IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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KOALA CORPORATION,

ORDER

Plaintiff,

03-C-0429-C

v.

WIZARD WORKS PRODUCT
DEVELOPMENT COMPANY, INC.
and MARK ARAGONA,

Defendants.

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In this civil action, plaintiff Koala corporation seeks monetary and injunctive relief from defendants Wizard Works Product Development Company, Inc. and its president Mark Aragona for patent infringement pursuant to 35 U.S.C. § 271. Jurisdiction is present. 28 U.S.C. § 1331. The action has been stayed against defendant Wizard Works until the conclusion of its bankruptcy proceedings. Defendant Aragona was personally served on August 27, 2003, with a copy of the complaint and summons indicating that he had twenty days in which to file an answer. Defendant Aragona did not file an answer within the twenty days and an entry of default was issued on September 24, 2003. Currently before the court is defendant Aragona's motion to vacate the entry of default pursuant to Fed. R. Civ. P.

55(c). The motion will be granted because defendant Aragona has shown that he (1) had "good cause" for the default; (2) took quick action to correct it; and (3) has a meritorious defense to the complaint.

A. Good Cause

Generally, an explanation for the delay that does not indicate willful neglect on the part of the defaulting party will establish good cause to reopen a case. North Central Illinois Laborers' District Council v. S.J. Groves & Sons Co., Inc., 842 F.2d 164, 167 (7th Cir. 1988) ("the 'willfulness' of the defaulting party's actions is the 'common thread' which runs through our decisions"); C.K.S. Engineers, Inc. v. White Mountain Gypsum Co., 726 F.2d 1202, 1205 (7th Cir. 1984). See also Davis v. Hutchins, 321 F.3d 641, 646 (7th Cir. 2003) (district court is justified in entering default against party and refusing to vacate it when party has "exhibited a willful refusal to litigate the case properly.").

Defendant Aragona argues that he did not file his answer in time because he relied on the advice of a New York attorney who told him that the period for answering is extended to thirty days when he is served by "nail and mail" (attaching the complaint and summons to the front door of the defendant's home and also mailing him a copy). Defendant used poor judgment in relying on the word of a lawyer who did not have much information about the case when the summons form stated plainly that defendant had twenty days in which

to file an answer. It is odd that defendant Aragona would assume that he had an extended period of time when in fact he was served personally and not just by "nail and mail."

However, it does not appear that defendant Aragona was willfully avoiding defending this suit; at most he was willfully delaying defending the suit and not for a particularly long period of time. He retained counsel just after the twenty days had lapsed and his attorney talked with plaintiff's attorney just thirteen days after the lapse and only six days after the default was entered. This single incident of delay did not meaningfully prejudice plaintiff or interfere with the efficient management of this court's docket. Merrill Lynch Mortgage Corp. v. Narayan, 908 F.2d 246 (7th Cir.1990). Further, there is a "well established policy favoring a trial on the merits over a default judgment." North Central Illinois Laborers' District Council v. S.J. Groves & Sons Co., 842 F.2d 164, 167 (7th Cir. 1988).

B. Prompt Corrective Action

It appears that defendant took prompt action to correct the default; he retained counsel at some point during the week the default was entered and had his attorney contact plaintiff's attorney within six days of the entry of default. Plaintiff's only counter-arguments are that (1) defendant described that actions of his attorney as "immediate" but there must have a lapse of several days; (2) plaintiff's counsel does not remember whether the issue of a stipulation to have the default set aside came up during the first communication; and (3)

plaintiff's counsel initiated the second communication one week later. The applicable standard requires only that a party in default take quick action, not instantaneous action. Jones v. Phipps, 39 F.3d 158, 162 (7th Cir. 1994). Even if plaintiff is correct as to all three of these arguments, defendant's corrective action was still "quick."

C. Meritorious Defense

Plaintiff argues that defendant failed to state a meritorious defense in its motion. Defendant has asserted that plaintiff failed to state a claim against him for infringement or inducement of infringement. A corporate officer may be held liable either when he induces the corporate infringement or when he knows of the infringement and there is a reason to pierce the corporate veil. Hoover Group, Inc. v. Custom Metalcraft, Inc., 84 F.3d 1408, 1411-12 (Fed. Cir. 1996). In his initial motion, defendant seems to be arguing that plaintiff has failed to state a claim of inducement against him because it neither asserted that defendant actively and knowingly assisted with the corporation's infringement or that plaintiff had any basis for piercing the corporate veil (in which case, he could be held individually liable for mere knowledge of infringement). Plaintiff concedes that it did not attempt to make out a claim for piercing the corporate veil. It points to portions of its complaint in which it alleged that defendant both knew of the infringement and actively participated in the sale and installation of the allegedly infringing structure. Defendant

argues in his reply brief that he put the issue of his personal liability at issue by stating in his affidavit that he acted at all times in his official capacity. I need not resolve the parties' dispute about the validity of the failure to state a claim defense because defendant has attached to his reply brief a copy of his answer in which he provides a number of clearly meritorious defenses such as patent invalidity, laches or estoppel. "A meritorious defense is not necessarily one which must, beyond a doubt, succeed in defeating a default judgment, but rather one which at least raises a serious question regarding the propriety of a default judgment and which is supported by a developed legal and factual basis." Jones v. Phipps, 39 F.3d 158, 165 (7th Cir. 1994).

ORDER

IT IS ORDERED that defendant Aragona's motion to vacate the entry of default pursuant to Fed. R. Civ. P. 55(c) is GRANTED. The clerk's office is directed to vacate the entry of default against defendant Aragona and set this case for a prompt preliminary pretrial

conference before U.S. Magistrate Judge Stephen L. Crocker.

Entered this 5th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge