UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Baxley

Mailed: August 17, 2016

Opposition No. 91221837

Bibiji Inderjit K Puri

v.

Bad Yogi LLC

Before Richey, Deputy Chief Administrative Judge,
and Kuhlke and Lykos, Administrative Trademark Judges.

By the Board:

Pursuant to the schedule set forth in the Board's August 7, 2015 order, Opposer's testimony period closed on May 29, 2016. This case now comes up for consideration of (1) Applicant's combined motion (filed June 27, 2016) to dismiss under Trademark Rules 2.132(a) and (b); and (2) Opposer's motion (filed July 19, 2016) to reopen her testimony period to file an amended notice of reliance in which she makes of record registrations and applications identified but not submitted with her first notice of reliance. Opposer's motion was incorporated into her brief in response to Applicant's motion to dismiss.

Applicant did not file either a reply brief in support of its Rule 2.132 motion or a brief in response to Opposer's motion to reopen her testimony period. However, because Opposer's motion to reopen her testimony period is effectively a cross-motion to Applicant's Rule 2.132 motion, we decline to grant the motion to reopen as conceded. *See* Trademark Rule 2.127(a). *See also* TBMP § 502.04 (2016).

Opposer's assertion that the Rule 2.132 motion is untimely is incorrect. In the Board's August 7, 2015 order, Applicant's testimony period was reset to close on July 28, 2016 and therefore opened on June 29, 2016. Applicant's motion to dismiss under Trademark Rule 2.132(a) was due prior to the opening of its testimony period. *See* Trademark Rule 2.132(c). Because Applicant was allowed until June 28, 2016 to file its Rule 2.132 motion, Applicant's filing of that motion on June 27, 2016 was indeed timely.

Opposer's assertion that the motion is improper because it requires a review of the evidentiary record prior to final decision is also incorrect. The Board can decide motions prior to final hearing, such as those decided in this order, that can be resolved by simply reviewing the face of the notice of reliance and attached documents, if any. *See* TBMP § 707.02.

Regarding the evidentiary record in this case, Opposer pleaded four registrations and four applications in the text of the notice of opposition and two registrations and four applications in the ESTTA cover form of the notice of opposition.[1] Opposer,

[1] In the text of the notice of opposition, Opposer pleads that she owns six marks which include forms of the word YOGI (paragraph 4); that she has used these marks on various goods since "as early as 1983" (paragraphs 5 and 6); that four registrations and two applications are "held by" third parties "for the benefit of" Opposer (paragraphs 7 through 12); and that two additional applications are "held by" Opposer (paragraphs 13 and 14). Although Opposer alleges that she uses her pleaded marks "through licensees" (paragraph 4), she does not precisely identify the relationship between Opposer and each of the third parties who hold registrations and applications for her benefit. 1 TTABVUE.

To the extent that Opposer claims ownership of pleaded marks on one hand, but has allowed third parties to register and apply to register those marks on the other, we note that only the owner can apply to register a mark, and that an application may be void *ab initio* if it was filed by an entity that was not the owner of the mark on the application filing date. *See Wonderbread 5 v. Gilles*, 115 USPQ2d 1296, 1303 (TTAB 2015).

Applicant, in its answer, "admits that Opposer purports to own and use the marks listed in paragraph 4," but otherwise denied specific allegations regarding Opposer's pleaded

however, did not submit any copies of the registrations and applications at issue as exhibits to the notice of opposition. 1 TTABVUE 1-8. Merely identifying a registration in the ESTTA cover form for a notice of opposition is insufficient to make that registration of record. *See Melwani v. Allegiance Corp.*, 97 USPQ2d 1537, 1540 (TTAB 2010). Rather, a pleaded registration will be received in evidence and be made of record in an opposition proceeding where the opposer submits as an exhibit to the notice of opposition

> an original or photocopy of the registration prepared and issued by the United States Patent and Trademark Office showing both the current status of and current title to the registration, or by a current printout of information from the electronic database records of the USPTO showing the current status and title of the registration.

Trademark Rule 2.122(d)(1).

Regarding the pleaded applications, however, there is no means by which a pleaded application will be received in evidence and made of record in an opposition proceeding through submission as an exhibit to a notice of opposition.[2] *See* Trademark Rule 2.122(c) (except as provided in Rule 2.122(d)(1) exhibits to pleadings are not evidence unless properly made of record at trial). Based on the foregoing, we

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registrations and applications and Opposer's claimed use of her pleaded marks since 1983. 4 TTABVUE, paragraphs 4 through 15.

During the pendency of this proceeding, pleaded application Serial No. 77784202 matured into Registration No. 4961890. However, pleaded application Serial No. 77871656 became abandoned after Opposer failed to file a statement of use.

[2] In any event, an application has "no probative value other than as evidence that the application was filed." *In re Phillips-Van Heusen Corp.,* 63 USPQ2d 1047, 1049 n.4 (TTAB 2002). Dates of use set forth in an application or registration are not evidence of use; such dates must be established by competent evidence. *See* Trademark Rule 2.122(b)(2).

find that Opposer did not make any evidence properly of record with her notice of opposition.

In the final week of the discovery period, Opposer, on February 24, 2016, filed her "first notice of reliance," wherein she listed, but did not include copies of, the registrations and applications upon which she intends to rely in this case.[3] That notice of reliance included statements that "[a]ll such documents are of public record and/or equally available to both parties." 7 TTABVUE 2 and 3. Even if we assume that the documents at issue are indeed public records that are equally available to both parties, the Board does not take judicial notice of USPTO records. *See UMG Recordings Inc. v. O'Rourke*, 92 USPQ2d 1042, 1046 (TTAB 2009). Further, merely listing registrations and applications in the first notice of reliance is insufficient to make them properly of record. *See In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012). Rather, we treat the first notice of reliance as analogous to a pretrial disclosure of documents that Opposer expected to offer during her testimony period.[4] *Cf.* Fed. R. Civ. P. 26(a)(3)(A)(iii); TBMP § 702.

After filing the first notice of reliance, Opposer took no other testimony and filed no other evidence until she filed an amended notice of reliance as an exhibit to her

[3] Although the first notice of reliance was prematurely filed more than two months prior to the commencement of Opposer's testimony period *(see* Trademark Rules 2.122(d)(2) and 2.122(e)), Applicant did not object to the premature filing of the notice of reliance until four months later, when it filed its Rule 2.132 motion. Because the premature filing of the notice of reliance could have been cured if a prompt objection was made, we deem any objection as to early filing of the first notice of reliance to be waived. *See ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1037 n.2 (TTAB 2012).

[4] The Board does not require pretrial disclosure of documents that a party plans to introduce at trial. *See* TBMP § 702.01.

brief in response to the Rule 2.132 motion and in support of her motion to reopen. In that brief, Opposer appears to confuse pretrial disclosure of information to Applicant by way of the notice of opposition, initial disclosures and the notice of reliance with making evidence of record during her testimony period. Even if Applicant had notice of the registrations and applications upon which Opposer intended to rely upon in this case prior to trial, Opposer failed to take proper steps to make those registrations and applications properly of record during her testimony period. That is, Opposer allowed this case to proceed past the close of her testimony period without making any evidence properly of record.

Because Opposer's testimony period has closed and Applicant has filed a motion for judgment under Trademark Rule 2.132(a), Opposer must show good and sufficient cause why judgment should not be rendered against her, failing which the opposition will be dismissed with prejudice. The "good and sufficient cause" standard, in the context of Trademark Rule 2.132(a), is equivalent to the "excusable neglect" standard which Opposer would be required to meet under Fed. R. Civ. P. 6(b)(1)(B) to reopen its testimony period. *See PolyJohn Enters. Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860, 1860-61 (TTAB 2002).

There are four factors to be considered, in the context of all the relevant circumstances, to determine whether a party's neglect of a matter is excusable. They are: (1) 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 the moving party; and, (4) whether

the moving party has acted in good faith. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 395 (1993). These factors do not carry equal weight. *See FirstHealth of the Carolinas Inc. v. CareFirst of Maryland Inc.,* 479 F.3d 825, 81 USPQ2d 1919, 1921-22 (Fed. Cir. 2007) (Court affirmed finding of no excusable neglect based on second and third factors, with third weighed heavily in the analysis). The Board has noted on numerous occasions that, as several courts have stated, the third factor may be considered the most important factor in any particular case. *See, e.g., Pumpkin Ltd. v. The Seed Corps,* 43 USPQ2d 1582, 1586 n.7 (TTAB 1997).

Turning initially to the third *Pioneer* factor, we find that Opposer's delay was caused by her failure to follow "simple and clear" rules regarding filing of registrations and official USPTO records under notice of reliance in Board proceedings. *Sterling Jewelers Inc. v. Romance & Co.*, 110 USPQ2d 1598, 1601 (TTAB 2014). Even if such failure was the result of neglect by Opposer's attorney, action, inaction or even neglect by Opposer's attorney does not entitle Opposer to another day in court. *See, e.g., Williams v. The Five Platters, Inc.*, 510 F.2d 963, 184 USPQ 744 (CCPA 1975), *aff"d,* 181 USPQ 409 (TTAB 1974). The Board finds therefore that Opposer's failure to take appropriate action prior to the close of her testimony period was within Opposer's reasonable control and weighs heavily against a finding of excusable neglect.

In addition, regarding the second *Pioneer* factor, we find that, from a docket management standpoint, that the delay has a significant potential impact on this case. Because Opposer allowed her testimony period to close without presenting any

case-in-chief, this case is over, unless we reopen Opposer's testimony period. Such a reopening would delay resolution of this case by several months and runs counter the Board's interest in an expeditious adjudication of its cases. "Both the Board and parties before it have an interest in minimizing the amount of the Board's time and resources that must be expended on matters, such as the motions decided herein, which come before the Board solely as a result of one party's failure to understand ... clear and straightforward rule[s]." *PolyJohn Enters. Corp.,* 61 USPQ2d at 1862. The Board's interest in deterring such failure weighs against a finding of excusable neglect under the second *Pioneer* factor. However, with regard to the remaining *Pioneer* factors, there is no evidence of bad faith attempt by Opposer, nor of specific prejudice to Applicant beyond mere delay.[5]

As additional arguments in favor of her motion to reopen, Opposer contends that the Board has sustained other oppositions in her favor where she did not take testimony; that, in view of these other oppositions, Opposer elected not to take discovery in this case; and that "Opposer's registrations and applications for the YOGI marks were reviewed by Applicant's counsel immediately as admitted on record in [Applicant's] Answer." 10 TTABVUE 4. However, Opposer has not identified any Board proceedings in which she was the plaintiff and the Board entered judgment in

[5] Opposer contends that she would be prejudiced by dismissal of the opposition. However, in deciding whether there is excusable neglect, we are concerned with whether the adversary of the party seeking to show excusable neglect will be prejudiced. *See, e.g., Vital Pharms. Inc. v. Kronholm*, 99 USPQ2d 1708, 1710-11 (TTAB 2011); *Trek Bicycle Corp. v. StyleTrek Ltd.*, 64 USPQ2d 1540, 1541 (TTAB 2001).

her favor after trial.[6] Further, the motions at issue in this decision were filed as a result of Opposer's failure to properly make any evidence of record during her testimony period. Whether she took discovery or testimony in this case is irrelevant. In addition, as noted *supra*, Applicant's answer indicates that Applicant denied specific allegations regarding Opposer's pleaded registrations and applications and Opposer's claimed use of her pleaded marks since 1983. 4 TTABVUE, paragraphs 4 through 15.

Based on the foregoing, we find, on balance, that Opposer has not demonstrated excusable neglect to warrant proceeding any further with this case. Opposer's cross-motion to reopen her testimony period is therefore denied.[7] In view of Opposer's failure to submit evidence or take testimony during her testimony period, Applicant's motion to dismiss under Trademark Rule 2.132(a) is granted.[8] The opposition is dismissed with prejudice.

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[6] We further note that whether or not Opposer took discovery in this case is not relevant to the issue at hand, failure to submit testimony and evidence during trial, and that the existence of other proceedings also does not obviate the failure to present evidence in this proceeding. "As always, each case must be determined on its own merits." *Miguel Torres S.A. v. Casa Vinicola Gerardo Cesari S.R.L.*, 49 USPQ2d 2018, 2020 (TTAB 1998).

[7] Opposer's amended notice of reliance is untimely and therefore will receive no consideration. *See* Trademark Rules 2.122(d) and (e) (notices of reliance must be filed during the filing party's testimony period).

[8] Applicant's motion to dismiss under Rule 2.132(b) for failure to show entitlement to the relief sought is moot.