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

Mailed: December 5, 2011

Opposition No. 91201589

FIRESTOP CONTRACTORS INTERNATIONAL ASSOCIATION

v.

JOHN P. SINISI CONSULTING, LLP

Cheryl Butler, Attorney, Trademark Trial and Appeal Board:

In accordance with the institution order dated September 14, 2011, applicant's answer to the notice of opposition was due October 24, 2011. On that day, applicant filed a motion to extend its time until December 24, 2011 to file its answer on the basis that it was securing legal representation. As noted by the Board in its order of October 26, 2011, applicant's motion was not accompanied by proof of service on opposer. As a courtesy, the Board forwarded a copy of applicant's motion to opposer. Also on October 26, 2011, opposer, acknowledging that applicant filed a motion to extend its time to answer, filed a motion for default judgment. Applicant filed a response thereto, including a proposed answer and appearance by counsel,[1] and opposer filed a reply.

[1] Eric Menhart and CyberLaw, P.C. are recognized as counsel of record for applicant.

In support of its motion, opposer argues that applicant did not obtain opposer's consent for an extension of time to answer, did not serve its motion on opposer, and did not file a timely answer.

In response, applicant argues that it made an effort to file a timely response in the nature of a motion to extend its time to answer, even though it did not realize the need to serve a copy on opposer; that it promptly obtained counsel; and that it submits a proposed answer. Applicant argues that the delay was not the result of willful conduct or gross neglect, but of misunderstanding; that the short delay does not prejudice opposer; and that the defendant has a meritorious defense.

In reply, opposer argues that default judgment should be entered because applicant failed to include a certificate of service with its motion to extend its time to answer and did not request opposer's consent to an extension of time to answer. Opposer also argues that "it is usual to include" an answer when responding to a motion for default judgment and the proposed answer is a "draft." Opposer argues that the certificate of service accompanying applicant's response is deficient because it does not include a date and the identity of the document service.

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; that is, whether the defendant has shown good cause why default

judgment should not be entered against it. *See Paolo's Associates Limited Partnership v. Paolo Boda*, 21 USPQ2d 1899 (Comm'r 1990); *and Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991). 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. *See* TBMP § 312 (3d ed. 2011).

Here, there is no indication that applicant's failure to file its answer by the due date was the result of willful conduct or gross negligence. Indeed, applicant, on the due date for the answer, filed a request to extend its time to answer because it was retaining representation. Although some delay has occurred, it is not prejudicial to opposer, who brought this opposition proceeding and has the burden of proof. Applicant, by filing a response accompanied by a proposed answer, and by retaining counsel, has shown that it intends to defend intends and that it has a meritorious defense. The Board generally does not enter judgment for failure to serve a filing, particularly early on in the proceeding. With respect to applicant's motion to extend time, the Board provided service to opposer and reminded applicant of the service requirement. *See* TBMP § 113.02 (3d ed. 2011) ("Occasionally, in order to expedite matters, and when the

interests of the other party or parties would be served thereby, the Board itself will serve … a copy of a document that does not include the required proof of service."). *See also Dotson v. Blood Center of Southeastern Wisconsin*, 988 F.Supp. 1216 (D.C. Wis. 1998) (reminding *pro se* plaintiff of service and filing requirements). With respect to applicant's response to opposer's motion for default judgment, applicant provided a certificate of service. Even though the certificate was not dated and did not specifically identify the document, actual service was made. *See for example Ives v. Guilford Mills, Inc.,* 3 F.Supp.2d 191 (D.C.N.Y. 1998) (if actual service is not contested, there is no point to invalidating a complaint for lack of a certificate); and *United States v. Brandt*, 8 F.R.D 163 (D. C. Mont. 1948) (amended complaint served on parties and filed with court should not be disregarded due to absence of certificate of service when actual service is not contested). In any event, by using ESTTA to file its response, the identity of the served document is apparent. Moreover, even if service had not occurred, the remedy would not be entry of judgment. Instead, the Board would require service and reset the time for a response. Finally, 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, particularly at such an early stage of the proceeding. *See Paolo's Associates, supra*.

In view thereof, opposer's motion for default judgment is denied. Applicant's October 24, 2011 motion to extend its time to answer is granted. The proposed answer, accompanying applicant's November 10, 2011 response to opposer's motion for default judgment is noted and entered and is applicant's operative pleading for this proceeding.[2]

Proceedings are resumed and dates are reset as follows:

Deadline for Discovery Conference	**1/9/2012**
Discovery Opens	**1/9/2012**
Initial Disclosures Due	**2/8/2012**
Expert Disclosures Due	**6/7/2012**
Discovery Closes	**7/7/2012**
Plaintiff's Pretrial Disclosures	**8/21/2012**
Plaintiff's 30-day Trial Period Ends	**10/5/2012**
Defendant's Pretrial Disclosures	**10/20/2012**
Defendant's 30-day Trial Period Ends	**12/4/2012**
Plaintiff's Rebuttal Disclosures	**12/19/2012**
Plaintiff's 15-day Rebuttal Period Ends	**1/18/2013**

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.l25.

Briefs shall be filed in accordance with Trademark Rules 2.l28(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

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[2] In view thereof, applicant's request for an additional fifteen days to submit its answer is moot.