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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER Justice PART 45

EDEN ROC, LLLP

-v-

MARRIOTT INTERNATIONAL, INC. et al

INDEX NO. 651027/2012

MOTION DATE

MOTION SEQ. NO. 003

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion ~~to~~ by defendants to dismiss the complaint is GRANTED in part, and DENIED in part per the attached Decision and Order.

The following causes of action are dismissed: 1st, 4th, 7th, 9th, 10th, 11th and 12th

Status Conference scheduled for 10-15-13 at 3:30 at 26 Broadway 10th Floor

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

Dated: September 18, 2013

MELVIN L. SCHWEITZER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

EDEN ROC, LLLP,	:	
Plaintiff,	:	Index No. 651027/2012
-against-	:	DECISION AND ORDER
MARRIOTT INTERNATIONAL, INC., MARRIOTT INTERNATIONAL DESIGN & CONSTRUCTION SERVICES, INC. and RENAISSANCE HOTEL MANAGEMENT COMPANY, LLC,	:	Motion Sequence No. 003
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

Defendants Marriott International, Inc. (Marriott International), Marriott International Design & Construction Services, Inc. (MIDCS), and Renaissance Hotel Management Company, LLC (Renaissance), move, pursuant to CPLR 3211 (a) (1) and (7), for dismissal of the complaint.

Factual Background and Allegations

Amended Complaint

Plaintiff Eden Roc LLLP (Eden Roc) owns the Eden Roc Renaissance Hotel (Hotel), a historic art deco style resort, located in Miami Beach, Florida.

On September 28, 2000, Eden Roc's predecessor-in-interest, BCM/CHI Eden Roc Tenant, Inc., the then owner of the Hotel, and Renaissance entered into a "Management Agreement" (as amended, Management Agreement), by which Renaissance agreed to manage and operate the Hotel on Eden Roc's behalf (amended complaint, ¶ 33). Defendant Marriott International, through a "Joinder and Guaranty Agreement," (Guaranty) joined in the

Management Agreement, as the parent company of Renaissance, and agreed to be liable, as primary obligor, for Renaissance's obligations under the Management Agreement (*id.*, ¶ 25).

The Management Agreement's initial term is 30 years, with Renaissance having five five-year renewal options (*id.*, ¶ 34). The Management Agreement provides that the "operation of the Hotel shall be under the exclusive supervision and control of [Renaissance] which, except as otherwise specifically provided in this Agreement, shall be responsible for the proper and efficient operation of the Hotel" (*id.*, ¶ 36). Renaissance was required to conduct itself in a manner consistent with Renaissance's "brand standards and System Standards[1] while having primary regard for the maximization of Hotel profits," acting "as a reasonable and prudent operator of the Hotel" (*id.*, ¶ 37).

Eden Roc purchased the Hotel in August 2005 (*id.*, ¶ 40). On October 18, 2005, defendants sent to Eden Roc pro formas, outlining three renovation scenarios (Base, Renovation, and Expansion) (*id.*, ¶ 46). Because the Expansion called for the doubling of guestrooms and the enriching of all aspects of the Hotel, Renaissance projected the Hotel's net house profit under the Expansion as $27 million for fiscal year 2012, while for Base and Renovation, 2012 net house profit was projected at $7.5 million and $13.5 million, respectively (*id.*, ¶ 48).

Eden Roc and Renaissance executed the "First Amendment to the Management Agreement," dated July 3, 2006, relating to the renovation (*id.*, ¶ 53). Eden Roc and MIDCS entered into a "Technical Services Agreement," dated July 3, 2006 (TSA) relating to the Hotel

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[1] The Management Agreement defines "System Standards" as referring to any of three categories of standards: (1) operational standards (i.e., services offered to guests, quality of food and beverages, and cleanliness); (2) physical standards (i.e., furniture, furnishings, and fixtures); and (2) technology standards (i.e., software, hardware, telecommunications, systems security, and information technology).

Renovation (*id.*, ¶ 54). Pursuant to the TSA, MIDCS agreed to provide Eden Roc with technical advisory, architectural design, and interior design services. Eden Roc invested nearly $240 million to renovate and expand the Hotel to align the Hotel's physical condition with the alleged lifestyle and boutique position of the Renaissance brand (*id.*, ¶ 57).

The Amended Complaint alleges that Renaissance's repeated breaches of the Management Agreement over the past three years have seriously injured the Hotel's reputation in the Miami Beach area, causing a "hemorrhaging of lost revenues" (*id.*, ¶ 58). As reflected by the Hotel's terrible and unsustainable financial performance for the 2010 and 2011 fiscal years, defendants allegedly have failed to operate the Hotel in accordance with the Management Agreement, Renaissance's brand standards, System Standards, or otherwise in accordance with their other contractual obligations (*id.*, ¶ 59).

Eden Roc allegedly has suffered enormous damages while the Miami hotel market and comparable hotels have been thriving. The Hotel's total net house profit is only $19.7 million since opening whereas defendants' own pro forma calculations were for the Hotel to earn net profits of approximately $30.8 million and $35 million in 2011 and 2012, respectively. Eden Roc has been forced to inject its own money ($11.4 million) to satisfy debt service obligations that Hotel funds allegedly should have satisfied if defendants were properly managing the Hotel (*id.*, ¶¶ 108-115).

Therefore, in January 2012, Eden Roc served defendants with a "Notice of Default," pursuant to the Management Agreement. Renaissance allegedly was in default by failing to (1) supervise, direct and control the management and operation of the Hotel, including the establishment of "prices, rates and charges for services provided in the Hotel" and the

employment and discharge of employees, and (2) act as a reasonable and prudent operator "having primary regard for the maximization of the profits generated by the Hotel operations consistent with maintaining the System Standards." Renaissance failed to cure any of the defaults by the "Cure Date" (*id.*, ¶¶ 121-126). In March 2012, Eden Roc served defendants with a "Notice of Termination," terminating the Management Agreement effective as of June 29, 2012, which also entitled Eden Roc to terminate the TSA (*id.*, ¶¶ 127-128).

In April 2012, Eden Roc served upon defendants a letter requesting that Renaissance comply with its termination obligations, but it refused, claiming that no event of default had occurred. That same month, Eden Roc served Renaissance with another notice of default for failing to comply with its termination obligations. Renaissance did not cure its alleged defaults which caused another "Event of Default." In May 2012, Eden Roc served another notice of termination, terminating the Management Agreement, effective August 10, 2012 (*id.*, ¶¶ 130-143). Defendants refused to relinquish control and management of the Hotel. This action ensued.

The complaint contains fourteen causes of action. The first five are for breach of contract. The sixth seeks a declaration that Eden Rock properly terminated the agreements. The others are for: breach of the implied covenant of good faith and fair dealing; conversion; breach of fiduciary duty; tortious interference with prospective business relations; slander of title; trespass; an accounting; and breach of the Guaranty against Marriott International.

Related Action

In a related action, also assigned to this Part, *Marriott Intl. Inc. v Eden Roc, LLLP*, Index Number 653590/12 (Related Action), the Appellate Division modified this court's decision

which granted the motion by Marriott International and Renaissance[2] for a preliminary injunction and set an undertaking in the amount of $400,000. The Appellate Division vacated the injunction (Decision dated March 26, 2013, reported at 104 AD3d 583 [1st Dept 2013]).

In the Related Action, plaintiffs sought to preclude Eden Roc from interfering with its management of the hotel. The complaint in the Related Action alleges that, around 1:30 a.m. on October 14, 2012, a group of 50 to 60 individuals (including a large number of uniformed security officers) stormed into the Hotel and, through intimidation, told Renaissance's employees at the Hotel that they were taking over management of the Hotel on Eden Roc's behalf. The takeover attempt was ultimately thwarted after police arrived at the scene and informed the takeover group that, in light of the absence of a court order permitting Eden Roc to evict Renaissance, they had to leave the property.

The preliminary injunction issued by this court enjoined Eden Roc from taking any action to remove Renaissance and Marriott International as managers of the Hotel. In vacating the injunction, the Appellate Division found that the "parties' detailed management agreement placed full discretion with plaintiffs to manage virtually every aspect of the hotel," and, therefore, it was a "classic example of a personal services contract that may not be enforced by injunction" (*id.* at 584). According to the Appellate Division, the agreement afforded the manager discretion to execute tasks that cannot be objectively measured.

In dicta, the Court also stated that, "[w]hile it is unnecessary to reach the question, we note that, contrary to defendant's contention, the agreement is not an agency agreement.

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[2] Marriott International and Renaissance are defendants in this action, and the plaintiffs in the Related Action.

Defendant lacks control over plaintiff, the alleged agent, since the agreement provides for plaintiff to have unfettered discretion in managing the hotel's operations" (104 AD3d at 584, citing *Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 96-97 [1st Dept 2009]).

Based on the Appellate Decision, by order dated May 21, 2013, this court declared "that Eden Roc has the authority to remove and eject Marriott Renaissance as manager of the Eden Roc hotel forthwith or on whatever other timetable it chooses for the orderly transition of business to a new manager, subject to whatever other cognizable judgments, liens or other interests there are and which be asserted in and to the Eden Roc property." The court also advised the parties that the declaratory judgment "has no effect on the existing claims and lawsuits for damages that each of them has filed against the other, and the court understands that each side, in adhering to this Declaratory Judgment, has reserved its respective rights as to its respective claims for damages and other relief in this matter."

This motion was made prior to the First Department's decision rendered on March 26, 2013. Hence, the court permitted Eden Roc to submit an additional opposition memorandum of law on June 21, 2013, and defendants to submit an additional reply memorandum of law in support on July 8, 2013.

Determination

The motion by defendants for dismissal of the complaint is granted to the extent of dismissing the 1st (breach of contract), 4th (breach of contract), 7th (breach of implied covenant of good faith), 9th (breach of fiduciary duty), 10th (tortious interference with business relations), 11th (slander of title), and 12th (trespass) causes of action.

Discussion

First Cause of Action

Eden Roc alleges that Renaissance breached the Management Agreement by failing to perform according to Renaissance's brand standards, the Management Agreement's System Standards, and hotel industry standards, and by failing to maximize Hotel profits (amended complaint, ¶ 147). It alleges that it is entitled to: (1) a declaration that it properly terminated the Management Agreement and the TSA; (2) rescission of the Management Agreement to the extent it continues; and (3) rescission damages of not less than $75 million, plus interest.

This cause of action seeking a declaration that the Management Agreement and TSA were terminated is not viable because it is duplicative of the sixth cause of action (*see Wildenstein v 5H&Co, Inc.*, 97 AD3d 488, 491-492 [1st Dept 2012] [causes of action seeking declarations that the contract is void and unenforceable are duplicative of the seventh cause of action for breach of contract that seeks, not only compensatory damages, but also a declaration that the contract is void and unenforceable]).

As for the request for rescission, the equitable claim for rescission fails because Eden Roc has a complete and adequate remedy at law (*Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 435 [1st Dept 2010]). Contrary to Eden Roc's assertion, the alleged breaches are not "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract" so as to warrant rescission (*RR Chester, LLC v Arlington Bldg. Corp.*, 22 AD3d 652, 654 [2d Dept 2005]). The amended complaint does not allege that Renaissance failed in its fundamental obligation to operate and manage the Hotel.

Second cause of action

Allegedly, Renaissance breached the Management Agreement by failing to perform according to Renaissances' brand standards and the Management Agreement's System Standards. The Management Agreement required Renaissance to (1) supervise, direct and control the management and operation of the Hotel, and (2) act as a reasonable and prudent operator having primary regard for the maximization of profits generated by the Hotel (amended complaint, ¶ 154). In addition, Renaissance: (1) employed "fatally flawed pricing strategies"; (2) failed to control the Hotel's spending and profit margins; (3) failed to properly manage the Hotel's staff and physical condition; and (4) wasted Hotel funds and assets (*id.*, ¶ 155).

Defendants argue that the breach of contract causes of action are deficient because the "Amended Complaint fails to allege facts – as opposed to conclusions – to show that any provision in the Management Agreement was breached" (memorandum in support at 24). In so arguing, defendants unpersuasively cite decisions such as *Fowler v American Lawyer Media* (306 AD2d 113 [1st Dept 2003]) and *Marino v Vunk* (39 AD3d 339 [1st Dept 2007]). In *Fowler v American Lawyer Media* and *Marino v Vunk*, the First Department found the allegations "vague and conclusory" because of the absence of allegations showing the breach of any binding contractual provisions between the parties. In *Marino v Vunk,* for example, the court stated that "[i]n support of her claim, plaintiff submits no documentation evidencing that such a policy indeed exists. In addition, plaintiff fails to allege that Avon was bound by this alleged policy, or what Avon promised to do regarding enforcement of this policy . . . " (39 AD3d at 340]).

Here, however, the amended complaint alleges specific breaches of designated provisions of the Management Agreement. Section 1.01 (E) provides, in part: "In fulfilling its obligations under this Agreement, Manager shall act as a reasonable and prudent operator of the Hotel,

having primary regard for the maximization of the profits generated by the Hotel operations consistent with maintaining the System Standards." In so doing, defendants are not to compromise "the standards of operation, quality and condition of the Hotel, the reputation of the Hotel and the Renaissance chain of hotels, compliance with System Standards, compliance with laws, requirements and recommendations of regulatory and other like bodies and of insurers, industry practice, ethical standards and the balance of risk versus certainty" (*id.*).

The amended complaint alleges, among other things, that: (1) "In violation of the Management Agreement, and in particular the contractual obligations to act as a reasonably prudent operator having primary regard for the maximization of profits, Renaissance flooded the Hotel with discounted and below-market-rate room bookings, causing 80% of the transient room nights sold at the Hotel over the past three years to be sold at discounted rates" (amended complaint, ¶ 64); (2) "Renaissance exacerbated the problem by implementing and abusing its associate, military and Marriott Rewards program incentives and discounts, through which Renaissance further reduced room rates and deprived the Hotel of revenue" (*id.*, ¶ 66); (3) "[a]dditionally, over the past 2 years, Renaissance increased Hotel personnel by nearly 50%, with Hotel staff mushrooming to nearly 600 employees, all while there are barely over 600 guest rooms at the Hotel" (*id.*, ¶ 74); and (4) Renaissance wrongfully terminated a "Room-Block Contract" rendering the Hotel liable for $485,000, which amount was paid out of Hotel funds (*id.*, ¶¶ 82-88).

Defendants argue that the following language from the First Department decision in the Related Action forecloses a breach of contract claim: "The parties' detailed management agreement places full discretion with plaintiffs to manage virtually every aspect of the hotel.

Such an agreement, in which a party has discretion to execute tasks that cannot be objectively measured, is a classic example of a personal services contract that may not be enforced by injunction" (104 AD3d at 584). That finding was made in the context of whether an injunction was available as a remedy in an action involving a personal services contract, but did not foreclose other remedies such as damages (*see e.g. Cohen v OrthoNet New York IPA, Inc.*, 19 AD3d 261, 261 [1st Dept 2005]). In a case with very similar facts, the court therein also found the breach of contract claims to be validly stated (*Madison 92nd St. Assoc. v Courtyard Mgt. Corp.*, Sup Ct, New York County, July 13, 2010, Kapnick, J., Index No. 602762/09).

The cases cited by defendants are distinguishable because they concern contractual requirements of "reasonable efforts" or "best efforts" (*Timberline Dev. v Kronman*, 263 AD2d 175 [1st Dept 2000]; *Brown v Business Leadership Group*, 57 AD3d 212 [1st Dept 2008], or in the context of a summary judgment motion where the court found several factors in play supporting judgment for defendants (*Digital Broadcast Corp. v Ladenburg, Thalmann & Co., Inc.*, 63 AD3d 647 [1st Dept 2009] [in addition to a finding of the absence of objective criteria against which defendants' efforts could be measured, the court applied the good faith business judgment rule, and found that the agreement excluded liability except for losses resulting from gross negligence or willful misconduct, neither of which occurred], *lv denied* 14 NY3d 737 [2010]).

Third Cause of Action

The cause of action is based on the premise that the Management Agreement required Renaissance to cause to be furnished to the Hotel certain services necessary and appropriate for the Hotel's operations in accordance with the System Standards that are furnished generally on a

central or system-wide basis to other hotels in the "Renaissance System" (defined in the Management Agreement as "Chain Services") (amended complaint, ¶ 159). The Management Agreement permits Renaissance to charge Eden Roc for the costs of such Chain Services, including the allocation of salaries, wages, development costs of services and overhead related to the employees of defendants, which the Management Agreement requires be "allocated on a fair and equitable basis among all domestic hotels receiving such services" (*id.*, ¶ 160). However, in providing and charging Eden Roc for Chain Services, the Management Agreement expressly provides "[n]one of Manager, Marriott, or any Affiliate of Manager or Marriott will earn a profit" (Management Agreement, 1.02 [A]). Allegedly, Renaissance breached the Management Agreement by improperly charging Eden Roc for and earning a profit on its provision of Chain Services to the Hotel (amended complaint, ¶¶ 161-162).

Although defendants are correct that the cause of action failed to identify any instances of a breach as to Chain Services, Eden Roc has cured the defect through the submission of a sworn affidavit (*Ray v Ray*, 108 AD3d 449, 452 [1st Dept 2013]). Eden Roc submitted the affidavit of Paul Guccini, chief financial officer of Bond Partners, a company that focuses on the development and management of hospitality projects, and which Eden Roc hired to act as asset manager of the Hotel during the pendency of the injunction during which Renaissance continued to manage the Hotel.

Guccini states that his company recently learned that Renaissance identified charges for Chain Services of $1.5 million in 2012, or 2.1% of the Hotel's gross revenues. In so doing, it improperly identified only a limited number of categories as falling within the Management

Agreement's definition of Chain Services, constituting a small fraction of the centralized or system-wide services that Renaissance provides to the Hotel.

Specifically, in 2012, Renaissance improperly failed to include the following in its Chain Services accounting for which Eden Roc was charged: (1) $420,845 for its share of the area sales services; (2) $637,093 for centralized regional sales office services which Renaissance provides to the Hotel and other hotels in its system in the Florida region; (3) $206,245 for area revenue management services; and (4) $133,877 for its provision of centralized area reservation services through "Area Reservations Sales Office." Guccini asserts further that a review of the Hotel's profit and loss statements reveals hundreds of other charges assessed to Eden Roc by Renaissance (or one of its affiliates) for services which, though provided on a "central or system-wide" basis to hotels in Renaissance's system, are not deemed to be Chain Services by Renaissance.

Guccini opines that the only conceivable explanation for Renaissance's inaccurate exclusion of such categories of services from its list of Chain Services – thereby preventing Eden Roc from obtaining the "basis for the allocation of the charge" as is its right for each Chain Service – is that Renaissance, in violation of section 1.2 (a) of the Management Agreement, is earning a profit on its provision of these services. The cause of action is validly stated on the basis of affording Eden Roc, the pleader, the benefit of every favorable inference (*Cohen v OrthoNet N.Y. IPA, Inc.*, 19 AD3d 261, 261 [1st Dept 2005]), rather than dismissed as unduly speculative. That is because the alleged omissions are so substantial in amount. Defendants' reliance upon the affidavit of Allison Thomas, and the letter by Tushar Agrawal, a Renaissance

vice-president – to establish that Renaissance was not trying to hide a profit – is unavailing on this pre-answer motion to dismiss.

Fourth Cause of Action

Section 4.04 [D] of the Management Agreement requires Renaissance to obtain Eden Roc's written consent before exceeding the budgeted amount for expenses in any major department or in excess of 5% of the aggregate expense amount set forth in the business plan for the Hotel for each given year (amended complaint, ¶ 166). Allegedly, Renaissance breached this provision by improperly exceeding the budgeted amounts for major departments without first obtaining Eden Roc's written authorization (*id.*, ¶ 167). As one example, in 2011 "Outside Labor Contracts" was budgeted for $102,000, and Renaissance, without written consent, exceeded the budgeted amount by $630,000, a variance of 621% (*id.*, ¶ 168).

Dismissal of this cause of action is warranted because documentary evidence conclusively establishes a defense as a matter of law (*Richard Feiner & Co. Inc. v Paramount Pictures Corp.*, 95 AD3d 232, 237 [1st Dept], *lv denied* 19 NY3d 814 [2012]). Section 4.04 [D]) of the Management Agreement pertains to those categories shown on "Format 90" on Exhibit F to the agreement. Format 90 on Exhibit F does not include "Outside Labor Contracts."

Fifth Cause of Action

This cause of action is against Renaissance for breach of contract for failing to cooperate with Eden Roc for an orderly transition of the management of the Hotel. Article 11.11 (M) of the Management Agreement provides that, in connection with a termination, Renaissance is required to cooperate with Eden Roc to provide for an orderly transition so that such transition occurs to the extent practical without any disruption to, or interference with, the orderly and continuous

operation of the Hotel (amended complaint, ¶ 172). Allegedly, Renaissance breached the Management Agreement by not cooperating for an orderly transition of the Hotel's management. For the reasons discussed below (sixth cause of action), this claim is not dismissed.

Sixth Cause of Action

Allegedly, Renaissance materially breached and is in material default of the Management Agreement for the reasons set forth in the first and second notices of default. Renaissance failed to cure the defaults, and Eden Roc properly terminated the Management Agreement and the TSA by serving the notices of termination (amended complaint, ¶¶ 176-180). Eden Roc seeks a declaration that it properly terminated both the Management Agreement and the TSA.

Defendants argue persuasively that the ruling by the Appellate Division in the Related Action does not dispose of the issue of the validity of the termination notices. Eden Roc purported to terminate the agreements (Management and TSA) pursuant to defaults occurring under sections 9.01 (D) and (E) of the Management Agreement, which the Appellate Division did not address. However, contrary to defendants' assertion, they have not shown that the cause of action is not validly stated. As discussed above, for pleading purposes the amended complaint adequately alleges that defendants failed to satisfy its express obligation to act as a reasonable and prudent operator with regard to the maximization of profits while maintaining certain Hotel (brand) standards.

Seventh Cause of Action

By reason of Renaissance's wrongful acts and conduct, Renaissance breached the implied covenant of good faith and fair dealing and unfairly frustrated the purpose of the Management Agreement, disappointed Eden Roc's reasonable expectations of Renaissance, and thereby

deprived Eden Roc of the benefits of the Management Agreement (amended complaint, ¶ 188). This cause of action is dismissed as duplicative of the breach of contract claims because they arise from the same facts (*Sebastian Holdings, Inc. v Deutsche Bank, AG.*, 108 AD3d 433, 434 [1st Dept 2013]; *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]).

Eighth Cause of Action

Eden Roc alleges that, in derogation of its right or interest in the Hotel assets, as owner, Renaissance interfered with and converted Hotel assets by, among other things, refusing to reimburse Eden Roc for the full amount of the $285,000 that a Renaissance employee stole from the Hotel and Eden Roc by issuing checks to phony vendors. Renaissance was grossly negligent in its supervision of its employees, which supervision was the proximate cause of that loss. Only after Eden Roc sent a letter to Renaissance demanding reimbursement for the stolen funds did Renaissance repay Eden Roc, and then only the amount Renaissance had received from its insurance carrier minus the deductible. Renaissance is obligated to reimburse Eden Roc for the total amount stolen by its employee (amended complaint, ¶¶ 89-93).

"Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights" (*Lopez v Fenn*, 90 AD3d 569, 572 [1st Dept 2011] [internal quotation marks and citation omitted], *lv dismissed* 19 NY3d 1022 [2012]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." (*Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 885 [1st Dept 2009] [internal quotation marks and citation omitted], *lv dismissed* 14 NY3d 785 [2010].)

Defendants do not argue that a conversion claim could not be viable for the alleged theft of Eden Roc's property by one of defendant's employees; only that the doctrine of respondeat superior does not apply because "it appears that a rogue employee managed to cash fraudulent checks, outside the scope of employment."

Pursuant to the doctrine of respondeat superior, liability for an employee's tortious acts may be imputed to the employer when they were committed "in furtherance of the employer's business and within the scope of employment" (*Holmes v Gary Goldberg & Co., Inc.*, 40 AD3d 1033, 1034 [2d Dept 2007] [internal quotation marks and citation omitted]). Those acts which the employer could reasonably have foreseen are within the scope of the employment, and thus, give rise to liability under the doctrine of respondeat superior (*id.* at 1035 [citation omitted]). The "tortious conduct be a natural incident of the employment" and "general rather than specific foreseeability has carried the day even in some cases where employees deviated from their assigned tasks" (*Riviello v Waldron*, 47 NY2d 297, 304 [1979]). Based upon these standards, the conversion claim is validly stated on this pre-answer motion to dismiss.

Ninth Cause of Action

Allegedly, Renaissance was Eden Roc's agent and owed fiduciary duties to it because the Management Agreement required Renaissance to operate the Hotel solely on Eden Roc's behalf and because of the express and inherent agency powers that the Management Agreement granted to it. Renaissance induced Eden Roc to repose trust and confidence in its knowledge and expertise to: (1) manage the Hotel; (2) engage in honest dealings with Eden Roc's best interests in mind; and (3) perform its responsibilities under the Management Agreement (amended complaint, ¶¶ 197-200).

Eden Roc contends that Renaissance breached fiduciary duties owed to Eden Roc by: (1) harming the Hotel's reputation; (2) binding Eden Roc to the wrongful contract termination settlement with LTER, Inc.; (3) applying a "bad debt adjustment" for credit extended in 2011, knowing Renaissance would be unable to collect the debt; and (4) bringing the Hotel to the "brink of financial ruin" (amended complaint, ¶ 203).

This cause of action is dismissed. To the extent that the fiduciary duty claim is based on an agency relationship (*see* amended complaint, ¶ 197), the Management Agreement provides in section 11.03 ("Relationship"):

> "In the performance of this Agreement, Manager 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 Manager a partner, joint venturer with, or agent of Owner. Owner and Manager 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 proceedings involving Owner and Manager."

Thus, the agreement expressly provides for the relationship of an independent contractor, not agency, and it expressly precludes a party from asserting otherwise. Although the Management Agreement refers to Renaissance as an independent contractor, that "does not defeat the existence of a fiduciary relationship where one would otherwise exist" (*Pergament v Roach*, 41 AD3d 569, 571 [2d Dept 2007], citing *El–Khoury v Karasik*, 265 AD2d 372, 373–374 [2d Dept 1999]), the Appellate Division has found that the Management Agreement was not an agency agreement (104 AD3d at 584). There is no agency relationship because "the agreement provides for [Renaissance] to have unfettered discretion in managing the hotel's operations" (*id.*).

Eden Rock also alleges that, even if Renaissance was an independent contractor, and not an agent, Renaissance owed it a fiduciary duty in that Renaissance undertook the duty to both act for Eden Roc and to give advice for the benefit of Eden Roc. The parties engaged in an arm's length transaction, however, pursuant to contract between sophisticated business entities, which did not create fiduciary duties (*Sebastian Holdings, Inc. v Deutsche Bank AG.*, 78 AD3d 446, 447 [1st Dept 2010]). Moreover, as is the case here, "causes of action for breach of fiduciary duty that merely restate contract claims must be dismissed" (*Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 463 [1st Dept 2007]). The complaint does not allege wrongful conduct that is independent of such contract (*id.*).

Tenth Cause of Action

The amended complaint alleges that, following Eden Roc's service of the first notice of termination, and to ensure the orderly transition of the Hotel to new management, it began negotiations with prospective management companies to take over management of the Hotel upon the effective date of the first notice of termination (amended complaint, ¶ 206).

Allegedly, defendants maliciously, and with improper means and the intent to harm Eden Roc, sought to intimidate prospective management companies from doing business with Eden Roc. In May 2012, defendants contacted Turnberry Associates (Turnberry), a well-known hotel management company with whom Eden Roc maintained a business relationship, and threatened to commence litigation against Turnberry if it discussed the Hotel with Eden Roc. In June 2012, defendants contacted Hard Rock Hotels & Resorts (Hard Rock), with whom defendants knew Eden Roc had a long-standing relationship, and threatened Hard Rock with litigation if it engaged in discussions with Eden Roc regarding the management of the Hotel. Eden Roc claims

to have suffered injury in its relations with potential hotel managers, and that both Turnberry and Hard Rock ceased discussions with it after being threatened by defendants (amended complaint, ¶¶ 209-210).

The cause of action for tortious interference with prospective business relations is dismissed because the allegations do not show that defendants engaged in "unlawful or improper means of interference" (*Chestnut Holdings of N.Y. Inc. v LNR Partners, LLC*, 106 AD3d 575, 576 [1st Dept 2013]). To establish a claim for tortious interference with prospective business relations, "a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff" (*GS Plasticos Limitada v Bureau Veritas*, 88 AD3d 510, 510 [1st Dept] [internal quotation marks and citation omitted], *lv denied* 17 NY3d 714 [2011], *rearg denied* 18 NY3d 877 [2012]). "[C]ivil suits and threats thereof constitute 'improper means' only if such tactics are frivolous" (*Pagliaccio v Holborn Corp.*, 289 AD2d 85, 85 [1st Dept 2001]).

Considering the checkered litigation history (including this action and the Related Action), it cannot be said that the threat of commencing litigation was frivolous. This is especially so because, unlike the contractual relations between Eden Roc and defendants, the relationship between Eden Roc and Turnberry and Hard Rock is deemed "business relations," subject to a much higher standard so as constitute tortious conduct (*see Carvel Corp. v Noonan*, 3 NY3d 182, 189-191 [2004]). Eden Roc's reliance upon the First Department decision in the Related Action is unpersuasive, because the Court rendered that in March 2013, and the alleged threats of commencing litigation were made in May and June of 2012.

Moreover, there is no allegation of "requisite malice or desire to inflict injury" (*2470 Cadillac Resources, Inc. v DHL Express (USA), Inc.*, 84 AD3d 697, 698-699 [1st Dept 2011], *lv dismissed* 18 NY3d 921 [2012]), or that it was done for the "for the sole purpose of inflicting intentional harm" (*Carvel Corp. v Noonan,* 3 NY3d at 190).

Eleventh Cause of Action

This cause of action is for slander of title against all defendants. By informing third-parties such as Hard Rock and Turnberry that the Management Agreement had not been terminated and that defendants were entitled to manage the Hotel for an additional 40 years, defendants intentionally and maliciously issued a series of communications to third-parties falsely casting doubt on the validity of Eden Roc's entitlement to unencumbered title of the Hotel after the termination date set forth in the first notice of termination (amended complaint, ¶ 217).

The elements of slander of title are "(1) a communication falsely casting doubt on the validity of [the] complainant's title, (2) reasonably calculated to cause harm, and (3) resulting in special damages" (*39 Coll. Point Corp. v Transpac Capital Corp.*, 27 AD3d 454, 455 [2d Dept 2006] [internal quotation marks and citations omitted]). The claim is defective because it fails to allege that defendants' comments were directed to the "title" to the property. Furthermore, the statements were not allegedly made with the requisite malice (*Modulars by Design v DBJ Dev. Corp.*, 174 AD2d 885, 887 [3d Dept 1991]).

Twelfth Cause of Action

In this cause of action for trespass, Eden Roc alleges that it had the absolute right to possess the Hotel beginning on June 29, 2012, and defendants have no right to maintain possession of or to enter the Hotel on or after that date. Defendants intentionally remained in

possession notwithstanding that they had no right to do so. By reason of the foregoing, defendants interfered with Eden Roc's right to possess, use and enjoy the Hotel (amended complaint, ¶¶ 221-224).

"Trespass involves an interference with a person's right to possession of real property either by an unlawful act or a lawful act performed in an unlawful manner" (*Kurzner v Sutton Owners Corp.*, 245 AD2d 101, 101 [1st Dept 1997]). Eden Roc purported to terminate the Management Agreement pursuant to contract, rather than on the basis impliedly sanctioned by the Appellate Division in the Related Action. Because there is an issue as to whether it had the contractual right to terminate the agreement based on contract, as discussed above, "[t]here has been no showing in this case of either an unlawful act or a lawful act performed in an unauthorized manner" (*id.*).

Thirteenth Cause of Action

The amended complaint alleges that defendants undertook to operate and manage the Hotel solely for the account of Eden Roc, exercising exclusive control over the Hotel's revenue, assets, and books and records. As the Hotel's owner, Eden Roc is entitled to an accounting of all Hotel assets (amended complaint, ¶ 228). Defendants do not argue that this cause of action should be dismissed.

Fourteenth Cause of Action

Allegedly, under the Guaranty Agreement, Marriott International joined in the Management Agreement, as the parent company of Renaissance, and agreed "to be liable, as primary obligor, for the full and faithful performance of each and all of the obligations of Renaissance [under the Management Agreement]" (amended complaint, ¶ 234). Eden Roc

contends that Marriott International breached the Guaranty by failing to ensure the "full and faithful performance" of Renaissance's obligations under the Management Agreement (*id.*, ¶ 238). According to defendants, the claims of breach of the Guaranty are based on the same allegations as the breach of contract claims, which are not viable (memorandum in support at 13). As discussed above, however, these claims are validly stated, and, therefore, the request to dismiss this cause of action is denied.

Accordingly, it is

ORDERED that the motion is granted to the extent of dismissing the 1st, 4th, 7th, 9th, 10th, 11th, and 12th causes of action; and it is further

ORDERED that defendants are directed to serve their answers to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a status conference ~~in Room 218,~~ at 26 Broadway 10th Floor ~~60 Centre Street~~, on October 15, 2013 at 3:30 ~~pm~~.

Dated: September 18, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER