[* 1]

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

PRESENT: _____ PART 56

Index Number : 600660/2007
MERDIAN CAPITAL
VS
FIFTH AVENUE 58/59
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE 4/20/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, 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

FILED
SEP 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/13/07

HON. ROBERT B. LOWE, III
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

----------x

MERIDIAN CAPITAL PARTNERS, INC.,

Index No. 600660/07

Plaintiff,

-against-

FIFTH AVENUE 58/59 ACQUISITION CO. L.P., FIFTH AVENUE 58/59 ACQUISITION CO. GP CORP., MACKLOWE PROPERTIES INC., MACKLOWE MANAGEMENT, LLC, WILLIAM MACKLOWE and ATTICUS CAPITAL LP,

Defendants.

----------x

RICHARD B. LOWE III, J.:

Motion sequence numbers 002 through 006 are consolidated for disposition.

In motion sequence number 002, defendants Fifth Avenue 58/59 Acquisition Co. GP Corp. (58/59 Acquisition), Macklowe Properties, and Macklowe Management, LLC move to dismiss the cause of action for partial actual eviction (CPLR 3211 [a] [1], [7]). Plaintiff Meridian Capital Partners, Inc. (Meridian) cross-moves to consolidate the motions of defendants 58/59 Acquisition, Macklowe Properties, and Macklowe Management LLC with Meridian's motion to compel. In motion sequence number 003, Meridian moves to compel defendants 58/59 Acquisition, Macklowe Properties, and Macklowe Management, LLC to answer the amended complaint (Amended Complaint), or alternatively, to deem the Amended Complaint a supplemental pleading filed nunc pro tunc.

In motion sequence number 004, newly-added defendant William Macklowe moves to strike paragraphs 59-62 of the Amended Complaint (CPLR 3024 [b]). In motion sequence number 005, newly-added defendant 58/59 Acquisition Co. L.P. moves to dismiss the complaint

for lack of jurisdiction (CPLR 3211 [a] [8]), and to dismiss the tenth cause of action and the prayer for punitive damages (CPLR 3211 [a] [7]). In motion sequence number 006, newly-added defendant Atticus Capital LP (Atticus) moves to dismiss the causes of action asserted against it (CPLR 3211 [a] [1], [7]; CPLR 3025 [b]).

Background

Meridian is a commercial tenant occupying space (Premises) on the 12th floor of the GM Building, located in Manhattan, New York, pursuant to a lease (Lease). In late 2006, Atticus sought to rent the remainder of the 12th floor that was unoccupied by Meridian. Defendant 58/59 Acquisition Co. L.P. is the owner of the GM Building and the landlord (Landlord) of the premises. Defendant 58/59 Acquisition is the Landlord's general partner. Defendants Macklowe Properties and Macklowe Management, LLC are the property managers of the GM Building (together, with the Landlord and 58/59 Acquisition, the Macklowe Defendants). Defendant William Macklowe (Mr. Macklowe) is the Landlord's principal.

Previously, Meridian moved for a preliminary injunction to enjoin defendants from demolishing, reconstructing, renovating, refurbishing or otherwise altering the appearance or function of the common areas located across from the elevator on the 12th floor (Elevator Lobby). By decision dated June 21, 2007, the court denied that motion.

In April of 2007, Meridian filed and served the Amended Complaint, and named the Landlord, Mr. Macklowe, and Atticus as additional defendants. In the Amended Complaint, Meridian alleges that Atticus repeatedly approached Meridian indicating that it was interested in occupying the entire 12th floor, including the Premises (Amended Complaint, ¶ 57). Additionally, Mr. Macklowe approached Meridian on numerous occasions to propose that

Meridian terminate the Lease early, in order to permit the Macklowe Defendants to rent the entire 12th floor to Atticus at a substantially higher rent than Meridian pays for the Premises (Amended Complaint, ¶ 137). Meridian pays lower rent than that paid for comparable spaces in the GM Building (Amended Complaint, ¶ 55).

In a conversation held in November of 2006, Mr. Macklowe allegedly threatened Meridian that, if it did not accept an early termination of the Lease, he would make the 12th floor a "war zone" (Amended Complaint, ¶ 61). Meridian responded that it did not wish to terminate the Lease early.

Allegedly, to punish Meridian for refusing to accept an early termination of the Lease, defendants began an intentional campaign of harassment against Meridian (Amended Complaint, ¶ 53). In late 2006, Meridian was advised that certain portions of the 12th floor, including the common areas, were to be demolished and renovated to accommodate Atticus (Amended Complaint, ¶ 63). Meridian strenuously objected to the proposed renovations, and cited Article 42 of the Lease, that purportedly authorized Meridian to control the appearance of the 12th floor Elevator Lobby, and consequently, barred the Macklowe Defendants from renovating or otherwise altering the Elevator Lobby without Meridian's approval.

Meridian alleges that despite its protestations and allegedly in violation of Article 42 of the Lease, on February 28, 2007, Mr. Macklowe's threat to render the 12th floor a "war zone" was realized, and the demolition of the 12th floor common areas, including the Elevator Lobby, restrooms, and halls, commenced (Amended Complaint, ¶¶ 62, 63, 67). As part of the demolition, carpeting, baseboards, flooring and the common area bathrooms were removed. Further, substantial and unhealthy noise, dust, asbestos, and debris have been generated from the

demolition (Amended Complaint, ¶¶ 69-72). Meridian further alleges that the Macklowe Defendants have, at various times, prevented and interfered with Meridian's ingress and egress into the Premises (Amended Complaint, ¶ 79).

In the Amended Complaint, Meridian seeks a permanent injunction enjoining defendants from altering the appearance of the Elevator Lobby without Meridian's approval, and from demolishing other portions of the 12th floor common areas without making appropriate provisions to protect Meridian. Additionally, Meridian asserts ten causes of action. The first two causes of action are for breach of contract, asserted against the Macklowe Defendants, and arise out of alleged breaches of the Lease. Meridian additionally asserts causes of action for partial constructive eviction, partial actual eviction, nuisance, trespass and gross negligence against the Macklowe Defendants, and seeks money damages. Meridian asserts a cause of action for tortious interference with contract against Atticus, and asserts causes of action for intentional and malicious infliction of injury to business against Atticus, Mr. Macklowe and the Macklowe Defendants, and seeks punitive damages.

In oral arguments held on the within motions, the court granted Meridian's cross-motion to consolidate for hearing and determination motion sequence numbers 002 and 003. Additionally, the court denied the Landlord's motion (005) insofar as it sought dismissal pursuant to CPLR 3211 (a) (8), and denied Atticus' motion insofar as it sought dismissal pursuant to CPLR 3025 (b) (Transcript, 11:8-13, 43:2-8).

Discussion

I. Macklowe Defendants' Motion to Dismiss the Cause of Action For Partial Actual Eviction

The Macklowe Defendants move to dismiss the second cause of action of the original

complaint for partial actual eviction pursuant to CPLR 3211 (a) (1), (7), on the ground that the conduct that Meridian complains of does not constitute a partial actual eviction because Meridian does not allege that it was ever physically excluded from the Premises, and because provisions of the Lease permit the Landlord to undertake renovations of the Elevator Lobby without Meridian's consent.

Meridian alleges that it adequately pled a cause of action for partial actual eviction, and that any shortcomings have been remedied by the Amended Complaint. Meridian alleges that, as a result of the ongoing construction work, Meridian employees have been temporarily barred from using the 12th floor common area restrooms, ingress and egress has been interfered with, and that, at various times, Meridian has been prevented from using portions of the Premises (Amended Complaint, ¶¶ 77-79).

For the reasons stated below, affording the complaint a liberal construction, accepting the facts alleged as true, and according Meridian the benefit of every favorable inference (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]), the facts alleged do not support a cause of action for partial actual eviction.

An eviction, whether partial or complete, occurs when the landlord wrongfully ousts the tenant from physical possession of the leased premises (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970]). There must be a physical expulsion or exclusion to constitute an eviction (*id.*). Untenability of a portion of the demised premises, as opposed to a physical expulsion therefrom, does not give rise to a partial actual eviction (*id.*). Further, mere interferences with ingress and egress that make access to the demised premises slower, less convenient, less pleasant and more difficult do not amount to partial actual eviction (*Cut-Outs,*

Inc. v Man Yun Real Estate Corp., 286 AD2d 258, 261 [1st Dept 2001], *lv denied* 100 NY2d 507 [2003]).

Meridian does not allege that it was ever physically expelled from the Premises, that it was prevented from occupying the Premises for any substantial period of time, or that the defendants' actions resulted in the permanent taking of a portion of the Premises. Thus, because Meridian failed to allege that it was expelled, or otherwise that the demolition and renovation on the 12th floor amounted to a taking of a portion of the Premises, Meridian failed to sufficiently allege a cause of action for partial actual eviction (*Barash,* 26 NY2d at 84-85).

Rather than alleging that it was physically expelled, Meridian alleges that the Landlord's wrongful acts, including temporary interferences with ingress and egress, substantial, unsightly and unhealthy noise, dust and debris, have resulted in the diminution of its beneficial use and enjoyment of the Premises. While temporary limitations on the use of a leased premises do not amount to an actual eviction (*Cut-Outs, Inc.,* 286 AD2d at 261), such allegations may support a cause of action for constructive eviction. However, the Macklowe Defendants are not moving to dismiss this cause of action, and thus, the court need not discuss it at this time.

Therefore, the Macklowe Defendants' motion to dismiss the cause of action for partial actual eviction is granted.

II. Mr. Macklowe's Motion to Strike Certain Allegations in the Amended Complaint

Mr. Macklowe moves to strike four paragraphs of the Amended Complaint, pursuant to CPLR 3024 (b), on the basis that the paragraphs contain details of a November, 2006 conversation (November Conversation), that was held for the purposes of settlement of the parties' dispute. Meridian opposes striking these paragraphs from the Amended Complaint,

because at the time that the November Conversation took place, litigation had not yet commenced.

Material may be stricken from a pleading if it contains scandalous or prejudicial material (CPLR 3024 [b]). Generally, relevancy is the standard by which a court determines whether material should be stricken, because relevancy is the best key to determine whether material is admissible at trial (*Soumayah v Minnelli*, 41 AD3d 390 [1st Dept 2007]). Further, evidence relating to offers or attempts to settle a claim is inadmissible as proof of liability (CPLR 4547). Thus, allegations in a pleading that contain details of offers or attempts to settle a claim are deemed irrelevant, and will be stricken (*Soumayah,* 41 AD3d 390).

However, even where litigation is merely a possibility, evidence may be considered inadmissible settlement material where it is evident that the parties are contemplating litigation (*ESPN, Inc. v Office of Commr. of Baseball*, 76 F Supp 2d 383, 410 [SD NY 1999]; *see also* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4547 [CPLR 4547 is a substantially identical adoption of Rule 408 of the Federal Rules of Evidence]). For example, where a party is represented by counsel who threatens litigation, or where one party initiates the first administrative steps toward litigation, evidence may be excluded as "settlement material" (*id.*).

Here, the November Conversation was held by telephone, and Mr. Macklowe, the Landlord's in-house counsel, and Meridian's in-house counsel participated. The purpose of the meeting was to discuss proposals for an early termination of the Lease. While the conversation took place several months before formal litigation was commenced on March 1, 2007, letter exchanges between the parties demonstrate that their counsel had been in regular communication

over a period of one and one-half years prior thereto, to discuss the disruptive conditions that the Macklowe Defendants were allegedly causing on the 12th floor (Exhibit 2, annexed to the Affidavit of Richard Claman, Esq.).

These exchanges reflect an increasingly deteriorating and contentious relationship between Meridian and the Macklowe Defendants. For example, in a letter dated February 17, 2006, Meridian notified the Landlord that it intended to begin withholding a portion of its rent due to "another material breach of our lease agreement," and to complain of a pattern of "stonewalling, delay, and half-truth from our Landlord" (Exhibit 2, annexed to the Affidavit of Richard Claman, Esq., February 17, 2006 Letter). Meridian stated that the "empty assurances that our concerns will be addressed will no longer be accepted," and that if immediate steps were not taken to "remedy [its] damages," then Meridian may seek "such other relief to which we are entitled" (*id.*).

Furthermore, approximately one month prior to the November Conversation, Meridian sent a letter to the Macklowe Defendants, where it complained of the "little regard for our [Meridian's] right to 'quietly enjoy' our premises . . . in the absence of a lease termination agreement, we stand by our demands for a rent concession and a written commitment that the use of our space will not be interfered with for the remainder of the term of our lease" (Exhibit 2, annexed to the Affidavit of Richard Claman, Esq., September 14, 2006 Letter). In response, counsel for the Macklowe Defendants stated that it would consider a proposal for early Lease termination, but "in light of your [Meridian's] obvious litigation undertones, I ask that all future communication with regard to the tenant and its tenancy be conducted through me, counsel" (Exhibit 2, annexed to the Affidavit of Richard Claman, Esq., September 21, 2006 Letter).

The totality of communications between Meridian and the Macklowe Defendants demonstrate that, while formal litigation had not yet commenced by the time that the November Conversation occurred, litigation between them was as a real possibility.

Thus, because the purpose of the November Conversation was to discuss proposals for an early Lease termination that undoubtedly involved consideration of the parties' rights and obligations under the Lease, the November Conversation can be characterized as an attempt to compromise a dispute. Therefore, paragraphs 59 and 60, wherein Meridian alleges that Mr. Macklowe indicated his willingness to violate the Lease and conceded that the Macklowe Defendants did not have the right to alter the Elevator Lobby, amount to settlement material that is inadmissable under CPLR 4547, insofar as Meridian seeks to introduce it as an admission of liability.

However, notwithstanding that evidence may be considered settlement material, CPLR 4547 does not preclude material if it is being offered for "another purpose" other than to establish liability (CPLR 4547; *American Re-Insurance Co. v U.S. Fidelity & Guar. Co.*, 19 AD3d 103, 104 [1st Dept 2005]).

Thus, paragraphs 61 though 62, wherein Meridian alleges that Mr. Macklowe threatened to make the 12th floor a "war zone" if it refused to accept an early termination of the Lease, is not inadmissible and irrelevant, because it is being introduced for the "other purpose" of establishing Mr. Macklowe's motive.

Accordingly, the motion to strike is granted only as to paragraphs 59 through 60.

III. Landlord's Motion to Dismiss the Tenth Cause of Action

The tenth cause of action for "intentional and malicious infliction of injury to business" is

asserted against the four Macklowe Defendants, but only the Landlord moves to dismiss it for failure to state a cause of action (CPLR 3211 [a][7]), on the ground that this tort is not recognized in New York. The Landlord contends that Meridian is actually alleging a cause of action for prima facie tort, which Meridian failed to adequately plead for failure to allege disinterested malevolence.

According to Meridian, the Macklowe Defendants attempted to coerce it into terminating the Lease early, exemplified by Mr. Macklowe's threat to turn the 12th floor into a "war zone" if Meridian did not agree to an early Lease termination. Further, the Macklowe Defendants allegedly destroyed the 12th floor common areas in malicious retribution against Meridian, that caused injury to its business.

Meridian cites two cases that purportedly recognize the tort of "intentional and malicious interference with business," *Glatter-Gotz v Reiger Organs, Inc.* (286 AD 1088, 1088 [1st Dept 1955]), and *Terminal Music Supply, Inc. v Musical Instruments Exch., Inc.* (283 AD 869 [1st Dept], *appeal denied* 283 AD 1030 [1954]). However, neither of these cases sets forth the elements of the cause of action. Furthermore, Meridian does not state the elements of the cause of action, and has otherwise failed to demonstrate that the tort is recognized in New York.

It appears that in alleging "intentional and malicious interference with business," Meridian is attempting to plead prima facie tort, tortious interference with contract, or tortious interference with prospective business relations, causes of action that are recognized in New York. The elements of a cause of action for prima facie tort are (1) the intentional infliction of harm; (2) resulting in special damages; (3) without excuse or justification; and (4) by an act or series of acts that would otherwise be lawful (*Burns Jackson Miller Summit & Spitzer v Lindner,*

59 NY2d 314, 333 [1983]; *DeMicco Bros., Inc. v Consolidated Edison Co. of N.Y., Inc.*, 8 AD3d 99, 100 [1st Dept 2004]).

To establish "intentional infliction of harm," a plaintiff must demonstrate that the defendant acted with "disinterested malevolence," which is defined as a malicious act "unmixed with any other and exclusively directed to injury and damage" (*id.*). Where other demonstrable motives exist, such as profit, self-interest and business advantage, no recovery can be had under prima facie tort (*Squire Records v Vanguard Recording Socy.*, 25 AD2d 190, 191 [1st Dept], *appeal dismissed* 17 NY2d 870, *appeal denied* 17 NY2d 424, *mot denied* 18 NY2d 895 [1966], *order affd* 19 NY2d 797 [1967]), as justification operates as a "neutralizing factor" that overrides the intent to injure (*Appalachian Power Co. v American Inst. of Certified Pub. Accountants*, 177 F Supp 345, 350 [SD NY], *affd* 268 F 2d 844 [2d Cir], *cert denied* 361 US 887 [1959]).

The allegations contained in the Amended Complaint undermine any contention that the Landlord acted with "disinterested malevolence" in permitting the 12th floor demolition to go forward. It alleges that an early termination of the Lease would have permitted the Landlord to rent the Premises to Atticus "at a substantially greater profit" because Meridian's rent is "substantially below the level at which Macklowe is currently leasing comparable space in the GM Building" (Amended Complaint, ¶¶ 55, 137-38). This allegation flatly contradicts any contention that the Landlord committed a malicious act "unmixed with any other" (*Squire Records*, 25 AD2d at 191), and thus, will not be credited.

Neither do the allegations contained in the Amended Complaint support a cause of action for tortious interference with contract, which requires the existence of a valid contract between the plaintiff and a third party, the defendant's intentional procurement of the third party's breach

of the contract, and resulting damages (*Lama Holding Co. v Smith Barney,* 88 NY2d 413, 424 [1996]). Meridian does not allege the existence of a contractual relationship that was breached as a result of the Landlord's intentional inducement.

Similarly, Meridian's allegations do not support a cause of action for tortious interference with prospective economic relations, where a plaintiff must plead that the defendant was motivated solely by malice to disrupt the prospective business relationship (*Carvel Corp. v Noonan,* 3 NY3d 182, 190 [2004]). For the same reason as Meridian fails to allege disinterested malevolence in connection with a cause of action for prima facie tort, Meridian's allegations do not support an allegation that the Landlord was motivated solely by malice, where Meridian elsewhere alleges that the Landlord wished to terminate the Lease early in order to rent the space at a "substantially greater profit" to Atticus (Amended Complaint, ¶¶ 55, 137).

Accordingly, the Landlord's motion to dismiss the tenth cause of action is granted.

V. Motion by Atticus to Dismiss

Atticus moves to dismiss the causes of action for tortious interference with contract and intentional and malicious infliction of injury to business.

In support of its cause of action for "intentional and malicious interference with business," Meridian alleges that Atticus "directly and indirectly encouraged" the Macklowe Defendants to exact retribution against Meridian for its refusal to accept an early termination of the Lease, that would have permitted Atticus to rent the entire 12th floor (Amended Complaint, ¶ 128). Further, Meridian alleges that Atticus conducted the demolition and renovation in such a manner as to cause the maximum amount of disruption to Meridian's business, and was motivated solely by malice with the intent to injure Meridian (Meridian Memo. of Law, pg. 7).

However, as discussed above, Meridian failed to demonstrate that the tort of "intentional and malicious interference with business" is recognized in New York. Alternatively, under a prima facie tort theory, Atticus' obvious justification of self-interest, as a tenant desiring to occupy the entire floor of a premier office building, the GM Building, defeats any contention that Atticus acted solely out of a desire to harm Meridian.

Moreover, Atticus' lease, executed on December 8, 2006 (Affidavit of Kenneth McComb, ¶ 4), authorized it to renovate and upgrade the common areas of the 12th floor, common corridor, and elevator lobby (Exhibit A, annexed to the Affidavit of Kenneth McComb, § 4.01 [k]). The demolition and renovation of its leased space and adjacent common areas on the 12th floor in anticipation of its tenancy pursuant to its lease is another obvious motivation for Atticus' actions.

Furthermore, the allegations do not support a cause of action for tortious interference with contract. According to Meridian, Atticus had notice of Article 42 of the Lease, that purportedly grants Meridian the authority to control the appearance of the Elevator Lobby throughout the term of the Lease, and procured the Macklowe Defendants' breach of that provision by initiating demolition, and otherwise, causing the dangerous and disruptive conditions on the 12th floor by its demolition and renovation, in violation of Meridian's Lease (Affidavit of Peter Brown, Esq. in Opp. to Atticus' Motion, ¶¶ 16-18).

One who intentionally and improperly interferes with the performance of a contract by inducing or otherwise causing a third person to breach a contract is subject to liability for the resulting damages (*White Plains Coat & Apron Co. v Cintas Corp.*, 8 NY3d 422, 425 [2007]).

Although it has yet to be determined whether the Lease was breached, the Court accepts

the facts alleged as true for the purpose of determining whether Meridian has sufficiently stated a cause of action (*Allianz Underwriters Ins. Co.*, 13 AD3d at 174). However, Meridian does not provide any factual basis or specify what actions Atticus undertook to procure a breach of the Lease. Mere conclusory allegations that a contract was breached because of the defendant's conduct is insufficient to adequately state a claim for tortious interference (*Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 183 [1st Dept], *lv dismissed* 92 NY2d 962 [1998]).

Moreover, a party is not liable for tortious interference with contract where it justifiably acts to protect its own legal or economic interest with the breaching party (*Estate of Steingart v Hoffman*, 33 AD3d 465, 466 [1st Dept 2006]; *see also White Plains Coat & Apron, Co.*, 8 NY3d at 426 [a generalized economic self interest constitutes a defense to a cause of action for tortious interference with contract, if the alleged tortfeasor had a pre-existing economic or legal relationship with the breaching party]).

Atticus' lease was executed on December 8, 2006 (Affidavit of Kenneth McComb, ¶ 4). Meridian alleges that Atticus induced a breach of the Lease by initiating demolition, that commenced in February of 2007 (Affidavit of Peter Brown, Esq. in Opp. to Atticus' Motion, ¶¶ 16-18). Thus, at the time that Atticus allegedly intentionally interfered with the Lease, Atticus had a pre-existing contractual relationship with the Macklowe Defendants. Therefore, Atticus' actions would have been justifiable in light of its own financial and legal interest to fulfill its rights and obligations under the lease (*Estate of Steingart*, 33 AD3d at 466; *see also White Plains Coat & Apron, Co.*, 8 NY3d at 426).

Accordingly, Atticus' motion to dismiss the causes of action for malicious interference

with business and tortious interference with contract is granted.

Accordingly, it is

ORDERED that the motion (002) by Fifth Avenue 58/59 Acquisition Co. GP Corp., Macklowe Properties Inc. and Macklowe Management, LLC to dismiss the second cause of action is granted, and the second cause of action is dismissed; and it is further

ORDERED that the cross-motion by Meridian Capital Partners, Inc. to consolidate for hearing and determination the motion of Fifth Avenue 58/59 Acquisition Co. GP Corp., Macklowe Properties Inc. and Macklowe Management, LLC and the motion of Meridian Capital Partners is granted; and it is further

ORDERED that so much of the motion (003) by Meridian Capital Partners, Inc. to compel the defendants to answer the Amended Complaint, is granted, and is otherwise denied; and it is further

ORDERED that so much of the motion (004) by William Macklowe to strike paragraphs 59-62 of the Amended Complaint is granted only to the extent that paragraphs 59 and 60 are struck, and the motion is otherwise denied; and it is further

ORDERED that so much of the motion (005) by Fifth Avenue 58/59 Acquisition Co. L.P. to dismiss the tenth cause of action is granted, and the tenth cause of action is dismissed as against Fifth Avenue 58/59 Acquisition Co. L.P. and the prayer for punitive damages is struck, and is otherwise denied, and it is further

ORDERED that the motion (006) by Atticus Capital LP to dismiss the eighth and ninth causes of action is granted, and the eighth and ninth causes of action are dismissed and the prayer for punitive damages is struck; and it is further

ORDERED that the caption shall be amended to reflect the dismissal of defendant Attics Capital LP; and it is further

ORDERED that Fifth Avenue 58/59 Acquisition Co. L.P., Fifth Avenue 58/59 Acquisition Co. GP Corp., Macklowe Properties Inc., Macklowe Management, LLC, and William Macklowe are directed to serve an answer to the Amended Complaint within 20 days from the date of service of a copy of this order with notice of entry.

Dated: September 13, 2007

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.

FILED
SEP 27 2007
NEW YORK
COUNTY CLERK'S OFFICE