UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: August 1, 2006

Opposition No. **91156061**

Central MFG. CO

v.

Go Daddy Software, Inc.

Cheryl S. Goodman, Interlocutory Attorney:

This case now comes up on applicant's motion, filed April 4, 2006, to reopen its testimony period.[1]

Applicant seeks a one day extension of the testimony period for the "limited purpose" of accepting the notice of reliance advising that while applicant's counsel prepared the notice of reliance[2] and exhibits for electronic filing prior to the close of applicant's testimony period (April 3, 2006), counsel was involved in another litigation matter on April 3, 2006 and later fell ill due to pregnancy on that day which prevented the timely filing of the notice of

[1] It is noted that on May 12, 2006 opposer withdrew its motion to quash the testimonial deposition of Barbara Jo Rechterman. Accordingly, opposer's related motion to strike the testimonial deposition and applicant's motion for sanctions are rendered moot.

[2] The notice of reliance consists of decisions from civil actions involving opposer.

reliance.[3] Applicant's counsel argues that these circumstances establish excusable neglect.

In response, opposer argues that applicant's counsel's excuses for failing to timely file the notice of reliance do not constitute excusable neglect; that applicant's counsel is not a solo practitioner but a member of a law firm and is unable to show that no other member of the firm could have filed the notice of reliance; and that opposer will be prejudiced by the reopening of the testimony period.

A party may move to reopen an expired testimony period upon the showing of excusable neglect. See Fed. R. Civ. P. 6(b)(2) and TBMP Section 509.01(b) (2d ed. rev. 2004). The analysis to be used in determining whether a party has shown excusable neglect was set forth by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), followed by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).[4] Here, applicant's counsel has put forth two reasons for her failure to timely file the notice of reliance: the press of other litigation and her illness.

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[3] Applicant's counsel Ms. Catalfio states that after a court hearing in an unrelated litigation matter "she felt quite ill and had to go home and rest."

[4] The circumstances to be considered include: (1) the 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, and whether it was within the reasonable control of the movant, and (4) whether the moving party had acted in good faith.

It is settled that an attorney's preoccupation or involvement in other cases or litigation does not constitute excusable neglect under Fed.R.Civ.P. 6(b)(2). *Societa Per Azioni Chianti Ruffino Esportazione Vinicola Toscana v. Colli Spolentini Spoletoduc ale SCRL*, 59 USPQ2d 1383 (TTAB 2001). Therefore, counsel's involvement in other litigation unrelated to this matter does not excuse her failure to timely file the notice of reliance or to file a motion to extend the testimony period. Accordingly, the Board does not find excusable neglect on this basis.

With regard to applicant's counsel's illness, courts have found excusable neglect only where the illness is so physically and mentally disabling--at least temporarily--that counsel is unable to file any papers in the proceeding and is not reasonably capable of communicating to co-counsel his inability to file papers in a particular proceeding. *Islamic Republic v. Boeing Co*., 739 F.2d 464, 465 (9th Cir. 1984) ("illness involved diarrhea, vomiting, and a five pound weight loss over 36 hours"). The fact that an attorney performed some litigation tasks during his illness is often taken to show that the illness was not incapacitating. *See Buck v. United States Dep't of Agric. F.H.A.*, 960 F.2d 603 (6th Cir. 1992)(finding no excusable neglect resulting from sudden illness of the movant's counsel noting that counsel performed other litigation tasks

during the time of the claimed illness); *Dobard v. United States District Court for Northern California*, Civ. No. 93-17125, 1994 WL 615719 (N.D. Cal. November 4, 1994) (finding no excusable neglect where attorney was "well enough to file two lengthy motions" during his illness). Additionally, the fact that there are other attorneys who are responsible for administration of the case will weigh against a finding of excusable neglect for an attorney's illness. *See Meza v. Washington State Dep't of Social & Health Servs.*, 683 F.2d 314, 315 (9th Cir. 1982)(other lawyers in office could have filed notice).

Taking into account all of the relevant circumstances, the Board is not persuaded that counsel's illness constituted excusable neglect so as to justify reopening its testimony period. There is no indication that applicant's counsel was so incapacitated that she could not speak on the telephone to co-counsel[5] to direct them to file the notice of reliance or an extension request and there is no explanation for applicant's counsel's failure to take appropriate measures when she fell ill.[6] Also, on the same day of her illness, she was involved in other litigation

[5] Both Brian W. LaCorte and Thomas D. MacBlain, along with Donna Catalfio have been identified as counsel for applicant in filings in this case.

[6] There also is no explanation as to why the notice of reliance was not filed prior to the last day of testimony when counsel asserted it was prepared prior to that date.

matters. These factors warrant against a finding of excusable neglect.

Accordingly, applicant's motion to reopen testimony for one day to accept the notice of reliance is denied.

Proceedings are resumed.

Remaining trial dates are reset as follows:

15-day rebuttal testimony period for party in position of plaintiff to close	August 30, 2006

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.l25.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.