

UNITED STATES DEPARTMENT OF COMMERCE
Patent and Trademark Office
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Bottorff

Opposition No. 99,224

THIS OPINION IS CITABLE AS
PRECEDENT OF THE TTAB

JULY 7, 1997
Pumpkin, Ltd. dba Pumpkin
Masters

v.

The Seed Corps

Before Sams, Rice and Hairston,
Administrative Trademark Judges.

By the Board.

I. INTRODUCTION AND BACKGROUND

This case now comes up on opposer's February 27, 1997 motion to reopen its testimony period. Applicant has filed a brief opposing the motion, and opposer has filed a reply brief in support of the motion. A discussion of the procedural history of this case is helpful in understanding the issues raised by opposer's motion.

The Board issued its original trial order in this case on February 9, 1996, pursuant to which the discovery period was set to close on May 16, 1996 and opposer's testimony period was set to close on July 15, 1996. On May 14, 1996, applicant filed a motion to extend discovery and testimony

periods, which the Board granted as uncontested on July 3, 1996. Pursuant thereto, the discovery period was reset to close on July 16, 1996 and opposer's testimony period was reset to close on September 14, 1996.

On July 22, 1996, opposer filed a motion to further extend trial dates to allow for completion of discovery depositions. Opposer requested that the close of the discovery period be extended to September 14, 1996, and that opposer's testimony period be reset to close on November 14, 1996, opening thirty days prior thereto. Opposer's motion was received at the Board on July 29, 1996. When applicant failed to contest the motion, the Board granted it, stamping "APPROVED AS UNCONTESTED AUG 21 1996" on the original and on two copies of the motion and returning a copy to each party. Cf. Trademark Rule 2.121(d).

On October 7, 1996, opposer, citing Trademark Rule 2.121, filed a consented motion to extend until November 12, 1996 its time to respond to applicant's second set of discovery requests.¹ The Board stamped the motion "APPROVED" on October 17, 1996 and returned a copy thereof to each party.

¹The applicable rule governing opposer's motion to extend its time to respond to applicant's discovery requests is FRCP 6(b)(1), not Trademark Rule 2.121. However, Trademark Rule 2.121(a)(1) provides, *inter alia*, that "[t]he 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."

On November 15, 1996, the day after the close of opposer's testimony period as last reset, applicant filed a motion to compel opposer's responses to applicant's second set of interrogatories, which had been served on April 19, 1996. Opposer filed a brief in opposition to the motion to compel on December 5, 1996. On February 6, 1997, the Board issued an order denying the motion to compel and resetting trial dates, commencing with applicant's testimony period. In its order, the Board noted that opposer's testimony period had closed on November 14, 1996, and that opposer had failed to present any evidence in support of its claim.

On February 27, 1997, opposer filed the present motion to reopen its testimony period, asserting that its failure to present evidence during its assigned testimony period was the result of excusable neglect, within the meaning of FRCP 6(b)(2).

II. OPPOSER'S ARGUMENTS IN SUPPORT OF ITS MOTION TO REOPEN

In support of its motion, opposer argues that the standard for determining whether a party's failure to take required action was the result of "excusable neglect" under FRCP 6(b)(2) has been liberalized as a result of the decision of the U.S. Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*

et al, 507 U.S. 380 (1993) (hereinafter *Pioneer*).²

Accordingly, opposer argues, pre-*Pioneer* decisions of the Board and of the Court of Appeals for the Federal Circuit on the issue of excusable neglect, such as *American Home Products Corp. v. David Kamenstein, Inc.*, 172 USPQ 376 (TTAB 1971), and *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710 (Fed. Cir. 1991), are no longer controlling precedent.

Opposer argues that its failure to present testimony during its assigned testimony period was the result of excusable neglect, when viewed under the equitable analysis required by *Pioneer*. Specifically, opposer argues that applicant will not be prejudiced by a reopening of opposer's testimony period, but merely will be deprived of a windfall victory. The lack of prejudice to applicant is evidenced, according to opposer, by applicant's failure to file a motion to dismiss under Trademark Rule 2.132(a) after the close of opposer's testimony period. Furthermore, opposer contends, applicant will not be prejudiced by a reopening of opposer's testimony period because applicant still will be

²The *Pioneer* decision is discussed more fully, *infra*. In brief, the Court held that delays and omissions caused by negligence and carelessness cannot be deemed to be inexcusable per se. Rather, the determination of whether a party's neglect is excusable is an equitable one which takes into account all relevant circumstances surrounding the party's delay or omission, including the danger of prejudice to the nonmovant, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

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able to present its evidence during its own testimony period.

Opposer also argues that the length of the delay caused by its failure to present testimony is minimal, in that only three months had passed between the close of opposer's testimony period and its filing of its motion to reopen. Opposer asserts that it promptly prepared and filed its motion to reopen after discovering its error on February 11, 1997, the date it received the Board's February 6, 1997 order. Opposer further argues that its delay has had no substantial impact on this proceeding, inasmuch as the Board has already suspended proceedings pending determination of opposer's February 27, 1997 motion to reopen. Opposer also notes that the Board, when it denied applicant's November 15, 1996 motion to compel discovery on February 6, 1997, reset applicant's testimony period to close on March 28, 1997, some three and one-half months after the previously-reset closing date for applicant's testimony period, i.e., December 15, 1996. Opposer argues that, in equity, opposer is entitled to a similar extension of its own testimony period.

With respect to the reasons for opposer's failure to present testimony, opposer asserts that it is possible that opposer's counsel failed to properly or timely docket the Board's August 21, 1996 order approving opposer's July 22, 1996 motion to extend trial dates, but that opposer cannot determine with certainty whether that is so. Opposer

conjectures that the docketing failure may have resulted from a mishandling of the docketing slips for this case, or from a confusion of this case with a different case also pending between the parties. Opposer states that its counsel evidently received a copy of the order, but it does not know exactly when, inasmuch as the order does not bear opposer's counsel's mailroom receipt stamp or docketing notations, nor does it bear a mailing date from the Board.³

Finally, opposer argues that it has acted in good faith in its attempts to cure its inadvertent error, that opposer has prosecuted this case vigorously through discovery, that the outcome of this case is very important to opposer's business, and that, accordingly, opposer's testimony period should be reopened so that opposer may have its "day in court."

In support of its motion, opposer has submitted the affidavits of its counsel, of its counsel's secretary who was responsible for docketing matters, and of opposer's president.

Applicant, acting pro se in this case, filed a brief in opposition to opposer's motion to reopen, supported by the

³Opposer has submitted a copy of the August 21, 1996 order it received from the Board. As noted above, that copy clearly shows the Board's stamp thereon, which states that opposer's motion to extend dates was approved as uncontested on August 21, 1996. Under the Board's practice, the date stamped on the order is deemed to be the "mailing date" of the order. The documentary materials submitted by opposer reveal that its counsel received every other Board order within several days of the mailing date stamped on the order.

affidavit of its president. In essence, applicant argues that, inasmuch as opposer is represented by experienced counsel, its failure to abide by the Board's trial schedule is inexcusable. Applicant also asserts that it has been prejudiced by the delay caused by opposer's failure to present evidence, that it will be prejudiced if opposer is given another opportunity to present evidence, that a reopening of opposer's testimony period will have an impact on the resources of the Board, and that opposer has been uncooperative during this proceeding.

III. DISCUSSION AND ANALYSIS

A. Excusable Neglect.

Opposer's motion to reopen its testimony period is governed by FRCP 6(b), made applicable to Board proceedings by Trademark Rule 2.116(a). Rule 6(b) provides as follows:

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

Inasmuch as opposer's previously-assigned testimony period already had lapsed by the time that opposer filed its motion, opposer is not entitled to have its testimony period reopened unless the Board, in its discretion, determines that opposer's failure to present testimony or other evidence during that previously-assigned testimony period was the result of excusable neglect. FRCP 6(b)(2).

The Board and the Court of Appeals for the Federal Circuit previously have defined "excusable neglect" as

failure 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.

Hewlett-Packard Co. v. Olympus Corp., 18 USPQ2d at 1712 (citing *Black's Law Dictionary* 508 (5th ed. 1979)).

However, it appears that the Board's reliance on this definition of excusable neglect must be revisited in light of the Supreme Court's decision in *Pioneer*.

In *Pioneer*, the Supreme Court found, in a sharply divided five-to-four decision, that a creditor in a bankruptcy case had shown that its failure to timely file its proof of claim was the result of excusable neglect, within the meaning of Bankruptcy Rule 9006(b)(1), and that its late-filed proof of claim accordingly should have been

accepted by the Bankruptcy Court.⁴ In so deciding, the Court's majority rejected any "bright-line" approach to determining whether excusable neglect exists, i.e., an approach under which excusable neglect could be found only upon a showing that the movant's failure to take timely action was caused by circumstances beyond its reasonable control, or under which any showing of fault on the part of the late filer would defeat a claim of excusable neglect.

The Court reasoned that because "neglect," by definition, encompasses omissions to act caused by carelessness, it would be improper to hold that excusable neglect can be shown only when the failure to act was caused by intervening circumstances beyond the party's control, or to hold that omissions caused by inadvertence, mistake or carelessness are per se not within the ambit of excusable neglect. "Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Pioneer*, 507 U.S. at 392.

However, unless the party's neglect is "excusable," the party will not be entitled to a reopening of the time for taking action. In the context of the bankruptcy case before

⁴Bankruptcy Rule 9006(b)(1) is essentially identical to FRCP 6(b).

it, the Court stated that because Rule 9001(b)(1) requires that the party's neglect of the date for taking required action be "excusable," the Rule will "deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1)." *Id.* at 395.

According to the Court, 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. . .the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395. The Court also held that, under our system of representative litigation, a party must be held accountable for the acts and omissions of its chosen counsel, such that, for purposes of making the "excusable neglect" determination, it is irrelevant that the failure to take the required action was the result of the party's counsel's neglect and not the neglect of the party itself. *Pioneer*, 507 U.S. at 396 (citing *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) and *United States v. Boyle*, 469 U.S. 241 (1985)).

Applying this analysis to the Chapter 11 bankruptcy case before it, the Supreme Court noted that the courts below had specifically found that the creditor/movant and

its counsel had acted in good faith, and that the creditor's late filing of its proof of claim posed no danger of prejudice to the debtor or of disruption to efficient judicial administration. Indeed, the Court observed, the Bankruptcy Court had taken judicial notice of the fact that the debtor's second amended plan of reorganization actually accounted for the creditor's claim, despite the creditor's failure to file a timely proof of claim.

Regarding the third "excusability" factor, i.e., the culpability of the movants and/or their counsel, the Court gave little weight to the fact that counsel was experiencing upheaval in his law practice at the time the proof of claim was due.⁵ However, the Court considered it "significant" that the notice of the proof of claim bar date provided by the Bankruptcy Court was "outside the ordinary course in bankruptcy cases," remarking as follows:

As the Court of Appeals^[6] noted, ordinarily the bar date in a bankruptcy case should be prominently announced and accompanied by an explanation of its significance. See 943 F.2d, at 678. We agree with the court that the "peculiar and inconspicuous placement of the bar date in a notice regarding a creditors['] meeting," without any indication of the

⁵Counsel had explained that the proof of claim bar date, of which he was unaware, came at a time when he was experiencing "a major and significant disruption" in his professional life caused by his withdrawal from his former law firm. Because of this disruption, counsel did not have access to his copy of the case file until after the bar date had passed. *Id.* at 384.

⁶The Court is referring to the Court of Appeals for the Sixth Circuit.

significance of the bar date, left a "dramatic ambiguity" in the notification. Ibid.

Id. at 398-99.

The Court concluded:

This is not to say, of course, that respondents' counsel was not remiss in failing to apprehend the notice. To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be "excusable." In the absence of such a showing, however, we conclude that the unusual form of notice employed in this case requires a finding that the neglect of respondents' counsel was, under all the circumstances, "excusable."

Id. (Court's footnote regarding bankruptcy procedure omitted).

B. Opposer Has Not Demonstrated Excusable Neglect.

Applying the *Pioneer* excusable neglect analysis to the present case, the Board finds as follows.

Turning first to the third *Pioneer* factor, i.e., the reason for the delay, including whether it was within the reasonable control of the movant,⁷ the Board finds that

⁷In undertaking the *Pioneer* analysis, several of the Circuit Courts of Appeals have stated that this third *Pioneer* factor may be deemed to be the most important of the *Pioneer* factors in a particular case. See, e.g., *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994); *City of Chanute, Kansas v. Williams Nat. Gas Co.*, 31 F.2d 1041, 1046 (10th Cir. 1994); *Thompson v. E.I.duPont de Nemours & Co., Inc.*, 76 F.3d 530, 534 (4th Cir. 1996).

opposer's failure to present evidence during its assigned testimony period was caused by circumstances wholly within opposer's reasonable control, i.e., the failure of opposer's counsel's docketing system.⁸ Opposer's counsel acknowledges that the Board's August 21, 1996 order resetting trial dates was received and docketed, but asserts that he cannot determine with certainty when it was received and docketed, or why the case was not properly called up for appropriate action prior to or during opposer's testimony period.

After careful review of opposer's affidavits and their attachments, the Board finds that opposer has failed to show that anyone other than opposer and its counsel are responsible for opposer's failure to properly docket and/or call up the case for proper and timely action. Unlike the Bankruptcy Court's notice involved in *Pioneer*, there was no ambiguity in the Board's August 21, 1996 order notifying opposer that its motion to extend trial dates had been granted.

Additionally, it is significant that the trial dates set forth in the Board's August 21, 1996 order were selected

⁸The Board, and its reviewing Court, have held that docketing errors and breakdowns do not constitute excusable neglect. See *Williams v. Five Platters, Inc.*, 510 F.2d 963, 184 USPQ 744 (CCPA 1975); *Litton Business Systems, Inc. v. J.G. Furniture Co.*, 190 USPQ 428 (TTAB 1976), *recon. den.*, 190 USPQ 431 (TTAB 1976). After *Pioneer*, it is doubtful that docketing errors should be held, *per se*, to be inexcusable neglect. However, the previous case law on the subject of docketing errors is directly relevant to the third *Pioneer* factor, i.e. whether a party's delay or omission was caused by circumstances within its reasonable control.

and proposed by opposer in its July 22, 1996 consented motion to extend trial dates. Opposer apparently and inexplicably failed to docket those proposed trial dates when it submitted its July 22, 1996 motion.⁹ Thus, even if the Board were to assume (which it does not) that opposer's counsel was not negligent in failing to docket the Board's August 21, 1996 order approving opposer's July 22, 1996 consented motion to reset trial dates, opposer's counsel clearly was remiss in failing to ascertain the status of that motion prior to the opening, or the close, of the rescheduled testimony period he himself had set out for opposer.¹⁰

In short, the Board finds that opposer's failure to present evidence during its assigned testimony period was solely the result of counsel's negligence, which, under *Pioneer*, the Board must attribute to opposer itself.

Because the reason for opposer's failure to present evidence during its testimony period was wholly within the reasonable

⁹The record shows that, upon receipt of applicant's May 14, 1996 motion to extend trial dates, opposer docketed the proposed new trial dates without waiting for the Board to approve applicant's motion. See Affidavit of Cherise L. Knox, opposer's counsel's secretary, at paragraph 15. Opposer does not explain why the proposed extended trial dates included in its own July 22, 1996 motion were not similarly docketed.

¹⁰In addition to failing to properly docket the new trial dates requested in its July 22, 1996 motion and approved by the Board on August 21, 1996, opposer also apparently failed to review the status of the trial schedule both when it filed its October 7, 1996 consented motion to extend its time to respond to applicant's second set of discovery requests, and when it filed its December 5, 1996 brief in opposition to applicant's November 15, 1996 motion to compel discovery.

control of opposer, the third *Pioneer* factor weighs heavily against a finding of excusable neglect.

Turning next to the first *Pioneer* factor, i.e., the danger of prejudice to applicant, it does not appear from this record that applicant's ability to defend against opposer's claims has been prejudiced by opposer's failure to adhere to the trial schedule. That is, there has been no showing that any of applicant's witnesses and evidence have become unavailable as a result of the delay in proceedings. See, e.g., *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997).¹¹ See also *Paolo's Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1904 (Comm'r 1990). In view thereof, the Board finds that this first *Pioneer* factor weighs in favor of a finding of excusable neglect.¹²

¹¹In *Pratt*, the First Circuit stated:

From our vantage point it is difficult to see what cognizable prejudice, in the sense, for example of lost evidence, would come to the defendant from reopening the case. Of course, it is always prejudicial for a party to have a case reopened after it has been closed advantageously by an opponent's default. But we do not think that is the sense in which the term 'prejudice' is used in *Pioneer*.

Pratt v. Philbrook, 109 F.3d at 22.

¹²However, that is not to say that applicant has been unaffected by the delay caused by opposer's failure to abide by the trial schedule in this case. The determination of whether applicant is entitled to registration of its mark, and thus the possible issuance of any such registration, obviously have been irremediably delayed. Furthermore, the Board is not persuaded by opposer's argument that applicant's failure to file a motion to dismiss the opposition under Trademark Rule 2.132(a) is evidence of an absence of prejudice, under the first *Pioneer* factor.

As for the second *Pioneer* factor, i.e., the length of the delay and its potential impact on judicial proceedings, the Board notes that opposer's testimony period closed on November 14, 1996 and that opposer did not file its motion to reopen until February 27, 1997, some three and one-half months later. However, in addition to the time between the expiration of the time for taking action and the filing of the motion to reopen, the calculation of the length of the delay in proceedings also must take into account the additional, unavoidable delay arising from the time required for briefing and deciding the motion to reopen. The impact of such delays on this proceeding, and on Board proceedings generally, is not inconsiderable. Proceedings before the Board already are quite lengthy because they must be conducted on the written record rather than by live testimony.

More fundamentally, however, it cannot escape the notice of any interested observer of or participant in proceedings before the Board that the Board's steadily growing docket of active cases, and the resulting inevitable increase in motion practice before the Board, are increasingly straining the Board's scarce resources. The Board, and parties to Board proceedings generally, clearly have an interest in minimizing the amount of the Board's time and resources that must be expended on matters, such as most contested motions to reopen time, which come before the Board solely as a result of sloppy practice or inattention

to deadlines on the part of litigants or their counsel. The Board's interest in deterring such sloppy practice weighs heavily against a finding of excusable neglect, under the second *Pioneer* factor.

Finally, under the fourth *Pioneer* factor, there is no basis in this record for finding that opposer's failure to present evidence during its assigned testimony period was the result of bad faith on the part of opposer or its counsel.

C. Conclusion: Opposer's Motion to Reopen is Denied.

In the Board's considered opinion, the dominant factors in the "excusable neglect" analysis in this case are the second and third *Pioneer* factors. The absence of prejudice and bad faith in this case, under the first and fourth *Pioneer* factors, is outweighed by the combination of circumstances under the second and third *Pioneer* factors which are present in this case: opposer's failure, caused solely by opposer's negligence and inattention, to appear for trial in accordance with the trial schedule approved by the Board on opposer's own motion; the unnecessary and otherwise avoidable delay of this proceeding and expenditure of the Board's resources, which are direct results of opposer's negligence; and the Board's clear interest in deterring such negligence in proceedings before it, an interest which is shared generally by all litigants with cases pending before the Board.

In short, after consideration of all of the circumstances in this case and of the relevant authorities, and in the exercise of its discretion after a careful balancing of the *Pioneer* factors, the Board finds that opposer has not demonstrated that its failure to appear and present evidence during its assigned testimony period was the result of excusable neglect. Accordingly, opposer's motion to reopen its testimony period is denied. FRCP 6(b)(2).¹³

IV. DECISION - OPPOSITION DISMISSED WITH PREJUDICE

In view of our denial of opposer's motion to reopen its testimony period, and inasmuch as opposer failed to offer any evidence whatsoever in support of its claims during the period assigned to opposer for presentation of its case-in-chief, we find that opposer has failed to carry its burden of proof in this case, and that opposer therefore cannot

¹³The Board is not persuaded by opposer's argument that its testimony period should in equity be reopened in view of the Board's reopening of applicant's testimony period after denial of applicant's motion to compel discovery. Applicant's motion to compel was filed on November 15, 1996, prior to the opening of its testimony period but after the expiration of opposer's testimony period. In resetting trial dates upon decision of applicant's motion, the Board merely returned the parties to their respective positions as of the filing of the motion. Furthermore, opposer is unpersuasive in arguing that its motion to reopen its testimony period should be granted because it is entitled to its "day in court." Opposer had its day in court, namely, the thirty-day testimony period which opposer itself had requested.

prevail herein.¹⁴ Further proceedings in this case thus having been rendered unnecessary,¹⁵ the opposition is

¹⁴The miscellaneous documentary materials attached to opposer's notice of opposition are not evidence in this case. Trademark Rule 2.122(c).

¹⁵It is unnecessary to reset remaining trial dates in this case, in view of opposer's failure to prove its case during its assigned testimony period. The Board notes that, during applicant's previously-reset testimony period and prior to the suspension of these proceedings for consideration of opposer's motion to reopen, applicant filed a notice of reliance by which it introduced into evidence a copy of a design patent, issued to applicant's president on February 11, 1997, covering "the ornamental design of a pumpkin scoop." This evidence submitted by applicant does not in any way support or prove opposer's case-in-chief. The Board will not schedule a rebuttal testimony period for opposer, because even if opposer were to succeed in rebutting applicant's evidence regarding applicant's design patent, opposer still will have failed to prove its case-in-chief. Furthermore, if opposer were to attempt to introduce evidence in support of its case-in-chief during a rebuttal testimony period, the evidence would constitute improper rebuttal and would not be considered by the Board. See *Hester Industries, Inc. v. Tyson Foods Inc.*, 2 USPQ2d 1646 (TTAB 1987).

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dismissed with prejudice.

J. D. Sams

J. E. Rice

P. T. Hairston

Administrative Trademark Judges
Trademark Trial and Appeal Board