Matter of New York Landmarks Conservancy, Inc. v 375 Park Ave. Fee, LLC
2014 NY Slip Op 30865(U)
April 4, 2014
Sup Ct, New York County
Docket Number: 151097/2014
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of:

NEW YORK LANDMARKS CONSERVANCY, INC.,

Plaintiff,

for an Order Enjoining Respondents from removing the Pablo Picasso Curtain, entitled *Le Tricorne*, from its current location at the building located at 375 Park Avenue, New York, New York,

-against-

375 PARK AVENUE FEE, LLC, RFR HOLDING CORP., CLASSIC RESTAURANT CORP. and THE FOUR SEASONS RESTAURANT,

Defendants.

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Index No.: 151097/2014

INTERIM DECISION AND ORDER

Motion Seq. #s 001 and 003

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff New York Landmarks Conservancy Inc. ("Landmarks") moves by Order to Show Cause to preliminarily enjoin respondents 375 Park Avenue Fee, LLC ("375 Park"), RFR Holding Corp. ("RFR"), and The Four Seasons Restaurant ("Four Seasons") (collectively, "defendants") from removing the "Picasso Curtain" from its current location without its express written consent and authorization (motion seq. 001).

Defendants oppose the application and cross move by Order to Show Cause to dismiss the Amended Verified Complaint as against 375 Park and RFR (motion seq. 003) pursuant to CPLR 3211(a)(1) and (a)(7).[1]

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[1] Landmarks initially filed a Verified Petition, which was the subject of a motion to dismiss by 375 Park and RFR (motion seq. 002). In response, Landmarks filed an Amended Verified Complaint. Consequently, such motion was rendered moot, and the instant motion to dismiss aimed at the Amended Verified Complaint ensued

Factual Background

The Picasso Curtain, *Le Tricorne*, was painted by Pablo Picasso in 1919, and is currently housed at the Four Seasons Restaurant in Manhattan, where it has been located for over 50 years (Attorney Affirmation in Support of OSC, ¶2).

The Four Seasons Restaurant occupies portions of the ground floor, concourse level, and first floor mezzanine of the Seagram Building located at 375 Park Avenue, pursuant to an October 7, 1998 lease between Four Seasons' parent company, Classic Restaurant Corp.[2] (as tenant) and RFR's predecessor, TIAA Realty Inc. (as owner) (the "Lease").[3] The ground floor interior and first floor interior of the Four Seasons were previously designated as a Landmarks by the New York City Landmarks Preservation Commission (the "Commission") (see Landmarks Preservation Commission October 3, 1989; Designation List 221; LO-1666; Amended Complaint, ¶6).[4] At the time the Lease was signed, Joseph E. Seagram and Sons, Inc. ("Seagram") was the owner of the Picasso Curtain, which was mounted on a wall (the "Wall") in

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footnote 1, cont'd.

(see Order dated March 5, 2014). Notably, 375 Park and RFR also claimed that the action was brought in the improper form, and plaintiff responded that CPLR 103(c) permits the Court to enter an order allowing the parties to proceed in the form of an ordinary action. During the oral argument on April 2, 2014, Landmarks made an oral application to amend the pleadings to the extent of referring to the parties as plaintiff and defendants, and conforming this action to a plenary action, which the Court granted.

[2] Although the Verified Petition and subsequent Amended Verified Complaint also named Classic Restaurant Corp. ("Classic") as a respondent, the Order to Show Cause does not appear to be aimed at Classic (see Emergency Affirmation, ¶¶3, 7).

[3] RFR, through 375 Park, purchased the Building in 2000.

[4] The Findings and Designation section of the relevant portion of the Designation Report defines the Interior Landmarks as follows: "FOUR SEASONS RESTAURANT, GROUND FLOOR INTERIOR consisting of the entrance lobby and the staircase leading from the entrance lobby to the first floor interior; FIRST FLOOR INTERIOR consisting of the restaurant lobby . . . ; and the fixtures and interior components of these spaces, including but not limited to, wall surfaces, floor surfaces, doors, railings, hanging sculptures, and metal draperies; . . . ."

a portion of the Four Seasons known as "Picasso Alley." (Transcript, p. 42). Picasso Alley itself is undisputedly designated as a landmark.

The Building was sold to RFR in 2000, and the Picasso Curtain continued to reside in Picasso Alley.

In 2005, the Picasso Curtain was conveyed to Landmarks pursuant to a Deed of Gift dated November 28, 2005 (the "Deed of Gift"). Under the Deed of Gift, the Donor conveyed the Picasso Curtain "currently displayed in a public space" at the Building "Subject to the conditions stated below," which include the following:

> "(c) to the extent that the location shall, in the Donee's [Landmarks'] reasonable judgment, cease to be suitable for the display of the Curtain, the Donee [Landmarks] shall not remove the Curtain from the location where it is now displayed for so long as the space or the building in which the space is located retains its Landmarks designation . . . ."

In November 2013, RFR advised Landmarks of its intent to permanently remove the Picasso Curtain due to an alleged leaking steam pipe in the ceiling which might leak onto the Curtain[5] (Amended Complaint, ¶25). Landmarks sent an engineer to the location, who found no evidence of a steam leak. At Landmarks' request, an expert Donald Friedman examined the Wall for the alleged steam leak, and found no evidence of water damage or any signs of "recent movement of the partition back-up block or stone veneer."

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[5] According to 375 Park and RFR, previously, in the Fall of 2013, RFR's General Manager of the Seagram Building, Frank Farella ("Farella") noticed that some of the travertine panels adjacent to the Picasso Curtain were protruding and that grout around those panels was missing (Farella Affidavit, ¶5-6). When he tapped the panels in that area, he heard a hollow sound, as opposed to when he tapped on other panels around the room away from the Picasso Curtain, where the grout was in tact. (Id., ¶6). Farella then met Steven Najarian ("Najarian") of Severud Structural Engineering and Richard Martelli of Tri Star Construction on November 15, 2013 to inspect the area. Najarian prepared a letter dated December 16, 2013 of his findings (the "Severud Letter").

According to RFR and 375 Park, RFR offered Landmarks the opportunity to move the Picasso Curtain, but Landmarks objected to any move. During oral argument, Four Seasons indicated that its position is to remain neutral and be guided by the Court's decision (Transcript, p. 10).

In December 2013, RFR's CEO Aby Rosen ("Rosen") claimed that his engineer also raised structural concerns with the Wall behind the Picasso Curtain. When Landmarks requested documentation from the engineer, Rosen sent the engineer's letter, which alleged a dangerous condition in the Wall that required emergency repairs.[6] According to the letter, the engineer (Najarian) recommended that "several of these panels [that had "shifted approximately 3/8" to 1/2" horizontally"] "located on the wall where the Le Tricorne Picasso Tapestry is hung" "be removed to investigate the cause of this movement." The letter further stated that "further movement could cause the panels to collapse, thus causing a potential safety hazard. The potential to cause damage to the Picasso tapestry exists should the panels shift further or collapse."

In December 2013 and January 2014, Richard L. Tomasetti, P.E. ("Tomasetti") and Robert Kornfeld, AIA ("Kornfield") of Thornton Tomasetti examined the condition of the Wall and the original design drawings ("Design Drawings"), and opined that there were no travertine panels behind the Picasso Curtain, and that the travertine panels adjacent to both sides of the Curtain were not displaced. And, the travertine panels that were displaced (mostly by 1/8") do not require drastic action to remediate. Thornton Tomasetti recommended monitoring of the travertine panels for movement and additional non-destructive evaluations, including locating the existing anchors and assessing their condition and examining elements within the Wall with optical devices such as a boroscope. Thornton Tomasetti further opined that since the travertine panels on both sides of the Picasso Curtain were not affected, non-destructive testing and subsequent panel support repair, if necessary, could be performed without disturbing the Picasso

[6] It appears that the letter sent was the one created by Najarian dated December 16, 2013.

Curtain.[7]

Landmarks asserts that the Picasso Curtain is an integral part of the Four Seasons Restaurant (Amended Complaint, ¶8), and that the sole reason for RFR's actions is that Rosen dislikes the Picasso Curtain and wants to replace it with other artwork.

Landmarks' conservator, Sarah Lowengrad ("Lowengrad") inspected the Picasso Curtain, and opined that its removal "posed a significant risk of damage to both the paint layer and the fabric, which would likely crack or break" and thus the "safest method to preserve the Picasso Curtain is continued display in the place it is currently located." (Lowengrad Affidavit, ¶11). One of the potential movers retained by RFR admitted to Landmarks that the Picasso Curtain is so fragile and brittle that it might "crack like a potato chip." An independent art mover has advised that the proper removal of the Picasso Curtain would take 7 to 10 working days. Yet, RFR plans to remove the Picasso Curtain within one weekend to avoid business interruptions, which would undoubtedly damage the Curtain.

Thus, Landmarks seeks, in its first and second causes of action, respectively, to preliminarily and permanently enjoin defendants from removing the Picasso Curtain from its present location.

In its third cause of action, Landmarks asserts that pursuant to the Lease, 375 Park and RFR are not permitted to perform any modifications to Picasso Alley without written authorization from Four Seasons and/or Classic. The majority owner of Classic was the owner of the Picasso Curtain when the Lease was signed, and the Deed of Gift specifically provided that Landmarks would not remove the Picasso Curtain from Picasso Alley for so long as the space or

[7] Landmarks offered to pay the costs for the recommended movement monitors.

the Building in which the space is located retains its Landmarks designation. Landmarks, as the current owner of the Picasso Curtain, is both an intended and third-party beneficiary of the portion of the Lease relating to modifications of Picasso Alley, and as such, authorization from Landmarks and Four Seasons/Classic must be obtained before removing the Curtain from Picasso Alley. The removal of the Picasso Curtain from Picasso Alley without such authorization is a breach of the Lease, and 375 Park and RFR have breached the Lease by seeking to remove the Curtain from Picasso Alley without the proper authorizations.

In the fourth cause of action (for trespass to chattel), Landmarks alleges that the unjustified removal of the Picasso Curtain by 375 and RFR without Landmarks' consent will adversely impact and interfere with Landmarks' use and enjoyment of the Curtain and the improper removal of the Curtain will result in irreparable damage to the Curtain.

The fifth cause of action (for conversion) alleges that 375's and RFR's actions in exercising control over the Picasso Curtain in derogation of and to the exclusion of Landmarks has and will damage Landmarks' ownership rights, as the Curtain will suffer irreparable damage if it is removed from as currently planned.

In its sixth cause of action (alleging prima facie tort), Landmarks alleges that in regard to 375 Park's and RFR's intentional removal of the Picasso Curtain without Landmarks' consent, they are purporting to act under a claim of right, title or interest. Such removal is motivated by malice, is unsupported by any excuse or justification, and will result in special damages to Landmarks as the Picasso Curtain will likely be irreparably and permanently damaged if it is removed as currently planned.

In the seventh cause of action, Landmarks seeks a declaration of the rights of the parties

as to whether 375 Park and/or RFR are permitted to remove the Picasso Curtain without receiving the authorization and consent of Landmarks, Classic, and/or the Four Seasons.

Landmarks argues that it is entitled to a preliminary injunction enjoining defendants from removing the Picasso Curtain from its current location until final determination of this matter, and an order permanently enjoining defendants from removing the Curtain from its current location without Landmarks' consent and authorization. Landmarks argues that it is likely to succeed on the merits of its claims, and that RFR's unauthorized removal of the Picasso Curtain will likely result in significant and irreparable damage to the Curtain. And, the balance of equities favor the Landmarks in that any destructive action taken by RFR will render moot any relief the Court grants if the Picasso Curtain is removed from its current location as intended by RFR, and militates against any claim of urgency in the need to remove the Curtain.[8]

In opposition, 375 Park and RFR 375 Park argue that the art works, including the Picasso Curtain, are not part of the Four Seasons Landmarks designation (see page 6, stating "These features [masterpieces of modern art], are not part of this designation . . . a painted curtain . . . Le Tricorne") and Landmarks has no right to keep the Picasso Curtain the Building. Landmarks has no rights under the Lease, or any right or contract with RFR which permits it to interfere with

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[8] The Court notes that Landmarks asserted in its order to show cause submissions, Verified Petition, Amended Complaint, and subsequent Reply papers that, defendants failed to obtain permission from the Commission to perform any work in Picasso Alley. In opposition, defendants denied any need to seek Commission approval because the Picasso Curtain is not part of the landmarked space, and such approval is premature until the exact nature of repairs needed is determined. However, the third cause of action in the Amended Complaint *does not* assert this claim, and asserts that defendants failed to obtain consent from Landmarks, Classic and Four Seasons only. It is noted that while defendants later asserted in their motion to dismiss (seq. 003) that, Landmarks has no standing to assert the Commission's rules (Motion Seq. 003, Memo of Law, E-doc #73, pp. 16 and 17 pertaining to the declaratory relief claim), Landmarks does not respond to this argument in opposition, and defendants point out that Landmarks is silent on this issue (E-doc # 83, p. 10). In light of the Amended Complaint and Landmarks' silence, in opposition to dismissal, as to whether it has standing to assert rights regarding consent to work in the Alley, the Court does not address whether Landmarks has such standing to assert Commission's rights, if any.

RFR's right to make repairs to the Building pursuant to section 16.1 of the Lease.[9] Any rights under the Lease to interfere with RFR's moving of the Picasso Curtain belong to Four Seasons, which Landmarks has no standing to assert. And, when the Lease expires in July 2016, the Picasso Curtain will have to be removed in any event, as section 24.5(ii) of the Lease contains RFR's consent only to the display of the Picasso Curtain in the Building.

Defendants contend that according to Farella, the Wall on which the Picasso Curtain hangs is comprised of travertine panels, which extend behind the Curtain for at least nine inches on each side (Farella Affidavit in Opposition, ¶ 4).

On the other side of the Wall is a two-floor kitchen of the Four Seasons Restaurant (Farella Aff. ¶ 7). On the first floor, where the food for the Restaurant is prepared, industrial -sized refrigerators and freezers sit directly up against the Wall shared with the Picasso Curtain (Id. ¶ 8; Affidavit of Najarian, ¶ 5). On the second floor, where the dishwashing operation of the Restaurant is located, a large conveyor dishwashing machine allegedly runs along the Wall shared with the Picasso Curtain. The dishwashing machine allegedly emits a considerable amount of steam and moisture when in full operation. (Id.) The second floor is washed down with a hose at least once per day. (Id. ¶9.) The plans for the Seagram Building show an air conditioning duct in the Wall immediately behind the Picasso Curtain, which is cited as another potential moisture source "If the ductwork leaked air during the cooling season" causing condensation to build "up on the structure supporting" the Wall. (Id. ¶¶10-11.)

The Picasso Curtain spans the height of both floors (Farella Aff. ¶ 7).

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[9] At oral argument, plaintiff clarified that it is both necessary and desirable "to see what's going on in the wall," and that it is necessary and desirable "to do these repairs" (Transcript, p. 5).

RFR's notice to Landmarks in November 2013 of its intent to remove the Picasso Curtain was based on the condition of the Wall as assessed by Najarian, and that after this action was commenced, Narajian visited the Picasso Curtain on February 14, 2014, which confirmed his earlier analysis that steam and moisture emanating from the Four Seasons' kitchen could have compromised the block wall supporting the travertine panel. At his second visit, Najarian met with building engineers to review the drawings of the area, and the first drawing, R-9 – "Restaurant Elevations – Sections of Upper Lobby, Barber Shop, & Miscellaneous," later revised as of September 8, 1958, "clearly shows that the travertine panels extend past the Curtain by nine inches on each side." His field "observations confirm the extension of the panels behind the Curtain, though a field dimension could not be taken to determine how far behind the Curtain the panels run and whether they traverse the entire back of the Curtain." Najarian also notes that "the Velcro tape that had been used on the sides is attached to the travertine panels." The second drawing he reviewed, "Plan of Restaurant," is dated May 5, 1958, and this drawing clearly shows an air conditioning shaft – another potential moisture source – exists at the mezzanine level where the dishwasher is located, directly behind the Curtain." Najarian opines that the bulging of the travertine panels and exposure to moisture and temperature changes on the other side of the Wall indicate that the entire Wall is becoming structurally unsound, warranting the removal of some of the panels in order to identify the cause thereof. There is a current safety hazard, and the potential for the Picasso Curtain to be damaged or injury to a patron should not be ignored. RFR has not yet determined what repairs need to be done on the Wall because RFR has not yet removed the Picasso Curtain to inspect the area behind the Curtain. And, RFR does not need to obtain approval to do any work on the Wall, since the Picasso Curtain is not part of the internal

landmark of the Building.

Tom Zoufaly ("Zoufaly") of Art Installation Design which specializes in moving art, inspected the Picasso Curtain and opined that the Curtain can be safely removed within 16-18 hours, and should be removed to prevent self-destruction, as it is in danger of tearing.[10]

Defendants contend that in the event the Court issues a preliminary injunction, Landmarks must post at least $1 million bond pursuant to CPLR 6312(b) to protect RFR in the event of further structural damage in the Wall. Any injunction would prevent 375 Park and RFR from investigating and repairing the Wall and risk injury to persons and property.

In support of dismissal, 375 Park and RFR first argues that the first two causes of action for injunctive relief are remedies, and are thus dependent on the merits of the substantive claims asserted. As Landmarks failed to sufficiently plead any viable substantive claims, injunctive relief cannot be granted. Further, that the removal of the Picasso Curtain "might" or "may" cause the Picasso Curtain to break is insufficient to show that the alleged irreparable harm is non-speculative. And, the Picasso Curtain will have to be moved when the Lease expires in two years, and by that time, the condition of the Wall and Picasso Curtain will have only deteriorated, further complicating any move. Thus, there can be no irreparable harm if the Picasso Curtain is moved now, which is recommended for its own protection and preservation. Further, since Landmarks cannot prevent a building owner from moving a piece of nonlandmarked art under all circumstances without Landmarks' consent, the balance of the equities favors RFR.

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[10] Zoufaly observed that the Picasso Curtain is hanging from two "Velcro" anchors attached to the top left and right corners of the Curtain, and that the Velcro anchors are failing in many "spots" such that the Curtain is no longer being securely held to the Wall. There appears to be stress tears along the horizontal top edge of the Curtain due to gravity and normal wear. The Picasso Curtain is in danger of self-destruction if the Velcro fails and the existing tears continue to stretch open from right to left. Thomas Branchick (conservator of paintings at the Williamstwon Art Conservation Center) and Grethen Guidess (a textile conservator) agree.

As to the third cause of action, it is argued that Landmarks is, at most, an incidental beneficiary of the Lease, and lacks standing as a third-party beneficiary to enforce the Lease. The inurement clause in section 38.10 of the Lease expressly listing the Building owner and tenant as the intended beneficiaries of the Lease, coupled with the prohibition of any assignments of the Lease under section 15.1, shows that the parties did not intend that third parties benefit from the contract. The sole allegation that Landmarks is the current owner of the Picasso Curtain is insufficient. And, there would be no need to include in the Deed of Gift a provision for obtaining an undertaking from RFR and Four Seasons to allow the Picasso Curtain to hang if Landmarks had third-party beneficiary rights under the Lease.

Nor has RFR breached the Lease. The Lease prohibits Four Seasons from performing any work (except for routine maintenance) in Picasso Alley without RFR's consent, which may be withheld in RFR's sole discretion; neither Four Seasons' nor the Landmarks' consent is required, as RFR controls any and all modifications to Picasso Alley. Furthermore, section 16.1(A) allows RFR to access the leased premises to make repairs RFR "deem[s] necessary or desirable" without having to obtain anyone's written consent. RFR was required only to give Four Seasons reasonable notice in order to perform maintenance or repairs its deems necessary. And, until the engineers can determine the cause of the displacements, and what repairs are necessary, RFR cannot know whether any consent to perform work on the Wall will be needed from Landmarks. Under caselaw, Landmarks has no right to interfere with RFR's right to make repairs.

375 Park and RFR also assert that Landmarks fails to plead a claim for prima facie tort in its fourth, fifth, and sixth causes of action. Landmarks' engineer admits that there has been displacement in the travertine panels, which defeats any claim that RFR intentionally seeks to

harm Landmarks without justification. The claim of "special damages" lacks any specific itemization of damages, as required to assert a prima facie tort. And, Landmarks' allegation that the removal of the Picasso Curtain will result in special damages contradicts it claims for injunctive relief that no remedy at law exists as the harm it faces cannot be quantified monetarily.

And, the seventh cause of action must be dismissed because Landmarks lacks standing to seek a declaration of rights under the Lease. And, the adjudication of the other causes of action, which parallel the declaratory relief sought, renders declaration relief claim duplicative.

In reply in further support of injunctive relief, Landmarks reiterates the merits of its claims, and adds additional support for its claim that the unauthorized, improper removal of the Picasso Curtain will more than likely result in irreparable damage to the Curtain. Landmarks (*via* its President, Peg Breen, points out that Rosen has offered differing excuses for the need to remove the Curtain from Picasso Alley. Lowengard asserts that the "splits" in the Picasso Curtain were mentioned in conservator Gustav Berger's publications regarding his treatment of the Picasso Curtain and thus, the claim that the "splits" require immediate removal of the Curtain lacks any factual support.

In opposition to the motion to dismiss, Landmarks argues that the first and second causes of action are properly premised upon newly asserted, viable claims.

Landmarks asserts that Schedule G of the Lease specifically identifies various artwork located at the Four Seasons, including the Picasso Curtain, which were owned by Seagram, a disclosed stockholder and majority owner of Classic. (Opp, p. 10). Schedule I of the Lease, which contains Article 26, pertains to "Tenant's Exclusive Rights," and specifically states that no aspect of the Four Seasons shall be modified without Classic's prior written authorization, except

as provided in paragraph 7 (work performed by other tenants) and Part C (work required by government agencies to correct dangerous conditions). The purpose for including this clause was for Classic, whose then majority owner was the owner of the Picasso Curtain, to ensure that no work was performed in Picasso Alley (including removing the Curtain) without the consent of the Curtain's owner. Thus, the Lease limits 375 Park's and RFR's ability to remove the Picasso Curtain from the Alley, which is tacitly admitted by defendants, who claim that they will be able to remove the Picasso Curtain once the Lease expires in July 2016. And, while section 16.1 of the Lease permits RFR to make repairs at the Four Seasons, such repairs are subject to the express limitations included in Schedule I and this Section requires RFR to restore the premises to the condition existing prior to the repairs. Also, the Lease does not contain a "No third party beneficiary clause."

In order to perform any work within the Four Seasons Restaurant, including work on the Wall on which the Picasso Curtain hangs, RFR must obtain approval from Landmarks, which it (along with 375 Park) failed to do. Further, pursuant to the Lease, RFR must obtain written approval from Classic and/or the Four Seasons, to perform any modifications in Picasso Alley, including the removal of the Picasso Curtain, which RFR failed to do. RFR and Rosen have misrepresented to Classic and the Four Seasons that Landmarks consented to the removal of the Picasso Curtain. And, notwithstanding the Landmarks' objection and lack of written consent from Landmarks or the Four Seasons to the removal of the Picasso Curtain, RFR retained a moving company to remove the Curtain.

In sur-reply, 375 Park and RFR submits Gustav Berger's publication entitled, "Conservation of a Rare Work by Picasso," where he explains how he extensively treated the

Picasso Curtain after it was taken down. Berger states that, after the Picasso Curtain was cleaned, "[i]t was then sprayed, section after section, with poly(vinyl)acetate Ayaf (Union Carbide) in order to consolidate the powdery glue paint." He explains that "[t]he mounting fabric, a fine Dacron Polyester, Tergal (4), was adhered to the back of the painting in sections . . . . until the whole back was covered with two layers of Tergal." Defendants contend that Berger's removal of the Picasso Curtain from the Wall in 1975, "took only 45 minutes!" (Ex. A at 25) and his treatment of the Curtain reinforces that it can be safely removed in one to two business days. Berger's application of "Tergal" lining reinforced the integrity of the fabric, making it less likely that the fabric will be damaged upon removal. Berger does not reference any tears or splits at the top of the Picasso Curtain. Thus, the Picasso Curtain not only can safely be moved, but should be removed given the poor condition of the Curtain's support structure.

Landmarks also argues that the undertaking sought lacks merit, as there are nondestructive and inexpensive methods to determine the condition of the area behind the Wall, which can be done without disturbing the Picasso Curtain since the displaced panels are not located near the Curtain.

In further support of their cross-motion, 375 Park and RFR argues, in reply, that a permanent injunction preventing RFR from ever moving the Picasso Curtain without Landmarks' consent lacks merit, especially since the Curtain was excluded from the Landmarks' designation and the Lease is set to expire in two years.

As to Landmarks' claim of third-party beneficiary status, the mere mention of the Picasso Curtain in Schedule G of the Lease is not evidence of an intent to permit enforcement by a third party. Schedule I does not mention the Picasso Curtain, or state that the Curtain cannot be

moved to do repairs or for any other reason. In any event, the mere mention of a party's name does not render such person a third-party beneficiary. And, that the caselaw cited by defendants involved construction contracts is of no moment, as the cases cited therein involved other types of contracts. Further, nowhere does it state that section 16.1 of the Lease is subject to Schedule I. Rather, Schedule I is incorporated into the definition of "Requirements," which does not appear in section 16.1. The Deed of Gift specifically states that Landmarks and the Donee will use their best efforts to procure undertakings from the owner and lessee of 375 Park Avenue. However, Landmarks never obtained such undertaking and there would have been no reason for the Donee and Landmarks to seek undertakings from RFR if there was any expectation that RFR was already prohibited from taking down the Picasso Curtain.

Landmarks cannot plead conversion or trespass to chattel, as there can be no claim that RFR interfered with Landmarks' possession of the Picasso Curtain. RFR asked Landmarks to take down the Picasso Curtain and take possession of it so that the travertine Wall can be repaired. Landmarks' refusal to take possession of its own property caused RFR to seek to remove the Picasso Curtain itself. If anything, Landmarks is interfering with RFR's property rights to maintain and repair its building. Further, that the Picasso Curtain might be damaged if it is moved is based on speculation.

Landmarks does not address Severud's letter, which refutes any claim of malice, and the conclusory allegation that RFR acted with malice is, in and of itself, insufficient to support a prima facie tort claim. Nor has Landmarks pleaded special damage with any itemization, as there has been no harm to the Picasso Curtain. Thus, the prima facie tort claim is premature.

Landmarks also cited no contrary authority to the caselaw establishing that causes of

action for declaratory relief pled under these circumstances should be dismissed as duplicative and unnecessary.

Analysis

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On such a motion, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

Pursuant to CPLR 3211(a)(l), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Such a motion may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011] *citing Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 967 NYS2d 338 [1st Dept 2013]).

To be considered "documentary," evidence must be unambiguous and of undisputed authenticity (*Fontanetta v Doe*, 73 AD3d 78, 898 NYS2d 569 [2d Dept 2010] *citing* Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3211:10, at 21–22; *Raske v Next Management, LLC*, 40 Misc 3d 1240(A), Slip Copy, 2013 WL 5033149 (Table) [Supreme Court, New York 2013]; *Philips South Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 867 NYS2d 386 [1st Dept 2008]).

First and Second Causes of Action

As to the first cause of action for a preliminary injunction the test is whether a movant has shown: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor" (*Doe v Axelrod*, 73 NY2d 748, 750, 536 NYS2d 44, 45, 532 NE2d 1272 [1988]; *Housing Works, Inc. v City of New York*, 255 AD2d 209, 213, 680 NYS2d 487, 491 [1st Dept 1998]). As to the second cause of action for a permanent injunction, Landmarks must allege, in addition to the elements for a preliminary injuction, "a violation of a right presently occurring, or threatened and imminent" (*Lemle v Lemle*, 92 AD3d 494, 939 NYS2d 15 [1st Dept 2012] *citing Elow v Svenningsen*, 58 AD3d 674, 675, 873 NYS2d 319 [2009] [finding that "plaintiff sufficiently pleaded a cause of action for a permanent injunction, as there allegedly was a "violation of a right presently occurring, or threatened and imminent; that the plaintiff has no adequate remedy at law; that serious and irreparable injury will result if the injunction is not granted; and that the equities are balanced in the plaintiff's favor")).

As discussed below, the branch of defendants' motion to dismiss the third and fifth

causes of action is denied, and Landmarks sufficiently established the likelihood of success on the merits of its breach of contract and conversion claims.[11]

However, in light of the impending hearing on the issues of, *inter alia*, whether Landmarks will suffer irreparable injury in the event defendants are not enjoined from removing the Picasso Curtain from its present location, a determination on the viability of the first and second causes of action is held in abeyance pending such hearing.

Consequently, the issue of whether the balance of equities tips in favor of Landmarks is also held in abeyance pending such hearing.

Third Cause of Action-Breach of Lease

As to defendants' claim that Landmarks lacks standing to assert any breach of Lease claim as it is not an intended third-party beneficiary of the Lease, it is uncontested that one who seeks to recover as a third-party beneficiary of a contract must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental (*Edge Management Consulting, Inc. v Blank,* 25 AD3d 364, 807 NYS2d 353 [1st Dept 2006]). "One is an intended beneficiary if one's right to performance is '*appropriate to effectuate the intention of the parties' to the contract and* either the performance will satisfy a money debt obligation of the promisee to the beneficiary or '*the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance*'" *(id., citing Roosevelt Islanders for Responsible Southtown Dev. v Roosevelt Is. Operating Corp.*, 291 AD2d 40, 57, 735 NYS2d 83 [2001], *quoting Lake Placid*

[11] During oral argument, plaintiff's counsel acknowledged that the second cause of action for permanent injunctive relief is sought in accordance with the Lease (Transcript, pp. 35-37).

Club Attached Lodges v Elizabethtown Bldrs., Inc., 131 AD2d 159, 161, 521 NYS2d 165 [1987], quoting Restatement [Second] of Contracts § 302[1][b] (emphasis added)). And, as pointed out by the First Department, Appellate Division, courts are to look at "the modern test set forth in the Restatement (Second) of Contracts, which looks to the surrounding circumstances, including the contractual language, to determine whether "the promisee . . . intends to give the beneficiary . . . the benefit of the promised performance" and whether those circumstances are "sufficient, in a contractual setting, to make reliance by the beneficiary both reasonable and probable" (*City of New York (Dept of Parks & Recreation—Wollman Rink Restoration) v Kalisch–Jarcho, Inc.*, 161 AD2d 252, 554 NYS2d 900 [1st Dept 1990] *citing Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 44, 495 NYS2d 1, 485 NE2d 208 [1985]).

The resolution of this issue involves, in large part, upon the interplay of five sections of the Lease as follows:

Section 16.1 : . . . Landlord . . .shall have the right to enter the Premises at all reasonable times . . . to make such repairs to the Premises . . . (i) as Landlord may deem necessary or desirable . . . . Following completion of any of the foregoing work, Landlord shall promptly repair and restore the Premises to the condition existing immediately prior to performance of such work.

Section 26.01 Part A. Modifications, 3. Modifications not permitted: Modifications to the following *shall in no event be permitted*: . . . (b) The following portions of the interior of the Building: (i) the ground floor lobby and the area (hereinafter referred to as "*Picasso Alley*") shown on Schedule III hereto and including mosaic glass and ceramic tile ceilings. (Emphasis

added).

Section 24.5: *Notwithstanding anything else contained in this Lease to the contrary,* Landlord hereby acknowledges and agrees as follows: . . . (ii) Landlord recognizes that the artwork located on or within the Premises and listed in Schedule G annexed is not owned or leased by Tenant, but rather is owned by the third parties identified in Schedule G opposite the name of such artwork. *Landlord hereby consents to the presence of such artwork* within the Premises and any artwork displayed in the Premises in replacement of or substitution therefor, but acknowledges that Landlord has no security interest therein and *that, on the Expiration Date, such artwork may be removed by or on behalf of Tenant or its third-party owner* on reasonable notice to Landlord during such reasonable hours as Landlord may specify." (Emphasis added).

Schedule G, "Artwork Not Subject to Landlord's Security Interest," provides that "Joseph E. Seagram & Sons, Inc." owns the "following works of art" and lists the Picasso Curtain at issue.[12]

Section 38.18: The covenants, conditions and agreements contained in this Lease shall bind and inure to the benefit of Landlord and Tenant and their respective legal representative, successors, and, except as otherwise provided in this Lease, their assigns." (hereinafter referred to as the "Inurement Clause").

Section 15.1: Except as otherwise provided in this Article 15, Tenant shall not (a) assign

[12] It is noted that Exhibit G expressly identified Landmarks as the owner of a different piece of artwork, entitled "Four Seasons," by Richard Lippold.

this Lease . . . .[13]

This case does not involve the typical landlord and tenant lease with the typical non-assignment or inurement clauses.

It is "elementary" that "clauses of a contract should be read together contextually in order to give them meaning" (*Diamond Castle Partners IV PRC, L.P. v IAC/Interactivecorp*, 82 AD3d 421, 918 NYS2d 73 [1st Dept 2011]). "[I]t is a "cardinal rule of construction" that a court adopt an interpretation that renders no portion of the contract meaningless" (*id., citing Matter of Wallace v 600 Partners Co.*, 205 AD2d 202, 206, 618 NYS2d 298 [1994], affd. 86 NY2d 543, 634 NYS2d 669, 658 NE2d 715 [1995]).

As to the Inurement Clause, it has been held that a provision that "expressly negates enforcement by third parties" is "controlling" *(see IMS Engineers-Architects, P.C. v State of New York*, 51 AD3d 1355, 858 NYS2d 486 [3d Dept 2008] (citing to a clause stating that nothing therein "shall create or give third parties any claim or right of action" . . . ."); *City of New York (Dept. of Parks & Recreation—Wollman Rink Restoration) v Kalisch–Jarcho, Inc.*, 161 AD2d 252, 554 NYS2d 900 [1st Dept 1990] (noting, there was "no such clause in the subcontract" "expressly negating enforcement of the contract by third parties"); *Nepco Forged Products, Inc. v Consolidated Edison Co.*, 99 AD2d 508, 508, 470 NYS2d 680, 680 [2d Dept 1984] ("Nothing in this Agreement, express or implied, is intended to confer on any other person any rights or

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[13] It is noted that section 15.3(B) provides: The provisions of clauses (a) . . . of Section 15.1 shall not apply to . . . (iv) with respect to any stockholder of Tenant which is a natural person or with a trust by or for the benefit of such persons. *As of the date of this Lease, Schedule K sets forth the names and addresses of each present stockholder of Tenant.* (Emphasis added).

Schedule K identifies Joseph E. Seagram & Sons, Inc., Alex Von Bidder/The Four Seasons Restaurant and Julian Nicolini/The Four Seasons Restaurant the three stockholders of the Tenant/Classic. Further, Schedule N of the Lease states that Joseph E. Seagram & Sons, Inc. owns 80% of the Classic.

remedies, in or by reason of this Agreement"); *Edward B. Fitzpatrick, Jr. Const. Corp. v Suffolk County*, 138 AD2d 446, 525 NYS2d 863 [2d Dept 1988] (acknowledging "clauses to the effect that no third-party rights accrued therefrom")).

However, inurement clauses are not sancrosanct, and may be deemed insufficient to defeat a claim of third-party beneficiary rights as matter of law (*see Anwar v Fairfield Greenwich Ltd.*, 728 F Supp 2d 372 [SDNY 2010]; *see De Lage Landen Fin. Servs. v Rasa Floors, LP*, Civ. No. 08–0533, 2009 WL 884114, at *8–*9 [E.D. Pa. 2009] (applying New York law) ("[C]onflicting evidence" requires the "benefit of discovery and development of the factual record to aid in construing the contracts and discerning the parties' intent.")).

Here, it cannot be said, as a matter of law, that the Inurement Clause herein is the type that expressly precludes enforcement by third-party beneficiaries. The Inurement Clause is not limited "solely" or "only" to the signatories of the Lease, and there is no language expressly denying third-party rights or limiting enforcement of the agreement to the signatories. And, under the circumstances, an interpretation that the Inurement Clause does not preclude third-party beneficiary status upon the Picasso's owner does not necessarily render the Clause superfluous.

And, while the non-assignment clause is clear and unambiguous, this Court adopts the rationale by the Court in *Piccoli A/S v Calvin Klein Jeanswear Co.*, that, "it is possible for parties to intend that a third party enjoy enforceable rights while at the same time intending to limit or preclude assignments" (19 F Supp 2d 157, 164 [SDNY 1998]). Thus, such clauses are insufficient, in and of themselves, to negate a claim of third party beneficiary status (see *Piccoli v*

Calvin Klein Jeanswear Co., (stating, "Insofar as Sazerac [Co., Inc. v Falk, 861 F Supp 253 [SDNY 1994] stands for the proposition that the existence of a non-assignment clause alone suffices to preclude assertion of intended third-party beneficiary status, the Court cannot agree.")).

The above provisions indicate clearly that no modifications are permitted to be performed in Picasso Alley, which necessarily includes the Picasso Curtain. More importantly, notwithstanding the Landlord's right to enter to make repairs, the Landlord expressly consented to the presence of Picasso Curtain and the sole reference to the removal of the Picasso Curtain was in the context of permitting the Curtain's "third-party owner" and Four Seasons to do so *after* the expiration of the Lease.[14] The Picasso Curtain was housed in Picasso Alley and was given to Landmarks in a certain condition and at that certain location. According to plaintiff's counsel, the area described in the Lease as Picasso Alley is "called Picasso Alley because the Picasso Curtain has hung there since 1959. When Phyllis Lamberg bought the Picasso Curtain her sole intention was to have it part of PhilipJohn design for the Four Seasons" (Transcript, p. 44). Indeed, it strains credulity to separate Picasso Alley from Picasso Curtain, when the Picasso Alley's name is solely derived from the Picasso Curtain.[15]

At or about the time of the Lease signing (see Lease, Schedule N, Seagram's Letter),

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[14] The validity of plaintiff's counsel argument that section 24.5's reference to RFR's consent to the Picasso Curtain's presence "does not override the landlord's right in, for example, section 16.1 to move the Curtain if the landlord deems that its necessary or desirable to do the repairs" (Transcript, p. 32), is arguably undermined by section 24.5's introductory phrase, "*Notwithstanding anything else contained in this Lease to the contrary . . . .*"

[15] The contract provisions in the Purchase Order in *El-AD 52 LLC v Climate Master, Inc.* (2012 NY Slip Op 33391[U]), provided for the "Seller" and "Purchaser" to undertake certain performance in the event of non-conforming products, and no reference in regard to the products was made to the Owner. Here, specific reference to the Picasso Curtain's removal is made to its "owner."

Picasso Curtain's owner was the majority owner of the Tenant, Four Seasons. The subsequent transfers of ownership of the Picasso Curtain from Seagram to "Vivendi," and from "Vivendi" to Landmarks, did not necessarily remove the alleged intended beneficiary protection afforded by the Lease and its surrounding circumstances.

According to Four Seasons, Seagrams, the majority owner of Four Season's parent company, Classic, was also the owner of the Picasso Curtain. By requiring the consent of Four Seasons to make any modifications to Picasso Alley, where it was disclosed that the Seagram was a majority owner of Four Season's parent, Classic, arguably indicates the assumption of Four Seasons to protect the interest in maintaining the continued presence of the Picasso Curtain in the Alley, an interest shared by Seagram which also owned the Picasso Curtain at that time. It is argued that the purpose for prohibiting any modification of Picasso Alley was for Four Season's parent to ensure that no work was performed in Picasso Alley (including removing the Picasso Curtain).

Thus, it cannot be said, at this juncture, that the Picasso Curtain's owner has no third-party beneficiary rights to a Lease, containing obligations undertaken by the Landlord to refrain from making modifications to a particularly named area (*to wit*: Picasso Alley), the name of which derives its sole source from the Picasso Curtain located therein (Transcript, p. 41).

Given these clauses, it cannot be said that the documentary evidence conclusively establishes that plaintiff is not an intended beneficiary of the Lease term precluding the Landlord from making any modifications to the Alley and the Picasso Curtain therein.

Therefore, dismissal of the third party action for failure to state a cause of action and

upon documentary evidence is denied.

Fourth Cause of Action-Trespass to Chattel

"With respect to the cause of action for trespass to chattel, the four essential elements are (1) intent, (2) physical interference with (3) possession (4) resulting in harm" (*Sweeney v Bruckner Plaza Associates LP*, 21 Misc 3d 1129(A), 875 NYS2d 824 (Table) [Supreme Court, Bronx County 2004], affd, 57 AD3d 347, 869 NYS2d 453 [1st Dept 2008]). To recover damages under a cause of action for trespass to chattel, a plaintiff must allege that the chattel suffered damage (""*J. Doe No. 1" v CBS Broadcasting Inc.*, 24 AD3d 215, 806 NYS2d 38 [1st Dept 2005] (dismissing trespass to chattels claim because, "plaintiff admitted she was not claiming that defendant *had damaged* any of the image" (emphasis added) (*Sweeney, supra*) (although only for two hours, "vehicle was nevertheless taken without [plaintiff's] consent and if unauthorized then the defendants interfered with [plaintiff's] use and enjoyment of his vehicle")).

"The distinction between conversion and trespass to chattels is that where a defendant merely *interfered* with plaintiff's property then the cause of action is for trespass, while denial of plaintiff's dominion, rights, or possession is the basis of an action for conversion" (emphasis added) (*Sweeney v Bruckner Plaza Associates LP*, 21 Misc.3d 1129(A), 875 NYS2d 824 (Table) [Supreme Court, 2004] *citing Sporn v MCA Records, Inc.*, 462 NY2d 482, 487 [1983]). Thus, as this Court stated in *Davidoff v Davidoff*, "A claim for trespass to chattels occurs when defendant intentionally, and without justification or consent, physically interferes with the use and enjoyment of plaintiff's personal property in plaintiff's possession, thereby causing harm to plaintiff" (*Davidoff v Davidoff*, 12 Misc 3d 1162(A), 819 NYS2d 209 (Table) [Supreme Court,

New York County 2006] *citing* PJI 3:9); *Sporn v MCA Records, Inc.*, *supra*; *Hecht v Components Intern., Inc.*, 22 Misc 3d 360, 867 NYS2d 889 [Supreme Court, Nassau County 2008] ("Liability will attach if the possessor is dispossessed of the chattel; the chattel is impaired as to condition, quality, or value; or the possessor is deprived of the use of the chattel for a substantial time")).

Here, there is no claim that defendants have physically interfered with the Picasso Curtain; nor is there any claim that defendants have deprived Landmarks of the use of the Picasso Curtain for any length of time. While defendants have threatened to remove the Picasso Curtain, Landmarks does not cite, and the Court's research has not uncovered, any caselaw permitting a trespass to chattel claim in the absence of any actual physical interference with personal property at issue. Therefore, in the absence of any alleged physical interference and actual damage to the Picasso Curtain, or that the condition, quality, or value of the Curtain has been impaired, the tort of trespass to chattels cannot stand.[16]

Therefore, dismissal of this claim for failure to state a cause of action is warranted, and this claim is severed and dismissed.

Fifth Cause of Action - Conversion

A conversion occurs when a party, "intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Lynch v City of New York*, 108 AD3d 94, 965 NYS2d 441 [1st Dept 2013]; *Lemle v Lemle*, 92 AD3d 494, 939 NYS2d 15 [1st Dept 2012] ("[c]onversion is the unauthorized

[16] At oral argument, counsel for plaintiff conceded the absence of any caselaw in plaintiff's papers permitting a trespass to chattel to be maintained based on alleged anticipated damage to the chattel (Transcript, pp. 20, 26).

assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights")). "Two key elements of conversion are (1) the plaintiff's possessory right or interest in the property and (2) the defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Pappas v. Tzolis*, 20 NY3d 228, 982 NE2d 576 [2012]). Here, Landmarks has clearly stated (and shown) that it has a possessory right in the Picasso Curtain, and that defendants exercised dominion over the Curtain by hiring and arranging a moving company to remove the Curtain from Premises.

Contrary to defendants' contention, "it is not necessary that one should take physical possession of property to be guilty of conversion. Any wrongful exercise of dominion, by one other than the owner, is conversion" (Suzuki v Small, 214 AD 541, 212 NYS 589 [1st Dept 1925] Although arcane, in the case of *Suzuki v Small*, the First Department stated:

> 'Conversion at law is defined to be 'an unauthorized assumption and exercise of the right of ownership over goods, or personal chattels, belonging to another, to the alteration of their condition, or the exclusion of the owner's rights.' Bouvier's Law Dict. A wrongful intention is not an essential element of the conversion and it is sufficient if it appears that the owner has been deprived of his property by the defendant's unauthorized act, in assuming dominion and control
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> * * * * *
>
> The fundamental test as to conversion is the assumption and exercise of dominion, whether any actual interference with the property itself be involved or not.
>
> * * * * *
>
> 'It is not necessary to a conversion that there should be a manual taking of the thing in question, by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion, or in defiance of the plaintiff's right? If he does, that is, in law a conversion, be it for his own or another person's use.'
>
> * * * * *
>
> "To establish conversion *it is not necessary to find a manual taking of the property or that the defendant applied it to his own use*. If he exercised dominion over it to the exclusion of and in defiance of the owner's right he is liable for a conversion." (Emphasis

added).

* * * * *

'Conversion, however we define it, involves at least the element of an unauthorized assumption of dominion over the property of another.

Here, Landmarks, the owner of the Picasso Curtain, has expressly withheld consent for any party to remove the Picasso Curtain from its present location, and to the extent RFR has taken affirmative steps to cause the Curtain to be removed, RFR has assumed and exercised dominion and control over the Curtain in derogation and defiance of Landmarks' superior ownership rights.

Therefore, defendants failed to establish entitlement to dismissal of this claim pursuant to CPLR 3211(a)(1) and (a)(7), and dismissal of this claim is denied.

Sixth Cause of Action - Prima Facie Tort

"Prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful" (*Broadway & 67th St. Corp. v City of New York*, 100 AD2d 478, 475 NYS2d 1 [1st Dept 1984]). The requisite elements for a cause of action sounding in prima facie tort are (1) the intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal *(AREP Fifty-Seventh, LLC v PMGP Associates, L.P.*, 981 NYS2d 406 [1st Dept 2014]*; Kickertz v New York University*, 110 AD3d 268, 971 NYS2d 271 [1st Dept 2013]). The "plaintiff [must] allege that disinterested malevolence was the sole motivation for the conduct of which [he or she] complain[s]" (*AREP Fifty-Seventh, LLC v PMGP Associates, L.P.*, *citing Epifani v Johnson*, 65 AD3d 224, 232, 882 NYS2d 234 [2d Dept 2009]).

Further, an "essential element of such a cause of action is an allegation of special damages, fully and accurately stated with *sufficient particularity* as to identify and causally relate the *actual losses* to the allegedly tortious acts. Failure to do so lays the cause of action open to summary dismissal" (emphasis added) (*Broadway & 67th St. Corp. v City of New York, supra*).

Here, Landmarks' claim that defendants seek to remove the Picasso Curtain to replace it with artwork of their own liking defeats the claim that defendants acted with disinterested malice (*AREP Fifty-Seventh, LLC, supra* (plaintiff's argument that defendants were motivated by an intent to delay the construction of plaintiff's hotel which would compete with defendants' hotel business negates the requirement of acting with disinterested malevolence)). Further, no particularized statement of the actual, reasonably identifiable and measurable losses suffered is alleged (*Skouras v Brut Productions, Inc.*, 45 AD2d 646, 360 NYS2d 811 [1st Dept 1974]). Thus, dismissal of this claim for failure to state a cause of action is warranted, and this claim is severed and dismissed.

Seventh Cause of Action-Declaratory Judgment

A "declaratory judgment action requires an actual controversy between parties having a stake in the outcome" (*Mt. McKinley Ins. Co. v Corning Inc.*, 33 AD3d 51, 818 NYS2d 73 [1st Dept 2006]). However, a "cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 529 NYS2d 279 [1st Dept 1988] (dismissing declaratory judgment claim that "merely seek a declaration of the same rights and obligations as will be determined under the first and second

causes of action"); *W2007 Monday 230 Park Mezz II, LLC v Landesbank Baden-Wuerttemberg*, 38 Misc 3d 1209(A), 966 NYS2d 350 [Supreme Court, New York County 2013] (dismissing declaratory judgment action where the "breach of contract claim essentially is parallel to the claim for a declaratory judgment and plaintiff has an adequate remedy of an action for breach of contract")).

Landmarks asserts rights arising from its ownership status established by the Deed of Gift and alleged intended, third-party beneficiary rights under the Lease in order to maintain the continued presence of its Picasso Curtain in Picasso Alley. Landmarks, as the owner of the Picasso Curtain at issue, clearly has a stake in the outcome of the controversy created by defendants' imminent intent to remove it from Picasso Alley.

However, plaintiff's seventh cause of action for a declaration that *"pursuant to the terms of the Lease*, 375 Park LLC and RFR must obtain the written consent and authorization of NY Landmarks Conservancy, Classic and/or Four Seasons before they can remove the Picasso Curtain from Picasso Alley" contains identical allegations as the third cause of action, and each cause of action requires a determination as to whether Landmarks is a third-party beneficiary with standing to even assert such claims. Since Landmarks has alleged an alternate form of relief, *i.e.*, conversion and breach of the Lease, and the obligations, if any, of the defendants toward the plaintiff under the Lease will be determined under these causes of action, the seventh cause of action is dismissed as unnecessary and duplicative pursuant to CPLR 3211(a)(1) and (a)(7).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the plaintiff's Order to Show Cause to preliminarily enjoin respondents 375 Park Avenue Fee, LLC, RFR Holding Corp., and The Four Seasons Restaurant from removing the "Picasso Curtain" from its current location without its express written consent and authorization (motion seq. 001) is held in abeyance pending the hearing scheduled on the issues of, *inter alia,* irreparable harm; and it is further

ORDERED that the branch of the cross-motion by 375 Park Avenue Fee, LLC, RFR Holding Corp. to dismiss the first and second causes of action in the Amended Verified Complaint as against 375 Park and RFR (motion seq. 003) pursuant to CPLR 3211(a)(1) and (a)(7) is held in abeyance pending the hearing scheduled on the issues of, *inter alia,* irreparable harm; and it is further

ORDERED that the branch of the cross-motion by 375 Park Avenue Fee, LLC, RFR Holding Corp. to dismiss the Amended Verified Complaint as against 375 Park and RFR (motion seq. 003) pursuant to CPLR 3211(a)(1) and (a)(7) is granted as to the fourth, sixth, and seventh causes of action for trespass to chattel, prima facie tort, and declaratory judgment, respectively, and such causes of action are hereby severed and dismissed; and it is further

ORDERED that the branch of the cross-motion by 375 Park Avenue Fee, LLC, RFR Holding Corp. to dismiss the Amended Verified Complaint as against 375 Park and RFR (motion seq. 003) pursuant to CPLR 3211(a)(1) and (a)(7) is denied as to the third and fifth causes of action for breach of contract and conversion, respectively; and it is further

ORDERED that the parties shall serve CPLR 3101(d) expert exchanges and exhibit lists pursuant to the transcript (April 2, 2014); and it is further

ORDERED that a hearing on the following issues shall be held with expert testimony on April 30, 2014, 10:00 a.m. and continuing through May 1, 2014 as required: (1) irreparable harm; (2) whether repairs are necessary; and (3) whether removal of the Curtain is necessary to inspect and/or monitor in order to perform the alleged repairs; and it is further

ORDERED that the plaintiff shall serve a copy of this order with notice of entry within 20 days of entry; and it is further

ORDERED that this constitutes the interim decision and order of the Court.

Dated: April 4, 2014

Hon. Carol Robinson Edmead, J.S.C.