

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

Faint

Mailed: February 3, 2014

Opposition No. 91197690

John Kevin Timothy dba UROCK
Radio

v.

Umberto Sulpasso dba UROCK

**Before Kuhlke, Bergsman and Greenbaum,
Administrative Trademark Judges.**

By the Board:

This case now comes up on applicant's second motion, filed August 9, 2013, to dismiss the opposition pursuant to Trademark Act § 2.132(a) for opposer's failure to take testimony or enter evidence. The motion is fully-briefed.¹

Background

Applicant seeks to register the mark:

UROCK

for music related goods and services.² Opposer filed his notice of opposition on December 2, 2010, and the Board's

¹ The Board regrets any delay in considering the motion.

² Application Serial No. 85044568, filed May 21, 2010, based on Trademark Act § 44(e) for, "Digital media, namely, CDs, DVDs, downloadable audio files, featuring music" in Class 9, and "Entertainment, namely, live performances by a musical band" in

institution order issued the next day, setting the close of opposer's testimony period as November 8, 2011.³

Applicant filed his first motion to dismiss the opposition pursuant to Trademark Rule 2.132(a) on November 14, 2011. On January 18, 2012, the Board issued an order suspending proceedings for consideration of the motion to dismiss and opposer's cross-motion to reopen his testimony period, allowed opposer time to respond to the motion to dismiss, and provided detailed information about how to conduct Board proceedings. By its order of July 10, 2012, the Board granted opposer's cross-motion to reopen his testimony period and reset dates. That order advised at footnote number one that, "for evidence to be considered at final hearing, it must be properly introduced in evidence during the appropriate trial period." (Board's order of July 10, 2012 at 2 n.1, citations omitted).

Class 41. The following description of the mark is of record, "The mark consists of the word "UROCK", written with the special BASE02 font." Color is not claimed as a feature of the mark.

³ Opposer's change of correspondence address, filed July 14, 2013 is noted and made of record. The Board notes that opposer's counsel entered an appearance on March 21, 2012 and has not entered a motion to withdraw from representation. Nonetheless, the Board construes opposer's July 14, 2013 filing, together with opposer's "testimony" filed on the same date under opposer's own signature, as notice that opposer is once again appearing pro se in this proceeding.

The Board's order of May 16, 2013 denied opposer's motion for summary judgment filed September 7, 2012, because neither opposer, nor applicant, had ever served initial disclosures. That order also denied applicant's motions precluding opposer from using certain witnesses at trial as a sanction for failing to make initial disclosures. Proceedings were resumed and opposer's trial period was re-set to close on July 14, 2013.

Arguments of the Parties

On July 14, 2013, opposer filed a document entitled "Opposer's Testimony and Evidence." A review of the document shows that it consists of a cover sheet and what is essentially a copy of opposer's previously denied motion for summary judgment. Although the cover sheet lists Exhibit A declaration of opposer, Exhibit B declaration of Steve Chang, and the exhibits to those declarations, none of the exhibits were attached.⁴

In response to applicant's second motion to dismiss, opposer argues that evidence already "exists in the record" to support his claims of prior use of the mark. Specifically, opposer argues that he submitted on April 11, 2011 a "stipulation of facts" and attached supporting documents. In

⁴ Opposer's correction, filed August 12, 2013, to his certificate of service to the "testimony" is noted and made of record.

the alternative, opposer argues his July 14, 2013 filing was not a "miscalcaptioned" motion for summary judgment, as it clearly states in the opening paragraph that the filing is "evidence and testimony." Opposer asks the Board to overlook the "defects in filing," allow opposer further time to remedy the defects by viewing his response to the motion to dismiss, and its 114 pages of attachments, as service on applicant of the "missing evidence."⁵

In reply, applicant argues that opposer has plainly admitted that his July 14, 2013 filing is devoid of any evidence, that the Board had previously warned opposer by its January 18 and July 10, 2012 orders that only properly introduced evidence would be considered at trial, and despite opposer's arguments that his failure to submit the proper testimony and attachments was a "glitch," applicant's service copy is "identical in every way" to the document docketed as entry number forty-one in this Board proceeding. Applicant argues that opposer's April 11, 2011 filing is not a "stipulation" as applicant has never stipulated to any facts in this proceeding, and that opposer's requests to "correct" his testimony are untimely. Applicant "strongly objects" to

⁵ Opposer also appears to argue that only applicant's service copy of the July 14, 2013 filing was missing the attachments. The Board notes, however, that there are no attachments appearing in the electronic file for opposer's filing on that date.

allowing opposer to introduce such attachments outside of his testimony period, and argues that opposer has not exercised reasonable diligence and attention to his own prosecution.

Analysis

Opposer's April 11, 2011 filing marked as a "stipulation" is not evidence in this case, as it was entered outside of opposer's testimony period, applicant never agreed to it, and it was not approved by the Board. The Trademark Rules clearly state that no testimony shall be taken except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. Trademark Rule 2.121(a)(1); *see also* TBMP § 705 and cases cited therein.

Further, while opposer's July 14, 2013 filing is timely, the motion is not evidence, and there were no attachments. Thus, the Board construes opposer's response as a motion to reopen his testimony period to introduce the late-filed attachments.

Pursuant to the Trademark Rules, when a plaintiff fails to offer testimony or other evidence during its testimony period, the defendant may move for dismissal for failure to prosecute. The burden then shifts to the plaintiff to demonstrate "good and sufficient cause" why judgment should not be entered against it. Trademark Rule 2.132(a).

In considering the motion to reopen together with applicant's motion to dismiss, the Board has previously held that the "good and sufficient cause" standard set out in Trademark Rule 2.132(a) is equivalent to the "excusable neglect" standard applied to a motion to reopen. *Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1702 (TTAB 2002).

In analyzing excusable neglect, the Board relies on the Supreme Court's discussion in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993). See *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). The Supreme Court defined the inquiry into excusable neglect as "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 [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 movant, and [4] whether the movant acted in good faith." *Pioneer*, 507 U.S. at 395. Consistent with several circuit courts of appeal, the Board has found the third *Pioneer* factor, namely, the reason for the delay, and whether it was within the reasonable control of the movant, to

be of paramount importance. See *Pumpkin*, 43 USPQ2d at 1586 n.7, and cases cited therein.

With regard to the danger of prejudice to the applicant, we note that the mere passage of time is generally not considered prejudicial, absent the presence of other facts, such as the loss of potential witnesses. *Pumpkin*, 43 USPQ2d at 1587. The Board finds the delay in this case, however, is substantial. This is opposer's second attempt to re-open his testimony period, and the total delay caused by opposer's inaction is considerably longer. Opposer's testimony period previously closed in 2011, and opposer waited forty-one days after the close of his most recent testimony period to submit the missing attachments from his July 14, 2013 filing. While there is no evidence opposer acted in bad faith, opposer has offered no reasons why he was not diligent in prosecuting his case. Thus, we find the reason for the delay was within opposer's control.

Opposer bears the burden of coming forward with evidence to support his case and it is clear that opposer has not done so here. The Board finds that the second and third *Pioneer* factors heavily outweigh the first and fourth *Pioneer* factors in this case, and finds that opposer's failure to take testimony or offer evidence was not the result of excusable

neglect. Accordingly, opposer's motion to reopen his testimony period is **denied**.

However, even if the Board were to allow opposer to enter his late-filed attachments in this case, they are not "testimony" and are not admissible as evidence. Declarations are not testimony, and may not be introduced absent a stipulation between the parties approved by the Board. Trademark Rule 2.132(b). See *Tri-Star Marketing LLC v. Nino Franco Spumanti S.R.L.*, 84 USPQ2d 1912, 1914 (TTAB 2007) (declaration cannot be submitted in lieu of testimony deposition absent a stipulation of the parties). Thus opposer's declarations, and the documents attached to them are not admissible.

Inasmuch as opposer has not submitted any record evidence in support of his case, applicant's motion for judgment is **granted**. Accordingly, the opposition is dismissed with prejudice.
