

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Mailed: October 20, 2008

Cancellation No. 92047608

Zen Spa Enterprises Inc. dba
Zen Spa and Health Studio

v.

Kevin and Lea Koon (joined as
party defendant with Bodies In
Motion, Inc.)

Before Quinn, Holtzman and Walsh,
Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of Kevin and Lea Koon's ("respondents") "petition to revive" (filed May 30, 2008) which we construe as a motion to vacate the default judgment under Fed. R. Civ. P. 60(b). Petitioner has submitted a brief in response.

By way of background, on June 5, 2007, the Board instituted these proceedings and allowed the owner of the mark at that time, Bodies In Motion, Inc. ("registrant"), forty days to answer the petition to cancel. The institution order was mailed to registrant at its address of record, but was returned to the Board as undeliverable. Unable to locate a current address for registrant, the Board provided notice of the filing of the petition to cancel by

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publication in the Official Gazette on January 1, 2008 as prescribed by Trademark Rule 2.118.¹ No appearance having been entered in response to the service effected by publication, the Board entered default judgment on February 27, 2008.

Respondents argue, in support of their motion, that they are the current owners of the subject registrations but that neither they, nor registrant "have ever been served in this cancellation procedure." They now seek an opportunity to respond to the petition to cancel. Specifically, respondents allege that prior to August 2007 they began negotiations with registrant to purchase the subject registrations "after having determined that an opposition or cancellation filed against one or both of the marks on behalf of Zen Spa Enterprises, Inc. had been dismissed"; that respondents "inquired of Bodies in Motion, Inc., through their Attorney whether Registrant had ever been served in the action by Zen Spa Enterprises, and was informed that Registrant had not been served"; that respondents concluded negotiations for purchase of the subject mark in December 2007; that assignments for the marks were executed on January 18, 2008, yet the executed

¹ It is noted that registrant's copy of the Board's order of December 4, 2007 informing the parties of the notice by publication was returned as undeliverable.

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copies of such assignments were not mailed by registrant's attorney to respondents until February 5, 2008 and not received by respondents until February 8, 2008; that such assignments were recorded with the Office on February 11, 2008; and that at the time the Board provided notice of the filing of the petition to cancel in the Official Gazette registrant had relinquished its rights to the marks by agreement and respondents had not been recipients of the assignment of the marks.

Petitioner has opposed the motion, arguing that respondents' time for answering the petition to cancel and the time for seeking reconsideration and/or appealing the Board's decision have lapsed; that respondents knew or should have known of the pending cancellation proceedings; that through minimum effort respondents could have obtained information and verified the status of the subject marks by accessing the USPTO's website; that a review of the status of the marks would have shown that a cancellation proceeding was pending and that the reason registrant had not been served was because the Board's institution order of June 5, 2007 had been returned as undeliverable; and that on January 1, 2008, immediately prior to the alleged date of the execution of the assignments of the subject marks, the Board effected service by publication and notified not only registrant, but its assignees of the filing of the petition

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to cancel; and that respondents could have and should have entered an appearance in this case and the fact that the assignments had not yet been recorded was no bar for entering an appearance.

As a preliminary matter, we hereby join respondents as party defendants herein in accordance with Trademark Rule 2.113(c).

Motions to set aside or vacate a final judgment rendered by the Board are governed by Fed. R. Civ. P. 60(b), which, as made applicable by Trademark Rule 2.116(a), applies to all final judgments issued by the Board, including default judgments. Relief from a final judgment is an extraordinary remedy to be granted only in exceptional circumstances. However, because default judgments for failure to timely answer the complaint are not favored by the law, a motion under Fed. R. Civ. P. 55(c) and 60(b) seeking relief from such a judgment is generally treated with more liberality by the Board than are motions under Fed. R. Civ. P. 60(b) for relief from other types of judgments. See TBMP Sections 312.03 and 544 (2d ed. rev. 2004).

Among the factors to be considered in determining a motion to vacate a default judgment for failure to answer the complaint are (1) whether the plaintiff will be prejudiced, (2) whether the default was willful, and (3)

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whether the defendant has a meritorious defense to the action. See *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613 (TTAB 1991).

In this instance, we first note that petitioner has pointed to no prejudice that it would suffer if we were to grant the motion. We also note that by filing their motion, respondents have shown that they believe they have a meritorious defense and intend to defend their rights in the subject mark.

Nevertheless, we find that respondents willfully failed to timely answer the petition for cancellation. Respondents state that prior to purchasing the subject marks they inquired of registrant whether it "had ever been served" the petition to cancel filed by petitioner. Such an inquiry indicates that respondents were aware that a proceeding involving the marks they were purchasing had been instituted and that they had a duty to verify the status of the registrations before such purchase. The mere fact that registrant had not received its service copy of the petition to cancel does not absolve it and, in this instance, respondents, of their obligations to enter an appearance and/or to answer the petition to cancel. It appears that respondents chose to ignore the fact that such a proceeding was pending and the fact that the Board was attempting to effect service on the current owner of the mark. Through

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minimal effort, by accessing the Board's website, respondents could have determined that the reason registrant had not been served was because the Board's institution order of June 5, 2007 was returned as undeliverable inasmuch as registrant did not have a current address of record on file with the Office. Also, through minimal effort, respondents could have determined that on January 1, 2008, immediately prior to the alleged date of the execution of the assignments of the subject marks, the Board effected service by publication pursuant to Trademark Rule 2.118 and notified not only registrant, but its assigns (i.e., respondents) or legal representatives that an appearance was to be made within thirty days or the cancellation would proceed as in the case of default. According to respondents, the assignments of the subject registrations were executed on January 18, 2008. On such date respondents could have entered their appearance, but choose not to. See TBMP Section 124 (2d ed. rev. 2004).²

Under the circumstances, we find that respondents' motion is merely a belated attempt to avoid the consequences of their own neglect. Such neglect does not yield respondents an opportunity to now answer the petition to cancel.

² The Board did not actually enter judgment until February 27, 2008, well after the expiration of the thirty-day period allowed in the Board's notice of publication issued on January 1, 2008.

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In view thereof, respondents' motion for relief from final judgment is denied. The subject registrations will be cancelled in due course.³

³ We note that the subject registrations have not been cancelled by the Commissioner for Trademarks as of the date of the mailing of this order.