

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

Baxley

Mailed: January 7, 2011

Cancellation No. 92051645

Masonite International  
Corporation and Masonite  
Corporation

v.

Doors for Builders, Inc.

**By the Trademark Trial and Appeal Board:**

On January 6, 2011, i.e., on the day prior to the due date for respondent's pretrial disclosures, respondent filed a motion for summary judgment in its favor on the ground of priority. However, any motion for summary judgment should be filed prior to the commencement of trial, and the Board, in its discretion, may deny as untimely any motion for summary judgment filed thereafter. See Trademark Rule 2.127(e) (1).

Under the Board notice instituting this proceeding, trial commenced on August 31, 2010. Thus, any motion for summary judgment in this proceeding should have been filed by not later than August 30, 2010.

After the close of petitioner's original testimony period, opposer filed a consented motion to reopen its testimony period, which the Board granted in an October 19,

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2010 order. In that order, the Board reset pretrial disclosure deadlines and testimony periods, with trial herein commencing again on November 18, 2010. However, even if the parties agreed to allow service of discovery responses and documents after the commencement of trial herein, so agreeing did not entitle them to file motions for summary judgment after the commencement of trial. See *La Maur, Inc. v. The Bagwells Enterprises, Inc.*, 193 USPQ 234 (Comm'r Pat. 1976) (resetting of dates does not make timely an untimely action). Based on the foregoing, respondent's motion for summary judgment is untimely and is denied on that basis.<sup>1</sup>

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<sup>1</sup> In its motion, respondent seeks entry of summary judgment on the ground that petitioner cannot establish prior use in commerce of its pleaded GLENVIEW mark on the identified goods. In addition to establishing priority through use of a mark in interstate commerce, priority may be established on the basis of intrastate use of a mark or use of a term as a trade name. See *Panda Travel Inc. v. Resort Option Enterprises Inc.*, 94 USPQ2d 1789 (TTAB 2009). Further, priority can be established through use of a mark between the United States and a foreign country. See Trademark Act Section 45, 15 U.S.C. Section 1127. In addition, priority can also be established through use analogous to trademark use. See *Westrex Corp. v. New Sensor Corp.*, 83 USPQ2d 1215 (TTAB 2007). To establish prior analogous use sufficient to create proprietary rights, petitioner must show prior activities sufficient to create an association in the minds of the purchasing public between the mark and the petitioner's goods. See *Malcolm Nicol & Co. v. Witco Corp.*, 881 F.2d 1063, 1065, 11 USPQ2d 1638, 1639 (Fed. Cir. 1989). A showing of analogous use does not require direct proof of an association in the public mind. See *T.A.B. Systems v. Pactel Teletrac*, 77 F.3d 1372, 1375, 37 USPQ2d 1879, 1882 (Fed. Cir. 1996). Nevertheless, the activities claimed to create such an association must reasonably be expected to have a substantial impact on the purchasing public before a later user acquires proprietary rights in a mark. See *id.*

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Under the circumstances, the Board deems it appropriate to reset remaining trial dates herein. Accordingly, remaining dates herein are reset as follows.

Defendant's Pretrial Disclosures	1/14/11
Defendant's 30-day Trial Period Ends	2/28/11
Plaintiff's Rebuttal Disclosures	3/15/11
Plaintiff's 15-day Rebuttal Period Ends	4/14/11

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.