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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
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Mailed: March 19, 2007

Opposition No. **91165671**

WAYMOUTH FARMS, INC.

v.

JILL FRECHTMAN

Before Quinn, Holtzman and Mermelstein, Administrative Trademark Judges.

By the Board:

This case now comes before the Board for consideration of applicant's motion under Fed. R. Civ. P. 60(b) to vacate the April 7, 2006, entry of judgment against applicant on the grounds of mistake, inadvertence, surprise or excusable neglect. The motion has been fully briefed.

In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380(1993), the Supreme Court addressed the meaning of "excusable neglect" in the context of the Federal Rules of Bankruptcy Procedure. The Court held that 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 … [1] the danger of

> prejudice to the [non-moving party], [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.
>
> 507 U.S. at 395.

The Board adopted these factors for determining excusable neglect in *Pumpkin Ltd. v. The Seed Corps,* 43 USPQ2d 1582 (TTAB 1997), and has found the third factor — the reason for the delay and whether it was within the movant's control — to be of paramount importance. *Pumpkin,* 43 USPQ2d at 1587 n.7; *see also, Old Nutfield Brewing Co., v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701 (TTAB 2002).

Applying *Pioneer* to this case, the first factor favors applicant. There does not appear to be any legal prejudice to opposer that would prevent it from presenting its case or cause it to bear greater costs in going forward on its claims than it would have if applicant had not delayed in responding to opposer's requests for admissions or conceded its motion for summary judgment. *See Pratt v. Philbrook*, 109 F.3d 18, 22 (1st Cir. 1997); *Paolo Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1904 (Comm'r 1990).

With regard to the second *Pioneer* factor, it is adjudged that the relief applicant seeks has caused delay beyond the normal delays in any contested legal proceeding. Applicant states that she spoke with her attorney in May or

June about the notice of abandonment dated April 7, 2006. Yet applicant waited nearly 8 months, until December 4, 2006, to file her motion to vacate the default judgment. Even assuming applicant did not learn until August 7, 2006, that her application had been "abandoned after inter partes decision," she was, at that time, advised to contact the Board for further information. Nonetheless, applicant apparently did not contact the Board and took little action until having a casual conversation with the lawyer-husband of a friend in the Fall. Ultimately, applicant's motion for relief was not filed until four months after applicant had actual knowledge that her trademark had been abandoned. The second *Pioneer* factor weighs against a finding of excusable neglect.

In considering the fourth *Pioneer* factor, there is no evidence that applicant acted in bad faith; this factor favors applicant.

Addressing the third and critical *Pioneer* factor, applicant contends that her attorney acted negligently in failing to defend her in this proceeding and willfully misled her as to the true status of her case, and that any delay in the proceeding was caused solely by her former counsel and should not be attributable to her. Specifically, applicant contends that her attorney failed to advise her that opposer

had served requests for admissions on applicant or that he had failed to answer them and that he failed to advise her that opposer had then filed a summary judgment motion based on her failure to answer the requests and that he had failed to respond to the motion.

In her affidavit in support of the motion to vacate, applicant explains that while she "personally prepared and filed" the application for registration of her mark, she "believed that the prudent course of action would be" for her to hire an attorney to represent her in the opposition proceeding; that she was advised that attorney James Hakomaki "had extensive legal training and experience in the areas of patent and trademark law"; and that after hiring him, she "understood that all pleadings and correspondence were thereafter sent directly by counsel for Opposer to Mr. Hakomaki." Applicant continues, "Thereafter, I periodically contacted Mr. Hakomaki to find out how the case was proceeding. On those occasions, Mr. Hakomaki assured me that everything was under control."

Opposer does not disagree with applicant's factual account and adds that "Mr. Hakomaki confirmed he was not diligent and merely through inattentiveness failed to defend against the opposition proceeding." *Opposer's Opposition to Applicant's Motion,* p. 2.

Before *Pioneer,* the concept of "excusable neglect" generally included a party's failure to take the proper steps at the proper time in consequence of reliance on the care and vigilance of his or her counsel. See, e.g., *Hewlett-Packard Co. v. Olympus Corp.,* 18 USPQ2d 1720, 1712 (Fed. Cir. 1991)(citing *Black's Law Dictionary* 508 (5th ed. 1979)). Following this approach, in *General Motors Corporation v. Cadillac Club Fashions, Inc.,* 22 USPQ2d 1933 (TTAB 1992), the Board granted petitioner's motion in a cancellation proceeding for relief from judgment, where petitioner made reasonable inquiries about the status of the proceeding but its attorney was negligent and concealed critical facts from its client.

The Board's reliance on this concept of excusable neglect as including misplaced reliance on one's counsel was revisited in light of the Supreme Court's decision in *Pioneer*, wherein the Court criticized the lower court's focus of its analysis of excusable neglect on "whether respondents did all they reasonably could in policing the conduct of their attorney, rather than on whether their attorney, as respondents' agent, did all he reasonably could to comply with the court-ordered bar date." *Pioneer,* 507 U.S. at 396. Later Board decisions expressly overruled the holding in *General Motors*. *See Gaylord Entertainment Co. v.*

Calvin Gilmore Productions, Inc. 59 USPQ2d 1369 (TTAB 2000); and *CTRL Systems Inc. v. Ultraphonics of North America Inc.*, 52 USPQ2d 1300, 1302 (TTAB 1999).

As the Board explained in *Pumpkin*:

> [U]nder 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)).

43 USPQ2d at 1587.

Thus, it is well settled that a person is bound by the consequences of the conduct of his or her freely-selected counsel, including both the acts and omissions of counsel.

In the present proceeding, applicant voluntarily chose her attorney as her representative in the action, and she cannot now avoid the consequences of his omissions. While applicant appears to have made status inquiries of her attorney during this proceeding, her lack of awareness that no action was being taken is not excusable neglect. "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R.R. Co.,* 370 U.S. 626,

633-34 (1962)(quoting *Smith v. Ayer,* 101 U.S. 320 (1879) (footnote omitted).

Here, both parties agree that Mr. Hakomaki was not diligent in his representation of applicant in this matter. Although Mr. Hakomaki may have neglected this matter, applicant offers no evidence or argument that her counsel's neglect was excusable. Applicant goes to some length in an attempt to establish that she was diligent in trying to monitor this matter and Mr. Hakomaki's efforts on her behalf. But as the cases discussed above make clear, applicant's diligence in calling her attorney is not the issue. On the contrary, once applicant appointed Mr. Hakomaki to represent her, it was his actions or omissions which became relevant to our excusable neglect analysis.

While we are not without sympathy for applicant, she has not shown that her attorney's neglect is excusable. His failure to respond to opposer's admissions requests and its motion for summary judgment were matters entirely within his control. Moreover, the length of delay and impact on judicial proceedings is significant. While there has been no showing of bad faith or prejudice to opposer, on balance, the *Pioneer*

factors support a finding that excusable neglect has not been shown in this case.

Accordingly, applicant's motion to vacate the order of judgment is hereby denied. The opposition remains sustained and applicant's application stands abandoned.