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

coggins

Mailed: December 14, 2011

Cancellation No. 92052910

Major League Softball, Inc.

v.

Thomas R. Adams dba
WMLS International

Before Quinn, Holtzman, and Ritchie,
Administrative Trademark Judges.

By the Board:

This case comes up on respondent's motion (filed January 18, 2011) for relief from final judgment under Fed. R. Civ. P. 55(c) and 60(b).[1]

Background

By way of background, this cancellation proceeding was filed on August 18, 2010, and on the following day the Board sent a copy of the order instituting the proceeding directly to respondent at his address of record. No answer to the petition for cancellation having been filed, the Board sent notice of default to respondent on November 4, 2010. No

[1] Although respondent titled his motion as one to set aside notice of default, the motion is construed as one for relief from final judgment. *See* TBMP § 312.03 (3d ed. 2011).

response or other appearance having been made by respondent, the Board, on December 21, 2010, entered judgment by default against respondent and granted the petition for cancellation. On January 5, 2011, the Commissioner for Trademarks cancelled the subject registration. Respondent's motion followed.

Motion for Relief from Final Judgment

The involved registration was cancelled under a default judgment. Because default judgments for failure to timely answer the complaint (i.e., the petition for cancellation) 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. TBMP §§ 312.03 and 544 (3d ed. 2011).

Fed. R. Civ. P. 60(b) provides for relief from judgment in specified instances, and Fed. R. Civ. P. 60(c) requires that any motion for such relief be made within a "reasonable time," and within one year if the motion is based on, *inter alia*, mistake, inadvertence, surprise, or excusable neglect. In this case, respondent's motion was filed twenty-eight days after the Board entered judgment against respondent and thirteen days after the Commissioner cancelled the registration. The motion was therefore filed within a reasonable time.

Among the factors to be considered in determining whether a defendant should be granted relief from a default judgment for failure to timely answer the complaint are (1) whether petitioner will be prejudiced, (2) whether the default was willful, and (3) whether respondent has a meritorious defense to the action. *See Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991), citing *United Coin Meter Co. Inc. v. Seaboard Coastline Railroad*, 705 F.2d 839 (6th Cir. 1983); and *Davis v. Musler*, 713 F.2d 907 (2d Cir. 1983)(motion granted pending showing of meritorious defense where other two elements were established).

By way of the motion, counsel for respondent states that "at all times during the prosecution of the application which matured into [the subject registration] the address of [counsel] has been listed as the correspondence address for communications with the Patent and Trademark Office," that counsel "was designated as the representative of [respondent] to whom communications concerning [the subject registration] were to be mailed," and that "none of [the Board's] communications was addressed to or received by" counsel. We note, however, that the Board followed correct procedure in sending all correspondence directly to respondent. As TBMP § 117.03 (3d ed. 2011) explains:

> [I]n the case of a party whose registration is the subject of a proceeding before the Board, any representation which may be of record in the registration file at the time of the commencement

> of the Board proceeding is not considered to be effective for purposes of the Board proceeding. Rather, correspondence is sent to the registrant itself... unless and until an attorney makes an appearance in the Board proceeding in the registrant's behalf, or a written power of attorney is filed in the proceeding by the registrant, or written authorization of some other person entitled to be recognized is filed in the proceeding by the registrant, or the registrant designates in writing another address to which correspondence is to be sent.

See Trademark Rule 2.113(c). Accordingly, the Board properly sent copies of the institution order, notice of default, and default judgment to respondent's own address instead of to the address of counsel in the registration file.

We further note that the petition for cancellation includes a certificate of service indicating that the petition was served upon counsel for respondent instead of respondent himself. While it was incorrect for petitioner to serve the petition on counsel for respondent, rather than on respondent, we will not grant respondent's motion for relief on this basis.[2] *See* Trademark Rule 2.111(b), and *Equine Touch Foundation Inc. v. Equinology Inc.*, 91 USPQ2d 1943, 1944 n.3 (TTAB 2009). Although a petition is to be served on the owner of the registration or its domestic representative, if one has been appointed, at the correspondence address of record for the owner or domestic

[2] Indeed, respondent did not raise this issue.

representative, if any, it is clear that petitioner had been corresponding with counsel for respondent in June 2008 (prior to registration), and again several times in August 2010 (after registration), including the day before filing the petition; and that counsel was representing respondent at that time. Instead of granting the motion on the basis of petitioner's faulty service, the Board will look to the three factors considered relevant to a Fed. R. Civ. P. 60(b) determination, as listed above. *See Djeredjian v. Kashi Co.*, *supra.*

With respect to the first factor, because respondent filed his motion only twenty-eight days after the Board entered judgment against him and thirteen days after the Commissioner cancelled the registration, there does not appear to be any measurable prejudice to petitioner should the Board reopen this cancellation proceeding.[3]

With respect to the second factor, it does not appear that respondent's default was willful, but instead resulted from counsel's mistaken belief that his representation which was of record in the underlying application file would be effective for purposes of the cancellation proceeding at the

[3] The Board's delay in taking up the motion is not attributable to respondent. We are aware that petitioner alleges (at para. 8 of the petition) that its two pleaded applications were refused registration under Section 2(d) of the Trademark Act based on respondent's registration, and that during the pendency of the outstanding motion the status of the pleaded applications may have changed.

time of the commencement of the Board proceeding, such that any communication from the Board would be directed to counsel instead of to respondent himself.

With respect to the third factor, respondent has not submitted an answer or otherwise discussed his defense to the petition, and thus has not shown that he has a meritorious defense to the petition for cancellation. In view thereof, respondent is allowed until December 30, 2011, in which to file an answer to the petition to cancel.[4] If respondent is able to show by his answer that he has a meritorious defense to the petition to cancel, then the Board will grant respondent's motion for relief from judgment under Fed. R. Civ. P. 55(c) and 60(b), and reset conferencing, disclosure, discovery, and trial dates accordingly.

Changes of Address

In view of the appearance of counsel made on behalf of respondent (by way of the motion for relief from final judgment), correspondence will now be sent to counsel. *See* TBMP § 117.01 (3d ed. 2011).

The change of correspondent (filed December 6, 2011) by petitioner is noted and entered.

[4] The better practice would have been for respondent to file an answer to the petition simultaneously with his motion for relief from judgment.