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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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January 15, 2019

Cancellation No. 92068216

Future Pipe Industries Limited

v.

Kent G. Anderson

By the Trademark Trial and Appeal Board:

This case now comes up on Respondent's October 1, 2018, response to the Board's August 28, 2018, notice of default.

Petitioner did not file a brief in opposition to Respondent's submission. Nevertheless, the Board declines to treat Respondent's submission as conceded. As discussed below, in view of the obvious procedural deficiencies in Respondent's submission, the Board will not consider it. Therefore, it was proper for Petitioner to refrain from contesting the submission.

1. Background and Respondent's Default

Respondent's answer to the petition to cancel was due by May 7, 2018. *See* 2 TTABVUE 3. On May 14, 2018, Respondent belatedly filed a request for an extension of time to file his answer. In contravention of Trademark Rule 2.126(a)–(b), 37 C.F.R. § 2.126(a)–(b), Respondent submitted the extension request in paper form, via postal

mail, rather than through the Board's electronic filing system, ESTTA.[1] In the accompanying certificate of service, Respondent indicated that a copy of the extension request was served on Petitioner's attorney by U.S. mail, not by email as required by Trademark Rule 2.119(b), 37 C.F.R. § 2.119.[2] The paper submission of the extension request was given the filing date of May 14, 2018, the date on which the submission was received by the USPTO.[3] *See* Trademark Rule 2.195(a), 37 C.F.R. § 2.195. The filing date of the extension request thus was after the May 7, 2018, deadline for Respondent to file and serve an answer the petition to cancel or a motion for an extension of the time to answer.

In an order issued on August 28, 2018, the Board declined to consider Respondent's May 14, 2018, "extension request" because the request was filed in paper form, rather than by ESTTA; the service copy of the extension request was not served on Petitioner's attorney via email; and, in any event, the extension request was filed after Respondent's deadline to file an answer had expired, and Respondent

[1] Trademark Rule 2126(a)–(b) provides that absent technical problems or extraordinary circumstances, all submissions to the Board must be filed via ESTTA. Absent certain exceptions, not applicable in this instance, a submission in paper form must include a written explanation of the technical problems or extraordinary circumstances which the filing party alleges necessitated the filing of a paper submission. Trademark Rule 2126(b). A paper submission that lacks the required explanation will not be considered. *Id.*

[2] Except for the petition to cancel, every submission filed with the Board in this proceeding must be served upon the other party or its attorney before the submission will be considered. Absent technical problems, extraordinary circumstances, or stipulation of the parties, service must be made by email. Trademark Rule 2.119(a)–(b).

[3] Even if Respondent was entitled to file the extension request in paper form (which he was not, in view of his failure to provide an explanation of any technical difficulties or extraordinary circumstances), the paper submission was not filed using the Priority Mail Express® procedure, or by first-class mail with a certificate of mailing. Thus the extension request is deemed to have been filed on May 14, 2018, and Respondent is not entitled to an earlier mailing date for timeliness purposes. *See* Trademark Rules 2.195(a), 2.195(a)(4), 2.197(a)(1), and 2.198, 37 C.F.R. §§ 2.195(a), 2.195(a)(4), 2.197(a)(1), and 2.198.

therefore already was in default. *See* 8 TTABVUE 3. The Board entered notice of default against Respondent under Fed. R. Civ. P. 55(a) as a result of Respondent's failure to timely file an answer to the petition to cancel or a motion for an extension of the time to answer. *Id.*

Respondent was allowed until September 27, 2018, to show cause why judgment by default should not be entered against him in accordance with Fed. R. Civ. P. 55(b)(2). *Id.*

The Board also provided Respondent with detailed information regarding the rules governing the filing and services of papers, and the form and content of an answer to a petition to cancel. *Id.* at 1–5. Additionally, the Board provided Respondent with information for a pro se litigant, and informed Respondent that "[s]trict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is required of all parties, whether or not they are represented by counsel." *Id.* at 5–8.

2. Response to the Notice of Default[4]

On October 1, 2018, Respondent belatedly responded to the notice of default by again filing a submission in paper form without any accompanying claim that the

[4] Respondent continues to ask the Board to communicate with him by postal mail, not email. *See* 9 TTABVUE 1, 4 TTABVUE 2. The Board previously informed Respondent that the Board uses email when sending decisions, orders, or other notices to the parties, and directed Respondent to "provide an active email address to the Board, and to Petitioner's counsel, as soon as possible, and no later than in connection with his response to the notice of default." 8 TTABVUE 6–7. The Board considers the submission of filings using ESTTA as a party's consent to the Board's sending notice of Board actions by email. If a party's email address is not already of record, the Board will obtain the email address when that party files correspondence with the Board using ESTTA, or files a change of correspondence address specifying an email address. *See* TBMP § 117.01. Here, however, Respondent continues to

paper submission was necessitated by technical problems or extraordinary circumstances.[5] As was the case with Respondent's previous extension request, the response to the notice of default was not filed using the Priority Mail Express® procedure, or by first-class mail with a certificate of mailing. Thus, even if Respondent was entitled to file the response to the notice of default in paper form (which he was not[6]), the paper submission is deemed to have been filed on October 1, 2018, after the deadline to respond to the notice of default. *See* discussion *supra*, at p.2, n.3.

In view of the foregoing, Respondent's October 1, 2018, response to the notice of default will not be considered. Trademark Rule 2.126(a)–(b).

By themselves, the improper submission of the response in paper form and the untimeliness of the submission are a sufficient bases for entering default judgment against Respondent. For the sake of completeness, however, the Board notes that Respondent's submission is substantively non-responsive to the notice of default and does not include Respondent's proposed answer to the petition to cancel.[7] *See* Fed. R.

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file submissions in paper form, rather than by email, and has not otherwise provided the Board with his email address. It is the responsibility of a party to a proceeding before the Board to ensure that the Board has the party's current correspondence address, including an email address. Trademark Rule 2.18(b), 37 C.F.R. § 2.18(b); *see also* TBMP §§ 117.01. If a party fails to notify the Board of a change of address, as a result the Board is unable to serve correspondence on that party, default judgment may be entered against the party. Trademark Rule 2.118; *see also* TBMP § 117.07.

[5] The response to the notice of default indicates that it was served on Petitioner's counsel via email, although the date of service is not specified. A certificate of service must clearly state the date and manner in which service was made. *See* Trademark Rule 2.119(a).

[6] The October 1, 2018, submission failed to explain what technical difficulties or extraordinary circumstances necessitated the paper submission. Trademark Rule 2.126(b).

[7] In the August 28, 2018, notice of default, the Board advised Respondent that if he filed a response to the notice of default, he also should file his proposed answer to the petition to

Civ. P. 55(c) ("The court may set aside an entry of default for good cause[.]"); *see also* TBMP § 312.02 (2018) ("Setting Aside Notice of Default") and TBMP § 508 ("Motion for Default Judgment for Failure to Answer").

3. Determination

In view of the foregoing, judgment by default hereby is entered against Respondent, the petition to cancel is granted, and Registration No. 5223362 will be cancelled in due course by the Commissioner for Trademarks with respect to the subject classes, namely, International Classes 6, 17, and 19. *See* Fed. R. Civ. P. 55(b), and Trademark Rule 2.114(a).

cancel. 8 TTABVUE 3. The Board went on to explain to Respondent the rules governing the form and content of an answer. *Id.* at 4–5.