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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: December 22, 2005

Opposition No. 91162831

D & M NEW WORLD MANAGEMENT,
INC.

v.

TORGOVY DOM "AROMA"

**Before Hairston, Holtzman, and Walsh, Administrative
Trademark Judges.**

By the Board:

Pursuant to the Board's order of July 27, 2005, opposer's testimony period closed on October 26, 2005. The record does not indicate that opposer has taken testimony or submitted other evidence.¹ This case now comes up on applicant's motion for judgment pursuant to Trademark Rule 2.132(a), filed November 8, 2005, and opposer's "cross-motion for summary judgment," filed December 12, 2005.

Turning first to opposer's submission, we find it untimely as either a motion for summary judgment or as a response to applicant's Trademark Rule 2.132(a) motion.

"A motion for summary judgment, if filed, should be filed prior to the commencement of the first testimony

¹ We further note that opposer did not attach title and status copies of any relevant registrations to its notice of opposition,

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period..." Trademark Rule 2.127(e)(1). As noted in the Board's manual,

The motion for summary judgment is a pretrial device, intended to save the time and expense of a full trial when a party is able to demonstrate, prior to trial, that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. In inter partes proceedings before the Board, trial commences with the opening of the first testimony period. Therefore, a motion for summary judgment should be filed prior to the opening of the first testimony period, as originally set or as reset, and the Board, in its discretion, may deny as untimely any summary judgment motion filed thereafter.

TBMP § 528.02 (2d ed. rev. 2004)(footnotes omitted).

Opposer does not argue - and this case does not present - any unusual circumstances which would justify the Board's exercise of discretion to consider opposer's dilatory motion, and we decline to do so.² Opposer's motion for summary judgment is accordingly DENIED as untimely.

We next turn to consideration of opposer's filing to the extent it constitutes a response to applicant's motion for judgment due to opposer's failure to prosecute.

Pursuant to Trademark Rule 2.132(a), "the party in the position of plaintiff shall have fifteen days from the date

see Trademark Rule 2.122(d)(1), and that by its answer, applicant denied the salient allegations of the notice of opposition.

² We note that even if opposer's motion for summary judgment were considered on the merits, it would fail, because it is supported only by counsel's unverified statements and by documents which were not authenticated by the affidavit or declaration of someone with first-hand knowledge of them. See generally TBMP § 528.05 (2d ed. rev. 2004)(and authorities cited therein).

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of service of the motion to show cause why judgment should not be rendered against him.”³

Here, applicant’s motion was served on November 8, 2005, by first class mail. Including the extra time allowed for service by mail under Trademark Rule 2.119(c), opposer’s response should have been filed within twenty days of service, or by November 28, 2005. Nonetheless, opposer’s paper was filed on December 5, 2005, with a certificate of mailing dated November 30, 2005. Because it is untimely, opposer’s paper will not be considered in response to applicant’s motion for judgment.

No timely response to applicant’s motion for judgment having been received, the motion is GRANTED as conceded.⁴

³ This response period is the same as that for any motion other than a motion for summary judgment. Compare Trademark Rule 2.127(a) (response to motions due in 15 days) with Trademark Rule 2.127(e)(1) (response to motions for summary judgment due in 30 days).

⁴ Even if opposer’s submission were considered as a timely response to applicant’s motion for judgment, the result would be no different.

In order to defeat the motion, opposer must show that its failure to present trial evidence was the result of excusable neglect. *HKG Industries Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156, 1157 (TTAB 1998). The most important factor in the excusable neglect analysis is the reason for the delay. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, n.7 (TTAB 1997). But on this score, opposer’s “response” is absurd: “Opposer has not taken testimony to date because it did not believe that it was fair to waste either its client’s time and money or the Board’s time on a case where the facts are so patently obvious.”

Opposer does not deny that it knew of the trial dates in this proceeding. Even if - as opposer argues - the merits of the case were or should have been readily apparent to applicant, it is opposer which bears the burden of proving its case to the Board by a preponderance of the evidence. Thus, opposer would fall short of showing the excusable neglect necessary to overcome its failure to submit evidence.

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Trademark Rule 2.132(a); Trademark Rule 2.127(a)(Board may grant unopposed motion as conceded).

Accordingly, the opposition is dismissed with prejudice.

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