UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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October 3, 2018

Opposition No. **91240607**

U.S. Department of Health and Human Services

v.

Lawrence M. Nelson AKA General Brown, MD and Mary Elizabeth Conover Foundation, Inc. (joined as party-defendant)[1]

Yong Oh (Richard) Kim, Interlocutory Attorney:

On April 11, 2018, U.S. Department of Health and Human Services ("Opposer") filed a notice of opposition against Application Serial No. 87264561.[2] By the Board's institution order, Applicants' answer was due May 21, 2018.[3] On May 9, 2018, Opposer filed a first amended notice of opposition with a certificate of service

[1] It is noted that an assignment of the subject application and mark therein to Mary Elizabeth Conover Foundation, Inc. ("the Foundation") was executed on January 25, 2018, and the assignment was recorded in the Assignment Recordation Branch at Reel/Frame 6259/0591. Although the Board will normally substitute the assignee as the party in interest if the assignment occurred prior to the commencement of the proceeding, *see Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1434 n.1 (TTAB 2007), as no objection has been raised to joinder, the Foundation has been joined as a party-defendant.

[2] 1 TTABVUE.

[3] 2 TTABVUE 3.

bearing a service date of May 3, 2018.[4] On May 10, 2018, Opposer filed an amended certificate of service showing May 10, 2018, as the date of service of the amended notice of opposition.[5]

On June 22, 2018, Applicants filed their answer to the amended notice of opposition. That same day, Opposer moved for default judgment based on the putative untimeliness of Applicants' answer. Applicants have contested the motion.

Decision

Opposer presumably filed its amended notice of opposition as a matter of course pursuant to Fed. R. Civ. P. 15(a)(1), made applicable to Board proceedings by Trademark Rule 2.116. Although the filing was made outside of the twenty-one (21) days allowed, the Board, as a matter of practicality, permits a plaintiff to amend its pleading once as a matter of course beyond the initial twenty-one (21) days until the defendant files either an answer or a motion under Rule 12(b), (e) or (f). *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 507.02 (June 2018). In the absence of a Board order resetting the time for answer, a defendant must answer the amended pleading "within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." Fed. R. Civ. P. 15(a)(3).

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[4] 4 TTABVUE 6. Opposer represents that the amended notice of opposition was actually served on May 3, 2018, but that it was unable to file it via ESTTA and that after receiving technical assistance from the USPTO, Opposer filed the amended notice on May 9, 2018. *Motion for Default Judgment*, 7 TTABVUE 3 n.1.

[5] 5 TTABVUE 2.

Notwithstanding Applicants' putative efforts to obtain clarification regarding their time to answer the amended notice, in the absence of an amended schedule, Applicants' answer to the amended notice was due May 24, 2018, based on the amended complaint's service date of May 10, 2018. As the answer was filed on June 22, 2018, it is deemed untimely.

The standard for determining whether default judgment should be entered against a defendant for its failure to file a timely answer to the notice of opposition is found in Fed. R. Civ. P. 55(c) which states that "[t]he court may set aside an entry of default for good cause." Good cause is generally found where "(1) the delay in filing is not the result of willful conduct or gross neglect, (2) the delay will not result in substantial prejudice to the opposing party, and (3) the defendant has a meritorious defense." *DeLorme Publ'g Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1223 (TTAB 2000).

Taking each of these points in reverse order, the showing of a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint. *See* TBMP § 312.02. Here, by filing an answer denying the salient allegations of the amended notice of opposition, Applicants have shown their intent to defend themselves in this opposition and that they have a meritorious defense to Opposer's claims. *See DeLorme Publ'g*, 60 USPQ2d at 1224.

As to the question of prejudice, Applicants' delay in filing their answer is less than one (1) month and there is nothing in the record to suggest that Opposer has

been substantially prejudiced by the resultant delay. Indeed, delay alone is not a sufficient basis for establishing prejudice. *See Regatta Sport, Ltd. v. Telux-Pioneer, Inc.*, 20 USPQ2d 1154, 1156 (TTAB 1991).

Finally, the Board does not find that Applicants' delay in filing their answer was the result of willful conduct or gross negligence. It is apparent from Applicants' opposing brief that shortly after Opposer's filing of an amended notice of opposition, Applicants undertook efforts to obtain clarification as to the proceeding schedule in view of Opposer's filing. *See Response to Motion for Default Judgment*, 8 TTABVUE 3-4. Whether or not such efforts were warranted in light of the guidelines under Fed. R. Civ. P. 15, they certainly undercut any notion of willful conduct or gross neglect on the part of Applicants in failing to timely file their answer.

Bearing in mind that 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 when a proceeding is at such an early stage as is the case here. *See Paolo's Assocs. Ltd. P'ship v. Paolo Boda*, 21 USPQ2d 1899 (Comm'r 1990). Accordingly, Opposer's motion for default judgment is **DENIED**. Applicants' answer is **ACCEPTED** and is the operative pleading herein.

Dates are **RESET** as follows:

Deadline for Discovery Conference	**10/31/2018**
Discovery Opens	**10/31/2018**
Initial Disclosures Due	**11/30/2018**
Expert Disclosures Due	**3/30/2019**
Discovery Closes	**4/29/2019**
Plaintiff's Pretrial Disclosures Due	**6/13/2019**
Plaintiff's 30-day Trial Period Ends	**7/28/2019**
Defendant's Pretrial Disclosures Due	**8/12/2019**

Defendant's 30-day Trial Period Ends	**9/26/2019**
Plaintiff's Rebuttal Disclosures Due	**10/11/2019**
Plaintiff's 15-day Rebuttal Period Ends	**11/10/2019**
Plaintiff's Opening Brief Due	**1/9/2020**
Defendant's Brief Due	**2/8/2020**
Plaintiff's Reply Brief Due	**2/23/2020**
Request for Oral Hearing (optional) Due	**3/4/2020**

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence.

Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

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