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

September 18, 2020

Opposition No. 91233690

Image Ten, Inc.

v.

Rusty Ralph Lemorande

Ann Linnehan, Interlocutory Attorney:

This matter comes before the Board for consideration of Applicant's motion for summary judgment, filed February 7, 2020, and Opposer's motion to strike Applicant's motion, also filed February 7, 2020. The motion to strike is fully briefed.[1]

Opposer argues the Board should strike Applicant's motion as untimely because it was submitted after the deadline for Opposer's pretrial disclosures. 53 TTABVUE.[2] In response, Applicant concedes the motion is untimely, but contends the Board should consider the motion because the delay was due to the parties' failed settlement discussions. Applicant argues Opposer will not be prejudiced by the late-filed motion. 54 TTABVUE 4.

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[1] The Board has considered the parties' briefs and materials submitted therewith, but addresses the record only to the extent necessary to set forth the Board's analysis and findings and does not repeat or address all of the parties' arguments or materials. *Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

[2] Record citations are to TTABVUE, the Board's publicly available docket history system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

Motions for summary judgment must be filed prior to the first pretrial disclosure deadline. Trademark Rules 2.120 and 2.127. *See also* 2 TTABVUE 2. Here, Applicant concedes his motion was filed after the deadline for Opposer's pretrial disclosures, January 22, 2020. *See* 51 TTABVUE 2. Applicant fails to show, however, that his delay in filing was due to excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B). *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 509.01(b)(1) (June 2020) (motion to reopen period to take required action must show that party's failure to take required action during the time allotted must show excusable neglect).

In determining whether a party's failure to act during a period is due to excusable neglect, the Board must take into account all relevant circumstances surrounding the party's omission or delay, including: (1) the danger of prejudice to the movant; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of responding party; and (4) whether the responding party acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 396-97 (1993); *Pumpkin Ltd. v. Seed Corps*, 43 USPQ2d 1582, 1585-86 (TTAB 1997) (explaining Supreme Court's analysis in *Pioneer*). The Board has noted on numerous occasions that the third factor may be considered the most important factor in any particular case. *See, e.g.*, *Pumpkin*, 43 USPQ2d at 1586 at n.7.

Under the third *Pioneer* factor, the only explanation provided by Applicant is failed settlement discussions. Although attempts at settlement are favored, they do not excuse a party's failure to act within the prescribed times. *See Vital Pharms., Inc.*

v. Kronholm, 99 USPQ2d 1708, 1711 (TTAB 2011) (citing *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1859 (TTAB 1998) (the belief in settlement and/or the existence of settlement negotiations do not justify a party's inaction or delay or excuse it from complying with the deadlines set by the Board or imposed by the rules)). The Board finds, under the second *Pioneer* factor, there would be a long delay in the proceeding that would be occasioned by a motion for summary judgment, weighing against a finding of excusable neglect. The first and fourth *Pioneer* factors are neutral for lack of evidence. In view thereof, Opposer's motion to strike Applicant's motion for summary judgment is **granted**, and Applicant's motion will receive no consideration.

The Board deems the filing of Opposer's motion to strike on February 7, 2020 to have tolled the running of all dates herein. All motions filed by the parties during the suspension period (e.g., 57, 58, 59 TTABVUE) were filed out of time and will receive no consideration.

Proceedings are **resumed** and dates reset as set forth below. The Board will consider Opposer's testimony (55 TTABVUE) and notice of reliance (56 TTABVUE) as timely filed unless Opposer withdraws the same during its reset testimony period.

Plaintiff's 30-day Trial Period Ends	10/23/2020
Defendant's Pretrial Disclosures Due	11/7/2020
Defendant's 30-day Trial Period Ends	12/22/2020
Plaintiff's Rebuttal Disclosures Due	1/6/2021
Plaintiff's 15-day Rebuttal Period Ends	2/5/2021
Plaintiff's Main Brief Due	4/6/2021
Defendant's Main Brief Due	5/6/2021
Plaintiff's Reply Brief Due	5/21/2021

Request for Oral Hearing (optional) Due 5/31/2021

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

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