Goodman

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

Mailed: May 17, 2013

Cancellation No. 92056455

Third Estate LLC

v.

Ahmed Lago

By the Trademark Trial and Appeal Board:

Answer was due on December 25, 2012. On January 3, 2013, petitioner filed a motion for default judgment. Thereafter on January 17, 2013, respondent filed a motion to extend which the Board construed as motion to extend time to respond to the motion for default judgment. The Board granted this motion as conceded, and on March 18, 2013, respondent filed his answer.[1]

[1] Respondent's answer included the address of petitioner after the heading of the case. Therefore, the Board presumes service of this filing on petitioner. However, respondent is advised that the suggested format for a certificate of service is as follows and that all future filings should follow this format: I hereby certify that a true and complete copy of the foregoing (insert title of submission) has been served on (insert name of opposing counsel or party) by mailing said copy on (insert date of mailing), via First Class Mail, postage prepaid (or insert other appropriate method of delivery) to: (set out name and address of opposing counsel or party).

_____
Signature

Petitioner argues that default judgment should be entered due to respondent's failure to timely answer or file an extension of time prior to the due date for the answer.

The standard for determining whether to set aside default is good cause. Fed. R. Civ. P. 55(c). Good cause is established when it is shown that the delay in filing an answer was not the result of willful conduct or gross neglect, that the delay will not result in substantial prejudice to petitioner, and that respondent has a meritorious defense to the action. *Fred Hayman Beverly Hills Inc. v. Jacques Bernier* Inc., 21 USPQ2d 1556 (TTAB 1991). When considering these factors, the Board keeps in mind that the law strongly favors determination of cases on their merits. *Paolo's Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1902 (Comm'r Pat. 1990).

Meritorious Defense

The Board finds that respondent has set forth a meritorious defense by filing an answer and denying certain allegations in the petition to cancel. *DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000) (plausible response to allegations in notice of opposition all that required for meritorious defense). *See also, Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986, 993 (E.D.N.Y. 1995) ("A meritorious defense is established by

Rule 55 standards by setting forth denials and defenses in an answer").

Prejudice

With regard to the question of prejudice, substantial prejudice within the meaning of Rule 55(c) does not result from delay alone. Rather, the plaintiff must demonstrate that the default caused some actual harm to its ability to litigate the case, such as diminishing the amount of available evidence, increased difficulties of discovery, or the thwarting of plaintiff's recovery or remedy. 10 C. Wright, A. Miller, M. Kane & R. Marcus, Federal Practice and Procedure Civil 3d Section 2699 (Westlaw edition 2013).

While respondent has not addressed the question of prejudice in its filing, petitioner has argued in its motion for default judgment that the "continued existence" of respondent's trademark has the potential to harm petitioner and its family of marks as a result of "third parties forming the belief that it is permissible to violate the Petitioner's strong and pervasive trademark rights when it is in fact not."

The Board finds that setting aside default will not cause substantial prejudice to petitioner inasmuch as the harm that petitioner points to does not demonstrate actual harm to petitioner's ability to litigate the case. 10 C.

Wright, A. Miller, M. Kane & R. Marcus, Federal Practice and Procedure Civil 3d Section 2699.

Willfulness

Respondent's filing of his answer does not address whether respondent's failure to timely file an answer was the result of willful conduct or gross neglect.

Inasmuch as it is the Board's policy to decide cases on their merits and because only two of the three factors for setting aside default has been satisfied, respondent is allowed until **TWENTY DAYS** from the mailing date of this order to supplement his response to the motion for default judgment to address the question of whether his failure to timely file an answer was the result of willful conduct or gross neglect. *Cf. Mike Rosen & Assocs., P.C. v. Omega Builders, Ltd.*, 940 F.Supp. 115 (E.D.Pa. 1996) (court conditioned granting of motion to set aside default on subsequent submission of prima facie evidence of meritorious defense). Petitioner shall be allowed an opportunity to supplement its motion for default judgment based on this filing, with the time for filing such response under Trademark Rule 2.127(a).

In the event that respondent fails to supplement his response, or if his response is insufficient to show that the failure to timely answer was not willful, default judgment will be entered against as a him. *See e.g.,*

Shepard Claims Service, Inc. v. William Darrah & Associates, 796 F.2d 190, 195 (6th Cir. 1986) (court may refuse to set aside default . . . "where the default is due to willfulness or bad faith, or where defendant offers no excuse for default").

It should be noted that while Patent and Trademark Rule 10.14 permits any person to represent himself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition proceeding to secure the services of an attorney who is familiar with such matters.

Respondent is advised that if he chooses to represent himself, he should familiarize himself with the Board rules and procedures. It is recommended that respondent obtain a copy of the latest edition of Title 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice and is available for a fee from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Respondent is further advised that pro se parties are not entitled to any special treatment by the Board and strict compliance with the Trademark Rules and all other applicable rules is expected of all parties, even those representing themselves.

Any response to this order should be served on petitioner in accordance with Trademark Rule 2.119.

Proceedings herein are otherwise suspended pending further submission from respondent. If proceedings resume, dates will be reset.

By the Trademark Trial and Appeal Board