UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Baxley

Mailed: February 7, 2006

Cancellation No. 92032958

Tango Chix Productions, Inc.

v.

Olive Industries, Ltd.

Cancellation No. 92043001
Cancellation No. 92043008

Olive Industries, Ltd.

v.

Tango Chix Productions, Inc.

Before Rogers, Drost and Zervas,
Administrative Trademark Judges

By the Board:

The parties to these proceedings are in opposite postures: Tango Chix Productions, Inc. ("Tango Chix") seeks to cancel Olive Industries, Ltd.'s ("Olive") Registration No. 1629630 in Cancellation No. 92032958, and Olive seeks to cancel Tango Chix's Registration No. 2807710 in Cancellation No. 92043001 and Registration No. 2807709 in Cancellation No. 92043008. The proceedings were consolidated in a December 14, 2004 Board order and have moved forward with Cancellation Nos. 92043001 and 92043008 being scheduled in a

manner analogous to counterclaims. See generally TBMP Section 313 (2d ed. rev. 2004).

Discovery and trial dates in the above-captioned proceedings were last reset in the Board's April 25, 2005 order. Under the schedule set forth in that order, Tango Chix's testimony period as plaintiff in Cancellation No. 92032958 closed on September 8, 2005, and Olive's testimony period as defendant in that case and as plaintiff in Cancellation Nos. 92043001 and 92043008 closed on November 7, 2005. Neither party filed evidence or took testimony during these testimony periods.

This case now comes up for consideration of (i) Olive's motion (filed December 12, 2005) to dismiss Cancellation No. 92032958 under Trademark Rule 2.132(a) because of Tango Chix's failure to prosecute; (ii) Tango Chix's motion (filed December 5, 2005) to dismiss Cancellation Nos. 92043001 and 92043008 under Trademark Rule 2.132(a) because of Olive's failure to prosecute; and (iii) Olive's cross-motion (filed December 20, 2005) to reopen its testimony period in Cancellation Nos. 92043001 and 92043008.

We turn first to Olive's motion to dismiss Cancellation No. 92032958 under Rule 2.132(a). Because no brief in response to that motion is of record, that motion is hereby

granted as conceded.[1] See Trademark Rule 2.127(a). Judgment is hereby entered against Tango Chix in Cancellation No. 92032958, and Tango Chix's petition to cancel in Cancellation No. 92032958 is denied with prejudice.

We turn next to Tango Chix's motion to dismiss Cancellation Nos. 92043001 and 92043008 based on Olive's failure to prosecute and Olive's cross-motion to reopen its testimony period in those cases. In support of its motion to dismiss, Tango Chix contends that Olive failed to take testimony or file evidence during its testimony period as plaintiff in Cancellation Nos. 92043001 and 92043008 and thus asks that these cancellation proceedings be dismissed with prejudice.

In response thereto and in support of its motion to reopen its testimony period as plaintiff in Cancellation Nos. 92043001 and 92043008, Olive contends that its failure to take testimony and file evidence during its testimony period was caused by the failure of an assistant to its attorney to docket properly the trial schedule as last reset in the Board's April 25, 2005 order; and that, during the

[1] Although Olive's motion to dismiss under Rule 2.132(a) was not filed prior to the commencement of Olive's testimony period as defendant in Cancellation No. 92032958 and as plaintiff in Cancellation Nos. 92043001 and 92043008, the Board may, in its discretion, grant such motion. See Trademark Rule 2.132(c); TBMP Section 534.01 (2d ed. rev. 2004).

time period at issue, the assistant was "in and out of medical and/or psychiatric care and eventually left [the attorney's] office in the autumn of 2005." Declaration of Olive's attorney, Val D. Hornstein, at 3. Olive further contends that, in a May 17, 2005 order, the Board set aside a notice of default that it issued to Tango Chix for failure to timely file answers in Cancellation Nos. 92043001 and 92043008 based on Tango Chix's response that it did not file timely answers in these cases because of a docketing error; that Tango Chix requested and Olive agreed to at least five extensions of time to serve responses to written discovery requests which extended the parties' time to serve such responses to after the close of Tango Chix's testimony period as plaintiff in Cancellation No. 92032958; that the parties have completed taking discovery and are ready to proceed with trial; that there is no evidence of prejudice to Tango Chix; and that Olive has acted in good faith throughout these proceedings. Accordingly, Olive asks that the Board deny Tango Chix's motion to dismiss and reopen Olive's testimony period.

In its reply to the motion to dismiss and in response to Olive's cross-motion to reopen Olive's testimony period, Tango Chix contends that Olive's docketing error does not constitute excusable neglect; and that the fact that the Board set aside the notice of default that it issued to

Tango Chix for failure to timely file answers in Cancellation Nos. 92043001 and 92043008 based on Tango Chix's explanation that it did not timely file such answers because of a docketing error has no bearing on Tango Chix's motion to dismiss.

Inasmuch as Tango Chix has filed a motion for judgment under Trademark Rule 2.132(a), Olive must show good and sufficient cause why judgment should not be rendered against it, failing which the petitions to cancel will be denied with prejudice. The "good and sufficient cause" standard, in the context of Trademark Rule 2.132(a), is equivalent to the "excusable neglect" standard which Olive must meet under Fed. R. Civ. P. 6(b) to reopen its testimony period. See *Grobet File Co. of America Inc. v. Associated Distributors Inc.*, 12 USPQ2d 1649 (TTAB 1989).

In *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993), as discussed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the 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:

> [A]t 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 Investment Services Co. v. Brunswick Associates L.P., 507 U.S. at 395. In subsequent applications of this test, several courts have stated that the third *Pioneer* factor, namely the reason for the delay and whether it was within the reasonable control of the movant, might be considered the most important factor in a particular case. *See Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d at 1586, fn. 7 and cases cited therein.

We turn initially to the third *Pioneer* factor. It is settled that action, inaction, or even neglect by a party's attorney and employees of that attorney will not excuse that party so as to yield it another day in court. See, e.g., *Williams v. The Five Platters, Inc.*, 510 F.2d 963, 184 USPQ 744 (CCPA 1975), *aff'g* 181 USPQ 409 (TTAB 1974). We find that Olive's failure to act prior to the close of its testimony period was caused by the docketing error of an assistant to Olive's attorney. This docketing error is considered to be within Olive's control.

Olive's attorney, in his declaration, alleges that his assistant was under medical and/or psychiatric care during the relevant time period. Olive's attorney, however, makes only these general assertions and has failed to set forth any specific facts about precisely how his assistant's

psychiatric or medical condition adversely affected counsel's ability to monitor proceedings, so as to render excusable the assistant's failure to docket the trial schedule set forth in the April 25, 2005 order. See Wright & Miller, *Federal Practice and Procedure, Civil 3d,* Section 1165 (citing *Jim's Trailer Sales, Inc. v. Shutok*, 153 F. Supp. 274 (W.D. Pa. 1957) (facts constituting excusable neglect must be stated with particularity)). Based on the foregoing, the third *Pioneer* factor weighs heavily against a showing of excusable neglect.

We note that, in a May 17, 2005 order, the Board set aside a notice of default that was issued to Tango Chix in Cancellation Nos. 92043001 and 92043008 based on Tango Chix's explanation in response thereto that it failed to timely file its answer because of a docketing error.[2] However, the Board is more lenient in determining whether a defendant has shown good cause under Fed. R. Civ. P. 55(c) why default judgment should not be entered against a defendant for failure to file a timely answer than it is in determining whether a plaintiff has shown good and sufficient cause why judgment should not be entered against

[2] In the May 17, 2005 order, the Board left discovery and trial dates as reset in the schedule set forth in the April 25, 2005 order.

a plaintiff for failure to prosecute.[3] Compare *Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 USPQ2d 1899 (Comm'r 1990) with *PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860 (TTAB 2002).

With regard to the second *Pioneer* factor, while Olive's trial period closed on November 7, 2005 and it filed its motion on December 20, 2005, after Tango Chix filed its motion to dismiss, the relief it seeks - reopening of its trial period - will cause delay beyond the normal delays in any contested legal proceeding. If the Board were to grant Olive's motion to reopen, and the trial dates in Cancellation Nos. 92043001 and 92043008 were reset beginning with Olive's trial period, final briefing on the merits in these proceedings would not be completed until at least October 2006, i.e., eleven months after Olive's trial period closed under the April 25, 2005 order. This delay is not insignificant.

Olive's delay has impacted this case by disrupting the orderly administration thereof.[4] Both the Board and parties

[3] The Board is reluctant to enter judgment by default against a defendant for failure to file a timely answer and tends to resolve any doubt with regard thereto in favor of the defendant. See TBMP Section 312.02 (2d ed. rev. 2004).

[4] We note that Olive should have filed its motion to dismiss Cancellation No. 92032958 under Trademark Rule 2.132(a) prior to the October 9, 2005 commencement of its testimony as plaintiff in Cancellation Nos. 92043001 and 92043008. See Trademark Rule 2.132(c); TBMP Section 534.01 (2d ed. rev. 2004). However, Olive did not file its motion to dismiss until December 12, 2005, long after the close of its testimony period and only after Tango Chix

before it have an interest in minimizing the amount of the Board's time and resources that must be expended on matters, such as the motions decided herein, which come before the Board solely as a result of a plaintiff's failure to docket properly a trial schedule. See *PolyJohn Enterprises Corp. v. 1-800-Toilets Inc., supra.* In view of the foregoing, the second *Pioneer* factor weighs against a finding of excusable neglect.

With regard to the first *Pioneer* factor, if the testimony period is reopened, Olive, which has not yet offered testimony or other evidence, will have a second opportunity to offer testimony or other evidence, which may be time consuming and costly to Tango Chix. Tango Chix will also have lost any advantage it has gained due to Olive's failure to offer testimony or other evidence. Further, Tango Chix will have to wait even longer to know the resolution of this matter, and ultimately, whether its registrations will survive this proceeding. Thus, we resolve this factor in Tango Chix's favor.

With regard to the fourth *Pioneer* factor, we find that there is no evidence of bad faith on the part of Olive. Thus, the fourth factor is neutral.

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timely filed a motion to dismiss Cancellation Nos. 92043001 and 92043008 under Trademark Rule 2.132(a).

In view of the foregoing, and noting particularly that the third factor, i.e., "the reason for the delay, including whether it was within the reasonable control of the movant," may be deemed to be the most important of the factors listed above in a particular case, see *Pumpkin*, *supra* at n.7, we find that Olive's failure to timely offer testimony or other evidence during its testimony period was not the result of excusable neglect.

In addition, the fact that the parties agreed to extend their time to serve written discovery requests until after the close of Tango Chix's testimony period as plaintiff in Cancellation No. 92032958 does not affect the trial schedule in these consolidated proceedings.[5] Trademark Rule 2.120(a) states in relevant part as follows:

> The resetting of a party's time to respond to an outstanding request for discovery will not result in the automatic rescheduling of the discovery and/or testimony periods; such dates will be rescheduled only upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.

Although Olive correctly notes in its brief in response that the Board generally disfavors default judgments, the Board is justified in enforcing procedural deadlines. See

[5] Olive contends that it agreed to at least five extensions of time to serve responses to written discovery requests. We note, however, that Olive appears to have agreed to such extensions without reviewing the trial schedule herein. The record in these proceedings is available online at http://ttabvue.uspto.gov/ttabvue/.

Hewlett-Packard Co. v. Olympus Corp., 931 F.2d 1551, 1554, 18 USPQ2d 1710, 1713 (Fed. Cir. 1991). Moreover, that general policy typically shields defendants from an adverse judgment that would otherwise be entered on technical or procedural grounds. A plaintiff, however, is in a different position and bears not only a burden of proof but also a burden of moving a case forward through presentation of its proofs. Olive commenced Cancellation Nos. 92043001 and 92043008 and, in so doing, took responsibility for moving these cases forward in accordance with the trial schedule set forth in the April 25, 2005 order. See *Atlanta-Fulton County Zoo, Inc. v. DePalma,* 45 USPQ2d 1858, 1860 (TTAB 1998). However, Olive failed to do so.

In view thereof, Tango Chix's motion to dismiss Cancellation Nos. 92043001 and 92043008 under Trademark Rule 2.132(a) for failure to prosecute is hereby granted and Olive’s motion to reopen is denied. Judgment is hereby entered against Olive in Cancellation Nos. 92043001 and 92043008, and the petitions to cancel in both proceedings are denied with prejudice.