

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

February 14, 2020

Opposition No. 91252535

AQUA TECHNIX GMBH

v.

Aquatic Leisure Technologies Inc.

Andrew P. Baxley, Interlocutory Attorney:

On January 14, 2020, the Board issued a notice of default in this proceeding under Fed. R. Civ. P. 55(a) because no answer was of record.

In response, Applicant filed a “motion to show good cause,”¹ in which it asserts that it failed to timely answer because many of its employees were on holiday breaks in the time immediately before the due date for Applicant’s answer. Applicant further contends that the fact that Applicant’s key decision makers are located in Australia caused delays in communicating with its attorneys and that it sought Opposer’s consent to an extension of time to answer late on the January 4, 2020 deadline for filing that answer, but did not hear back from Opposer’s attorney until the next day.

¹ A response to a notice of default should be captioned as a response and not as a motion. A notice of default is essentially an ex parte matter between the Board and a defendant that does not contemplate full briefing. *Compare* TBMP § 312.02 (2019) *with* TBMP § 502.02(b). By captioning a response as a motion, Applicant invites full briefing, which is rarely useful and only delays resolution of the default issue.

The standard for determining whether default judgment should be entered against a defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard, i.e., whether the defendant has shown good cause why default judgment should not be entered against it. As a general rule, good cause to set aside a defendant's 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 defendant has a meritorious defense. *See Fred Hayman Beverly Hills, Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991). The determination of whether default judgment should be entered against a party lies within the Board's sound discretion. In exercising that discretion, the Board is mindful of its policy to decide cases on their merits where possible and therefore only reluctantly enters judgment by default for failure to timely answer. *See* TBMP § 312.02.

Bearing in mind that the Board tends to be liberal in addressing defaults, the Board finds that Applicant's failure to timely respond to the notice of opposition was unintentional and was caused by difficulties in communicating with Applicant's key decision makers halfway around the world during the holiday season. Further, there is no indication of any prejudice to Opposer, i.e., that Opposer's ability to prosecute this case has not been adversely affected beyond mere delay. *See Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1587 (TTAB 1997). In addition, Applicant has set forth a meritorious defense in its concurrently filed answer. *See Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991). In view thereof, the motion to set aside Applicant's

default is granted. Applicant's default is hereby set aside, and Applicant's concurrently filed answer is accepted and made of record.

Proceedings are resumed. Dates are reset as follows.

Deadline for Discovery Conference	3/15/2020
Discovery Opens	3/15/2020
Initial Disclosures Due	4/14/2020
Expert Disclosures Due	8/12/2020
Discovery Closes	9/11/2020
Plaintiff's Pretrial Disclosures Due	10/26/2020
Plaintiff's 30-day Trial Period Ends	12/10/2020
Defendant's Pretrial Disclosures Due	12/25/2020
Defendant's 30-day Trial Period Ends	2/8/2021
Plaintiff's Rebuttal Disclosures Due	2/23/2021
Plaintiff's 15-day Rebuttal Period Ends	3/25/2021
Plaintiff's Opening Brief Due	5/24/2021
Defendant's Brief Due	6/23/2021
Plaintiff's Reply Brief Due	7/8/2021
Request for Oral Hearing (optional) Due	7/18/2021

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, the manner and timing of taking testimony, matters in evidence, 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

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final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).