UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

G. LOOMIS, INC., Plaintiff, v. GARY A. LOOMIS, et al., Defendants.	CASE NO. C09-5236BHS ORDER GRANTING DEFENDANT TARGUS'S MOTION TO SET ASIDE ENTRY OF DEFAULT, WITH CONDITIONS

This matter comes before the Court on the motion to set aside entry of default filed by Defendant Targus Fly & Feather, Inc. ("Targus"). Dkt. 68. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the record, and hereby grants the motion, with conditions, for the reasons stated herein.

I. BACKGROUND

On October 30, 2008, Plaintiff filed a complaint against Targus and other Defendants in the Unites States District Court for the Central District of California. Dkt. 1. Plaintiff served the complaint on Wayne Richey, Targus President and registered agent. Dkt. 9. Plaintiff maintains that Targus infringed upon the Gary Loomis trademark by selling Gary Loomis products, in violation of the Lanham Act, 15 U.S.C. 1125(a) and 1114.[1] Dkt. 73 at 2.

[1] Section 1125(a) of the Lanham Act prohibits the use of false designations of origin, false descriptions, and false representations in the advertising and sale of goods and services. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1106 (9th Cir. 1992). Section 1114 covers remedies.

On December 5, 2008, before any Defendant had answered, Plaintiff filed a first amended complaint. Dkt. 10.

On December 8, 2008, Mr. Richey contacted Plaintiff's counsel and inquired whether a settlement would be possible. Dkt. 75 at 2 (Declaration of Neil Erickson). Plaintiff subsequently sent Mr. Richey a draft settlement agreement and a draft declaration that was to be part of the proposed settlement. *Id*. Apparently, Targus was not represented by counsel at that time.

On January 12, 2009, Plaintiff's counsel sent Mr. Richey an email, indicating that Plaintiff had not received any response from Mr. Richey and that Targus had not responded to the complaint. Dkt. 76. Plaintiff stated that "[w]e agreed not to pursue a default of Targus if you [Mr. Richey] provided full responses to our inquiries and we settled thereafter." *Id*. Plaintiff again emailed Mr. Richey on January 20, 2009, and informed Mr. Richey that if he did not provide the requested information by January 22, 2009, Plaintiff would move for default against Targus. Dkt. 77. Mr. Richey responded the following day and stated that he would provide the information "ASAP." *Id*.

Apparently, the matter remained unresolved, and on March 24, 2009, Plaintiff again emailed Mr. Richey and indicated that Mr. Richey needed to complete the proposed settlement agreement by March 27, 2009. Dkt. 78. Plaintiff advised Mr. Richey that Plaintiff expected Targus to file a response to the first amended complaint if Mr. Richey failed to complete the settlement documents. *Id*. Plaintiff further advised Mr. Richey that if he failed to complete the documents, and failed to respond to the lawsuit by April 1, 2009, Plaintiff would seek default. *Id*.

On April 10, 2009, Plaintiff responded to an email sent by Mr. Richey the same day, and advised Mr. Richey that if the matter was not "wrapped up" by April 14, 2009, Plaintiff would move for entry of default. Dkt. 79.

On April 17, 2009, Mr. Richey contacted D. Peter Harvey and asked Mr. Harvey to represent Targus in its dispute with Plaintiff. Dkt. 70 (Declaration of D. Peter Harvey).

At some point, Mr. Harvey agreed to represent Targus. According to Mr. Harvey, Mr. Richey asked him to represent Targus to "continue discussions with [Plaintiff's counsel] for the purpose of concluding the settlement agreement." *Id*. Apparently, Mr. Harvey was retained only to assist Targus in settlement matters, and did not represent Targus in its litigation with Plaintiff. Dkt. 75 at 3 (Declaration of Neil Erickson). Mr. Harvey did not file a notice of appearance on behalf of Targus.

On April 20, 2009, Plaintiff emailed Mr. Harvey and explained that Plaintiff had proposed a settlement to Targus. Dkt. 80. In return for Targus's agreement to settle and provide a declaration "regarding the factual events surrounding the sale of Gary Loomis' products," Plaintiff advised that it would dismiss Targus from its lawsuit. *Id*.

On April 21, 2009, the action was transferred to this Court. Dkt. 24.

On May 5, 2009, Plaintiff filed a motion seeking leave to file a second amended complaint. Dkt. 35. The Court granted Plaintiff's motion, Dkt. 39, and Plaintiff filed a second amended complaint on May 19, 2009. Dkt. 40.

On May 20, 2009, Plaintiff emailed Mr. Harvey and provided him with a copy of the second amended complaint. Dkt. 70-3. Plaintiff copied Mr. Richey on this email. *Id*. In the email, Plaintiff stated: "Please confirm that you are authorized to accept service of process on behalf of Targus. If I do not hear from you by the end of the week, we will proceed with direct service. In either case, given the passage of time, my client will insist on a timely responsive pleading by Targus without further extension." *Id*. Mr. Harvey claims that he did not receive this email because he was traveling at the time, and was "under the impression" that the settlement was still awaiting completion. Dkt. 70, 3-4. It is not clear when Mr. Harvey did receive the email. Mr. Richey claims that, although he was served with the second amended complaint, he "assumed that Mr. Harvey would take care of any issues in the suit that needed to be taken care of." Dkt. 71 at 2. (Declaration of Wayne Richey). It appears that Plaintiff did not attempt direct service on Mr. Harvey.

On May 29, 2009, Plaintiff served the second amended complaint on Mr. Richey on behalf of Targus. Dkt. 49 (Affidavit of Service).

On July 1, 2009, Plaintiff filed a motion for default against Targus. Dkt. 60. On July 7, 2009, the Clerk entered default against Targus. Dkt. 63. Mr. Harvey maintains that he first became aware of the entry of default on July 20, 2009, when he checked the Court docket. Dkt. 70 at 4. According to Mr. Harvey, Plaintiff did not advise him of the motion for or entry of default. *Id*.

On July 24, 2009, attorney Robert Van Siclen filed a notice of appearance on behalf of Targus. Dkt. 67. On July 30, 2009, Targus filed a motion to set aside default. Dkt. 70. On August 10, 2009, Plaintiff filed a response. Dkt. 73. On August 13, 2009, Targus filed a reply. Dkt. 84.

II. DISCUSSION

An entry of default may be set aside for good cause. Fed. R. Civ. P. 55(c). The "good cause" standard for vacating an entry of default is the same standard for vacating a default judgment. *Franchise Holdings II, LLC v. Huntington Rests. Group, Inc.*, 375 F.3d 922, 925 (9th Cir. 1986); *see also* Fed. R. Civ. P. 65(b). In deciding whether to set aside an entry of default, the Court considers three factors: (1) whether Plaintiff will be prejudiced if the Court sets aside the default judgment, (2) whether Defendants have a meritorious defense, and (3) whether culpable conduct of Defendants led to the default. *Falk v. Allen*, 739 F.2d 461 (9th Cir. 1984). These factors are to be considered conjunctively. *See TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001); *see also Brandt v. American Bankers Ins. Co. of Fla.*, 08-5760BHS, Dkt. 41 at 7 (adopting *TCI* standard that factors should be balanced and rejecting *Franchise Holdings* holding that the *Falk* factors are disjunctive). The decision of whether to set aside a default judgment is discretionary. *TCI*, 244 F.3d at 695.

Targus maintains that the entry of default should be set aside because it did not act with culpability, it has a meritorious defense, and Plaintiff will not be prejudiced.

A. CULPABILITY

A defendant's conduct is culpable for the purposes of the *Falk* analysis where there is "no explanation of the default inconsistent with a devious, deliberate, willful, or bad faith failure to respond." *Employee Painters' Trust v. Ethan Enter., Inc.*, 480 F.3d at 1000 (*quoting TCI*, 244 F.3d at 698).

Targus maintains that it did not act with culpability because Mr. Harvey was unaware of the second amended complaint, he had no notice of the impending default, he reasonably believed settlement was imminent, and Mr. Richey believed Mr. Harvey would handle matters relating to the litigation. Dkt. 68 at 5. In opposition, Plaintiff asserts that Targus failed to file a response to the original complaint filed in November 2008. Dkt. 73 at 6. Plaintiff further contends that Targus has needlessly delayed settlement negotiations. *Id*. Finally, Plaintiff contends that Targus acted with culpability because it received notice of the second amended complaint via email to Mr. Harvey and service to Mr. Richey, but failed to respond. *Id*. at 7.

The Court concludes that Targus has provided an explanation for its failure to respond to the second amended complaint that satisfies the liberal standard set out in *TCI*: its explanation is not consistent with a "devious, deliberate, willful, or bad faith failure to respond."

First, the Court notes that Targus filed a motion to set aside the entry of default shortly after default was entered.

Second, Targus does not appear to have acted willfully, or in bad faith, in failing to respond to the second amended complaint. While Mr. Richey should have obtained counsel on behalf of Targus and responded to the original complaint, at least as of early 2009, Plaintiff assured Mr. Richey that it would dismiss Targus from the lawsuit if Mr. Richey completed the proposed settlement documents. While Plaintiff argues that Mr. Richey needlessly delayed this process, it is not clear to the Court that Mr. Richey did so

in bad faith as to delay his duty to respond to the lawsuit. It appears reasonable that Mr. Harvey and Mr. Richey believed settlement negotiations were still pending.

The Court notes, however, that it is unclear why Targus failed to appear in this matter. As reflected by emails sent to Mr. Richey by Plaintiff, Mr. Richey was warned several times that Plaintiff may seek default against Targus. In addition, Mr. Richey was served with the second amended complaint. Targus' argument that Plaintiff should have served Mr. Harvey with the second amended complaint is undermined by two factors: (1) Plaintiff was under the impression that Mr. Harvey was not representing Targus in the litigation, and (2) Mr. Harvey had not filed any notice of appearance. Because no attorney had appeared on Targus's behalf, service on Targus's registered agent appears proper. *See* Fed. R. Civ. P. 4(h) (service on corporation); *see also* 4B *Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d* § 1146 (2009) ("amended or supplemental pleadings must be served on parties who have not yet appeared in the action in conformity with Rule 4"). While not amounting to culpability as defined by *TCI*, Mr. Richey should have either consulted Mr. Harvey or retained counsel to represent Targus's interests in federal court.

While Targus has provided an explanation sufficient to satisfy *TCI*, it should still be required to reimburse Plaintiff for the reasonable fees associated with responding to Targus's motion to set aside the entry of default. *See* Section II(D), *supra*.

B. MERITORIOUS DEFENSE

"A defendant seeking to vacate a default judgment must present specific facts that would constitute a defense. . . . But the burden on a party seeking to vacate a default judgment is not extraordinarily heavy." *TCI*, 244 F.3d at 700.

Targus maintains that it has a meritorious defense because, while it has admitted that it had "Gary Loomis branded products in the marketplace," Targus does not admit that it actually sold any of these products, or that the "products were or are infringing." Dkt. 84 at 4. Targus further argues that it quickly withdrew Gary

Loomis products after receiving a cease-and-desist letter, undermining any claim that Targus acted with malice or willfulness. *Id*. at 5. Finally, Targus maintains that it requires further discovery to put forth the necessary evidence in support of its defense. *Id*.

> The elements of a Lanham Act violation are: first, the defendant used in connection with trade a false designation of origin or false description or representation; second, the defendant caused such goods and services to enter into commerce; and third, that the plaintiff is a person who believes that he or she is likely to be damaged as a result.

1st Nat. Reserve, L.C. v. Vaughan, 931 F. Supp. 463, 466 (E.D. Tex. 1996).[2]

For purposes of setting aside entry of default, the Court concludes that Targus has asserted a meritorious defense. There appears to be factual disputes concerning the issue of whether Targus actually sold Gary Loomis products, as well as issues concerning intent. The Court also notes that this action is in its early stages and the scheduling order has only recently been issued.

C. PREJUDICE

To be prejudicial, the setting aside of a judgment must hinder a plaintiff's ability to pursue his or her claim. *TCI*, 244 F.3d at 701. That is, the delay caused to a plaintiff as a result of pursuing the default judgment "must result in tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion." *Id*. (*quoting Thompson v. Am. Home Assur. Co.*, 95 F.3d 429, 433-34 (6th Cir. 1996)).

The Court concludes that the setting aside of the entry of default will not prejudice Plaintiff because the delay will not hinder Plaintiff's ability to pursue its claim.

D. CONDITIONS

A district court has discretion in setting conditions for setting aside an entry of default. *See Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La. Hydrolec*, 854

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[2] The parties did not set out the elements of Plaintiff's claim; the elements as set out in this order are not binding throughout this litigation.

F.2d 1538, 1546-47 (9th Cir. 1988); *see also* Fed. R. Civ. P. 60(b) (on "just terms" a court may relieve a party from final judgment).

The imposition of such conditions commonly includes increased legal costs incurred as a result of responding to the motion to set aside a default. 10A *Wright, Miller & Kane* § 2700.

By failing to respond to the second amended complaint, Targus caused Plaintiff to incur unnecessary costs. Accordingly, the setting aside of the entry of default is conditioned on Targus's reimbursement of Plaintiff's reasonable legal fees for responding to its motion to set aside entry of default.

III. ORDER

Therefore, it is hereby **ORDERED** that

Defendant's motion to set aside the entry of default (Dkt. 68) is **GRANTED**, **with conditions**. Defendant shall demonstrate satisfaction of the conditions set out in this order on or before September 11, 2009. The entry of default will be set aside upon Defendant's satisfaction of these conditions.

DATED this 25th day of August, 2009.

BENJAMIN H. SETTLE
United States District Judge