

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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CME

Mailed: August 20, 2016

Opposition No. 91214578 (parent)

Opposition No. 91226723

Cancellation No. 92063552

LeMans Corporation

v.

LeMar Xavier Lewis

By the Trademark Trial and Appeal Board:

On July 25, 2016, prior to consolidation of the above-captioned proceedings, the Board issued a notice of default in Cancellation No. 92063552 due to Mr. Lewis's failure to file an answer to the petition to cancel by the deadline of July 13, 2016 or a motion to extend his time to answer. The Board allowed Mr. Lewis thirty days in which to show cause why default judgment should not be entered against him. Now before the Board is Mr. Lewis's response to the Board's order and [proposed] answer, filed July 25, 2016,¹ LeMans Corporation's ("LeMans") response thereto, filed August 1, 2016, and Mr. Lewis's reply brief, filed August 4, 2016.²

¹ The Board notes Mr. Lewis's change of correspondence address, filed April 14, 2016 in Opposition No. 91226723 and filed June 6, 2016 in Cancellation No. 92063552. The Board has updated its records in these proceedings as well as Opposition No. 91214578 to reflect this change of address.

² Mr. Lewis filed his briefs and [proposed] answer in Cancellation No. 92063552 at 16-18 TTABVUE; LeMan's filed its opposition brief in the parent case, Opposition No. 91215478 at 64 TTABVUE.

In response to the notice of default, Mr. Lewis: (1) apologizes “for not responding in a timely manner” and acknowledges that he “fully understand[s] and [is] well aware of [his] obligations to keep up with trail [sic] deadlines,” Cancellation No. 92063552, 16 TTABVE 2; (2) explains that his responsibilities to his family as “the soul [sic] income provider ... working multiple jobs” and “lingering physical disabilities” have prevented him from being able “to study board guidelines and procedures,” *id.*; (3) asserts that his “attempts to find a *pro bono* trademark attorney has [sic] been disappointing” and he does “not have the financing necessary to retain and maintain counsel,” *id.*; (4) indicates that he has “spent over 10 years trying to acquire the necessary tools to fully launch the Thoro brand [and does] not wish to forfeit [the] rights that [he] has worked diligently to secure,” *id.*; and (5) states that he has now “taken the time to provide a response to the petition [to cancel].” *Id.*

LeMans argues that Mr. Lewis is asserting the “same ‘lingering physical disabilities’ and attempts to find legal counsel for his reasons ... to extend deadlines” in this proceeding as he has asserted in the above-captioned parent proceeding, Opposition No. 91214578, 64 TTABVUE 2; that in Opposition No. 91214578 “each new counsel [Mr. Lewis] has found has withdrawn shortly after,” *id.*; that Mr. Lewis’s [proposed] answer is “argumentative and contains neither an admission nor a clear denial of the allegations (nor a statement of insufficient information to admit or deny);” *id.* at 3; and that Mr. Lewis’s “continued non-compliance with Board Rules and procedures, and the leniency asked for and

received by [Mr. Lewis] on such non-compliance, are prejudicing [LeMans] in terms of adding significantly to the time and cost of these proceedings” and “has and will continue to impair [LeMans’s] ability to meet appropriately and clearly the necessary evidentiary requirements in these now Consolidated Proceedings.” *Id.* at 3.

In reply, Mr. Lewis argues that “any delay in responses in previous separate oppositions [sic] proceedings should not be attributed to” his failure to file a timely answer in Cancellation No. 92063552. Mr. Lewis further states that he “will be fully in compliance with the USPTO Board’s rules and regulations.” Cancellation No. 92063552, 18 TTABVUE 2-3.

“However the issue [of default] is raised, the standard for determining whether default judgment should be entered against the defendant for his failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard.” TBMP §§ 312.01 and 508 (2016). Under Fed. R. Civ. P. 55(c), default may be set aside “for good cause.” As a general rule, good cause will be found where the defendant’s delay is not the result of willful conduct or gross neglect, where prejudice to the plaintiff is minimal, and where the defendant has a meritorious defense. *See Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). The determination of whether default judgment should be entered against a party lies within the sound discretion of the Board. In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. *See Paolo’s Assocs. Ltd. P’ship v. Bodo*, 21 USPQ2d 1899, 1902

(Comm'r 1990). Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant. *See id.*

The Board appreciates the frustration of LeMans regarding the delays in Opposition No. 91215478 that have been caused by Mr. Lewis's failure to comply with deadlines and Board orders, but the issue for consideration here is whether Mr. Lewis has demonstrated good cause to set aside the notice of default in Cancellation No. 92063552. The Board finds that Mr. Lewis has done so.

As Mr. Lewis has explained, he failed to timely file an answer due to work and familial obligations in addition to purported health issues. This does not rise to the level of willfulness or gross neglect. In addition, Mr. Lewis's 12-day delay in filing an answer will cause minimal prejudice to LeMans in Cancellation No. 92063552. *Fred Hayman*, 21 USPQ2d at 1557 (minimal prejudice from nine-day delay).

With respect to a meritorious defense, Mr. Lewis has filed a [proposed] answer in which he states that he "agrees" with the allegations in paragraph 9, but "disagrees" with the allegations pleaded in the remaining paragraphs of the petition to cancel, namely, paragraphs 1-8 and 10-20. The Board construes Mr. Lewis's statement that he "agrees" with the allegations in paragraph 9 as an admission of that paragraph and Mr. Lewis's statements that he "disagrees" with the allegations in paragraphs 1-8 and 10-20 as a denial of the salient allegations in those paragraphs. This is sufficient to set forth a meritorious defense to the action. *See Fred Hyman*, 21 USPQ2d at 1557; *see also* TBMP § 312.02 ("The showing of a

meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint.”).

In view of the foregoing, the Board’s notice of default, issued July 25, 2016, is set aside, and Mr. Lewis’s [proposed] answer filed concurrently with his response to the notice of default (Cancellation No. 92063552, 17 TTABVUE) is accepted and is now Mr. Lewis’s operative pleading in Cancellation No. 92063552. The Board, however, emphasizes to Mr. Lewis that he is required to strictly comply with all of the Board’s rules and procedures in these consolidated cases regardless of any work or familial obligations and the fact that he is representing himself *pro se*. See *McDermott v. San Francisco Women’s Motorcycle Contingent*, 81 USPQ2d 1212, n.2 (TTAB 2006).

Proceedings are resumed and dates are reset as follows:³

Deadline for Discovery Conference in Opposition No. 91226723 and Cancellation No. 92063552	9/21/2016
Discovery Opens	OPEN
Initial Disclosures Due in Opposition No. 91226723 and Cancellation No. 92063552	10/21/2016
Expert Disclosures Due	2/18/2017
Discovery Closes	3/20/2017
Plaintiff’s Pretrial Disclosures Due	5/4/2017
Plaintiff’s 30-day Trial Period Ends	6/18/2017
Defendant’s Pretrial Disclosures Due	7/3/2017
Defendant’s 30-day Trial Period Ends	8/17/2017
Plaintiff’s Rebuttal Disclosures Due	9/1/2017
Plaintiff’s 15-day Rebuttal Period Ends	10/1/2017

³ Mr. Lewis’s motion, filed June 22, 2016 in Opposition No. 91226723, to extend his time to answer discovery is moot and will be given no further consideration as Mr. Lewis does not dispute LeMans’s assertion that no discovery has been served in Opposition No. 91226723, and therefore, an extension of time is not necessary. See Opposition No. 91214578, 64 TTABVUE 3.

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.
