

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Lykos

Mailed: March 12, 2008

Paul Stuart, Inc.

v.

Grace Wexler substituted  
for Powder, LLC<sup>1</sup>

Angela Lykos, Interlocutory Attorney

On September 22, 2007, pursuant to Fed. R. Civ. P. 55(a), the Board ordered respondent to show cause why default judgment should not be entered against her for failure to timely answer the petition to cancel.

In response thereto, on October 19, 2007, respondent filed a combined motion to set aside the notice of default and to accept respondent's late-filed answer submitted concurrently therewith. Petitioner has filed a brief in opposition thereto which the Board construes as a cross-motion for default judgment.

The standard for determining default judgment is found

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<sup>1</sup> By this order, Grace Wexler has been substituted as party defendant in this case by virtue of assignment of the involved registration. See TBMP § 512.01 and authorities cited therein. Evidence thereof was recorded with the Assignment Branch of the Trademark Office at Reel 3642, Frame 0947.

in 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 the defendant has a meritorious defense. See *Fred Hyman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991).

Moreover, the Board is reluctant to grant judgments by default, since the law favors deciding cases on their merits. See *Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 USPQ2d 1899 (Comm'r 1990).

In this instance, we find that respondent has shown cause sufficient to avoid a default judgment. First, there is no evidence that respondent's failure to timely answer the notice of opposition was either willful or the result of gross neglect. Indeed, as respondent explains, her delay was due to the fact that she was not informed of the instant proceeding in a timely manner by counsel representing Powder, Inc., the original defendant in this case. Petitioner's contention that respondent had implied knowledge of the proceeding is unconvincing. Thus, respondent's failure to timely answer the petition to cancel was inadvertent.

Second, the Board can see no prejudice to petitioner, other than delay -- which the Board would not characterize as significant -- that would result from accepting respondent's late-filed answer. Furthermore, discovery remains open, and by this order will be extended, giving the parties sufficient time to conduct any necessary fact-finding. Finally, the Board finds that respondent has attempted to set forth a meritorious defense, by way of her answer. Whether respondent will prevail in this proceeding is, of course, a matter for trial.

In view thereof, respondent's combined motion to set aside the notice of default and to accept respondent's late-filed answer is granted.<sup>2</sup> Trial dates, including the closing date of discovery, and testimony periods, are reset as follows:

THE PERIOD FOR DISCOVERY TO CLOSE:	8/20/08
30-day testimony period for party in position of plaintiff to close:	11/18/08
30-day testimony period for party in position of defendant to close:	1/17/09
15-day rebuttal testimony period for plaintiff to close:	3/3/09

In each instance, a copy of the transcript of testimony

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<sup>2</sup> The Board has not considered petitioner's allegations that respondent fraudulently procured her registration from the USPTO. Such allegations were not properly pleaded in the petition to cancel, and have no relevance regarding whether default judgment is warranted in this case.

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.

**NEWS FROM THE TTAB:**

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

[http://www.uspto.gov/web/offices/com/sol/notices/72fr42242\\_FinalRuleChart.pdf](http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf)

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>