

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500
General Email: TTABInfo@uspto.gov

Baxley

May 9, 2023

Opposition No. 91282337

Murvin Persaud

v.

MD Audio Engineering, Inc.

Before Taylor, Lykos and Larkin,
Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of Opposer's fully briefed motion (filed February 9, 2023) to vacate judgment under Fed. R. Civ. P. 60(b).¹ 11 TTABVUE. We also address Applicant's motion to dismiss Opposer's Amended Notice of Opposition or, alternatively, for a more definite statement, filed January 10, 2023, which was

¹ The parties were involved in Cancellation No. 92074565, styled *MD Audio Eng'g, Inc. v Persaud*, wherein Applicant, as Petitioner, sought to cancel Opposer's Registration No. 5763880. In that proceeding, the Board, in an August 3, 2022 order (16 TTABVUE), granted Petitioner/Applicant's motion for discovery sanctions under Trademark Rule 2.120(h) and entered judgment against Respondent/Opposer after Respondent/Opposer failed to comply with the Board's April 4, 2022 order compelling discovery. 13 TTABVUE.

In a February 9, 2023 order, the Board denied Respondent/Applicant's motion to vacate judgment under Fed. R. Civ. P. 60(b). 28 TTABVUE. On March 9, 2023, Respondent/Opposer filed a petition to the Director requesting reinstatement of his registration and Director review of the February 9, 2023 order. 29 TTABVUE. In a May 2, 2023 petition decision, the Director dismissed the petition, but indicated that it would be forwarded to the Board for treatment as a timely filed request for reconsideration of the February 9, 2023 decision. 30 TTABVUE. The request for reconsideration is pending.

granted on February 7, 2023, and resulted in the entry of the judgment that is the subject of Opposer's motion to vacate judgment.

I. Background

Applicant filed an application to register on the Principal Register the standard character mark MD AUDIO ENGINEERING for "Automobile sound systems comprised of amplifiers, speakers, and subwoofers" in International Class 9.² After Applicant's mark was published for opposition, Opposer, on December 15, 2022, filed a notice of opposition, followed, on December 16, by an amended notice of opposition. 1 and 5 TTABVUE. On January 10, 2023, Applicant filed its motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. 7 TTABVUE. In a January 11, 2023 suspension order, the Board stated that "[a]ny submission filed during the pendency of this motion which is not relevant thereto will be given no consideration" and that "[r]emaining briefing of that motion is due in accordance with Trademark Rule 2.127(a)." 8 TTABVUE 1. After Opposer failed to respond to the motion to dismiss, the Board, in a February 7, 2023 order, granted the motion as conceded. 9 TTABVUE. Two days later, Opposer filed his Rule 60(b) motion.

II. FRCP 60(b) Motion

In support of the Rule 60(b) motion, Opposer contends that, in view of the suspension order, he did not know that he had to respond to the motion to dismiss

² Application Serial No. 88501889, filed July 5, 2019, based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), and alleging August 25, 2011 as the date of first use anywhere and of first use in commerce. The application includes a disclaimer of AUDIO ENGINEERING. On March 14, 2023, this application matured into Registration No. 6998611.

and that the suspension order did not set forth a due date for his response to the motion to dismiss. Accordingly, Opposer contends that his failure to respond was “an honest mistake or misunderstanding.” 11 TTABVUE 2.

In response, Applicant contends that ignorance of the rules does not constitute excusable neglect, especially in this instance where Opposer chose to pursue this case without the assistance of counsel, and that Opposer did not address the merits of the motion to dismiss.

The Board will treat Opposer’s motion as being under Federal Rule of Civil Procedure 60(b)(1), which provides for relief from judgment based on “mistake, inadvertence, surprise, or excusable neglect.” Such a motion must be brought within a reasonable time, not to exceed one year following the entry of judgment, and may be rejected as untimely if it is not brought within a reasonable time. *See Fed. R. Civ. P. 60(c)(1)*. Whether the time of filing a Rule 60(b) motion was reasonable depends upon the facts in a case, including the length and circumstances of delay in filing, the prejudice to the opposing party by reason of the delay, and the circumstances warranting equitable relief. *See Venture Indus. Corp. v. Autoliv ASP Inc.*, 457 F.3d 1322, 79 USPQ2d 1758, 1763 (Fed. Cir. 2006). Respondent filed his Rule 60(b) motion two days after the entry of the judgment. We therefore find that Respondent sought relief from judgment within a reasonable time.

We now turn to the merits of Respondent’s motion. We note initially that relief from a final judgment is an extraordinary remedy to be granted only in exceptional circumstances or when other equitable considerations exist. *See Djeredjian v. Kashi*

Co., 21 USPQ2d 1613, 1615 (TTAB 1991). In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380 (1993), as discussed by the Board in *Pumpkin, Ltd. v. Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the U.S. Supreme Court clarified the meaning and scope of “excusable neglect,” as used in the Federal Rules of Civil Procedure and elsewhere. The Court held that the determination of whether a party’s neglect is excusable is:

at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include. . . [1] the danger of prejudice to the [nonmovant], [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 the movant, and [4] whether the movant acted in good faith.

Pioneer Inv. Servs. Co., 507 U.S. at 395. In subsequent applications of this test, the third *Pioneer* factor, namely the reason for the delay and whether it was within the reasonable control of the movant, is often treated as the most important factor in deciding excusable neglect issues.³ See *Pumpkin, Ltd.*, 43 USPQ2d at 1586 n.7 and cases cited therein.

We therefore turn initially to the third *Pioneer* factor. Opposer’s contention that, in view of the suspension order, he did not know that he had to respond to the motion to dismiss is unpersuasive. The plain language of the suspension order indicated that that order precluded only submissions that were irrelevant to the motion to dismiss and in no way precluded Opposer from responding thereto. In addition, Trademark Rule 2.127(a) states in relevant part that “[w]hen a party fails to file a brief in

³ “[I]nadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute ‘excusable’ neglect.” *Pioneer Inv. Servs. Co.*, 507 U.S. at 392 (1993).

response to a motion, the Board may treat the motion as conceded.” (emphasis added). Thus, it was incumbent upon Opposer to respond to the motion to dismiss.

In bringing the above-captioned opposition, Opposer had a duty to be aware of the applicable procedural rules, including Rule 2.127(a), and to follow them, whether or not he was represented by an attorney. *See McDermott v. S. F. Women’s Motorcycle Contingent*, 81 USPQ2d 1212, 1212 n.2 (TTAB 2006). Moreover, the Board does not set forth due dates for responding to a motion in orders suspending proceedings pending disposition of that motion because those due dates are set by operation of the applicable rules. *See Trademark Rules 2.127(a) and 2.127(e)(1)*. In view of the foregoing, we resolve this factor against Opposer.

We find, however, regarding the first *Pioneer* factor that the danger of potential prejudice to Applicant is not significant. Applicant’s being deprived of the windfall of an uncontested dismissal and instead being required to defend this opposition does not constitute prejudice. Rather, prejudice contemplates an adverse impact on Applicant’s ability to litigate this case, such as through lost evidence or unavailable witnesses. *See Pumpkin Ltd.*, 43 USPQ2d at 1587; TRADEMARK BOARD MANUAL OF PROCEDURE (TBMP) § 509.01(b) (2022).

As for the second *Pioneer* factor, the length of the delay and its potential impact on this proceeding, we find that the delay caused by Respondent’s failure to act during discovery in this case and the motion arising therefrom are also relatively insignificant because Opposer filed his motion to vacate the judgment just two days

after its entry. We find that this factor also weighs heavily in favor of a finding of excusable neglect. Regarding the fourth *Pioneer* factor, we find that there is no indication that Opposer is acting in bad faith.

We therefore find that, on balance, Opposer has shown that his failure to take timely action herein was the result of excusable neglect. Based on the foregoing, Opposer's motion to vacate judgment under Fed. R. Civ. P. 60(b)(1) is granted, and we will decide Applicant's motion to dismiss on the merits.

III. FRCP Rule 12(b)(6) Motion

We now turn to the motion to dismiss for failure to state a claim. A Rule 12(b)(6) motion to dismiss is a test solely of the legal sufficiency of a complaint. *See Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007). To withstand a Rule 12(b)(6) motion to dismiss, Opposer need only allege such facts which, if proven, would establish that: (1) Opposer has entitlement to a statutory cause of action, formerly known as standing, under Trademark Act Section 13, 15 U.S.C. § 1063; and (2) a valid statutory ground exists for denying the registration sought. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020). "A dismissal under Rule 12(b)(6), to be sustained, must be correct as a matter of law when the allegations of the complaint are taken as true. Disputed issues are construed favorably to the complainant, and all reasonable inferences are drawn in favor of the complainant." *Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993) (citations omitted).

“[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In particular, a plaintiff need only allege “enough factual matter ... to suggest that [a claim is plausible]’ and ‘raise a right to relief above the speculative level.” *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010). A plaintiff need not set forth its entire case at the pleading stage. See *Lewis Silkin LLP v. Firebrand LLC*, 129 USPQ2d 1015, 1017 (TTAB 2018).

We find that, in the amended notice of opposition, 5 TTABVUE 3, Opposer has provided fair notice of the basis for entitlement to a statutory cause of action by its allegation of prior use of the trade name MD AUDIO for “audio gear” and the repair, modification, manufacture and rebuilding thereof. See *Green Spot (Thailand) Ltd. v. Vitasoy Int’l Holdings Ltd.*, 86 USPQ2d 1283, 1285 (TTAB 2008) (standing based on prior use of an identical mark); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1106 (TTAB 2007) (standing based on prior use of an identical mark). However, Opposer has failed to allege a ground for opposition that is properly before the Board. In particular, Opposer alleges “trademark infringement.” 5 TTABVUE 3-4. Opposer also alleges that the “Customs and Border Patrol should be held accountable” for allowing Applicant’s products bearing the involved mark MD AUDIO ENGINEERING to enter the United States after April 2020. 5 TTABVUE 2. Because the Board is empowered only to determine the right to obtain and maintain

trademark registrations, these issues are outside of the Board's purview. *See* TBMP § 102.01 and cases cited therein. In view thereof, the motion to dismiss is granted.

In keeping with Board practice, Opposer is allowed until **thirty (30) days** from the date of this order to file a second amended petition to cancel which alleges a proper ground for opposition,⁴ failing which this proceeding will be dismissed. *See* Trademark Rule 2.106(c); TBMP § 503.03. Proceedings otherwise remain **suspended**.

IV. Pro Se Representation

Opposer is representing himself herein. While Patent and Trademark Rule 11.14 permits any person to represent himself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in a Board proceeding 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.

In this proceeding, the parties should review the Trademark Board Manual of Procedure (TBMP) and the Trademark Rules of Practice, online at <https://www.uspto.gov/trademarks/ttab>. The Board expects all parties appearing before it, whether or not they are represented by counsel, to comply with the Trademark Rules of Practice and where applicable, the Federal Rules of Civil Procedure.

⁴ *See* TBMP § 309.03(b) regarding the substance of a notice of opposition.

Trademark Rules 2.119(a) and (b) state that every submission filed in this proceeding must be served upon the attorney for the other party, or on the party if there is no attorney, and proof of such service must be made before the paper will be considered by the Board. Consequently, copies of all submission which Opposer may subsequently file in this proceeding must be accompanied by a signed statement indicating the date and manner in which such service was made, e.g., by e-mail. The statement, whether attached to or appearing on the paper when filed, will be accepted as prima facie proof of service.