

<b>L'Art De Jewel Ltd. v Hudson Sheraton Corp., LLC</b>
2007 NY Slip Op 33511(U)
October 23, 2007
Supreme Court, New York County
Docket Number: 0601076/2005
Judge: Walter Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: TOLUB  
Justice

PART 15

L'ART DE JALIL LTD

INDEX NO. 601076/05

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

- v -  
HUDSON SERRATION CORP LLC,  
KTAL.

MOTION SEQ. NO. 06

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this 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

**FILED**  
OCT 25 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**IS DECIDED**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 10/23/07

WALTER B. TOLUB  
J.S.C.

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 15

-----x  
L'ART DE JEWEL LTD.,

Plaintiff,

Index No. 601076/05  
Mtn Seq. 006

-against-

HUDSON SHERATON CORPORATION, LLC and  
THE HYMAN COMPANIES, INC., d/b/a  
LANDAU COSTUME JEWELRY

Defendants.

-----x  
THE HYMAN COMPANIES, INC., d/b/a  
LANDAU COSTUME JEWELRY,

Third-Party Plaintiff

-against-

HST LESSEE SNYT LLC,

Third-Party Defendant  
-----x

**FILED**  
OCT 25 2007  
NEW YORK  
COUNTY CLERKS OFFICE

**WALTER B. TOLUB, J.:**

Defendant/third-party plaintiff, The Hyman Companies, Inc., d/b/a Landau Costume Jewelry ("Landau") is the operator of a costume jewelry store located in the lobby of the Sheraton Hotel on Seventh Avenue and 53<sup>rd</sup> Street ("the Hotel"). Landau obtained the right to sell its merchandise at this particular location via a March 20, 1999 License Agreement ("the License") issued by defendant Hudson Sheraton Corporation ("Hudson Sheraton"). Plaintiff is the operator of another retail jewelry store located in the Sheraton's lobby.

This action was commenced after Landau began selling karat

\* 3 ]

gold jewelry, watches and cultured pearls, items which plaintiff believes violates its lease with defendant Hudson Sheraton, and its successor-in-interest, HST Lessee, SNYT, LLC ("HST").<sup>1</sup> Plaintiff's original complaint contained five causes of action, the first four of which were asserted against Hudson Sheraton alleging breach of the L'Art De Jewel-Hudson Sheraton lease. The fifth cause of action was asserted against defendant Landau and sought a permanent injunction prohibiting Landau from selling karat gold jewelry, watches and cultured pearls.

By decision dated January 3, 2006, this court dismissed the fifth cause of action as against Landau, and concluded, among other things, that plaintiff was entitled to partial summary judgment on its first cause of action based on Landau's violation of both the restrictive covenant contained within plaintiff's lease, as well as the use restrictions contained within Landau's License Agreement (see, Decision dated January 3, 2006). This court maintained its position upon re-argument (see, Decision dated May 8, 2006). Both decisions are presently the subject of appeal before the Appellate Division.

Shortly after this court issued its January, 2006 decision, Hudson Sheraton served Landau with a Notice of Default and Demand to Cure, predicated upon this court's conclusion that Landau had

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<sup>1</sup>Hudson Sheraton sold its interest to another entity which appointed HST as successor-in-interest in June, 2006.

violated the terms of its license agreement. HST, as successor-in-interest to Hudson Sheraton, served Landau with a second Notice of Default and Demand to Cure on June 16, 2007.<sup>2</sup> In response, on June 26, 2006, Landau commenced a third-party action against HST, followed immediately by a motion for a *Yellowstone* injunction (sequence 003), wherein Landau unsuccessfully sought to prevent Hudson Sheraton and HST from terminating its existing rights under the Landau-Hudson Sheraton/HST License Agreement. Plaintiff simultaneously moved for leave to amend its complaint to assert causes of action against HST (motion sequence 005). By decision dated November 26, 2006, this court denied the *Yellowstone* injunction, and allowed plaintiff to amend the complaint. The November, 2006 decision is presently on appeal.

By this motion, plaintiff seeks leave to amend its complaint so as to assert a claim against defendant Landau for tortious interference of contract. Plaintiff additionally seeks an injunction preventing Landau from interfering with the contract between plaintiff and third party defendant HST Lessee SNYT LLC ("HST"), as well as an order relieving plaintiff from its contractual requirement to pay monthly rent to HST pending the

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<sup>2</sup>The default(s) alleged in the June 16 notice stemmed from (1) the January 2006 and May 2006 orders issued by this court; (2) Landau's failure to make minimum considerations due under the License Agreement for April through May 2006; and (3) Landau's failure to deliver gross revenue statements required under the License Agreement for April 2006 and May 2006 (see, Decision dated November 26, 2006).

\*5]  
complete resolution of this action.

Discussion

As a preliminary matter, the portion of plaintiff's motion seeking a permanent injunction preventing Landau from interfering with the L'Art De Jewel-HST contract is denied. Although not worded as such, what plaintiff ultimately seeks is an injunction barring Landau from selling items in derogation of Landau's licensing agreement- or, in other words, restoration of plaintiff's fifth cause of action. Inasmuch as the relief sought is the subject of an appeal, the request for the injunction is denied.

The portion of plaintiff's motion seeking relief from its contractual obligation to pay rent pursuant to the terms of the lease is also denied. "A tenant's duty to pay rent is not suspended, even if the landlord breaches its obligations under the lease, unless there is an express provision in the lease declaring the circumstances under which the tenant may withhold his rent" (Westchester County Industrial Development Agency v. Morris Industrial Builders, 278 AD2d 232, 232 [2<sup>nd</sup> Dept 2000], citing, 56-70 58<sup>th</sup> Street Holding Corp v. Fedders-Quigan Corp., 5 NY2d 557; 1225 Fulton Ave. Corp. v. Carbonell, 24 NYS 2d 749; Matter of New York City Housing Authority v. Jackson, 58 Misc 2d 847)). Since the lease between plaintiff and Hudson Sheraton,

now HST,<sup>3</sup> contains no provision which would obviate the requirement to pay rent, plaintiff must remit payment.

The remaining question for consideration, is whether plaintiff should be allowed to amend its complaint to include a claim against defendant Landau for tortious interference of contract.

A claim for tortious interference with contract, both existing and prospective, requires plaintiff to establish (1) the existence of a valid contract between plaintiff and a third party; (2) that defendant knew of the contract; (3) defendant's intentional procurement of the third party's breach; and (4) damages (see, Lama Holding Co. v. Smith Barney, Inc., 88 NY2d 413 [1996]). Review of the papers submitted support plaintiff's assertion that they would ultimately succeed in establishing the first and second elements of this cause of action. Furthermore, it may be possible for plaintiff to establish the remaining

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<sup>3</sup> The court notes that opposition submitted by HST appears to take the position that they, somehow, are not responsible for breaching plaintiff's lease because they were not a party to the original action. The first page of the Lease however (See, Order to Show Cause, Exhibit A), seems to indicate otherwise as it prominently indicates that the lease, and the covenants contained therein, extends to "their heirs, distributees, executors, administrators, legal representatives, **successors and assigns**" (emphasis added). It is therefore very likely, contrary to HST's arguments, that a determination of breach of contract would not only impose liability upon defendant Hudson Sheraton, but would extend to defendant HST - especially since it is obvious to this court that Landau has been allowed to continue to sell items which this court deemed violative of Landau's license agreement, and plaintiff's lease agreement back in January 2006.

elements of the cause of action.

Importantly, the court notes that none of the allegations contained within the proposed cause of action are new. Landau has been well aware of plaintiff's position since the first filing of motion papers in this action. Moreover, since meaningful discovery has yet to be completed notwithstanding the age of this case, Landau's claim that they would somehow be unduly prejudiced by the introduction of a new cause of action against them is at best, unconvincing. Inasmuch as defendants have presented no evidence of prejudice, surprise, or undue delay (CPLR 3025; Cheribin v. Empire Ambulance Service, Inc., 43 AD3d 364 [1<sup>st</sup> Dept 2007]), the portion of plaintiff's motion seeking to amend the complaint is granted.

Accordingly, it is

ORDERED that the portion of plaintiff's motion which seeks to amend its complaint to assert a claim against defendant The Hyman Companies, Inc., d/b/a Landau Costume Jewelry is granted, and the within proposed amended second complaint is deemed served; and it is further


ORDERED that defendants are to answer said complaint, to the extent not already done, within thirty days of service of a copy of this order with notice of entry; and it is further

ORDERED that the relief sought in the balance of plaintiff's motion is denied.

Counsel for the parties are directed to appear for a compliance conference on November 16, 2007 at 11:00 a.m. in IA Part 15, Room 335, 60 Centre Street, New York, New York.

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

Dated: 10/23/07

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

**FILED**  
OCT 25 2007  
NEW YORK  
COUNTY CLERK'S OFFICE