Setai Group v 400 Fifth Realty LLC
2012 NY Slip Op 33419(U)
November 30, 2012
Sup Ct, New York County
Docket Number: 115306/2010
Judge: Eileen Bransten

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
COUNTY OF NEW YORK: IAS PART 3

----------x

THE SETAI GROUP,

Plaintiff,

-against-

Index No. 115306/2010
Motion Date: 5/22/12
Motion Seq. No.: 002

400 FIFTH REALTY LLC,

Defendant.

----------x

The following papers, numbered 1 to 3, were read on this motion to dismiss.

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

Dated: November 30, 2012

Hon. Eileen Bransten, J.S.C.

Check One: ☐ FINAL DISPOSITION x NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMITORDER/JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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THE SETAI GROUP, LLC,

Plaintiff,

-against-

400 FIFTH REALTY LLC,

Defendant.

----------X

Index No. 115306/2010
Motion Date: 5/22/12
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BRANSTEN, J.

This matter comes before the Court on Defendant 400 Fifth Realty LLC's ("400 Fifth") motion to dismiss the second and third causes of action in Plaintiff The Setai Group LLC's ("Setai") First Amended Verified Complaint ("Amended Complaint") pursuant to CPLR 3211(a)(1) and (a)(7). Setai opposes.

Background

Plaintiff Setai is a development company, specializing in luxury residential and boutique hotel properties. (Am. Compl. ¶ 6.) Setai entered into a series of agreements with Defendant to develop a hotel located at 400 Fifth Avenue, New York, New York. (*Id.* ¶ 11.)

Among the agreements entered into by the parties was the Brand and Marketing Agreement, dated July 10, 2007, by which Setai granted 400 Fifth a license to use the Setai name, mark, and related intellectual property ("Setai IP") in connection with the development of the hotel. Relevant to the instant dispute, Section 4.4.1 of this Brand and

Marketing Agreement provided that 400 Fifth was entitled to use the Setai IP "only in such format and manner as are specifically approved in advance in writing by Licensor." (Affidavit of Michelle Fava Capitano ("Capitano Aff."), Ex. 2.) In addition, under Section 3.1 of the Brand and Marketing Agreement, 400 Fifth covenanted and agreed to "develop, construct, sell, market and operate the Project ... in material conformity with the Brand Standards." (*Id.*) The "Brand Standards" referenced were attached to the Brand and Marketing Agreement as Exhibit A. (*Id.*)

On November 10, 2009, Setai and 400 Fifth executed the Fourth Amendment to the Brand and Marketing Agreement, in which they agreed to approve 400 Fifth's retention of West Paces Hotel Group ("West Paces") as a "hotel consultant for the *Hotel*," and retain West Paces as "a Third Party Manager in the event that [400 Fifth] owns the Hotel on the Opening Date." (Captiano Aff., Ex. 4, ¶ 3.) While sale of the hotel to Honua Fifth Avenue LLC was contemplated at the time of the Fourth Amendment, the sale was never completed. 400 Fifth owned the hotel on the opening date. (*Id.* ¶¶ 18, 21.)

The instant litigation stems from 400 Fifth's purported breaches of the Brand and Marketing Agreement. Plaintiff filed the Amended Complaint on April 4, 2011. Defendant filed this pre-answer Motion to Dismiss counts two and four of the Amended Complaint shortly thereafter.

I. Defendant's Motion to Dismiss

Plaintiff Setai asserts four separate breach of contract claims in its Amended Complaint based on: (1) defendant's failure to pay a monthly fee as required under Section 2 of the Fourth Amendment; (2) defendant's "unauthorized and wrongful" use of Setai IP under the Branding and Marketing Agreement; (3) defendant's failure to adhere to Brand Standards, contrary to the Branding and Marketing Agreement; and, (4) defendant's failure to pay the franchise fee, in violation of Section 2 of the Fourth Amendment.

Defendant 400 Fifth now seeks to dismiss counts two and four of the Amended Complaint pursuant to CPLR 3211(a)(1) and (a)(7).

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We 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 within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994) (internal quotations and citations omitted); *see also Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002); *Prichard v. 164 Ludlow Corp.*, 14 Misc.3d 1202(A), *3 (Sup. Ct., N.Y. Cty. 2006). "It is well settled

that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence ... are not presumed to be true on a motion to dismiss for legal insufficiency. *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 496 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 235, 235 (1st Dep't 2003).

A. *Count Two*

Count two of the Amended Complaint asserts a breach of the Brand and Marketing Agreement based on 400 Fifth's unauthorized use of Setai IP on the hotel's website and in other promotional materials. Specifically, following West Paces' retention as hotel consultant under the Fourth Amendment, Setai alleges that 400 Fifth wrongfully stated on its website that West Paces – also known as Capella Hotels and Resorts – had been selected instead as general manager for the hotel. In addition, Setai contends that 400 Fifth used the Capella name in conjunction with the Setai IP on the hotel's website and promotional materials without Setai's permission. In response, 400 Fifth argues in its papers that Setai approved the appointment of West Paces as hotel manager and that the presence of the Capella name on the website, far from being wrongful, was the product of this agreement.

While defendant's argument has some facial appeal, whether West Paces ultimately became hotel manager is collateral to the main contention made by Setai in count two, namely that it did not authorize the use of the Setai IP and the Capella name on the hotel's website. Section 3.3.3 of the Brand and Marketing Agreement provides that: "Licensee shall submit to Licensor for prior written approval ... prototypes of all materials to be used in connection with the sales or marketing of the Project, regardless of whether such materials bear the Setai Intellectual Property ..." (Capitano Aff., Ex. 2.) The Agreement conditions 400 Fifth's use of the Setai IP on compliance with Section 3.3. (*Id.*, Ex. 2, ¶ 4.4.1.)

Setai alleges that 400 Fifth neither sought nor received approval for this use of the Setai IP. (Am. Compl. ¶ 47.) Defendant does not contend that Setai in fact approved the specific uses of the Setai IP alleged. Instead of addressing the alleged unauthorized use, Defendant disputes whether the use was "wrongful" since Setai approved the appointment of West Paces as hotel manager in the Fourth Amendment. *See* Capitano Aff. ¶¶ 18-24.[1] However, defendant's discussion as to whether Setai agreed to the appointment of West

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[1] In a footnote, the Capitano Affidavit asserts that defendant will show that its reference to the Capella name on the hotel website is substantially similar to a similar reference on the Setai Miami hotel website. As such, Capitano asserts that Setai should be deemed to have approved the content of the 400 Fifth hotel website under Section 3.3.2 of the Brand and Marketing Agreement. Putting aside the fact that assertion generates a factual issue on the motion to dismiss, this affidavit allegation is not "documentary evidence" that may be properly received by the Court on a CPLR 3211(a)(1) motion. *Tsimerman v. Janof*, 40 A.D.3d 242 (1st Dep't 2007) (finding affidavits asserting "the inaccuracy of plaintiffs' allegations" did not qualify as "documentarty evidence" and affirming denial of CPLR 3211(a)(1) motion).

Paces does not address plaintiff's contention that defendant breached Sections 3.3.3 and 4.4.1 of the Brand and Marketing Agreement. Taking plaintiff's allegations as true, as the Court must at this juncture, *see Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994), there is no basis upon which to grant defendant's motion to dismiss count two.

Further, defendant's argument that it accurately described West Paces as hotel manager on the website before opening does not entirely address plaintiff's allegation that the description was "wrongful." (Capitano Aff. ¶ 20.) Pursuant to the Fourth Amendment, Setai approved West Paces as hotel manager "in the event that [400 Fifth] owns the Hotel on the Opening Date." Accepting plaintiff's allegations as true, however, prior to the hotel opening date, 400 Fifth stated on the hotel website that Capella Hotel and Resorts was the general manager. (Am. Comp. ¶ 43.) For the purposes of this motion, representing that Capella was general manager before it became so on the opening date appears to be an inaccurate statement. While defendant notes that the damages accruing from this alleged inaccuracy may not be substantial, the amount of damages has no bearing on whether plaintiff has a claim, which is the question before this Court on defendant's motion. Further, the damages figure is a matter to be determined through discovery, not to be resolved on a motion to dismiss.

B. *Count Three*

In addition to disputing the propriety of references to West Paces and Capella on the hotel website, Setai also alleges that 400 Fifth breached the Brand and Marketing Agreement by failing to "develop, construct, sell, market and operate the Project in material conformity to Setai's Brand Standards." (Am. Compl. ¶ 16.) 400 Fifth's failure to meet these standards purportedly resulted in Honua's refusal to complete its purchase of the hotel, which resulted in Setai not being manager of the hotel. (*Id.* ¶¶ 59-61.) Defendant 400 Fifth does not attack the later allegation, focusing only on Setai's lack of specificity in the Amended Complaint regarding which particular Brand Standards were breached. (Capitano Aff. ¶¶ 25-26; Def.'s Memorandum of Law in Support of Motion to Dismiss at 3-4.)

CPLR 3013 requires that statements in a pleading "be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." Under the CPLR, "the emphasis with respect to pleading is placed, where it should be, upon the primary function of pleadings, namely, that of adequately advising the adverse party of the pleader's claim . . ." *Foley v. D'Agostino*, 21 A.D.2d 60, 62-63 (1st Dep't 1964).

Here, Setai's pleading asserts a violation of Brand Standards but does not provide facts supporting a claim of breach. Setai points to the specific contractual provision at issue – the Brand Standards attached to the Brand and Marketing Agreement – however it does not provide any factual allegations sufficient to withstand a motion to dismiss. While prolixity is neither required nor encouraged, plaintiff nonetheless must provide defendant with notice of the actions constituting the alleged breach of the Brand Standards provision of the Brand and Marketing Agreement. *See Westdeutsche Landesbank Girozentrale v. Learsy*, 284 A.D.2d 251, 251-52 (1st Dep't 2001) (affirming dismissal of contractual claim where pleaders failed to "substantiate their allegations with facts sufficient to satisfy the pleading requirements" of CPLR 3013); *Broome v. ML Media Opportunity Partners L.P.*, 273 A.D.2d 63, 64 (1st Dep't 2000) (affirming dismissal of breach of contract claim where plaintiff identified the agreement alleged to have been breach but "there are no factual allegations" asserted in support of breach); *Certain Underwriters at Lloyd's, London v. William M. Mercer, Inc.*, 7 Misc.3d 1008(a), at *7 (Sup. Ct. N.Y. Cty. 2005) ("Merely pleading that a contract was breached, without setting forth the nature of the contractual allegation alleged to be violated or the nature of the claimed breach violated CPLR 3013.").

Plaintiff explains in its briefing that Honua provided defendant with spreadsheets and documents detailing 400 Fifth's failure to adhere to Brand Standards. (Pl.'s Memorandum of Law in Opposition to Motion to Dismiss, at 10.) Such allegations, however, are currently not included in the Amended Complaint. In light of plaintiff's failure to plead factual allegations in support of its claimed breach of the Brand Standards provision, defendant's motion to dismiss count three is granted without prejudice to plaintiff's ability to amend count three to include the facts alluded to in its briefing.

[continued on next page]

Conclusion

For the reasons set forth above, it is hereby

ORDERED that defendant 400 Fifth's motion to dismiss count two of the Amended Complaint is denied; and it is further

ORDERED that defendant 400 Fifth's motion to dismiss count three of the Amended Complaint is granted; and it is further

ORDERED that plaintiff Setai is granted leave to amend Count Three of the Amended Complaint and such amendment (the "Second Amended Complaint") shall be filed within 20 days of the Notice of Entry; and it is further

ORDERED that defendant 400 Fifth shall answer counts one, two, three, and four of the Second Amended Complaint within 20 days of the Second Amended Complaint's filing.

Dated: New York, New York
November 30, 2012

ENTER:

Hon. Eileen Bransten, J.S.C.