

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

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Mailed: May 26, 2005

Cancellation No. 92043116

Shoe Spring, Inc.

v.

Basic Sports Apparel, Inc.

Before Hohein, Hairston, and Chapman
Administrative Trademark Judges.

Basic Sports Apparel, Inc. is the record owner of Registration No. 2,218,515, issued on January 19, 1999, on the Principal Register for the mark SPIRAL for "jackets, pullovers, hats, jeans, T-shirts, vests, shorts, underwear, shoes, socks, gloves, headbands and scarves" in International Class 025.

On March 22, 2004, Shoe Spring, Inc. filed a petition to cancel the registration, claiming that registrant had abandoned its mark; that petitioner has priority of use of the trademark SPIRA for shoes; and that although it did not believe there to be a likelihood of confusion between the marks, the registrant's mark had been cited against petitioner's pending application. Registrant, on June 14,

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2004, filed an answer which denied all the salient allegations of the petition to cancel.

Discovery closed on October 18, 2004. Petitioner's testimony period closed on January 16, 2005.

This case now comes up on respondent's motion for judgment under Trademark Rule 2.132(a), 37 CFR § 2.132(a), for petitioner's failure to prosecute, filed on January 26, 2005. Petitioner responded on February 16, 2005, and filed a motion to reopen its testimony period.

As indicated above, petitioner filed its petition to cancel on March 22, 2004. Respondent filed a stipulated extension to answer the petition on May 5, 2004, and its answer was filed on June 14, 2004. Trial dates were not reset and petitioner's testimony period closed on January 16, 2005. We will address petitioner's motion to reopen first.

In support of its motion to reopen, petitioner states that "through no fault of its own, it was required to change legal counsel handling this cancellation"; that petitioner "was unaware that [the] matter in question was not properly responded to and thought the matter was still pending"; and that "petitioner moved its offices during the relevant period and may not have received all of its mail regarding this matter."

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Respondent contends that while petitioner's affidavit states that its counsel withdrew "in early 2004," respondent's "counsel communicated with petitioner's counsel via telephone regarding the filing of a stipulated motion for an extension of time to answer on or about May 4, 2004"; that communication continued when counsel received "a letter from petitioner's counsel dated June 4, 2004 and respond[ed] to the letter on July 9, 2004"; and that during such time neither respondent nor its counsel were informed that petitioner's counsel was withdrawing. Further, as to petitioner's allegation that it moved its offices and "may not have received all of its mail regarding this matter," respondent points out that no mail was sent out regarding the testimony period subsequent to "early 2004" and thus petitioner's relocation is irrelevant to petitioner's testimony period closing. Respondent concludes that petitioner's allegations do not amount to the good and sufficient cause necessary to reopen its testimony period.

Pursuant to Fed. R. Civ. P. 6(b)(2), the requisite showing for reopening an expired period is that of excusable neglect. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), and as discussed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the U.S. Supreme Court set forth factors to be considered in determining excusable

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neglect. Those factors 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. 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, supra* at n.7.

Accordingly, we turn to the third factor and find that petitioner's failure to take testimony or offer evidence during its testimony period was caused by its complete failure to act and to monitor the time periods in this proceeding. Such action was wholly within the reasonable control of petitioner. Docketing errors and breakdowns do not constitute excusable neglect. *See Pumpkin, supra*, and cases cited therein.

The statements offered by petitioner in support of its motion to reopen - that it was "required to change legal counsel" and that "it may not have received all of its mail" - do not constitute circumstances which meet the excusable neglect standard when, in fact, petitioner's counsel has not withdrawn, petitioner has not executed a new

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power of attorney, and there is no evidence that petitioner failed to receive correspondence regarding this case.

Petitioner, as plaintiff, has a duty to pursue prosecution of its petition to cancel within the time period set by the Board or to request a timely extension or suspension thereof.

Petitioner contends that there is no prejudice to respondent because it "means no harm to Basic Sports Apparel, the Registrant, of the SPIRAL mark. Petitioner sought to register the SPIRA name, and was denied registration by the Trademark Office, solely as a result of the Registrant's mark." However, as respondent points out, respondent has suffered harm and continues to suffer harm because this cancellation proceeding is preventing respondent from filing a Section 15 affidavit of incontestability; respondent continues to pay legal fees to defend this petition; and the application petitioner points to as being refused in light of respondent's registration, has since been abandoned.

Petitioner brought this case and, in so doing, took responsibility for moving it forward in accordance with the trial schedule, but failed to do so. See *Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 USPQ2d 1858, 1860 (TTAB 1998).

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With regard to the second *Pioneer* factor, we find that the delay caused by petitioner's failure to take testimony or offer evidence during its testimony period is significant. The Board's growing docket of active cases, and the resulting, inevitable increase in motion practice before the Board, increasingly strains the Board's limited resources. Both the Board and parties 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 one party's total failure to monitor its own litigation. The Board's interest in deterring such failure weighs against a finding of excusable neglect under the second *Pioneer* factor.

As for the fourth factor, whether petitioner acted in good faith, we find that there is no evidence of bad faith on the part of petitioner.

On balance, we find that petitioner's failure to timely act before the close of its testimony period was not caused by factors constituting excusable neglect, petitioner's motion to reopen its testimony period is hereby denied.

Inasmuch as petitioner has failed to offer any testimony or other evidence in this case, respondent's motion to dismiss under Trademark Rule 2.132(a) is hereby

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granted. Accordingly, judgment is hereby entered against petitioner, and the petition to cancel is denied.

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