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TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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June 25, 2019

Opposition No. 91240137

Bold Strategies, Inc.

v.

Tyler S. Keegan

**Before Ritchie, Pologeorgis, and Hudis,
Administrative Trademark Judges.**

By the Board:

On January 8, 2019, Opposer filed a motion for partial summary judgment on its claim of likelihood of confusion.¹ 5 TTABVUE. On February 19, 2019, in view of Applicant's failure to file a response to the motion for summary judgment, the Board granted the motion for summary judgment as conceded and entered judgment against Applicant. 7 TTABVUE. This case now comes up on Applicant's motion (filed March 4, 2019) for relief from final judgment.² The motion is fully briefed.

¹ Opposer asserted dilution and false suggestion of a connection as additional grounds for opposition. 1 TTABVUE.

² Applicant's motion is titled "Motion for Reconsideration and Relief from Final Judgment." However, because Applicant does not argue that the Board erred in entering judgment against Applicant based on his failure to respond, we do not consider the motion as including a request for reconsideration of the Board's decision but will entertain it solely as a motion for relief from final judgment. *See* Trademark Rule 2.127(a), 37 C.F.R. 2.127(a), and TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 518 (June 2019).

We initially noted that although Applicant has been represented by counsel throughout this proceeding, Applicant filed his motion for relief from final judgment pro se. In his motion, Applicant states, “I have discharged my attorney and request that he be removed from your records.” 9 TTABVUE 3. We construe this statement as Applicant’s revocation of power of attorney under Trademark Rule 2.19(a), 37 C.F.R. § 2.19(a). Accordingly, Applicant’s attorney of record, Brian R. Langford of Macarthur, Heder & Metler PLLC, no longer represents Applicant in this proceeding.

Turning to the merits of Applicant’s motion for relief from judgment, Applicant states that prior to the deadline for responding to the motion for summary judgment, Mr. Langford telephoned Applicant to inform him that he “was finalizing the response to the Motion for Summary Judgment and would file it the next day,” 9 TTABVUE 5, and that after he received notice that his application had been abandoned, he attempted to contact his attorney several times with no response. Applicant argues that these circumstances constitute excusable neglect or “other equitable ground[s]” because he relied on his attorney’s representation that he was preparing a response and would file it by the deadline. 9 TTABVUE 5. Applicant further argues that he had no reason to believe that his attorney would fail to meet the deadline because his attorney “had always acted responsibly.” *Id.*

In support of his motion, Applicant submits an email and a declaration from Mr. Langford in which Mr. Langford admits that the failure to file the response to the summary judgment motion was “completely [his] fault.”³ In his declaration, Mr.

³ Langford Declaration at ¶ 18 (9 TTABVUE 12) and Exhibit A (9 TTABVUE 7).

Langford identifies the reason for failing to file the response. He states that prior to Opposer's filing of the motion for summary judgment, he learned that his sister fell into a coma due to a cardiac event. She was subsequently removed from life support⁴ and, as a result of the tragic circumstances of his sister's passing, he was suffering from "overwhelming" grief and was unable to "put together a coherent and reasoned response."⁵

In response, Opposer argues that Applicant is bound by the acts of his chosen attorney and Applicant does not dispute that his attorney is liable for the missed deadline. Opposer also argues that Applicant's attorney's explanation is insufficient because he does not specifically identify his reasons for failing to file the response that he was allegedly finalizing, his reason for not seeking leave to file a late response, or the reason someone else at his firm could not have submitted the response. In addition, Opposer argues that Applicant's attorney's explanation is ambiguous about the timing of his family tragedy. Opposer further argues that it will suffer "significant prejudice" if the Board grants Applicant's motion for relief because "the Board will be forcing Opposer to resume spending significant amounts of time, money and resources continuing to litigate a matter that has already been resolved by the Board." 10 TTABVUE 10-11.

In his reply, Applicant argues that he has shown excusable neglect in this case because he was "affirmatively deceived" by his attorney when the attorney told

⁴ *Id.* at ¶ 8 (9 TTABVUE 11).

⁵ *Id.* at ¶¶ 13, 15 (9 TTABVUE 11-12).

Applicant that he was finalizing a response to the summary judgment motion and then did not return calls or emails after missing the deadline. 11 TTABVUE 3.⁶

Relief from a final judgment under Fed. R. Civ. P. 60(b) is an extraordinary remedy to be granted only in exceptional circumstances. *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991). The method for analyzing excusable neglect under Rule 60(b)(1) was established by the Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship et. al.*, 507 U.S. 380, 396-97 (1993), and explained by the Board in *Pumpkin Ltd. v. Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). The factors for determining whether a party's neglect is excusable include: (1) the danger of 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, including whether it was within the reasonable control of movant; and (4) whether movant acted in good faith. *See Pioneer*, 507 U.S. at 395; and *Pumpkin Ltd.*, 43 USPQ2d at 1586-88. The determination of whether relief from judgment should be granted lies within the sound discretion of the Board. *See Djeredjian*, 21 USPQ2d at 1615.

Turning to the first *Pioneer* factor, we find Opposer's argument that it will suffer prejudice if it must spend time and resources litigating the matter unpersuasive. Prejudice under the first factor contemplates prejudice to the non-movant's ability to litigate the case due to, for example, the loss of evidence or a witnesses as a result of

⁶ The Board has considered the arguments and evidence submitted in connection with the motion, but does not repeat or discuss all of the arguments and submissions, and does not address irrelevant arguments. *Guess? IP Holder L.P. v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

the delay. *Pumpkin Ltd.*, 43 USPQ2d at 1587. The expenses associated with having to litigate a matter Opposer brought before the Board, without regard to a dispositive ruling on a motion for summary judgment, do not support a claim of prejudice. See *Paolo's Assoc. Ltd. P'ship v. Bodo*, 21 USPQ2d 1899, 1904 (Comm'r 1990). Thus, we find that the first *Pioneer* factor weighs in favor of finding excusable neglect.

With respect to the length of the delay and its impact on the proceeding, we note that Applicant filed his motion for relief only thirteen days after the Board entered judgment. Although we must also consider the delay in the proceeding resulting from briefing and deciding the present motion, see *Pumpkin Ltd.*, 43 USPQ2d at 1588, we find that the overall delay has not significantly impacted the proceeding. Accordingly, the second *Pioneer* factor also weighs in favor of finding excusable neglect.

We turn next to the third factor in the *Pioneer* analysis, the reason for the delay, including whether it was within Applicant's reasonable control. Here, Applicant attempts to separate himself from the negligent actions of his former counsel and applies the excusable neglect standard to his own actions in reliance on the counsel's representations. See 9 TTABVUE 3. Under this factor, however, Applicant is accountable for the acts or omissions of his chosen counsel and any distinction between the neglect of Applicant's former counsel and Applicant himself is irrelevant. *Pioneer Inv. Servs. Co.*, 507 U.S. 380, 396-97; *CTRL Sys. Inc. v. Ultraphonics of N. Am. Inc.*, 52 USPQ2d 1300, 1302 (TTAB 1999). Thus, we must consider the actions of Applicant's former counsel and the surrounding circumstances to determine whether the delay was within Applicant's reasonable control.

Upon review of Mr. Langford's declaration and email, we note that he does not assert that the delay was beyond his control. Instead, Mr. Langford states that the failure was completely his fault⁷ and that his personal issues "do not excuse the failure."⁸ In addition, we agree with Opposer that the declaration is vague with respect to the timing of the events described. The declaration merely states that counsel received a phone call regarding his sister's cardiac event "prior to the time that the Motion [for summary judgment] was filed."⁹ Counsel does not identify any other relevant dates or indicate why, upon realizing he would be unable to file the response, he could not file a timely motion to extend time to respond to Opposer's motion.¹⁰ In addition, counsel does not identify why, in view of his family tragedy, someone else at his firm could not take over the case or, at a minimum, file a motion to extend time.¹¹ *See, e.g., Gaylord Entm't Co. v. Calvin Gilmore Prods. Inc.*, 59 USPQ2d 1369, 1372 (TTAB 2000) (failed to provide specific reasons for former counsel's inaction); and *HKG Indus. Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156, 1158 (TTAB 1998) (no factual details as to the date of counsel's death in relation to

⁷ Langford Dec. at ¶ 18 (9 TTABVUE 12).

⁸ 9 TTABVUE 7.

⁹ Langford Dec. at ¶ 5 (9 TTABVUE 10).

¹⁰ Mr. Langford states that he requested Opposer's consent for an extension of time to respond to the motion for summary judgment the day after the response was due. *Id.* at ¶ 15 (9 TTABVUE 12). Opposer states, however, that it did not agree to the extension because the deadline had already passed and the request only vaguely referred to "unforeseen circumstances" as the reason for the extension. 10 TTABVUE 6, 24-26.

¹¹ A motion to extend time that is filed before the time taking action expires merely requires a showing of good cause for the requested extension. Fed. R. Civ. P. 6(b); *see also* TBMP § 509.01.

plaintiff's testimony period or as to why other lawyers in deceased counsel's firm could not have assumed responsibility for the case).

In view of the foregoing, we find that Applicant's failure to file a response or to file a timely motion to extend time to respond to the motion for summary judgment was within Applicant's reasonable control. Thus, the third *Pioneer* factor weighs against a finding of excusable neglect.

Finally, there is no evidence in the record and Opposer does not argue that Applicant's failure to respond to the motion for summary judgment was the result of bad faith on the part of Applicant or his counsel. Accordingly, the fourth *Pioneer* factor weighs in favor of a finding of excusable neglect.

Upon consideration of all the relevant circumstances and authorities and keeping in mind the Board's preference for deciding cases on their merits, *see DeLorme Publ'g Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000), the Board finds that the absence of prejudice to Opposer, the lack of significant delay or impact on the proceedings, and the absence of bad faith on Applicant's part outweigh the third *Pioneer* factor, the reason for the delay. Thus, the Board, in its discretion, finds that Applicant's delay in responding to the motion for summary judgment is the result of excusable neglect. *See Pioneer Inv. Serv. Co.*, 507 U.S. at 392 ("Although inadvertence, ignorance of the rules or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant.") (citing 4A WRIGHT & MILLER,

FEDERAL PRACTICE AND PROCEDURE § 1165 (2d ed. 1987)). Accordingly, Applicant's motion for relief from final judgment is **granted** and the Board's February 19, 2019 order sustaining the opposition and entering judgment against Applicant is hereby vacated.¹²

Applicant is allowed until **TWENTY DAYS** from the mailing date of this order to appoint new counsel, or to file a paper stating that Applicant chooses to represent himself.¹³ In addition, Applicant is allowed until **THIRTY DAYS** from the mailing date of this order to file and serve his response to Opposer's motion for partial summary judgment. A reply brief, if any, shall be due in accordance with Trademark Rule 2.127(e)(1), 37 C.F.R. § 2.127(e)(1).

Proceedings are otherwise suspended pending disposition of Opposer's partial motion for summary judgment.

A copy of this order has been sent to all persons listed below.

cc:

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¹² The involved application, Serial No. 87513578, will be reinstated to pending status.

¹³ If Applicant chooses to represent himself, Applicant must provide an email address for correspondence and service of papers. Trademark Rule 2.119(b), 37 C.F.R. § 2.119(b) (service of submissions filed with the Board must be made by email unless otherwise stipulated).

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Information regarding legal representation

While Patent and Trademark Rule 11.14 permits any person to represent itself, it is strongly advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in *inter partes* proceedings before the Board to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney. *See* TBMP § 114.02.

Trademark Rules 2.119(a) and (b) require that every submission filed in a proceeding before the Board **must** be served upon the other party or parties, and proper proof of such service must be made before the submission will be considered by the Board. Accordingly, all submissions filed in this proceeding **must** be accompanied by a statement, signed by the attorney or other authorized representative, attached to or appearing on the original submission when filed, clearly stating the date and manner in which service was made, the name of each party or person upon whom service was made, and the email address or address. *See* TBMP § 113.03. Service must be made by email unless otherwise stipulated, or unless the filing party has satisfied the requirements for another method of service as set forth in Trademark Rule 2.119(b). The statement will be accepted as prima facie proof of service, must be signed and dated, and should take the form of a Certificate of Service as follows:

I hereby certify that a true and complete copy of the foregoing (insert title of submission) has been served on (insert name of opposing counsel or party) by forwarding said copy on (insert date of mailing), via email (or insert other appropriate method of delivery) to: (set out name, address, and email address of opposing counsel or party).

Signature _____
Date _____

Submissions in Board proceedings must be made via ESTTA, the Electronic System for Trademark Trials and Appeals, and must be in compliance with Trademark Rules 2.126(a) and (b). *See* TBMP § 110.01. The ESTTA user manual, ESTTA forms, and instructions for their use are at <http://estta.uspto.gov/>.

It is recommended that any pro se party be familiar with the latest edition of Chapter 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice. Parties should also be familiar with the Trademark Trial and Appeal Board Manual of Procedure (TBMP), available at <http://www.uspto.gov/ttab>, the TTABVUE system for viewing the record for all Board proceedings, available at <http://ttabvue.uspto.gov/ttabvue/>, and the Standard Protective Order, available at <https://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/standard-documents-and-guidelines-0>.

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is required of all parties, whether or not they are represented by counsel. *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, n.2 (TTAB 2006), *aff'd unpub'd*, 240 Fed. Appx.865 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1109 (2008).