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

Mailed: March 25, 2009

Opposition No. 91169419
Opposition No. 91169697
Opposition No. 91170049
Opposition No. 91170258

DANIEL A. MENDOZA

v.

VODAFONE GROUP PLC

Before Quinn, Walters and Mermelstein, Administrative Trademark Judges.

By the Board:

In an order dated September 18, 2008, the Board granted applicant's motion for summary judgment as conceded. The oppositions, based on likelihood of confusion, were dismissed with prejudice and the counterclaim to cancel opposer's pleaded Registration No. 2389214, based on abandonment and fraud, was granted. The registration was cancelled under Trademark Act §18 on December 29, 2008.

On November 24, 2008, after the expiration of the period for appeal,[1] opposer filed a document under seal entitled "Plaintiff's Declaration and Exhibit Against Cancellation." In accordance with the Board's order dated January 13, 2009, opposer

[1] Trademark Rule 2.145(d)(1).

submitted a duplicate of such document for the public record. In its order, Board informed opposer that it considered his filing to be "a motion to reopen the cancellation proceeding." Applicant filed a response to opposer's submission and opposer filed a "reply."

By his filing, opposer submitted his declaration reciting his recollection of people and events for "… the year 1999 and or 2000." Opposer also submitted a photograph of a named individual shown with a piece of art. The purpose of such submissions was to support opposer's position that he "… has no need to mislead or file fraudulent paperwork …" with the Office.

As the Board informed opposer in its January 13, 2009 order, his November 24, 2008 filing was untimely insofar as opposer intended it to be a request for reconsideration of the September 18, 2008 grant of applicant's motion for summary judgment.[2] To the extent opposer is now attempting to submit evidence on the merits of his claim and opposer's counterclaim, the submissions are unavailing. After entering summary judgment against opposer, this proceeding was concluded.

To the extent that opposer's correspondence may be construed as a "motion to reopen the cancellation proceeding," it is a motion for relief from final judgment.

Fed. R. Civ. P. 60(b) provides for relief from final judgment in specified instances. Any motion for such relief must

[2] Trademark Rule 2.127(b).

be made within a reasonable time not more than one year from the entry of judgment where the motion is brought pursuant to the first three grounds for relief (mistake, inadvertence, surprise, excusable neglect; newly discovered evidence; or fraud). Here, opposer's filing is presumed to be under Fed. R. Civ. P. 60(b)(1) and is timely insofar as it was brought within a reasonable time and less than one year after entry of the summary judgment. Nonetheless, relief from a final judgment, which lies within the sound discretion of the Board, is an extraordinary remedy to be granted only in exceptional circumstances. *See* TBMP §544 (2d ed. rev. 2004).

As noted earlier in this order, opposer's submission appears to be an attempt to introduce evidence into the record.[3] Opposer does not explain at all, let alone make a showing of excusable neglect, why he did not file a response to applicant's motion for summary judgment; opposer does not explain why he did not seek reconsideration of the summary judgment determination in a timely manner; and opposer does not expressly ask the Board for relief for final judgment.

Applicant, in its response, argues that opposer has not shown excusable neglect in support of any relief from final judgment or in support of "reopening" the proceeding. More specifically, applicant argues that it will be prejudiced if the

[3] The Board notes in passing that, while a declaration may be permissible on a summary judgment motion, for trial, any statement of a party is to be

proceeding is reopened in view of opposer's dilatory conduct and "vexatious tactics" in these consolidated cases; that opposer has caused numerous delays in the past three years since commencement of this proceeding; that opposer has not stated any reason for his delay in responding to applicant's motion for summary judgment; that opposer has not acted in good faith in this case because he has violated discovery obligations and orders from the Board; and that opposer's filing is improper and should not be treated as a motion of any kind.

In reply, opposer argues the substance of his "evidence" and argues that he "… was under consider [*sic*] stress of the Proceeding, along with the weight of the tone of the opposing parties [*sic*] Counsel; and Plaintiff made some costly errors in his legal responses."

In *Pioneer Investment Serv. Co. v. Brunswick Assoc. Ltd P'ship,* 507 U.S. 380, 395 (1993), the Supreme Court endorsed four factors to be considered in taking into account all the relevant circumstances in determining excusable neglect. Those factors are: (1) the danger of prejudice to the non-moving party; (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 moving party; and, (4) whether the moving party has acted in good faith. In subsequent applications of this test by the Circuit Courts of Appeal, several courts have

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introduced by way of a testimonial deposition. *See* TBMP §702 (2d ed. rev.

stated that the third factor must be considered the most important factor in a particular case. *See Pumpkin Ltd. v. The Seed Corps,* 43 USPQ2d 1582, 1586 at fn. 7 (TTAB 1997).

With respect to the first *Pioneer* factor, applicant has shown that it has been prejudiced by opposer's repeated failures to meet deadlines, to provide basic discovery, and to address the merits of issues and motions. With respect to the second *Pioneer* factor, while opposer's earlier actions have caused some delay to this proceeding, opposer's more recent actions, or failures to act, have caused increasing delay. As applicant notes with respect to the third, and most important, *Pioneer* factor, opposer has provided not explanation why he did not act in a timely manner with respect to applicant summary judgment motion. The fourth *Pioneer* factor in neutral because it is unclear that opposer is purposefully acting in bad faith.

After careful consideration of the *Pioneer* factors and the relevant circumstances in this case, the Board finds that opposer has not attempted to establish excusable neglect, and the facts of this case do not otherwise establish excusable neglect, so as to warrant any relief from final judgment. Although the fourth *Pioneer* factor is neutral with respect to opposer's actions, the remaining three Pioneer *factors* weigh against opposer, with the first and third factors weighing heavily against opposer.

2004).

Accordingly, opposer has not shown excusable neglect to warrant any relief from final judgment and, to the extent opposer is asking for relief from final judgment, such relief is denied. The summary judgment entered against opposer on September 18, 2008 stands.

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