

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

Goodman

Mailed: August 20, 2012

Cancellation No. 92054391

Mr. Timothy Pitka

v.

Hal Greene

Before Quinn, Mermelstein and Ritchie, Administrative
Trademark Judges.

By the Board:

On August 19, 2011, petitioner commenced this proceeding by filing a petition seeking cancellation of respondent's registration on the grounds of fraud and abandonment. As required, petitioner attempted to serve a copy of the petition for cancellation on respondent by mail at its address of record. Petitioner subsequently notified the Board that the Postal Service returned the service copy undelivered, with a notation that a forwarding order for respondent had expired. Pursuant to the applicable rules, the Board then provided for service of the petition by publication in the Official Gazette. No response to the service of publication having been received, the Board entered default judgment against respondent on December 12, 2011. On February 6, 2012, respondent filed a motion for

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relief from judgment and a motion to consolidate this proceeding with another pending cancellation against the same registration.

On February 9, 2012, respondent filed an appeal of the Board's order entering judgment to the U.S. Court of Appeals for the Federal Circuit. On April 27, 2012, the Board issued an order in compliance with the Federal Circuit's procedure for Fed. R. Civ. P. 60(b) motions pending after a notice of appeal is timely filed, and the Federal Circuit remanded this case to the Board on June 21, 2012. Although petitioner never filed a response to the motion for relief from judgment, we will now consider the motion on its merits.

Motion for Relief From Judgment

We find that the motion for relief from judgment was made within a reasonable time as it was made less than two months after entry of judgment. Fed. R. Civ. P. 60(b)(1).

Respondent's motion to vacate under Rule 60(b)(1) is based on "mistake, inadvertence, and/or excusable neglect." Fed. R. Civ. P. 60(b)(1). Among the factors to be considered in determining whether to vacate a default judgment are 1) whether the default was willful; 2) whether the defendant has a meritorious defense; and 3) whether prejudice will result to the non-defaulting party. See *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613 (TTAB 1991).

Existence of a meritorious defense

Respondent argues that his meritorious defense is established by his answer and affirmative defenses. (Respondent lodged a proposed answer as an exhibit to its motion for relief.) In particular, respondent argues that his meritorious defense is based on the fact that he was using the MEET.COM mark at the time of execution of the statement of use, and continued to use the mark in commerce, and that any lapse of use was less than three years with an intent to resume use.

We find that respondent's arguments, in addition to the filing of his answer and affirmative defenses, establish a meritorious defense. See e.g., *DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000) (to establish a meritorious defense all that is required is a plausible response to the allegations in the notice of opposition).

Prejudice

Respondent argues that there will be no prejudice to petitioner in reopening proceedings as mere inconvenience and delay is insufficient to establish prejudice, and there has been no indication that petitioner has suffered the loss or unavailability of evidence or witnesses.

Inasmuch as delay alone is generally not sufficient to establish prejudice, and petitioner has raised no claim of

prejudice, we find no specific prejudice to petitioner in setting aside default judgment.

Willfulness

With regard to the willfulness prong, we consider whether the party intended to violate court rules and procedures. *Info. Sys. & Networks Corp. v. United States*, 994 F.2d 792, 796 (Fed. Cir. 1993). In this case, respondent states that he did not receive any notification of the Board proceedings and that his failure to update the USPTO with his new address was not willful nor the result of gross neglect. Respondent further advises that he did not learn of the Board proceeding until advised by his licensee who had conducted a status check of the registration, and that he acted promptly thereafter. Under these circumstances, we find no indication that respondent intended to violate Board rules and procedures or to delay this proceeding. Accordingly, we find that respondent's failure to answer was not willful.

Inasmuch as we find that respondent's failure to answer was not willful, there is no prejudice to petitioner in setting aside default judgment, respondent has a meritorious defense, and further, that petitioner has not opposed the motion, respondent's motion for relief from judgment is granted, and default judgment is set aside. Respondent's answer is accepted.

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Consolidation

The Board now turns to respondent's motion to consolidate this proceeding with Cancellation No. 92054457, which is a petition for cancellation of the same registration, involving a different party petitioner.

Inasmuch as this proceeding involves a different party petitioner and different counsel as well as an additional ground for cancellation, the proceedings will to some degree involve different questions of fact and law. Thus, the Board finds that consolidation is not appropriate. It appears that respondent desires consolidation merely for the convenience of respondent himself, and this is not enough to warrant consolidation.¹

In view thereof, the motion to consolidate is denied.

Proceedings are resumed.

Dates are reset as follows:

Deadline for Discovery Conference	9/19/2012
Discovery Opens	9/19/2012
Initial Disclosures Due	10/19/2012
Expert Disclosures Due	2/16/2013
Discovery Closes	3/18/2013
Plaintiff's Pretrial Disclosures	5/2/2013
Plaintiff's 30-day Trial Period Ends	6/16/2013
Defendant's Pretrial Disclosures	7/1/2013
Defendant's 30-day Trial Period Ends	8/15/2013
Plaintiff's Rebuttal Disclosures	8/30/2013
Plaintiff's 15-day Rebuttal Period Ends	9/29/2013

¹ The Board notes that a similar request for consolidation was also denied in Cancellation No. 92054457.

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In each instance, a copy of the transcript of testimony 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.