

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

coggins

Mailed: April 13, 2015

Opposition No. 91219335

Braniff International Property Company

v.

Braniff Holdings, Inc.

By the Board:

Now before the Board are Applicant's motion (filed January 31, 2015) to accept a late-filed answer, and Opposer's motion (filed February 23, 2015) to reopen the time in which to file a brief in opposition thereto.

Procedural Issues

Before determining the motions, the Board addresses several procedural issues.

Applicant's representative

It appears that Applicant is a corporation which is representing itself through Anthony J. Rossi, who signed the answer as "a director of the board" of Applicant. A corporation may represent itself in a Board proceeding; however, the representative must be either (1) an individual who is a member in good standing of the highest court of any State or (2) an officer of the corporation with authorization to represent the corporation. See Patent and Trademark Rules 11.1 and 11.14(e). It

is unclear whether Mr. Rossi is an attorney for the corporation or an officer thereof. The position of “director” alone is not enough to allow the Board to recognize Mr. Rossi as Applicant’s representative in this matter. However, a review of the files of the subject applications reveals that Mr. Rossi signed one of the applications (i.e., Serial No. 86319634) as “cco/evp,”¹ a review of Opposer’s motion to reopen reveals that Mr. Rossi signed a November 23, 2014 email (presumably to Opposer) as “Chief Commercial Officer/EVP,” (see Mot. to Reopen, Exhibit 1 to Exhibit A (November 23, 2014 email)), and a review of the answer reveals that Mr. Rossi signed the certificate of service attached thereto as “President.” In view thereof, the Board presumes that Mr. Rossi is an officer of the corporation with authorization to represent the corporation, and that the answer and motion² to accept the late answer were therefore signed by a representative of Applicant that is permitted under the Patent and Trademark Rules. See Trademark Rule 2.119(e). See also *Birlinn Ltd. v. Stewart*, 111 USPQ2d 1905 (TTAB 2014). To remove any question of whether Mr. Rossi remains eligible to represent Applicant, all future filings by Mr. Rossi should include his title (e.g., as a corporate officer) which permits him to represent Applicant.³ See TBMP § 106.02 (“A document filed in a proceeding before the Board should include the name, in typed or printed form, of the person who

¹ The other application (Serial No. 86278358) was signed by Mr. Rossi as “director.”

² The motion was filed without a signature block and with the only signature being an electronic signature on the ESTTA cover sheet.

³ While a signatory may hold several positions or function in several capacities within a corporation, a signatory should include with every filing a description of the representative (and permissive) capacity in which he signs.

signed; a description of the capacity in which he or she signed (e.g., ... as a corporate officer, if the filing party is a corporation ...); and his or her business address and telephone number.”).

Counsel highly recommended

Although Patent and Trademark Rule 11.14 permits a corporation to represent itself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in a Board proceeding to secure the services of an attorney who is familiar with such matters. If Applicant does not retain counsel, then Applicant will have to familiarize itself with the rules governing this proceeding. Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.

Applicant’s address, Opposer’s notice of ineffective service

Opposer’s notice (filed March 19, 2015) of ineffective service upon Applicant of Opposer’s brief in opposition to the motion to accept the late-filed answer and Opposer’s motion to reopen reveals that mail addressed to Applicant at Applicant’s current address of record has been returned by the U.S. Postal Service to Opposer. Inasmuch as the service address used by Opposer for Applicant matches the address provided by Applicant in its answer to the notice of opposition, and Opposer employed a method of service permitted under Trademark Rule 2.119(b)(4), the Board deems service to have been proper, although not fully effected. In view thereof, the Board will consider Opposer’s motion to reopen.

Applicant is reminded that it is the responsibility of a party to a proceeding before the Board to ensure that the Board --and, by extension, opposing counsel-- have the party's current correspondence address, including an e-mail address,⁴ if applicable. If a party fails to notify the Board of a change of address, with the result that the Board is unable to serve correspondence on the party, default judgment may be entered against the party. *See* TBMP § 117.07.

Civil action

It has come to the attention of the Board that the parties may be engaged in a civil action. *See* Mot. to Reopen, Exhibit 1 to Exhibit A (November 23, 2014 email) which states, *inter alia*, that Applicant is “filing an injunction against” Opposer and “will be filing a ... suit against” Opposer “in the United States District Court [for the] Southern District of New York.” In view of this information, Applicant must, within **twenty days** from the mailing date of this order, file and serve a notice which sets forth the status of the referenced litigation, including a copy of the operative pleadings (without exhibits), so that the Board may ascertain whether the final determination of the civil actions may have a bearing on the issues before the Board. *See* Trademark Rule 2.117(a); TBMP § 510. If there are no civil actions, Applicant must file and serve a notice stating such within the same time frame.

Service of Applicant's motion

Although Applicant's motion to accept the late-filed answer was filed on January 31, 2015, there is no indication that it was served upon Opposer. Applicant is

⁴ Applicant's email address (for courtesy copies of Board orders) has been updated to braniffholdings@gmail.com, which is the email address provided in the answer.

reminded that Trademark Rules 2.119(a) and (b) require that every paper filed with the Board 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. The statement, whether attached to or appearing on the paper when filed, will be accepted as *prima facie* proof of service. The statement should take the form of a “Certificate of Service” which should read as follows:

The undersigned hereby certifies that a true and correct copy of the foregoing [insert title of document] was served upon [insert name of party served] by forwarding said copy, via first class mail [or insert other appropriate means], postage prepaid to: [insert name and address].

The certificate of service must be signed and dated. *See* TBMP § 113.

Motion to Reopen

Opposer moves to reopen the time to file a brief in opposition to Applicant’s motion to accept the late-filed answer. As noted above, Applicant’s motion fails to include proof of service upon Opposer. Notwithstanding Applicant’s failure to include proof of service, it appears that Opposer knew of the motion. Indeed, Opposer states that it believed that it filed a brief in opposition to the motion on February 20, 2015, and in fact attempted to serve a copy of its brief upon Applicant that day. While attempting to file the brief with the Board via ESTTA on February

20, 2015, Opposer failed to validate and submit the filing. The brief was not actually filed until February 23, 2015.

Although the service copy of the brief in opposition was returned to Opposer, the Board has deemed Opposer's attempt at service to be sufficient. *See* discussion, *supra*. In addition, there is no danger of prejudice to Applicant if the brief is considered, the brief was filed only three days later than the deadline would have been had Applicant served its motion via mail, and there is no indication that Opposer acted in bad faith. Although it was Opposer's failure to complete the validation/submission step in ESTTA while attempting to file the brief on February 20th, the Board determines that, on balance, Opposer has shown excusable neglect for its failure to file a timely brief in opposition to Applicant's motion to accept the late-filed answer. *See* Fed. R. Civ. P. 6(b)(1)(B) and *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). In view thereof, the motion to reopen is **granted** to the extent that the Board will consider Opposer's brief in opposition to Applicant's motion to accept the late-filed answer, which brief was attached as Exhibit A to the motion to reopen.

Motion to Accept Late Answer

The issue of whether default judgment should be entered against Applicant for failure to file a timely answer to the notice of opposition was raised by Applicant by its motion asking that its late-filed answer be accepted. The standard for determining whether default judgment should be entered against Applicant for its failure to file a timely answer to the notice of opposition is the Fed. R. Civ. P. 55(c)

standard, that is, whether Applicant has shown good cause why default judgment should not be entered against it.

The form and substance of the wording in Applicant's motion is unusual. It is (again) highly recommended that Applicant obtain trademark counsel.

Answer was due, as last rest, on January 20, 2015.⁵ As best the Board can tell, it appears that Applicant bases its motion on allegations that it did not receive a copy of the Board's December 30, 2014 order which reset the date to file an answer,⁶ Applicant learned of the deadline from a third-party advertisement, there was a January 10, 2015 death in the immediate family of one of Applicant's (unnamed) directors which led to Applicant's non-operational status for a short period, and Applicant acted quickly to file an answer after the deadline.

In opposition to the motion, Opposer argues that Applicant knew about this Board proceeding as evidenced by a November 23, 2014 email, and that Applicant does not have a meritorious defense.

Under the circumstances in this case, the Board determines that Applicant's failure to file a timely answer does not appear to be willful, grossly negligent, or substantially prejudicial. The November 23rd email was sent prior to the Board's resetting of the time to answer (after Opposer's notice of ineffective service of the notice of opposition), and while it references a "USPTO Opposition Claim" such reference appears to be in relation to "fraud" -- but fraud is not a ground pleaded by

⁵ Although the date to answer was set as January 18, 2015, answer was not due until January 20th by operation of Trademark Rule 2.196.

⁶ As noted above, it is Applicant's duty to provide the Board with an address at which the Board (and Opposer) may serve documents upon Applicant.

Opposer in this proceeding; moreover, the email makes no mention of Applicant's awareness that an answer was or would be due in the case. The email does not reveal much, at all, about Applicant's knowledge of this proceeding, and certainly does not prove that Applicant's failure to file a timely answer "was the result of gross neglect if not outright willful conduct" as Opposer suggests. Without evaluating the merits of this case, the Board further determines that Applicant's late answer contains a meritorious defense to the complaint inasmuch as it presents a plausible response to Opposer's allegations. The Board is persuaded that the foregoing constitutes good cause to discharge Applicant's technical default and to accept the late answer. Fed. R. Civ. P. 55; *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991); TBMP §§ 312.01 and 02. Accordingly, Applicant's motion is **granted**, and Applicant's late answer is noted.⁷

Schedule

Dates are reset on the following schedule.

Civil Action Information/Statement Due from Applicant	20 days
Deadline for Discovery Conference	5/12/2015
Discovery Opens	5/12/2015
Initial Disclosures Due	6/11/2015
Expert Disclosures Due	10/9/2015

⁷ It is curious that Applicant answered Paragraphs 3, 4, and 5 of the notice of opposition by stating that Applicant lacks knowledge or information sufficient to form a belief about the truth of those allegations. It appears that Applicant should possess direct information about those allegations. In view thereof, Applicant is reminded of its Fed. R. Civ. P. 11(b) obligation which provides that by presenting to the Board a pleading, motion, or other paper, Applicant "certifies that to the best of [Applicant's] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that the "legal contentions are warranted" and "the denials of factual contentions are warranted." Applicant has an obligation to make reasonable inquiries prior to filing any paper in this proceeding. It is again recommended that Applicant obtain trademark counsel.

Discovery Closes	11/8/2015
Plaintiff's Pretrial Disclosures	12/23/2015
Plaintiff's 30-day Trial Period Ends	2/6/2016
Defendant's Pretrial Disclosures	2/21/2016
Defendant's 30-day Trial Period Ends	4/6/2016
Plaintiff's Rebuttal Disclosures	4/21/2016
Plaintiff's 15-day Rebuttal Period Ends	5/21/2016

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.