UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Mailed: April 12, 2005

Opposition No. **91157867**

Sony Computer Entertainment American Inc.

v.

Frosty Treats, Inc.

Before Seeherman, Chapman, and Bucher, Administrative Trademark Judges

This case now comes up on applicant's motion, filed November 19, 2004, for relief from judgment under Fed. R. Civ. P. 60(b)(1). Both parties have filed briefs thereon.

The notice of opposition to application Serial No. 78168231 was filed by opposer on September 5, 2003 and was instituted by the Board on September 26, 2003. Applicant filed its answer on November 4, 2003. On June 10, 2004, opposer filed a motion for summary judgment, with a certificate of service upon applicant, making a responsive brief due by July 10, 2004. The Board issued a suspension order on September 7, 2004. Having received no response to the motion for summary judgment, the Board entered judgment, granting opposer's motion as conceded, on October 21, 2004.

On November 19, 2004, applicant filed its motion for relief from judgment.

According to applicant, and in support of its motion, applicant contends that its counsel has "no recollection and record of ever having received the motion" [1] for summary judgment; and that counsel did receive the Board's suspension order of September 7, 2004, but "inadvertently believed that this notice related to the District Court summary judgment proceedings."[2] Apparently, upon receipt of the Board's October 21, 2004 order granting opposer's motion for summary judgment as conceded, applicant filed this motion.

Opposer, in its response to applicant's motion for relief from judgment, argues that applicant has failed to show that its delay was the result of excusable neglect. In the alternative, opposer requests suspension of this opposition proceeding until the Eighth Circuit Court of Appeals decides the substance of the issues on appeal in the civil action.

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[1] The documentary support for applicant's motion consists of declarations from David R. Barnard, attorney for applicant, and Christa Mossman, a paralegal at Mr. Barnard's law office.

[2] There is also a civil action between the parties in the United States District Court for the Western District of Missouri, Western Division, Case No. 04-2502, that resulted in the District Court granting summary judgment in favor of defendant, Sony Computer Entertainment America Inc., on May 19, 2004, finding, *inter alia,* that the term "Frosty Treats" is generic for cold desserts such as ice cream. This case remains pending on appeal before the Eighth Circuit Court of Appeals.

The determination of whether to grant relief from judgment under Fed. R. Civ. P. 60(b) is a matter largely within the discretion of the court, or in this instance, the Board, and such relief is granted only in exceptional circumstances. *See Case v. BASF Wyandotte*, 737 F.2d 1034, 222 USPQ 737 (Fed. Cir. 1984). Federal Rule of Civil Procedure 60(b)(1) provides that a tribunal may relieve a party from a final judgment for "mistake, inadvertence, surprise, or excusable neglect".

In view of the totality of the events in the proceedings between these parties, and particularly opposer's attorney's averment that he did not receive a copy of applicant's motion for summary judgment, the Board finds that applicant has established excusable neglect for its failure to respond to opposer's motion for summary judgment.

Applicant's motion for relief from judgment is hereby granted and the Board's order dated October 21, 2004, granting opposer's summary judgment motion as conceded, is hereby vacated.

We turn then to applicant's request that proceedings be suspended pending the outcome of the issue in this civil action currently on appeal. Applicant's request is granted in that we hereby suspend proceedings in this opposition pending a final determination of the civil action between the parties in the U.S. District Court for the Western

District of Missouri. *See* Trademark Rule 2.117(c); *Goya Foods Inc. v. Tropicana Products Inc.,* 846 F.2d 848, 6 USPQ2d 1950 (2d Cir. 1988).

Within twenty days after the final determination of the civil action, the interested party should notify the Board so that this case may be called up for appropriate action. During the suspension period the Board should be notified of any address changes for the parties or their attorneys.

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