

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

coggins

Mailed: February 14, 2012

Cancellation No. 92054462

Round Hill Cellars

v.

Lolonis Winery, and
Lolonis Vineyards, Inc.¹

Before Bucher, Mermelstein, and Bergsman,
Administrative Trademark Judges.

By the Board:

This case comes up on respondent's motion (filed January 3, 2012) for relief from final judgment under Fed. R. Civ. P. 55(c) and 60(b).²

Background

This cancellation proceeding was filed on September 1, 2011. Five days later the Board sent a copy of the order

¹ Respondent submitted, as Exhibit C to its January 3, 2012 filing, a copy of a Secured Party Bill of Sale and Transfer Statement showing that the subject registration (as a "general intangible") has been sold and transferred to Lolonis Vineyards, Inc. In view thereof, the Board *sua sponte* joins Lolonis Vineyards, Inc. as a party defendant. See TBMP § 512.01 (3d ed. 2011). It is recommended that respondent record the assignment with the Assignment Services Division of the Office; respondent may do so using the Electronic Trademark Assignment System at the following URL: <http://etas.uspto.gov>.

² Although respondent titled its motion as one "to set aside notice of default judgment," the motion is construed as one for relief from final judgment. See TBMP § 312.03 (3d ed. 2011).

instituting the proceeding directly to respondent Lolonis Winery at its address of record. The institution order set respondent's time to answer as October 16, 2011. No answer to the petition for cancellation having been filed by the deadline set therefor, petitioner filed a motion for default judgment on October 21, 2011. No response thereto or other appearance having been made by respondent, the Board, on November 28, 2011, granted petitioner's motion for default judgment as conceded, entered judgment against respondent, and granted the petition for cancellation. On December 9, 2011, the Commissioner for Trademarks cancelled the subject registration. Respondent's motion followed.

Motion for Relief from Final Judgment

The involved registration was cancelled pursuant to 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 thirty-six days after the Board entered judgment against respondent and twenty-five days after the Commissioner cancelled the registration. The motion was therefore filed within a reasonable time.

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, respondent states that at the time the petition to cancel was filed, respondent Lolonis Winery had been in bankruptcy; petitioner knew that respondent had been involved in a bankruptcy proceeding, and knew that respondent had a secured creditor with an exclusive interest in the subject registration; that petitioner knew respondent had also been involved in a

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California Superior Court proceeding, brought by the secured creditor, in which a receiver for respondent had been appointed; petitioner failed to inform the receiver and the secured creditor of the cancellation proceeding, although petitioner knew of their identities and addresses; petitioner took advantage of the fact that respondent was operating with a receiver and sent correspondence only to respondent's "defunct address"; and, at the time petitioner filed the motion for default, petitioner knew, by way of a Notification of Disposition of Collateral, which notification had been sent to petitioner three weeks earlier, that respondent no longer had an interest in the subject registration and that any prior interest had transferred to respondent's secured creditor.

Petitioner opposes the motion and argues that respondent did not attempt to make the required showing for two of the three necessary elements for relief from final judgment under Fed. R. Civ. P. 55(c) and 60(b); specifically, that respondent failed to argue that petitioner would not be prejudiced and failed to show that respondent has a meritorious defense to this proceeding. Petitioner also argues that no assignment has been recorded for the subject registration; that petitioner properly sent correspondence to respondent's correspondence address of record, which address was and still is the actual winemaking

and storage facility for respondent; that the parties were involved in a declaratory judgment action in District Court at the time respondent filed for bankruptcy; that petitioner hired bankruptcy counsel to navigate the bankruptcy proceeding and to explore settlement with respondent and respondent's main creditor during the bankruptcy case; and that petitioner would be prejudiced by reopening the cancellation proceeding. Petitioner states that respondent's receiver was at some point responsible for managing and operating respondent and that the receiver was aware of a trademark dispute between the parties; however, petitioner's brief and declaration attached thereto are not clear as to whether the receiver knew of this Board proceeding (as opposed to the District Court action between the parties). There is no clear indication whether the receiver, who petitioner appears to state was the legal representative of respondent during the pendency of this cancellation proceeding, knew about the Board proceeding.³

As petitioner correctly suggests, the Board will look to the three factors considered relevant to a Fed. R. Civ. P. 60(b) determination, as listed above, in determining

³ Indeed, petitioner states that it was under no obligation to send any correspondence about this Board proceeding to any address other than respondent's address of record, even though petitioner admits that it knew a third-party receiver was responsible for respondent's management and operation.

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respondent's motion for relief. *See Djeredjian v. Kashi Co., supra.*

With respect to the first factor, because respondent filed its motion only thirty-six days after the Board entered judgment against it and twenty-five 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. Petitioner's argument that it would be prejudiced because it took "time and trouble to file its own application" for a ladybug design mark is specious. Office records indicate that application Serial No. 85445858 was filed by petitioner on October 12, 2011 - a date prior to the Board's entry of judgment, prior to petitioner's motion for default, and even prior to the original deadline allowed for respondent to answer the petition.⁴ Moreover, petitioner has not alleged that witnesses or evidence have become unavailable due to the passage of time, or that it has suffered any substantial prejudice. *See DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000). The mere fact that petitioner will be required to prosecute its case on the merits, rather than reap the windfall of a default, is not

⁴ Office records indicate that petitioner's application Serial No. 85445858 was approved for publication on February 1, 2012.

prejudice; if it were, a defaulting defendant could never prevail on this factor.

With respect to the second factor, there is no evidence that respondent's default in the Board proceeding was willful or the result of gross negligence. In fact, petitioner argues, somewhat disingenuously, that, due to the timing of the sale of the subject registration and later motion for default judgment, Lolonis Vineyards, Inc., as the purchaser of the subject registration, could have filed a brief in opposition to the motion for default judgment even though petitioner was under no obligation to serve - and in fact did not serve - a copy of that motion upon Lolonis Vineyards, Inc.⁵

With respect to the third factor, respondent has not submitted an answer or otherwise discussed its defense to the petition, and thus has not shown that it has a meritorious defense to the petition for cancellation. In view thereof, respondent is allowed until March 9, 2012, in

⁵ We note that at the time the petition was filed - and at all times thereafter - Lolonis Winery was listed in the records of the USPTO as the owner of the subject registration. It does not appear that any change of ownership or address for the registration has been filed. Respondent does not need leave from the Board to file the assignment, and the Board sees no reason why, as stated by respondent in its motion for relief, the pendency of this proceeding prevents the filing of an assignment. As noted *supra*, at fn.1, it is recommended that respondent record the assignment with the Assignment Services Division of the Office.

which to file an answer to the petition to cancel.⁶ If respondent is able to show by its answer that it has a meritorious defense to the petition to cancel, then the Board may 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. *Cf. Fred Hayman of Beverly Hills Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991) ("by the submission of an answer which is not frivolous, applicant has adequately shown that it has a meritorious defense").

Civil Action Information

Petitioner provided no information in the petition to cancel, and very little information in its brief in opposition to the motion for relief, about the District Court action between the parties. The institution order for this proceeding directed the parties to immediately inform the Board of any civil action involving related marks or other issues of law or fact which overlap with the Board case, so that the Board can consider whether suspension of Board proceedings is appropriate. Petitioner failed to do so; and, in view thereof, the Board presumes the civil action was terminated prior to the filing date of the

⁶ The better practice would have been for respondent to file an answer to the petition simultaneously with its motion for relief from judgment.

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petition for cancellation. Accordingly, petitioner is ordered to provide the Board with the status of, and relevant pleadings from, the civil action. Petitioner is allowed until March 9, 2012, to respond.

Bankruptcy Proceeding

Although both parties discuss a bankruptcy proceeding involving respondent, neither has provided the Board with essential information about it. If respondent is now (or was at any time since the cancellation petition was filed) in bankruptcy, this proceeding might be subject to the automatic stay provisions of the Bankruptcy Code, 11 U.S.C. § 362, which would clearly affect the Board's consideration of respondent's motion. In order to comply with the mandatory provisions of Bankruptcy Code § 362, the Board consulted the PACER database for what appears to be the relevant bankruptcy proceeding, *In re Lolonis Winery*, No. 11-43235 (Bankr. N.D. Cal.). It appears that the voluntary (Chapter 11) bankruptcy petition, filed March 25, 2011, was dismissed on June 6, 2011, well-prior to commencement of this proceeding. It thus has little relevance to the issue at hand.

Change of Address

In view of the appearance of counsel made on behalf of respondent (by way of the motion for relief from final

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judgment), correspondence for respondent will now be sent to counsel. See TBMP § 117.01 (3d ed. 2011).

Summary

Respondent is allowed until March 9, 2012, in which to file an answer to the petition to cancel. If respondent can show thereby that it has a meritorious defense to the petition, then the Board may 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.

Petitioner is allowed until March 9, 2012, in which to file with the Board the status of, and relevant pleadings from, the District Court civil action between the parties.

The parties are encouraged to use ESTTA (at the following URL: <http://estta.uspto.gov/>) for the filing of all submissions in Board proceedings. See TBMP § 110.09 (3d ed. 2011).