Holiday Hospitality Franchising LLC v CPTS Hotel Lessee LLC
2018 NY Slip Op 30795(U)
May 1, 2018
Supreme Court, New York County
Docket Number: 653096/2016
Judge: Eileen Bransten

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

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HOLIDAY HOSPITALITY FRANCHISING LLC, IHG HOTELS GROUP RESOURCES, INC.,

Plaintiffs,

-against-

Index No. 653096/2016
(Action No. 1)
Motion Seq. Nos. 001, 003

CPTS HOTEL LESSEE LLC, TIMES SQUARE JV LLC, VORNADO REALTY TRUST,

Defendants.

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CPTS HOTEL LESSEE LLC,

Plaintiff,

-against-

Index No. 653517/2016
(Action No. 2)
Motion Seq. No. 001

HOLIDAY HOSPITALITY FRANCHISING LCC,

Defendant.

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BRANSTEN, J.:

These motions arise out of two separate actions which involve the same dispute between Holiday Hospitality Franchising, LLC ("Holiday") and IHG Hotels Group Resources, Inc. ("IHG"), and CPTS Hotel Lessee LLC ("CPTS"), Times Square JV LLC ("Times Square"), and Vornado Realty Trust ("Vornado"). In *Holiday Hospitality Franchising LLC, IHG Hotels Group Resources, Inc. v. CPTS Hotel Lessee LLC, Times Square JV LLC, Vornado Realty Trust,* Index No. 653096/2016 ("the Holiday action"), defendants CPTS, Times Square, and Vornado jointly move to dismiss most of the Holiday complaint (Motion Sequence 001), and Holiday individually moves for a preliminary injunction (Motion Sequence 003). In addition, Holiday separately moves to dismiss *CPTS Hotel Lessee LLC v. Holiday Hospitality Franchising LLC,*

Index No. 653517/2016 ("the CPTS action") (Motion Sequence 001). The Court consolidates all three motions for disposition and, upon consolidation, for the reasons that follow, grants the motions to dismiss in part and denies them in part, and grants Holiday's motion for a preliminary injunction.

I. Background[1]

IHG owns numerous hotel brands including Crowne Plaza, Holiday Inn, Candlewood, Even, and Hotel Indigo. (CPTS Compl. ¶ 20.) Through an agreement with its immediate corporate parent, nonparty Six Continent Hotels, Inc., Holiday franchises and operates several IHG brands in the United States, including Crowne Plaza. CPTS owns and operates Crowne Plaza Times Square ("the Hotel"), which is located at 888 Seventh Avenue, New York, New York. *Id.* Times Square owns the property, which it leases to CPTS. *Id.* Vornado is a publicly owned real estate investment trust which owns all or parts of both CPTS and Times Square. (Holiday Compl. ¶ 21.) CPTS describes itself as an "affiliate" of Vornado. (CPTS Compl. ¶ 2.) CPTS and Times Square share the same corporate mailing address in Delaware. *Id.* ¶ 18.

A. The IHG Management Agreement

On November 16, 2006, Times Square and IHG executed a management agreement pursuant to which IHG licensed the Crowne Plaza brand to Times Square and provided Times Square with day-to-day management services. *Id.* ¶ 23. The agreement was amended in 2009. *Id.* In early 2011, Times Square indicated that it wished to terminate the IHG Management Agreement. (Holiday Compl. ¶ 4.) The parties mediated their dispute, resolving it through their

[1] **The facts in this section are drawn from the parties' Complaints, unless otherwise noted.**

May 18, 2012 Settlement Agreement and Mutual Release ("the Settlement Agreement"). The Settlement Agreement provided for the transfer of the management of CPTS following the selection of an approved third-party manager.[2] In addition, and of significance here, the Settlement Agreement incorporated several ancillary agreements, including "Holiday Hospitality Franchising LLC Crowne Plaza License Agreement" ("the License Agreement").

B. *The License Agreement.*

The License Agreement enables CPTS to continue operating as a Crowne Plaza hotel. Under the Crowne Plaza system, the Hotel "provide[s] a high-quality hotel service to the public under the name 'Crowne Plaza.'" (License Agreement § 1.) The License Agreement states that the system includes "all elements which are designed to identify Crowne Plaza hotels to the consuming public or are designed to be associated with those hotels . . . which identify or reflect [Crowne Plaza's] quality standards and business practices." *Id.* §1(B). CPTS agreed to maintain the system and uphold the Crowne Plaza standards set forth in the 313-page Crowne Plaza Standards Manual ("the Manual"), and Holiday was responsible for providing training and consultation services, and for letting CPTS use its reservation services. *Id.* §§ 1(B)(3)(a), 1(B)(4). The agreement provided, in addition, that Holiday would

> conscientiously seek to maintain high standards of quality, cleanliness, appearance and service at all hotels using the System so as to promote, protect and enhance the public image and reputation of the Crowne Plaza name and to increase the demand for services offered by the System. Licensor's judgment in such matters shall be controlling in all respects, and it shall have wide latitude in making such judgments.

[2] Highgate is the current management company.

Id. § 1(B)(4)(d) ("Section 4(D)"). It further states that CPTS is an independent contractor and that

> neither party is the legal representative nor agent of . . . the other for any purpose whatsoever. [The parties] expressly acknowledge that the relationship intended by them is a business relationship based entirely on and circumscribed by the express provisions of this License and that no partnership, joint venture, agency, fiduciary or employment relationship is intended or created by reason of this License.

Id. §13(A).

The License Agreement commenced on July 1, 2012, and by normal operation of the agreement would not expire until March 31, 2027. *Id.* § 12(A)(1). Holiday alone retained the option to extend the term until November 16, 2036. *Id.* CPTS waived its right to terminate the license during its term "on any legal, equitable or other grounds" including, among other things, an argument that the License Agreement was void or that a breach by Holiday would relieve it of the obligation to honor the agreement. *Id.*

There are limited exceptions to this waiver, and they are set forth in Section 12(A)(2) of the agreement ("Section 12(A)"). In particular, CPTS can terminate the agreement if Holiday breaches Section 4(D) of this License by "materially failing to market Crowne Plaza branded hotels as upscale hotels so as to promote, protect and enhance the public image and reputation of the Crowne Plaza name . . . ." *Id.* § 12(A)(2)(iii)(a). Under the agreement, if CPTS intends to terminate on this basis it must provide Holiday a thirty-day notice which specifies the ground for termination. Holiday has the right to cure the alleged breach; if that is not possible within thirty days, Holiday may begin to cure the breach within this time frame and have an additional ninety days to complete the cure.

If Holiday does not take any steps to cure, then CPTS may terminate the agreement after thirty days. *Id.* § 12(A)(2). If Holiday disagrees that it has violated Section 4(D), however, it may dispute CPTS' notice of termination through a judicial proceeding. In this circumstance, "no termination of this License may be effected (regardless of any notice or other action by Licensee) until a final judgment is entered by the court in that action and all rights of appeal have been exhausted or abandoned." *Id.* (emphasis added)

C. *The Manual*

The Manual, which CPTS was obliged to follow, "outlines the minimum standards required by [Holiday] . . . to protect the trade and service marks associated with the Crowne Plaza system of hotels." (Manual § II.) It further states that "[t]he ways and means to achieve these minimum requirements are the responsibility of the Licensee who controls the day-to-day-operations and the management of the hotel." *Id.* It sets forth the hallmarks of the Crowne Plaza brand, and, among other things, outlines how to handle reservation and meeting room inquiries and what amenities and services should be provided to customers. *Id.* pp. § III, pp. 9-90, § XII, pp. 197-220. It contains a detailed guide relating to meeting proposals, including a timetable for responses and directions as to what food and drink services should be provided. *Id.* § III, pp. 9-90.

There also are guidelines relating to signage, including those in the parking area. *Id.* pp. 91-95. The Manual sets forth provisions concerning IHG's priority club benefits, employee room rates, and other programs. *Id.* pp. 97-108. There are strict requirements relating to CPTS' individual marketing of its hotel, including its website. *Id.* pp. 109-30. Under the Manual, licensees such as CPTS are required to link to the franchisor's online reservation system, follow

a specified cleaning regimen for each room, and satisfy maintenance requests in a timely manner. *Id.* pp. 131-38. There are mandatory training sessions and standards for pricing, customer service requirements, lists of mandatory supplies for business services, restroom requirements, standards for the hotel's recreation services and provisions for each guest room, accessibility requirements, requirements relating to construction and to guest and meeting room sizes and contents, and minimum provisions and services in the public areas of the hotel. *Id.* §§ VIII-XVI, pp. 139-302. Finally, there are appendices relating to the interior of the hotel, and relating to security and safety, including rules governing fire safety, guest privacy and protection, and ventilation. Appendix B p. 307, Appendix C pp. 3-24.

D. The Dispute.

CPTS contends that Holiday materially breached its duties under Section 4(D). According to CPTS, Holiday has made a "woefully deficient investment in the growth and promotion of the Crowne Plaza brand." (CPTS Compl. ¶ 33.) CPTS states that the 117 television commercials Holiday purchased in 2015 is significantly lower than the number purchased by Marriott, Hyatt, and other industry peers; that Holiday has not invested sufficiently in online, mobile, and social media channels; and that the $4 million per year Holiday has spent advertising the Crowne Plaza brand is completely inadequate – causing CPTS to spend $250,000 of its own resources on advertising. *Id.* ¶¶ 35-39. CPTS claims that Holiday's reservation system is outdated, and that its brand contribution[3] is only 33%, which is lower than those of similar quality Manhattan hotels. *Id.* ¶¶ 41-46.

[3] Brand contribution measures the percentage of reservations at the Hotel which result from Holiday's efforts.

Next, CPTS claims that the Crowne Plaza brand lags behind those of similar quality hotels by key industry measures, such as occupancy rate, the average daily rate, and the revenue per available room ("RevPAR").[4] CPTS alleges that Crowne Plaza also trails other similar quality hotels in the cost per key, which measures the average cost a purchaser pays for a room in the hotel, and that this indicates the brand is perceived as of lesser value. *Id.* ¶¶ 47-57. It states that the Crowne Plaza pipeline, or projected growth, is lacking; that there is corporate instability due to frequent personnel changes at the executive level; that there is insufficient Crowne Plaza presence in the United States; and that customer satisfaction and public perception of Crowne Plaza is abysmal. *Id.* ¶¶ 58-72. Additionally, CPTS argues that IHG's 2014 planned investment of $50 million to grow the brand consisted of "stopgap measures [it threw] at the wall to see what would stick" and required additional and wasted investments on the part of Crowne Plaza Hotel owners. *Id.* ¶¶ 80-81. It contends that a 2016, $200 million, initiative by IHG to transform the Crowne Plaza brand undoubtedly will yield the same result.

On May 13, 2016, CPTS sent Holiday a notice of default, which cited Holiday's alleged breach of Section 4(D) and relied on the reasons described above. The notice stated that to cure the default, Holiday had to compensate CPTS for $30 million in damages it sustained, market the Crowne Plaza brand accordingly, and correct all its alleged problems. *Id.* ¶¶ 83-84. CPTS claims that Holiday "took no steps to cure or even begin curing" the alleged breaches with the contracted 30 days. *Id.* ¶ 85. In a notice of termination dated July 5, 2016, CPTS notified Holiday that the License Agreement would be terminated on August 8, 2016. Alternatively, claiming that it properly terminated the License Agreement and seeking a declaration to this

[4] The average daily rate measures the average rate for the rooms that are sold in the hotel each day. The revenue per available room is determined by dividing the amount of daily revenue by the total number of rooms in the hotel, whether rented or vacant.

effect, CPTS argued the License Agreement would terminate on the expiration date of the lease for the Hotel, December 16, 2016. *Id.* ¶¶ 86, 111.

IHG and Holiday disagree with these allegations. They state the Hotel, which is on Broadway between 48th and 49th Streets, is Crowne Plaza's flagship hotel in the United States and is one of the most important of the brand's hotels worldwide. (Holiday Compl. ¶ 36.) Further, they allege, the Hotel's occupancy rate and RevPAR are both higher than other hotels in its competitive set. *Id.* ¶ 39. They maintain that "Crowne Plaza brand's system contributed 78.6% of the rooms sold at the Hotel in 2015, and the system contribution . . . has increased every year since 2012 (when the parties entered into the License Agreement)." *Id.* ¶ 40.

According to IHG and Holiday, Times Square had been "threatening" to terminate the Management Agreement since 2011, because, they allege, Vornado owns the property and wants to sell the Hotel without the encumbrance. *Id.* ¶ 42. Holiday signed the stipulation of settlement and the License Agreement, they state, with the express purpose of keeping the Hotel in the Crowne Plaza chain. *Id.* ¶¶ 43-47. For this reason, they state, Holiday insisted both that CPTS waive its termination rights with only the exceptions set forth in Section 12(A) and confirming that any attempt by CPTS to terminate the agreement would be stayed if Holiday commenced a litigation challenging such attempt. *Id.* ¶¶ 48-49, 57-65.

In addition, they highlight, CPTS asserts in the License Agreement that it independently examined the market conditions and risks of operating the Hotel. *Id.* ¶50. IHG and Holiday contend that the lengthy term of the License Agreement and potential extension prove the parties' intent that the Hotel continue under the Crowne Plaza brand. *Id.* ¶51. They cite additional provisions which they allege underscore this intent.

IHG and Holiday contend they are not in default of the License Agreement. Instead, they argue, the allegations of default under Section 4(D) are pretextual, and CPTS' statement that a personal services or agency relationship exists is contradicted by the Agreement itself. *Id.* ¶ 66-67. They allege that the defendants in the Holiday action committed fraud by inducing Holiday to sign the License Agreement with assurances that they would honor the license, although they fully intended to terminate it. *Id.* ¶¶ 105-111. Moreover, IHG and Holiday note, they challenged all of CPTS' contentions on June 10, 2016, less than a month after the May 13, 2016 notice of default, and notified CPTS that Holiday had commenced an action against it in the Supreme Court of this county. (Holiday Letter dated June 10, 2016.) Holiday filed a summons with notice the same day. CPTS both demanded a Complaint and filed the CPTS Complaint on July 5, 2016. Holiday's Complaint was filed on July 25, 2016. Although IHG and Holiday deny they breached their obligations, they contend any such breach was cured by their $200 million plan to transform the Crowne Plaza brand over the next few years. (Mem. of Law in Support of Holiday Motion to Dismiss, at p. 15.)

The Holiday complaint asserts four causes of action: 1) declaratory judgment stating Holiday is not in default and CPTS cannot terminate the License Agreement under Section 12(A); 2) permanent injunction barring CPTS from terminating the Agreement upon the expiration of the lease based on an agency or personal services argument; 3) damages based on CPTS' alleged fraud; and 4) breach of contract based on CPTS' allegedly improper termination. In addition to declaratory and injunctive relief, the Holiday complaint seeks substantial damages, as well as attorneys' fees and costs.

The CPTS complaint asserts the following claims: 1) breach of contract based on the alleged violations of Section 4(D); 2) declaratory judgment that the termination of the License Agreement was proper and effective; 3) in the alternative, for declaratory judgment that the License Agreement is terminated based on agency and personal services contract principles; 4) in the alternative, for a declaration that the License Agreement is terminated as of the expiration of the Hotel lease; and 5) attorneys' fees and costs. CPTS also seeks substantial monetary damages.

II. **Discussion**

In the CPTS action, Holiday moves to dismiss all five causes of action alleged in the complaint. In the Holiday action, defendants CPTS, Times Square, and Vornado jointly move to dismiss the first three causes of action, for declaratory judgment, fraud, and permanent injunction,[5] and Holiday individually moves for a preliminary injunction.[6] Holiday also seeks declaratory relief which essentially would prevent CPTS from asserting breach of contract or the existence of a personal services agreement in the Holiday action.

The essential question before the Court is whether the subject management agreement is a personal services contract, exempt from injunctive relief. Alternatively, the Court is asked whether other grounds exist to terminate the contract are valid and available.

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[5] CPTS does not seek to dismiss Holiday's breach of contract claim which, it contends, is intertwined with its own breach of contract cause of action.

[6] For the purposes of the discussion section and for the sake of simplicity, the Court refers to the licensees collectively as "CPTS" and the licensors as "Holiday."

A. Legal Standard

On a motion to dismiss for failure to state a cause of action under CPLR § 3211, all factual allegations must be accepted as truthful and the complaint must be construed in a light most favorable to the plaintiff, which must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). The court "determine[s] only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citation omitted). Although the court does not "assess the merits of the complaint or any of its factual allegations," if the allegations do not set forth a valid cause of action, the complaint is not sufficient. *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dep't 2003).

B. *Termination under Section 4(D)*

CPTS rests its contract claim on Holiday's alleged breach of Section 4(D) of the License Agreement. As this Court described above, CPTS states that Holiday's breach is evidenced by its insignificant brand contribution and its low cost per key compared to similar quality hotels, among other things, and that turnover among Crowne Plaza's top executives undermined its ability to develop a coherent strategy for improvement. Moreover, CPTS alleges that it has sustained damages of at least $30 million due to Holiday's breach. CPTS states that it acted within its rights when it served its notice of breach and subsequently terminated the License Agreement and commenced this action.

In support of its argument for dismissal of this cause of action, Holiday contends that CPTS' allegations of breach are conclusory and lack any evidentiary support. It cites to the accepted principle that vague, nonspecific, and conclusory allegations of a breach are insufficient to comprise a claim. Holiday stresses that, under Section 4(D), it is required to "conscientiously seek" to adhere to certain standards, and that it has wide latitude to comply with its obligations by exercising its business judgment. (License Agreement § 4(D).) It also notes that CPTS entered into the 2012 Settlement and License Agreements with full knowledge of the market conditions relating to the Hotel. *Id.* § 50.

Further, Holiday states that CPTS did not evaluate Holiday's actions under the prevailing standard. Where, as here, the agreement "provides for the unilateral exercise of discretion by one of the parties, that party is restrained by the implied covenant of good faith from exercising such discretion arbitrarily or irrationally." *DirecTV Latin Am., LLC v. RCTV Int'l Corp.*, 38 Misc. 3d 1212(A), 2013 NY Slip Op 50082(U), *5 (Sup Ct, NY County, Jan. 15, 2013] [internal quotation marks and citation omitted] ["DirecTV"], *affd,* 15 A.D.3d 539 [1st Dep't 2014]). Holiday notes, applying this standard, the court in *DirecTV* held, to withstand a dismissal motion, the plaintiff would have to allege "facts that could sustain the claim that [the defendant's] actions were. . . willy-nilly without any reason." *Id.* (internal quotation marks and citation omitted). Further, Holiday argues the License Agreement underscores the intent of the parties to have the 'arbitrary and capricious' standard governs its conduct.

CPTS does not allege such arbitrariness in its complaint. To the contrary, Holiday contends several of CPTS' allegations – that Holiday purchased advertising airtime, contributed around $4 million per year to advertising, initiated a $50 million plan to grow the brand in 2014

and announced a $200 million initiative in 2016 – show that Holiday has acted conscientiously and within its discretion. Though Holiday strenuously objects to CPTS' argument that Holiday was in breach at any time, it states that the $200 million investment CPTS acknowledges Holiday planned to make in 2016 would have operated as a cure. Holiday argues CPTS has not alleged facts supporting its conclusory assertion that it has incurred any financial damages, much less the $30 million in damages it seeks. In addition to its application to dismiss this claim, Holiday seeks a declaratory judgment on its first cause of action, stating that CPTS cannot terminate the License Agreement under Section 12(A).

CPTS both opposes Holiday's motion for declaratory judgment and moves to dismiss Holiday's first cause of action. It states that its allegations of breach are sufficiently detailed. It claims that its complaint describes Holiday's alleged failures at length and, indeed, shows that Holiday's performance has been deficient in the areas of advertising, reservation systems and contribution. This, coupled with Holiday's inadequate pipeline development, allegedly has caused the brand to deteriorate.

In addition, CPTS challenges Holiday's argument that an arbitrary and capricious standard applies. It states that the cases on which Holiday relies are distinguishable because they involved licensors who had unfettered discretion. It was because of this, CPTS argues, the courts determined that the implied covenant of good faith and fair dealing applied to impose an arbitrary and capricious standard. Here, on the other hand, it states, a clear standard of conduct exists in the contract, and the standard is "conscientiousness." Citing *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 304 (1983)[7], CPTS argues that the good faith obligation should not

[7] In *Liebowitz v. Bank Leumi Trust Co. of New York*, 152 A.D.2d 169, 174 (2nd Dep't 1989), the court noted that the portion of *Murphy* relating to whistle blower protection has been superseded by statute. That does not affect the discussion here.

be implied as it is inconsistent with the higher "conscientiousness" standard set forth in the License Agreement. It contends that "conscientious" does not mean "not arbitrary and capricious," and points out that the phrase "arbitrary and capricious" is used elsewhere in the License Agreement. CPTS additionally argues that, by alleging it has cured the default, Holiday has implicitly acknowledged that a default existed. CPTS argues that it incurred damages of over $6.8 million per year in the form of franchise, royalty, marketing, and distribution fees, and has also spent hundreds of thousands of dollars on its own marketing initiatives.

In reply, Holiday adheres to its original arguments, including that the application of an arbitrary and capricious standard is appropriate. Further, it contends that the CPTS complaint states only that Holiday did not succeed fully in its efforts on the brand's behalf, and, thus, has not shown arbitrariness. It adds that Holiday's $200 million planned investment in the brand is not an admission of breach, but a sign of its continuing conscientiousness, and that it only pointed out that it would have cured a breach had one occurred.

Finally, Holiday alleges CPTS' purported damages are comprised primarily of the fees CPTS owed under the agreement, and, therefore, they are not attributable to any alleged misconduct by Holiday; that CPTS was required under the agreement to spend money on advertising and therefore these expenditures are not "damages"; and that CPTS' claim that its booking rates suffered due to Holiday's alleged breach is not asserted in the complaint. Though it does not waive its position, CPTS' reply focuses instead on its "personal services" argument and its application to dismiss Holiday's fraud and declaratory judgment claims. It also argues Holiday's cause of action for a declaration that it did not breach the Agreement should be dismissed as duplicative of the cause of action for breach of contract.

After careful consideration, the Court concludes that the "arbitrary and capricious" standard applies. By focusing solely on the meaning of the word "conscientious," CPTS overlooked the portion of Section 4(D) that gives Holiday sole discretion to define that term. In light of this, the covenant of good faith and fair dealing, which is an implicit part of all contracts, restrains Holiday from acting arbitrarily. *See DirecTV*, 38 Misc. 3d 1212(A), 2013 NY Slip Op 50082(U), *4; *see also Dianet Communications LLC v. Franchise and Concession Review Comm. of the City of New York*, 22 Misc. 3d 1106(A), 2008 NY Slip Op 52605(U), *14 [Sup Ct, NY County, Dec. 18, 2008] [in a contract which gives one of the parties complete discretion, "there is an implied promise not to act arbitrarily or capriciously in the exercise of that discretion"]).

Moreover, this interpretation is consistent with the contract overall. Both parties rely on Section 5(C) of the License Agreement to support their argument. As is relevant here, Section 5(C) states:

> Any action taken by Licensor in the enforcement of this License that is shown to be *arbitrary or capricious* will be rescinded by Licensor to the extent feasible, *but wide discretion and latitude will be allowed to the judgment of Licensor in the discharge of its overriding responsibility to maintain and improve the standards, performance and facilities of the hotels* . . .

(emphasis added). This provision contemplates the use of the arbitrary and capricious standard relating to Holiday's responsibility under License Agreement to maintain and improve the brand. As this responsibility of Holiday is also set forth in Section 4(D), it is evident the parties intended for the arbitrary and capricious standard to apply there as well. This determination is not inconsistent with *Murphy*, which only bars application of the good faith and fair dealing

standard when it is in direct conflict with the terms of the contract. Here, where it is "in aid and furtherance of other terms of the agreement," it is appropriate. *Murphy*, 58 N.Y.2d at 304.

Whether Holiday acted arbitrarily, however, is a factual issue which must be decided by the factfinder at a hearing or trial. *Madison 92nd St. Assoc., LLC v. Courtyard Mgt. Corp.*, Index No. 602762/2009, at 7 (July 13, 2010, Sup Ct NY County) (Kapnick, J.). This is particularly true here, where the parties' allegations as to critical facts such as Crowne Plaza and the Hotel's key market measures, Holiday's brand contribution, the state of Holiday's reservation system, and the sufficiency of Holiday's advertising expenditures, contradict each other. Accordingly, the Court does not dismiss CPTS' contract claim.[8] Although, as Holiday alleges, CPTS' normal financial obligations under the License Agreement cannot constitute damages, CPTS has alleged other expenses and financial losses sufficiently to create an issue of fact.

Holiday's cause of action for a declaratory judgment that it is not in breach of Section 4(D) and that CPTS cannot terminate the agreement on this basis does not duplicate its claim for breach of contract. Holiday alleges that the monetary damages available under the breach of contract claim cannot fully compensate it for the breach. Instead, it argues, equitable relief – in particular, a declaration that CPTS cannot terminate the agreement on this basis – also is required in order to make it whole. Thus, the Court denies CPTS' motion to dismiss the claim.

[8] The Court notes, without further discussion, that Holiday has not conceded a violation of its obligation in its papers. CPTS' arguments to the contrary lack merit.

C. *Nature of the Agreement: License, Personal Services, or Agency*

Next, the Court must address whether, putting aside Holiday's alleged breach, CPTS' can nevertheless cancel Holiday's Agreement, without cause, on the grounds that the subject agreement is one for personal services.

CPTS' third cause of action asks this Court to declare that the License Agreement creates a personal services relationship between the two parties[9] and, therefore, any waiver of CPTS' right to terminate the agreement is invalid. Although primarily it asserts that it performs personal services on behalf of Holiday, CPTS also states the reverse is true. In Holiday's motion to dismiss this claim and to seek a declaratory judgment that CPTS may not terminate the agreement on this theory, Holiday points out that, under Section 12(A) of the License Agreement, CPTS waived its right to assert that a personal services contract exists.

In support of this position, Holiday first notes that in another case in which a franchisee asserted that an agency relationship existed between itself and the franchisor, this Court ruled that the express waiver of the franchisee's right to assert an agency argument was valid, especially because the agreement was between sophisticated business parties and their astute attorneys, and was preceded by "a very careful deliberation as to the terms of this contract." *M Waikiki LLC v. Marriott Hotel Serv., Inc, I.S. Intl., LLC and Ian Schrager*, Index No. 651457/2011 (Aug. 31, 2011, Sup Ct, NY County) (Bransten, J.) (Hearing Tr. at 85) ("Waikiki").

[9] CPTS' complaint states that the agreement creates a personal services or agency relationship, but its arguments focus entirely on personal services. In its reply, it clarifies that it has abandoned its agency arguments. Thus, the Court shall focus on the personal services argument.

Holiday additionally points to *Husain v. McDonald's Corp.*, 205 Cal. App. 4th 860, 870 (Cal. Ct. App. 2012) (personal services argument rejected by the court), for the principle that CPTS' complaint fails to make a prima facie showing the agreement was one for personal services. Holiday states, although it has provided detailed directions to CPTS regarding the implementation of its System and has allowed CPTS to use its reservation system, do not mean that Holiday is providing personal services on behalf of CPTS. It asserts that CPTS relies on cases involving management agreements rather than franchise or license agreements, and, therefore, these cases are inapplicable. It warns that if courts accept CPTS' personal services argument, it would render similar clauses in all other franchise agreements unenforceable.

CPTS opposes Holiday's application, insists that as a matter of law the License Agreement is a personal services contract, and moves for judgment in its favor on this issue. Citing *Marriott Intl., Inc. v. Eden Roc, LLP*, 104 A.D.3d 583, 584 (1st Dep't 2013) ("Eden Roc"), and *Wooley v. Embassy Suites, Inc.*, 227 Cal. App. 3d 1520, 1536 (Ct. App. 1991), it argues the agreement at hand requires CPTS to execute its discretion in carrying out its work. It contends the agreement requires CPTS' "special skill, taste, and judgment" in its performance of continuous acts. *Price v. Herman*, 81 N.Y.S.2d 361, 362 (Sup. Ct. Nassau County 1948). It states that Holiday's reliance on *Husain* is misplaced, and that *Husain* favors its own position because here, unlike in *Husain*, the agreement contemplates the exercise of discretion by the franchisee. CPTS notes that Holiday contends that the Hotel is irreplaceable, because it is Crowne Plaza's United States flagship, and it states that this further underscores the personal nature of the services CPTS provides. It stresses that as a matter of public policy the right to terminate a personal services agreement cannot be waived by contract.

Holiday's reply further attacks CPTS' assertions. It claims that although CPTS must exercise its skill and judgment in implementing Holiday's standards and directions, CPTS only provides personal services to the public, through its third-party manager, and not to Holiday. Moreover, Holiday continues, despite CPTS' ability to exercise its skill and judgment, the system's directions and the Manual's instructions are extremely detailed and thus show no personal services agreement exists. It further argues that it provides no personal services to CPTS under the agreement, and that the License Agreement identifies no such services. It argues that "the mere fact . . . that a contract calls for the performance of labor or service is not sufficient to render it non-assignable." *In re Compass Van & Storage Corp.*, 65 B.R. 1007, 1011 (E.D.N.Y. Bankr. 1986) ("Compass") (citation omitted). Instead, only contracts which require "the exercise of special knowledge, judgment, taste, skill, or ability" fall within this category. *Id.* (citation omitted).

Holiday states that the training and consultation services it provides to all Crowne Plaza hotels are at its own option and do not constitute personal services. Holiday contends that the uniqueness of the Hotel and its status as a flagship property lie not in the skills and services CPTS provides, but in the Hotel's central Manhattan location and its size. Moreover, Holiday reiterates that if the Court accepts CPTS' interpretation of the agreement, "huge swathes of contracts in this state would suddenly become terminable at will . . ., engendering substantial commercial uncertainty." (Reply Mem. of Law in Support of Holiday Motion to Dismiss, at 12.) It again stresses, on this issue, that the parties acknowledge in the License Agreement that the agreement did not create a personal services contract, and argues that the agreement must be enforced pursuant to the parties' intent.

In reply, CPTS argues that because it requires Holiday to conscientiously support the brand, provide training services, give CPTS access to its reservation system, and make itself available for advice and consulting, the License Agreement obligates Holiday to provide personal services to CPTS. CPTS states that its own obligations, to be efficient and courteous to the public and to provide high quality services, should be construed as personal services. It stresses that, although the manual provides comprehensive operational directions to CPTS, it explicitly gives CPTS discretion in carrying out its obligations. CPTS argues *Husain* as well as *In re Sunrise Restaurants, Inc.*, 135 B.R. 149 (Bankr. M.D. Fla. 1991) ("Sunrise"), upon which Holiday also relies, are distinguishable because they involve fast-food chains. Moreover, it points to cases which reject Holiday's argument in the fast-food context. In those cases, a unique property – in particular, a flagship property – was involved. CPTS states that although, as Holiday notes, CPTS provides services to hotel customers, rather than directly to Holiday, this is an illusory distinction because Holiday dictates the way in which the services are to be performed.

If a personal services relationship existed, CPTS' waiver would be unenforceable as a matter of public policy. *See In re Compass Van & Storage Corp.*, 65 B.R. 1007, 1011 (U.S. Bankr. Ct., E.D.N.Y. 1986). Here, however, a personal services relationship does not exist. For one thing, the agreement expressly states that it is not one for personal services. As all parties acknowledge, the agreement resulted from a lengthy mediation process between the parties which simultaneously terminated the Management Agreement and enabled CPTS to hire a third-party management company. Prior to this, Holiday had provided management services. The mediation involved sophisticated commercial entities and their experienced counsel. Section 4(D) of the License Agreement expressly states that the contract at hand is not one for personal

services. "Courts will not rewrite contracts that have been negotiated between sophisticated, counseled commercial entities." *Flag Wharf, Inc. v. Merrill Lynch Capital Corp.*, 40 A.D.3d 506, 507 (1st Dep't 2007); *see Waikiki*, Hearing Tr. at 85 (concerning agency argument). To rule otherwise would be to insert into the agreement a relationship that the parties deliberately did not include. *See Fifth Ave. Real Estate Assoc. v. Yeshiva Univ.*, 228 A.D.2d 178, 178 (1st Dep't 1996). The analysis could simply end there.

Moreover, the relationship here is not one generally considered personal service agreements. "A contract to paint a picture; a contract between an author and his publisher; an agreement to sing; an agreement to render service as a physician" are considered personal contracts. *T. Zenon Pharm., LLC v. Wellmark, Inc.*, 876 N.W.2d 813 (Iowa Ct. App. 2015) (citing *Compass,* 65 B.R. at 1011). The services for which CPTS is responsible are governed by the Manual, a lengthy and meticulously detailed document which does not allow much room for deviation. The discretion CPTS has, therefore, is limited to ensuring, among other things, that the proper style of sheets is used, the proper signage is present, the appropriate greetings are uttered, and meetings are handled pursuant to a specified set of rules which govern every aspect of the scheduling of the meetings and the setup of the conference rooms where the meetings are held. This bracketed responsibility certainly exists with respect to fast-food chains as well, to enable the franchisees to make purchases, hire staff, and in other ways carry out the business pursuant to its template.

Moreover, as Holiday stresses, the Manual applies to every one of the Crowne Plaza hotels, and does not require the unique expertise of CPTS. Indeed, under the original agreement, Holiday rather than CPTS managed the hotel and, under the License Agreement, the parties

agreed a third-party management company would take Holiday's place. Although in discussing CPTS' power to transfer the license, the License Agreement states that the licensee's obligations are personal to CPTS, it further provides that CPTS may transfer the agreement to another, equally acceptable party upon Holiday's approval. *Cf. Husain*, 140 Cal. Rptr. 3d at 376 (rejecting argument that language in the franchise agreement describing the franchisor-franchisee relationship as close and personal rendered the agreement one for personal services). The Court also agrees with Holiday that the Hotel's unique status as Crowne Plaza's United States flagship does not transform the contract into one for personal services.

Husain, upon which Holiday relies, involves an analogous situation in the context of a fast food franchise. Because the agreement required the plaintiff "to comply with all business policies, practices, and procedures imposed by [the franchisor], . . . maintain the building, equipment, and parking area in compliance with standards designated by [the franchisor], and purchase fixtures, lighting and other equipment . . . in accord with [the franchisor's] designated standards," *id.* at 377, a California court concluded that it was not a personal services contract and, consequently, specific performance was appropriate. Moreover, in so holding, it expressly distinguished the management agreement involved in *Wooley* and, thus, CPTS' argument that *Wooley* governs lacks merit.

Primarily, CPTS relies on cases involving management agreements, and to this extent they are distinguishable as well. *E.g.*, *Eden Roc, LLLP,* 104 A.D.3d at 584 (finding personal services contract where the agreement "place[d] full discretion with [the manager] to manage virtually every aspect of the hotel," including tasks "that cannot be objectively measured"). In the case currently before the Court, in fact, CPTS always hired a separate entity to manage the

Hotel. After the original management agreement, under which IHG was manager, was dissolved, CPTS entered into a subsequent management agreement with another party.

Ultimately, although the Court considers the reasoning in *Husain* and other similar cases persuasive, it is not controlling, for it involves California rather than New York law. Similarly, the Florida cases to which CPTS cites expressly rely on Florida corporate law, which does not govern here. *E.g., Burger King v. Agad*, 911 F. Supp. 1499, 1506-07 (S.D. Fla 1995)("Agad")(relying on *Burger Chef Syst. Inc. v. Burger Chef of Florida, Inc.*, 317 So. 2d 795 [Dist. Ct. of App. Fla., Fourth Dist. 1975]). Under New York law, as the Court has stated, courts give great deference to the terms of complex agreements that sophisticated parties negotiate with the assistance of sophisticated attorneys. Here, a multi-million-dollar agreement is at issue; the franchise fees alone were around $6.8 million per year. Here, too, the parties do not dispute that they entered this long-term License Agreement in settlement of their dispute over the Management Agreement. Thus, the details here were crafted to resolve the dispute and protect the relationship between the parties. The limited grounds for termination, the length of the agreement, and the express statement that CPTS cannot allege a personal service relationship exists and attempt to terminate on this basis collectively enable Holiday to maintain the Hotel as a Crowne Plaza. The interpretation CPTS suggests would subvert this purpose and the clear intent of the contract.

Accordingly, the Court grants Holiday's motion to dismiss CPTS' third cause of action and grants Holiday's application for a declaration that the License Agreement is not a personal services agreement and, thus, cannot be terminable at will.

D. Fraud.

The Court grants the prong of CPTS' motion seeking to dismiss Holiday's third cause of action, which alleges fraud. Holiday rests its claim on the allegation that CPTS induced Holiday to sign the License Agreement although CPTS intended not to adhere to its terms. The elements of a cause of action for fraudulent inducement under New York law are "(1) a false representation of material fact; (2) known by the speaker to be untrue; (3) made with the intention of inducing reliance and forbearance from further inquiry; (4) that is justifiably relied upon; and (5) results in damages." *JTRE, LLC v. Bread & Butter*, 2014 N.Y. Slip Op. 31488(U) at *21-22 (Sup. Ct., New York Cty. June 6, 2014) (Edmead, J.).

"A mere misrepresentation of an intent to perform under the contract is insufficient to sustain a cause of action to recover damages for fraud." *Gorman v. Fowkes*, 97 A.D.3d 726, 727 (2nd Dep't 2012). Contrary to Holiday's assertions that it has asserted a cause of action, the claim cannot survive. Here, Holiday's complaint really is that CPTS never intended to perform under the contract which is the quintessential type of allegations which do not make up fraud. As such, CPTS' third cause of action for fraud is dismissed.

E. *Expiration of the Lease*

CPTS' fourth cause of action seeks a declaration that it has the right to terminate the License Agreement upon the expiration of its lease. In moving to dismiss this cause of action, Holiday argues that because the lessor, Times Square, and CPTS are both affiliated with Vornado, the parties can collude to terminate the franchise agreement without the limitations set forth in Sections 4(B) and 12(A). Holiday argues because the expiration of the lease was foreseeable, the parties would have added this as a reason for termination of the License

Agreement, if such was their intent. Therefore, Holiday argues it is entitled to an order dismissing the claim, a declaration that CPTS has no right to terminate on this basis, and an injunction enforcing the declaratory judgment.

In support of its argument that the lease is a proper ground for termination of the License Agreement, CPTS points to Section 1(A) of the License Agreement, which provides in pertinent part that CPTS "represents that, subject to the terms of a lease with Times Square [], it is entitled to possession of the Hotel during the entire license term without restrictions that would interfere with anything contemplated in this License." In addition, CPTS notes that in Section 15(L) of the Agreement Holiday approved of the master lease structure. Together, CPTS states, this indicates the License Agreement implicitly recognizes it is subject to the continuation of the lease. It further contends that CPTS and Times Square's status as affiliates of Vornado is irrelevant, and that the expiration of the lease renders it impossible to continue the License Agreement.

Holiday replies that CPTS' argument ignores the fact that it waived all arguments, except those in Section 12(A), as grounds for termination, and that this includes a waiver of arguments relating to the lease's termination. It reiterates that the License Agreement supports its interpretation. Holiday states that CPTS cannot cite the impossibility of performance as a reason for termination because CPTS and Times Square are under the common control of Vornado. CPTS does not waive this argument but does not focus on this issue in its reply papers. *See supra* at 13.

CPTS has not shown that the expiration of the lease on December 16, 2016 is a proper ground for termination. Section 1(A), on which CPTS relies, states not only that the License Agreement was subject to the lease between CPTS and Times Square, but that CPTS had the right to possession of the Hotel throughout the term of the License Agreement without any

restrictions. As part of CPTS' implied duty of good faith and fair dealing, it cannot "do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (citation and internal quotation marks omitted). In *Greenwich Village Assoc. v. Salle*, 110 A.D.2d 111, 115 (1st Dep't 1985), for example, the court found that the subletter could not evade its contractual obligation not to terminate its sublease by purchasing the prime lease and terminating it.

Given the relationship between CPTS, Times Square, and Vornado, an issue of fact would exist as to CPTS' good faith attempts, if any, to renew the lease upon its expiration. Indeed, CPTS does not even allege or otherwise suggest that it made such an attempt. On the contrary, CPTS indicates that it wants to terminate the lease as an alternative ground for ending the License Agreement. Absent any countervailing evidence that CPTS could not obtain a renewal lease, this constitutes a breach of CPTS' covenant of good faith and fair dealing. *See Dalton*, 87 N.Y.2d at 389; *cf. Charter One Bank v. Midtown Rochester*, 284 A.D.2d 993 (1st Dep't 2001) (where plaintiff presented evidence suggesting that defendant refused to negotiate a new lease, this raised issue of fact as to breach of the covenant of good faith and fair dealing). Moreover, because CPTS has not stated that it is impossible to renew the lease, it has not shown impossibility of performance. That said, however, the Court will not issue a permanent injunction preventing CTPS from *ever* terminating the License Agreement on this basis because it cannot predict if or when circumstances will arise that make it *impossible* for CTPS to renew or extend the lease. Holiday's motion to dismiss this Fourth cause of action is denied as issues of fact remain.

F. *Appropriateness of Equitable Relief*

CPTS challenges Holiday's application for injunctive relief because, it contends, Holiday has an adequate remedy at law. According to CPTS, these cases "are entirely about money damages . . . ." (Mem. of Law of CPTS, Times Square, and Vornado, at 32.) CPTS contends that it cannot be held liable for injunctive – or any – relief because Holiday's only damage is the harm it caused to the Crowne Plaza brand through its own actions. It states that because the License Agreement expressly extended only to the Hotel, and only for the agreement's duration, CPTS cannot be held liable for harming the brand. CPTS points out that Holiday has the option of licensing the Crowne Plaza brand at other locations in Manhattan, and notes that it has signed an agreement to erect a Crowne Plaza hotel on West 36th Street in Manhattan. This, CPTS states, undermines Holiday's argument that the Hotel is unique in its status as a flagship property and further demonstrates that the Hotel is replaceable. It argues that Holiday's alleged loss of goodwill is speculative, and its allegation of irreparable harm based on the loss of a single hotel in the chain is not credible.

Holiday counters that monetary relief alone would not compensate it for the loss of the Hotel. It relies in part on the words of Section 12(A)(1) of the License Agreement, which states, in pertinent part, that Holiday retained "without limitation rights to injunctive relief" if CPTS tried to terminate the agreement for reasons other than those started in 12(A)(2), and that in a judicial proceeding to obtain an injunction irreparable harm would be presumed, although Holiday still would have to show a likelihood of success on the merits and a balance of equities in its favor. Significantly, one of the grounds CPTS seeks to terminate the agreement is under 4(D) which leads to a presumption of irreparable harm under section 12(A)(1). CPTS concedes there is a presumption of irreparable harm but cautions that it is rebuttable.

The Court denies the motion to dismiss the cause of action seeking injunctive relief. Although, as CPTS argues, the presumption of irreparable harm is rebuttable, the reality is facts are required to rebut a presumption and, therefore, dismissal of the claim is premature at this juncture. Further, in evaluating CPTS' motion to dismiss the claim, the Court must accept Holiday's allegations as true and consider the complaint in a light most favorable to it. *See Allianz Underwriters Ins. Co.,* 13 A.D.3d at 174. Here, at the very least, Holiday has raised issues of fact that the loss of the Hotel would damage its reputation and that the Hotel, due to its size and prime location, is critical to its status as a franchise for business travelers along with other visitors to big cities and cannot be replaced.

In addition, the complaint states facts that, if true, show likelihood of success on the merits and a balance of equities in Holiday's favor. To prevail on the merits Holiday must show that it has made conscientious efforts to improve and maintain the brand and these efforts were not irrational or "willy nilly." *DirecTV*, 38 Misc. 3d 1212(A), 2013 NY Slip Op 50082(U), *5. Holiday's complaint alleges not only that it acted conscientiously but that its efforts have been successful. According to Holiday, the Hotel's occupancy rate and RevPAR exceed those of hotels in its competitive set, and its brand contribution is substantial and has increased every year since the parties entered into the License Agreement. Moreover, given that the irreparable injury is presumed and a likelihood of success is plead in the Complaint, the balance of the equities lie in Holiday's favor. This is especially true where, as here, CPTS has asserted repeatedly that it can be compensated monetarily for any loss it incurs. Therefore, the Court does not find Holiday is precluded or prevented from seeking injunctive relief.

G. *Preliminary Injunction.*

Penultimately, the Court addresses Holiday's motion for preliminary injunction under CPLR §6301. Under CPLR §6301, a preliminary injunction is appropriate "where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual." Thus, Courts issue such injunctions when they "preserve the status quo pending trial." *U.S. Ice Cream Corp. v. Carvel Corp.*, 136 A.D.2d 626, 628 (2nd Dep't 1988) (injunction issued where defendants' attempt to terminate plaintiffs' exclusive licensing agreement may have put plaintiff out of business, thus rendering its efforts to retain the license moot); *see Rockwood Pigments NA, Inc. v. Elementis Chromium LP*, 124 A.D.3d 509, 511 (1st Dep't 2015).

The Court grants Holiday's motion for a preliminary injunction. Holiday has shown that the injunction is necessary to preserve the status quo. Absent such relief, CPTS has acknowledged it will terminate the agreement, essentially changing the status quo and effectively resolving the application for an injunction, as well as CPTS' own applications for equitable relief, in CPTS' favor. The Court has considered CPTS' arguments to the contrary and finds them unpersuasive.

In connection with the award of this Preliminary Injunction the Court finds Plaintiff needs to pay a bond or place an undertaking. Bonds and undertakings should be rationally related to the quantum of damages which would be sustained in the event it is later determined the injunction was not proper. See, *51 W. 62nd Owners Corp. v. Harness Apt. Owners Corp.*, 173

A.D.2d 372, 373 (1st Dep't 1991). Therefore, the Court directs Plaintiff post a bond or undertaking with the County Clerk in the amount of $600,000 no later than May 18, 2018.

H. Attorneys Fees

Finally, the Court denies the prong of Holiday's motion seeking to dismiss CPTS' cause of action for attorney's fees. Such relief is premature, as issues of fact remain to be decided.

Conclusion

For the reasons above, therefore, it is:

ORDERED that Holiday's motion to dismiss in the CPTS action, Index No. 653517/2016, sequence number one (001), is granted to the extent of dismissing the third cause of action (declaration that agreement is for personal services) and the fourth cause of action (declaration that the agreement is terminated upon expiration of the Lease) and is otherwise denied; and it is further

ORDERED that Holiday's motion for a preliminary injunction in the CPTS action, Index No. 653517/2016, sequence number three (003), is granted and a preliminary injunction is issued, continuing the stay until these actions are decided. Plaintiff is to post a bond or undertaking in the amount of $600,000 by May 18, 2018; and it is further

ORDERED that CPTS' motion to dismiss in the Holiday action, Index No. 653096/2016, sequence number one, is granted to the extent of dismissing the third cause of action for fraud and is otherwise denied.

Dated: May 1, 2018

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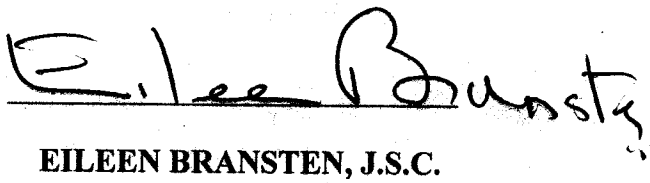

EILEEN BRANSTEN, J.S.C.