

**Dunster Props. Ltd. v Roc Apparel Group LLC**

2007 NY Slip Op 34109(U)

December 12, 2007

Supreme Court, New York County

Docket Number: 0600895/2007

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 600895/2007

DUNSTER PROPERTIES LIMITED

vs

ROC APPAREL GROUP LLC

Sequence Number : 001

SUMMARY JUDGMNT/LIEU COMPLAINT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*is decided for*

*affixed*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

**FILED**  
DEC 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: \_\_\_\_\_

*12/12/07*

*[Signature]*

**EMILY JANE GOODMAN** S.C.

Check one:

FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 17

-----X  
DUNSTER PROPERTIES LIMITED,

Plaintiff,

-against-

Index № 600895/07

ROC APPAREL GROUP LLC, f/k/a URBAN  
MENSWEAR LLC,

Defendant.

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EMILY JANE GOODMAN, J.S.C.:

**FILED**  
DEC 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

In this motion for summary judgment in lieu of complaint, plaintiff Dunster Properties Limited (Dunster) seeks an order, pursuant to CPLR 5303, recognizing a money judgment entered by the West London County Court of the United Kingdom against defendant Roc Apparel Group LLC, f/k/a Urban Menswear LLC (Urban Menswear).

Pursuant to a written "Tenancy Agreement," Dunster, as landlord, leased certain premises located at 64-65 Glebe Place, Chelsea, London (the premises) to Urban Menswear, as tenant, for one year commencing on January 2, 2004 and ending on January 1, 2005. At the end of the lease term, a disagreement arose between Dunster and Urban Menswear concerning the timing and manner in which the premises were vacated. As a result, Dunster instituted a Claim for Possession of the premises in the West London County Court (UK court), United Kingdom (UK) on February 10, 2005. In that action, Dunster named Urban Menswear LLC as the "First Defendant" and, non-party in the instant action, Daman Dash (Dash) as the "Second Defendant." Dash is identified in the UK pleading device called a "Particulars of Claim" as an officer/employee of Urban Menswear who, as permitted under clause 2.22 of the Tenancy

Agreement, was the actual tenant residing in the premises at Glebe Place. According to Dunster, Dash, and therefore, Urban Menswear, did not surrender possession of the premises until March 24, 2005. According to Urban Menswear, the premises were vacated at least two months prior to the end of the leasehold, in October 2004, at which time a few, minor items were admittedly left behind for disposal.

The hearing/trial<sup>1</sup> date for the Claim of Possession was set for March 15, 2005. It is undisputed that, in order to effect service on Urban Menswear, which is an American company without an address in the UK, Dunster served a copy of the legal documents (the UK “Claim Form”) on Boodle Hatfield, the First and Second defendants’ London-based solicitors at the time the lease was executed. Service was made in accordance with the preamble to the Tenancy Agreement which states that service on Urban Menswear “shall be C/-Boodle Hatfield, 61 Brook Street, London W1K 4BL.” The Claim of Possession was heard, as scheduled, on Tuesday, March 15, 2005, before District Judge Nicholson in the absence of the First and Second defendants, and in the absence of a solicitor on these defendants’ behalf. At the heart of the possession claim was the tenant’s alleged failure to remove all items from the premises, to return keys, and to arrange a time for a “check out” with an inventory clerk. At the conclusion of the proceedings, District Judge Nicholson issued an order and judgment for possession for the premises. The judgment, which was entered on March 15, 2005 (March judgment), awarded damages to Dunster in the amount of £50,224.00, plus additional damages in the amount of £688.00 per day from March 15, 2005 until possession was delivered, plus costs in the amount of

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<sup>1</sup>The UK documents alternately use the words “hearing” and “trial” when referring to the Claim of Possession proceedings held on March 15, 2005.

£5,000.00. As possession was ultimately found to have been delivered nine days later, on March 24, 2005, the sum of £6,129.00 (£688.00 per day times nine days) was added to the damages for a total award of £61,416.00.

On May 6, 2005, Urban Menswear sought, by application under Part 6 and Part 39.3 of the UK Civil Procedure Rules (CPR), an order setting aside the March judgment. The bases of the application were that: (1) Dunster failed to effect proper of process, rendering the March judgment a nullity; (2) the premises had been timely vacated; and (3) the few items left behind by Dash were insubstantial;<sup>2</sup> and (4) lease clause § 2.45 (b) provided for the landlord's disposal, at the tenant's expense, of any items left behind at the end of the tenancy.

On July 22, 2005, a hearing was held before District Judge Wright with respect to the First and Second defendant's application. Both claimant and the First and Second defendants were represented by counsel/solicitors at the hearing which examined the merits of the application. By order and judgment of the West London County Court, dated August 5, 2005 (August judgment), District Judge Wright: (1) dismissed the First Defendant's application and refused the First Defendant's application for an appeal; (2) set aside the March judgment as against the Second Defendant, without costs; (3) directed First Defendant to pay Claimant's costs subject to a detailed assessment should the parties not come to an agreement as to costs; (4) directed the First Defendant "do pay an interim sum of £7,500.00 on account of the Claimant's costs, such sum to be paid by 4.00 pm on 12<sup>th</sup> August 2005"; and (5) barred Urban Menswear from objecting to Dunster's assessment of costs if Urban Menswear fails to pay the interim sum

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<sup>2</sup>The Particulars of Claim describes the property left behind as clothes, pictures, toiletries and other personal items.

by August 12, 2005. Attached to the order denying the application, is a 10-page transcript of the judgment (judgment transcript) in which District Judge Wright sets forth the basis for his ultimate determination that the requisite criteria were not satisfied for setting aside the March judgment pursuant to Part 39.3 of the CPR.

It is undisputed that Urban Menswear did not pay the interim sum of £7,500.00 on or before August 12, 2005, nor did it dispute Dunster's bill of costs. As a result, a "Default Costs Certificate" was issued by the UK court on December 9, 2005, ordering defendant to pay £27,065.05, representing the plaintiff's costs associated with defendant's application proceeding. This amount, added to the March judgment award of £50,224.00, plus costs of £5,000.00, plus the additional damage award of £6,192.00, totals £88,472.05. Dunster was also awarded post-judgment interest which was calculated from the date of the award at a rate of 8%, for a total, as of February 12, 2007, of £102,520.59.

Dunster now moves in Supreme Court, New York County, for an order, pursuant to CPLR 5303, recognizing the money judgment entered by the UK court against defendant in the amount of \$199,915.15, plus interest through the date of judgment at the rate of 8% per annum. To arrive at this figure in US dollars, Dunster applied the rate of exchange of the British Pound to the US dollar (£1 British Pound = \$1.95 US) that was effect on February 12, 2007, the date on which Dunster prepared the instant motion papers. Defendant, who has, apparently, not paid any portion of the UK judgment, opposes its recognition by the New York courts.

The principle of international comity is codified in CPLR Article 53, the Uniform Foreign Country Money-Judgments Recognition Act. Article 53 was enacted "to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of

New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here” (CIBC Mellon Trust Co. v Mora Hotel Corp. N.V., 100 NY2d 215, 221 [2003]). CPLR 5302 provides: “[t]his article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.” CPLR 5303 provides: “[e]xcept as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by . . . a motion for summary judgment in lieu of complaint . . . .”

It is defendant’s contention that it would be inappropriate for this court to recognize the foreign judgment because plaintiff did not effect personal service on defendant and jurisdiction was not obtained by the UK courts. As a result of the ineffective service, Urban Menswear and Dash did not have adequate notice of the proceedings and were not given an opportunity to be heard on the merits. Urban Menswear also contends that excessive costs were added onto the judgment by the UK clerk of the court and are not part of the judgment and, therefore, not subject to recognition under CPLR Article 53. Without so stating in its affirmation in opposition to plaintiff’s motion, defendant appears to rely on subsections (a) (1) and (b) (2) of CPLR 5304, the statute which delineates the grounds for non-recognition of a foreign country judgment. CPLR 5304 (a) (1) provides that a foreign judgment is not conclusive if the judgment was rendered “under a system which does not provide. . . procedures compatible with due process” and CPLR 5304 (b) (2) provides that the judgment need not be recognized if “the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend.”

The arguments presented by defendant do not support an order denying plaintiff's motion for recognition of the UK Judgment. Jurisdiction was properly obtained by the UK court as service was made in accordance with the CPR and at the address set forth in the lease. The UK court reviewed the jurisdictional question raised by Urban Menswear when it examined a series of related issues as part of its application process. One of the UK court's mandatory inquiries as part of the application process involved its review of the reasons proffered by the First and Second defendants for not attending the March 2005 possession trial. The defense took the position then, as it does now, that it did not receive proper notice of the trial due to ineffective service of process. While there is no dispute that service was made upon its former solicitors, it was argued that Boodle Hatfield had ceased to act for Urban Menswear by the time the proceedings were issued. The defense solicitor argued that CPR § 6.15 (1) (a), service on a party at an address given in an agreement is only for actions brought to enforce the terms of that agreement. The defense reasoned that, because the claim is an action for possession alleging trespass by the tenants, Dunster cannot rely upon CPR § 6.15 for effecting service pursuant to the contract, and no authorization was granted to Boodle Hatfield to accept service of process for a claim sounding in trespass.

Characterizing this argument as one which creates an artificial distinction, District Judge Wright rejected the argument and found that valid service of the Claim Form was made on Urban Menswear by effecting service on Boodle Hatfield. The court further explained that service on Boodle Hatfield was valid because, regardless of whether Boodle Hatfield were still defendants' solicitors at the time that the possession claim arose, the Tenancy Agreement states that Boodle Hatfield's address would be the tenant's address for the acceptance of service. The preamble of

the Tenancy Agreement identifies the tenant as “Urban Menswear Ilc [sic] whose address for service in the United Kingdom shall be C/-Boodle Hatfield, 61 Brook Street, London W1K 4BL,” and section 4.12 of the lease states:

[a]ny notice or document required or authorised to be served by the Landlord hereunder or any notice or document in relation to or in connection with or in anticipation of any legal proceedings may be served on the Tenant at the Premises or at the Tenant’s address in the United Kingdom given for service herein. Any notice required or authorised to be served by the Tenant shall be served at the address of the Landlord as set out in this agreement or as may be advised in substitution thereof from time to time. Subject to the forgoing notice shall be sufficiently served if served in accordance with the provisions of Section 196 of the Law of Property Act 1925 (as amended).

There is no question that the issue of ineffective service was raised by defendants in the UK application proceeding and that the presiding judge examined and rejected the arguments offered. The same arguments, which have been renewed before this court, remain unavailing. Urban Menswear’s apparent failure, by oversight or otherwise, to notify the landlord that Boodle Hatfield was no longer its solicitor and/or that it was identifying some other entity and/or locale within the UK jurisdiction as Urban Menswear’s address for service, created any notice problems which may have arisen. Moreover, the risks associated with such failure or oversight must be borne by Urban Menswear and do not invalidate service (Colonial Sand & Stone Co. v Enrico & Sons Contractors, Inc., 66 AD2d 705 [1<sup>st</sup> Dept 1978]).

Like the UK court, this court is also unpersuaded by defendant’s excuse for failing to appear once it became aware of the impending March 2005 trial. It was argued at the application hearing that: (1) DeMichael, the relevant director of Urban Menswear, was surprised to learn that possession proceedings had been instituted; (2) DeMichael had insufficient notice of the scheduled trial and was often traveling; and (3) DeMichael was, and is, not comfortable doing

business technologically (via e-mail and the like), and as a result, he did not read all relevant e-mails, and did not realize that trial was going to take place. According to the judgment transcript, District Judge Wright credited the evidence presented at the application trial as proof that, on February 14, 2005, following receipt of the Claim Form, Boodle Hatfield e-mailed DeMichael attaching copies of the Claim Form containing information as to when and where the Claim of Possession trial was scheduled to take place. District Judge Wright credited evidence of a further e-mail from defendant's solicitor to Urban Menswear on March 7, 2005, confirming that a trial was being held on March 15, 2005 on the possession claim, and accepted the witness statement of Dunster's solicitor, Mr. Kilcoyne, that prior to the possession trial, he had exchanged both phone calls and e-mails with DeMichael concerning the consequences of failing to vacate the premises in accordance with the terms of the lease. Defendant's protestations notwithstanding, it cannot be said that Urban Menswear did not receive notice of the UK proceedings in sufficient time to enable it to defend itself (CPLR 5304 [b] [2]).

Also relevant to the application process and ultimate determination, was the time with which defendants moved to set aside the March judgment. The UK court evaluated defendants' evidence in this regard and found it both inadequate and unavailing. The proof consisted primarily of witness statements indicating that DeMichael was surprised to learn that possession proceedings had been instituted, and of witness statements indicating that Urban Menswear, by DeMichael, "subsequently" became aware of the March judgment sometime between the date it was issued, on March 15, 2005, and the date on which defendant contacted its UK solicitor, on March 22, 2005. The judgment transcript reveals District Judge Wright's displeasure with: (1) the failure of defendant to submit direct evidence from DeMichael; (2) the lack of specificity

with respect to defendant's assertions; and (3) the lack of specificity with respect to dates and times referenced by defendant. The District Judge concluded that the delay of six weeks and three days between the time defendant learned of the March judgment and the time defendant made the application to set aside the judgment, was neither prompt nor timely. The UK court clearly rejected defendants' arguments with respect to notice and jurisdiction, and the fact the Urban Menswear's application was not successful for the reasons set forth above, does not create a jurisdictional issue within the meaning of CPLR 5304 (a) (2).

Moreover, defendant unconvincingly argues it was not afforded due process because it has not had an opportunity to be heard on the merits. The judgment transcript contains the court's analysis of the merits of the underlying possession claim in its effort to determine whether Urban Menswear had a reasonable prospect of success at trial. To this end, the District Judge accepted the claimant's interpretation of the Tenancy Agreement, and specifically found that, under sections 2.13 and 2.35 of the lease, the removal of all possessions from the premises was an integral part of the tenant's obligation to vacate the premises by January 1, 2005. Therefore, Urban Menswear's admitted failure to ensure that all of Dash's property was removed from the premises on or before January 1, 2005, entitled Dunster to the judgment of possession and an award of damages.

With respect to defendant's objection to the costs and interest fees imposed, Urban Menswear argues that it would be unconscionable for this court to recognize the costs and interest fees added by the UK clerk of the court because the amounts are not only excessive, but are not part of the court's judgment, and therefore, not subject to recognition under Article 53 of the CPLR. Defendant offers neither case law nor statutory law in support of this argument, and

fails to address the obvious fact that Urban Menswear entered this contract with the advice of its counsel, solicitors Boodle Hatfield. By executing the Tenancy Agreement, both landlord and tenant accepted section 4.10, which is a forum selection and choice of law clause. Section 4.10 provides that the agreement is governed by English law and that the parties submit to the jurisdiction of the courts of England and Wales. The costs and interest added to the damages awarded by the UK courts are permitted under the laws of the UK to which Urban Menswear voluntarily subjected itself by signing the lease. Other than obtaining unfavorable results, Urban Menswear offers no evidence to substantiate its claim that it has been denied due process in the UK courts, or that any of the decisions made by the UK courts violate any public policy of New York (see CPLR 5304 [a] [1]). There is not only no merit to defendant's assertion that the costs imposed by the UK clerk of the court are not part of the foreign judgment, but it was the repeated failure of Urban Menswear's to meet payment deadlines which triggered and compounded the unfavorable results.

Finally, it is well settled that "[a]n obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it" (Die Deutsche Bank Filiale Nurnberg v Humphrey, 272 US 517, 519 [1926]; Sung Hwan Co., Ltd. v Rite Aid Corp., 16 Misc 3d 1104 [A], 2007 NY Slip Op 51263 (U), Sup Ct, New York County 2007). Contrary to the position advanced by Urban Menswear, the foreign money judgment which is stated in British pounds must be converted to US dollars at the time the New York judgment is entered, not at the time the UK judgment was entered. Although neither party has cited relevant precedent, nor has the court has found relevant appellate precedent, it is not logical it reach any conclusion other than the amount owed must be

converted at the time of the entry of judgment and the applicable conversion rate would therefore be the conversion rate at that time.

Accordingly, based upon defendant's failure to articulate any basis, under Article 53 of the CPLR, for nonrecognition of the UK money judgment, it is the decision of the court to grant that aspect of Dunster's motion which seeks an order, pursuant to CPLR 5303, recognizing the money judgment entered by the West London County Court of the United Kingdom against defendant Roc Apparel Group LLC, f/k/a Urban Menswear LLC.

It is hereby

ORDERED that motion is granted in accordance with the terms stated herein; and it is further

ORDERED that upon service of a copy of this Decision and Order with notice of entry, and proof of the conversion rate on the date plaintiff seeks to enter judgment and the interest rate in Britain from February 12, 2007 through the date of entry of judgment, the Clerk of the Court is directed to enter judgment in favor of plaintiff as against defendant in the aggregate amount of the US dollar equivalent of £102,520.59 British pounds and plus 8 percent interest in British pounds for the period from February 12, 2007 through entry of judgment, with the conversion calculation to be made based upon the exchange rate set on the date the judgment is entered by the Clerk of the Court, plus cost and disbursements as taxed by the Court.

**This constitutes the Decision and Order of the Court.**

Dated: December 12, 2007

**FILED**  
DEC 19 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**