

[

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

jk

Mailed: January 13, 2012

Opposition No. 91200934

Office of the Commissioner
of Baseball

v.

S9 Sports, LLC

By the Board:

As set forth in the Board's August 9, 2011 order, applicant's deadline to file an answer was reset to December 2, 2011. On December 13, 2011, opposer filed a motion for default judgment pursuant to Trademark Rule 2.106(a) based on applicant's failure to timely file either an answer or a motion to extend the time to answer.¹ On December 20, 2011, applicant filed its brief in response and motion for leave to file an answer, as well as its late-filed answer.

Accordingly, this proceeding is before the Board for consideration of opposer's motion for default judgment. The motion is fully briefed.

Analysis

The standard for determining whether default judgment should be entered for failure to timely answer is the Fed.

¹ Opposer's motion serves as a substitute for the Board's issuance of a notice of default. See TBMP § 508 (3d ed. 2011).

R. Civ. P. 55(c) standard, namely, whether a defendant has shown good cause why judgment by default should not be entered against it. See TBMP § 312.01 (3d ed. 2011). 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 the defendant has a meritorious defense. See *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991).

By way of its response, applicant states that the answer was not timely filed due to an inadvertent failure to calendar the deadline therefor following a period of suspension for settlement efforts, and that this was a mistake and oversight on counsel's part. Applicant supports this with an affidavit of its counsel. It also asserts that there has been no injury or prejudice to opposer. Applicant requests that the Board allow its late-filed answer and refrain from entering default judgment.

Upon review of the record, it thus far does not evidence evasive conduct, bad faith or gamesmanship on applicant's part, and does not suggest that the failure to timely answer, or move for an extension to answer, was the result of willful behavior, or indifference or inattentiveness to this proceeding.

Applicant has adhered to the preferred practice of filing a late answer with its response to the motion for default judgment, indicating a good faith effort to address the merits of this opposition. Applicant's brief and its answer indicate that applicant intends to pursue a plausible and meritorious defense to this proceeding. Furthermore, while the Board notes the delay that applicant's default has occasioned, in its motion, opposer does not articulate any specific prejudice that it has endured or will endure as a result of applicant's failure to answer.

Finally, while the determination of whether judgment by default should be entered lies within the Board's discretion, the Board nevertheless prefers to determine the issue of the right to registrability on the merits of the claims and defenses brought before it, and to resolve the issue of default in favor of the defendant, where appropriate. See TBMP § 312.02 (3d ed. 2011).

In view thereof, the Board finds that applicant has demonstrated the required good cause to set aside its default. Applicant's late-filed answer is accepted and is now its operative pleading in this proceeding.² Opposer's motion for default judgment is hereby denied.³

² Applicant's pleading is captioned "Applicant's Original Answer and Affirmative Defenses," and sets forth the following under the heading "Defenses:" "Applicant denies there is any likelihood of confusion between its mark and the marks owned or controlled by Opposer."

Schedule

Proceedings are resumed. Conferencing, discovery and trial dates, are hereby reset as follows:

Deadline for REQUIRED Discovery Conference	2/13/2012
Discovery Opens	2/13/2012
Initial Disclosures Due	3/14/2012
Expert Disclosures Due	7/12/2012
Discovery Closes	8/11/2012
Plaintiff's Pretrial Disclosures due	9/25/2012
Plaintiff's 30-day Trial Period Ends	11/9/2012
Defendant's Pretrial Disclosures due	11/24/2012
Defendant's 30-day Trial Period Ends	1/8/2013
Plaintiff's Rebuttal Disclosures due	1/23/2013
Plaintiff's 15-day Rebuttal Period Ends	2/22/2013

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

For clarity, the parties should note that the Board construes this as an amplification of applicant's denial of the salient allegations in the notice of opposition, and not as a true affirmative defense. See, e.g., *Textron, Inc. v. Gillette Co.*, 180 USPQ 152, 153 (TTAB 1973).

³ Insofar as opposer, in its motion, requests a resetting of discovery and trial dates, said motion is granted.