

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

GCP

Mailed: July 29, 2015

Cancellation No. 92059244

Garan Services Corp.

v.

Newman

By the Trademark Trial and Appeal Board:

This proceeding now comes before the Board for consideration of Respondent's motion (filed March 23, 2015) to "reopen" its time to respond to the service by publication of Petitioner's petition to cancel. The motion is fully briefed.

For purposes of this order, the Board presumes the parties' familiarity with the pleadings, the history of the proceeding and the arguments and evidence submitted with respect to Respondent's motion.

Background

Respondent is the owner of the registered mark  for the following goods:

"Leather and imitations of leather, animal skins, trunks and travelling bags, umbrellas, parasols and walking sticks; whips, harness and saddlery, leatherware, namely, key cases and briefcases, sun umbrellas, card cases, wallets, document cases, purses, handbags, beach bags, sports bags, traveling bags" in International Class 18; and

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Clothing, namely, bathing suits, blouses, boots, boot uppers, half-boots, suspenders, belts, shawls, sweaters, socks, shirts, shirt fronts, underwear, suits, neckties, sashes for wear, scarves, gloves, vests, waterproof coats, skirts, singlets, coats, trousers, overcoats, parkas, capes, pelisses, jumpers, dresses, stuff jackets, jackets, tee-shirts, shorts, Bermuda shorts, tops, tank tops, camisoles, dressing gowns, pajamas, slippers, bathing caps, bath slippers, sandals, stockings, tights, breeches for wear, briefs, underwear, brassieres, bandanas, turbans, house coats, esparto shoes and sandals, petticoats, ascots, fingerless gloves, bedroom slippers ; footwear ; headgear, namely, hats, knitted caps, caps, cap peaks ; leather clothing, namely, shirts, pants, coats, dresses, boots, boots uppers, suspenders, belts, underwear, neckties, gloves, vests, skirts, jackets, shorts, Bermuda shorts, trousers, overcoats, parkas, capes, pelisses, slippers, sandals, fingerless gloves, bedroom slippers ; imitation leather clothing, namely, shirts, pants, coats, dresses, boots, boots uppers, suspenders, belts, underwear, neckties, gloves, vests, skirts, jackets, shorts, Bermuda shorts, trousers, overcoats, parkas, capes, pelisses, slippers, sandals, fingerless gloves, bedroom slippers ; knitwear, namely, knitted blouses, knitted caps, shawls, sweaters, socks, sashes for wear, scarves, gloves, vests, skirts, dresses, coats, capes, pelisses, jumpers, fingerless gloves ; undershorts, namely, underwear boy shorts” in International Class 25.

On May 21, 2014, Petitioner filed a petition to cancel seeking to cancel Respondent’s mark solely for the goods identified in International Class 25 on the grounds of fraud and abandonment.

The Board’s May 23, 2014, institution order set the deadline to answer the petition to cancel for July 2, 2014. Respondent did not file an answer by the set deadline nor did Respondent file a timely motion to extend its time to answer. In view thereof, the Board issued a notice of default on July 19, 2014. Thereafter, on August 11, 2014, Petitioner filed a communication with the Board advising that its service copy of the petition to cancel was returned as undeliverable by the U.S. Postal Service.

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On December 8, 2014, the Board issued an order noting Petitioner's ineffective service, vacating the Board's July 19, 2014, default notice, and suspending this case pending service by publication.

On February 10, 2015, service by publication was issued in the Office's Official Gazette requiring Respondent to enter an appearance by March 12, 2015.¹ Respondent did not make an appearance in this proceeding by the set deadline.²

Respondent's Motion To "Reopen" Time To Respond To Service By Publication

Although Respondent did not make a timely appearance in this case pursuant to the service by publication notification, the Board never issued an order entering default judgment against Respondent pursuant to Fed. R. Civ. P. 55(b). Notwithstanding the foregoing, Respondent remains in technical default. As such, the Board construes Respondent's motion as one to set aside the technical default and not as a motion to reopen time to enter an appearance pursuant to the service by publication.

Whether default judgment should be entered against a party is determined in accordance with 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

¹ The Board notes that the Board's February 10, 2015, order incorrectly states that the scheduled date for service by publication is February 10, 2014, instead of February 10, 2015.

² The Board notes that none of Respondent's copies of any Board order were returned as undeliverable by the U.S. Postal Service.

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

In this case, the Board finds that, based upon the record, Respondent's delay in responding to the service by publication was not willful or in bad faith. Moreover, the Board finds that Respondent's 11-day delay in responding to the service by publication has not caused any significant prejudice to Petitioner aside from a slight delay in this proceeding. Furthermore, by filing its construed motion to set aside its technical default, it is clear that Respondent intends to defend its registration against the petition for cancellation. Finally, it is well-established that a trial on the merits is favored over a default judgment. *See, e.g., Information Sys. and Networks Corp. v. United States*, 994 F.2d 792, 795 (Fed. Cir. 1993).

In view thereof, Respondent's construed motion to set aside its technical default and to allow Respondent to enter an appearance in this case is **GRANTED**. In view thereof, Respondent's technical default is hereby set aside. *See Fed. R. Civ. P. 55(c)*.

Trial Schedule

Trial dates, beginning with the deadline to file an answer or otherwise respond to the petition to cancel, are reset as follows:

Time to Answer	8/7/2015
Deadline for Discovery Conference	9/6/2015
Discovery Opens	9/6/2015
Initial Disclosures Due	10/6/2015
Expert Disclosures Due	2/3/2016
Discovery Closes	3/4/2016
Plaintiff's Pretrial Disclosures Due	4/18/2016
Plaintiff's 30-day Trial Period Ends	6/2/2016
Defendant's Pretrial Disclosures Due	6/17/2016
Defendant's 30-day Trial Period Ends	8/1/2016

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Plaintiff's Rebuttal Disclosures Due
Plaintiff's 15-day Rebuttal Period Ends

8/16/2016
9/15/2016

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 Trademarks Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.