

Rose Marie Raccioppi
d/b/a Apogee Learning

v.

Apogee, Inc.

Opposition No. 96,338
On Petition to the Commissioner
Filed: April 24, 1997

Apogee, Inc. (“Applicant”), has petitioned the Commissioner for review of the March 26, 1997 interlocutory order of the Trademark Trial and Appeal Board (“Board”). The petition is denied under Trademark Rules 2.146(a)(3) and 2.146(e)(2).¹

FACTS²

Rose Marie Raccioppi, d/b/a Apogee Learning (“Opposer”), filed a Notice of Opposition on February 1, 1995. The Opposition was instituted on June 6, 1995.

Applicant and Opposer filed numerous motions. On May 3, 1996, the Board issued an order to compel Opposer to provide, among other things, documents requested by Applicant and to make Ms. Rose Marie Raccioppi available as a witness under Rule 30(b)(6) of the Federal Rules of Civil Procedure (FRCP).

After the May 3, 1996 Board order, both parties filed more motions. Significantly for this petition, on May 20, 1996, Opposer filed a “Notice Of Motion For Summary Judgment.” On September 5, 1996, the Board denied Applicant’s motion to dismiss the opposition, but granted Applicant’s motion for a continuance to the degree that Opposer was ordered to make Ms. Raccioppi available as a Rule 30(b)(6) witness and Applicant was permitted additional time to file its opposition to the motion for summary judgment. The September 5, 1996 order specifically suspended proceedings (other than the taking of Ms. Raccioppi’s deposition and Applicant’s subsequent filing of an opposition to the motion for summary judgment) pending disposition of the motion for summary judgment.

¹ Although the petition is denied, it is recommended that both parties read, carefully, the entire contents of this decision.

² Review of the Opposition proceedings has been limited to those filings relevant to the disposition of this petition.

More motions were filed by Opposer and Applicant. On March 26, 1997, the Board reviewed the intervening motions and granted Applicant's motion to extend the time to take Ms. Raccioppi's deposition and file its response to the motion for summary judgment.

More motions followed. This petition was filed on April 24, 1997. On May 16, 1997, the Board granted Applicant's motion to suspend proceedings pending the disposition of this petition.

ANALYSIS

Standard of Review On Petition

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).

Background of the Case

After almost two years in the pre-trial phase of proceedings, Applicant has requested extraordinary equitable relief in the form of a petition to the Commissioner.

As is evident from the summary above, both parties have filed numerous motions. The recurrent theme in these motions is Applicant's attempts to depose Ms. Raccioppi and Opposer's refusal to produce Ms. Raccioppi as a witness. When the Board finally issued an order to compel Ms. Raccioppi's appearance, Opposer filed a motion for summary judgment.³

It is Applicant's contention that the Board has impermissibly limited discovery by restricting examination of Ms. Raccioppi to those matters directly related to the motion for summary judgment.

Board's March 26, 1997 Order

In addition to ruling on various motions by Opposer and Application, the Board's March 26, 1997 order clarified its order of September 5, 1996. The September 5, 1996 order required that Ms. Raccioppi be made available to Applicant as a Rule 30(b)(6) witness, prior to Applicant's filing of a response to the motion for summary judgment.

The Board provided the following guidance in the March 26, 1997 order:

Opposer's motion for a protective order is granted to the extent that opposer is required to produce only Rose Marie Raccioppi as a deposition witness under Rule 30(b)(6) and only for examination with respect to issues directly related to the pending motion for summary judgment. The Board presumed that it was understood that under

FRCP 56(f) the only discovery permitted is that essential to the party's opposition to the motion for summary judgment and thus necessarily is limited to the issues raised by that motion. Thus, while the scope of the deposition need not be limited solely to the nature of the services of opposer, applicant may only examine Ms. Raccioppi with respect to matters directly related to the motion, including the identity of documents, and may not delve into other areas which might possibly give rise to other claims or defenses.

Discussion

The Commissioner understands Applicant's frustration with Opposer's tactics. However, Applicant's argument that the Board has committed either clear error and abuse of discretion with respect to handling of the motions to date in this case is simply unsupported by any evidence. In fact, the requested review of the Board's March 26, 1997 order, as well as a review of the opposition file as a whole, reveals that the Board has exercised great patience throughout the prosecution of this opposition. Its orders have been thoughtful and responsive to the parties' numerous filings. The Applicant cannot plausibly contend otherwise, for the Board has repeatedly supported Applicant's motions for extensions of time to take discovery of Ms. Raccioppi and to extend time in which to respond to Opposer's motion for summary judgment.³

While Applicant may not like the fact that Opposer has filed a motion for summary judgment, and may consider it an obvious stalling maneuver, the motion was both permissible and timely filed. In both its September 5, 1996⁴ and March 26, 1997 order, the Board has done no more than accurately apply the rules of discovery. As Applicant knows, the scope of inquiry on motion for summary judgment is much narrower than the scope of inquiry permissible for preparation for trial on the merits. Thus, the Board has not, in any manner, violated Applicant's due process rights or in some way "sanctioned" Applicant. The Board's March 26, 1997 order may be narrower than Applicant wished and broader than Opposer hoped, but it is indisputably clear and fair.

DECISION

For the reasons noted above, Applicant's petition to the Commissioner is denied.

³ The Commissioner appreciates that Applicant's repeated motions for extensions of time have been necessitated, at least in part, by Opposer's reluctance to produce Ms. Raccioppi as a witness.

⁴ The Board order of September 5, 1996 is not directly on review, since the time for filing a petition to the Commissioner with respect to this order has long since passed. 37 C.F.R. §2.146(e)(2). However, as is obvious, review of the September 5, 1996 order is required for disposition of this petition.

The Commissioner supports the Board's efforts to speed prosecution of this opposition and to encourage civility and cooperation between the parties. For example, both parties would do well to heed the Board's request to refrain from filing copies of previous Board orders and prior filings. The opposition file is already four inches thick and the parties are still in the pre-trial phase.⁵

The opposition file will be resumed to the Board for resumption of the opposition proceedings.

Philip G. Hampton, II
Assistant Commissioner
for Trademarks

PGH:EKM

Date:

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⁵ It is noted that scarce judicial resources are devoted to each order. Since no fees are required for the various motions filed, the board is giving the parties quite a bit of consideration for free.