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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92043691
Party	Plaintiff Smart Inventions, Inc.
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Submission	Other Motions/Papers
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Date	07/07/2006
Attachments	Opposition to Motion to Set Aside Default.pdf (3 pages)(183663 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Registration Serial No.	:	2,513,616
For the Mark	:	SMART BROOM
Registered	:	December 4, 2001

- -X

Smart Inventions, Inc.

Petitioner,

v.

Yellowtop, North American, Inc.,

Registrant.

- -X

Cancellation No. 92043691

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

PLAINTIFF'S OPPOSITION TO MOTION TO SET ASIDE DEFAULT JUDGMENT

Smart Inventions, Inc. through its counsel, Paul D. Supnik, hereby opposes the Motion to Set Aside Default Judgment of TMB PRODUCTS, LLC and TMB PRODUCTS DEVELOPMENT L.L.C. (hereafter collectively TMB) served by mail on June 19, 2006.

Once default judgment has actually been entered against a defendant pursuant to Fed. R. Civ. P. 55(b), the judgment may be set aside only in accordance with Fed. R. Civ. P. 60(b). TMBP §312.03. Here, judgment has actually been entered and Fed. R. Civ. P. 60(b) controls. The factors to be considered in determining this motion are:

(1) whether the plaintiff will be prejudiced,

(2) whether the default was willful, and

(3) whether the defendant has a meritorious defense to the action. FRCP Rule 60(b), TMEP 312.03.

Smart Inventions, Inc. is prejudiced. It filed its cancellation proceeding because of a 2(d) rejection in an Office Action in connection with an application for registration of the mark SMART MOP based on the SMART BROOM registration of defendant. The SMART MOP application has now registered. More than a year has passed since the default judgment was entered and the registration cancelled.

It is impossible to determine from the moving papers of TMB whether or not the default was wilful, and if so, to what extent. Although TMB's counsel states that the document was returned, there is no evidentiary showing that the client was not actually aware of the opposition proceeding, only the mere conclusion of counsel. And there is only the conclusionary statement that the motion is made within a reasonable time. No information is provided as to how TMB learned of the cancellation of the mark, what actions were taken when it learned of the cancellation and whether there was any communication between the prior company, Yellow Top, North America and TMB concerning the cancellation proceeding.

Finally, TMB has not shown that it has a meritorious defense to the cancellation proceeding. It has not submitted an answer. It has not explained the issue of abandonment raised in the cancellation petition. And it has not discussed what could be an issue of collateral estoppel regarding a prior opposition proceeding between the apparent predecessor of TMB, Yellowtop, North America, Inc. and petitioner involving the mark SMART BROOM. Thus, an opposition was dismissed with prejudice against Yellowtop, North America, Inc. Issues raised by Smart Inventions in that opposition resulted in conclusive priority by Smart Inventions, Inc. over Yellowtop, North America in connection with its SMART BROOM opposition against the

then pending Smart Inventions, Inc. appliation for the mark SMART BROOM.

The showing required by the defendant when a default judgment has been entered is greater than the showing when the defendant simply seeks to show why a default judgment should not be entered against it.

In view of the foregoing, it is requested that defendant's Motion to Set Aside Default judgment be denied.

SMART INVENTIONS, INC.

Dated: July 7, 2006

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of the above PLAINTIFF'S OPPOSITION TO MOTION TO SET ASIDE DEFAULT JUDGMENT to be served by First Class Mail, postage prepaid on this date to:

Ronald N. Compton, Esq.
Summers, Compton, Wells & Hamburg, P.C.
8909 Ladue Road
St. Louis, Missouri 63124

Dated: July 7, 2006

_____
PAUL D. SUPNIK
Attorney for Applicant