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

Faint

Mailed: February 12, 2009

Cancellation No. 92048383

Warner Bros. Entertainment Inc.

v.

Martin Howard Samuel

Before Quinn, Grendel and Taylor, Administrative Trademark Judges.

By the Board:

Respondent owns a registration for the mark GOBSTONES in typed form for a "board and electronic marbles-like game for more than one player" in International Class 28.[1] Petitioner filed a petition for cancellation on November 2, 2007 on the grounds of false suggestion of a connection based on Trademark Act § 2(a), fraud, abandonment, and that the application was void ab initio because respondent was not using the mark at the time he applied for his use-based registration. Petitioner alleges ownership of all right, title and interest in and to all trademarks, including GOBSTONES, derived from the fictitious names, places and

[1] Registration No. 2879738, filed October 31, 2003 as a use-based application, and registered August 31, 2004.

things mentioned in the *Harry Potter* books through an agreement it has with the author J.K. Rowling.

Proceedings were instituted by the Board on November 5, 2007, and respondent was allowed until December 15, 2007 to file an answer. Respondent filed on December 14, 2007 a motion for a sixty day extension of time to answer, or until February 12, 2008, and petitioner filed on January 11, 2008 a motion to extend conferencing and other deadlines. No order issued from the Board, but respondent did not file an answer by the requested date of extension, and petitioner filed its first motion for default judgment on February 25, 2008. On September 15, 2008 the Board granted the motion for extension of time as conceded, denied the first motion for default judgment and allowed respondent until November 14, 2008 to file his answer to the petition to cancel. When no answer was filed petitioner, on November 21, 2008, filed its second motion for default judgment.

On December 8, 2008, respondent submitted a combined answer to the petition to cancel and response to the motion for default with a certificate of service on counsel for petitioner. Respondent offered no explanation as to why he failed to timely file his answer, but we view the portion styled as a response to the motion for default as a timely response to that motion.

On December 29, 2008, petitioner filed a motion to strike respondent's answer arguing that the answer does not comply with Trademark Rule 2.114 in that it does not address the averments made in the petition to cancel, and was otherwise unresponsive, despite respondent having been advised of the Board's Rules in previous Board orders. Petitioner contends that respondent's pleading is merely a description of respondent's alleged actions over the years, includes statements about settlement in violation of Fed. R. Evid. 408, and that these statements are not relevant.

A review of respondent's pleading shows that the paragraphs are not numbered, and it does not appear to contain admissions or denials of the allegations of the petition to cancel as required by Trademark Rule 2.114(b)(1), nor does it appear to contain denials in any of the forms required by Fed. R. Civ. P. 8(b). Respondent alleges that he contacted J.K. Rowling's literary agent in 2000 to discuss "Gobstones," a fictional game in the book *Harry Potter and the Prisoner of Azkaban*. Respondent contends the agent informed him that Warner Brothers owned the *Harry Potter* rights and had licensed those rights to others. Respondent alleges that he submitted a prototype for the game to Warner Brothers in 2001, and details offers of settlement monies allegedly made by Warner Brothers in

2007. As a response to the motion for default, respondent states,

> [Petitioner's counsel] … assumes I reside permanently in the United States and should therefore respond immediately to his every communication – however, such is not the case and I am not always available nor able to reply at his convenience.
>
> Despite concerted effort, I have not encountered a Trademark attorney who is willing to plead my case as all those contacted stated, in all honesty, Warner Bros. has more money than I and, in their opinion, I would only be wasting yet more of mine.

Viewing the pleading in a light most favorable to respondent, it is not a sufficient answer in compliance with Fed. R. Civ. P. 8(b) and 10(b), and Trademark Rule 2.114(b)(1), but instead merely a recitation of the facts as seen by respondent. Nor has respondent offered any reason for its late filing of the answer.

Whether default judgment should be entered against a party is determined in accordance with Fed. R. Civ. P. 55(c), which reads in pertinent part: "the court may set aside an entry of default for good cause…." 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. *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991).

Turning first to whether respondent's failure to timely answer was willful, we need not look to whether respondent acted in bad faith, but only whether respondent consciously chose to ignore the Board's orders. *See Delorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000)(finding willfulness in applicant's conscious choice not to respond to notice of opposition based on belief that pleading was insufficient). By his filing respondent seems to state he does not believe he needs to respond timely to papers filed in this proceeding, nor otherwise follow the rules, as he is "not always available." Respondent has been given ample opportunity to file an answer by the Board's two previous orders on November 5, 2007 instituting this action, and on September 15, 2008, denying petitioner's first motion for default and allowing respondent time to answer. Thus we find that petitioner's failure to timely file an answer was willful.

While there are no allegations of prejudice to petitioner from respondent's failure to file the answer, and it is not clear whether respondent has a meritorious defense since he has not provided any denials of allegations made in the complaint, based on the record before us, we find that respondent has not shown good cause to set aside default.[2]

[2] Based on our decision, the motion to strike is moot.

In view thereof, petitioner's motion for default judgment is granted, judgment by default is hereby entered against respondent, the petition to cancel is granted, and Registration No. 2879738 will be cancelled in due course. *See* Fed. R. Civ. P. 55, and Trademark Rule 2.114(a).

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