

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
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Mailed: August 25, 2010

Opposition No. 91189474

Cheryl Cooley

v.

Bernadette Cooper and Joyce
Irby

**Before Hairston, Kuhlke, and Wellington,
Administrative Trademark Judges.**

By the Board:

Discovery closed in this case on February 3, 2010, and opposer's testimony period closed on May 5, 2010.

This case now comes before the Board for consideration of (1) applicants' motion (filed July 15, 2010) to dismiss for failure to prosecute under Trademark Rule 2.132(a), and (2) opposer's response and cross-motion (filed August 3, 2010) to reopen her testimony period.

In support of their motion, applicants contend that opposer did not take testimony or offer any evidence during her testimony period. Accordingly, applicants request that the notice of opposition be dismissed with prejudice.

In response, opposer maintains that she did not realize that the period to take and/or submit her testimony had

elapsed until receipt of applicants' motion for failure to prosecute. Opposer further contends that her counsel, in November 2009, was diagnosed with prostate cancer and since the diagnosis, opposer's counsel has undergone months of radiation therapy and has participated in a protocol for cancer medication. In light of opposer's counsel's serious medical condition, opposer further maintains that opposer's counsel has had extensive absences from his office arising from the treatment of his medical condition. Due to these extensive absences, opposer contends that it has been difficult for her counsel to keep track of office matters and, as a result, opposer's counsel inadvertently neglected to calendar opposer's testimony period.

As applicants' motion for failure to prosecute and opposer's request to reopen her testimony period involve equivalent legal standards and arise out of the same set of operative facts, the Board considers applicants' motion and opposer's request together.

Under Trademark Rule 2.132(a), when a plaintiff fails to offer testimony or other evidence during its prescribed testimony period, the defendant may move for dismissal for failure to prosecute. Absent a showing of good and sufficient cause why judgment should not be rendered against it, judgment will be entered against plaintiff. See Trademark Rule 2.132(a). The Board has held that the "good

and sufficient cause" standard set out in Trademark Rule 2.132(a) is equivalent to the "excusable neglect" standard set out in Fed. R. Civ. P. 6(b)(1)(B). See *HKG Industries Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156, 1157 (TTAB 1998). See also Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 534.02 (2d ed. rev. 2004) and the authorities cited therein.

As clarified by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), and followed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the inquiry as to whether a party's neglect is excusable:

at bottom is 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.

The Board, as several courts have done in subsequent applications of the test, has usually considered that the third factor -- the reason for the delay and whether it was in the reasonable control of the movant -- as the most significant factor in a particular case. See *Pumpkin Ltd. v. The Seed Corps*, supra at n.7 and cases cited therein. Therefore, the Board initially considers the third *Pioneer*

factor, and in this case finds that opposer's failure to timely take or present evidence during the prescribed testimony period was not due to circumstances clearly within her or her counsel's control.

As noted above, the reason for opposer's failure to timely take or submit any testimony during her designated testimony period was primarily due to opposer's counsel's battle with prostate cancer and extensive absences from his office to receive treatment for his medical condition. Obviously, the serious health issues confronted by opposer's counsel were not within either opposer or opposer's counsel's reasonable control. In view thereof, the Board finds that opposer's failure to timely take or submit any testimony within her designated testimony period was the result of excusable neglect.

As for the remaining *Pioneer* factors, the Board finds no evidence of bad faith by opposer to delay this case and no undue prejudice suffered by applicants.

Accordingly, applicants' motion to dismiss for failure to prosecute is denied and opposer's cross-motion to reopen her testimony period is granted. Moreover, to the extent that opposer has yet to serve her pretrial disclosures upon applicants, opposer is allowed thirty days from the mailing

date of this order in which to serve such disclosures upon applicants.

Proceedings herein are resumed. Trial dates, beginning with the close of opposer's testimony period, are reset as follows:

Plaintiff's 30-day Trial Period	
Ends	11/8/2010
Defendant's Pretrial	
Disclosures	11/23/2010
Defendant's 30-day Trial Period	
Ends	1/7/2011
Plaintiff's Rebuttal	
Disclosures	1/22/2011
Plaintiff's 15-day Rebuttal	
Period Ends	2/21/2011

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 taking of testimony. Trademark Rule 2.125.

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 2.129.