

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

Mailed: August 27, 2015

Opposition No. 91214606

Jason Smith

v.

Will Heitman

By the Trademark Trial and Appeal Board:

Pursuant to the Board's order of May 15, 2014, Opposer's testimony period closed on April 10, 2015. This case now comes up for consideration of Applicant's motion, filed April 23, 2015, for involuntary dismissal pursuant to Trademark Rule 2.132(a), and Opposer's combined response and cross-motion to reopen, filed May 1, 2015.¹ Applicant's motion for involuntary dismissal pursuant to Trademark Rule 2.132(a) is fully briefed. Applicant opposes Opposer's motion to reopen.

The Board addresses first Opposer's cross-motion to reopen his "time to prepare the necessary documents to proceed in this matter," Cross Motion, p. 1, ¶ 3, which the Board construes as a cross-motion to reopen Opposer's pretrial disclosure

¹ In his cross-motion, Opposer seeks an "extension of time," but because Opposer's pretrial disclosure and testimony deadlines have expired, his motion is, in fact, a motion to reopen. Cross-Motion, p. 1, ¶ 3.

deadline and testimony period.² The Board has considered the parties' submissions and presumes the parties' familiarity with the factual bases for Opposer's cross-motion, and does not recount the facts or arguments here, except as necessary to explain the decision.

In order to reopen Opposer's now-expired pretrial disclosure deadline and testimony period, Opposer must establish "excusable neglect." *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1852 (TTAB 2000) ("Pursuant to Fed. R. Civ. P. 6(b)(2), the requisite showing for reopening an expired period is that of excusable neglect."). The Supreme Court has set forth four factors to be considered in determining excusable neglect, namely: (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. *See Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *Baron Philippe*, 55 USPQ2d at 1852.

Turning to the third *Pioneer* factor first, as grounds for his motion, Opposer asserts that he: (1) "has been suffering from severe medical issues which have caused him to be hospitalized for weeks at a time," Cross-Motion at p. 1, ¶ 1; (2) "is scheduled to have surgery on May 5, 2015" and "expects his recovery to be approximately one month," *id.*; and (3) "has been unable to independently care for himself[,] ... has had to stop working and has not been able to devote his full

² The Board does not read the language in Opposer's motion as requesting a reopening of all the deadlines in this proceeding.

attention to this matter.” *Id.* at ¶ 2. We acknowledge, as Applicant points out, that Opposer has not provided details regarding the dates and nature of his illness, but given the privacy concerns related to healthcare issues, the Board countenances Opposer’s omission of such details.³ The Board further finds that because of Opposer’s illness, his failure to timely serve pretrial disclosures and introduce testimony was outside of his reasonable control. As such, the third *Pioneer* factor weighs in favor of finding excusable neglect.

The first, second and fourth *Pioneer* factors also weigh in favor of finding excusable neglect. There is no evidence that Applicant would be significantly prejudiced by the reopening of Opposer’s pretrial disclosure and testimony periods, beyond a short delay. Applicant has not presented evidence showing lost evidence or unavailable witnesses. *See Paolo’s Assocs. Ltd. P’Ship v. Paolo Bodo*, 21 USPQ2d 1899, 1904 (Comm’r 1990). Nor will Applicant incur greater costs in defending this matter than if Opposer had served pretrial disclosures and introduced testimony and evidence on a timely basis. *See HKG Indus., Inc., et al. v. Perma-Pipe, Inc.*, 49 USPQ2d 1156, 1157 (TTAB 1998). The delay and its potential impact on this proceeding also is limited, and the Board does not find that Opposer’s conduct in this proceeding rises to the level of bad faith.

In view of the foregoing, and in the exercise of its discretion, the Board finds excusable neglect. Accordingly, Opposer’s cross-motion to reopen his pretrial disclosure and testimony deadlines is **GRANTED**. In view hereof, Applicant’s motion for

³ The Board, however, may not be so lenient with respect to any future filings.

involuntary dismissal pursuant to Trademark Rule 2.132(a) is moot and will be given no further consideration.

Proceedings are resumed and dates are reset as follows:

Plaintiff's Pretrial Disclosures Due	9/28/2015
Plaintiff's 30-day Trial Period Ends	11/12/2015
Defendant's Pretrial Disclosures Due	11/27/2015
Defendant's 30-day Trial Period Ends	1/11/2016
Plaintiff's Rebuttal Disclosures Due	1/26/2016
Plaintiff's 15-day Rebuttal Period Ends	2/25/2016

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 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.
