

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

DETROIT ENTERTAINMENT, LLC.)
)
) Opposer,)
)
) vs.)
)
) MOTOR CITIES CASINOS, LLC.)
)
) Applicant.)
)
)

Opposition No. 91151905



10-01-2003

U.S. Patent & TMO/tm Mail Rpt Dt. #57

**APPLICANT'S REPLY TO PLAINTIFF/DETROIT ENTERTAINMENT'S RESPONSE
TO APPLICANT'S MOTION FOR JUDGMENT FOR FAILURE TO PROVE CASE**

I. Introduction

Plaintiff/Opposer Detroit Entertainment has failed to meet its burden of establishing excusable neglect for its failure to take any testimony or present any evidence during its testimony period. Rather than providing a basis for excusable neglect, Plaintiff provides a mish mash of excuses that tend to center on the conduct of Defendant and its counsel rather than Plaintiff -- a Plaintiff that admittedly knew of the testimony period deadline and its duties during that period. Nor does Plaintiff explain the substance of a purported miscommunication between Plaintiff and its counsel. The Board is left to speculate as to what miscommunication occurred, why it occurred and how this miscommunication caused Plaintiff to ignore a critical deadline. No excusable neglect exists within the explanation and excuses offered by the Plaintiff.

II. Plaintiff has Failed to Meet the Excusable Neglect Standard as Established by the Supreme Court in *Pioneer* and as Interpreted by the Board

The Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993) established the modern excusable neglect standard. The Pioneer excusable neglect standard has been recently interpreted and applied by the Board in *Old Nutfield Brewing Co. Ltd. v. Hudson Valley Brewing Company, Inc.* 65 U.S.P.Q.2d 1701 (TTAB 2002). In *Hudson* the Plaintiff attempted to reopen discovery after failing to take any action during its testimony period. The Board recounted the *Pioneer* elements weighed in establishing excusable neglect as (1) the danger of prejudice to the [nonmoveant], (2) the length of 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. See, *Pioneer*, 507 U.S. at 395. In *Hudson*, the Board held that "consistent with several circuit courts of appeal, the Board has found the third Pioneer factor, namely, the reason for the delay, and whether it was within the reasonable control of the movant, to be of paramount importance." See also, *Pumpkin Ltd. v. The Seed Corps.*, 43 U.S.P.Q.2d 1582 (TTAB 1997).

In the instant matter, it appears that Plaintiff's purported basis for not submitting any evidence during the testimony period was the "unfortunate result of miscommunications between Plaintiff and its counsel." See Plaintiff's brief at page 10. Plaintiff also states that the miscommunication "was not the result of inadvertence or failure to meet calendar deadlines." In the affidavit of Plaintiff's counsel (attached to Plaintiff's brief) comprising five pages, only three sentences are devoted to explaining this miscommunication that resulted in a failure to prosecute during the testimony

period. These two paragraphs, numbers 25 and 26 of Plaintiff's counsel's affidavit, essentially state in conclusive fashion that there was a miscommunication between Plaintiff and its counsel. Plaintiff, however, fails to explain the substance of the miscommunication or how it affected the decision making process that resulted in a failure to offer any evidence during the testimony period. Specifically, what was the miscommunication between Plaintiff and its counsel? Plaintiff has not shared this information, nor has Plaintiff explained how this information might be considered excusable neglect under the *Pioneer* and *Hudson* standard.

Plaintiff's other apparent bases for claiming excusable neglect is to point the finger at Defendant and suggest that somehow Defendant's actions contributed to Plaintiff's failure to prosecute its case. Plaintiff, however, fails to provide any authority to suggest that any delay in providing information, if in fact any delay occurred, pursuant to a discovery request submitted to the Defendant amounts to excusable neglect on behalf of the Plaintiff. Notwithstanding, and to set the record straight, Defendant denies the allegations of failing to cooperate in discovery or failing to provide information requested by the Plaintiff pursuant to Plaintiff's discovery requests in a timely manner. In fact, Plaintiff cannot point to any information that it requested from Defendant that it did not receive pursuant to a discovery request. Plaintiff received everything it asked for from the Defendant and received it in a timely fashion. Nothing submitted by Plaintiff proves otherwise.

Also, as expected, Plaintiff attempts to claim that a purported settlement offer by the Plaintiff somehow justifies Plaintiff's failure to take any action during its testimony period. Again, Plaintiff cites no authority in support of how a nominal settlement offer

made towards the end of Plaintiff's testimony period can be later determined to stay proceedings or form a basis for excusable neglect for failure to prosecute during the testimony period. None of Plaintiff's purported reasons for failing to prosecute its action during its testimony period are on their face even within the realm of what has been considered excusable neglect by the Board or the Courts.

III. Defendant is Prejudiced by Plaintiff's Failure to Prosecute

Defendant is prejudiced by Plaintiff's failure to prosecute and bring to conclusion its opposition without further delay. The often quoted, but still relevant, testament that "justice delayed is justice denied" applies here where Defendant may be forced to endure considerable additional delay in having the registration of its trademark, MOTOR CITIES CASINOS, approved. Defendant is prejudiced in having knowledge of facts at issue in this case fade out over time since critical information such as first use occurred several years ago and individuals with this knowledge are not obligated to maintain this information. Defendant is also prejudiced in having witnesses with this knowledge move or otherwise become unavailable. Defendant is a small corporation with limited resources but significant import resting on whether it will receive final registration of its trademark. Further delay will cause financial and business hardship to this small entity.

IV. The Length of the Delay is Significant

Plaintiff only took action in support of continued prosecution of its opposition when Defendant filed a motion to dismiss for failure to submit evidence or take testimony during Plaintiff's testimony period. If Defendant had not taken action to bring this issue to the Board's attention, this matter would still be languishing with no foreseeable end.

V. The Reason for the Delay, While Unclear, was Well Within the Control of the Plaintiff

Plaintiff does not even appear to allege that the reason for its failure to take testimony or submit evidence was due to anything outside of its control, for example, an illness or condition that made performance within the time period impossible. Plaintiff never identifies what road block, condition or misinformation prevented the Plaintiff from taking any action whatsoever for its 30-day testimony period. Plaintiff cites no authority for supporting that a "miscommunication" with its client, with nothing more, creates a basis for excusable neglect. While not providing an explanation for Plaintiff's failure to take action, Plaintiff's "miscommunication" explanation clearly and unequivocally shows that the delay was entirely within the control of the Plaintiff.

VI. Conclusion

Plaintiff has failed to meet its burden of establishing excusable neglect for its failure to take action during its testimony period. Pursuant to Trademark Rule 2.132(a), Plaintiff's opposition should be dismissed with prejudice.

Respectfully submitted,

HARNES, DICKEY & PIERCE, P.L.C.

Dated: September 30, 2003

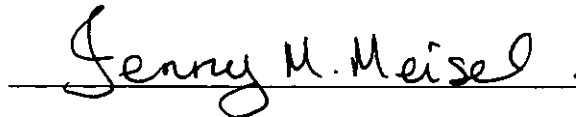
By: 

Dean W. Amburn
George T. Schooff
5445 Corporate Drive, Suite 400
Troy, Michigan 48098
Phone: (248) 641-1600
Facsimile: (248) 641-0270
Attorneys for Applicant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of September, 2003, a true and correct copy of the foregoing ***Applicant's Reply To Plaintiff/Detroit Entertainment's Response To Applicant's Motion For Judgment For Failure To Prove Case*** was deposited in the United States mail, postage prepaid, to the following:

R. Richard Costello
Michael J. McCue
QUIRK & TRATOS
3773 Howard Hughes Parkway
Suite 500 North
Las Vegas, NV 89109

A handwritten signature in cursive script that reads "Jenny M. Meisel." The signature is written in black ink and is positioned above a horizontal line.

HARNES, DICKEY & PIERCE, P.L.C.
ATTORNEYS AND COUNSELORS
P.O. BOX 828
BLOOMFIELD HILLS, MICHIGAN 48303
U.S.A.

FOR COURIER DELIVERY ONLY
5445 CORPORATE DRIVE
TROY, MICHIGAN 48098
(248) 641-1600

CABLE
PATENTS TROY, MICHIGAN
TELEX NO. & REPLY
287637 HARNES UR
TELEFACSIMILE
(248) 641-0270

Commissioner for Trademarks
2900 Crystal Drive
Arlington Virginia 22202-3514

Sir:

EXPRESS MAILING CERTIFICATE

Applicant: Motor Cities Casinos
Opposition No.: 91151905
For: MOTOR CITIES CASINOS
Docket: 4344-400001

"Express Mail" Mailing Label Number

EL623310086US

Date of Deposit: September 30, 2003

I hereby certify and verify that the accompanying Transmittal Letter (in duplicate), Applicant's Reply To Plaintiff/Detroit Entertainment's Response To Applicant's Motion For Judgment For Failure To Prove Case, with attached Proof of Service, return receipt postcard and this Express Mail Certificate are being deposited with the United States Postal Service "Express Mail Post Office To Addressee" service under 37 C.F.R. 1.10 on the date indicated above and are addressed to Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3514.


Signature of Person Mailing Documents

JPD

HARNES, DICKEY & PIERCE, P.L.C.
ATTORNEYS AND COUNSELORS
P.O. BOX 828
BLOOMFIELD HILLS, MICHIGAN 48303
U.S.A.

FOR COURIER DELIVERY ONLY
5445 CORPORATE DRIVE
TROY, MICHIGAN 48098
(248) 641-1600

CABLE
PATENTS TROY, MICHIGAN
TELEX NO. & REPLY
287637 HARNES UR
TELEFACSIMILE
(248) 641-0270

September 30, 2003

Commissioner for Trademarks
2900 Crystal Drive
Arlington Virginia 22202-3514

Re: Opposition No. 91150915
In the Matter Of Application Serial No. 75/646,977
Mark: MOTOR CITIES CASINOS
Our Ref. No. 4344-400001

Sir:

Enclosed please find the following:

1. Express Mail Certificate;
2. Applicant's Reply To Plaintiff/Detroit Entertainment's Response To Applicant's Motion For Judgment For Failure To Prove Case; and
3. Return receipt postcard.

The Commissioner is hereby authorized to charge any additional fees which may be required to Deposit Account No. 08-0750. A duplicate copy of this transmittal letter is enclosed.

Respectfully submitted



Dean W. Amburn
Reg. No. 46,517

DWA/jmm
Enc.

cc: R. Richard Costello, Esq.



10-01-2003