

Goodman

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

Mailed: April 27, 2012

Cancellation No. 92054391

Mr. Timothy Pitka

v.

Hal Greene

Before Quinn, Mermelstein and Ritchie, Administrative
Trademark Judges.

By the Board:

On December 12, 2011, the Board entered default judgment against respondent after service by publication, and on February 6, 2012, respondent filed a Motion for Relief from Final Judgment and Motion to Re-open the Proceedings pursuant to Fed. R. Civ. P. "60(b)(1), 60(b)(6), 55(c), 6(b), and 37 § C.F.R. 2.116(a)." Then on February 9, 2012, respondent filed a notice of appeal with the United States Court of Appeals for the Federal Circuit also seeking to stay the appeal and remand to this Board for consideration of his motion for relief from final judgment.

This order is intended to comply with the United States Court of Appeals for the Federal Circuit's procedure for Fed. R. Civ. P. 60(b) motions filed after a notice of appeal is timely filed. *See Home Prods. Int'l, Inc. v. United*

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States, 633 F.3d 1369, 1378 n.9 (Fed Cir 2011); *cf.* Fed. R. App. P. 12.1.

We consider respondent's motion to be one for relief from judgment under Fed. R. Civ. P. 60(b)(1). Any motion requesting such relief must be made within a reasonable time, and within one year under Rule 60(b)(1). Fed. R. Civ. P. 60(c)(1). A party may move to vacate under Rule 60(b)(1) on the basis of (1) mistake, inadvertence, surprise, or excusable neglect. Among the factors to be considered in determining a Rule 60(b) motion to vacate a default judgment are the following: (1) whether the non-defaulting party will be prejudiced, (2) whether the default was willful, and (3) whether defendant has a meritorious defense. *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991). Whether to grant or deny a motion to vacate under Rule 60(b) is within the Board's discretion. *Djeredjian v. Kashi Co.*, 21 USPQ2d at 1615.

Here, we find that respondent's motion is timely, having been filed less than two months since the entry of default judgment. We find that respondent's motion has sufficiently addressed the factors of prejudice, meritorious defense, and willfulness such that respondent has established excusable neglect to obtain relief from entry of judgment. We would be inclined to grant respondent's Motion for Relief from Final Judgment, and will provide a fuller

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analysis of our decision, should the case be remanded by an order of the appellate court.¹

¹ Respondent should provide a copy of this order to the United States Court of Appeals of the Federal Circuit, to supplement his motion for remand filed with the appellate court. *Cf.* Fed. R. App. P. 12.1(a).