

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

Baxley

Mailed: March 18, 2011

Opposition No. 91190169

Susino Umbrella Co., Ltd.

v.

Susino USA, LLC

Before Kuhlke, Wellington, and Wolfson,  
Administrative Trademark Judges

By the Board:

In the above-captioned proceeding, Susino Umbrella Co., Ltd., a Chinese corporation, ("opposer") opposes registration of Susino USA, LLC's<sup>1</sup> ("applicant") application to register the mark SUSINO in stylized form for various types of umbrellas in International Class 18 on the ground of likelihood of confusion with its previously used mark SUSINO for umbrellas under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d).

After applicant filed its answer on June 5, 2009, it then filed a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) on August 27, 2009. While the motion to dismiss was pending, opposer's counsel of record filed a request to withdraw as opposer's counsel in

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<sup>1</sup> Applicant is appearing *pro se* herein.

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this proceeding. On October 30, 2009, the Board issued an order that granted the withdrawal of representation and suspended proceedings to allow opposer time to seek new counsel. On November 29, 2009, opposer filed a statement indicating that it would represent itself. On December 2, 2009, opposer filed an electronic form submission in which it changed its correspondence address to "Jin'ou Industrial Park, DongshiTown, Jinjiang, FJ 362271" in China and provided the following e-mail address:

meihuaumbrella@yahoo.com.cn.<sup>2</sup> On December 10, 2009, the Board denied applicant's motion to dismiss on the merits and reset dates herein.

On March 12, 2010, two months prior to the close of the discovery period as reset in the December 10, 2009 order, applicant filed a motion for summary judgment on the priority and likelihood of confusion claim. Applicant's motion was primarily based on opposer's failure to respond to requests for admission that applicant served upon opposer on January 11, 2010 that, accordingly, are deemed admitted. See *infra*. The Board, in a March 26, 2010 order, then suspended the proceeding pending determination of the motion for summary judgment. After no response to that motion was received, the Board, in a June 8, 2010 order, granted the

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<sup>2</sup> The November 29, 2009 and December 2, 2009 submissions include only electronic signatures. No domestic representative information was provided.

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motion as conceded and dismissed the opposition with prejudice. On July 13, 2010, applicant's involved application matured into Registration No. 3816103.

The following motions are now pending before the Board: (1) opposer's motion (filed August 20, 2010) for relief from judgment under Fed. R. Civ. P. 60(b)(1), (4) and (6); (2) applicant's motion (filed September 25, 2010) to strike certain exhibits to the declaration of opposer's president, Anbang Wang ("Wang"), that opposer submitted with its brief in support of its motion for relief from judgment; and (3) opposer's motion (filed October 28, 2010) to strike the Nadrich declaration that applicant filed on October 18, 2010, on the grounds that the filing is an impermissible surreply.

The Board turns initially to the motion to strike the Nadrich declaration, which was filed by itself, six days after the motion for relief from judgment was fully briefed. A review of that declaration indicates that it presents surreply evidence in opposition to the motion for relief from judgment.<sup>3</sup> As the non-movant, applicant may file only a single brief in opposition to opposer's motion to vacate entry of judgment. Trademark Rule 2.127(a). After a movant

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<sup>3</sup> Applicant's time in which to file a reply brief to rebut opposer's arguments made in its brief in response to applicant's motion to strike had not expired when applicant filed the Nadrich declaration. However, the Nadrich declaration includes no such rebuttal arguments in support of applicant's motion to strike.

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files a reply brief, "[t]he Board will consider no further papers in support of or in opposition to a motion." *Id.* In view thereof, the Nadrich declaration is not properly before the Board, and opposer's motion to strike that declaration is granted.

Regarding applicant's motion to strike exhibits that opposer attached to its motion to vacate judgment, as noted *supra*, applicant is allowed to file only a single brief in opposition to opposer's motion to vacate entry of judgment. A non-movant should not file a brief in response to a motion in which it argues the merits of the motion and then file a separate motion to strike arguments and exhibits that the movant submitted in support of the motion. Rather, all procedural arguments and arguments on the merits in response to the motion to vacate judgment should have been incorporated into a single brief in response to that motion. *Id.* Nonetheless, because the brief in response to the motion to vacate judgment and the motion to strike, taken together, do not exceed the twenty-five page limit for a brief in response to a motion, the Board will consider both submissions.<sup>4</sup> *Id.*

In support of the motion to strike, applicant contends that exhibits 1-10 and 15 of the Wang declaration that

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<sup>4</sup> The Board, however, will not consider any further bifurcated briefing in response to motions herein.

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opposer submitted in support of the motion for relief from judgment should be stricken because they are evidentiary materials attached to a brief on the case that were not properly made of record during opposer's testimony period, and which were not properly authenticated. Applicant further contends that the Wang declaration should be stricken because he was not named in the initial disclosures that opposer served herein on August 29, 2009.

Applicant's arguments are not well-taken. Opposer's brief in support of its motion to vacate entry of judgment is not a final brief on the case, and testimony periods have not commenced in this case.<sup>5</sup> Unlike final briefs on the case, parties are generally not precluded from including declarations with attached exhibits in support of pre-trial motions. Further, for purposes of opposer's motion, the exhibits are adequately made of record based on Wang's personal knowledge of those exhibits as described in his declaration. Cf. TBMP Section 528.05(b) (2d ed. rev. 2004).

Moreover, opposer, in its initial disclosures, was required to disclose the names of "individual[s] likely to have discoverable information." Fed. R. Civ. P.

26(a)(1)(A). However, there is no support for applicant's

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<sup>5</sup> In the Board's December 10, 2009 order, the discovery period was reset to close on May 11, 2010. In a March 26, 2010 order, the Board suspended proceedings herein pending disposition of applicant's motion for summary judgment.

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position that failure to name an individual in a party's initial disclosures precludes that party from relying upon that individual in connection with procedural motions in that case. Accordingly, applicant's motion to strike certain exhibits from the Wang declaration is denied.

The Board will now consider opposer's motion for relief from judgment. Opposer contends that applicant's principals had been its United States sales agents. After the business relationship between opposer and applicant's principals had deteriorated, the principals organized applicant as a limited liability company and, without opposer's authorization, filed the involved application on December 19, 2007. Opposer learned about the filing of the involved application early in 2008 when Nadrich, one of applicant's principals, told opposer's sales manager, Jianzhang Wang, about such filing. Opposer then hired a Chinese trademark agency to oppose registration of applicant's mark; however, the trademark agency, without opposer's knowledge or authorization, "assigned the matter" to a law firm located in Beijing, China, who in turn, without opposer's knowledge or authorization, solicited the assistance of opposer's former United States attorney. Opposer contends that, after its former United States attorney withdrew from this case, the statement that opposer would represent itself and change of correspondence address were filed under Wang's electronic

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signature without his knowledge or authorization. On December 23, 2009, applicant served interrogatories and document requests on opposer. The certificates of service of those interrogatories and document requests indicates that such service was by mail to the address using the erroneous postal code 352771, instead of the 362271 postal code set forth in the change of correspondence address that opposer filed on December 2, 2009. On January 11, 2010, applicant served requests for admission on opposer by mail using the same erroneous postal code and by e-mail to the e-mail address set forth in the change of correspondence address. Opposer contends that the e-mail address set forth in the change of correspondence address had been obsolete for four years, and the parties had not agreed to service by electronic transmission. As a result, opposer contends that it did not receive any of applicant's discovery requests.

On March 12, 2010, applicant filed the motion for summary judgment with a certificate of service stating that such motion was served on opposer by mail only and again using the erroneous 352771 postal code. Opposer also contends that it did not receive the motion for summary judgment. Opposer admits that Wang received the Board's March 26, 2010 suspension order, but contends that Wang does not read or understand English and therefore could not comprehend its significance. Opposer sought a translation

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of the suspension order from the Chinese trademark agency, but was informed that this proceeding had "entered into the judgment stage." After opposer was informed by one of applicant's principals that summary judgment had been entered herein, opposer discharged its Chinese trademark agent and law firm, hired new Chinese and United States counsel, and filed its motion for relief from judgment. Based on the foregoing, opposer contends that it should be relieved from judgment because: (1) the judgment is void under Fed. R. Civ. P. 60(b)(4) in view of applicant's failure to properly serve both the requests for admission and the motion for summary judgment; (2) its failure to respond to the motion for summary judgment was the result of excusable neglect under Fed. R. Civ. P. 60(b)(1); and (3) exceptional circumstances warrant setting aside the entry of judgment under Fed. R. Civ. P. 60(b)(6).

In opposition, applicant contends that opposer failed to monitor the status of this proceeding and that therefore any neglect by opposer is "culpable rather than excusable." While applicant concedes that there were typographical errors in the certificates of service of all of the discovery requests and motion for summary judgment, applicant asserts that it may have "used the correct postal code on the actual envelope[s]." Applicant contends in addition that the parties agreed to service by e-mail; that,

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on December 11 and 15, 2009, the parties exchanged e-mails regarding the discovery and expert disclosure schedule with opposer using the e-mail address set forth in the December 2, 2009 change of correspondence address; that neither its discovery requests nor its motion for summary judgment were returned as undeliverable to applicant; and that the e-mail in which applicant sent requests for admission to opposer was sent via an e-mail tracking service, which indicates that such e-mail was opened nine times by five persons. Accordingly, applicant asks that the Board deny opposer's motion for relief from judgment.

In reply, opposer contends that applicant has failed to rebut the assertion that opposer never received the motion for summary judgment, the certificate of service of which, unlike applicant's requests for admission, indicates was not served by e-mail. Opposer further contends that, even if the e-mail tracking service indicates that the e-mail in which applicant sent the requests for admission was opened nine times, the e-mail tracking report indicates that it was opened by persons in Beijing, Fujian and Tianjin, while opposer is located in Jinjiang; and that, after applicant did not receive responses to its discovery requests, applicant did not contact opposer prior to filing the motion for summary judgment. Opposer further contends that it

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should be relieved from judgment because it did not choose its former Chinese and United States attorneys.

Relief from judgment under Fed. R. Civ. P. 60(b) is an extraordinary remedy to be granted in the Board's discretion only in exceptional circumstances. *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613 (TTAB 1991). The determination of whether to grant a Fed. R. Civ. P. 60(b) motion is a matter largely within the Board's discretion. See *Case v. BASF Wyandotte*, 737 F.2d 1034, 222 USPQ 737 (Fed. Cir. 1984).

A motion for relief from judgment under Rule 60(b) must be filed "within a reasonable time" with a motion under Rules 60(b)(1), (2), and (3) filed "no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). Opposer filed its motion for relief from judgment slightly more than two months after the entry of the judgment at issue and therefore acted within a reasonable time after the entry of the judgment at issue.

Rule 60(b) states in relevant part as follows: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for ... (1) mistake, inadvertence, surprise, or excusable neglect; ... (4) the judgment is void; ... [or] (6) any other reason that justifies relief." Under Fed. R. Civ. P. 60(b)(4), a "judgment can be challenged as void only

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on grounds of lack of jurisdiction or for some failure of due process in the original proceeding." *Broyhill Furniture Ind. Inc. v. Craftmaster Furniture Corp.*, 12 F.3d 1080, 29 USPQ2d 1283 (Fed. Cir. 1993). See also *Jack Lenor Larsen Inc. v. Chas. O. Larson Co.*, 44 USPQ2d 1950 (TTAB 1997).

An order granting a summary judgment motion as conceded is the "functional equivalent of a default judgment." *Feeney v. AT&E, Inc.*, 472 F.3d 560, 562 (8<sup>th</sup> Cir. 2006). Default judgments do not address the merits of the case and are therefore "not favored by the law." TBMP Section 544. Thus, motions for relief from judgments entered as a result of a default are "generally treated with more liberality by the Board than are motions under Fed. R. Civ. P. 60(b) for relief from other types of judgments." *Id.* A default judgment entered after insufficient service must be set aside as void. *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851-52 (9th Cir. 1992).

Applicant has included as an exhibit to its brief in opposition to opposer's motion for relief from judgment a copy of a November 30, 2009 e-mail from Wang and Tom Lee to Nadrach that was sent from the email address set forth in the December 2, 2009 change of correspondence address, namely, [meihuaumbrella@yahoo.com.cn](mailto:meihuaumbrella@yahoo.com.cn). As an attachment to that e-mail, Wang and Lee enclosed a service copy of opposer's statement that it would represent itself and asked

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Nadrich if applicant would agree to communicate by e-mail. We find that, by only serving by e-mail the statement that opposer would represent itself, and including that e-mail address as part of opposer's correspondence address in both that statement and the December 2, 2009 change of correspondence address, opposer effectively consented to service by e-mail at that e-mail address.<sup>6</sup> Accordingly, because applicant has expressly indicated in the certificate of service of the requests for admission that e-mail was a manner of service therefor, such service is acceptable. See Trademark Rule 2.119(a). However, because the certificates of service of applicant's remaining discovery requests and motion for summary judgment do not expressly identify e-mail as a manner of service thereof, any copies of these latter documents that applicant sent to opposer by e-mail were merely as courtesies, and service of these latter documents is otherwise insufficient.

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<sup>6</sup> In addition to the November 30, 2009 e-mail sent by Wang and Tom Lee from [meihuaumbrella@yahoo.com.cn](mailto:meihuaumbrella@yahoo.com.cn) to Nadrich, applicant also included as an exhibit to its brief in response to the motion for relief from judgment a copy of a December 15, 2009 e-mail sent by Wang from that e-mail address to Nadrich. Both the December 30, 2009 and December 15, 2009 e-mails are written in English. We are not persuaded by opposer's assertions supported only by the Wang declaration that: (1) the statement that opposer would represent itself was filed without opposer's knowledge or authorization; (2) the e-mail address included in its December 2, 2009 change of correspondence address has been obsolete for four years; and (3) Wang neither reads nor understands English.

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In view of such acceptable service of, and opposer's failure to timely respond to, the requests for admission, such requests stand admitted by operation of applicable rules.<sup>7</sup> See Fed. R. Civ. P. 36(a)(3); TBMP Section 407.03. But see Fed. R. Civ. P. 36(b); TBMP Section 525 (motion to amend or withdraw admissions). Nonetheless, the certificates of service in all of applicant's discovery requests and motion for summary judgment all include the same erroneous postal code, 352771, and are therefore unacceptable on their face to the extent that applicant relies upon them as evidence of service by mail.<sup>8</sup> See Trademark Rule 2.119(a). Applicant's assertion that it may have properly addressed the envelopes for the documents at issue lacks any support and is wholly unpersuasive. Rather, we find that applicant failed to serve opposer properly with its motion for summary judgment and that such failure constitutes a failure of due process which warrants granting opposer relief from judgment.

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<sup>7</sup> Even if applicant's e-mail tracking of the requests for admission does not indicate that the e-mail in which the requests for admission were sent as an attachment was opened in Jinjiang, opposer could have opened that e-mail elsewhere.

Although applicant did not contact opposer after opposer failed to timely respond to applicant's requests for admission, applicant was under no obligation to so contact.

<sup>8</sup> The extent to which use of an incorrect postal code can disrupt mail delivery in China is unclear from the record.

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In view thereof, opposer's motion for relief from judgment under Fed. R. Civ. P. 60(b)(4) is granted.<sup>9</sup> The Board's June 8, 2010 order entering judgment against opposer and dismissing the opposition with prejudice is hereby vacated.<sup>10</sup> Applicant's Registration No. 3816103 will be forwarded to the Commissioner of Trademarks for appropriate action. Opposer is allowed until thirty days from the mailing date of this order to file a brief in opposition or other response to the motion for summary judgment.<sup>11</sup> Applicant's reply brief is due in accordance with Trademark Rules 2.119(c) and 2.127(e)(1).

To minimize further problems regarding service of documents herein, the parties are ordered to serve all documents by e-mail, with backup service by mail, and to keep their correspondence and e-mail addresses current at all times. See Trademark Rule 2.119(b)(6); TBMP Section 117.07.

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<sup>9</sup> We therefore need not reach whether relief from judgment is warranted under Fed. R. Civ. P. 60(b)(1) and (6).

<sup>10</sup> Notwithstanding the foregoing, opposer brought this opposition and in doing so took responsibility for moving this case forward without undue delay. See *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1860 (TTAB 1998). The Board will look with disfavor upon any failure by opposer to comply with deadlines set by the Board or the Trademark Rules of Practice.

<sup>11</sup> If opposer has not received a copy of the motion for summary judgment, it may obtain one online at <http://ttabvueint.uspto.gov/ttabvue/>.

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Proceedings herein are otherwise suspended, in accordance with the March 26, 2010 order, pending the Board's decision on the motion for summary judgment. See Trademark Rule 2.127(d).