

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

Mailed: August 14, 2015

Opposition No. 92052260

Steven Westlake

v.

Edgar Alexander Barrera

**Before Ritchie, Wolfson and Masiello,
Administrative Trademark Judges.**

By the Board:

Respondent owns a registration for the mark THE NATIONAL POLICE GAZETTE THE LEADING ILLUSTRATED SPORTING JOURNAL IN AMERICA and design, depicted below:



for “magazines in the field of current events and sports,” in International Class 16 and “publication of magazines; newspaper publication; newspaper publishing,” in International Class 41.¹ In his amended petition to cancel filed September 15, 2010, Petitioner set forth claims of fraud and false

¹ Registration No. 3662484 issued August 4, 2009 claiming a date of first use anywhere and in commerce of January 2, 1977 for both classes.

suggestion of a connection under Section 2(a).² In his amended answer, Respondent denied the salient allegations in the amended petition to cancel.

As last reset, Petitioner's testimony period was scheduled to close on July 29, 2014, and that period was not extended. During his testimony period, Petitioner failed to introduce any evidence or testimony. In the Board's January 28, 2015 order, the Board allowed Petitioner until February 12, 2015 to show cause why judgment should not be rendered against him for failure to prosecute this case. On February 18, 2015, Petitioner filed a combined motion to reopen his time to respond to the Board's show cause order, together with his combined response to the show cause order and motion to reopen his testimony period.³ Respondent opposes the combined motions and submitted arguments against Petitioner's response to the show cause order.⁴ The Board has considered the parties' submissions and presumes the parties' familiarity with the factual bases for the motions, and does not recount them here, except as necessary to explain the Board's decision.

² The original petition to cancel was filed March 29, 2010. The Board's September 24, 2010 order accepted the amended petition to cancel as Petitioner's operative pleading.

³ Inasmuch as Petitioner argues that he "should be granted this one extension of time to submit evidence," the Board construes this language as a motion to reopen his testimony period. *Response* at. p. 8.

⁴ Respondent filed "responses" to the Board's January 28, 2015 show cause order on February 12, 2015, even though no response from Respondent was called for.

Respondent also filed papers March 27, 2015 and April 3, 2015 alleging, *inter alia*, that Petitioner's February 18, 2015 combined motion to reopen and response to the Board's show cause order was not properly served on Respondent. The Board's April 9, 2015 order served those papers on Respondent allowing Respondent additional time to file a response. Respondent filed a response on April 23, 2015 and the same response, this time notarized, again on April 26, 2015 (in duplicate).

Motion to Reopen

The Board first addresses the motion to reopen Petitioner's time to file a response to the Board's show cause order. Petitioner, supported by affidavits from his attorney and paralegal, alleges that Petitioner's attorney, Mr. Mark Levy, prepared a response prior to the deadline and sent it to his paralegal, Ms. Amy Manzer on February 12, 2015 for filing with the Board; that Mr. Levy resides in Florida while Ms. Manzer works in the firm's main office in Birmingham, New York; that unbeknownst to Mr. Levy, Ms. Manzer was involved in a serious automobile accident on February 8, 2015 with resulting injuries and a doctor's visit on February 10, 2015; and that because of the accident, Ms. Manzer was unable to file the response to the show cause order by the Board's February 12, 2015 deadline.

For the Board to reopen Petitioner's time to respond to the Board's show cause order, Petitioner must establish that his failure to act in a timely manner was the result of excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B); TBMP § 509.01(b)(1). In *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380, 395 (1993), as adopted by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the Supreme Court held that the determination of whether a party's neglect is excusable is:

at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include... [1] the danger of prejudice to the [nonmovant], [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 movant, and [4] whether the movant acted in good faith.

We consider Petitioner's motion to reopen time to respond to the Board's show cause order in light of these factors. Regarding the first *Pioneer* factor, there does not appear to be any prejudice to Respondent. Prejudice to the nonmovant as contemplated under the first *Pioneer* factor must be more than mere inconvenience or delay. Prejudice to the nonmovant is prejudice to the nonmovant's ability to litigate the case. *See Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d at 1587 (*citing Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997)); TBMP § 509.01(b)(1).

Regarding the second *Pioneer* factor, Petitioner filed the motion to reopen six days after the deadline for his response. Accordingly, the impact of the delay upon this proceeding is insignificant and weighs in favor of a finding of excusable neglect.

Turning to the third *Pioneer* factor, the Board finds that Petitioner's failure to timely act was caused by his paralegal's automobile accident and resulting injuries. Ms. Manzer's condition apparently rendered her unable to file Petitioner's already-prepared response. Accordingly, this factor weighs in favor of a finding of excusable neglect. Finally, regarding the fourth *Pioneer* factor, there is no evidence of bad faith on Petitioner's part.

In view thereof, the motion to reopen Petitioner's time to respond to the Board's show cause order is **granted**. The Board now considers Petitioner's response to the Board's show cause order.

Response to Show Cause Order and Motion to Reopen Testimony

Petitioner alleges, *inter alia*, that the Board should set aside its show cause order for failure to prosecute because the proceeding has languished for five years due to Respondent's various requests for extensions of time based upon Respondent's alleged need to retain counsel and to recover from various medical emergencies; that allowing the parties to now submit evidence will allow the Board to determine the case on its merits and thus, will not prejudice Respondent's ability to defend the claims; that this delay is slight; that Petitioner failed to submit evidence or testimony because of "the difficulty [he] has endured to continue publishing *The National Police Gazette* on a monthly basis while simultaneously remaining abreast of and responding to Respondent's numerous requests for extensions and stays," *Response* at p. 5; that given the totality of factors, "equity favors permitting Petitioner to reopen these proceedings," *id.* at p. 6; and that Petitioner has always acted in good faith.

The Trademark Rules clearly state that no testimony shall be taken except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. Trademark Rule 2.121(a)(1); *see also* TBMP § 705 and cases cited

therein. In order to discharge the Board's show cause order for failure to prosecute his case, Petitioner must demonstrate "good and sufficient cause" why judgment should not be entered against it. *Cf.* Trademark Rule 2.132(a). The Board has previously held that the "good and sufficient cause" standard set out in Trademark Rule 2.132(a) is equivalent to the "excusable neglect" standard applied to a motion to reopen. *Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1702 (TTAB 2002). As previously discussed, in analyzing excusable neglect, the Board relies on the Supreme Court's discussion in *Pioneer Investment Services Co.*, 507 U.S. 380.

With regard to the danger of prejudice to the Respondent, we note that the mere passage of time is generally not considered prejudicial, absent the presence of other facts, such as the loss of potential witnesses, which has not been alleged here. *Pumpkin*, 43 USPQ2d at 1587. Although the delay to Respondent may not be prejudicial, the Board finds the delay occasioned by Petitioner's failure to submit evidence in support of his case is substantial. Petitioner's trial period expired July 29, 2014 yet he did not file his motion to reopen testimony until the scheduled testimony periods for both parties expired and only after the Board issued its show cause order on January 28, 2015. Further, while there is no evidence Petitioner acted in bad faith, Petitioner has offered no reasons why he was not diligent in prosecuting his case, except to say it was difficult to publish *The National Police Gazette* on a

monthly basis and respond to the various motions filed by Respondent.⁵ *See Pumpkin, Ltd.*, 43 USPQ2d at 1586, n.7 (In undertaking the Pioneer analysis, several courts have stated that the third *Pioneer* factor, namely the reason for the delay and whether it was within the reasonable control of the movant, might be considered the most important factor). We find the reason for the delay was within Petitioner's control and this factor weighs strongly in favor of Respondent.

Considering the circumstances herein, the Board finds that Petitioner's failure to take testimony or offer evidence was not the result of excusable neglect. Accordingly, Petitioner's motion to reopen his testimony period is **denied**.

Inasmuch as Petitioner has not submitted any record evidence or testimony in support of his case, the Board enters judgment in favor of Respondent. The cancellation is **dismissed**.

⁵ Although Petitioner argues that Respondent occasioned many delays in this proceeding, we note that it was Petitioner who brought the proceeding. Respondent's delays are no excuse for Petitioner's failure to prosecute.