SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART: 45

MARRIOTT INTERNATIONAL, INC. and
RENAISSANCE HOTEL MANAGEMENT COMPANY, LLC,

PLAINTIFFS,

-against-

EDEN ROC, LLLP

DEFENDANT.

Index No. 653590/12

26 Broadway
New York, New York
October 26, 2012

BEFORE:

HONORABLE MELVIN L. SCHWEITZER, Justice

APPEARANCES:

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ALVIN A. NERLINO, CSR, RPR
Senior Court Reporter

This action, Index Number 653590/2012, arises from a dispute between plaintiffs Marriott International Inc., hereinafter Marriott, and Renaissance Hotel Management Company, hereinafter Renaissance (Marriott and Renaissance collectively plaintiffs) and defendant, Eden Roc, LLLP (hereinafter Eden Roc).

On October 15, 2012, plaintiffs filed suit asserting breach of contract and seeking declaratory judgment and equitable relief in response to Eden Roc's attempt to oust plaintiffs from managing the Eden Roc Renaissance Hotel (the Hotel) owned by Eden Roc.

Upon purchasing the hotel in 2005 Eden Roc assumed a management agreement dated September 28th, 2000 (hereinafter the Agreement) that entitled plaintiffs to operate the Hotel for 30 years subject to further renewal.

The Agreement is a 137-page comprehensive and complex business arrangement between two sophisticated corporate entities negotiated at arm's length. (*See* the Agreement at 11.18).

In relevant part the Agreement governs the relationship between the parties and the management and operation of the Hotel. (*See* the Agreement at Article 11(n)(1)).

The Agreement also details each party's right to terminate the Agreement and prescribes remedies available upon breach. (*See, for example*, the Agreement at Article 2 and 9).

Procedural History.

Previously Eden Roc commenced an action against plaintiffs arising out of the Agreement and asserting a variety of claims sounding in contract, tort and breach of

fiduciary duty (hereinafter the Eden Roc Action or the ongoing litigation, Index Number 651027/2012.

The Eden Roc Action remains pending before the Court.

Nonetheless Eden Roc attempted to take the law into its own hands by attempting to physically remove plaintiffs from the Hotel and its management role on the morning of October 14, 2012, ostensibly on grounds that they had properly terminated the Agreement, which they had the power to do as principal in the relationship.

Plaintiffs sought, and the Court granted, a temporary restraining order (hereinafter TRO), ordering that:

1. Eden Roc, its agents and all of the persons in its control are restrained MH

~~trained~~ and enjoined from any action to remove or replace plaintiffs as the manager of the Hotel and from any action to interfere with plaintiffs management and operation of the Hotel, and,

2. Eden Roc, its agents and all other persons in its control are directed MH

to allow plaintiffs to perform its role as manager of the Hotel in accordance with the Management Agreement (*see* the order October 15, 2012).

Standard.

A party seeking vacatur of a TRO must show "compelling or changed circumstances that render continuation of the injunction inequitable." CPLR 6314; Wellbilt Equipment Corp. v. Redeye Grill LP, 308 A.D.2d 411 (First Department 2003).

As with the power to grant injunctive relief, it is entirely within the Court's discretion whether to grant a motion to vacate or modify a TRO or a preliminary injunction. Matter of Midland Insurance Company, 87 A.D.3d 487, 488 (App. Div. First Department 2011); Rosemont ENT Inc. v. Irving, 49 A.D.2d 445 (New York App. Div. First Department 1975).

A TRO or preliminary injunction should be modified whenever continuing it in force would not serve the objectives of the remedy it was designed to achieve. Margolies v. Encounter Inc., 42 NY2d 475 (1997).

For the following reasons the Court denies Eden Roc's motion to vacate the TRO and converts the TRO into a preliminary injunction.

Likelihood of success on the merits.

This is not a personal services contract.

Eden Roc states, without discussing or citing controlling authority, and I emphasize the word controlling, that the Agreement is for the provision of personal services.

Despite the nonbinding cases proffered by Eden Roc that conclusorily state that hotel management agreements are personal services contracts, the Court finds that this Agreement is not a personal services contract.

Historically, the distinctive features of a personal service contract is that it must follow the person with the skills at the root of the contract. Even from the times of Justinian, Circa 533 AD, Roman contract law deferred to the maxim *servitia personalia sequuntur personam*. "Personal services follow the person" (Justinian Institute Book 2 at 374, 533 AD).

In other words, a personal services contract is one resting on the skills, tastes or science of a party, that is those contracts where personal performance by the promissor is the essence and the duty imposed cannot be done as well by others as by the promissor himself. Sanfillippo v. Oehler, 869 Southwest 2nd 159, Missouri Court of Appeals, 1994. *See also* Prazen v. Shoop, 974 Northeast 2nd, 1006, Illinois Appellate

Court, 4th District, 2012; Mail and Media v. Rottenbery, 213 Georgia Appeals, App. 826, 827, 1994; Slone v. Aerospace Design and Fabrication, 111 Ohio Appellate 3rd, 725, 731 (Ohio Court of Appeals Cuyahoga County 1996).

Accordingly, a personal services contract traditionally contains obligations involving such a relation of personal confidence that the parties intend performance solely by the party obligated and therefore, the personality of one of the parties is material.

Here the parties are both sophisticated corporate entities that negotiated a comprehensive commercial agreement at arm's length.

The Agreement does not rely on services being rendered by any specific person or group of persons, but rather the Agreement creates a long-term commercial relationship between corporate entities.

While the performance of a sole manager may be considered personal services, (*see* 5(a) Corbin on Contracts 1964, Section 1204, page 398) the performance of a conglomerate such as plaintiffs is not.

Thus, the Court concludes that the Agreement is not a personal services contract.

The contrary result in Woolley v. Embassy Suites Inc., 227 Cal. App 3rd, 1520 (Court of Appeals 1991) relies on a California statute, *see* California Code Civil Procedure Section 526, and cites concerns that courts should not order specific performance of personal services contracts because doing so would impose upon courts the "prodigious if not impossible task of passing judgment on the quality of performance." Woolley, 227 Cal. App 3rd at 1533.

[redacted]

There is no comparable statute in New York and no similar concern where the parties have written into the Agreement the standards by which performance is to be judged, such as in this Agreement.

The Court's determination that a hotel management contract was a personal services contract in FHR TB, LLC v. TB Isle Resort L.P., Case No. 11-23115-CIV-Graham/Goodman, 2011 U.S. District LEXIS 155742 at *86 (S.D. Florida, September 26, 2011), applying New York law, was not challenged on appeal in that case and cites no applicable New York law in support of the proposition.

Moreover, in both of these cases the relationship between the parties was that of a revokable agency.

Finally, in Wien & Malkin, LLP v. Helmsley-Spear, Inc., 12 A.D.3d 65, 67 (First Department 2004), the contract at issue differs from the Agreement here, as the personal services of Harry B. Helmsley were integral to that relationship as evidenced by the provision permitting removal, without cause, of the Managing Agent in the event of his death.

Exception to the rule against enforcing personal services contracts.

Even if the Agreement were a personal services contract, the rationale for the general rule against enforcing personal services contracts does not apply on these facts.

Every rule has its exceptions, as does the near universal precept that a Court will deny specific performance of a personal services contract.

As Eden Roc notes, the fundamental precept that Courts generally will not enforce personal services contracts, is rooted in the 13th Amendment's prohibition

against slavery and indentured servitude. *See* United States Constitution, Amendment 13.

However, here the Court need not compel any party to perform as plaintiffs do not seek to suspend their performance, but to the contrary, desire to perform.

Personal services arise from business activity that involves confidence and trust, the delegation of authority or the maintenance of amicable relations. But where services are more commercial in nature than personal, then the Court will order specific performance. *See* Humphryes Manufacturing Company v. David Williams Company, 128 New York Supp. 680 (1991 Supreme Court).

Plaintiffs are not Eden Roc's agent.

Eden Roc also argues that it holds the unilateral right and/or power to terminate the contract subject to a suit for damages at any time as a principal vis-a-vis an agent.

However, the parties specified the nature of their relationship in the Agreement, stating "In the performance of this Agreement, [plaintiffs] shall act solely as an independent contractor. Neither this Agreement nor any agreements, instruments, documents or transactions contemplated hereby shall in any respect be interpreted, deemed or construed as making [plaintiffs] a partner, joint venturer with, or agent of [Eden Roc]. [Eden Roc] and [plaintiffs] agree that neither party will make any contrary assertion, claim or counterclaim in any action, suit, expert resolution pursuant to Section 11.21, arbitration or other legal proceeding involving [Eden Roc] and [plaintiffs]."

Whereas here the Agreement was the result of an arm's length relationship between sophisticated business entities after negotiations, and the parties clearly chose not to contract for an agency relationship, the Court will not impose one.

See Madison 92nd Street Association v. Courtyard Management Corp., Index Number 602762/2009 (opinion denying a motion to dismiss) (Justice Kapnick).

Factually, Eden Roc has some control over plaintiffs, but does not exercise the degree of control over the day-to-day functions of plaintiffs that would give rise to an agency relationship.

Accordingly, the Court finds that there is not an agency relationship between the parties and that therefore, Eden Roc does not retain the power, the right to terminate the Agreement subject to damages.

The Agreement specifies that injunctive relief is available as a remedy.

Finally, the Agreement specifically states that specific performance is available as a remedy. *See* Exhibit A, the Agreement at Article 9.

Where such sophisticated parties have negotiated at arm's length every element of a contract, including remedies available in any event of a breach, the Court will not decline to enforce the specific performance remedy without firmly rooted controlling law prohibiting it.

The Court notes in passing that Eden Roc or its predecessor-in-interest could have negotiated for a provision to allow them as owner to terminate the Agreement at any time without cause. Such a term might have been obtained in consideration of a significant termination payment.

However, no such term was in the Agreement when Eden Roc assumed the Agreement, nor did the parties amend the Agreement to include one.

The Court emphasizes, however, that it is not specifically enforcing the contract at this time but rather is granting a preliminary injunction merely to maintain the status quo during the pendency of already ongoing litigation.

In sum, with respect to the matters of the personal services contract and its enforcement, the assertion that this is an agency relationship that can be terminated at will and that injunctive relief is indeed an available remedy here, it is the plaintiffs that have shown a likelihood of success on the merits.

Irreparable harm, reputational harm and harm to good will.

Plaintiffs argue that it will suffer irreparable harm if the TRO is vacated. Such harm would include to the brand, lost bookings and good will with guests and travel agencies and booking agents.

Plaintiffs have already received several inquiries regarding the management situation from potential guests and have had to amend contracts with guests as a result.

According to New York law, reputational harm and harm to good will constitute irreparable harm for which damages are an inadequate remedy. *See* Axios Products Inc. v. Time Machine Software Inc., Index Number 13825/10, 2010 WL 3974915 (New York Supreme Court Suffolk County October 4, 2010); People Ex Rel Abrams v. Anderson, 137 A.D.2d, 259, 271 (4th Department 1988).

As plaintiffs note, the prospect of such harm justifies preliminary injunctive relief because "damage to business reputation and good will can be difficult or impossible to quantify and demonstrates irreparable harm as opposed to injury that can be compensated

with damages." John H. Rottkamp & Son Inc. v. Wulfurst Farms, LLC, 17 Misc. 3rd, 382, 388 (New York Supreme Court Suffolk County 2007).

Accordingly, the Court finds that plaintiffs have demonstrated that it would suffer irreparable harm without injunctive relief. That is not to say that the iconic Eden Roc name and historic reputation will not also suffer irreparable harm as a result of this highly public dispute, but you unfortunately, by taking high profile unilateral self-help action, which has brought this previously low profile litigation out in the open, Eden Roc itself did the most to precipitate what the Court suspects will now turn into an issue of reputational harm for both sides until things cool down a bit and prudent business people, well aware of what is at stake in the public arena, prevail on both sides of these legal issues.

Balancing of the equities, self-help and the public interest.

Following up on this issue of self-help, the Court is of the view that its ruling here in favor of maintaining preliminary injunctive relief will actually help to rebalance the equities.

The Court is of the view that it also is in the public interest to maintain constancy at the Hotel during the pendency of the ongoing litigation and thus the balance of the equities for all concerned favor preliminary injunctive relief to maintain the status quo and stabilize the situation.

Accordingly, the Court denies Eden Roc's motion to vacate the TRO and converts the previously issued TRO into a preliminary injunction, ordering that:

1. Eden Roc, its agents and all other persons in its control are restrained and enjoined from any action to remove or replace Marriott Renaissance as the

manager of the Hotel and from any action to interfere with Marriott Renaissance management and operation of the Hotel; and

2. Eden Roc, its agents and all other persons in its control are directed to allow Marriott Renaissance to perform its role as manager of the Hotel in accordance with the Management Agreement.

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Now, we want to get that as quickly as we can because I'm sure one side will want to seriously consider having somebody else review my words of wisdom.

Once again, I know I can't please both sides, but I hope I can please you in helping this get resolved, because I just get the feeling that this can get resolved, where there's money that was put into this hotel at the expense of the owner and he expects his hotel to be run a certain way and he's clearly not happy, and I don't think that the good name of Marriott wants an unhappy client, if you will. And if anything could be done to bring the two sides together, I'd like to help. We can either appoint a mediator with great hotel experience in this matter, you can pick one of your own, it can all be done under my auspices, but that's my offer, it stands and for all concerned, especially, as I said, a fan of Eden Roc from years back when I passed over Fontainebleau and went next door, I would hope that you could arrive at some kind of a solution.

So, have a good weekend.
Thank you very much.

MR. SOLOWAY: Your Honor, I believe, under the CPLR that a bond on a preliminary injunction is mandatory, and we would like to request that they be required to post a bond here.

MR. KATSIRIS: Your Honor, may I address that? I'd like to give my partner a break here.

I believe under the CPLR he's right. We would submit in the circumstances of this case it be set in a nominal amount, say $50,000, something along those lines because this injunction is maintaining the status quo.

The hotel is currently making money and Eden Roc submits a replacement manager might be able to make more money, but those damages are speculative.

So under the circumstances we think a nominal undertaking would be appropriate. We're prepared to post it today.

MR. SOLOWAY: Your Honor, that's not the measure for the bond here.

The question on this injunction is what would the measure of our damages be to them if they are not entitled to the injunctive relief that they obtained today.

We pay them somewhere around $300,000 a month that we would not have to pay them if they weren't entitled to this injunction. This injunction, this case, could last for two years. We would be entitled to a significant bond.

And I also would submit to your Honor, what we would show is we would earn far more without them. They are costing us seven to $10 million a year in costs that we will not incur.

So we would argue that the bond should be, if you include a year's worth of costs and a year's worth of management fees, that the bond should be at least $10 million.

MR. KATSIRIS: Your Honor, that is, we take a very different view, and actually Mr. Soloway's comments illustrate the speculative nature of the damages that would flow from this preliminary injunction.

Mr. Soloway is right if this is reversed what would the damages be. Again, this injunction maintains the status quo, so at most the damages would be the difference between the hypothetical money that a replacement manager would earn and what Marriott would have earned and that's impossible to calculate, it's speculative.

So we would submit a nominal bond in the amount of $50,000 would be appropriate.

MR. SOLOWAY: We're self-managing.

THE COURT: I'm not going to do 50,000, that's much too low. But I'm not going to do $10 million, either.

Let's do a bond of $400,000.

MR. KATSIRIS: We'll post that today, your Honor.
Thank you.

MR. BOYLE: One last thing.
Also pending currently is Eden Roc's motion for a preliminary injunction.
Is it correct that that motion has effectively been mooted?

THE COURT: Yes. Because what I've done is turned the TRO into a preliminary injunction, which is the same relief that you were asking for.

MR. BOYLE: So Eden Roc's, so Eden Roc's motion for a preliminary injunction throwing Renaissance out of the property is denied.

THE COURT: Is denied.

And you had made a motion. Didn't you make a motion?
MR. BOYLE: Yes.

THE COURT: For a preliminary, a mandatory injunction?

MR. BOYLE: We made a motion for a TRO and preliminary injunction, which your Honor has granted today.

THE COURT: Yes.

MR. BOYLE: Eden Roc had made two motions, they had made a motion for a preliminary injunction and also a motion to vacate our TRO.

So I want to be clear that in turning down their motion to vacate the TRO and granting our motion for a preliminary injunction, your Honor has also – –

THE COURT: Turned down their motion for a preliminary injunction.

MR. BOYLE: Can we make sure that's on the record.

THE COURT: Yes, that's on the record.

THE REPORTER: Yes.

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Dated: ~~October 26, 2012~~ November 7, 2012

This is the order of the Court, Melvin L. Schweitzer, Supreme Court Justice.

Hon. Melvin L. Schweitzer