

## **United States - Relocation of Office Not Excusable Neglect For Lack Of Testimony**

In *P22 Type Foundry, Inc. v. Berthold Types Ltd./Berthod LLC*, Petitioner brought a cancellation action against three registrations owned by Respondent. Petitioner's first testimony period closed, during which time the Petitioner's attorney failed to take any testimony or provide any evidence to the Trademark Trial and Appeal Board ("TTAB"). Due to Petitioner's failure to take any testimony or to offer any other evidence in the matter, Respondent moved for involuntary dismissal of the action. The TTAB granted Respondent's motion, and denied Petitioner's request to reopen the discovery and testimony periods.

According to the TTAB, Trademark Rule 2.132(a) provides that when "the party in the position of plaintiff fails to take testimony during the time allowed, judgment may be entered against it in the absence of a showing of good and sufficient cause. The 'good and sufficient cause' standard, in the context of this rule, is equivalent to the 'excusable neglect' standard which would have to be met by any motion under Fed. R. Civ. P. 6(b) (2) to reopen the plaintiff's testimony period."

The attorney for the Petitioner argued that he failed to take testimony because he had relocated his office. This office relocation, which took approximately 35 days, resulted in, amongst other things, construction delays, computer crashes, and technical mishaps with data wiring, which led to the corruption of files and docket software.

The TTAB stated that this office relocation and the problems associated therewith did not constitute "good and sufficient cause" or "excusable neglect." The TTAB focused on the third factor (held by several courts to be the most important) of the four part test devised by the U.S. Supreme Court in *Pioneer Investment v. Brunswick Associates*, 507 U.S. 380 (1993), as to what constitutes "excusable neglect," namely, "the reason for the delay, including whether it was within the reasonable control of the movant."

The TTAB held that the delay was within the Petitioner's attorney's control since, *inter alia*, there were other avenues that Petitioner's attorney may have used to check on the status of the proceedings and the pertinent dates and deadlines associated therewith, such as checking the United States Patent and Trademark Office free database and website..

This most recent ruling demonstrates a seeming pattern by the TTAB to be willing to impose harsher penalties for party mistakes or lack of due diligence.

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