

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Mailed: June 2, 2014

Opposition No. 91207394

Bratva, Inc.

v.

Oleg Makler

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

By the Board:

This case now comes up for consideration of Oleg Makler's ("applicant") fully briefed motion (filed November 22, 2013) to dismiss under Trademark Rule 2.132(a) for failure to prosecute.

In applicant's application, applicant seeks to register the mark BRATVA in standard character form for "Arranging and conducting special events for social entertainment purposes; Arranging, organizing, conducting, and hosting social entertainment events; Hosting social entertainment events, namely, arranging and conducting concerts, parties, rallies and special events, for others; Publication of documents in the field of training, science, public law and social affairs; Social club services, namely, arranging, organizing, and hosting social events, get-togethers, and parties for club members; Special event planning for social entertainment purposes" in

International Class 41.¹ In this proceeding, Bratva, Inc. (“opposer”) opposes registration of applicant’s involved mark on the ground of fraud. Applicant, in his answer, denied the salient allegations of the notice of opposition.

Following the Board’s institution of this proceeding on October 10, 2012, neither party filed any motions to extend. Thus, pursuant to the Board order instituting this proceeding, opposer’s thirty-day testimony period expired on September 15, 2013.² Applicant filed his motion to dismiss under Trademark Rule 2.132(a) for failure to prosecute following the close of applicant’s testimony period.

Because the motion to dismiss was filed after the commencement of applicant’s testimony period, it was late-filed. *See* Trademark Rule 2.132(c). Nonetheless, the Board elects to exercise its discretion and consider such motion. *See id.*; *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858 (TTAB 1998).

Opposer, on December 28, 2013, filed a brief in response to the motion to dismiss under seal without including either proof of service upon applicant or the requisite redacted copy of that brief. *See* Trademark Rules 2.27(d), 2.27(e), 2.119(a) and 2.127(a); TBMP Sections 113 and 412.04 (3d ed. rev.2 2013). Pursuant to the Board’s January 21, 2014 order, opposer, on January

¹ Application Serial No. 85623013, filed May 11, 2012, and alleging May 9, 2000 as the date of first use anywhere and the date for first use in commerce.

² Parties take trial testimony through depositions and file trial evidence in the form of notices of reliance during their testimony periods. *See, e.g.*, TBMP Section 702.02.

22, 2014, filed a redacted copy of its brief in response. The record does not indicate that opposer served a copy of the unredacted version of its brief in response upon applicant. On January 30, 2014, applicant filed his reply brief in support of the motion to dismiss.

The certificate of service included as part of applicant's motion to dismiss indicates that such motion was served by mail on November 22, 2013. Accordingly, opposer was allowed until December 12, 2013 to file a brief in response thereto. See Trademark Rules 2.119(c) and 2.127(a). Because opposer did not file the unredacted copy of its brief in response until December 28, 2013, sixteen days after the due date, opposer must establish that its failure to act in a timely manner was the result of excusable neglect.

In the brief in response, opposer contends that its attorney has "not been active in this case only since the beginning of October 2013" due to a "severe crisis in [his] personal life"³ that prevented him from being "attentive to this case;" that he did not see the electronic version of the motion to dismiss until December 12, 2013, when he returned to the United States after a trip abroad on a matter not related to the "severe crisis" or his profession as an attorney; and that, upon his return, opposer's attorney immediately wrote to applicant's attorney, who "ingratically" refused to consent to a one-week extension of time to file the brief in response. Opposer further contends that its attorney "has not been able to be properly attentive to [his] duties"

³ Opposer's attorney provided this information in great detail in the unredacted version of its brief in response.

because of another crisis in his personal life affecting his wife, his baby daughter, and both parents (including his father's "relapse," which arose shortly after his return from abroad). Because its brief in response was due by "December 22, 2013," opposer contends that applicant will not be prejudiced by the one-week late filing of opposer's brief in response to the motion to dismiss during the Christmas holiday season.

In his reply brief, applicant contends that, while he is sympathetic to opposer's attorney's personal situation, opposer's explanation does not justify the delay.

For the Board to consider opposer's brief in response, opposer must establish that its failure to act during the relevant time period was caused by excusable neglect. See Fed. R. Civ. P. 6(b)(1)(B); TBMP Section 509.01(b). Opposer's contention that its brief in response was due by December 22, 2013 is incorrect. Rather, as noted *supra*, such brief was due by not later than December 12, 2013. Accordingly, the relevant time period is the one immediately before and including December 12, 2013.

In *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993), as discussed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the Supreme Court clarified the meaning and scope of "excusable neglect," as used in the Federal Rules of Civil Procedure and elsewhere. The Court held that the determination of whether a party's neglect is excusable 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 Investment Services Co., *supra* at 395. In subsequent applications of this test, several courts have stated that the third *Pioneer* factor, namely the reason for the delay and whether it was within the reasonable control of the movant, might be considered the most important factor in a particular case. *See Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d at 1586, fn.7 and cases cited therein.

We turn initially to the third *Pioneer* factor. While we are sympathetic to opposer's attorney regarding his family situation, we note that such situation was sufficiently under control for the attorney to be able to travel abroad on apparently unrelated business around the time of the filing of the motion to dismiss, and that, upon his return, the attorney was sufficiently aware of the imminent deadline for responding to the motion to dismiss that he sought applicant's consent to an extension of time to so respond.⁴ Because applicant did not consent to the extension sought, it was incumbent upon opposer to timely file a motion to extend time to respond to the motion to dismiss, instead of choosing to file the brief in response late. Such a motion

⁴ We further note that the relapse that opposer's attorney's father sustained appears to have occurred after the December 12, 2013 due date for opposer's response to the motion to dismiss, i.e., outside of the relevant time period.

to extend would have been based on facts entirely within the knowledge of opposer's attorney and could have been researched and prepared relatively quickly.⁵ *See, e.g.*, TBMP Section 509.01(a). Based on the foregoing, we find that opposer's failure to act in a timely manner was in part the result of its attorney's failure to file a motion to extend time to respond to the motion to dismiss.

In addition, as noted *supra*, opposer's brief in response was due by December 12, 2013, and not by December 22, 2013, as opposer argues in its brief. We find in addition that opposer's failure to act in a timely manner was caused in part by its attorney's failure to comprehend straightforward procedural rules regarding due dates for briefs in connection with motions in Board proceedings. *See* Trademark Rules 2.119(c) and 2.127(a); *PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860 (TTAB 2002). We further find that such failure was within opposer's reasonable control. Based on the foregoing, the Board finds that the third *Pioneer* factor weighs against a showing of excusable neglect.

Turning to the second *Pioneer* factor, we find that, although opposer filed the brief in response to the motion to dismiss sixteen days late, the delay caused by opposer's failure to take timely action prior to the due date for its brief in response is significant. In addition to the time between the due date

⁵ The Board could have decided such a motion by telephone conference shortly after the filing thereof. *See* Trademark Rule 2.120(i)(1); TBMP Section 502.06(a).

and the filing of the brief in response, the calculation of the length of the delay in proceedings also must take into account the additional, unavoidable delay arising from the time required for additional briefing and preparing decisions on such motions. *See PolyJohn Enterprises Corp., supra.* Further, the Board and parties appearing before it have an interest in minimizing the amount of the Board's time and resources that must be devoted to matters, such as the motion decided herein, which come before the Board in part due to one party's failure to understand Board procedural rules. The Board's interest in deterring such failure weighs against a finding of excusable neglect under the second *Pioneer* factor.

With regard to the first *Pioneer* factor, we find that there is no evidence of significant prejudice to applicant, and, with regard to the fourth *Pioneer* factor, we find that there is no evidence of bad faith on the part of opposer. On balance, we find that opposer's failure to timely act before the due date for its brief in response to the motion to dismiss was not caused by facts constituting excusable neglect. Accordingly, opposer's brief in response to the motion to dismiss has received no consideration, except as noted in the foregoing.⁶

⁶ A cursory review of the brief in response indicates that opposer contends that the parties had not agreed that discovery had closed. However, the Board, which controls the scheduling of this case, set June 17, 2013 as the closing date of the discovery period in the notice instituting this proceeding. *See* TBMP Section 510.01. Because neither party filed a motion or stipulation to extend the discovery period, discovery closed on that date, regardless of whether the parties believed that discovery was ongoing. Although opposer's brief indicates that

But even if we were to consider opposer's brief in response to applicant's motion to dismiss, dismissal is appropriate under Trademark Rule 2.132(a) where a plaintiff's testimony period has closed, and the plaintiff has not taken any testimony or filed any evidence. Opposer did not take any testimony or file any other evidence with the Board in support of its notice of opposition during its assigned testimony period. *See Atlanta-Fulton County Zoo Inc. v. DePalma, supra.* Further, the exhibits to opposer's notice of opposition cannot be relied upon as trial evidence on opposer's behalf. *See Trademark Rule 2.122(c).* Finally, all the excuses for opposer's failure to take action occurred after the close of opposer's testimony period. Therefore, leaving aside any potential evidentiary issues that the attachments to opposer's brief in response to the motion to dismiss might raise, the attachments were not submitted during opposer's testimony period, and are therefore not of record.⁷

opposer served discovery requests during July 2013 and sought to take discovery depositions during July and August 2013, after the close of the discovery period, discovery depositions must be taken and written discovery requests must be served prior to the close of the discovery period. *See Trademark Rule 2.120(a)(3).*

⁷ We also note that opposer did not file a cross-motion to reopen its testimony period, or even acknowledge the need to reopen testimony, and we do not construe opposer's response to applicant's motion to dismiss as a cross-motion to reopen testimony.

In view thereof, applicant's motion to dismiss the opposition under Trademark Rule 2.132(a) is granted. The opposition is hereby dismissed with prejudice.⁸

In addition, as noted *supra*, the record does not indicate that opposer served a copy of the unredacted version of its brief in response to the motion to dismiss upon applicant. *See* Trademark Rule 2.119(a). Opposer is allowed until ten days from the mailing date of this order to file with the Board proof of such service upon applicant, failing which the unredacted version will be placed in the public record.

⁸ Opposer indicates that, had the Board denied the motion to dismiss, it would file a motion for summary judgment. However, such motion would be untimely at this stage of the proceeding. *See* Trademark Rule 2.127(e)(1); TBMP Section 528.02.