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

MBA

Mailed: September 14, 2011

Opposition No. 91200167

M2 Software, Inc.

v.

Higher Logic, LLC

Michael B. Adlin, Interlocutory Attorney:

Pursuant to the Board's institution order of June 8, 2011, applicant's answer was due on July 18, 2011. Applicant failed to timely file an answer or to otherwise move with respect to the notice of opposition, however. This case now comes up for consideration of applicant's "motion to show good cause why its answer should be accepted as timely filed," filed July 20, 2011. Applicant's motion, which is fully briefed and accompanied by a [proposed] answer to the notice of opposition, is essentially, and will therefore be construed as, a motion to reopen applicant's time to answer.

In its sparse motion, applicant claims that it "has attempted to contact Opposer on numerous occasions to discuss if an extension to answer the Opposition would be agreed upon in order for settlement discussions to take

place," but that opposer failed to respond to applicant's communications. Declaration of Lauri S. Thompson, applicant's counsel, ¶ 4. Applicant further claims, without explanation or evidentiary support, that its failure to timely answer was "due to an internal miscommunication," but not "willful conduct or gross neglect," and that opposer would not be prejudiced if applicant's [proposed] answer is accepted.

Opposer argues in its response to the motion that applicant did not seek to contact opposer until the night before applicant's answer was due, which was a Sunday on which opposer's office was closed. However, in his Declaration, one of opposer's officers concedes that opposer received another communication from applicant, which appears to predate the July 17, 2011 communication. Declaration of David Escamila ¶ 4. In any event, opposer further argues that applicant has not established good cause for accepting its late answer, that applicant has not established that it has a meritorious defense and that "[t]he extensive time and resources required to reopen" applicant's time to answer "will cause substantial diversion of attention from" opposer's business.

In order to reopen its now-expired time to answer or otherwise move with respect to the notice of opposition, applicant must establish that its failure to timely answer

was the result of "excusable neglect." Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co., 55 USPQ2d 1848, 1852 (TTAB 2000) ("Pursuant to Fed. R. Civ. P. 6(b)(2), the requisite showing for reopening an expired period is that of excusable neglect."). As the Board stated in Baron Philippe:

> In Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380, 395 (1993), the Supreme Court set forth four factors to be considered in determining excusable neglect. Those factors are: (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and, (4) whether the moving party has acted in good faith. In subsequent applications of this test by the Circuit Courts of Appeal, several courts have stated that the third factor may be considered the most important factor in a particular case. See Pumpkin Ltd v. The Seed Corps, 43 USPQ2d 1582, 1586 at fn. 7 (TTAB 1997).

Id., at 1852.

Here, applicant has not made, or event attempted to make, the required showing. Indeed, applicant merely alleges, without any evidentiary support whatsoever, that its failure to timely act was "due to an internal miscommunication." The internal miscommunication was by definition (since it was "internal"), entirely within applicant's reasonable control. Furthermore, applicant has

not presented any evidence that any of the remaining factors weigh in its favor. Accordingly, applicant's motion to reopen is hereby **DENIED**, and applicant is in default, which is hereby entered. Fed. R. Civ. P. 55(a).

"However the issue [of default] is raised, the standard for determining whether default judgment should be entered against the defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard." TBMP §§ 312.01 (3d ed. rev. 2011). Under Fed. R. Civ. P. 55(c), default may be set aside "for good cause shown." As a general rule, good cause will be found where the defendant's delay has not been willful or in bad faith, where prejudice to the plaintiff is lacking, and where the defendant has a meritorious defense. See Fred Hyman Beverly Hills, Inc. v. Jacques Bernier, Inc., 21 USPQ2d 1556 (TTAB 1991). Moreover, as pro se opposer recognizes, the Board is reluctant to grant judgments by default, because the law favors deciding cases on their merits. See Paolo's Associates Limited Partnership v. Paolo Bodo, 21 USPQ2d 1899 (Comm'r 1990).[1]

[1] In other words, applicant fails to recognize not only that there is a difference between the entry of default and default judgment, but also that the standard for setting aside default is significantly more lenient than that for reopening an expired deadline. Compare Fed. R. Civ. P. 55(a) with Fed. R. Civ. P. 55(b); compare TBMP § 312.01 with § 509.01(b) (3d ed. rev. 2004).

Here, there is no evidence whatsoever that applicant's failure to timely answer the petition for cancellation was willful or in bad faith. To the contrary, it appears that applicant's failure to meet the deadline was the result of an internal miscommunication, and not willful conduct or gross neglect. While opposer attempts to argue otherwise, its allegations are not based on any evidence, but rather on mere supposition, and even if, as opposer alleges, applicant attempted to "create an artificial record," that would not mean that its failure to answer the day after its second telephone call was willful or in bad faith as opposed to the result of an "internal miscommunication," even if applicant was aware of the deadline.[2] Furthermore, applicant's delay is exceedingly short and opposer has not established that it would be prejudiced if default is set aside. Indeed, in complaining about the "substantial diversion of attention" which would allegedly result from setting aside default, opposer fails to recognize that it initiated this proceeding, i.e. chose to participate in the "diversion," and in any event, opposer's claim is devoid of any evidentiary or other support. Finally, applicant's

[2] In other words, while pro se opposer cites the correct standard, it applies it incorrectly. Furthermore, opposer's speculation about applicant's motives, and its factual allegations about applicant's conduct, are belied by Mr. Escamilla's admission that applicant left "one other voicemail," in addition to the one left the day before applicant's answer was due.

[proposed] answer to the notice of opposition establishes that applicant has a meritorious defense.[3]

Accordingly, default is hereby **SET ASIDE**, and applicant's [proposed] answer to the notice of opposition is accepted and is now applicant's operative pleading herein. Conferencing, disclosure, discovery, trial and other dates are reset as follows:

Deadline for Discovery Conference	**October 12, 2011**[4]
Discovery Opens	**October 12, 2011**
Initial Disclosures Due	**November 11, 2011**
Expert Disclosures Due	**March 10, 2012**
Discovery Closes	**April 9, 2012**
Plaintiff's Pretrial Disclosures	**May 24, 2012**
Plaintiff's 30-day Trial Period Ends	**July 8, 2012**
Defendant's Pretrial Disclosures	**July 23, 2012**
Defendant's 30-day Trial Period Ends	**September 6, 2012**
Plaintiff's Rebuttal Disclosures	**September 21, 2012**
Plaintiff's 15-day Rebuttal Period Ends	**October 21, 2012**

[3] Opposer misapprehends the meaning of a "meritorious defense" in the context of default. The issue is not which party, if any, will ultimately prevail on the merits at trial or in any final decision. Rather, applicant established that it has a meritorious defense "by the submission of an answer which is not frivolous." Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc., 21 USPQ2d 1556, 1557 (TTAB 1991).

[4] Applicant's assertion in its reply brief that the deadline for the discovery conference "is at the discretion of the parties" is completely wrong. The discovery conference is required, and is required to take place by the deadline set herein therefor. Trademark Rule 2.120(a)(2).

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 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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