SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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BOWERY HOSPITALITY GROUP LLC,

Plaintiff,

- v -

REGENCY RESTAURANT L.L.C., HAMPSHIRE HOTELS GROUP, LLC, DREAM HOTEL GROUP, LLC FKA HAMPSHIRE HOTELS MANAGEMENT LLC

Defendant.

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INDEX NO. 653479/2016

MOTION DATE 05/21/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 62, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

This case raises the question of whether the defendant-hotel owners properly terminated a contract between the defendants and the plaintiff, a management company retained to manage the day-to-day operations of the hotel's lounge and restaurant, where the application to include the plaintiff on the hotel's liquor license was denied and the contractual variable compensation structure for the plaintiff included a percentage of gross sales of the lounge and restaurant, including alcohol sales. For the reasons set forth on the record (11/14/19) and as otherwise set forth below, the defendants' motion for summary judgment pursuant to CPLR 3212 is granted and the defendants' motion to strike the plaintiff's demand for a jury trial pursuant to CPLR 4102 is denied as moot.

BACKGROUND

Regency Restaurant LLC (**Regency**) operates the food and beverage services at the Time Hotel (the **Hotel**) in New York, including Serafina Restaurant (the **Restaurant**) and Le Grande Lounge (the **Lounge**). In 2014, the Restaurant and Lounge underwent extensive renovations. During that time, Regency entered into two written contracts with Bowery Hospitality Group LLC (**BHG**) to provide day-to-day management of the Restaurant and Lounge: (i) a certain Lounge Management Agreement (the **Lounge Agreement**), dated August 20, 2014, between Regency and BHG (NYSCEF Doc. No. 16), and (ii) a Restaurant Management Agreement (the **Restaurant Agreement**), of even date therewith, between Regency and BHG (NYSCEF Doc. No. 17). Section 2 of the Lounge Agreement and the Restaurant Agreement provides:

> "[Regency] hereby engages [BHG] to act as its agent for the operation of the [Lounge and Restaurant] on [Regency's] behalf, upon the terms and conditions set forth herein, for the Term. [BHG] hereby accepts such appointment and agrees to supervise, direct and control the operation and management of the [Lounge and Restaurant] during the term of this Agreement upon the terms set forth herein. [BHG] shall have no right to delegate any of its duties or responsibilities hereunder, except with the prior written consent of [Regency], which consent may be arbitrarily withheld."

(NYSCEF Doc. No. 16 § 2; NYSCEF Doc. No. 17 § 2). The term of the Lounge Agreement and the Restaurant Agreement was 10 years, commencing from the date on which the Lounge re-opened (October 2015) (*id.*, § 2.2).

Pursuant to Section 3.3 of the Lounge Agreement (which section was not included in the Restaurant Agreement), BHG was to, among other things, "develop and implement a pre-opening program for the Lounge and the Pre-Opening Budget," including selecting and procuring all utensils, glasses, linens, towels, uniforms and other supplies needed for the

operation of the Lounge, arranging all marketing and advertising, and hiring and training all Lounge employees (NYSCEF Doc. No. 16 § 3.3). Section 3.3 further provides that BHG shall "cooperate with [Regency] in its application to amend the [H]otel liquor license under which the Lounge is operated (which shall be held in the joint names of [Regency], [BHG], and the owner of the Hotel) and otherwise supervise and manage all things necessary to re-open the Lounge" (*id.*).

Section 5.1 of both the Lounge Agreement and the Restaurant Agreement state that

> "[BHG] shall have responsibility for the day to day operations of the [Lounge and Restaurant] (including the stocking and servicing of mini-bars located in Hotel guest rooms) during the Management Term and [Regency] shall not unreasonably interfere with [BHG's] management of the [Lounge and Restaurant]. Notwithstanding the foregoing, [BHG] acknowledges that it is the intention of [Regency] that the [Lounge and Restaurant] be operated as a division of the Hotel's business and not as an independent entity and accordingly agrees to comply with all reasonable instructions given by the general manager of the Hotel relating to the treatment of Hotel guests"

(NYSCEF Doc. No. 16 § 5.1; NYSCEF Doc. No. 17 § 5.1). Section 5.1 of the Lounge Agreement further states that BHG was to provide certain services to the Hotel, including, but not limited to providing beverage catering services to any room or area within the Hotel if requested, and to provide beverages (including alcoholic beverages) to the general manager, senior staff, and senior executives at a 50% discount off of menu prices (NYSCEF Doc. No. 16 §§ 5.1 [ii], [iii]). Section 5.1 of the Restaurant Agreement also states that BHG was to provide room service twenty-four hours per day, seven days perk week, including food and alcohol, among other services (NYSCEF Doc. No. 17 § 5.1 [iii]).

Section 6 of the Lounge Agreement and the Restaurant Agreement set forth the compensation structure for BHG. To wit, Section 6.1 of the Lounge Agreement provides that BHG was to receive a flat fee of $50,000 for its services in developing and implementing the theme of the Lounge prior to its re-opening (NYSCEF Doc. No. 16 § 6.1). After the Lounge and the Restaurant re-opened to the public, however, BHG was to be paid variable compensation consisting of both (i) a "top line" management fee of 5% of the Lounge's gross sales and 2% of the Restaurant's gross sales and (ii) a "bottom line" management fee calculated as a percentage of the EBITDA of the Lounge and the Restaurant (NYSCEF Doc. No. 16 § 6.2; NYSCEF Doc. No. 17 § 6.1).

Significantly, for the purposes of the instant motion for summary judgment, Section 9 of the Lounge Agreement and the Restaurant Agreement set forth the procedures and the rights of the parties concerning termination of either Agreement. Section 9.3 states:

> "Either party shall have the right to terminate this Agreement immediately upon written notice to the other in the event of an act of deliberate fraud, dishonesty or embezzlement on the part of the non-terminating party with respect to the [Lounge or Restaurant] ***or the occurrence of an event whereby the continuance of [BHG] as manager of the [Lounge or Restaurant] would be likely adversely to affect [Regency's] hotel liquor license or the renewal thereof.***"

(NYSCEF Doc. No. 16 ¶ 9.6; NYSCEF Doc. No. 17 ¶ 9.6 [emphasis added]).

From August 2014 through December 2015, BHG assisted in the design, development, and programming of the Lounge and the Restaurant in preparation for their re-opening. After the renovations were completed, the Lounge re-opened for business in October 2015 and the Restaurant re-opened in December 2015. BHG operated the Lounge and the Restaurant as

agreed. On October 28, 2015, Regency applied to the New York State Liquor Authority (the SLA) for an endorsement to add BHG to the Hotel's liquor license (NYSCEF Doc. No. 19). BHG sold alcoholic beverages under the Hotel's liquor license while the application for an endorsement was pending. On December 2, 2015, the SLA denied the application due to a separate pending license revocation proceeding involving BHG (NYSCEF Doc. No. 20).

BHG continued to operate the Lounge and the Restaurant and continued to serve alcoholic beverages to customers on behalf of Regency and the Hotel through February 2016. In late February 2016, principals of the Defendants called a meeting with principals of BHG, at which time the Defendants requested that BHG cease providing services under the Lounge Agreement and the Restaurant Agreement. On April 12, 2016, Regency sent written notice to BHG indicating that the License Agreement and the Restaurant Agreement were terminated pursuant to section 9.3 of the respective contracts (NYSCEF Doc. No 23; NYSCEF Doc. No. 24).

BHG brought this action against the Defendants by filing a summons and complaint on July 1, 2016. The complaint asserts causes of action for breach of contract, unjust enrichment, specific performance, and accounting. As indicated on the record and in its opposition papers, BHG has abandoned the unjust enrichment, specific performance, and accounting cause of action. The Defendants filed an answer on August 10, 2016. The Defendants now move for summary judgment pursuant to CPLR § 3212 dismissing the remaining causes of action for breach of contract and to strike BHG's jury demand pursuant to CPLR § 4102.

DISCUSSION

Summary judgment will be granted only when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

Breach of the Lounge Agreement and the Restaurant Agreement

To prevail on a cause of action for breach of contract, the plaintiff must establish: (i) the existence of a contract, (ii) the plaintiff's performance, (iii) the defendant's breach, and (iv) resulting damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). A clear and complete document setting forth an agreement should be enforced according to its terms (*Gladstein v Martorella*, 71 AD3d 427, 429 [1st Dept 2010]). Extrinsic evidence is not admissible where an agreement is clear and unambiguous on its face (*id.*). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*id.*, citing *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). A merger clause in a contract that specifically proscribes all oral agreements precludes reference to any other alleged agreements between the parties not reduced to writing in the contract (*Torres v D'Alesso*, 80 AD3d 46, 57 [1st Dept 2010]).

The Defendants primarily argue that Regency was entitled to terminate the Lounge Agreement and the Restaurant Agreement because (i) the revocation proceeding and endorsement application denial were ***likely to*** and in fact ***did*** adversely affect the Hotel's Liquor License, and (ii) it was unlawful for BHG to perform its duties under the Lounge Agreement and Restaurant Agreement without being added to the Hotel's liquor license, therefore Regency would risk losing its liquor license by permitting BHG to continue to operate under the license.

In its opposition papers, BHG argues that there are material issues of fact concerning whether BHG's continued operation was likely to adversely affect the Hotel's liquor license. Specifically, BHG argues that (i) the SLA's denial of Regency's application for an endorsement adding BHG to the Hotel's liquor license was not an event that was likely to adversely impact the Hotel's liquor license, and (ii) it did not actually receive any variable compensation, and that it therefore could have continued to act as the day-to-day manager of the Lounge and Restaurant without violating the ABC law and jeopardizing the Hotel's liquor license. Both arguments are without merit.

First, the revocation proceeding adversely affected the Hotel's liquor license because it was the basis for the SLA's adverse determination denying the endorsement application. The application disapproval in and of itself constitutes an adverse event allowing termination under Section 9.3 of the Lounge Agreement and the Restaurant Agreement (*see* NYSCEF Doc. No. 20). The decision setting forth the reasons for the disapproval states: "[T]he application is disapproved without prejudice because BOWERY HOSPITALITY ASSOCIATES LLC has a revocation

proceeding pending before the Authority case #1264426" (*id.*). The SLA's disapproval decision explained that "[s]ince a determination of revocation may result in the revocation of the license and a proscription against the issuance of another license for such premise for two years, a determination of this application on its merits would be improper" (*id.*). It further explained that the endorsement application could not be refiled until 20 days after the resolution of the revocation proceeding, if the resolution were in BHG's favor (*id.*; Kwon Aff ¶¶ 16-18). The evidence shows that the Defendants requested an update from BHG regarding the status of the revocation proceeding in an email dated February 22, 2016 (NYSCEF Doc. No. 21). BHG did not respond to this email. The revocation proceeding was not finally resolved until May 23, 2016, when the SLA issued a full board decision dismissing the charges against BHG (NYSCEF Doc. No. 25). But the Lounge Agreement and the Restaurant Agreement were terminated on April 12, 2016, prior to the favorable resolution of the revocation proceeding. And in any event, as discussed below, it was unlawful for BHG to manage the day-to-day operations of the Lounge and Restaurant without being placed on the Hotel's liquor license, and the adverse determination of the endorsement application as a result of the revocation proceeding made BHG's continued management of the Lounge and Restaurant likely to put the Hotel's liquor license at risk for revocation or suspension.

Section 100 (1) of the New York Alcoholic Beverage Control Law (**ABC**) provides that "[n]o person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter." In addition, under section 111, "a license issued to any person . . . for any licensed premises shall not be transferable to any other person . . . ." Section 111 further provides that a license "shall be

available only to the person therein specified." Courts have consistently upheld SLA determinations disciplining license holders where the management company has full authority to manage the day-to-day operations of the business but is not specified in the liquor license (*Shore Haven Lounge, Inc. v. New York State Liquor Auth.*, 37 NY2d 187, 190 [1975]; *Teng K. Inc. v New York State Liquor Auth.*, 80 AD3d 480, 481 [1st Dept 2011]). Although the Lounge Agreement and the Restaurant Agreement specified that the Lounge and Restaurant were to be operated as divisions of the Hotel rather than independent entities, both Agreements give BHG virtually exclusive responsibility and control over the day-to-day operations of the Lounge and the Restaurant. And although BHG agreed to comply with all reasonable instructions given by the general manager of the Hotel, this was specifically with regard to the treatment of Hotel guests, only. Based on the degree of control exercised by BHG, they were required under the Alcoholic Beverage Control Law to be added to the Hotel's liquor license.

Significantly, the SLA regulations provide that a liquor license may be revoked, canceled, or suspended as a result of a "[v]iolation by the licensee or permittee of any provision of the Alcoholic Beverage Control Law" (9 NYCRR § 53.1 [a]). Therefore, by continuing to manage the Lounge and Restaurant without being included on the liquor license in violation of the ABC, BHG was putting the Hotel's liquor license at risk of suspension or revocation. This constitutes grounds for termination under Section 9.3 of the Lounge Agreement and the Restaurant Agreement.

Even if the Lounge Agreement and Restaurant Agreement implicitly contemplated some lag time to allow for BHG to be added to the liquor license (it does not do so explicitly), it cannot be read

to allow BHG to continue to manage the day-to-day operations indefinitely without being added to the Hotel's liquor license. "Where, as here, the [contract] terms were negotiated by experienced attorneys and business persons, there is no basis to 'interpret an agreement as impliedly stating something which the parties have neglected to specifically include'" (*425 Fifth Ave. Realty Assocs. v Yeshiva Univ.*, 228 AD2d 178, 178 [1st Dept 1996], quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978]).

Second, BHG's compensation under Section 6.2 of the Lounge Agreement and the Restaurant Agreement was based on a percentage of liquor sales. SLA Declaratory Rulings have explained that contractual arrangements in which unlicensed third parties are entitled to receive a percentage of proceeds from the sale of alcoholic beverages are generally considered by the SLA as constituting an unlawful transfer of a financial interest in the licensed business to an unlicensed party (SLA Decl. Ruling 2015-01717F at 2; SLA Decl. Ruling 2011-03527C at 3). Although there is a *de minimus* exception where compensation to the unlicensed third party does not exceed 10% of gross sales of alcohol (SLA Decl. Ruling 2017-01701), the variable compensation structure set forth in the Lounge Agreement and the Restaurant Agreement allowed for variable compensation excess of 10% (*see* NYSCEF Doc. No. 16, 17 § 6.2; Ashok Aff. ¶ 37; Kwon Aff. ¶ 14). Therefore, BHG's continued management of the Lounge and the Restaurant under the contractually-agreed variable compensation scheme would have violated ABC § 111 and would have jeopardized the Hotel's liquor license.

Notwithstanding the apparent illegality of the variable compensation structure under the circumstances, BHG argues that pursuant to an oral modification, the parties agreed that BHG

would not be paid a percentage of alcohol sales but would instead receive a flat fee. The argument fails. First, the Lounge Agreement and the Restaurant Agreement both contain a merger clause, which states: "Except as otherwise expressly set forth in this Agreement, this Agreement may be amended, supplemented or restated only by a writing signed by [Regency and BHG]" (NYSCEF Doc. Nos. 16, 17 § 11.2). Therefore, any oral modification would not have any force or effect. Moreover, the alleged oral modification is vague and the complaint is missing critical details, such as who agreed to the modification, when the agreement was allegedly made, or its salient terms.

Nevertheless, BHG argues that the parties' performance demonstrates that they assented to the oral modification and abided by its terms, because BHG did not actually receive any variable compensation as set forth under Section 6.2 of the Lounge Agreement and the Restaurant Agreement. But the evidence tells a different story. BHG relies on a vague statement in the Affidavit of Eric Marx in support of BHG's opposition to the Defendant's motion for summary judgment that "the parties agreed to suspend BHG's compensation while BHG resolved the separate revocation proceeding" (Pl's Mem. in Opp at 9; Marx Aff. ¶¶ 7-11). This vague and conclusory statement, however, is insufficient, without any supporting evidence, to raise a triable issue of fact. Notably, Regency has submitted an invoice that BHG sent to Regency on March 7, 2016 for fees for its services at the Lounge and the Restaurant for the months of December 2015, January 2016, and February 2016, as well as for certain future events, for a total of $18,681.2, based on a percentage of liquor sales (NYSCEF Doc. No. 37, Ashok Aff., Ex. M). Regency also submitted copies of checks that it sent to BHG for payment of the invoice totaling $18,681.21 (NYSCEF Doc. No. 38, Ashok Aff., Ex. N).

To the extent that BHG argues that it never cashed the checks and therefore it never actually received the variable compensation, the argument is unavailing. The invoice and the checks establish that, contrary to BHG's argument, the alleged oral modification did not reflect the parties' understanding and BHG was earning and accruing variable compensation. This payment structure was simply unlawful under ABC § 111 and SLA regulations, and BHG's continued management under such payment scheme would have been likely to adversely affect the Hotel's liquor license or the renewal thereof. Therefore, termination was proper under Section 9.3 of the Lounge Agreement and the Restaurant Agreement.

As indicated on the record and in its opposition papers, BHG has abandoned its remaining causes of action, and they are therefore dismissed. And, in light of the court's decision herein, the Defendants' motion to strike BHG's demand for a jury trial is denied as moot.

Accordingly, it is

ORDERED that the Defendants' motion for summary judgment is granted in its entirety and the complaint is dismissed.

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11/15/2019
DATE

ANDREW BORROK, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE	