THIS ORDER IS NOT A PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE
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July 19, 2021

Cancellation No. 92069506

Blue Ice Mountain Works SA

v.

Massoud Davoudzadeh

Before Zervas, Shaw and Larkin.
Administrative Trademark Judges.

By the Board:

This proceeding is before the Board on Respondent's March 14, 2020 motion (10 TTABVUE) for reconsideration of the March 6, 2020 order (9 TTABVUE) denying his February 4, 2020 motion (8 TTABVUE) for relief from the Board's December 19, 2018 entry of default judgment (5 TTABVUE).

Background and Analysis

In its petition to cancel, Petitioner alleged claims of abandonment and fraud against Respondent's Registration Nos. 4393936 and 4815842. Petitioner alleged ownership of two then-pending applications, Serial Nos. 87692052 and 87692110. 1 TTABVUE 4-5.

Respondent did not file an answer to the petition to cancel, or a response to the Board's October 31, 2018 notice of default. 4 TTABVUE. On December 19, 2018, the

Board entered default judgment pursuant to Fed. R. Civ. P. 55(b), and Registration Nos. 4393936 and 4815842 were subsequently cancelled. 5-6 TTABVUE. On June 4, 2019, Petitioner's two applications matured to registration.

Fed. R. Civ. P. 60(b)(1)-(3)[1] provides for relief from judgment due to certain circumstances, including "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(6) provides for relief from judgment for "any other reason that justifies relief." Subsection (c)(1) sets a one-year timeliness requirement on motions made for reasons set forth in subsections (1), (2) and (3). TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 544 (2021).

On February 4, 2020, Respondent filed a motion for relief from default judgment. 8 TTABVUE. Inasmuch as Respondent's motion was filed more than a year after the entry of judgment, the Board denied it as untimely. 9 TTABVUE.

In his March 14, 2020 motion for reconsideration of that denial, Respondent posits that his February 4, 2020 motion was based on Fed. R. Civ. P. 60(b)(6), a provision not subject to the one-year time limit, and therefore was timely.

Whether the time of filing of a Rule 60(b) motion was reasonable depends upon the facts in a case, including the length and circumstances of delay in filing, any prejudice to the opposing party by reason of the delay, and the circumstances warranting equitable relief. *Venture Indus. Corp. v. Autoliv ASP Inc.*, 457 F.3d 1322, 79 USPQ2d 1758, 1763 (Fed. Cir. 2006). Inasmuch as Respondent clarifies that his

[1] Fed. R. Civ. P. 60(b), as made applicable by Trademark Rule 2.116(a), applies to all final judgments issued by the Board, including default judgments.

February 4, 2020 motion sought relief under Fed. R. Civ. P. 60(b)(6), and inasmuch as he filed that motion approximately thirteen-and-a-half months after the entry of default judgment, the motion was timely and the Board will reconsider it.

Turning to the merits, upon such terms as are just, the Board may, on motion, relieve a party from a final judgment for one of the reasons specified in Fed. R. Civ. P. 60(b). Relief from a final judgment is generally an extraordinary remedy to be granted in exceptional circumstances or when other equitable considerations exist. *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991). Respondent must persuasively show that the relief requested is warranted for one or more of the reasons specified in Fed. R. Civ. P. 60(b).

Fed. R. Civ. P. 55(c) states:

> The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

Thus, because default judgments for failure to timely answer are not favored by the law, a motion under Fed. R. Civ. P. 55(c) and Fed. R. Civ. P. 60(b) seeking relief from such a judgment, while an extraordinary remedy, is generally treated with more liberality than are motions under Fed. R. Civ. P. 60(b) for relief from other types of judgments. *Info. Sys. and Networks Corp. v. U.S.*, 994 F.2d 792, 795 (Fed. Cir. 1993) ("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)). Factors to be considered in a motion to vacate a default judgment for failure to answer are 1) whether the plaintiff will be prejudiced, 2) whether the default was willful, and 3) whether the defendant has a meritorious defense to the action. *Djeredjian v. Kashi Co.*, 21 USPQ2d at 1615.

Respondent's core assertion is that he "denies receiving (the) petition" to cancel, and "received neither the notice of the petition to cancel nor the notice of cancellation."[2] 8 TTABVUE 2, 8. He explains that he "received the Office's August 27, 2018 courtesy reminder to file for renewal of Registration No. 4393936;[3] that in November, 2018, he attempted to hire TTC Business Solutions in North Carolina to assist "but was not able to complete the engagement because of his limited grasp of written English among other reasons;" and that he had no knowledge that TTC Business Solutions was controlled by The Trademark Company and Matthew Swyers, who was excluded from USPTO practice on January 26, 2017.[4] 8 TTABVUE 2-3, 8. Respondent explains this situation as "confusion of the petition with the warning (assuming the petition was received)." *Id.* at 9. He further states:

> [H]is facility with the English language being limited, should it be proven that notice of the petition to cancel was actually delivered, he

[2] On the issue of non-receipt of notice of this cancellation proceeding, Respondent argues that "Petitioner should have notified the USPTO which could then, at its discretion, contact the registered agent. *See* 37 CFR § 2.113(c)(1). Additionally, Petitioner could have notified the registered agent directly." 8 TTABVUE 9. However, Trademark Rule 2.113(c)(1) does not provide for notification of a cancellation proceeding by service on a registered agent. The Rule states: "The Board shall forward a copy of the notice to the party shown by the records of the Office to be the current owner of the registration(s) sought to be cancelled at the email or address of record for the current owner…" TBMP § 310.01.

[3] Respondent's Registration No. 4393936 registered on August 27, 2013. Thus, on August 27, 2018, the USPTO emailed the standard "courtesy reminder of required trademark Registration maintenance filing under Section 8," advising him to file a Declaration of Use and/or Excusable Nonuse by August 27, 2019, and providing links and instructions. As for Respondent's Registration No. 4815842 registered on September 22, 2015, this was cancelled on December 19, 2018, prior to the time the USPTO would have sent the courtesy reminder for that registration.

[4] In Proceeding No. D2016-20, *In the Matter of Matthew H. Swyers,* the Director of the USPTO issued a January 26, 2017 order approving Mr. Swyers' Affidavit for Consent Exclusion, which excludes him from practice before the USPTO in trademark matters.

> may have assumed it was related to the renewal process rather than a petition to cancel.

Id. at 3.

In his supporting affidavit, Respondent states, in relevant part:

> A response was not filed to the petition because I never was served with the documents and had no knowledge of the case that was filed.
>
> This lapse did not occur due to any failure of my own.
>
> My grasp of the English language is limited and I have difficulty reading and comprehending English text.

Id. at 12. Lastly, it appears that Respondent contacted his current counsel of record believing that the correspondence he had received from the Board related to his maintenance documents. *Id.* at 9.

Turning first to Respondent's asserted non-receipt of the Board's notice of this proceeding, Respondent does not indicate that his address of record in either of the registration records is, or at any time was, incorrect.[5] The institution order was not returned to the Board by the United States Postal Service as undeliverable, nor was the notice of default, or the order entering default judgment.[6] Therefore, it is presumed that these were received by Respondent. *Careerxchange Inc. v. Corpnet Infohub Ltd.,* 80 USPQ2d 1046, 1049 (TTAB 2005), citing *Jack Lenor Larsen Inc. v. Chas. O. Larson Co.*, 44 USPQ2d 1950 (TTAB 1997). Consequently, on this record the

[5] It is the responsibility of each party to ensure that the Board has the party's current correspondence address, including an email address, at all times throughout a proceeding. TBMP § 117.07.

[6] Furthermore, the March 6, 2020 order denying the Fed. R. Civ. P. 60(b) motion was not returned as undeliverable.

Board is unable to verify Respondent's claimed non-receipt, and it does not appear that Respondent can rebut this presumption.

With respect to Respondent's explanation that he was confused between Board correspondence regarding this proceeding and USPTO correspondence regarding maintenance of Registration No. 4393936, the explanation is plausible given that the USPTO emailed the standard Section 8 courtesy reminder on August 27, 2018, and Petitioner filed the petition to cancel on September 6, 2018. With regard to Respondent's contention that he has limited facility with English, Respondent has been, at all times, on notice that USPTO matters and Board proceedings are conducted in English. Trademark Rules 2.21(a) and 2.32(a). *See also* TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") §§ 202 and 802 (2018); TBMP § 104. Furthermore, it is telling that Respondent completed, signed and submitted the English language application underlying Registration No. 4393936 without counsel. Further, in the course of communicating with the trademark examining attorney, Respondent personally authorized an amendment to his application, in English. Moreover the numerous invoices he submitted with his motion under consideration are in English. 8 TTABVUE 14-27. Finally, his execution of his January 23, 2020 affidavit, *id.* at 12-13, suggests that he felt sufficiently confident in his ability to read and comprehend English text to swear under penalty of perjury to the truth and correctness of a legal document written in English. These matters, coupled with Respondent's operation of his business in the United States for over thirty years, *id.* at 12, suggest that Respondent has sufficient proficiency in English to understand

documents directed to him by the USPTO. Thus, the record as a whole does not support Respondent's asserted lack of English proficiency preventing comprehension of the trademark forms, documents and communications.

Respondent cites *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154 (TTAB 1991), wherein the Board granted a Fed. R. Civ. P. 60(b)(1) motion, noting that the respondent's president, as well as its employees, including mail sorters, were immigrants with limited command of English. Here, Respondent makes no similar claim regarding any personnel on whom he relies, and in fact appears to have understood and utilized English enough to navigate the registration process twice and to otherwise advance his business interests in the United States for more than thirty years. In sum, while the record does not show a willful disregard for this proceeding, Respondent's explanations are either ill-supported or are not of such a nature that they demonstrate extraordinary circumstances.

We turn to whether Respondent has a meritorious defense to Petitioner's claims. Although he was not required to do so, Respondent did not file an answer with his motion from which the Board can determine whether he has a meritorious defense to present. Respondent sets forth in his motion his position on the merits of Petitioner's claims, then concludes that he "has shown that he has a meritorious defense to the Petition." 8 TTABVUE 9-10. The substantive matters that Respondent set forth in his motion that go to the merits, while not considered for the purpose of adjudicating the Rule 60(b) motion, nonetheless indicate that Respondent wishes and is able to address and defend against Petitioner's allegations. 8 TTABVUE 5-7.

Finally, as for whether Petitioner will be prejudiced, the Board looks to whether the nonmovant will be prejudiced by more than the mere inconvenience and delay caused by a movant's previous failure to take timely action, and more than a loss of any tactical advantage it otherwise would enjoy as a result of the movant's delay or omission. Prejudice contemplates an adverse impact on the ability to litigate, such as where the delay has resulted in a loss or unavailability of evidence or witnesses that otherwise would have been available, or a change in economic position during the delay. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.,* 960 F.2d 1020, 22 USPQ2d 1321, 1329 (Fed. Cir. 1992). The entry of the default judgment resulted not only in the cancellation of Respondent's registrations, but also in the issuance of two registrations to Petitioner on June 4, 2019. Petitioner has enjoyed the benefits of those registrations for more than two years, but would lose them if Respondent's request for reconsideration were granted and the registrations were subsequently cancelled in the course of restoring the status quo when this proceeding was filed in September 2018. A change in economic position can be presumed under the circumstances.[7] Based on these facts, the equitable considerations that necessarily apply in determining this factor weigh in favor of finding prejudice to Petitioner.

Having carefully taken into account and balanced all of the circumstances of record, the Board finds that Respondent has not demonstrated extraordinary

[7] Moreover, this proceeding was terminated on December 19, 2018, and Petitioner is not required to voice its prejudice.

circumstances that warrant granting relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6).

Respondent's motion for relief from judgment is **denied**. The December 19, 2018 order stands as issued.