

**Triple Fashion Corp. v 240 West 37 LLC**

2008 NY Slip Op 33463(U)

December 22, 2008

Supreme Court, New York County

Docket Number: 115823/07

Judge: Joan A. Madden

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

PRESENT: Madden  
Justice

PART 11

Triple Fashion Corp.

INDEX NO: 45823/07

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

MOTION SEQ. NO. 02

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

240 West 37 LHC

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Reargue Order

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 determined in accordance with the annexed decision and order.

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

**FILED**

DEC 31 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: December 22, 2008

[Signature]  
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: PART 11

-----X  
TRIPLE FASHION CORP., BEST SALES PRODUCTS  
CO., INC., DEPENDABLE TRANSPORT &  
MESSENGER, INC., BOA FASHION INC., CONTOUR  
DRAPERY, INC., KESSELMAN TRIMMINGS INC.,  
GALILEE ENTERPRISE INC., IZA TRIMMINGS, INC.,  
and SAN LOUIS SPORTS LTD.,

INDEX NO. 115823/07

Plaintiffs,

-against-

240 WEST 37 LLC,

Defendant.

**FILED**

DEC 31 2008

COUNTY CLERK'S OFFICE  
NEW YORK

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JOAN A. MADDEN, J.:

In this action between seven commercial tenants<sup>1</sup> and their landlord, defendant landlord moves for an order pursuant to CPLR 2221(d) granting leave to reargue the portion of this court's Interim Order dated March 6, 2008, which granted plaintiffs' motion for a preliminary injunction "to the extent of setting this matter down for an evidentiary hearing as to the issues of 24 hour access and the operation of the elevators."<sup>2</sup> Additionally, defendant moves for an order pursuant

\_\_\_\_\_  
<sup>1</sup>Originally, this action involved nine tenants, but two were permitted to withdraw pursuant to a November 29, 2007 stipulation and a March 29, 2007 order. The two tenants no longer in the action are Kesselman Trimmings Inc. and Iza Trimmings, Inc.

<sup>2</sup>In support of their motion for a preliminary injunction, plaintiffs submitted and relied on the motion papers submitted in a related action by another tenant in the same building, Ray & W Cut Inc. v. 240 West 37 LLC, Index No. 111411/07, Supreme Court, New York County. The plaintiffs in the two actions are represented by the same counsel and are moving for identical preliminary injunctions. The court directed a joint hearing on the preliminary injunction motions, but plaintiffs consented to stay the hearing in light of defendant's identical motions for reargument and summary judgment.

to CPLR 3212 granting summary judgment dismissing the complaint in its entirety.

“A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law.” Foley v. Roche, 68 AD2d 558, 567 (1<sup>st</sup> Dept 1979). Reargument is not intended “to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided . . . [or] to provide a party an opportunity to advance arguments different from those tendered on the original application.” Id at 567-568.

Applying this standard, reargument is not warranted, as defendant fails to establish that the court overlooked or misapprehended the facts or misapplied the law, in directing a hearing on plaintiffs’ motion for a preliminary injunction.

In accordance with CPLR 6301, the court directed a hearing on plaintiffs’ motion for a preliminary injunction and the issues of 24-hour access and elevator service.<sup>3</sup> Basically, plaintiffs assert that they are seeking to preserve the status quo as it existed under the prior landlord/owner of the building, where the tenants were allowed 24-hour access and had adequate elevator service. Plaintiffs allege that shortly after defendant purchased the building, it took actions to “empty” the building by commencing summary eviction proceedings against “virtually all of the tenants.”<sup>4</sup> Plaintiffs also allege that defendant sharply reduced the hours of access to

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<sup>3</sup>On November 7, 2007, the court signed an order to show cause in the related action, Ray & W Cut Inc. v. 240 West 37 LLC, which included a temporary restraining order that “plaintiff and its employees shall have reasonably immediate access based on passes issued as of this date, and a method shall be established so that any additional employees or others entitled to access plaintiff’s premises shall be issued passes within a reasonable time of application” and “plaintiff and its employees shall have access to the premises till 7 p.m. on weekdays.”

<sup>4</sup>Plaintiffs assert that defendant commenced approximately 12 separate Civil Court summary eviction proceedings against other tenants in the building.

the building, instituted new and inconvenient security procedures for gaining entry into the building, and has not provided passenger and freight elevator service, all of which have adversely affected plaintiffs' ability to conduct their businesses.

Specifically, on October 19, 2007, defendant advised the tenants that "[c]ommencing on October 22, 2007, access to the building for Tenants, their guests, employees, invitees, licensees, vendors, etc. shall be restricted to business days from 8:00 a.m. to 6:00 p.m. and Saturdays from 8:00 a.m. to 1:00 p.m. only. Plaintiffs submitted an affidavit of Luis Alvarez, Vice President of Iza Trimmings, Inc.,<sup>5</sup> that he has been operating his trimming wholesale business out of the building for 26 years, and "[d]uring that entire time, we have had a key to the entrance door to the building [and] have opened our business at 6:30 a.m. to accommodate our customers." Alvarez states that "without warning, over the weekend of November 3 and 4, 2007, the locks to the entrance door to the building were changed, and the landlord now refuses to give us a key," and "they refuse to open the building before 8:00 a.m. and apparently require all tenants to be out of the building by 6:00 p.m., and also refuse access on the weekends."

As to the issue of elevator service, plaintiffs alleged that since defendant acquired the building, "rarely has a week gone by without at least one of the elevators being out of service," and "[s]ome days, both elevators are out of service for hours."<sup>6</sup> Plaintiffs submitted information compiled by a tenant, that during the period from January 11, 2008 to February 5, 2008, one or

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<sup>5</sup>As noted above, Iza Trimmings, Inc. is no longer a party to this action. However, Mr. Alvarez's affidavit is still properly considered, even as a non-party, since he is a tenant in the building and has first-hand knowledge of the actions of both the prior and current landlords.

<sup>6</sup>The issue of elevator service is specifically addressed in the supplemental motion papers submitted in the Ray & W Cut Inc. action, which, at the request of the instant plaintiffs, have been considered in connection with this action.

both elevators were out of service either all day or a substantial portion of a day, on ten separate days. Plaintiffs asserted that if the court directed a hearing, defendant should be directed to produce a witness from its elevator service company, to “determine whether those outages are intentional.”

Based on the foregoing, the court previously determined that a hearing was necessary to resolve plaintiffs’ motion for a preliminary injunction, as plaintiffs were entitled to an opportunity to establish the likelihood of their success on the merits of their claims for breach of the lease, based on defendant’s alleged failure to provide 24-hour access and adequate elevator service.

In seeking reargument, defendant contends that plaintiffs’ motion for a preliminary injunction should have been denied without a hearing, as the parties’ leases “clearly and unambiguously allow Landlord to restrict access to the Building to certain delineated hours,” and plaintiffs are “unable – as a matter of law – to introduce any evidence showing that Defendant has ‘waived’ its right to enforce the Leases’ access provisions after it notified tenants of its decision to enforce the governing provisions.” Defendant’s contentions are not persuasive.

Even though the leases contain non-waiver and merger clauses, plaintiffs rely on the course of dealings between the parties in asserting that the prior landlord permitted 24-hour access and provided adequate elevator service. It is well settled that parties to a lease may waive a non-waiver clause where the reasonable expectations of both parties under the lease have been modified by subsequent actions of the parties. See e.g., TSS-Seedman’s, Inc. v. Elota Realty Co., 72 NY2d 1024, 1027 (1988) (notwithstanding lease nonwaiver clause, landlord’s acceptance of rent waived tenant’s default in payment of rent, and lease remained in effect); Kenyon & Kenyon

v. Logany, LLC, 33 AD3d 538, 539 (1<sup>st</sup> Dept 2006) (despite lease nonwaiver clause, landlord waived its right to insist on written notice from tenant exercising its option to lease additional space, by not insisting on such notice for nearly 10 months after receiving tenant's oral notification and acting as if it had accepted the tenant's oral exercise of the option); Simon & Son Upholstery, Inc. v. 601 West Associates, LLC, 268 AD2d 359, 360 (1<sup>st</sup> Dept 2000) (landlord waived nonwaiver and merger clauses and right to object to photography studio, where prior landlord was fully apprised and involved in the photography studio modifications, including approving the renovations, providing tenant parking, accepting payments for the photography studio tenant, and using the premises in a sales brochure); Lee v. Wright, 108 AD2d 678, 680 (1<sup>st</sup> Dept 1985) (parties may waive a non-waiver clause and issue of fact existed as to whether landlord's acceptance or rent for a four-year period, without any effort to terminate the tenancy, waived landlord's right to object to tenant's continued occupancy).

As stated above, plaintiffs alleges that the prior landlord provided the tenants with 24-hour access and adequate elevator service. At a minimum, such allegations are sufficient to raise issues for an evidentiary hearing as to whether "sufficient indicia that the reasonable expectations of the parties under the original lease were supplanted by subsequent actions." Simon & Son Upholstery, Inc. v. 601 West Associates, LLC, *supra* at 36. The decision in Simon & Son Upholstery, Inc. v. 601 West Associates, LLC, is particularly instructive. In that case, just as here, the tenant leased the premises from the prior owner, who sold the building. Relying on the nonwaiver and merger clauses in the lease, the new owner/landlord argued that the lease prohibited the tenant's use of the premises as a photography studio, and refused to provide after hours elevator service for the photography studio. Rejecting that argument, the First Department

held that “[w]hile no explicit consent can be found in the record, it is clear from the course of dealings between the parties that the [prior] landlord consented to the use of the premises for a studio.” The First Department concluded that “[s]ince we find that the prior landlord had consented to use of the part of the premises for a photography studio, and since the record indicates that the new landlord . . . was aware of the ensuing partial conversion, plaintiffs are entitled to a limited [preliminary] injunction” directing the landlord to provide elevator service after normal business hours. Id at 360. Based on that authority, the instant plaintiffs are entitled to a hearing on their motion for a preliminary injunction, where they will have an opportunity to demonstrate a course of dealings with the prior landlord, in which the prior landlord consented to provide 24-hour access and adequate elevator service.

Contrary to defendant’s assertion, neither the parol evidence rule nor the statute of frauds precludes plaintiffs from relying on an oral modification to the lease, as an oral modification can be exempt from the statute of frauds where partial performance is unequivocally referable to the claimed oral modification. See Rose v. Spa Realty Associates, 42 NY2d 338 (1977); Travis v. Fallani & Cohn, 292 AD2d 242, 244 (1<sup>st</sup> Dept 2002).

Turning to defendant’s motion for summary judgment dismissing the complaint, the motion is granted in part and denied in part.

The complaint seeks declaratory and injunctive relief, and damages based on the following causes of action: 1) a first cause of action for damages for tortious interference with plaintiffs’ leases, alleging that “[s]ince the time that the Defendant took title to the Subject Building, the Defendant has engaged in a course of conduct designed to cause the Plaintiffs to

vacate their respective premises”<sup>7</sup>; 2) a second cause of action for breach of plaintiffs’ right to quiet enjoyment of their leases; 3) a third cause of action for violation of plaintiffs’ privacy, and the privacy of plaintiffs’ employees and guests; 4) a fourth cause of action for breach of the lease, based on defendant’s failure properly to operate and maintain the elevators; 5) a fifth cause of

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<sup>7</sup>The first cause of action (paragraph 17 of the complaint) lists the following specific actions that defendant has allegedly engaged in:

a) instituting frivolous lawsuits for de minimis breaches of the Plaintiffs’ long term leases; b) removing locks to the entrance door of the Subject Building, allowing strangers and vagrants access to the said Building; c) shutting down the passenger and freight elevators preventing access to the Plaintiffs’ premises; d) failing to properly repair the passenger and freight elevators, preventing access to the Plaintiffs’ premises; e) using its own actions in allowing unfettered access to the Subject Building as a basis for instituting unnecessary restrictive access policies to the Subject Building; f) instituting a policy requiring building identification cards on virtually no notice, causing substantial and unreasonable delays in the Plaintiffs gaining access to their own premises; g) refusing to provide building identification cards without pay stubs from Plaintiffs for their employees; h) requiring new building identification cards two weeks after issuing the first building identification cards, causing substantial and unnecessary delays in the Plaintiffs gaining access to their respective premises; i) requiring that the Plaintiffs and their employees permit their building identification cards to be copied before permitting access; j) refusing to allow access to guests and visitors of the Plaintiffs unless they show identification and permit it to be copied, even if the Plaintiffs identify the guest/visitor, and request that they be given access; k) hiring individuals to act as ‘building security’ who are rude and offensive, and treat Plaintiffs, their guests and customers in a manner so as to discourage or prevent access to the Subject Building and the conduct of business; l) hiring individuals to act as ‘process servers’ who are rude and offensive, use profanity, threaten the Plaintiffs, and illegally enter the premises of the Plaintiffs; m) retaining employees and independent contractors who physically and verbally assault Plaintiffs, their guests, customers and visitors; n) changing the hours of access in the building from 24 hour access, as it has been since the inception of each of the leases, which in at least one instance is 26 years, to extremely limited access of only ten hours Monday through Friday, and four hours on Saturdays; and o) threatening the Plaintiffs and their employees with arrest if they remain in their respective premises after 7:00 p.m., despite the fact that past and common practice for the entire period of each of the leases was to permit 24-hour access to the Subject Building.

action for an injunction “prohibiting the Defendant from engaging in any conduct the same or similar to that described in paragraph 17 of the within complaint” (as noted above, paragraph 17 lists 15 separate actions constituting the alleged tortious interference); and 6) a sixth cause of action for attorney’s fees, “pursuant to the express terms of the leases.”

Defendant is entitled to summary judgment dismissing the first cause of action for tortious interference with the lease and the third cause of action for violation of privacy.

The elements of a claim for tortious interference with contract are: (1) the existence of a valid contract between plaintiff and a third party; (2) defendant’s knowledge of that contract; (3) defendant’s intentional procuring of the breach of the contract; and (4) resulting damages. See Foster v. Churchill, 87 NY2d 744, 749-750 (1996); William Kaufman Organization, Ltd v. Graham & James LLP, 269 AD2d 171, 173 (1<sup>st</sup> Dept 2000). Plaintiff’s tortious interference claim fails as matter of law. Plaintiff’s claim is based solely on its lease with defendant and does not allege the existence of any contract with a third-party. See Buller v. Giorno, 28 AD3d 258 (1<sup>st</sup> Dept 2006); Koret, Inc. v. Christian Dior, S.A., 161 AD2d 156 (1<sup>st</sup> Dept), app den 76 NY2d 714 (1990). Thus, the first cause of action is dismissed.

The third cause of action for violation of plaintiffs’ privacy and the privacy of plaintiffs’ employees is without merit. New York does not recognize a common law right to privacy, and the only right to judicial relief for invasion of privacy is a limited statutory right under sections 50 and 51 of the Civil Rights Law, which are not applicable to the facts in this case.<sup>8</sup> See

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<sup>8</sup> Civil Rights Law §50 prohibits the use for “advertising purposes or the purposes of trade . . . the name, portrait or picture of any living person without having first obtained the written consent of such person.” The violation of section 50 is a misdemeanor, and section 51 makes a violation of section 50 actionable in a civil suit for equitable relief and damages.

Arrington v. New York Times Co., 55 NY2d 433 (1982), cert den 459 US 1146 (1983); Cohen v. Hallmark Cards, Inc., 45 NY2d 493, 497 (1978); Wojtowicz v. Delacorte Press, 43 NY2d 858 (1978). Thus, the third cause of action is dismissed.

The balance of defendant's motion for summary judgment is denied.

In the second cause of action, plaintiffs assert a claim for breach of the covenant of quiet enjoyment, which requires an actual or constructive eviction. Jacobs v. 200 East 36<sup>th</sup> Owners Corp., 281 AD2d 281 (1<sup>st</sup> Dept 2001). Plaintiffs' allegations as to the reduction in hours of access to the building and the withholding of elevator service, arguably support a partial actual eviction. See e.g. Barash v. Pennsylvania Terminal Real Estate Corp., 26 NY2d 77, 83 (1970) (citing Lawrence v. Edwin A. Denham Co., 58 Misc 543 (App Term 1908) [actual partial eviction where tenant had unrestricted right to enter building at any hour of the day, and landlord barred tenant from entering the building at certain times]); Union City Union Suit Co., Ltd v. Miller, 162 AD2d 101 (1<sup>st</sup> Dept 1990), app den 77 NY 2d 804 (1991) (landlord's removal of freight elevator which was absolutely essential to tenant's beneficial enjoyment of the premises, constituted an actual partial eviction); Rasch, 2 New York Landlord & Tenant, §28.15 (4<sup>th</sup> Ed); but see Cut-Outs, Inc. v. Man Yun Real Estate Corp., 286 AD2d 258 (1<sup>st</sup> Dept 2001), lv app den 100 NY2d 507 (2003) (landlord's interference with ingress and egress to building did not result in a partial actual eviction, where tenant did not contend that it was deprived of access, but only that access was slower, less convenient and less pleasant); Graubard, Mollen, Horowitz, Pomeranz & Shapiro v. 600 Third Avenue Assocs, 240 AD2d 161 (1<sup>st</sup> Dept 1997) (no actual partial eviction where the landlord's reduction in elevator service never resulted in denial of access). Thus, the second cause of action shall stand.

The fourth cause of action for breach of the lease based on the reduction in elevator service shall stand. The complaint alleges that pursuant to paragraph 31 of the leases, the defendant is required to provide both passenger and freight elevator services, and that as a result of “defendant’s failure to properly operate and maintain the elevators,” plaintiffs “have been unable to properly conduct their business, and have lost substantial sums as a result of interruption in its operations.” As noted above, plaintiffs allege that since defendant acquired the building, one or both elevators have been out of service on a weekly basis, and the frequency of such outages suggests that they may be intentional.

The fifth cause of action seeks an injunction “enjoining defendant from engaging in any conduct the same or similar to that described in paragraph 17 of the within complaint.” Paragraph 17 is part of the first cause of action for tortious interference with the leases, which is being dismissed. However, the allegations in paragraph 17 shall stand to the extent they support a claim for breach of the parties’ leases. For example, as noted above, the court has directed a hearing on plaintiffs’ motion for a preliminary injunction so that plaintiffs can establish the likelihood of their success on the merits of their claim for breach of lease based on defendant’s alleged failure to provide 24-hour access. Plaintiffs’ allegations as to the 24-hour access issue are contained in paragraph 17 of the complaint, which states, *inter alia*, that defendant “chang[ed] the hours of access in the building from 24 hour access, as it has been since the inception of each of the leases, which in at least one instance is 26 years, to extremely limited access of only ten hours Monday through Friday, and four hours on Saturdays.” Thus, the fifth cause of action shall stand only to the extent the allegations in paragraph 17 can be construed to support a claim for a breach of the parties’ leases.

The sixth cause of action seeks attorney's fees, alleging that "[b]y the express terms of the leases, the prevailing party is entitled to the legal fees incurred in the successful prosecution or defense of any action regarding breach of the terms of the said lease." Absent documentary evidence conclusively refuting plaintiffs' allegations as to the terms of the leases, plaintiffs' claim for attorney's fees shall stand. However, at trial, plaintiffs will be required to establish their contractual right to attorney's fees by producing copies of their leases.<sup>9</sup>

Accordingly, it is hereby

ORDERED that defendant's motion for leave to reargue is denied; and it is further

ORDERED that defendant's motion for summary judgment is granted only to the extent of severing and dismissing the first and third causes of action, and the motion is denied as to the second, fourth, fifth and sixth causes of action; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on January 8, 2009 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street; and it is further

ORDERED that the parties are directed to appear for the hearing on plaintiffs' motion for a preliminary injunction on January 14, 2009 at 11:00 a.m.

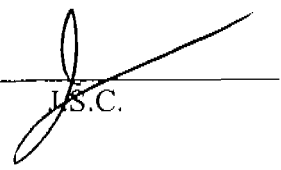
DATED: December 22, 2008

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<sup>9</sup>The only lease plaintiffs submit is the lease for the plaintiff/tenant in the related action, Ray & W Cut, Inc. Paragraph 47 of the Rider to that lease gives both the landlord and the tenant the right to recover reasonable attorney's fees as the "successful party" to "any action or proceeding against the other in connection with this Lease."