

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Mailed: May 30, 2003

Cancellation No. 92/040,976

NY-EXOTICS, INC

v.

EXOTICS.COM, INC.

Andrew P. Baxley, Interlocutory Attorney:

On January 21, 2003, the Board issued a notice of default under Fed. R. Civ. P. 55(a) inasmuch as no answer is of record.

On April 25, 2003, i.e., more than two months after the expiration of its time to respond, respondent filed a response thereto wherein it indicated that it had moved and had only just received papers in connection with this proceeding.¹ Incorporated into respondent's response is an intended answer.

Inasmuch as respondent clearly intends to defend this case on the merits, in keeping with the Board's policy of

¹ Respondent's communication does not indicate proof of service of a copy of same on counsel for petitioner as required by Trademark Rule 2.119 (which is more fully explained later in this order). In order to expedite this matter, a copy of said communication is forwarded herewith to counsel for petitioner, but strict compliance with Trademark Rule 2.119 is required in all further papers filed with the Board.

deciding cases on the merits where possible, the Board, in its discretion, elects to consider respondent's late-filed response to the notice of default. See TBMP Section 317.02.

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).

Respondent's arguments are persuasive of a showing of good cause inasmuch its failure to file an answer was caused by its delay in receiving papers related to this proceeding at its new address. Further, any potential prejudice to petitioner can be cured by reopening discovery, and respondent has set forth a meritorious defense by way of the denials in its intended answer.

As noted earlier, respondent's responses includes arguments that appear to be intended as an answer to the petition to cancel. A reading of this "answer" reveals, however, that it does not comply with Rule 8(b) of the

Federal Rules of Civil Procedure, made applicable to this proceeding by Trademark Rule 2.116(a).

Fed. R. Civ. P. 8(b) provides, in 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 petition to cancel filed by petitioner herein consists of six paragraphs and three subparagraphs setting forth the basis of petitioner's claim of damage. In accordance with Fed. R. Civ. P. 8(b) it is incumbent on respondent to answer the petition to cancel by admitting or denying the allegations contained in each paragraph. If respondent is without sufficient knowledge or information on which to form a belief as to the truth of any one of the allegations, it should so state and this will have the effect of a denial.

In view of the foregoing, respondent is allowed until **thirty days** from the mailing date of this order in which to file an answer herein which complies with Fed. R. Civ. P. 8.

As noted earlier in this order, Trademark Rules 2.119(a) and (b) require that every paper filed in the Patent and Trademark Office in a proceeding before 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 respondent may subsequently file in this proceeding, including its answer to the petition to cancel, 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.

It should also be noted that while Patent and Trademark Rule 10.14 permits any person 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 cancellation 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.

It is recommended that respondent obtain a copy of the latest edition of Title 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice and is available

for a fee from the Superintendent of Documents, U. S. Government Printing Office, Washington, D.C. 20402.²

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.

Discovery and trial dates are hereby reset as follows:

DISCOVERY PERIOD TO CLOSE:	9/1/03
Plaintiff's 30-day testimony period to close:	11/30/03
Defendant's 30-day testimony period to close:	1/29/04
15-day rebuttal testimony period to close:	3/14/04

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 Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

² The Trademark Trial and Appeal Board Manual of Procedure (TBMP) (Stock No. 903-022-00000-1) is available for a fee from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. (Telephone (202) 512-1800). The TBMP is also available on the World Wide Web at <http://www.uspto.gov>.