IHG Mgt. (Maryland) LLC v West 44th St. Hotel LLC
2018 NY Slip Op 30624(U)
April 9, 2018
Supreme Court, New York County
Docket Number: 655914/2017
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN PART 3
Justice

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IHG MANAGEMENT (MARYLAND) LLC,

Plaintiff,

INDEX NO. 655914/2017

MOTION DATE 04/09/2018

MOTION SEQ. NO. 002

- V -

WEST 44TH STREET HOTEL LLC, TISHMAN ASSET CORPORATION

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 88, 89, 90, 91, 92, 93, 94, 95, 111

were read on this application to/for Dismiss .

Upon the foregoing documents, it is

ORDERED Defendant's Motion to Dismiss is GRANTED in part and DENIED in part as stated on the April 4, 2018 record and transcript (Michael Barfield, OCR) at 5:23-22:11; it is further

ORDERED while the Court relies on the rationale provided in the above referenced transcript it also explains as follows:

The question presented to this Court was: Can Defendant, a hotel owner, terminate a long-term contract with Plaintiff, a hotel management company, under Maryland law and under the plain terms of the contract? To some extent, this appeared to be a case of first impression insomuch as the subject Maryland law - Title 23 of the Commercial Law Article of the Annotated Code of Maryland – has never been challenged in Court nor has any Court been asked

to determine whether a Hotel Management Agreement (HMA) is a personal services contract under Maryland law.

Specific Performance: First Cause of Action

Underlying Defendants' position supporting dismissal is the argument that Personal Service contracts cannot be enforced by injunctive relief, largely relying on the seminal case of *Marriott Int'l v. Eden Roc, LLLP*, 104 A.D.3d 583 (1st Dep't 2013). In *Eden Roc*, the First Department found that HMA at issue was, indeed, a personal services contract, and therefore was exempt from injunctive relief.

Applying that same logic, Defendants assert the subject HMA also is a personal services contract and, therefore, Plaintiff is not entitled to Specific Performance. Alternatively, Defendants argue if this HMA is not considered a personal service contract, it is nevertheless terminable upon the occurrence of an event – that event being Plaintiff's default.

In opposition, Plaintiff argues Maryland Title 23 specifically addresses the availability of specific performance as a remedy for anticipatory or actual breach or attempted or actual termination of a HMA. As such, Plaintiff argues the holding of *Eden Roc*, a New York case, is inapposite and inapplicable to this case which is governed by Title 23 and Maryland Law. Plaintiff, relying entirely on Section 23 of the Maryland Annotated Code, argues entitlement to an injunction as a matter of law.

Drawing on the definition of "operating agreement" under Section §23-101(c), Plaintiff argues hotel management agreements were specifically contemplated by the legislature when enacting Title 23 in 2004 and, as such, hotel management agreements are afforded its protection. See, *Maryland Fiscal Note*, 2004 Sess. S.B. 603. Plaintiffs argue it is axiomatic that the

Maryland legislature, fully aware of other jurisdictions position on hotel management contracts and the potential for them to be found exempt from specific performance (vis a vis *Eden Roc's* progeny), took care to create a law that prohibits that unilateral termination ability from hotel owners. That is likely why the term "operating agreement" was so defined in §23-101(c) to remove any question as to whether a hotel management agreement falls under the definition of "operating agreement".

Indeed, §23-101(c) removes all ambiguity from interpretation as to whether a hotel management agreement may be specifically performed. Maryland legislature has said yes. Section §23-101(c) defines operating agreement as a "written contract, agreement, instrument, or other document between at least two persons that relates to the management, operation, or franchise of a hotel . . . ." Still, however, to ensure Defendants personal service argument is aptly dealt with, the Court will nevertheless address whether this HMA is exempt from injunctive relief under *Eden Roc* and similar cases.

Eden Roc's HMA vs. The Subject HMA

The First Department has observed that a business can be found to have entered into a personal services contract where "the parties' detailed management agreement places full discretion with plaintiffs to manage virtually every aspect of the [Defendant's business]." *Marriott Int'l, Inc. v. Eden Roc, LLLP*, 104 A.D.3d 583, 584 (1st Dep't, 2013); *see also Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 12 A.D.3d 65, 70 (1st Dep't 2004), *rev'd on other grounds*, 6 N.Y.3d 471 (2006) (applying NY standards of a personal services contract to managerial contracts).

Thus, this court must determine whether the services contract between the Plaintiff and Defendant placed full discretion with the plaintiff to manage the assets, relying on the Plaintiff's "knowledge, skill, taste, or other personal qualities" in performing those services. *See 6A Corpus Juris Secundum Assignments § 39 (2018); accord American Broadcasting Companies, Inc. v. Wolf*, 76 A.D.2d 162, 163 (1st Dep't, 1980), *aff'd*, 52 N.Y.2d 394 (1981); *see also Marriott Int'l, Inc. v. Eden Roc, LLLP*, 104 A.D.3d 583, 584 (1st Dep't, 2013). As such, turning to the language in the agreement, Plaintiff argues its specific skills, characteristics and personality are not essential to the HMA. Therefore, plaintiff argues, its unique personal skills are not necessary to be the manager of this (or any other) InterContinental hotel. *Pl. Memo in Opp* at 16. Additionally, the parties specifically contemplated that others could perform plaintiff's managerial role under the HMA, including by expressly allowing Plaintiff Manager to transfer or assign its rights under the HMA to an unaffiliated third party without Owner's consent. *See*, HMA §18.01(b).

Distinguishing itself from the HMA discussed in *Eden Roc,* the subject HMA states it is an agency agreement (*Eden Roc* expressly disclaimed agency). Also, the subject HMA requires Owner to actively participate in the management and operation of the hotel and the Manager's discretion is restricted by owner's rights and obligations, again unlike *Eden Roc*. *See*, HMA §§1.05, 1.08(d), 5.03. Additionally, the HMA provides the Owner with various rights, including to enter into a lease, license or management agreement for any restaurants located within the Hotel, and enter into any leases or other agreements related to the retail space and external signage. *See*, HMA §1.06. Owner also retained the right to approve candidates for all new openings for key hotel personnel positions and approve the strategy with respect to the negotiation of labor union contracts. *See*, HMA §5.03(b), (c).

The *Eden Roc* agreement provides no such rights to the owner. Rather, the *Eden Roc* agreement states explicitly that "the operation of the Hotel shall be under the exclusive supervision and control of Manager," and "Manager shall have the discretion and control in all matters relating to the management and operation of the Hotel," subject to very limited approval rights of owner. *Soloway Affirm.* Ex. F § 1.01(c) (emphasis added). Indeed, the *Eden Roc* owner was not required -- or even permitted -- to actively participate in management of the hotel. Most importantly, perhaps, *Eden Roc* was decided under New York law. While the seminal New York case, *Eden Roc* indeed held the HMA used at that hotel, in that case, was a personal services contract – the case did not stand for the broad stroked proposition that any and all HMAs are inherently personal services contract exempt from specific performance. Rather, as this Court already remarked, one must look at the terms of the contract first before making such a determination. (September 19, 2017 Tr: 18:2-19:4; 20:15).

Significantly, here, Section 14.02(d) and 14.02(e) of the subject HMA specifically contemplate Specific Performance of the Agreement. Section 16.01 also states the "agreement may not be terminable at will". HMA §16.01 (emphasis added). In the face of this, it is difficult to consider Defendants argument that the HMA is nevertheless entirely a personal services contract, exempt from specific performance and one that can be terminated at will.

If this Court were to hold that the HMA is one for personal services, incapable of being subject to specific performance, the Court would simultaneously be rendering those provisions in the Agreement which permit specific performance meaningless. See, *Vermont Teddy Bear Co. v. 538 Madison Realty, Co.*, 1 N.Y.3d 470, 475 (2004) ("Courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the

parties under the guise of interpreting the writing.") *See*, Pl. Memo in Opp at 16. For those reasons, this Court declines to find that this particular HMA is one for personal services contract, exempt from specific performance.

Notably, while Maryland's statute declares HMA's are subject to specific performance, it does not foreclose the ability to terminate hotel management services. In fact, Section §23-104 clearly states operating agreements shall continue for the specified amount of time or until the happening of an event. An HMA can also be terminated if it contains an early right of termination (which would remove it from Title 23 altogether). Again, §16.01 confirms the parties waived the right to terminate the HMA at will.

Section §23-104 coincides with the plain reading of the HMA. That is, the HMA clearly states upon the occurrence of an event, the HMA may be cancelled. The "default" can be considered the event contemplated by this Maryland statute. Defendant has already noticed Plaintiff's default and, if valid, shall be grounds to terminate the contract and escape specific performance.

As such, this Court finds there are sufficient differences between the two HMAs (*Eden Roc* and this subject HMA), and, when analyzed together with Maryland Title 23 which specifically includes HMAs, this Court declines to determine this subject HMA is a personal services contract subject to exemption from specific performance. Therefore, the portion of Defendant's motion which seeks to dismiss Plaintiff's First Cause of Action for Specific Performance is Denied.

Permanent Injunction: Second Cause of Action

Injunctive relief will be afforded only in those extraordinary situations where the plaintiff has no adequate remedy at law and such relief is necessary to avert irreparable injury. *Chicago Research and Trading v New York Futures Exch., Inc.*, 84 AD2d 413, 416 (1st Dep't 1982). Supporting dismissal of this cause of action, Defendants argue Plaintiff cannot demonstrate the requisite "irreparable harm" which would warrant such injunctive relief. *Def. Memo in Supp* at 20.

Specifically, Defendants return to the "personal services contract" argument insomuch as they argue the HMA is a personal services contract which cannot be enforced by injunction. As discussed already, however, the Court has rejected the argument that this HMA is a personal services contract and exempt from specific performance "as a matter of law". *Def. Memo in Support* at 7, 11. Alternatively, Defendants argue Plaintiff IHG is nothing other than Owner's property manager, whose sole entitlement under the HMA is monthly fees in return for its management services. See, *Gov't Guar. Fund v. Hyatt Corp.*, 166 F.R.D. 311, 329 (D.V.I. 1996) ("Hyatt's sole interest in the Management Agreement is its right to compensation."), aff'd, 95 F.3d 291 (3d Cir. 1996). Section 7 of the HMA sets forth IHG's compensation for its services.

Defendants argue where a hotel manager's damages are calculable, no irreparable harm exists. See, *Woolley v. Embassy Suites, Inc.*, 278 Cal. Rptr. 719 (Ct. App. 1991). Plaintiff does not attempt to argue Defendant W. 44th Street Hotel is not the owner of the hotel and readily concede it is the Owner's property. Complaint ¶3. The HMA also makes clear that Plaintiff has no possessory interest in the Hotel. *See*, HMA §16.01.

Supporting its claim for a Permanent Injunction, Plaintiff argues the Complaint sufficiently alleges if the Owner follows through with its termination of the HMA, Plaintiff Manager will lose a unique and irreplaceable asset and experience damage to its reputation and goodwill. See, Complaint ¶¶1, 4, 20-22, 47-79. However, as held in *FHR TB, LLC v. TB Isle Resort, LP*, 865 F. Supp. 2d 1172 (S.D Fla. 2011), the loss of one hotel does not constitute irreparable harm where it was "only one of 67 luxury resorts which Fairmont operates internationally". IHG touts that the brand has more than 180 hotels in more than 60 countries, of which the subject hotel is just one. See, Complaint ¶19. It is also notable to this Court that Plaintiff already negotiated a break-up fee, which is contained within the HMA, should the Owner sell the Hotel to a third-party. As such, it was clearly contemplated that circumstances could arise whereby Plaintiff would no longer manage the hotel in exchange for money. See, HMA §14.05.

And, while at the Motion to Dismiss stage, the Court shall accept all allegations in the Complaint as true, it need not where facts underlying the cause of action were contradicted by other allegations in the pleadings and/or belied by documentary evidence. Therefore, Plaintiff's allegation that the hotel is IHG's "asset" or that IHG has some "possessory interest" in the Hotel need not be accepted as true by this Court. See, *Greene v. Doral Conference Ctr. Assocs.*, 18 A.D.3d 429, 430 (2nd Dept 2005) (plaintiff failed to state a cause of action where facts underlying the cause of action were contradicted by other allegations in the pleadings). Compare, Complaint ¶3 and ¶60.

Finally, the Court agrees with Defendants argument that potentially awarding Plaintiff a permanent injunction would impermissibly re-write the HMA to eliminate the Owner's bargained-for-right to terminate IHG in the event of uncured defaults. *See*, Def. Memo in Support at 11; *see also*, HMA §14.01, 14.02. As such, the Court finds precedent in granting Defendants Motion to Dismiss Plaintiff's Second cause of Action for a Permanent Injunction. If Plaintiff ultimately demonstrates it did not default and the Owner breached the contract, Plaintiff is entitled to seek specific performance of the HMA and/or money damages.

As discussed in connection with Motion Sequence 001, because the Court will have a preliminary injunction in place preventing the termination of the HMA until it can be determined whether an event of default has occurred, Plaintiff's claimed irreparable harm will be prevented as the HMA will only be terminated if, in fact, Plaintiff defaulted. Therefore, Plaintiff's First Cause of Action shall remain and Plaintiff's Second Cause of Action is dismissed with prejudice.

Claims against Defendant Tishman Asset Corporation as the Hotel's Asset Manager

Defendant Tishman Asset Corporation ("Tishman") also seeks dismissal of all actions as against it under CPLR 3211(a)(1). Specifically, Defendant Tishman contends the mere 3 references made to it in Plaintiff's Complaint all concern IHG's mistaken belief that Tishman is the asset manager for the Hotel and has some hand in decision making. *Def. Memo in Supp* at 15. Supporting its argument, Defendant annexes an asset management agreement, together with amendments, showing Tishman is not the asset manager. See, *Soloway Affirm.*, Ex. G.

Plaintiff opposes, arguing the document provided does not conclusively establish that Tishman Asset Corp. is not the hotel's asset manager. Plaintiff also argues all the Tishman entities "act on behalf of one another". However, the only support provided to this assertion is

that they all "share the same address". *Pl. Memo in Opp* at 24. While it may be true that both entities share the same address, such a speculative conclusion shall be rejected by Courts when confronted with documentary evidence, including written agreements. See, *Arboleda v. Microdot*, LLC, 2016 WL 881185 at * 3 (Sup Ct. N.Y., March 2016) (Hagler, J.). (dismissing improper party based on documentary evidence including written agreements and rejecting opponent's "speculative and conclusory" assertions that the party was proper). *See also*, *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003) (dismissing complaint where documentary evidence made clear that defendant had no obligation to plaintiff that could have been breached).

A plain reading of the asset management agreement shows Tishman Hotel, LP as asset manager, not Tishman Asset Corporation. Therefore, Defendant Tishman's motion is GRANTED and the Complaint is dismissed against it with prejudice.

4/ 9 /2018
DATE

EILEEN BRANSTEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE