This Order is a Precedent of the TTAB

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

Mailed: July 24, 2015

Opposition No. 91219982

3PMC, LLC

v.

Stacy Lee Huggins

Before Rogers, Chief Administrative Trademark Judge, Richey, Deputy Chief Administrative Trademark Judge, and Taylor, Administrative Trademark Judge.

Richey, Deputy Chief Administrative Trademark Judge:

This matter is before us on the motion of Stacy Lee Huggins ("Applicant") pursuant to Fed. R. Civ. P. 60(b) for relief from a prior Board judgment in this proceeding. Before we reach the merits of the motion, we briefly describe the procedural background of this case.

The involved application[1] was published in the Official Gazette on September 2, 2014. On December 31, 2014, 3PMC, LLC ("Opposer"), filed a notice of opposition (1 TTABVUE), and the Board's electronic filing system[2] automatically instituted this proceeding (2 & 3 TTABVUE). That same day, Applicant filed, through the electron-

[1] Application Serial No. 86033388 was filed under § 1(a) of the Trademark Act of 1946, 15 U.S.C. § 1051(a), for the mark 'COKE HEAD, in standard characters, for "t-shirts; tee shirts."

[2] ESTTA (Electronic System for Trademark Trials and Appeals).

ic filing system of the Trademark Examining Operation,[3] an express abandonment of his application (4 TTABVUE).[4] On February 28, 2015, the Board entered judgment against Applicant pursuant to Trademark Rule 2.135 for abandoning the application after the commencement of an opposition without the express consent of the opposing party (5 TTABVUE). *See* Trademark Rule 2.135, 37 C.F.R. § 2.135. Applicant made a timely motion for relief from judgment under Fed. R. Civ. P. 60(b), arguing that his request for express abandonment was filed prior in time to the filing of the notice of opposition and, therefore, no opposition had been "commenced" and the opposition proceeding should have been dismissed without prejudice. *See* TBMP § 218 (2015). Opposer stated in response that it "generally accepts the factual allegations" in Applicant's motion (8 TTABVUE 3), but that the evidence "does not, however, establish a *clear* sequence of events" (8 TTABVUE 6). Additionally, Opposer disputed the conclusion that the abandonment should be considered the effective first filing and the notice of opposition to have come thereafter and urged the Board to deny Applicant's request to avoid prejudice to Opposer.

Before the Board could rule on Applicant's Rule 60(b) motion, the Applicant appealed the Board's judgment to the U.S. Court of Appeals for the Federal Circuit, divesting the Board of jurisdiction at least with respect to its ability to grant the

[3] TEAS (Trademark Electronic Application System).

[4] The entry at 4 TTABVUE is a copy of the electronic filing made through TEAS.

motion.[5] On June 17, 2014, the Board issued a ruling indicating its intention to grant the motion if the Court of Appeals remanded the matter for that purpose. *See* Fed. R. Civ. P. 62.1(a)(3) ("If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may . . . state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue."); TBMP § 901.03 ("If the Board is inclined to grant the Fed. R. Civ. P. 60(b) motion, it will issue a short memorandum so stating. The movant may then request a limited remand from the appellate court so that the Board can rule on the motion."). On July 20, 2014, the Court of Appeals granted Applicant's motion for a limited remand to the Board (11 TTABVUE).

Turning to the merits of Applicant's motion, we reaffirm our holding in *In re First Nat'l Bank of Boston*, 199 USPQ 296, 301 (TTAB 1978), that we "shall not take cognizance of fractions of a day," and we will assume that an opposition and an express abandonment, filed the same day, were filed at the same instant. In accordance with our precedent, we conclude that the involved application was not subject to an opposition when it was abandoned and, therefore, Trademark Rule 2.135 does not apply.

We observe that *First Nat'l Bank of Boston* was decided when Board filings were submitted on paper and the variety of ways in which such a submission could be made and received in the USPTO led the Board to conclude that "the exact temporal

[5] The Board may deny a Rule 60(b) motion during the pendency of an appeal but, in order to grant such a motion, the Board must first reacquire jurisdiction of the matter. *See* Fed. R. Civ. P. 62.1 advisory committee's note (2009); TBMP § 901.03.

sequence of events . . . was not (and still is not) fixed with certainty." *Id*. at 299. While greater certainty regarding the timing of events may be possible in the age of electronic filing, that is not always the case given the technological limitations to which computer systems and networks are susceptible. In addition, the interaction of discrete electronic systems, such as ESTTA, TEAS and the USPTO's internal system known as TRAM,[6] may be complicated when one system involves automatic processing, but another does so only in certain circumstances and, in the absence of those circumstances, requires manual processing to update the system to reflect the significance of a filing.[7]

Applicant, to support his argument that the abandonment of his application actually was filed prior to the opposition, asserts that the abandonment was time-stamped by the USPTO's TEAS system at 09:10:24 EST,[8] while the notice of opposition does not bear a time-stamp. However, Applicant points out that filing of the abandonment occurred more than five hours before the Opposer filed an electronic

---

[6] TRAM (Trademark Reporting and Monitoring system) is an internal database of information on applications and registrations used to provide the status and prosecution history displayed to the public in the USPTO's TSDR (Trademark Status and Document Retrieval) database.

[7] TEAS automatically processes the express abandonment of an application and reflects the application's abandoned status in TRAM/TSDR, if it is filed before the application has been approved for publication in the Official Gazette. However, it does not automatically change the application's status to abandoned when the filing is made after the application has been approved for publication. In the latter case, human review and action occurs to update TRAM/TSDR and make the expressly abandoned status accessible to other systems in the USPTO. In either situation, there is an interval from 24 to 72 hours between filing of the document in TEAS and updating in TRAM.

[8] Applicant supplied a copy of the time-stamped document from TSDR as Exhibit A to Defendant's Motion for Relief from Final Judgment (7 TTABVUE 8-9).

application to register the same mark for, inter alia, the same goods as listed in the involved application, which opposer subsequently cited as a basis for its opposition, and which application contains a time stamp of 14:35:30 EST.[9] Thus, in Applicant's view, the sequence of events necessarily involved first, abandonment of his application, second, Opposer's subsequent filing of its application, and third, Opposer's filing of the opposition to Applicant's application.

Opposer suggests that, if the Applicant's suggested sequence of events is accurate, the Board's ESTTA system would not have accepted and docketed the notice of opposition. In this regard, Opposer notes that the TBMP explains that ESTTA will not institute an opposition against an application not subject to opposition (8 TTABVUE 6). *See* TBMP § 306.01.

As noted above, the Board's ESTTA system is separate from the USPTO's TEAS system and the former is not equipped to draw a conclusion about the status of an application, and whether it is subject to opposition, except based on data it accesses automatically in the TRAM system. TRAM is not updated continuously and instantaneously, so at a given point in time, it may not reflect documents such as Applicant's abandonment that recently may have been filed but are not yet uploaded and processed. In any event, ESTTA did institute the opposition because there was no available data in TRAM to indicate that it should not. Unfortunately, with multiple electronic filing systems that operate and update differently, it is not always possible to establish temporal sequence with certainty, even in an electronic filing envi-

[9] Applicant supplied a copy of the time-stamped document as Exhibit B to Defendant's Motion for Relief from Final Judgment (7 TTABVUE 11-28).

ronment; nor is it always true that electronic systems are immediately cognizant of all the data or documents that ultimately bear on a procedural determination of respective rights.

In adopting the proposition that a day is an indivisible period of time for purposes of the situation presented here, we take into account the prejudice that Opposer claims it will suffer. As we said in *First Nat'l Bank of Boston*, in order for us to credit evidence of the exact hour or minute when the filings were made, the opposing party's prejudice must rise to the level of "manifest injustice." *See id*. at 300. Opposer's sole argument that it will be prejudiced if we rely on the proposition cited above and grant Applicant's Rule 60(b) motion is that Opposer may be subject to opposition or cancellation proceedings by Applicant "down the road" and "will be forced to monitor the activities of Applicant at the USPTO for an indeterminate amount of time." (8 TTABVUE 7). Any business that pursues registration of its trademarks and that seeks to protect its trademarks experiences the same expenditure of time and resources. The cost is one of doing business and does not rise to the level of manifest injustice. Moreover, as in *First Nat'l Bank of Boston*, the Board will refund Opposer's opposition fee. *Id*. at 301.

Finally, Opposer argues against a unilateral rule that an abandonment of an application and an opposition filed on the same day are deemed to be filed at the same instant because it reduces the statutory time frame for filing an opposition by one day. Opposer's argument is meritless as an Applicant may abandon an application at anytime during the statutory time frame for opposition without prejudice be-

fore an opposition has been filed, thereby eliminating the statutory opportunity to pursue an opposition altogether. The rule announced in *First Nat'l Bank of Boston* and reaffirmed here is simply an order of precedence adopted by the Board for purposes of managing its own docket.

Decision: The Board grants Applicant's Rule 60(b) motion, vacates the Board's February 28, 2015 order, and dismisses the opposition without prejudice. The opposition filing fee will be refunded to Opposer in due course.