judges.**

By the Board:

This case comes before the Board on applicant's motion, filed January 23, 2009¹, for judgment pursuant to Trademark Rule 2.132(b), and opposer's response and motion to reopen testimony periods, filed January 30, 2009.

Motion to Reopen Opposer's Testimony Period

Opposer submitted no evidence of any type during its main testimony period² and did not seek any extension of the testimony period, which closed on January 6, 2009. On January 23, 2009, applicant filed the instant motion for judgment.

¹ Applicant's original motion was filed January 13, 2009, then twice amended on January 22 and 23, 2009. We construe the earlier motions to be withdrawn in light of the subsequent filings.

² Opposer did, however, file status and title copies of its claimed registrations with its notice of opposition pursuant to Trademark Rule 2.122(d)(1), which are of record.

Pursuant to Trademark Rule 2.132(b),

If no evidence other than a copy or copies of Patent and Trademark Office records is offered by any party in the position of plaintiff, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground that upon the law and the facts the party in the position of plaintiff has shown no right to relief.

In this case, opposer has filed a combined response and motion to reopen its testimony period. Pursuant to Fed. R. Civ. P. 6(b)(1)(B), the requisite showing for reopening an expired period is that of excusable neglect. The Board's "excusable neglect" standard was discussed in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), which followed the test set out by the Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993). In *Pioneer*, the Court stated that a determination of excusable neglect is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include ... (1) the danger of prejudice to the [nonmovant], (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 movant, and (4) whether the movant acted in good faith. *Pioneer*, 507 U.S. at 395.

Opposer's counsel attests,³ as a showing of excusable neglect, that immediately before the testimony period opened counsel fell seriously ill causing him to be out of the office for three weeks; that he was unable to take a testimonial deposition during the testimony period due to his illness; and that there was no other attorney in his firm sufficiently qualified on this client's matters to take a testimonial deposition during that time period.

Applicant objects, arguing there is no excusable neglect because opposer's failure to take depositions and enter evidence was solely within opposer's control. Applicant states that opposer was fully aware of the dates in this proceeding; that during the time counsel was ill, he submitted a significant number of filings with the USPTO;⁴ and that there are two other attorneys assisting him in trademark matters. In reply, opposer clarifies that he was in touch with his office by phone from home and giving instructions to his paralegal on which filings she could draft and he merely reviewed and inserted his electronic

³ In support of these statements, opposer's counsel has submitted three declarations; two of his own and one from the paralegal who works closely with him on trademark matters.

Opposer also asserted that a draft copy of one of his declarations (docket entry no. 12) was mistakenly filed and requested that it be withdrawn and removed from the record. The document remains part of the record, although counsel has withdrawn his reliance upon it, and it will be given no consideration by the Board.

signature. It is noted that under his direction, motions to extend were filed under his signature in other cases and there is nothing in the declarations providing a reason as to why this case is any different from the others he was seeking extensions for. To the extent that this case involved a docketing error, we note that docketing errors and breakdowns do not constitute excusable neglect. See *Pumpkin, supra*, and cases cited therein.

Thus, in these circumstances, we find that the third *Pioneer* factor is determinative. *Pumpkin Ltd. v. The Seed Corps, supra*, at fn 7. That is, assuming *arguendo* that there is no prejudice to applicant, substantial delay of the proceeding or lack of good faith by opposer, opposer's failure to submit evidence was wholly within counsel's control in light of his ability to file or have filed extensions in other proceedings.

Accordingly, opposer's motion to reopen its testimony period is denied.

Applicant's Motion to Dismiss for Failure to Prosecute

Because opposer made its pleaded registrations properly of record with the filing of its notice of opposition, opposer has made a sufficient showing for this proceeding to go forward. Trademark Rule 2.132(b). Accordingly,

⁴ Applicant has attached as exhibits to its opposition to the motion to reopen, filings made during this time period, in some sixteen other trademark matters. See Exhibits C-R.

applicant's motion to dismiss is denied. We emphasize to opposer that, during its rebuttal trial period, it must limit its submissions to permissible rebuttal of applicant's testimony and evidence.

In light of the foregoing, trial dates are reset as indicated below.

Time to Answer	CLOSED
Deadline for Discovery Conference	CLOSED
Discovery Opens	CLOSED
Initial Disclosures Due	CLOSED
Expert Disclosures Due	CLOSED
Discovery Closes	CLOSED
Plaintiff's Pretrial Disclosures	CLOSED
Plaintiff's 30-day Trial Period Ends	CLOSED
Defendant's Pretrial Disclosures	May 26, 2009
Defendant's 30-day Trial Period Ends	July 10, 2009
Plaintiff's Rebuttal Disclosures	July 25, 2009
Plaintiff's 15-day Rebuttal Period Ends	August 24, 2009

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 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b).⁵ An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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⁵ It is noted that as a show of good faith opposer's counsel agreed to limit his briefing schedule to thirty days instead of sixty. In that all time periods have been reset, the briefing schedule will be the standard schedule.