

**Marc Jacobs Intl., LLC v David Anthony
Easton, Inc.**

2008 NY Slip Op 32173(U)

July 29, 2008

Supreme Court, New York County

Docket Number: 0603159/2007

Judge: Walter B. Tolub

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SCANNED ON 8/12/2008
[* 1]
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB
Justice

PART 15

Index Number : 603159/2007
MARC JACOBS INTERNATIONAL
vs
EASTON, DAVID ANTHONY
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

AUG 01 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/29/08

WALTER B. TOLUB J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----x
MARC JACOBS INTERNATIONAL, LLC

Plaintiff,

-against-

DAVID ANTHONY EASTON, INC., d/b/a
EASTON -MOSS & COMPANY,

Defendant.

-----x

Index No. 603159/07
Mtn Seq. 001

FILED
AUG 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

This is Plaintiff's motion for partial summary judgment as to the issue of whether Defendant is liable in trespass.

Facts

The facts are undisputed. Since February 1, 1998, Marc Jacobs International, LLC ("MJI") has leased the fifth floor of a building located at 72 Spring Street, New York, NY (the "Building"). The building is owned by the Spring Street Co. LLC c/o Propeller Co. LLC (the "Landlord"). MJI's lease for the fifth floor, dated July 21, 2004, set forth MJI's right to first refusal with respect to certain premises upon their availability, including the seventh floor of the Building.

Defendant David Anthony Easton, Inc., d/b/a Easton-Moss & Company ("Easton"), leased the entire seventh floor of the Building from the Landlord. Easton's ten year lease for the seventh floor terminated on June 30, 2007. Easton knew of MJI's right of first refusal to the seventh floor lease, however they

claim that they only heard rumors that MJI would exercise the option.

On July 11, 2006 and August 25, 2006, the Landlord notified MJI that the 7th floor would be available starting July 1, 2007. MJI exercised its option for the seventh floor on September 6, 2006 by written notification to the Landlord. MJI and the Landlord entered into a lease dated September 11, 2006 for the seventh floor of the Building, for a ten year term to commence on July 1, 2007.

Easton had not made arrangements to locate a new commercial space and vacate the seventh floor by June 30, 2007. Due to Easton's holdover, MJI was unable to take possession of the seventh floor on July 1, 2007 pursuant to the September 11, 2006 lease.

On July 11, 2007, the Landlord brought a holdover proceeding against Easton in the Civil Court of the City of New York (Spring Street Co., LLC v. David Anthony Easton, Inc. d/b/a Easton-Moss & Co., L&T Index 78690/07). The petition claimed that the Easton lease expired by its own terms on June 30, 2007 and that Easton continues to occupy, holdover and possess the seventh floor without the permission, authority or consent of the Landlord.

On August 2, 2007, MJI made a written demand to Easton to vacate the seventh floor. Easton informed MJI that it would take time to vacate the premises since other arrangements had not yet

been made.

On September 26, 2007, Easton and the Landlord entered into a Stipulation of Settlement ("Stipulation") which was So-Ordered by the Landlord-Tenant Judge handling the holdover action. In the Stipulation Easton and the Landlord agreed to: (1) the issuance of a Final Judgment of Possession and warrant of eviction, with the execution thereof stayed through December 16, 2007; (2) That time was of the essence; (3) that Easton would pay use and occupancy retroactively and prospectively through December 15, 2007; and (4) that Easton would pay the Landlord's attorneys' fees (*emphasis added* Defendant's Ex. C).

Defendant vacated the seventh floor on December 7, 2007.

Plaintiff argues that Defendant is liable for trespass since they remained on the seventh floor past the expiration of their lease and that pursuant to the September 2006 lease Plaintiff was entitled to legal possession of the seventh floor as of July 1, 2007. Defendant argues that the Stipulation entered into with the landlord in September 2007, provided them with permission to stay on the premises through December 15, 2007 and that therefore there can be no action for trespass.

Discussion

A plaintiff may have a final judgment for an admitted portion of a claim, only where, the defendant admits without qualification a part of plaintiff's claim and it appears that

there is no real dispute in regard to any fact affecting plaintiff's right to enforce that part of the claim (Fleder v. Itkin, 294 NY 77 [1945]). An admission of liability by the defendant of a part of a claim does not have to be an admission of the very cause of action sued on by plaintiff, but it is sufficient if defendant admits a liability based upon the same transaction that is the basis of plaintiff's claim (Lieberman v. Penn-Union Steel Corp., 69 NYS2d 595 [NY Cty. Ct. 1947]).

Here, Plaintiff seeks partial summary judgment solely as to whether the defendant is liable for trespass. There are two elements that establish liability for trespass to property: (1) plaintiff's exclusive *legal* possession of the property; and (2) defendant's intentional intrusion on that property (*emphasis added* Mondello v. Newsday, Inc., 6 AD3d 586 [2nd Dept 2004]).

First, Plaintiff must show that it had the exclusive legal right to possess the property. Where the parties' rights to possession of a leased space have already been determined, it is not necessary that the party determined to have the right of possession be in actual possession before bringing a trespass action with respect to the space (Kronish Lieb Weiner & Hellman LLP v. Tahari, LTD, 35 AD3d 317 [1st Dept 2006]).

"Trespass is an intentional harm at least to this extent: while the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must intend the act

which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness (citation omitted)" (Phillips v. Sun Oil Co., 307 NY 328, 331 [1954]).

Defendant does not dispute that plaintiff had a lease for the seventh floor commencing July 1, 2007 and that Defendant remained on the premises well after Plaintiff was supposed to take possession of the premises. Rather, Defendant argues that the landlord consented to the Defendant remaining on the seventh floor through December by virtue of the So-Ordered Stipulation entered into in the holdover proceeding and that such consent is a defense to an action in trespass (Shiffman v. Empire Blue Cross and Blue Shield, 256 AD2d 131 [1st Dept 1998]).

This court disagrees. Neither the Plaintiff nor the landlord granted Defendant permission to remain on the premises. The Stipulation states that Defendant agrees to a Final Judgment of Possession and a warrant of eviction to issue forthwith. The Stipulation did not grant Defendant any additional possessory rights, it did memorialize the Landlord's right to evict Defendant because it had no legal right to remain on the premises. With the in mind, the Landlord agreed to provide the December 16, 2007 surrender date and arrangements for compensation, but did not grant possessory rights.

Furthermore, even if the Landlord granted Defendant permission to remain on the premises, it cannot bar Plaintiff's claim for trespass. As stated above, because of the September 2006 lease between the Plaintiff and the Landlord, Plaintiff had the exclusive legal possession as of July 1, 2007 and is deemed to be in constructive possession of the premises.

Accordingly, it is

ORDERED that Plaintiff's motion for partial summary judgment is granted on its claim for trespass.

Counsel for the parties are to appear for a preliminary conference on September 19, 2008 at 11 AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 7/29/08

FILED
AUG 01 2008
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NEW YORK

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HON. WALTER B. TOLUB, J.S.C.