UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3514

wellington

Mailed: September 28, 2004

Opposition No. 91152686

THE DREAM MERCHANT COMPANY, KFT.

v.

FREMONSTOR THEATRICAL

Before Simms, Bucher and Rogers, Administrative Trademark Judges.

By the Board:

On June 17, 2004, the Board issued an order denying opposer's motion to reopen discovery and testimony periods and dismissing the opposition on its merits.

On July 19, 2004, opposer filed a motion for reconsideration of the Board's June 17, 2004 order.

Generally, the premise underlying a motion for reconsideration (whether it be for reconsideration of a decision on a motion under 37 CFR §2.127(b) or of a final decision under 37 CFR §2.129(c)) is that, based on the facts before it and the prevailing authorities, the Board erred in reaching the order or decision it issued. Such a motion may not properly be used to introduce additional

evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion. Rather, the motion normally should be limited to a demonstration that, based on the facts before it and the applicable law, the Board's ruling was in error and requires appropriate change. See TBMP §§ 518 and 544 (2d ed. rev. 2004).

In its motion for reconsideration, opposer makes three allegations of Board error. First, it argues that we abused our discretion by failing to grant opposer's motion to reopen as conceded. Second, it argues that we abused our discretion in ruling on the merits of the opposition. And, third, it argues that our final decision was erroneous and not supported by substantial evidence. We address the three allegations of error in order.

Initially, we note that opposer’s first argument begins by blurring the distinction between the question of whether a judgment should be entered against a plaintiff that fails to prosecute its case, including failing to file a brief, and the question whether that plaintiff has established grounds to reopen discovery and/or trial. Plaintiff is mistaken in concluding that merely because it established grounds for discharging a Rule 2.128(a)(3) order to show cause it has therefore also established that

its utter neglect of its burden as plaintiff should be excused and the entire schedule for this case reset.

As to whether we should have granted opposer's motion to reopen as conceded and opposer's contention that we erred in not doing so, Trademark Rule 2.127(a) clearly states that such a decision is within the discretion of the Board. And, if the uncontested motion is not treated as conceded, it is within the Board's authority to grant or deny the motion on its merits. *See, e.g., Boyds Collection Ltd. v. Herrington & Co.,* 65 USPQ2d 2017, 2018 (TTAB 2003); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.,* 55 USPQ2d 1848, 1854 (TTAB 2000); *Hartwell Co. v. Shane*, 17 USPQ2d 1569 (TTAB 1990) and *Western Worldwide Enterprises Group Inc. v. Qinqdao Brewery*, 17 USPQ2d 1137 (TTAB 1990). Accordingly, in this proceeding, we decided not to treat the motion to reopen as conceded but to consider it on the merits. We denied the motion based on opposer's failure to make the necessary showing of excusable neglect.

Opposer's remaining arguments in support of its first allegation of error constitute nothing but reargument of the points made in its motion to reopen and are an improper basis upon which to seek reconsideration. Moreover, even though plaintiff has now twice argued that applicant had

lost interest in the case, opposer has not pointed to a single fact supporting that conclusion.[1]

In sum, we view opposer's first allegation of error, specifically that we abused our discretion by not granting opposer's motion to reopen as conceded, as unsupported by the record.

Turning to opposer's second allegation of error, specifically, that we erred in considering the merits of opposer's case rather than simply dismissing it on procedural grounds, we likewise see no error in our order.

Opposer argues that it was "caught by surprise" by a determination on the ultimate merits of a case and cites the Federal Circuit's decision in *Selva & Sons. Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316 (Fed. Cir. 1983). The procedural facts of this case are entirely unlike those of *Selva* and opposer's reliance on said case is misplaced.[2]

[1] Applicant's failure to respond to opposer's motion to reopen was not a fact in existence when opposer first alleged that applicant had lost interest in the case. In regard to the instant request for reconsideration, it is opposer's burden to show that we erred in discounting that allegation when first made, not that subsequent events provide support for the allegation.

[2] In *Selva*, the Federal Circuit found the Board to have erred in treating a motion to dismiss as one for summary judgment without first notifying the non-moving party and allowing the party to brief the motion as such. *Selva*, 705 F.2d 1316 (Fed. Cir. 1983).

The proper focus in this case is on the rules and procedural facts of this case, not *Selva*.

Invoking TBMP Section 536, opposer argues that it is the Board's practice, when a Rule 2.128(a)(3) order to show cause is discharged, and when the opposer has neither tried its case or shown the right to reopen trial, to enter a ruling against the opposer "on procedural grounds" rather than on the merits of the pleaded claims. Opposer misconstrues the TBMP. Of more relevance is the sentence in the Section 536 of the TBMP which states: "It is not the policy of the Board to enter judgment against a plaintiff for failure to file a main brief on the case if the plaintiff still wishes to obtain an adjudication of the case on the merits." Clearly, the import of this statement is that, if an opposer is successful in seeking the discharge of a Rule 2.128(a)(3) order to show cause, its case may ultimately be decided on the merits. Of course, if the opposer has failed to try its case and there are no admissions by the applicant, then opposer will have no support for any portion of its case and it will be dismissed on that basis. When, however, the opposer had made an effort to try the case, or where the applicant has made admissions of pleaded matters, there is at least some record to consider. Such a case would be considered on

that record, which may or may not be enough for the opposer to sustain its burden of proof.[3] Moreover, opposer represents TBMP Section 536 as contemplating only entry of judgment against an opposer under Trademark Rule 2.132. TBMP Section 536 does not discuss Rule 2.132 nor does the *Gaylord* case also cited in that section of the manual.[4] In any case, we note that a ruling against opposer in the instant case under Rule 2.132(a) would be improper, because applicant admitted various pleaded matters, so this was not a case with no record, and judgment may not be entered under Rule 2.132(b) except upon motion made by the applicant, as defendant, prior to its testimony period.

The remaining arguments in support of opposer's second allegation of error are unavailing. Opposer alleges that we "foreclosed" opposer from the opportunity to bolster the record. Simply put, opposer had that opportunity during its scheduled trial period, it did not take advantage of this period, and its motion to reopen its trial period was denied. Opposer's arguments regarding its success as a

[3] Opposer, as plaintiff in the proceeding, bears the burden of proving, by a preponderance of the evidence, priority and likelihood of confusion. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989).

[4] TBMP Section 536 (2d ed. rev. 2004), citing *Gaylord Entertainment Co. v. Calvin Gilmore Productions, Inc.*, 59 USPQ2d 1369 (TTAB 2000).

plaintiff in other proceedings, and what evidence it would have put in the record if it had not neglected trial do not establish error and are improper matters for presentation in a request for reconsideration.

Opposer's third allegation of error, i.e., that this case was determined on an insufficient record, is, in large part, a situation of its own making. Insofar as opposer neglected trial and failed to introduce any evidence into the record, the fact that the merits of this case were determined on defendant's admissions and on judicial notice of dictionary definitions is a situation largely attributable to opposer's inaction. We do not view our weighing of admissions and our consideration of dictionary definitions as a process involving "speculative assumptions." A review of our June 17, 2004 order reveals that all factual conclusions were made based on the record before us and upon taking judicial notice of dictionary definitions.[5]

Opposer's motion for reconsideration is hereby denied.

* * *

[5] We clearly informed the parties that we were taking judicial notice of dictionary definitions and cited the authority for doing so. See footnote 7 of the Board's June 17, 2004 order.