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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: August 30, 2018

Cancellation No. 92066525

Mariana Travassos Miguel Pereira

v.

Dean Thompson

Before Cataldo, Bergsman, and Goodman,
Administrative Trademark Judges.

By the Board:

Now before the Board is Respondent's contested motion (filed February 15, 2018) for relief from final judgment under Fed. R. Civ. P. 55(c) and 60(b).[1]

1. Background

On July 25, 2017, Petitioner filed a petition for cancellation of Respondent's Registration No. 4771161 for the mark HUNTER FIGHT WEAR. On July 31, 2017, the Board sent a notice instituting this proceeding (the "institution notice") to Respondent at his mailing address of record in Hong Kong.[2] 2 TTABVUE 1. The

[1] The declaration in support of the motion, as originally filed, was illegible. In an order issued on June 20, 2018, the Board allowed Respondent time to file a legible declaration, which Respondent did on July 2, 2017.

[2] We have given no consideration to Respondent's argument that Petitioner failed to properly serve the petition for cancellation. Effective January 14, 2017, Trademark Rule 2.113(a) was amended to remove the requirement that the petitioner serve the respondent with a copy of the petition for cancellation, and to specify that the Board's notice of institution constitutes service to the respondent of the petition. See MISCELLANEOUS CHANGES TO TRADEMARK TRIAL AND APPEAL BOARD RULES OF PRACTICE, 81 Fed. Reg. 69950,

institution notice was returned to the Board as undeliverable, and Respondent did not answer the petition for cancellation by the September 9, 2017 deadline for doing so. 4 TTABVUE. The Board then suspended proceedings and attempted to effect service of the institution notice on Respondent by publication in the Official Gazette dated October 10, 2017. 5 TTABVUE and 6 TTABVUE.

No appearance or answer was filed in response to the service effected by publication in the Official Gazette. Accordingly, on November 20, 2017, the Board entered default judgment against Respondent pursuant to Fed. R. Civ. P. 55(b) and Trademark Rule 2.114(a), 37 C.F.R. § 2.114(a), and granted the petition for cancellation. 7 TTABVUE. Respondent's registration then was cancelled by order of the Commissioner for Trademarks on December 1, 2017. 8 TTABVUE.

Respondent subsequently filed the current motion for relief from judgment on February 15, 2018.

2. Motion for Relief from Final Judgment

Fed. R. Civ. P. 55(c) states in relevant part that the court (or in this instance, the Board) "may set aside a final default judgment under Rule 60(b)."[3] Thus, upon such terms as are just, the Board, on motion, may relieve a party from a final default judgment for one of the following reasons specified in Fed. R. Civ. P. 60(b):

> (1) mistake, inadvertence, surprise, or excusable neglect;

69958 (October 7, 2016). The Board presently sends notification of the petition for cancellation to defendants by mail, pending database system enhancements to facilitate email notification. TBMP § 310.01 (2018).

[3] Fed. R. Civ. P. 55(c) and 60(b) are made applicable to Board proceedings by Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a).

> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
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> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
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> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

In its motion, Respondent cites generally to Fed. R. Civ. P. 60(b). 10 TTABVUE 3. Based on Respondent's arguments, we construe his motion as seeking relief from default judgment pursuant to Fed. R. Civ. P. 60(b)(1) based on "mistake, inadvertence, surprise, or excusable neglect." Respondent's motion focuses exclusively on the factors for establishing excusable neglect, and does not address any of the grounds for relief under subsections (2)–(5) of Fed. R. Civ. P. 60(b). Additionally, relief under Fed. R. Civ. P. 60(b)(6) is an extraordinary remedy to be granted only in exceptional circumstances, and is mutually exclusive of the other subsections of Fed. R. Civ. P. 60(b), such that a movant seeking relief from judgment based on mistake, inadvertence, surprise, or excusable neglect under Fed. R. Civ. P. 60(b)(1) cannot also obtain relief under Fed. R. Civ. P. 60(b)(6). *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 863–64, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988); *see also Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 393, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1992); *Info. Sys. and Networks Corp. v. U.S.*, 994 F.2d 792, 795 (Fed. Cir. 1993).

Fed. R. Civ. P. 60(c)(1) requires that a motion for relief from final judgment under Fed. R. Civ. P 60(b)(1) must be made within a "reasonable time," and not more than one year from entry of judgment. Respondent filed his motion less than three months after the entry of final judgment by default, and therefore the motion was filed within a reasonable time.

3. Analysis and Determination

We now turn to Respondent's argument that he is entitled to relief under Fed. R. Civ. P. 60(b)(1), which provides that the Board may relieve a party from default judgment upon a showing that the default resulted from mistake, inadvertence, surprise, or excusable neglect.[4] Because default judgments for failure to timely answer the petition for cancellation are not favored by the law, a motion under Fed. R. Civ. P. 60(b)(1) seeking relief from such a judgment is generally treated with more liberality by the Board than are motions under Fed. R. Civ. P. 60(b) for relief from other types of judgments. *Info. Sys. and Networks Corp.*, 994 F.2d at 795 ("Rule 60(b) 'is applied most liberally to judgments in default.'") (quoting *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 403 (5th Cir. 1981)); *see also Ruiz v. Quarterman*, 504 F.3d 523, 532 (5th Cir. 2007) ("[T]his lesser standard of review has been applied most liberally to motions to re-open default judgments[.]").

Among the factors to be considered in determining a motion under Fed. R. Civ. P. 60(b)(1) to vacate a default judgment based on mistake, inadvertence, surprise, or

[4] Although we have carefully considered all of the parties' arguments, we address the record only to the extent necessary to set forth our analysis and findings. We do not repeat or address all of the parties' arguments and evidence. *Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

excusable neglect are: (1) whether Petitioner will be prejudiced, (2) whether Respondent's default was willful; and (3) whether Respondent has a meritorious defense to the cancellation action. *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991); *see also Info. Sys. and Networks Corp.*, 994 F.2d at 795.

Regarding possible prejudice to Petitioner, prejudice must be more than the mere inconvenience and delay caused by Respondent's previous failure to take timely action, but contemplates an adverse impact on Petitioner's ability to litigate the case — e.g., due to a loss or unavailability of evidence or witnesses that otherwise would have been available to Petitioner — or a change in economic position during the delay. *See A.C. Aukerman Co. v. R.L. Chaides Constr. Co.,* 960 F.2d 1020, 22 USPQ2d 1321, 1329 (Fed. Cir. 1992); *Pumpkin, Ltd. v. Seed Corps*, 43 USPQ2d 1582, 1587 (TTAB 1997). Here, Petitioner has not shown that her ability to litigate her case has been adversely impacted by Respondent's default and the resulting delay, or that she changed her economic positon regarding her mark in reliance on the delay. Accordingly, this factor favors granting relief from judgment.

With respect to the second factor, it does not appear that Respondent willfully defaulted. Respondent states in his declaration in support of his motion that he did not learn of cancellation proceeding until February 2018. Declaration of Dean Thompson ¶ 12 (14 TTABVUE 3) ("Thomson Decl."). In view of the fact that the institution notice was returned to the Board as undeliverable, it is reasonable to accept Respondent's assertion that he was not aware of commencement of this proceeding until February 2018.

In his declaration, Respondent also avers that the attorney who prosecuted his underlying application never received notice of the cancellation proceeding. Thompson Decl. ¶ 11 (14 TTABVUE 3). However, the Trademark Office considers a power of attorney filed while an application is pending to end when the mark registers. See Trademark Rule 2.17(g); 37 C.F.R. § 2.17(g). Accordingly, when a petition to cancel a registration is filed, the Board mails the notice of institution of the proceeding directly to the owner of the registration (the respondent) at its address of record, unless the respondent has appointed a domestic representative, in which case the Board will mail the notice to the domestic representative. Trademark Rule 2.113(c); 37 C.F.R. § 2.113(c); *see also* TBMP § 310.01 ("the institution order is sent … to the respondent itself, or to the respondent's domestic representative, if one is appointed, even if there is an attorney or other authorized representative of record in the application file after the mark has registered."). Nevertheless, we note that on July 29, 2015, after the issuance of Respondent's involved registration, the attorney who filed and prosecuted the underlying trademark application filed a change of correspondence address in the file for the registration. Although this mere change of correspondence address was not sufficient to designate counsel as Respondent's domestic representative, it further indicates Respondent's efforts (albeit flawed) to maintain a current correspondence address with the Office, and thus further suggests that his default in the proceeding was not willful.[5]

[5] Furthermore, if the Board is unable to locate a respondent for purposes of notifying the respondent of the filing of the petition for cancellation, and the registration file reflects that an attorney or other authorized representative has appeared therein on the respondent's behalf within the last five years or so, the Board will, if necessary, contact the attorney or

Regarding the third factor, the showing of a "meritorious defense" does not require an evaluation of the merits of the case, but merely requires a plausible response to the allegations in the petition for cancellation and a willingness to defend the matter on its merits. *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991) (the two other factors having been shown, applicant was allowed time to show meritorious defense by submission of answer). Although Respondent did not file a proposed answer with its motion, as would have been the better practice, Respondent's arguments in its motion regarding the merits of Petitioner's claims sufficiently demonstrate a plausible response to the petition for cancellation and a willingness to defend the case on the merits. 10 TTABVUE 4–6. This factor favors granting relief from judgment.

In sum, there is no evidence that Petitioner will be prejudiced if the default judgment is set aside, or that Respondent's default was willful, and Respondent has shown that he has a meritorious defense to the cancellation action.

Accordingly, Respondent's motion for relief from final judgment under Fed. R. Civ. P. 60(b)(1) is granted, and the Board's default judgment entered on November 11, 2017, is set aside. Registration No. 4771161 will be restored to the register.

other authorized representative and ask for information concerning the respondent's current address. TBMP § 310.01; *see also* MISCELLANEOUS CHANGES TO TRADEMARK TRIAL AND APPEAL BOARD RULES OF PRACTICE, 81 Fed. Reg. 19296, 19297 ("The Board would continue its practice of using other appropriate and available means to contact a party to ensure the real party in interest is notified of the proceeding."). It is not evident that this was done here.

4. Resumption of Proceedings

Respondent's answer or response to the petition for cancellation is due by **October 1, 2018**. Dates in this proceeding are reset on the following schedule.

Time to Answer	10/1/2018
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

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