THIS DECISION IS NOT A PRECEDENT OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Mailed: May 16, 2016

Cancellation No. **92061845**

Datum Group LLC

v.

Thomas Koenig[1]

Before Bergsman, Mermelstein and Heasley,
Administrative Trademark Judges.

By the Board:

This matter comes up on Respondent's motion (filed November 20, 2015) for relief from final judgment pursuant to Fed. R. Civ. P. 60(b).[2] Although uncontested, we decline to treat the motion as conceded and consider the motion on the merits. *See Carrini Inc. v. Carla Carini S.R.L.*, 57 USPQ2d 1067, 1071 (TTAB 2000) ("Board possesses the inherent authority to control the disposition of cases on its docket").

Background

On July 14, 2015, Petitioner filed a petition to cancel Registration No. 4490434 on the ground of abandonment. As reflected in the accompanying

[1] Respondent's change of correspondence (filed May 9, 2016) has been noted and entered.

[2] During the course of the Board's review of the filing, it was noted that the declaration provided in support of Respondent's motion omitted the second page. At the Board's request, Respondent provided the missing page on May 10, 2016.

certificate of service, the petition was served on Respondent at his address of record in Vallejo, California. By the Board's institution order, Respondent was allowed until August 25, 2015, to answer the petition for cancellation. As neither an answer nor an extension of time to answer was filed by Respondent, the Board issued a notice of default on September 4, 2015. Respondent failed to respond to the notice of default so the Board entered default judgment under Fed. R. Civ. P. 55 on October 14, 2015. On October 21, 2015, the involved registration was cancelled by the Commissioner for Trademarks and this proceeding was terminated. All of the correspondence was mailed to Respondent's address of record.

On November 20, 2015, Respondent filed a motion and supporting declaration under Fed. R. Civ. P. 60(b) seeking relief from judgment. The basis of the request for relief is that Respondent "frequently travel[s] and live[s] outside of the United States" as part of his business [¶ 3 of *Koenig Declaration*, 10 TTABVUE 5], that "[a]ll mail sent to [Respondent] at the Vaellejo [sic], CA address is forwarded by the U.S. Postal Service to 638 Paseo Companeros, Chico, CA 95928" [¶ 4], that "[a]ll mail received at the Chico address is saved and forwarded to [Respondent] personally to review" [¶ 4], that Respondent "conferred with individuals that live at both the Vallejo and Chico addresses who regularly checks [sic] and receives [sic] mailing at these addresses and received word that no materials concerning the DATUM trademark registration arrived" including the petition for

cancellation, the Board's orders and the Commissioner's order [¶¶ 6, 8, 10, 12, 13], that Respondent "did not receive, review, or was otherwise aware" of any of these papers [¶¶ 5, 7, 9, 11], and that Respondent became aware of this proceeding when checking the status of his registration on October 26, 2015 [¶ 14], but was otherwise unaware of the proceeding or the notice of default [¶ 15].

Decision

While a notice of default may be set aside for good cause, "once default judgment has actually been entered against a defendant pursuant to Fed. R. Civ. P. 55(b), the judgment may be set aside only in accordance with Fed. R. Civ. P. 60(b), which governs motions for relief from final judgment." Trademark Board Manual of Procedure ("TBMP") § 312.03 (2015). Thus, to establish that relief from default judgment is appropriate, the party seeking relief "must persuasively show (preferably by affidavits, declarations, documentary evidence, etc., as may be appropriate) that the relief requested is warranted for one or more of the reasons specified in Fed. R. Civ. P. 60(b)." TBMP § 544. Although relief from a final judgment is an extraordinary remedy to be granted only in exceptional circumstances, *see Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991), where default judgment was entered as a result of a defendant's failure to timely answer the complaint, a motion under Rule 60(b) will generally be treated more liberally than a

similar motion seeking relief from other types of judgments. *See Info. Sys. and Networks Corp. v. United States*, 994 F.2d 792, 795 (Fed. Cir. 1993).

Among the factors to be considered in determining a motion for relief from a default judgment for failure to answer are: (1) whether the non-defaulting party will be prejudiced; (2) whether the default was willful; and (3) whether the defaulting party has a meritorious defense. *See Djeredjian*, 21 USPQ2d at 1615. This is not to say that the standard for granting relief under Rule 60(b) will be the same as that of setting aside a notice of default. *See, e.g., Waifersong Ltd. Inc. v. Classic Music Vending*, 976 F.2d 290, 24 USPQ2d 1632, 1633 (6th Cir. 1992) (while the factors are similar, the methodology for considering the factors in deciding a motion under Fed. R. Civ. P. 60(b)(1) and the weight to be accorded them differs). Rather, the showing submitted by the defaulting party will be viewed with less leniency when the party seeks relief from the judgment than when it seeks to show cause why default judgment should not be entered against it. TBMP § 312.03. Ultimately, the question of whether to grant the moving party relief from judgment is a matter largely within the Board's discretion. *See Djeredjian*, 21 USPQ2d at 1615.

As Respondent's motion was made approximately one month after the entry of judgment, we find the motion timely. *See* Fed. R. Civ. P. 60(c)(1).

Turning first to the question of willfulness, we do not find on this record that Respondent's default was willful. Respondent has attested that he has

not received any of the papers in this proceeding and that he had no knowledge of the proceeding. As there is nothing in the record to demonstrate otherwise, Respondent's verified statements are sufficient to demonstrate that the default was not willful.

As to whether Respondent has a meritorious defense, we note that Respondent submitted with his motion a proposed answer to the petition for cancellation wherein Respondent denied the salient allegations of Petitioner's claim of abandonment. We therefore find that Respondent has demonstrated a meritorious defense. *See DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000).

As to possible prejudice to Petitioner, although some delay will have resulted should judgment be vacated and proceedings resumed, delay alone is not a sufficient basis for finding prejudice. *See Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154, 1156 (TTAB 1991).

In view thereof, and bearing in mind that the law favors deciding cases on their merits, Respondent's motion for relief is hereby **GRANTED**.

Proceedings herein are **RESUMED**. Respondent's answer is **ACCEPTED** and is the operative pleading herein. Dates are **RESET** as follows:

Deadline for Discovery Conference	**6/20/2016**
Discovery Opens	**6/20/2016**
Initial Disclosures Due	**7/20/2016**
Expert Disclosures Due	**11/17/2016**
Discovery Closes	**12/17/2016**
Plaintiff's Pretrial Disclosures Due	**1/31/2017**
Plaintiff's 30-day Trial Period Ends	**3/17/2017**
Defendant's Pretrial Disclosures Due	**4/1/2017**

Defendant's 30-day Trial Period Ends	**5/16/2017**
Plaintiff's Rebuttal Disclosures Due	**5/31/2017**
Plaintiff's 15-day Rebuttal Period Ends	**6/30/2017**

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 taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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