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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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COLUMBIA INSURANCE COMPANY and
H.H. BROWN SHOE COMPANY, INC.,

Opposers,

vs.

LENWORTH ALEXANDER HYATT,

Applicant.
-----X

Opposition No. 91151757



08-11-2003

U.S. Patent & TMO/TM Mail Rcpt Dt. #11

**RESPONSE TO APPLICANT'S MOTION TO
SET ASIDE JUDGMENT UNDER FED. R. CIV. P. 60(b)**

Introduction

Opposers Columbia Insurance Company ("Columbia") and H.H. Brown Shoe Company, Inc. ("H.H. Brown") (Columbia and H.H. Brown shall hereinafter collectively be referred to as "Opposers"), by their attorneys, hereby respond to Applicant Lenworth Alexander Hyatt's ("Applicant") Motion, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to set aside the judgment, as set forth herein:

To the extent Opposers' response to Applicant's Motion may be useful to the Board, Opposers submit the instant response in opposition to Applicant's Motion.

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Argument

A. Applicant Has Not Met The Legal Standard To Have the Judgment Set Aside

Pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure, a judgment may be set aside here if the movant can demonstrate “mistake, inadvertence, surprise or excusable neglect.” None of Applicant’s arguments rise to the level necessary to support a ruling that would allow the Board to set aside the judgment.¹

First, Applicant asserts that there was “bias” in favor of Opposers and “prejudice” towards Applicant. See *Motion For Relief From Judgement (sic) Of Board/Petition To Re-Open Application Serial Number 76/242,606* (“Motion for Relief”), ¶¶ 2 – 4.

Applicant further asserts that the Board issued its decision due to a racial preference. These assertions are so outrageous, in reality, they should not even be addressed by Opposers. Moreover, they are directed at the Board itself, rather than the Opposers.

First, Applicant makes these assertions without any foundational basis. Applicant fails to provide any evidence pertaining to the ethnic background up of either the Board members or the Opposers and their counsel. Further, there is nothing in the record regarding Mr. Hyatt’s ethnic background.

After attempting to impugn the Board’s character, Mr. Hyatt next asserts that he never received the various discovery requests served upon him. *Motion for Relief*, ¶¶ 5, 6. This issue was taken up by the Board during its review of Opposers’ summary judgment motion. Indeed, the Board stated the following:

¹ Applicant also bases his Motion on 37 C.F.R. § 2.142(g). For reasons that will be explained in greater detail below, such basis is incorrect.

Applicant's second argument, that opposers must prove "by United States Postal Confirmation" that the discovery requests were actually served on applicant, is not well taken. Opposers' discovery requests contained a certificate of service stating that the discovery requests were placed in the U.S. Mail and addressed to applicant on July 22, 2003. The Board accepts opposers' certificate of service as *prima facie* proof of service. Trademark Rule 2.119(a). Applicant has not submitted any evidence to the contrary. The Board notes applicant does not contest that he received the discovery requests."

T.T.A.B. Order dated May 15, 2003 regarding Opposition No. 151,757 ("T.T.A.B. Order"), pg. 7.

Applicant provided no proof that he never received the discovery requests prior to the issuance of the Board's decision, and has not provided any new evidence that would cause the Board to alter its original finding.

In the alternative, however, Mr. Hyatt seemingly proudly announces that "it is not unusual for Applicant to return correspondence addressed from Attorneys to senders without ever opening most of them." See *Motion For Relief*, ¶ 5. For a number of reasons, this argument is insufficient to meet the Rule 60(b) standard. First, under the Trademark Rules of Practice, a Certificate of Service is considered *prima facie* proof that a document was served on a party. *Trademark Rule 2.119(a)*. Second, Mr. Hyatt's refusal of mail from attorneys cannot constitute a valid excuse for not responding to discovery requests. Third, since Mr. Hyatt was aware of the instant opposition, it behooved him to accept mail from Opposers' counsel. Finally, how is it that Mr. Hyatt has received every other piece of correspondence from both the Board and the Opposers, but the discovery requests just happened never to have been received?

None of these "reasons" rises to the level of mistake or excusable neglect. See *Information Systems and Networks Corp. v. U.S.*, 994 F.2d 792 (Fed. Cir. 1993). There, the court stated that three factors should be considered when considering whether a party's actions rise to the level of excusable neglect: (1) whether the non-defaulting party will be prejudiced; (2) whether the defaulting party has a meritorious defense; and (3) whether culpable conduct of the defaulting party led to the default. *Id.* at 795 (citations omitted). The Court further notes that the three factors were "disjunctive" such that a finding that any one of the factors is unfavorable to the defaulting party requires denial of the motion for relief. *Id.*

Here, Applicant fails on points 2 and 3.² As discussed above, the Applicant's "meritorious defenses" are (1) that the Board was biased and prejudicial; and that (2) he doesn't open his mail and therefore, didn't see the discovery requests. It is without question that these "reasons" cannot be considered meritorious under any definition of the word. Further, it is the Applicant's own statements which doom him to fail the third factor --- it is his very action (non-opening of mail) which, he asserts, caused his default. While Opposers do not believe Applicant's contentions regarding the mail, if they are taken at face value, they are the very reason for the default, and the failure to meet the necessary standard.

Next, Mr. Hyatt rehashes the typographical error Opposers made when they filed their motion for summary judgment. See *Applicant's Motion for Relief*, ¶ 9. In its original Order, the Board dismissed Applicant's same arguments. See *T.T.A.B. Order*, pg. 9 ("Also, in their reply brief, opposers clarified that they made a typographical

² In light of the *Information Systems* Court's statements concerning the factors, Opposers will not discuss the first factor, as it is not relevant.

mistake and, as plaintiffs herein, it would make no sense to seek summary judgment against themselves"). Once again, Applicant has not brought new evidence to the attention of the Board. Therefore, Applicant's argument must fail.

In paragraphs 10 and 12 of his Motion, Applicant asserts that since the Board's decision is not citable as precedent, it should be overturned. Clearly, Mr. Hyatt does not understand this phrase or its meaning. Opposers will not validate Mr. Hyatt's assertions with counter-arguments. Since the statement makes no sense, it should properly be ignored by the Board.

Finally, after having his application refused, Mr. Hyatt has "graciously" agreed to delete "footwear" from his application. See *Applicant's Motion for Relief*, ¶¶ 11, 13. First he asserts that he could not "accede" to that request at the time of the motion due to his belief there was another opposition pending. He goes on to state that by the time he became aware of the "other" opposition, Opposers' motion had already been filed. In support, he attaches a letter dated December 10, 2001 from Opposers' prior counsel.

Unfortunately for the Applicant, this is factually untenable. The original letter was sent by Opposers' prior counsel over one year before Opposers' current counsel filed their motion for summary judgment. Moreover, there were no other oppositions, as Applicant appears to be implying. Nevertheless, as Opposers noted in their original motion, had Applicant attempted to either call or write to Opposers' counsel, any confusion on his part would have been cleared up. The Board simply cannot allow Mr. Hyatt to avoid judgment simply because he was "confused."

At the same time Applicant states he was "confused," he indicates he will amend his application to delete "footwear" from the application. By granting summary

judgment, the Board has sustained the opposition and should cancel Mr. Hyatt's application. Accordingly, there is nothing for him to amend. Once again, a too-late offer to amend the goods, coupled with Applicant's apparent lack of understanding of certain legal terms do not add up to either "mistake" or "excusable neglect under Rule 60(b). Accordingly, Applicant's motion should be denied in its entirety.

B. Applicant Has Cited The Wrong Trademark Rule To Support His Motion

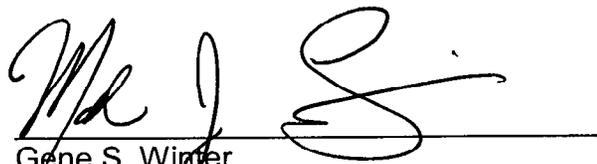
In his Motion for Relief, Applicant relies on 37 CFR § 2.142(g) as one basis for the Board setting aside its judgment in the instant action. Section 2.142 deals with ex parte appeals. Section g pertains specifically to the entry of a disclaimer, and requires a petition to the Commissioner. Since the instant proceeding is a contested one, Section 2.142 does not pertain hereto.

Conclusion

For the foregoing reasons, Applicant's Motion for Relief should be denied in all respects.

Dated: August 8, 2003

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Response To Applicant's Motion To Set Aside Judgment Under Fed. R. Civ. P. 60(b) was served this 8th day of August, 2003, via First-Class mail on:

Lenworth Alexander Hyatt
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Barbara North