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

Gilbert

Mailed: October 25, 2006

Opposition No. 91171163

XO TOURS AMERICA, INC.

v.

LOTUS TRAVEL CENTER INC.

Cheryl Butler, Attorney, Trademark Trial and Appeal Board:

In accordance with the institution order dated May 31, 2006, applicant's answer was due July 10, 2006. Opposer filed a motion for default judgment on August 14, 2006. On August 25, 2006, the Board, having not yet received an answer or a request to extend time to answer, granted opposer's motion, inadvertently construing it as a request to send notice of default, and issued a notice of default against applicant. On August 23, 2006, applicant filed its answer and a motion for leave to file a late answer to the opposition to applicant's registration.[1] Opposer filed its response to applicant's motion on September 8, 2006.

[1] Applicant's filing apparently crossed in the mail with the Board's August 25, 2006 notice of default.

Notice of Default

Inasmuch as applicant failed to timely answer the notice of opposition, applicant's motion for leave to file a late answer will be construed as a response to the notice of default. The standard for setting aside notice of default is the Fed. R. Civ. P. 55(c) standard; that is, whether applicant has shown good cause why default judgment should not be entered against it. Good cause is usually found when the applicant shows that (1) the delay in filing an answer was not the result of willful conduct or gross negligence on the part of the applicant, (2) the opposer will not be substantially prejudiced by the delay, and (3) the applicant has a meritorious defense to the action. The showing of a meritorious defense does not require an evaluation of the case, but only a plausible response to the allegations in the complaint. See TBMP §312.02 (2d ed. rev. 2004).

In the present case, applicant's counsel argues that he was unaware that the opposition had been filed until August 11, 2006, when his office received opposer's motion for default judgment; that, upon receipt of the motion for default judgment, he obtained a copy of the notice of opposition from the USPTO website and acted diligently to file applicant's motion for leave to file a late answer; that opposer is not prejudiced by the short delay in filing the answer; and that applicant has a meritorious defense to the proceeding.

In response, opposer argues that applicant's counsel states that he has no recollection of receiving the notice of opposition but does not mention receipt of the "letter" from the Board.[2] Opposer argues that it will be substantially prejudiced by applicant's delay in filing its answer because "[w]itnesses' memories will not be as clear…[and]…evidence will become lost or destroyed due to the passage of time." Opposer also contends that it will be substantially prejudiced by a shortened discovery period and attorney's costs incurred in filing the subject motions.

Opposer's conclusory statements as to fading memories and lost evidence do not show any substantial prejudice in this case. Opposer has not shown that any particular witness or evidence has become unavailable due to the six week delay in applicant's filing of its answer. The remainder of opposer's alleged damages do not amount to substantial prejudice.[3]

By filing an answer denying the salient allegations of the notice of opposition and a motion to accept such late answer,

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[2] The Board comments that a copy of the notice of opposition accompanies the institution "letter." See TBMP §310 (2d ed. rev. 2004). Thus, the Board interprets applicant's argument to mean it did not receive either the notice of opposition or the institution order since they would have been in the same envelope.

[3] The Board notes that the resetting of discovery period dates is within the discretion of the Board, and, in the instant case, the proceeding will be suspended as noted herein. Further, opposer voluntarily filed its motion for default judgment, and was not required to do so insofar as the Board has discretion to sua sponte issue notice of default without action by the opposer. TBMP §312.01 (2d ed. rev. 2004).

applicant has shown it intends to defend the opposition. Based upon this showing, the Board finds that applicant's delay in filing an answer was not the result of willful conduct or gross neglect.

For the reasons mentioned herein, the Board finds that applicant has established good cause why default judgment should not be entered against it. Moreover, because the law favors deciding cases on their merits, the Board is reluctant to grant judgments of default and tends to resolve all doubts by setting aside default. *See Paolo's Associates Limited Partnership v. Paolo Bodo,* 21 USPQ2d 1899, 1902 (Comm'r 1990).

Accordingly, notice of default is **discharged**, plaintiff's motion for default judgment is denied, and applicant's answer is noted and entered.

Copy of pleadings in civil action

Applicant has brought to the attention of the Board that the parties are engaged in a civil action in the Central District of California, US District Court, Case No. CV 06-4533 SJO (Ex). It is not clear from the papers submitted to date whether this civil action may have a bearing on the instant case. If the civil action may have a bearing on this case, then, the instant proceedings may be suspended until termination of the civil action. See TBMP §510 (2d ed. rev. 2004).

Accordingly, the parties are allowed **thirty days** from the mailing date of this order to submit copies of the pleadings in the referenced civil action. Failing which, the Board will resume proceedings and set discovery and trial dates.

Except as noted, proceedings are otherwise suspended.

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