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

Baxley

Mailed: January 14, 2010

Opposition No. **91184456**

L'Oreal USA, Inc.

v.

Robert Victor Marcon

Before Quinn, Zervas, and Cataldo,
Administrative Trademark Judges

By the Board:

The Board, in a July 28, 2009 order, granted as conceded opposer's combined motion for leave to file an amended notice of opposition and to extend testimony periods and, among other things, allowed applicant thirty days, i.e., until August 27, 2009, to file an answer to the amended notice of opposition.

After applicant failed to file a timely answer to the amended notice of opposition, the Board, on September 30, 2009, issued a notice of default. Because no response to the notice of default was of record, the Board, in a November 10, 2009 order entered default judgment against applicant.

On December 3, 2009, applicant filed a "request for further information," which the Board has treated as a

motion to vacate entry of judgment under Fed. R. Civ. P. 60(b). Opposer has filed a brief in response thereto.[1]

In support of his motion to vacate judgment, applicant contends that he timely filed a response to the notice of default on October 30, 2009 and therefore asks that his application be reinstated and this proceeding resumed. Applicant included copies of such response and a return receipt postcard, bearing a USPTO mailroom stamp indicating that the response, which displays the correct proceeding number in bold type on the first page thereof, was received at the USPTO on October 30, 2009.

In opposition to the motion to vacate entry of judgment, opposer admits that it received a copy of applicant's response to the notice of default during the week of November 2, 2009. However, opposer contends that, even if applicant timely responded to the notice of default, applicant has failed to show good cause why judgment by default should not be entered.

The record herein indicates that applicant timely filed a response to the notice of default.[2] Although that

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[1] Applicant's motion to vacate judgment does not include proof of service upon opposer, in compliance with Trademark Rule 2.119(a). However, because opposer has responded on the merits thereto, we have considered that motion.

[2] Applicant's response includes a "certificate of mailing," which indicates that a copy of that response was mailed to opposer at its address of record by certified first class mail on October 28, 2009. To the extent that certificate of mailing is intended to provide evidence of service of the response upon opposer, such

response was received at the USPTO, it was not entered into the Board file for this proceeding prior to the issuance of the November 10, 2009 order and has not subsequently been entered into that file. Consequently, default judgment was entered without any consideration of that response. In view thereof, the motion to vacate judgment is granted, and the Board will consider applicant's response to the notice of default.

In response to the notice of default, applicant contends that he failed to timely file his answer because he mistakenly thought that his answer to the amended notice of opposition was due at the time he filed his pretrial disclosures.[3] Accordingly, applicant asks that the Board set aside the notice of default.

In opposition to applicant's response, opposer contends that applicant would have the Board excuse his "utter lack of diligence when he failed to read and/or comply with the

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certificate should have been captioned as a certificate of service, but is acceptable proof of service. See TBMP Section 113.

[3] Applicant also argues at length in response to opposer's newly added claim that applicant did not have a bona fide intent to use the involved L'OREAL PARIS mark on "aloe vera drinks" under Trademark Act Section 1(b), 15 U.S.C. Section 1051(b), when he filed his involved application. To the extent that such arguments are in opposition to the motion for leave to file an amended notice of opposition, those arguments are untimely. See Trademark Rules 2.119(c), 2.127(a) and 2.127(b). To the extent that applicant argues against the merits of opposer's newly added Section 1(b) claim, those arguments are premature. See *Flatley v. Trump*, 11 USPQ2d 1284 (TTAB 1989).

plain language of [the July 28, 2009 order];" that applicant has failed to set forth a meritorious defense; and that opposer has been prejudiced by applicant's delay herein.

Whether default judgment should be entered against a party is determined in accordance with Fed. R. Civ. P. 55(c), which reads in pertinent part: "for good cause shown the court may set aside an entry of default." As a general rule, good cause to set aside a defendant's default will be found where the defendant's delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where defendant has a meritorious defense. See *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier Inc.,* 21 USPQ2d 1556 (TTAB 1991). The determination of whether default judgment should be entered against a party lies within the Board's sound discretion. In exercising that discretion, the Board is mindful of its policy to decide cases on their merits where possible and therefore only reluctantly enters judgment by default for failure to timely answer. See TBMP Section 312.02 (2d ed. rev. 2004).

Under the July 28, 2009 order, applicant was allowed thirty days, i.e., until August 27, 2009, to file his answer. Notwithstanding the clear language of that order, applicant inexplicably claims to have believed that his answer to the amended notice of opposition was not due until the time he filed his pretrial disclosures, which would have

been due on November 9, 2009.[4] We share opposer's puzzlement as to the basis for this mistaken belief.

Further, if applicant's belief were correct, pleadings herein would not have been settled until after opposer had presented its case-in-chief herein. Pleadings should be complete prior to the commencement of trial. See *SDT Inc. v. Patterson Dental Co.*, 30 USPQ2d 1707 (TTAB 1994). As such, applicant's mistaken belief has disrupted the orderly administration of this proceeding. Nonetheless, we find that, under the circumstances herein, applicant's failure to timely answer the amended notice of opposition was inadvertent and was thus neither willful nor in bad faith.[5]

With regard to the possible prejudice to opposer, opposer has argued at length against applicant's filing of a series of applications for "numerous famous marks,"[6] but has

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[4] Under the July 28, 2009 order, applicant's pretrial disclosures were due by November 9, 2009.

[5] Opposer's reliance upon *DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222 (TTAB 2000), in support of its opposition to applicant's response to the notice of default is misplaced. In *DeLorme*, default judgment was entered after the defendant therein intentionally chose not to file an answer to a notice of opposition that it believed was incomplete. In this case, applicant contends that he failed to file a timely answer because he was mistaken as to the due date of such answer. Because this case involves a mistaken belief as to the due date for the answer, rather than a decision not to answer, *DeLorme* is inapposite to the circumstances in this case.

[6] The amended notice of opposition indicates that applicant's applications include the following:
Application Serial No. 76596738 for the mark NESTLE for "over the counter medications, namely analgesics; sleep aids; cold and flu medications;"

made no specific showing of prejudice caused by applicant's failure to timely answer, such as lost witnesses, unavailable witnesses or expenses incurred in reliance upon the default judgment. See *Pratt v. Philbrook*, 109 F.3d 18, 22 (1st Cir. 1997).

Regarding whether or not applicant has a meritorious defense, applicant has failed to submit a proper answer which admits or denies the newly added allegations set forth in paragraphs 22-40 of the amended notice of opposition. See *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). Applicant is allowed until thirty days from the mailing date of this order in which to file a proper answer to the amended notice of opposition. If applicant is able to set forth a meritorious defense to the amended notice of opposition in that answer, then the Board will set aside the notice of default, involved application Serial No. 76596736 will be reinstated, and this proceeding will move forward.[7] See *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613 (TTAB 1991).

Application Serial No. 76577011 for the mark EVIAN for "ice cream; sherbert; and frozen confections;" and
Application Serial No. 78288366 for the mark HEINEKEN for "meat juices."

[7] Applicant is advised, however, that the Board will look with disfavor upon any further failure by him to comply with deadlines set by the Board or applicable rules.

Regarding the content of an answer, Fed. R. Civ. P. 8(b) provides, in relevant part:

> A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.

The notice of opposition filed by opposer herein consists of forty-five paragraphs setting forth the basis of opposer's claim of damage. In accordance with Fed. R. Civ. P. 8(b) it is incumbent on applicant to answer the notice of opposition by admitting or denying the allegations contained in each paragraph. If applicant is without sufficient knowledge or information on which to form a belief as to the truth of any one of the allegations, he should so state and this will have the effect of a denial.

Applicant intends to represent himself herein. While Patent and Trademark Rule 10.14 permits any person to represent himself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition proceeding to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney.

In defending this opposition, applicant should review the Trademark Board Manual of Procedure (TBMP), online at http://www.uspto.gov/trademarks/process/appeal/Trademark_Trial_and_Appeal_Board_Manual_of_Procedure_(TBMP).htm, and the Trademark Rules of Practice, online at http://www.uspto.gov/trademarks/process/appeal/tmlaw2.pdf. The Board expects all parties appearing before it, whether or not they are represented by counsel, to comply with the Trademark Rules of Practice and where applicable, the Federal Rules of Civil Procedure, online at http://www.law.cornell.edu/rules/frcp.

Trademark Rules 2.119(a) and (b) state that every paper filed in this proceeding must be served upon the attorney for the other party, or on the party if there is no attorney, and proof of such service must be made before the paper will be considered by the Board. Consequently, copies of all papers which applicant may subsequently file in this proceeding must be accompanied by a signed statement indicating the date and manner in which such service was made, e.g., by mail. The statement, whether attached to or appearing on the paper when filed, will be accepted as prima facie proof of service. Applicant is advised that the Board will not consider any further submissions from applicant that are filed without proof of service upon opposer at its correspondence address of record.

Applicant is further advised that he may not use certificate of mailing procedure on submissions that he files with the Board by mail from outside of the United States. See Trademark Rule 2.197; TBMP Section 110. Accordingly, applicant is urged to file submissions herein through the Board's Electronic System for Trademark Trials and Appeals (ESTTA) database, available online at http://estta.uspto.gov.

Except as noted in the foregoing, proceedings herein are suspended.