

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

Baxley

Mailed: June 16, 2015

Opposition No. 91216725

Zenith-Mart Inc.

v.

Godswill H. Oletu DBA Zenithmart

Andrew P. Baxley, Interlocutory Attorney:

In a March 26, 2015 order, the Board granted Opposer's motion to extend time to comply with the Board's February 6, 2015 order, allowing Opposer until April 23, 2015 to file a submission in which either its new attorney enters an appearance or Opposer states that it will represent itself.

On April 28, 2015, Opposer filed a motion to reopen an unspecified time to act, to suspend this proceeding for 180 days to allow Opposer time to raise outside funds to hire an attorney, and to dismiss Applicant's application "without contest, consideration or appeal whatsoever" under Fed. R. Civ. P. 12(b)(6). Applicant has filed a brief in response thereto.

By the motion to reopen, the Board presumes Opposer is seeking a reopening of its time to comply with the February 6, 2015 order, as reset in the March 26, 2015 order. Because the motion to reopen and the motion to suspend are based on common facts, the Board will decide those motions together.

For the Board to grant the motion to reopen, Opposer must establish that its failure to act in a timely manner was caused by excusable neglect. *See Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993); *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997); Fed. R. Civ. P. 6(b)(1)(B); TBMP § 509.01(b) (2014). The Board finds that Opposer has failed to show that its failure to act prior to the April 23, 2015 deadline set forth in the March 26, 2015 order was caused by excusable neglect. Although the Board is sympathetic to Opposer's Officer regarding his final exams in his MBA program, Opposer has not persuaded the Board that it could not have acted by filing, for example, a second motion to extend time to comply with the February 6, 2015 order, prior to April 23, 2015 deadline.

Moreover, bearing in mind that Opposer's former attorney filed his withdrawal from this case five months ago, granting Opposer further time to seek any attorney would prejudice Applicant, who is entitled to have this case decided without undue delay. Opposer brought this case and, in so doing, took responsibility for moving it forward without undue delay. *See Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858 (TTAB 1998). In view thereof, the motion to reopen time to comply with the Board's February 6, 2015 and March 26, 2015 order is denied.

Further, regarding the 180-day suspension that Opposer seeks, the Board presumes that Opposer is seeking a suspension based on good cause under Trademark Rule 2.117(c). The Board finds that Opposer's finds that Opposer's officer's business school exams and May 9, 2015 graduation constitute good cause

for a brief suspension of this case. Accordingly, the motion to suspend is granted to the extent proceedings are deemed suspended retroactive to April 28, 2015 and are resumed by this order. Unless and until an attorney appears on Opposer's behalf herein, this proceeding will go forward with Opposer representing itself.

To the extent that Opposer seeks entry of judgment under Federal Rule of Civil Procedure 12(b)(6), such motion is not properly before the Board and will receive no consideration.¹ A motion to dismiss under Rule 12(b)(6) is filed by a defendant against a plaintiff on the ground that the plaintiff has failed to state a claim upon which relief can be granted in the complaint and must be filed prior to, or concurrently with, the defendant's answer. *See* Fed. R. Civ. P. 12(b); TBMP § 503. To the extent that Opposer argues the merits of this case, such arguments are premature.

Proceedings herein are resumed. Remaining dates are reset as follows.

Expert Disclosures Due	7/16/2015
Discovery Closes	8/15/2015
Plaintiff's Pretrial Disclosures Due	9/29/2015
Plaintiff's 30-day Trial Period Ends	11/13/2015
Defendant's Pretrial Disclosures Due	11/28/2015
Defendant's 30-day Trial Period Ends	1/12/2016
Plaintiff's Rebuttal Disclosures Due	1/27/2016
Plaintiff's 15-day Rebuttal Period Ends	2/26/2016

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

¹ Opposer's exhibits in support of the motion to dismiss are not properly before the Board. A motion to dismiss under Rule 12(b)(6) is solely a test of the sufficiency of the complaint. *See* TBMP § 503.02. If Opposer wants to rely upon those exhibits as trial evidence, it must properly make them of record at trial. *See generally* TBMP § 701 *et seq.*

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. If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.