

Stealth Industries, Inc.

v.

Stone Age Equipment, Inc.

Opposition No. 81,164

On Petition to the Commissioner

Filed: August 1, 1996

Stealth Industries, Inc. (“Stealth”) has petitioned the Commissioner for reversal of an interlocutory order of the Trademark Trial and Appeal Board (the “Board”) issued in the above referenced proceedings. Stone Age Equipment, Inc. (“Stone Age”) has filed a response to the proceeding urging affirmance of the Board’s order. The petition is denied pursuant to the authority provided by Trademark Rule 2.146(a)(3); 37 C.F.R. 2.146(a)(3).

FACTS

This case has a lengthy procedural history, filled with extensions of time, suspensions, withdrawal of attorneys, motions, responses thereto, requests and Board orders. It began in 1989, when Stealth timely filed a Notice of Opposition on September 18th. During 1990, interrogatories and document production requests were exchanged between the parties. In 1991, the proceedings were temporarily suspended pending resolution of a civil proceeding. Motions, stays and further action occurred during the next several years. The discovery period closed in 1992.¹

Stealth filed *a pro se* motion to reset discovery and trial dates on October 16, 1995, based on the withdrawal of Stealth’s counsel who “[had] not delivered to [Stealth] all papers related to this proceeding” and who allegedly gave Stealth the erroneous impression that the opposition had been resolved by a licensing agreement between the parties. Stealth further asserted that it had only just recently discovered, via the Board’s September 25, 1995 order, that the opposition had not been resolved by negotiation by its now-withdrawn attorney.²

¹ Pursuant to a Board order dated November 15 1991, the discovery period closed on February 13, 1992. A subsequent Board order dated July 30, 1992, confirmed that the discovery period was in fact closed.

² Since 1991, three attorneys have withdrawn from representation of Stealth in this proceeding, the last withdrawal occurring in August of 1995.

On July 16, 1996, the Board issued an interlocutory order denying four outstanding motions and requests pending in the case, including Stealth's motion to reopen and reschedule the discovery and testimony periods, filed October 16, 1995.³ This petition followed.

Stealth argues that the Board's denial of its motion to reopen the discovery and testimony periods was "clear error or abuse of discretion" when viewed in light of the alleged actions of their withdrawn counsel, as well as Stealth's own diligence in pursuing this proceeding.⁴

In the unverified petition,⁵ Stealth specifically alleges the following: that it believed the opposition had been resolved via a license agreement between the parties; that it first became aware that the opposition was still "active" on August 24, 1995, the date Stealth received a faxed letter from its counsel expressly withdrawing from the proceeding; that on September 25, 1995, Stealth first learned that the Board proceeding had in fact not been fully resolved when it received the Board's order rejecting its request to suspend; and that the withdrawn counsel failed to promptly forward to Stealth all relevant papers regarding the proceeding.

In its response brief, Stone Age argues that the Board's decision is correct because Stealth failed to conclusively establish the following: the selection of qualified counsel by Stealth; active monitoring of the Board proceeding by Stealth, apart from the actions of its counsel; and Stealth's counsels' grossly negligent handling of the proceeding and intentional withholding of information on the progress and status of the proceeding. In addition, Stone Age strenuously disagrees with the allegations of Stealth's diligence, arguing that Stealth has attempted throughout the proceedings to delay and stall for time.

Further, Stone Age points out a discrepancy in Stealth's unverified petition with respect to allegations regarding a license agreement between the parties that Stealth alleges it relied upon when assuming that the opposition had been concluded by negotiation. Stone Age submitted a copy of a letter it received from Stealth's withdrawn counsel which makes clear that the license agreement was sent at Stealth's request. Furthermore, the license agreement submitted to Stone Age by Stealth's counsel was unsigned by either party, and it is unclear how Stealth could have assumed that the matter was even close to being resolved based on these facts.

DECISION

³ On December 8, 1995, Stealth filed a motion for summary judgment on the merits; on January 16, 1996, Stealth filed a motion to consolidate; and on April 26, 1996, Stealth submitted status and title copies of three trademark registrations for inclusion in the record. Stone Age submitted several responses to these motions and requests.

⁴ As stated previously, the Board's order addressed four separate motions and requests. However, Petitioner requested review only of the decision by the Board denying Stealth's request to reopen and reschedule the discovery and testimony periods.

⁵ All facts presented on petition must be properly verified, i.e. notarized or utilizing a declaration pursuant to 37 C.F.R. Section 2.20. 37 C.F.R. Section 2.146(c).

Pursuant to 35 U.S.C. §6 and 37 C.F.R. §2.146(a)(3), the Commissioner may invoke supervisory authority in appropriate circumstances. However, the Commissioner will vacate an action of the Trademark Trial and Appeal Board only where the Board has committed a clear error or abuse of discretion. *In re Societe Des Produits Nestle S.A.*, 17 USPQ2d 1093 (Comm’r Pats. 1990); *Riko Enterprises, Inc. v. Lindsley*, 198 USPQ 480 (Comm’r Pats. 1977). No clear error or abuse of discretion has been shown in the present case.

ANALYSIS

The time limits for the taking of testimony in an *inter partes* proceeding are expressly set forth in the Trademark Rules of Practice. *See* 37 C.F.R. §§2.120 and 2.121; *Trademark Trial and Appeal Board Manual of Procedure* (TBMP) §403.01. Testimony periods may be rescheduled, extended, or reopened by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. *See* 37 C.F.R. §§2.121(a)(1) and 2.121(c); FRCP §6(b); and TBMP §§501 and 509.

When a motion to extend a testimony period is filed *after* expiration of a period originally set or previously extended, it is considered a “motion to reopen,” as in the present situation. If the motion is not stipulated to by the parties, then the moving party must show that its failure to act during the specified time period was the result of “excusable neglect.” TBMP §509.01; FRCP §6(b). Inasmuch as Stealth’s motion to reopen the discovery and trial periods was not stipulated to by Stone Age, Stealth was required to make a showing of “excusable neglect” in order to prevail on the motion.

The “excusable neglect” standard applicable to FRCP §6 is enunciated in *Hewlett-Packard Co. v. Olympus Corp.*, 18 USPQ2d 1710, 1712, as follows: the “failure [of a party] to take the proper steps at the proper time, not in consequence of the party’s own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.”

In the order denying Stealth’s motion, the Board cited the *Hewlett-Packard* case, *infra*, and explained that “it is the responsibility of a party to keep track of dates and to either meet the schedule set by the Board or to take steps to secure a timely extension of that schedule. Any asserted carelessness on the part of [Stealth’s] attorney with respect to the prosecution of this case, or any lapse in communication between [Stealth] and his attorney, does not, per se, constitute excusable neglect.”

Thus, the Board determined that the facts asserted by Stealth in its motion papers did not satisfy the “excusable neglect” standard of *Hewlett-Packard*, *infra*, especially under the present circumstances wherein the discovery period had closed approximately three years prior to the filing of the motion.

Although the FRCP §6(b) “excusable neglect” standard has been defined in published decisions

and is well-recognized, it is clearly meant to be a flexible standard for use by judicial bodies.⁶ As the Board stated previously, the lapse in communication between Stealth and its withdrawing attorneys, as well as the alleged carelessness of these attorneys with respect to prosecution of the case, are not actions that constitute *per se* excusable neglect, and based on these facts it cannot be said that the Board clearly erred.

Accordingly, the petition is denied. The files will be returned to the Board for resumption of the opposition proceeding.

Philip G. Hampton, II
Assistant Commissioner
for Trademarks

PGH:LBK

Date:
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⁶ Both Stealth and Stone Age refer to an “excusable neglect” standard enumerated in *General Motors Corp. v. Cadillac Club Fashions Inc.*, 22 USPQ2d 1936 (11AB 1992). However, the *General Motors* decision, *infra*, discusses an “excusable neglect” standard expressly applicable to FRCP §60(b) motions for relief from a final judgment or order.