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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91221338
Party	Defendant Polo Gear LLC
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Date	08/12/2016
Attachments	6429-12 and -13 Notice of Appeal to CAFC w decision.pdf(138402 bytes)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Polo Gear Intellectual Properties, Inc. and Pologear LLC, Petitioner or Appellant,

v. **PETITION FOR REVIEW**

PRL USA Holdings, Inc., Respondent or Appellee.

Polo Gear Intellectual Properties, Inc. and Pologear LLC (name all parties* bringing the petition or appeal) hereby petition/appeal the court for review of the Order on D Mot for Relief from JGT: FRCP 60 (describe the order or decision and include decision number) of the Trademark Trial and Appeal Board (name the agency, board, office or bureau) entered on June 14, 2016 (date). The order or decision was received on June 14, 2016 (date).

Date: August 12, 2016

(Signature of petitioner, appellant or attorney)

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**See* Fed. R. App. P. 15 (a) (2) for permissible ways of identifying petitioners.

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2016, the foregoing "Notice of Appeal" was served on counsel of record for Opposer via first-class mail to:

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THIS OPINION IS NOT A PRECEDENT OF THE TTAB

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

Mailed: June 14, 2016

Opposition No. 91207805 (Parent)
Opposition No. 91221338

PRL USA Holdings, Inc.

v.

Polo Gear Intellectual Properties, Inc. and Pologear LLC

Before Quinn, Zervas, and Bergsman, Administrative Trademark Judges.

By the Board:

Judgment was entered against Applicant on January 20, 2016, and consolidated Opposition Nos. 91207805 and 91221338 were dismissed after Applicant failed to respond to an order to show cause why judgment should not be entered.[1] The consolidated cases now come before the Board for consideration of Applicant's "motion for reconsideration and relief from judgment" under Fed. R. Civ. P. 60(b) (filed February 22, 2016). Applicant's motion has been fully briefed.

The Board first notes that while Applicant's motion is titled as a motion for *reconsideration* and relief from judgment, Applicant does not argue that, based on the

[1] The Board issued the order to show cause on November 30, 2015 due to Applicant's failure to respond to the Board's October 21, 2015 order requesting that Applicant either appoint a new attorney or state that Applicant would represent itself.

evidence or prevailing authorities, the Board erred in reaching its decision to enter judgment against Applicant. *See* TBMP § 543 (2015). Therefore, the Board has not considered the motion as one for reconsideration. In addition, Applicant refers to the Board's entry of judgment as a "default judgment." However, the Board entered judgment against Applicant in view of Applicant's apparent loss of interest in each proceeding and not for Applicant's failure to file an answer under Trademark Rule 2.106(a) and Fed. R. Civ. P. 55(a). *See, e.g., Pro-Cuts v. Schilz-Priice Enterprises, Inc.*, 27 USPQ2d 1224 (TTAB 1993) (show cause order issued in view of applicant's apparent loss of interest).[2] In view of the foregoing, Applicant's motion is deemed a motion for relief from judgment under Fed. R. Civ. P. 60(b).

By way of background, On October 14, 2015, Applicant's attorney of record in the subject application filed a request to withdraw as attorney asserting that "Applicant fails to substantially fulfill an obligation to the practitioner regarding the practitioner's services . . . ."[3] As is the Board's practice when an attorney files a request to withdraw, the Board issued an order suspending the proceedings and allowing Applicant 30 days in which to appoint a new attorney or to file a paper stating that it desires to represent itself. Having received no response from Applicant, the Board issued an order to show cause on November 30, 2015 why judgment should not be entered in view of Applicant's failure to respond. Applicant did not respond to the show cause order, and in light of Applicant's apparent loss of

[2] 32 TTABVUE.
[3] 29 TTABVUE at 2. The attorney's first request to withdraw (filed October 9, 2015) did not include proof of service of the request upon the client in accordance with Rule 2.19(b).

interest in the proceeding, the Board entered judgment against Applicant on January 20, 2016.

Applicant, represented by new counsel, submitted a declaration, dated February 22, 2016, from Gary Fellers, founder and Chief Executive Officer of Applicant, with its motion for relief from final judgment which details the facts leading up to, and the reasons for, Applicant's failure to respond to the Board's show cause orders. 34 TTABVUE 33-44. The declaration is accompanied with communications from Applicant's attorney at the time regarding the status of the filing of an appearance/power of attorney and the status of the opposition proceedings.

Mr. Fellers states that, beginning in August of 2012, Applicant was represented by the law firm of Shutts & Bowen, and specifically, by Daniel Barsky, Esq. However, according to Applicant, its "primary point of contact" and the attorney who monitored all of its trademark matters was a senior partner at Shutts & Bowen, LLP named John Mariani. 34 TTABVUE 13, 36. In September of 2015, Mr. Mariani left the firm of Shutts & Bowen to start a new firm. Applicant states that, due to its long relationship with Mr. Mariani, Applicant decided to continue to have Mr. Mariani represent Applicant at his new firm. *Id.*; 36 TTABVUE 77-81. Consequently, the firm of Shutts & Bowen filed its requests to withdraw as Applicant's attorney in each of the preceedings, which the Board granted in an order dated October 21, 2015.[4]

After the withdrawal of Shutts & Bowen as its attorney of record, Applicant instructed Mr. Mariani to file an appearance with the Board for all pending

[4] 30 TTABVUE.

trademark applications and oppositions. Applicant states that it continued to receive notices from the USPTO at its business address regarding several pending deadlines for its applications and opposition proceedings despite repeated assurances from Mr. Mariani that he would represent Applicant in matters before the Board and the USPTO and would attend to all pending trademark matters.[5] After Applicant received the Board order entering judgment in its Board proceedings and several notices of abandonment for other pending applications, Applicant retained new counsel to represent Applicant in the opposition proceedings and all trademark matters at the USPTO.

Applicant argues that its failure to file a response to the Board's show cause order was excusable because Mr. Fellers repeatedly tried to get Mr. Mariani to file an appearance of attorney in the opposition proceedings and to substantively respond to the outstanding orders from the Board, which clearly show that Applicant did not willfully attempt to delay proceedings. Thus, Applicant contends, these efforts could not be characterized as gross neglect of its duties as defendant. Applicant further argues that the "excusable neglect" standard should be construed liberally because Applicant is the defendant in this case and was essentially appearing pro se because its attorney abandoned it; that due to Applicant's diligence in filing the motions to

[5] With respect to Mr. Mariani filing an appearance before the Board, the evidentiary record reflects only one email response from the attorney stating that he would be "doing so this week." 36 TTABVUE 114.

vacate judgment Opposer would suffer no hardship or prejudice if the Board vacates the judgment; and that Applicant has a meritorious defense to the oppositions. [6]

In response to the motion, Opposer argues that Applicant should be held responsible for the neglect of its chosen counsel. In addition, Opposer contends that here, unlike other cases where a party was deceived by its attorney, Applicant had actual knowledge of all deadlines and orders in the proceedings. Further, it contends that Applicant has not demonstrated excusable neglect because (1) the actions of Applicant's counsel were within the reasonable control of Applicant; and (2) the delay was unreasonable because Applicant did not act until four months after the October 21, 2015 notice from the Board allowing Applicant 30 days to appoint new counsel.

Relief from a final judgment under Fed. R. Civ. P. 60(b) is an extraordinary remedy to be granted only in exceptional circumstances. *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991). The method for analyzing excusable neglect under Rule 60(b)(1) was established by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Ptrshp et. al.*, 507 U.S. 380, 396-97 (1993), and explained by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). The factors for determining whether a party's neglect is excusable include: (1)

[6] The Board notes that TBMP § 312 and many of the cases cited by Applicant are inapposite because the standard used therein applies to judgments by *default* for failure to timely file an answer. As discussed, *supra*, judgment was entered in these proceedings for Applicant's apparent loss of interest and not for Applicant's failure to file an answer. The Board treats motions for relief from default judgment with more liberality than other types of judgments because default judgments for failure to timely file an answer are not favored by law. *See, Information Systems and Networks Corp. v. U.S.* (Fed. Cir. 1993); TBMP § 544 (2015). *See also, DeLorme Publishing Co. v. Eartha's Inc.* 60 USPQ2d 122 (TTAB 2000); *Fred Hyman Beverly Hills Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1899 (TTAB 1991).

the danger of prejudice to the non-moving party; (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 movant; and (4) whether movant acted in good faith. *See Pioneer*, 507 U.S. at 395; and *Pumpkin Ltd.*, 43 USPQ2d at 1586-88.

Turning to the first *Pioneer* factor, the danger of prejudice to Opposer, Opposer does not claim that its ability to pursue the opposition has been prejudiced in any way by the delay caused by Applicant's failure to respond to the Board's orders. Thus, the Board finds that the first factor weighs in favor of a finding of excusable neglect.

With respect to the second factor, the length of the delay and its impact on the proceeding, Applicant argues that it was diligent in retaining new counsel and that only a small amount of time has passed since the order to show cause in comparison to the length of the file history. Opposer contends that Applicant did not act until four months after the Board issued the order allowing it 30 days to appoint new counsel or state that it will be appearing pro se.

The Board must take into consideration, not only the length of time between the expiration of the time for responding the Board's order, but also the additional delay resulting from the time required for briefing and deciding the motions to vacate. *See Pumpkin Ltd.*, 43 USPQ2d at 1588.

Here, a response to the Board's order was due from Applicant in the consolidated proceedings on November 20, 2015. The impact of a six month delay in a proceeding is not insignificant. Additionally, there is an impact on the proceeding; it is in the

Board's interest to minimize the amount of time spent on motions which are the result of the failure of a party to follow Board orders or to meet deadlines. *Id.* (The Board has a clear interst in minimizing motions that are the result of sloppy practice or inattention to deadlines). Accordingly, the Board finds that the second factor weighs against a finding of excusable neglect.

We turn next to the third factor in the *Pioneer* analysis, the reason for the delay, including whether the delay was within the reasonable control of Applicant. It is well-settled that the attorney and client share a duty to remain diligent in defending or prosecuting the client's case and that the party is accountable for the acts or ommissions of its chosen counsel. *Pioneer*, 507 U.S. at 396. The decision in *Pioneer* "renders irrelevant any distinction between neglect of counsel and neglect of a party." Thus, Applicant's reliance on *General Motors Corp. v. Cadillac Club Fashions Inc.*, 22 USPQ2d 1933 (TTAB 1992) to support its contention that it was abandoned by its counsel is misplaced. In evaluating the Supreme Court's decision in *Pioneer* and the Board's decision in *Pumpkin Ltd.*, the Board determined that "the Board's *General Motors* decision is no longer good law." *CTRL Systems Inc. v. Ultraphonics of North America Inc.*, 52 USPQ2d 1300, 1302 (TTAB 1999).

In this case, the record indicates that, after Applicant's first attorney of record filed the request to withdraw, Applicant and Mr. Mariani both received notice of the pending deadlines at the USPTO.[7] The record further indicates that Applicant received the Board's orders requiring Applicant's response and other notices from the

[7] *See* February 22, 2016 Declaration of Mr. Fellers at ¶ 29; 34 TTABVUE at 40.

USPTO regarding abandonment of Applicant's pending applications, indicating that Mr. Miriani had not entered an appearance in the opposition proceedings and had failed to act on behalf of Applicant' with respect to matters before the Board.[8]

After careful review of Applicant's affidavit and the attachments, the Board finds that Applicant's failure to respond to multiple Board orders was wholly within the reasonable control of Applicant. There is nothing in the record that would render the conduct of Applicant's attorney, Mr. Mariani, who clearly ignored the Board's orders and Applicant's instructions, excusable. Under *Pioneer*, Applicant is responsible for the inaction or neglect of its chosen counsel. *See CTRL Systems Inc. v. Ultraphonics of North America Inc.*, 52 USPQ2d 1300, 1302 (TTAB 1999); *Cf. Columbia Broadcasting System, Inc. v. De Costa*, 165 USPQ 735 (TTAB 1976) (motion to reopen under Rule 60(b) denied where defendant's initial counsel failed to communicate with defendant regarding status of application or respond to defendant's inquiries); *Syosset Laboratories, Inc. v. TI Pharmaceuticals*, 216 USPQ 330, 332 (TTAB 1982) (motion to set aside judgment against opposer for failure to prosecute denied; incompetent attorney); *Marriott Corp. v. Pappy's Enterprises, Inc.*, 192 USPQ 735, 736 (TTAB 1976) (motion to set aside judgment for failure to prosecute denied; inattention and carelessness not excusable).

In addition, after Applicant's prior law firm, Shutts & Bowen, withdrew from the proceedings, all Board communications were sent to Applicant directly; thus, Applicant was fully aware of the status of the proceedings, the Board's requirements,

[8] 34 TTABVUE 14-15, 41-42.

and the failures of its chosen counsel to enter an appearance or respond to the orders.[9] Indeed, the Board's initial order after Shutts & Bowen's request to withdraw was specifically directed to Applicant, requiring Applicant to appoint new counsel or file a response stating that Applicant would represent itself.[10] To reiterate, at no time thereafter did Mr. Mariani ever enter an appearance and, thus, Mr. Mariani was never on the file as the attorney of record. Filing a response to the Board's order was the resposibility of Applicant and clearly within Applicant's reasonable control. Thus, Applicant's failure to respond could not be considered excusable neglect.

In view of the foregoing, the Board finds that Applicant's failure to respond to the Board's orders was a direct result of Applicant and Mr. Mariani's negligence. Therefore, the third *Pioneer* factor weighs strongly against a finding of excusable neglect.

Finally, there is no evidence in the record that Applicant's failure to respond to the Board's orders was the result of bad faith on the part of Applicant or its counsel. Accordingly, the fourth *Pioneer* factor weighs in favor of a finding excusable neglect.

In weighing the *Pioneer* factors, the Board has held that the third *Pioneer* factor may be deemed the most important of the factors in a particular case. *See Luster Products Inc. v. Van Zandt*, 104 USPQ2d 1877, 1879 (TTAB 2012); *Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1702 (TTAB 2002);

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[9] The fact that Applicant was at all times aware of the facts of this case distinguishes this case from decisions prior to *Pioneer* and *Pumpkin* such as *General Motors Corp. v. Cadillac Club Fashions Inc.*, 22 USPQ2d 1933 (TTAB 1992), where critical facts were concealed from the moving party.

[10] *See* 30 TTABVUE.

Pumpkin Ltd. v. The Seed Corps, 46 USPQ2d 1582, 1586 n.7 (TTAB 1997) (Board identified the second and third factors as the dominant factors). In view thereof, and in consideration of the facts and evidence herein, the Board, in its discretion, finds that the reason for the delay, which was a direct result of Applicant and its attorney's controllable negligence, combined with the length of the delay and the Board's interest in deterring such negligence outweighs the lack of evidence of bad faith and prejudice in this case.

Accordingly, Applicant's motion for relief from judgement under Fed. R. Civ. P. 60(b) is DENIED. The order dated January 20, 2016 stands.