

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: December 10, 2010

Opposition No. 91197103

Sporting Supplies
International, Inc.

v.

Star Vector Corporation

Michael B. Adlin, Interlocutory Attorney:

Applicant's putative motion to dismiss under Fed. R. Civ. P. 12(b)(6), filed December 3, 2010, will be given no consideration as it is not a true motion to dismiss.

Indeed,

[i]n order to withstand a motion to dismiss for failure to state a claim, a plaintiff need only allege such facts as would, if proved, establish that (1) the plaintiff has standing to maintain the proceedings, and (2) a valid ground exists for opposing the mark. ... For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to plaintiff. See Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc., 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993); see also 5A Wright & Miller, Federal Practice and Procedure: Civil 2d §1357 (1990). ... The purpose of a Rule 12(b)(6) motion is to challenge "the legal theory of the complaint, not the sufficiency of

any evidence that might be adduced" and "to eliminate actions that are fatally flawed in their legal premises and destined to fail ..." Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc., supra at 26 USPQ2d 1041.

Fair Indigo LLC v. Style Conscience, 85 USPQ2d 1536, 1538 (TTAB 2007); see also, Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998).

Here, applicant's motion does not challenge the sufficiency of opposer's pleading. Rather, applicant makes arguments on the merits regarding its claimed date of first use. Applicant's motion is therefore construed as a motion for summary judgment, TBMP § 503.04 (2d ed. rev. 2004), and is premature. Trademark Rule 2.127(e)(1) ("A party may not file a motion for summary judgment until the party has made its initial disclosures ..."). After the exchange of initial disclosures, applicant may make a motion for summary judgment. Applicant should be aware, however, that the claimed date of first use in its involved application is not evidence, and any motion for summary judgment based on applicant's claim of priority should be accompanied by evidence of applicant's alleged date of first use. Trademark Rule 2.122(b)(2); Levi Strauss & Co. v. R. Josephs Sportswear Inc., 28 USPQ2d 1464, 1467 (TTAB 1993); TBMP § 704.04. Dates remain as set in the Board's order of October 26, 2010.
