

Tess Color Hair Salon, Inc. v First Sigma Capital Inc.
2008 NY Slip Op 32264(U)
July 31, 2008
Supreme Court, New York County
Docket Number: 0600296/2005
Judge: Charles E. Ramos
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PRESENT:

Charles Edward Ramos

PART 53

Index Number : 600296/2005
TESS COLOR HAIR SALON
vs
FIRST SIGMA CAPITAL
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

C

his 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 and order.

FILED
AUG 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/31/08



HON. CHARLES E. RAMOS 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: COMMERCIAL DIVISION

-----X

TESS COLOR HAIR SALON, INC.,

Plaintiff,

-against-

Index No.
600296/2005

FIRST SIGMA CAPITAL INC.,

Defendant.

-----X

FIRST SIGMA CAPITAL INC.,

Third Party Plaintiff,

-against-

VERIZON COMMUNICATIONS, INC.,

Third Party Defendant.

-----X

Charles Edward Ramos, J.S.C.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

Plaintiff/tenant Tess Color Hair Salon Inc. ("Tess" or "plaintiff") claims that defendant/landlord First Sigma Capital Inc. ("Sigma" or "defendant") fraudulently concealed from the plaintiff the existence of an encumbrance upon the leased premises in the form of a recorded easement before plaintiff executed the lease agreement. Plaintiff seeks, inter alia, rescission of the lease agreement and money damages for constructive eviction and breach of a covenant of quiet enjoyment and moves herein to amend the complaint.

Defendant and Third Party Defendant Verizon Communications, Inc. ("Verizon") separately move for summary judgment.

Background

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NEW YORK

Plaintiff is owned and managed by Teresa Szurant ("Szurant") and operated a hair salon at the premises on the ground floor and a portion of the basement of a building located at 1101 First Avenue in Manhattan owned by Defendant. Prior to executing a ten-year lease agreement with Sigma on March 1st, 2004, Szurant examined the premises. The premises included the ground floor and "part" of the basement of the building, not otherwise specified. After executing the lease agreement, Tess made improvements to the leased premises to make it suitable for the operation of a hair salon.

From the time Tess took possession of the property, until it vacated the premises in October 2005, Verizon employees repeatedly sought entrance to the basement of the building in order to maintain a previously installed communications conduit. These ongoing visits by Verizon employees caused Szurant to complain to Susan Sahim ("Sahim"), Sigma's managing agent for the property at 1101 First Avenue. Sahim then directed Szurant not to give access to Verizon employees and notified Sigma's on-site superintendent to do the same. Szurant began to refuse Verizon employees access to the basement.

Sahim, on behalf of Sigma, complained to Verizon about the incursions. Patrick Leber ("Leber"), an engineering manager for Verizon, responded by citing to the existence of an easement to justify the presence of Verizon's employees at 1101 First Avenue.

On July 15, 1986 The New York Telephone Company purchased an easement for a Conduit Cable and Terminal Box on the property of

1101 First Avenue in New York (plaintiff's Exhibit 7). The diagram attached to the easement showed the Box to be in the rear of the property. At some point between 1986 and 2005 the Box was moved into the basement of 1101 First Ave. The Box was operated during the time in question by Verizon Communication the successor to The New York Telephone Company.

The easement granted to Verizon the right to "construct, reconstruct, relocate, replace, operate, repair, maintain, and at its pleasure remove" lines and equipment located in the basement. The easement, recorded in 1986, included a schematic drawing indicating that the conduit was located in the backyard-not in the basement-of the building at 1101 First Avenue, but as noted above, the easement granted Verizon the right to relocate its equipment.

Tess vacated the building in October of 2005. Thereafter, Tess instituted this action.

Discussion

In order to prevail on a motion for summary judgment, the movant must tender sufficient admissible evidence to demonstrate that no issues of material fact exist that would prohibit a judgment as a matter of law. See CPLR 3212; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 326 (1985). Thereafter, the burden shifts to the non-movant to proffer sufficient evidence so as to raise an issue of material fact. *Id.*

Recision of the Lease and Monetary Damages

There is "no duty on the seller or the seller's agent to

disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment." *Jablonski v Rapalje*, 14 AD3d 484, 485 (2d Dept 2005). The Court in *Jablonski* specifically defined what actions constitute "active concealment". A plaintiff must show that a seller "thwarted plaintiff's efforts to fulfill his [or her] responsibilities fixed by the doctrine of caveat emptor" *Id.* In the case at hand, there is no indication in the record that Sigma thwarted Tess's efforts to fulfill her duty to inspect all aspects of the property. Tess examined the premises, including the basement (three times) and she has not raised any material facts that would suggest physical concealment of the conduit or the easement on the part of Sigma.

Sigma had no duty to disclose the existence of the easement. The easement was a public record. For the plaintiff to succeed on a claim of fraudulent concealment it must establish the concealment of a material fact, that the defendant had a duty to disclose, scienter, justifiable reliance and injuries. *Mitschele v Schultz*, 36 AD3d 249 (1st Dept 2006).

Where there is no active concealment, the courts have been clear; "mere silence of the seller, without some act or conduct which deceived the purchaser does not amount to a concealment that is actionable as a fraud." *Matos v Crimmins*, 40 AD3d 1053, 1054 (2nd Dept 2007). The question of whether or not Sigma knew

of the easement and actually "concealed" the easement,¹ is unavailing. It has long been established that "an action may not be sustained upon proof of false representations as to facts ... to which the vendee had the means available of ascertaining the truth by the exercise of ordinary intelligence." *Schumaker v Mather*, 133 NY 590, 596 (1892).

Where the issue in contention is a matter of public record, not peculiarly in the defendant's knowledge and could have been ascertained by the plaintiff in the exercise of ordinary intelligence, a claim of fraud will not lie. *Chan v Bay Ridge Park Hill Realty Co.*, 213 A.D.2d 467 (2nd Dept 1995). The *Chan* case dealt with fraudulent misrepresentation, but that principal has been extended to fraudulent concealment in *Matos*, supra, (stating that regardless of plaintiff's contention of physical concealment, the easement was readily ascertainable from the public record).

Thus, as a matter of law, Sigma could not on this record commit fraudulent concealment because the easement was a matter of public record. Plaintiff's contention that even if she had checked the public records she would not have been on constructive notice fails because the terms of the easement are clear in that Verizon had the right to "relocate, replace, operate, repair, maintain, and at its pleasure remove the conduit." (Def. Exhibit G.)

¹ Plaintiff contends in her complaint that there was actual concealment but there is no evidence to suggest this claim

The lease states in Paragraph 13, "The Tenant has examined the Premises and agrees to accept possession of premises in the condition and state of repair which shall exist on the date hereof "as is" (Pl. Exhibit 6). Thus Tess actively approved the condition of the property and did not merely rely on Sigma's description. See, *Couch*, 204 AD2d 951 (3d Dept 1994).

Sigma had no duty to disclose the easement, Tess could have found the easement in the public records, and the "as-is" provision also entitles Sigma to summary judgment as a matter of law. Therefore, defendant's summary judgment is granted as to plaintiff's claim for recession of the lease and monetary damages.

Constructive Eviction

Tess' complaint also alleges in its third and fourth causes of action that Sigma constructively evicted Tess from its leased premises.² Pl. Am. Compl. ¶ 35-41.

For a claim of constructive eviction to succeed on the merits, a tenant must prove the existence of a wrongful act by the landlord that substantially and materially deprives the tenant of the beneficial enjoyment and use of the premises. See *Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77 (1970).

Plaintiff's claim for constructive eviction hinges upon a

² Both causes of action are substantively the same. The third cause of action alleges a claim for constructive eviction; the fourth alleges a claim for partial constructive eviction. Am. Compl. ¶ 35-41.

wrongful act, such as a finding that Sigma failed to disclose the existence of the easement to Verizon. Plaintiff's reliance on this failure by Sigma to satisfy the element of "wrongful act" that a cognizable constructive eviction claim requires, is misplaced.

Tess also seeks to establish that the presence of Verizon employees inside and outside the premises as well as in the basement, deprived plaintiff of the "beneficial use and enjoyment of the Premises." Plaintiff thus argues that the actions of the Verizon employees constituted a constructive eviction of the leased premises, as their activity prevented her from the beneficial use of the premises. Pl. Am. Compl. ¶ 36; Szurant Aff. ¶ 26-36.

However, plaintiff does not produce evidence showing that a wrongful act by Sigma caused the presence of Verizon employees and, as set forth above, because Sigma was under no duty to disclose the existence of a readily discernable easement, there was no wrongful act. See, e.g. *Jablonski*, 14 AD3d 484 ("New York adheres to the doctrine of caveat emptor and imposes no duty on the seller or the seller's agent to disclose any information concerning the premises when the parties deal at arm's length, unless there is some conduct on the part of the seller or the seller's agent which constitutes active concealment."); *Matos*, ("The mere silence of the seller, without some act or conduct which deceived the purchaser, does not amount to a concealment that is actionable as a fraud.").

[* 9]

Because Sigma's silence regarding the existence of an easement that was a matter of public record cannot constitute a wrongful act and because it is undisputed that Sahim, Sigma's managing agent for the property, responded to Szurant's complaints about the presence of Verizon employees and tried to alleviate her concerns (see e.g. Szurant Aff. ¶ 60), plaintiff's claim fails to satisfy both requirements. Sahim entered into negotiations with Verizon to try to prevent distress to plaintiff. See Pl. Ex. 31. Absent a finding of fraud, plaintiff cannot point to any wrongful conduct on the party of Sigma.³ Therefore, Sigma is entitled to summary judgment on both the third and fourth causes of action.

The Covenant of Quiet Enjoyment

Plaintiff alleges a fifth cause of action for breach of the covenant of quiet enjoyment. Am. Compl. ¶ 42-44. The lease agreement contains a covenant of quiet enjoyment. Pl. Ex. 6 at ¶ 22. However, the undisputed facts in the record also indicate that Sigma is entitled to summary judgment as a matter of law as to this cause of action, because the plaintiff was not evicted

³ In its Memorandum of Law, Plaintiff illogically claims both that Sigma acted wrongfully by instructing Plaintiff to deny Verizon access to the basement and for "doing nothing to protect plaintiff" from Verizon. Pl. Mem. Of Law at 16-17. The record is undisputed that Sahim engaged Verizon in order to address Plaintiff's concerns. Szurant Aff. ¶ 60; Sahim Aff. ¶ 5. Plaintiff further argues that Sigma committed fraud by representing their building as "first class" in ¶ 41(a) of the lease agreement, but provides no evidence of either a definition of "first class" or explication of how the leased premises did not measure up to this standard. Pl. Mem. Of Law at 16.

and did not comply with all conditions precedent the covenant requires in order to be operative.

An action for damages for the breach of a covenant of quiet enjoyment by a tenant requires the tenant to show that the tenant has vacated the premises due to either actual or constructive eviction and that at the time the tenant vacated the premises the tenant had performed all conditions precedent contained in the covenant. *Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, rearg denied 4 NY2d 1046 (1958); *Balzano v Lublin*, 162 A.D.2d 252 (1st Dep't 1990). This includes the payment of rent. *Id.*

The first element is undisputed—plaintiff vacated the property in November 2005. But, as discussed above, Sigma is entitled to summary judgment as to plaintiff's constructive eviction claims. This defeats the plaintiff's fifth cause of action as plaintiff was not evicted from the premises.

In addition, at the time plaintiff vacated the property, it was also in non-compliance with the covenant's conditions precedent by not being current in rent. The lease agreement between plaintiff and Sigma contains the following covenant, along with several conditions regarding the payment of rent.

22. Quiet Enjoyment. Landlord covenants and agrees with Tenant that upon Tenant paying the Rent and additional rent and observing and performing all the terms, covenants and conditions on Tenant's part to be observed and performed, Tenant may peaceably and quietly enjoy the Premises, subject, nevertheless, to the terms and conditions of this Lease including, but not limited to Article 16 and in accordance with Article 1 hereof and to all Superior Leases and Mortgages.Pl. Ex. 6 at 22 (emphasis added).

The covenant conditions the agreement "upon . . . pay[ment]" and specifies both "Rent" as well as "additional rent." Thus, in order for the covenant to be in effect, the Tenant must comply with both the "Rent" and "additional rent" obligations. The lease contains a section which defines "Rent" separately from "Advanced Rent." "Rent" being the monthly amount the tenant owed the landlord, and "Advanced Rent" being the sum of \$39,833.80. Pl. Ex. 6 at ¶1(A)(ix)-(x).

It is undisputed that plaintiff failed to pay rent from the months of July, 2005 until vacating the premises in November 2005. Plaintiff cannot claim to be in fulfillment of all conditions precedent at the time it vacated the premises⁴ by claiming that it was not in arrears in regard to rent payment because "the advanced rent payment of \$39,883.80 far exceeds the alleged arrears in the sum of \$23,145.42. \$23,145.42 is the amount of monthly rent owed for the period of July-November 2005. This argument is contrary to the express terms of the lease, which specify payment both of "Rent" and "additional rent" as a condition of the covenant. Thus the plaintiff may not find shelter in the advanced rent payment. Further, the lease required it to pay both forms of rent and plaintiff had only

⁴ Plaintiff also asserts that it is not in arrears in regard to rent due to constructive eviction. Szurant Aff. ¶ 20. However, as discussed above, Sigma is entitled to summary judgment as to this claim. Moreover, plaintiff asserts in its memorandum of law that the constructive eviction took place in October 2005, not July. Pl. Mem. Of Law at 21. Thus, Plaintiff is left only with the argument that the advanced rent sum should be deemed to satisfy plaintiff's non-payment of rent from July-October 2005.

satisfied one of the two from July 2005 until the date it vacated.

Plaintiff was not evicted and had not fulfilled the condition precedent required to keep the covenant of quiet enjoyment in force. Sigma is granted summary judgment as to the fifth cause of action of plaintiff's complaint.

Intentional Interference with Contract

Tortious interference with contract requires: (1) the existence of a valid contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional procurement of a breach of the contract without justification, (4) actual breach of the contract, and (5) resulting damages. *Snyder v Sony Music Entertainment Inc.*, 252 AD2d 294 (1st Dept 1999)

Tess has failed to offer proof regarding one or more of these elements. Tess failed to offer proof that there was collusion between Verizon and Sigma to breach the contract nor to show that there was any Intent by Verizon to cause the breach of the contract. Nor did Tess show that Verizon acted improperly in causing the breach of the contract.

The plaintiff is required to show that the defendant had intended to cause the counter-party to breach the contract. *Pontos Renovation Inc. v Kitano Arms Corp.*, 226 AD2d 191 (1st Dep't 1996). The plaintiff must show that the actions of the defendant were improper in some way that would be criminal or independently tortious. *Guard-Life Corp. v S. Parker Hardware*

Mfg. Corp., 50 NY2d 183, 189-190 (1980). Plaintiff must also show that the defendant's action was the "but for" cause of the breach of the contract. *Cantor Fitzgerald Assoc., L.P. v Tradition North America, Inc.*, 299 AD2d 204 (1st Dep't), lv denied 99 NY2d 508 (2002).

The plaintiff's complaint alleges that Verizon secured the breach by harassing and intimidating and alleged illegal acts, (Amended Complaint, P. 12 Paragraph 48). There is no explanation as to how harassment aimed at the plaintiff would have caused Sigma to breach its contract with Tess. Nor is there an elaboration in the complaint or the supporting affidavits that would show illegal or tortious actions on the part of Verizon to induce Sigma to break the lease.

In addition, if the acts are undertaken with a financial motivation they are not improper within the meaning of this cause of action. *South Fourth Street Properties, Inc. v Muschel*, 1 AD3d 347 (2d Dep't 2003). Here, the only reason for Verizon to want access to the property is in order to run their business of servicing phone lines.

Prima Facie Tort Without Justification and Disinterested

Malevolence

"A prima facie tort has been defined as 'the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful.'" *Belsky v Lowenthal*, 62 AD2d 319 (1st Dep't), app denied 45 NY2d 712 (1978). The primary intent of the defendant

must to have been to harm the plaintiff. *Weaver v Putnam Hospital Center*, 142 AD2d 641 (2d Dep't 1988).

The plaintiff failed to offer any proof as to the intent of Verizon to harm Tess, or proof that it was the primary intent because it was business related. A business interest negates a claim of malevolence for prima facie tort. *Prebble v United States*, 838 FSupp 36, 37 (NDNY 1993). Here the reason for any action undertaken by Verizon was commercial, since Tess has failed to show any proof that the intent of the defendant was to harm it or that it was malicious. Verizon is entitled to Summary Judgment on this issue.

Intentional Interference With Prospective Business Relationship

Tortious interference with a prospective business relationship requires showing "(1) business relations with a third-party; (2) the defendant's interference with those business relations; (3) that the defendant acted with the sole purpose of harming the plaintiff or used improper means; and (4) injury to the business relations." *Drug Emporium Inc. v Blue Cross of Western New York, Inc.*, 104 FSupp2d 184, 190 (WDNY 2000).

Tess has failed to offer proof that it lost any specific business or that there was any reason to believe that "but for" the interference of Verizon, Tess would have gained any other business. There was no showing of what percentage of any similar salons' business consists of walk-ins and what percentage of the plaintiff's business consisted of walk-ins. At best, we would be left with a qualified probability that some unspecified business

was lost due to Verizon's interference, which is insufficient.

As aforesaid, Tess failed to show that the acts of Verizon were independently tortious or based solely on malice. The acts that interfered with the prospective business relations must have been independently tortious or illegal. *Carvel Corp. v Noonan*, 3 NY3d 182, 190 (2004). The tortious acts must also be directed at the third-party not at the plaintiff. *Id.* at 192. The plaintiff must also show individual tortious acts. *Culverhouse v Cooke Center for Learning and Development, Inc.*, 177 Misc2d 365 (Sup Ct, Ulster County 1998). Tess relies on the other causes of action to show that the actions of Verizon were wrongful, which have been held herein not to be independently tortious.

To the extent that there are any names or dates given, they are Verizon employees who were invited onto the property or came there to resolve this dispute. They are the Verizon employees who signed the log in plaintiff's exhibit 33 and stood for pictures in plaintiff's exhibit 34.

Tess seeks to rely on tortious acts that were allegedly aimed at Tess. *Carvel* requires that the interference be aimed the third-party. Here there is no allegation that Verizon harassed or intimidated the customers or prospective customers of Tess. If malice is the claimed basis of the tort then it must be shown that the defendant acted solely out of malice and not out of financial self-interest. *Carvel* at 190. As above, in the Contract and Prima Facie claims, Tess has not offered any evidence as to any wrongful intent of Verizon. Tess has also not

rebutted the logical inference that even if Verizon sought to interfere with Tess' business that Verizon was acting merely out of its own financial self-interest in doing telephone repairs.

Plaintiff's cross-motion for leave to amend

Plaintiff cross-moves for an order to grant leave to serve a second amended complaint pursuant to CPLR 3025(b). The proposed amendment would add a tenth cause of action, a private nuisance claim against third-party defendant Verizon Communications Inc.

Amendments are generally permitted, absent prejudice or surprise. *Verizon New York Inc. v Consolidated Edison Inc.*, 38 AD3d 391 (1st Dep't 2007).

However, in proposing its private nuisance claim, plaintiff relies on the same facts and evidence that form the basis of its other causes of action against Verizon which have all been dismissed. Plaintiff is not alleging any new facts nor requesting additional discovery. The proposed nuisance claim is based on the record before us.

In order for this court to deny amendment or to grant Verizon summary judgment on its motion to dismiss the proposed nuisance claim, this Court must find that there are no triable issues of fact as to any of the elements of a private nuisance claim. If there are any material factual issues as to any of the elements of the proposed nuisance claim, amendment should be granted.

The elements of the tort of private nuisance are "(1) an interference substantial in nature, (2) intentional in origin,

(3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." *Copart Industries v Consolidated Edison of New York*, 41 NY2d 564, 570, *rearg denied* 42 NY2d 1102 (1977).

Tess has failed to provide any significantly corroborative evidence to show that triable issues of fact exist. In support of its private nuisance claim, plaintiff only offers Ms. Szurant's own affidavits, the majority of which are wholly conclusory statements. Due to the lack of evidence that plaintiff offers in support of its proposed nuisance claim, this Court will deny the motion to amend and grant summary judgment in favor of defendant Verizon on the proposed amendment.

Validity of the Easement, Trespass

Plaintiff has no standing to challenge the validity of the easement. "The extent of the use of the easement might be an issue between the parties to an easement, but such use may not be contested by a person not a party to the easement." *In Re Huie*, 22 Misc 2d 1028, 1034 (Sup Crt, Ulster County 1959). Accordingly, Tess's current challenge to the validity of the Verizon easement must fail as a matter of law and cannot be utilized either (1) to support leave to amend, or (2) to generate an issue of fact meriting a trial.

The genesis of the numerous claims against Verizon involves the easement recorded in September 30, 1986 from Fred Tuck, Inc. ("Tuck") in favor of New York Telephone Company.

Plaintiff now argues that the easement was not lawfully

granted to Verizon by Tuck because it never owned the building. The chain of title to the Building shows that Tuck was never an owner. The owner of the building as of July 15, 1986 was Valentine Spielman, Inc. ("VSI") (Exhibit 12). Therefore, Tess argues, Verizon did not acquire the easement by grant from Tuck, because the easement was invalid from inception having purportedly been granted by a non-owner (Tuck) of the servient tenement.

Verizon argues that it is axiomatic that the owner of the property may, in person or through an agent, grant an easement. See e.g., *Heyman v Biggs*, 223 NY 118, 125 (1918). Verizon also contends that the easement was recorded twenty-two years ago and was never challenged on the basis of the "authority" of the granting agent by any owner of the Property. Verizon asserts that Tess cannot, in a desperate attempt to "invalidate" Verizon's legal rights, now manufacture an issue of authority on no basis other than Tess Szurant's willingness to so.

The easement granted to New York Telephone on July 15, 1986 must be considered valid. While the plaintiff is correct in asserting that an easement must be granted by an owner of the burdened property, Verizon effectively addresses this assertion in noting that it is fully within the rights of a property owner to appoint an agent to grant an easement on his behalf. *Heyman*, *Real Property Law* [Cons. Laws, ch. 50], § 242; Laws of 1909, chap 52.

In addition, Tess lacks the requisite standing to maintain

an action for trespass (either to the basement, or to the front of the building), because plaintiff cannot (1) establish an exclusive right to the real property at issue, or (2) abrogate Verizon's rights that existed, and continue to exist, by virtue of the easement.

Plaintiff's assertion on the standing of a tenant to bring a trespass action seems to miss the point. Tess's standing is undermined, not by the status as a tenant, but by the fact that it had no right of exclusive possession, which is the sine qua non of trespass. Accordingly, plaintiff does not have standing to make a trespass claim against Verizon. An action for trespass cannot be brought, and will not lie where the alleged trespasser has acquired an easement over the land or otherwise has consent to enter upon the land. *Mangusi v Town of Mount Pleasant*, 19 AD3d 656 (2d Dept 2005).

It should also be noted that Tess's problems with Verizon were likely self-created, in that it (1) objected to the easement, (2) assumed complete dominion over the Basement area through a padlocking of the singular vault ingress/egress; (3) created the circumstance where Verizon employees had to personally request access; and (4) unilaterally decided that the presence of Verizon employees was inconsistent with its "high fashion beauty salon" and "interfered with the operation of the plaintiff's business and plaintiff's peaceful use and enjoyment of the premises."

While a refusal to leave after request may constitute a

trespass as an "unlawful remaining", Am. Jur. Trespass § 165, the plaintiff never claims that any Verizon employee refused a request to leave. Moreover, the evidence confirms that Tess requested that Verizon employees remain to "sign a log" and have their pictures taken [Exhibits 33 and 34]. The trespass claim is deficient as a matter of law.

Accordingly,

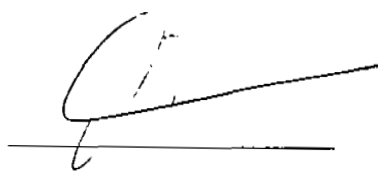
it is ORDERED that First Sigma Capital Inc.'s and Defendant Verizon Communications, Inc.'s motions for summary judgment (004, 005), are granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the third-party action (590848/05) shall continue.

Dated: July 31, 2008

ENTER:



FILED
HON. CHARLES E. RAMOS
J.S.C.

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