

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

JK

Mailed: July 25, 2016

Opposition No. 91213584

Jaguar Land Rover Limited

v.

Toys Tekk

**Before Richey, Deputy Chief Administrative Trademark Judge,  
and Bergsman and Wolfson, Administrative Trademark Judges.**

This proceeding is before the Board on Applicant's April 18, 2016 motion to amend or modify judgment, which the Board construes as a motion for relief from a final judgment pursuant to Fed. R. Civ. P. 60(b).<sup>1</sup> The motion is fully briefed.

### **Relevant Background**

On March 29, 2016, Applicant, through its counsel of record, filed an "Express Withdrawal of Application" (hereinafter "withdrawal") expressly abandoning its involved application Serial No. 85867803 pursuant to Trademark Rule 2.68, 37 C.F.R. § 2.68, without the consent of Opposer.<sup>2</sup> On April 13, 2016, the Board issued an order

---

<sup>1</sup> 31 TTABVUE.

<sup>2</sup> 28 TTABVUE.

pursuant to Trademark Rule 2.135, entering judgment against Applicant, and sustaining the opposition.<sup>3</sup>

On April 18, 2016, Applicant filed a motion to amend or modify judgment, and specifically to vacate the entry of judgment against Applicant. It argues, *inter alia*, that Opposer's written consent to the abandonment was in a settlement agreement, and submits with its motion a copy of said agreement. Applicant further argues that Applicant's counsel is litigating for the first time before the Board whereas Opposer's counsel is an experienced litigator; and that Opposer's counsel intentionally provided Applicant's counsel with a sample withdrawal so as to prejudice Applicant and in doing so made a fraudulent representation.

Contesting the motion, Opposer argues that the parties' settlement agreement does not say anything about Opposer's consent, that Applicant's counsel was aware of and cited in the withdrawal the proper authorities governing the withdrawal, and that Applicant has not articulated what prejudice it has suffered in view of what the parties' settlement agreement states.

### **Analysis**

Fed. R. Civ. P. 60(b), applicable to Board *inter partes* proceedings by operation of Trademark Rule 2.116(a), governs motions for relief from final judgment. *See* TBMP § 544 (2016). Relief from a final judgment is an extraordinary remedy to be granted only in exceptional circumstances or when other equitable considerations exist. The determination of whether a motion under Fed. R. Civ. P. 60(b) should be

---

<sup>3</sup> 29 TTABVUE 1.

granted is a matter that lies within the sound discretion of the Board. *See Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991). The movant must persuasively show, preferably by affidavits, declarations or documentary evidence, as may be appropriate, that the relief requested is warranted for one or more of the reasons specified in Fed. R. Civ. P. 60(b).

Applicant does not specify the provision of Fed. R. Civ. P. 60(b) on which it bases its motion. In general, the Board has acknowledged that, as a practical matter, motions to vacate or set aside a final Board judgment are usually based upon the reasons set forth in subsections (1), (2) and/or (6) of Fed. R. Civ. P. 60(b).<sup>4</sup> *See* TBMP § 544. To the extent that Applicant suggests that there has been a mistake, inadvertence, surprise or excusable neglect, the record does not support a finding of any of these bases for relief. The record does not indicate any irregularity in Applicant's preparation and filing of its withdrawal. The withdrawal is unambiguous, is complete on its face, and does not include or refer to any additional documentation, such as a settlement agreement.<sup>5</sup> The withdrawal references TBMP § 602.01, which sets forth Trademark Rule 2.135 in its entirety as follows (emphasis added):

37 CFR § 2.135 Abandonment of application or mark. After the commencement of an opposition, concurrent use, or interference

---

<sup>4</sup> Fed. R. Civ. P. 60(b)(2) is inapplicable inasmuch as Applicant does not argue that its motion is based on newly discovered evidence.

<sup>5</sup> It is not necessary that parties file their settlement agreement with the Board. *See* TBMP § 605.03(a). Where a settlement agreement calls for a party to withdraw with, or without, prejudice, the parties need not file a settlement stipulation because *the withdrawal itself*, when filed, will result in a final disposition of the proceeding in accordance with the applicable rules. *See* TBMP § 605.03(a).

proceeding, if the applicant *files a written abandonment* of the application or of the mark *without the written consent of every adverse party to the proceeding*, judgment shall be entered against the applicant. The written consent of an adverse party may be signed by the adverse party or by the adverse party's attorney or other authorized representative.

To the extent that Applicant wishes for the Board to now give effect to the settlement agreement as constituting Opposer's written consent, the request is unavailing. The withdrawal, as filed, did not include consent. Moreover, even if the Board were to retroactively give effect to the settlement agreement as Opposer's written consent to Applicant's abandonment, the settlement agreement itself provides that Applicant "shall file a Withdrawal of the Application, with prejudice."<sup>6</sup> Consequently, the agreement provides that Applicant may not file any other application to register the mark CLOUD ROVER. Under these circumstances, the entry of judgment against Applicant in this proceeding was proper.

To the extent that Applicant seeks relief under Fed. R. Civ. P. 60(b)(6), it does not set forth arguments to support a finding of "any other reason that justifies relief" from judgment. Applicant's counsel makes much of his argument that he adopted a sample withdrawal that Opposer's counsel provided to him.<sup>7</sup> The argument is

---

<sup>6</sup> 31 TTABVUE 7.

<sup>7</sup> Applicant also states that his adoption of the sample was "[D]ue to a clerical error." (31 TTABVUE 3). However, the clerical error is not explained, and in any event appears to be inconsistent with counsel's assertion that he decidedly used the sample withdrawal provided by Opposer's counsel. In fact, it is noted that the sample withdrawal that Opposer's counsel provided, from an unrelated proceeding (Opposition No. 91225219), resulted therein in an order identical to the order issued herein, that is, an order entering judgment against that applicant under Trademark Rule 2.135.

unavailing. Applicant's counsel has been of record on behalf of Applicant throughout this proceeding, and had a duty to remain diligent so as to prepare and file a withdrawal that he believed to be correct, appropriate in view of the authorities that govern such a filing, and in the best interest of his client. *See CTRL Systems Inc. v. Ultraphonics of North America Inc.*, 52 USPQ2d 1300, 1302 (TTAB 1999) (Fed. R. Civ. P. 60(b)(1) motion denied; counsel and client share duty "to remain diligent in prosecuting or defending the client's case"). Nothing in the record indicates that Applicant's counsel was unaware of the applicability of Trademark Rule 2.135 or of the consequence of filing a withdrawal without Opposer's written consent.

In summary, the Board's April 15, 2016 order appropriately applied Trademark Rule 2.135 and was proper in view of the withdrawal that counsel filed on behalf of Applicant. Applicant has not shown that it is entitled to relief from a final judgment under the provisions of Fed. R. Civ. P. 60(b). In view of these findings, Applicant's motion for relief from final judgment is denied.

The Board's April 14, 2016 order and entry of judgment against Applicant pursuant to Trademark Rule 2.135 stands.

### **Counterclaim Against Opposer's Registration No. 2100825**

In the November 9, 2015 order, the Board acknowledged Applicant's counterclaim against Opposer's pleaded Registration No. 2100825, with an institution date of May 18, 2015,<sup>8</sup> set time for Opposer to file an amended notice of

---

<sup>8</sup> 22 TTABVUE 11, 16. The USPTO Fee Payment History Service records reflect that the trademark processing fee for a petition for cancellation, that is, the counterclaim fee, was posted to the record for Registration No. 2100825.

opposition (to re-plead certain claims), set time for Applicant to file an answer to the amended notice of opposition and to restate its counterclaim against Registration No. 2100825, if desired, and set time for Opposer to file an answer to the restated counterclaim, if filed.<sup>9</sup> The Board also reset trial dates beginning with Opposer's pretrial disclosures.<sup>10</sup>

Opposer filed an amended notice of opposition,<sup>11</sup> and Applicant filed a motion to dismiss the amended notice of opposition.<sup>12</sup> The Board acknowledged the amended notice of opposition as the then-operative pleading in this proceeding,<sup>13</sup> denied the motion to dismiss, and indicated that dates "remain as set in the Board's November 9, 2015 order."<sup>14</sup> The Board did not reset Applicant's time to file an answer to the amended notice of opposition, and thereafter the parties' settlement agreement and Applicant's withdrawal of its involved application rendered the issue of Applicant's answer to the amended notice of opposition moot. Accordingly, Applicant's operative counterclaim is its counterclaim filed December 23, 2013, to cancel Registration No. 2100825 on the ground of abandonment ("*Second Counter-Claim*").<sup>15</sup> In its operative answer thereto filed January 22, 2014, Opposer denied the allegations in the counterclaim.<sup>16</sup>

---

<sup>9</sup> 22 TTABVUE 17.

<sup>10</sup> 22 TTABVUE 18.

<sup>11</sup> 23 TTABVUE.

<sup>12</sup> 24 TTABVUE.

<sup>13</sup> 25 TTABVUE 1.

<sup>14</sup> 25 TTABVUE 2.

<sup>15</sup> 4 TTABVUE 4.

<sup>16</sup> 5 TTABVUE 2.

In view thereof, discovery and trial dates for the counterclaim to cancel Opposer's Registration No. 2100825 are hereby reset as follows (in this schedule, "Plaintiff" is Applicant, Toys Tekk; "Defendant" is Opposer, Jaguar Land Rover Limited):

Expert Disclosures Due	<b>8/26/2016</b>
Discovery Closes	<b>9/25/2016</b>
Plaintiff's Pretrial Disclosures Due	<b>11/9/2016</b>
Plaintiff's 30-day Trial Period Ends	<b>12/24/2016</b>
Defendant's Pretrial Disclosures Due	<b>1/8/2017</b>
Defendant's 30-day Trial Period Ends	<b>2/22/2017</b>
Plaintiff's Rebuttal Disclosures Due	<b>3/9/2017</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>4/8/2017</b>

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). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.