

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

Baxley

Mailed: January 22, 2018

Cancellation No. 92067402

G&S Sporting Goods, LLC

v.

Derrick L Gray

Andrew P. Baxley, Interlocutory Attorney:

On January 17, 2018, the Board issued a notice of default under Fed. R. Civ. P. 55(a) because no answer is of record in this case. Respondent responded to the notice of default the next day. Although Respondent's response does not include proof of service upon Petitioner, as required by Trademark Rule 2.119(a), the Board will consider that response.

The Board notes initially that although Respondent's response is captioned as a motion to vacate judgment, judgment has not been entered in this case. Moreover, a response to a notice of default should not be captioned as a motion and should instead be captioned a response to a notice of default. A notice of default is essentially an *ex parte* matter between the Board and the defendant in a proceeding before it, whereas a motion contemplates full briefing by the parties. *Compare* TBMP §§ 312.02 and 502.02(b) (June 2017).

In that response, Respondent contends that he failed to timely answer because the parties were negotiating a consent agreement and he failed to file a motion to extend time to answer by the due date for his answer.

However the issue of default for failure to timely answer is raised, the determination of whether default judgment should be entered against a party is made in accordance with Fed. R. Civ. P. 55(c), which reads in pertinent part: “for good cause shown the court may set aside an entry of default.” 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.

Respondent’s response is sufficient to indicate that his failure to respond in a timely manner was neither willful nor in bad faith. Further, there is no indication of any prejudice to Petitioner. However, because Respondent failed to file an answer concurrently with his response, the Board cannot determine whether he has a meritorious defense.

Respondent is allowed until thirty days from the mailing date set forth in this order to file an answer. *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991).

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If Respondent so files, the Board will set aside the notice of default. Proceedings herein are otherwise suspended.