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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Pinkberry, Inc., Opposer Plaintiff, vs. Cotton City, Inc. Dba Pink Berry, Applicant Defendant.	Opposition No. 91179688 Application No. 77/025,496 Reply to Opposer Pinkberry, Inc.'s Opposition to Applicant Cotton City, Inc.'s Motion to Set Aside Default Judgment

08-12-2008

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Applicant Cotton City, Inc.'s Reply to Opposer Pinkberry, Inc.'s Opposition to Applicant's Motion to Set Aside Default Judgment

In Reply to Opposer Pinkberry, Inc.'s Opposition to Applicant Cotton City, Inc.'s Motion to Set Aside Default Judgment, Applicant makes the following points based on the cited authorities.

I. Summary: Applicant's Motion must be granted because: (1) even a cursory reading of the moving papers reveals the existence of a meritorious defense; (2) Applicant's former attorney's uncontroverted declaration establishes that the failure to timely answer was based on excusable neglect; and (3) Opposer Pinkberry will not suffer substantial prejudice if the relief sought is granted.

In reviewing the "Procedural Status" section of Applicant's Motion to Set Aside Default Judgment it is clear from even a cursory reading of the chronology that Applicant's Application 77/025,496 (the "496 Application") filed on October 20, 2006 preceded Opposer's Application numbers 77/277,124 and 77/277,130 both filed on September 11, 2007 by *nearly a full year*. On its face this raises a meritorious defense as to which applications would enjoy statutory protected mark status. Ordinarily, the prior Application would have priority and it would be incumbent upon the Opposer to carry its burden as to why the earlier-filed Application should be denied. Despite its inflamed rhetoric, Opposer has not carried this burden and is intent on confusing this tribunal by engaging in speculation as to why the Applicant did not file an Answer earlier in the proceedings.

The Declaration of Attorney B. Wynn Cromwell makes clear that there was not the slightest bit of culpability on either Atty. Cromwell's part nor on the part of Applicant's President, Seok Jin Kim in connection with the failure to timely file an Answer, as will be more fully discussed in Section II.B., *infra*.

As for the prejudice that will allegedly be suffered by Pinkberry, Inc. if the Default Judgment is set aside, the claim is without merit. As Pinkberry, Inc. itself has noted in its Opposition to the

Motion to Set Aside Default Judgment, Federal Rules of Civil Procedure Rule 60(b) governs this Motion. The statute provides that a motion for relief thereunder must be brought within a year of entry of the judgment. F.R.C.P. Rule 60(c)(1). Pinkberry, Inc. filed its two Responses to Suspension Inquiry or Letter of Suspension on February 13, 2008 (in order to reinstate the processing of its September 11, 2007 Applications), some three weeks after the entry of Default Judgment. Pinkberry claims in its Opposition that it relied "...upon the finality of the default judgment..." [**Opposition**, p. 3, ¶ II.B] and based thereon "...represented to the USPTO that Applicant's application had become abandoned." *Id.*, fn. 4 **Pinkberry took a calculated risk when it filed its Responses so soon after the entry of Default Judgment—a risk which was clearly unreasonable, given the short amount of time between the entry of the Default Judgment and its own Responses and given the fact that it did not bother to attempt to contact Applicant and find out its intentions or procedural posture with respect to possible appeals or other post-judgment relief.**

In short, any prejudice that might be suffered by Pinkberry by granting relief to Applicant/movant would be brought about by its own hand. It knew the address and phone number of Applicant and Applicant's counsel. Through the simple expedient of a phone call, a letter, or an e-mail, Pinkberry could have asked Applicant what it intended to do, if anything, about the Default Judgment prior to Pinkberry submitting its responses. At that point, it could then have made a rational determination of its next steps. However, because it did not communicate with Applicant, it ran the risk of exactly this scenario occurring: Applicant filing a Motion to Set Aside Default Judgment. Although Applicant is not aware of any legal duty for Pinkberry to have attempted to find out Applicant's intentions, certainly prudence and common sense would dictate that it make reasonable inquiries as to the nature of the legal terrain it was entering prior to doing so.

II. Factual Background and Argument

A. Applicant had a good-faith, but mistaken, belief that his lawyer was going to handle the Answer to the Opposition

Seok Jin Kim ("KIM"), President of Applicant, is from South Korea. His English language skills are very limited. He is neither sophisticated in the law nor in communication protocols here in America. What he did know is that he had a contact with the Legal Administrator for B. Wynn

Cromwell, Mr. Chris Choi ("CHOI") and that he had previously been involved in a personal injury (auto accident) lawsuit which he had brought to CHOI. He had a successful outcome in that case so when he finally got the Notice of Opposition filed by Pinkberry he brought the Notice to CHOI sometime in the latter part of October 2007.

KIM was relying on CHOI to route the Notice to an appropriate attorney in his law firm for further handling. In KIM's mind, once CHOI had accepted the Notice in late October 2007, KIM was represented by counsel and he could rely on his counsel to analyze what the document was and to take appropriate steps to properly handle it. That deference to and reliance on professionals is a universal trait here in this country and in that respect KIM was acting in an entirely reasonable and understandable manner.

Whether or not he was mistaken, that was his belief, which was substantiated by his attorney B. Wynn Cromwell's own "affidavit of fault" ("Cromwell Declaration"), attached to the Motion to Set Aside Default Judgment [**Cromwell Declaration**, ¶ 5-10]

Opposer makes much of KIM's failure to "keep tabs" on his lawyer [**Opposition**, p. 12, line 4] and comes up with a whole page full of questions more suitable for KIM's deposition than to an Opposition. The fact of the matter is, as stated above, KIM displayed appropriate deference to what he thought was his attorney and it would have been the height of arrogance on his part to start micromanaging his attorney so soon after turning the Notice over to him.

B. Applicant's lawyer's conduct was not "culpable" so as to fall outside of the classification of excusable neglect.

What is present under these facts is a clear case of miscommunication between attorney and client. As is usually seen in attorney-client relations, Atty. Cromwell used intermediaries when dealing with his clients. In this case, Atty. Cromwell used a Legal Administrator, CHOI, to liaise with his Korean speaking clients.

When CHOI was contacted by KIM in late October 2007 with Pinkberry's Opposition he reported to Atty. Cromwell that there was a new case pending for their lawfirm. However, Atty. Cromwell needed to see the Application and the Opposition in order to see the factual and

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