

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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KWM

Mailed: July 3, 2017

Opposition No. 91230403

Securrency, Inc.

v.

Luigi Boschin

By the Trademark Trial and Appeal Board:

Despite acknowledging that “it has not been injured or prejudiced” by the two-days-late service of Applicant’s answer, and that it received the answer which Applicant served, Opposer seeks default judgment and to strike purported “defenses” which Opposer itself acknowledges are not true affirmative defenses. While it is clear that Opposer is highly confident it will not make any of its own mistakes in this proceeding, it is less clear what purposes Opposer’s April 18, 2017 motion was intended to serve, though efficiently moving this case forward to a settlement or decision on the merits does not appear to be one of them.

Although there has been no entry of default in this case, as a general rule, good cause to set aside default will be found where the defendant’s delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where the defendant has a meritorious defense. *See Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). The determination of whether

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default judgment should be entered against a party lies within the sound discretion of the Board. *See id.* In exercising that discretion, the Board must be mindful that it is the policy of the law to decide cases on their merits. *See CTRL Sys., Inc. v. Ultraphonics of North America, Inc.*, 52 USPQ2d 1300, 1301 (TTAB 1999). Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant. *See id.*; *see also* TBMP § 312.02 (June 2017).

Inasmuch as Applicant's two-day delay was due to an inadvertent calendaring error and was not a result of willful neglect or gross conduct, Applicant filed a non-frivolous answer which by definition constitutes a meritorious defense,¹ and Opposer acknowledges that it has not been injured or prejudiced by Applicant's 48 hour delay,² default judgment is obviously unwarranted. Accordingly, Opposer's motion for default judgment is **denied** and Applicant's answer is his operative pleading. Trial dates remain as set in the Board's order of February 28, 2017.

¹ Although Opposer argues that Applicant did not put forth a meritorious defense, "all that is necessary to establish a 'meritorious defense' in this context is a plausible response to the allegations contained in the notice of opposition," which Applicant has made. *DeLorme Publ'g Co. v. Eartha's, Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000). To the extent Opposer's meritorious defense argument asserts that Applicant's purported affirmative defenses are insufficiently pleaded, this argument was improperly raised for the first time in its reply brief. Nevertheless, lack of injury or damage, failure to state a claim for relief and priority claims are not affirmative defenses, but instead amplifications of Applicant's denials. *See Order Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995); *Harjo v. Pro Football, Inc.*, 30 USPQ2d 1828, 1830 (TTAB 1994).

² Inasmuch as Opposer acknowledges receipt of Applicant's answer despite the typo, the typo does not warrant default judgment. The Board does not do draconian, especially in the context of Fed. R. Civ. P. 12 and 55.

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Recent Rules Change

CHANGES TO THE TRADEMARK TRIAL AND APPEAL BOARD RULES OF PRACTICE BECAME EFFECTIVE JANUARY 14, 2017

The USPTO published a Notice of Final Rulemaking in the Federal Register on October 7, 2016, at 81 Fed. Reg. 69950. It sets forth several amendments to the rules that govern *inter partes* (oppositions, cancellations, concurrent use) and ex parte appeal proceedings. A correction to the final rule was published on December 12, 2016, at 81 Fed. Reg. 89382.

For complete information, the parties are referred to:

- The Board's home page on the uspto.gov website:
<http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>
- The final rule:
<http://www.uspto.gov/sites/default/files/documents/81%20FR%2069950.pdf>
- The correction to the final rule:
<http://www.uspto.gov/sites/default/files/documents/81%20FR%2089382.pdf>
- A chart summarizing the affected rules and changes:
<http://www.uspto.gov/sites/default/files/documents/Chart%20Summarizing%20Rule%20Changes%2012-9-16.pdf>

For all proceedings, including those already in progress on January 14, 2017, some of the changes are:

- All pleadings and submissions must be filed through ESTTA. Trademark Rules 2.101, 2.102, 2.106, 2.111, 2.114, 2.121, 2.123, 2.126, 2.190, and 2.191.
- Service of all papers must be made by email, unless otherwise stipulated. Trademark Rule 2.119.
- Response periods are no longer extended by five days for service by first-class mail, Priority Mail Express®, or overnight courier. Trademark Rule 2.119.
- Deadlines for submissions to the Board that are initiated by a date of service are 20 days. Trademark Rule 2.119. Responses to motions for summary judgment remain 30 days. Similarly, deadlines for responses to discovery requests remain 30 days.

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- All discovery requests must be served early enough to allow for responses prior to the close of discovery. Trademark Rule 2.120. Duty to supplement discovery responses will continue after the close of discovery.
- Motions to compel initial disclosures must be filed within 30 days after the deadline for serving initial disclosures. Trademark Rule 2.120.
- Motions to compel discovery, motions to test the sufficiency of responses or objections, and motions for summary judgment must be filed prior to the first pretrial disclosure deadline. Trademark Rules 2.120 and 2.127.
- Requests for production and requests for admission, as well as interrogatories, are each limited to 75. Trademark Rule 2.120.
- Testimony may be submitted in the form of an affidavit or declaration. Trademark Rules 2.121, 2.123, and 2.125.
- New requirements for the submission of trial evidence and deposition transcripts. Trademark Rules 2.122, 2.123, and 2.125.

This is only a summary of the significant content of the Final Rule. All parties involved in a Board proceeding should read the entire Final Rule.