

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

MBA

Mailed: June 21, 2012

Opposition No. 91201070

Anderson Valley Acquisition
Company, LLC

v.

Matthew Harnden and Roger
Scommegna

Michael B. Adlin, Interlocutory Attorney:

This case now comes up for consideration of opposer's motion, filed June 5 and served June 7, 2012, to accept opposer's late-filed response to applicant's pending motion for summary judgment, which is construed as a motion to reopen opposer's time to respond to the motion for summary judgment. On June 21, 2012, the Board convened a teleconference with the parties to discuss the impact of opposer's late service of the motion two days after it was filed, at which Thomas R. Leavens appeared on opposer's behalf and Adam L. Brookman appeared on applicant's behalf. However, during the teleconference, which is summarized herein, applicant elected to present its opposition to the motion orally, making the service issue effectively moot.

In any event, pursuant to the Board's order of May 4, 2012, opposer's response to applicant's motion for summary judgment was due on June 3, 2012, a Sunday, and therefore opposer's response was effectively due on June 4, 2012. Trademark Rule 2.196. In its motion, opposer claims that its response was filed one day late because of "technical issues" relating to "formatting and uploading" the response via the Board's Electronic System for Trademark Trials and Appeals ("ESTTA"), which "caused the filing to require an unforeseeably lengthy amount of time." Opposer points out that it filed its response at 11:16 p.m. Central Time on June 5, 2012, i.e. 16 minutes late, and that applicant did not receive the response meaningfully later than it would have if it was timely filed and served.

In response, applicant claimed that it would have been more likely to consent to the late filing if this case was not, in applicant's estimation, "meritless." Applicant also pointed out that its motion for summary judgment has been pending for over six months, and that by virtue of filing its cross-motion for discovery under Fed. R. Civ. P. 56(d), opposer has already had significantly more time to prepare its response to the motion for summary judgment than it would have under other circumstances.

In order to reopen its expired time to respond to applicant's motion for summary judgment, opposer must

establish that its failure to timely respond was the result of "excusable neglect." Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co., 55 USPQ2d 1848, 1852 (TTAB 2000) ("Pursuant to Fed. R. Civ. P. 6(b)(2), the requisite showing for reopening an expired period is that of excusable neglect."). As the Board stated in Baron Philippe:

In Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395 (1993), the Supreme Court set forth four factors to be considered in determining excusable neglect. Those factors are: (1) the danger of prejudice to the non-moving party; (2) the length of 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. In subsequent applications of this test by the Circuit Courts of Appeal, several courts have stated that the third factor may be considered the most important factor in a particular case. See Pumpkin Ltd v. The Seed Corps, 43 USPQ2d 1582, 1586 at fn. 7 (TTAB 1997).

Id., at 1852.

The reason for opposer's delay was outside of its control. Not only did opposer experience "technical issues," but in recent weeks, technical problems have hampered the operation of ESTTA itself.¹ Applicant did not

¹ However, as pointed out during the teleconference, should something similar happen again, the analysis may very well be different. Indeed, the very first instruction on the ESTTA "welcome screen" is to "**PLAN AHEAD**" (emphasis in original). Following this basic heading, the instruction specifically

even argue, much less present any evidence of prejudice. This is not surprising, because a filing which is 16 minutes late and which applicant likely received at the exact same time it would have received a timely filing would not constitute prejudice. The length of the delay is infinitesimal, and will have absolutely no impact on this proceeding. And it appears that opposer has acted in good faith and applicant does not contend otherwise.

For all of these reasons, opposer's motion to reopen its time to respond to the motion for summary judgment is hereby **GRANTED** and its late response is accepted. Applicant's reply brief in support of its motion for summary judgment, if any, is due **July 11, 2012**.

states: "Because unexpected problems can occur, you should keep filing deadlines in mind and allow plenty of time to resolve any issue which might arise." The very next instruction is that "Eastern Time controls the filing date." While the Board is all too aware that attorneys routinely wait until the last minute, and it would be surprising if applicant never did so, opposer has been duly warned.