THIS ORDER IS NOT A PRECEDENT OF THE TTAB

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Trademark Trial and Appeal Board
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October 7, 2024

Opposition No. 91285334

Yong Tang

v.

Terasako and Shenzhen Dekelan Technology Co., Ltd.

Before Cataldo, Wellington, and Allard, Administrative Trademark Judges.

By the Board:

This proceeding is before us for consideration of Applicant's[1] motion for relief from final judgment, pursuant to Fed. R. Civ. P. 60(b). 32 TTABVUE.

[1] Though Shenzhen Dekelan Technology Co., Ltd. was previously joined as party-defendant in this proceeding, we use the singular form "Applicant." 8 TTABVUE.

In this order, citations to the record are to TTABVUE, the Board's online docketing system. *See Turdin v. Trilobite, Ltd.*, Conc. Use No. 94002505, 2014 WL 343270, at *2 n.6 (TTAB 2014); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 106.03 (2024). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any number(s) following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, the citation form in this order is in a form provided in TBMP § 101.03. This order cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this order employs citation to the Westlaw (WL) database. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

Opposer did not respond to the motion,[2] and the time to do so has passed. *See* Trademark Rule 2.127(a). Notwithstanding, we do not treat the motion as conceded; instead, we decide the motion on the merits. *See Prospector Cap. Partners, Inc. v. DTTM Operations LLC*, Can. No. 92063494, 2017 WL 3620060, at *6 (TTAB 2017); Trademark Rule 2.127(a); *cf.* TBMP § 544 ("The Board does not automatically approve such stipulations or consented motions [to vacate or set aside a final judgment], but independently determines whether vacatur is warranted.") (citation omitted).

I. Background

On September 1, 2023, Applicant's counsel requested to withdraw (9 TTABVUE), which the Board granted on September 5, 2023 (10 TTABVUE).

In granting the withdrawal, the Board gave Applicant time to appoint new counsel or to state that it would be proceeding pro se. 10 TTTABVUE 1.

After, it was brought to the Board's attention that Applicant is foreign domiciled, so, on October 12, 2023, the Board gave Applicant time to appoint U.S. counsel in accordance with Trademark Rule 2.11.[3] 12 TTABVUE.

[2] The certificate of service accompanying the motion does not include the date of service, in contravention of Trademark Rule 2.119(a). 32 TTABVUE 5. Notwithstanding, to expedite matters and because the interests of the parties would be served thereby, we will consider the motion. *See Coffee Studio LLC v. Reign LLC*, Can. No. 92066245, 2019 WL 990243, at *2 n.7 (TTAB 2019) ("We note the Board may exercise its inherent authority under individual circumstances to consider a filing on the merits where service issues are present.") (citation omitted); *see also* TBMP § 113.02.

[3] For this reason, the Board did not consider Applicant's "Motion to Compel to Dismiss the Opposition," which was filed in Applicant's pro se capacity. 11 TTABVUE.

Applicant did not respond nor did counsel appear, so, on November 28, 2023, the Board gave Applicant time to show cause why judgment should not be entered against it based on an apparent loss of interest in the proceeding. 13 TTABVUE.

Applicant, then, filed "Motion[s] to Compel to Dismiss the Opposition" on December 26, 2023 (14 TTABVUE) and January 3, 2024 (15 TTABVUE), which were not considered because they were filed in Applicant's pro se capacity and did not address the U.S.-counsel requirement (16 TTABVUE). However, these submissions indicated to the Board that Applicant had not lost interest in the proceeding, so, on January 17, 2024, the Board gave Applicant additional time to appoint U.S. counsel. 16 TTABVUE.

Applicant did not respond nor did counsel appear, so, on February 20, 2024, the Board gave Applicant time to show cause why the notice of opposition should not be sustained based on Applicant's failure to appoint U.S. counsel. 17 TTABVUE.

Applicant did not respond nor did counsel appear, so, on April 3, 2024 the Board entered judgement against Applicant, sustained the opposition, and refused registration of the involved mark. 18 TTABVUE.

Thereafter, on April 17, May 13, and May 14, 2024, Applicant, in its pro se capacity, filed "Motion[s] to Extend the Opposition" (20, 22, 24 TTABVUE), and, on May 18, 2024, Applicant, in its pro se capacity, filed a "Motion to Reinstate the Opposition" (26 TTABVUE). These submissions were not considered given Applicant's failure to include any proof of service or failure to serve Opposer's current counsel. 21, 23, 25, 28 TTABVUE.

On June 11, 2024, Applicant, through U.S. counsel Clement Cheng, filed a Petition to the Director, requesting that the opposition be reinstated, the involved, now-abandoned application be revived, and "additional time [be given] to search for and appoint an attorney." 27 TTABVUE.

Because of Applicant's request for "additional time to search for and appoint an attorney," notwithstanding the fact that putative new counsel signed and filed the Petition to the Director, on June 18, 2024, the Board gave Applicant's counsel time to state whether he is, in fact, representing Applicant in the proceeding. 28 TTABVUE.

On July 2, 2024, Applicant's counsel filed a "Revocation of Powers of Attorney and Change of Correspondent Address" that Applicant and its new counsel signed.[4] 29 TTABVUE. Therein, counsel was formally identified as Applicant's attorney of record.

On July 31, 2024, the Petition to the Director was denied. 30 TTABVUE.

The instant motion for relief from final judgment followed on August 29, 2024. 32 TTABVUE.

II. Standard

Once a final judgment has been entered against a party, judgment may be set aside in accordance with Fed. R. Civ. P. 60(b). Relief from a final judgment is an extraordinary remedy to be granted only in exceptional circumstances or when other equitable considerations exist. *See Djeredjian v. Kashi Co.*, Can. No. 92019384, 1991 WL 332560, at *2 (TTAB 1991).

[4] The submission failed to include proof of service. *See* Trademark Rule 2.119(a).

Applicant relies on Fed. R. Civ. P. 60(b)(1), which permits the Board to "relieve a party or its legal representative from a final judgment, order, or proceeding" because of "mistake, inadvertence, surprise, or excusable neglect."[5] 32 TTABVUE 2. Applicant's motion, moreover, is timely because it was filed within one year of judgment. *See* Fed. R. Civ. P. 60(c)(1).

A determination of excusable neglect requires consideration of the following factors set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 395 (1993), and which the Board applied in *Pumpkin Ltd. v. Seed Corps*, Opp. No. 91099224, 1997 WL 473051, at *5 (TTAB 1997) (quoting *Pioneer*, 507 U.S. at 395) (brackets in original): "the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Whether neglect is excusable "is at bottom an equitable [determination], taking account of all relevant circumstances," *Pioneer*, 507 U.S. at 395, and lies within the Board's discretion, *see FirstHealth of the Carolinas, Inc. v. CareFirst of Md., Inc.*, 479 F.3d 825, 828 (Fed. Cir. 2007).

[5] In deciding whether to grant relief from judgment under Fed. R. Civ. P. 60(b)(1), the Board has applied the "excusable neglect" standard, even in situations that may be described as "mistake" or "inadvertence." *See S. Indus., Inc. v. Lamb-Weston, Inc.*, Can. No. 92025580, 1997 WL 818018, at *3 (TTAB 1997) (applying "excusable neglect" standard where movant argued that failure was result of "mistake, inadvertence, and/or excusable neglect" because movant had mistaken belief).

III. Analysis

A. First *Pioneer* Factor – Prejudice

Inasmuch as Opposer did not respond to the motion, we have no argument or evidence of prejudice to Opposer. *See Pumpkin*, 1997 WL 473051, at *7 ("[T]here has been no showing that any of applicant's witnesses and evidence have become unavailable as a result of the delay in proceedings.") (citations and footnote omitted).

Thus, this weighs in favor of finding excusable neglect.

B. Second *Pioneer* Factor – Length and Impact of Delay

"[I]n addition to the time between the expiration of the time for taking action and the filing of the [instant] motion …, the calculation of the length of the delay in proceedings also must take into account the additional, unavoidable delay arising from the time required for briefing and deciding the motion." *Id.*

Though the motion was filed only one month ago, it also was filed five months after judgment was entered. 18 TTABVUE. In addition, granting the motion would require resetting the schedule to account for suspension of this proceeding from more than a year ago. 10 TTABVUE. This would be significantly detrimental to the Board's orderly administration of this proceeding because, when suspended, the next deadline was initial disclosures, but had Applicant timely appointed U.S. counsel, this proceeding could be in the trial briefing stage. 2 TTABVUE 3; *see, e.g.*, *Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, Opp. No. 91120235, 2002 WL 1832021, at *3 (TTAB 2002).

Accordingly, this weighs against a finding of excusable neglect.

C. Third *Pioneer* Factor – Reason for Delay

The third factor concerns the reason for the delay.

Applicant argues that it "did not understand the TTAB proceeding and attempted to handle it without legal representation and misunderstanding of the TTAB proceeding," and that it "did not engage an attorney to manage the proceedings and was not fully aware of the procedural requirements." 32 TTABVUE 2.

However, these assertions are belied by the five orders that have been issued in this proceeding pertaining to the U.S.-counsel requirement for foreign-domiciled parties, including two show-cause orders and two orders that explicitly informed Applicant of its obligation to appoint U.S. counsel. 2, 12-13, 16-17 TTABVUE. At no point before the Board entered judgment did Applicant advise the Board of its efforts, if any, to comply with the U.S.-counsel requirement; instead, Applicant improperly filed, in its pro se capacity, three submissions directed to the merits of the proceeding. 11, 14-15 TTABVUE. Only after judgment was entered did Applicant, again in its pro se capacity, file submissions addressing the U.S.-counsel requirement. 20, 22, 24, 26 TTABVUE. But these post-judgment submissions do not explain what, if any, efforts Applicant undertook in the many months preceding judgment to secure U.S. counsel; in fact, it appears Applicant did not begin contacting potential U.S. counsel until after judgment was entered. 24 TTABVUE 3-4.

Applicant does not produce any evidence demonstrating that its months-long failure to comply with the U.S.-counsel requirement, of which it was made aware a

number of times, was outside Applicant's reasonable control.[6]

In view thereof, this factor weighs against a finding of excusable neglect.

D. Fourth *Pioneer* Factor – Good Faith

Inasmuch as there is no evidence of Applicant's good or bad faith, this factor is neutral. *See Dating DNA, LLC v. Imagini Holdings, Ltd.*, Opp. No. 91185884, 2010 WL 1822098, at *3 (TTAB 2010).

E. Balancing the *Pioneer* Factors

Insofar as Applicant has not presented an acceptable explanation for its failure to timely appoint U.S. counsel, this combined with the length of the delay occasioned by this failure outweigh any lack of prejudice to Opposer. *See FirstHealth of the Carolinas*, 479 F.3d at 829-30 (affirming Board's finding of inexcusable neglect based on second and third *Pioneer* factors). Thus, Applicant has failed to demonstrate that it is entitled to relief from final judgment under Fed. R. Civ. P. 60(b)(1).

IV. Decision

Applicant's Fed. R. Civ. P. 60(b) motion is **denied**, and the April 3, 2024 order entering judgment against Applicant **stands** as issued.

[6] For example, Applicant argues that "it is [s]o difficult[] to seek a qualified lawyer" because it "[o]nly can search by Internet, [b]ut Google is [p]rohibited by China['s] government." 20 TTABVUE 2. Even assuming that this is true, Applicant does not assert that other search engines or resources were not available to Applicant.