STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE
COMMERCIAL DIVISION

GENESEE HOTEL PROPERTIES LLC,

Plaintiff, **Decision & Order**

vs.

Index #: 805008/2020

HYATT CORPORATION,

Defendant.

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Introduction

Genesee Hotel Properties LLC (hereinafter "Genesee" or "Plaintiff") commenced this action against Hyatt Corporation (hereinafter "Defendant" or "Hyatt"), alleging a breach of contract (hereinafter "Management Agreement") and breach of fiduciary duty. Plaintiff has requested a preliminary injunction to enjoin Defendant from terminating the Management Agreement that governs their commercial relationship.

The Court granted a Temporary Restraining Order on May 29, 2020, which enjoined Hyatt from terminating the Management Agreement and ordered the status quo to be maintained. The Court now considers Plaintiff's request for the preliminary injunction, which Defendant opposes.

Statement of Facts

Plaintiff owns the hotel located at 2 Fountain Plaza in the City of Buffalo. Hyatt manages the hotel pursuant to a Management Agreement. In doing so, Defendant manages the hotel's operating accounts, prepares budgets, and keeps records regarding the hotel's operations. As

consideration for using the Hyatt name, Plaintiff pays a management fee, which is a percentage of the hotel's gross receipts. If the hotel is profitable, Plaintiff nets the profits. However, if there is a loss, Plaintiff bears this. As part of the Management Agreement, Plaintiff is responsible for providing working capital to fund the operating accounts and to pay all outstanding liabilities, including bills from vendors and payroll.

According to Plaintiff, in November 2019, Defendant indicated Plaintiff needed to fund $200,000 in working capital for 2020. Thereafter, Defendant requested an additional $850,000 for working capital due to "mounting payables". Plaintiff alleges that it made two working capital infusions that totaled $800,000. However, Defendant responds that Plaintiff repeatedly failed to fund working capital and that, historically, Plaintiff has delayed funding working capital, missed timely payments to vendors, and overdrew their accounts. After the operating account was overdrawn in excess of $20,000, Defendant advanced $90,000 towards Plaintiff's outstanding obligations and estimated that approximately $2 million of working capital was necessary to cover operating expenses through the end of April. Defendant submits that this was to cover payroll, accrued payables to third-party vendors and other outstanding liabilities.

In the midst of the COVID-19 pandemic, which necessitated the temporary closing of the hotel, Plaintiff maintains that the monetary amounts Defendant demanded were never substantiated and continued to fluctuate. These demands varied from $1.3 million, $2 million, and $2.5 million. Plaintiff insists that it attempted to work with Defendant in good faith. Plaintiff stated that it applied for benefits under the Payroll Protection Program (hereinafter "PPP"), to be used towards outstanding expenses. However, notwithstanding the different amounts demanded, Plaintiff continued to question the Defendant's demands to fund hotel operations.

As the impasse between Plaintiff and Defendant continued and Plaintiff failed to make any contributions towards the hotel's operating expenses, Defendant served its 15-day notice to terminate the Management Agreement effective May 31, 2020. During this period, Defendant maintains that it attempted to continue good-faith negotiations with Plaintiff and offered additional extensions while Plaintiff sought to sell the hotel to a third party. However, Defendant insists that Plaintiff never contributed any amount towards outstanding expenses during this period.

To prevent termination, Plaintiff commenced this action seeking damages for breach of contract and breach of fiduciary duty and sought temporary injunctive relief by way of an Order to Show Cause, granted May 29, 2020. Plaintiff also seeks declaratory relief in their complaint. The Court granted a Temporary Restraining Order and now considers Plaintiff's request for a preliminary injunction.

Discussion

On a motion for a preliminary injunction, the moving party must demonstrate by clear and convincing evidence a likelihood of ultimate success on the merits, irreparable injury if the injunction were not granted, and a balancing of equities in favor of granting the injunction. Family-Friendly Media, Inc. v. Recorder Television Network, 74 A.D.3d 738 (2nd Dep't. 2010); Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 N.Y.3d 839 (2005); Aetna Ins. Co. v Capasso, 75 N.Y.2d 860 (1990). If any one of these three requirements are not satisfied, the motion must be denied. Faberge Intern., Inc. v. Di Pino, 109 A.D.2d 235 (1st Dep't. 1985). An injunction is a provisional remedy to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual. However, it is not to determine the ultimate rights of the parties. As such,

absent extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief sought in the complaint. Reichman v. Reichman, 88 A.D.3d 680, (2nd Dep't. 2011); SHS Baisley, LLC v. Res Land, Inc., 18 A.D.3d 727 (2nd Dep't. 2005). In addition, mandatory preliminary injunctions should not be granted absent extraordinary or unique circumstances or where the final judgment may otherwise fail to afford complete relief. SHS Baisley, LLC v. Res Land, Inc., 18 A.D.3d at 727, supra. However, the decision whether to grant or deny a preliminary injunction is within the sound discretion of the Court. Family-Friendly Media, Inc. v. Recorder Television Network, 74 A.D.3d at 738, supra; Masjid Usman, Inc. v. Beech 140, LLC, 68 A.D.3d 942 (2nd Dep't. 2009).

The Court must look at the causes of action the Plaintiff asserts to evaluate whether injunctive relief is warranted. In its complaint, Plaintiff alleges that Defendant not only breached its contract with Genesee, but it also breached the fiduciary duty owed to Plaintiff. By this decision the Court is not deciding the merits of the causes of action or even whether they were pled sufficiently. Instead, the Court must simply decide if Plaintiff has demonstrated there is a likelihood of success on the merits that justify injunctive relief.

I.

Breach of Contract

"The elements of a cause of action to recover damages for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) resulting damages." Palmetto Partners, L.P. v. AJW Qualified Partners, LLC, 83 A.D.3d 804 (2nd Dep't. 2011). Here, Plaintiff alleges that Defendant requested $800,000 in working capital to start 2020. Plaintiff states that it satisfied this demand by paying this amount in two installments. However, leading up to the hotel's closure due to the COVID-19 pandemic and during its closure, the parties engaged in further discussions to determine the correct amount of funding necessary to continue hotel operations. Several of the exhibits to papers submitted by both sides evidence those discussions. Notwithstanding those discussions, on April 10, 2020, Defendant sent a notice to Plaintiff declaring them in default and advised that unless $2 million was advanced towards working capital, they would terminate the Management Agreement. Plaintiff submits that in doing so, Defendant breached §7.1 of the Management Agreement, which provides

> "Except as otherwise in this Agreement specifically provided Owner shall, at all times during the Term cause sufficient working capital funds to be on hand in the operating accounts to assure the timely payment of all current liabilities of the Hotel…the uninterrupted and efficient operation of the Hotel…and the performance by Hyatt of its obligations hereunder."

Plaintiff argues that the $2 million demand was not supported by current and actual expenses and that Defendant's estimates were constantly revised. Further, Plaintiff notes that it applied for and received aid from the PPP. Plaintiff was willing to use funds from the PPP and advance another $400,000 in unrestricted capital to Defendant. However, according to Plaintiff, Defendant was not willing to withdraw its notice, leaving Plaintiff reluctant to advance funds with an uncertain end. By refusing to negotiate in good faith, Plaintiff argues that Defendant breached not only §7.1 of the Management Agreement, but section §12.1 as well, which sets forth a process for the defaulting party an opportunity to cure. By disregarding Plaintiff's offer of PPP funds and unrestricted capital, Genesee alleges Hyatt breached the Management Agreement.

Defendant disputes this and allege that Plaintiff's own conduct created the breach that justified termination. Defendant's argues that notwithstanding ongoing discussions, Plaintiff ignored repeated requests for working capital and has not made any contributions towards working

capital before or during the pandemic. Defendant maintains that Plaintiff's failure to fund the working capital is a clear breach. Further, Defendants insists that pursuant to the Management Agreement, Defendant is vested with the responsibility of managing the hotel and its finances, and by extension, setting a budget. As such, the Management Agreement does not give Genesee the right to dispute the amounts Hyatt demanded. Defendant maintains that by rejecting the demands made for working capital contribution, Plaintiff breached of the Management Agreement.

II.

Breach of Fiduciary Duty

"To state a claim for breach of fiduciary duty, a plaintiff must allege that the defendant owed him [or her] a fiduciary duty, that the defendant committed misconduct, and that the plaintiff suffered damages caused by that misconduct." Cohen & Lombardo, P.C. v Connors, 169 A.D.3d 1399 (4th Dep't. 2019). Genesee argues that that Hyatt has operated in a self-serving manner and has ignored the duty of loyalty it owes to Genesee. Genesee insists that Hyatt must act in its principal's best interest and not its own. By demanding $2 million within thirty days, under the penalty of

termination, Genesee argues that Hyatt acted in bad faith and abused the duty of loyalty owed to Plaintiff.

Defendant maintains it has not breached its fiduciary duty. Hyatt insists that managing the hotel in a businesslike and efficient manner was the duty owed to Plaintiff and it did so. Since Plaintiff refused to contribute anything toward working capital, Hyatt negotiated with vendors, met payroll, and paid other necessary expenses from its own funds without contribution from Genesee. This, Defendant argues, demonstrates their good faith and the fulfillment of its fiduciary duties.

Decision

As noted above, pursuant to CPLR 6301, "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in its favor." Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839 (2005); Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990); Doe v. Axelrod, 73 N.Y.2d 748 (1988). "The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual." Perpignan v. Persaud,

91 A.D.3d 622 (2nd Dep't. 2012), quoting Ruiz v. Meloney, 26 A.D.3d 485 (2nd Dep't. 2006); see Ying Fung Moy v. Hohi Umeki, 10 A.D.3d 604 (2nd Dep't. 2004).

Here, the nature of the dispute is difficult to isolate. It is quite clear that Hyatt would prefer to sever its relationship with Genesee due to differences in hotel management and operations. Genesee would like to continue its relationship with Hyatt; however, it is unclear whether they can financially do so. During oral argument, Plaintiff's precarious financial situation became clear, leaving the Court to question whether Genesee can meet its ongoing obligations. For instance, even though Plaintiff has secured funding through PPP, it was unable to say with certainty if the third-party servicer of the PPP loan would permit it to apply those funds to continue hotel operations.

It is apparent that Plaintiff has not contributed to the operating expenses of the hotel pursuant to the Hyatt's demands. However, it is less clear what the exact nature of that demand is. As noted during oral argument, the Court had difficulty ascertaining the exact amount of Hyatt's demand, as it continued to vary. Further, when asked, Hyatt acknowledged that despite making the $2 million demand, they themselves

have not paid many of the same expenses they allege Genesee has neglected.

According to the affidavit of Paul Devitt, Senior Vice President of Field Operations for Hyatt, Plaintiff will owe Hyatt "at least approximately $1,843,000." See Affidavit of Paul Devitt, dated June 12, 2020, ¶26. This amount, according to Devitt, includes the following expenses:

> $252,000 for payroll advanced by Hyatt for April and May
>
> $84,000 for payroll/benefits for June
>
> $223,000 for management fees owed for first 3 months of 2020
>
> $376,000 for various chain services, system services costs and loyalty program assessments
>
> $117,000 for past benefit costs
>
> $209,000 for insurance premiums
>
> $279,000 for severance fees for employees upon termination
>
> $227,000 for vacation pay at termination
>
> $76,000 for COBRA costs to be paid upon termination

Many of these costs are speculative as termination may not occur, some of these expenses have not been paid and are prospective, while others are more defined.

These ongoing discussions create the question of to whether the demand is realistic. Since it is apparent Hyatt wishes to discontinue its relationship with Genesee, could it demand an amount it knows Plaintiff could not pay and argue that Genesee's failure to pay constitutes a default that rises to the level of termination? While Hyatt wishes this Court to ignore the effects of the ongoing pandemic, the Court cannot simply brush aside what is otherwise a once-in-a-lifetime event that has crippled not only the solvent, but those who teeter on the brink.

Hyatt argues that notwithstanding the Plaintiff's argument, Genesee is not entitled to specific performance because the Management Agreement is terminable at will. Referencing Marriott International Inc. v. Eden Roc, LLLP, Defendant maintains that injunctive relief is not available with a personal services contract. 104 A.D.3d 583 (1st Dep't. 2013). In Eden Roc, the First Department vacated a temporary restraining order that required the owner to continue to honor the hotel management agreement and prevented its termination on the grounds that courts lack authority to order specific performance on a personal services contract. Id. However, as Plaintiff notes, Eden Roc is distinguishable as the roles were reversed. In Eden Roc, the manager was an independent contractor with full discretion to manage every aspect of the hotel. Here, the Management

Agreement requires Hyatt to act as an agent, which envisions a greater level of participation and action than that found in Eden Roc.

The Court agrees that IHG Mgmt (Maryland) LLC v. W. 44th Street Hotel LLC is more instructive to the facts here. In IHG Mgmt (Maryland) LLC, the First Department found injunctive relief was necessary as the agreement could not be construed as a personal services contract. 171 A.D.3d 413 (1st Dep't. 2018). Genesee, like the Plaintiff in IHG Mgmt (Maryland) LLC, had broader involvement than the limited involvement described in Eden Roc. Further, it is unclear if the Management Agreement can be considered a personal services agreement. As such, Eden Roc is not as persuasive as Defendant suggests. Further, contrary to what Defendant suggests, the damages are not defined and quantifiable. Here, if the hotel is no longer a "Hyatt", Genesee loses the brand name that gives it desirability. It no longer retains that marquee and renders it different from what it has been since 1981. The damages that may result from that deprivation are not calculable.

Here, the facts, at the nascent stage of this case, are very much in dispute. As such, a balancing of the equities militates in Plaintiff's favor. As noted, it is the Court's discretion to grant or deny a preliminary

injunction. Having considered all the submissions and two rounds of oral argument, this Court finds that Plaintiff has satisfied its burden of proving a likelihood of success on the merits, irreparable harm, and a balance of the equities in its favor. Conclusive proof is not needed nor required for a Court to exercise its discretion in granting injunctive relief. Vanderbilt Brookland LLC v. Vanderbilt Myrtle, Inc., 147 A.D.3d 1104 (2nd Dep't. 2017). The Court may also grant injunctive relief even though questions of fact exist. Ruiz v. Meloney, 26 A.D.3d 485 (2nd Dep't. 2006); see Ying Fung Moy v. Hohi Umeki, 10 A.D.3d 604 (2nd Dep't. 2004).

Here, caution justifies injunctive relief. If Hyatt is allowed to terminate the Management Agreement, the hotel ceases to be a Hyatt, and that, in and of itself, causes irreparable harm. The absence of an injunction would cause Plaintiff greater injury than the imposition of the injunction would inflict upon the Defendant. When considering everything in its totality, equity justifies injunctive relief. As such, the Plaintiff's request for a preliminary injunction is hereby GRANTED.

However, this cannot continue to be an open-ended relationship where Hyatt runs the hotel and pays all the expenses. While some of the expenses outlined by Hyatt are speculative, there are others that are

necessary and will need working capital to fund the hotel. That is the responsibility of the Plaintiff pursuant to the Management Agreement and not the Defendant. Since the Court has enjoined the Defendant from terminating the agreement, Plaintiff can no longer argue that it is reluctant to fund the working capital account without assurances from Defendant.

As such, Defendant must secure an undertaking. CPLR 6312 (b) directs a court to "fix an undertaking" in an amount that will compensate a Defendant for damages incurred by reason of the granting of a preliminary injunction in the event that it is finally determined that a plaintiff was not entitled to the injunction. Vassenelli v. City of Syracuse, 160 A.D.3d 1412 (4th Dep't. 2018); Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp., 69 A.D.3d 212 (4th Dep't. 2009); Rust v. Turgeon, 295 A.D.2d 962 (4th Dep't. 2002]; Wasus v. Young Sun Oh, 86 A.D.2d 753 (4th Dep't. 1982). In fact, in Vassenelli, the Fourth Department admonished that when issuing a preliminary injunction, court[s] had "no power to dispense with the undertaking required by CPLR 6312 (b)"; see also Ziankoski v. Simmons, 140 A.D.2d 1007 (4th Dep't. 1988]; Duane Sales v. Hayes, 87 A.D.2d 730 (3rd Dep't. 1982).

In reviewing the costs outlined by Defendant, payroll expenses advanced by the Hyatt for April and May, payroll and benefits for June, the past-due management fees owed for January, February, and March, vendor expenses, past benefit costs, and insurance premiums, have either already been paid or must be paid. The total for these payments is $1,261,000. The severance fees, vacation costs and COBRA, which total $582,000, are not immediately due as a result of the termination, which has been enjoined. The Court also anticipates additional working capital will be necessary for the coming months.

CPLR 2501 provides in relevant part that an "undertaking" includes: "(1) Any obligation, whether or not the principal is a party thereto, which contains a covenant by a surety to pay the required amount, as specified therein, if any required condition, as specified therein or as provided in subdivision (c) section 2502, is not fulfilled; and (2) *any deposit*, made subject to the required condition, of the required amount in *legal tender* of the United States -or- in face value of *unregistered bonds of the United States* or of the state." [italics added]

To simply direct that Plaintiff post a bond while Defendant pays the costs and expenses, is inequitable. Therefore, entitlement to the

preliminary injunction is conditioned on the Plaintiff depositing $1,000,000 cash into the working capital account for the hotel. Campagna v. Hill, 53 A.D.2d 1050 (4th Dep't. 1976); Shang v. Silvian, 60 A.D.2d 473 (3rd Dep't. 1977); Matter of 1650 Realty Assocs., LLC v. Golden Touch Mgmt., Inc., 101 A.D.3d 1016 (2nd Dep't. 2012); McCabe v. Advent Props., Inc., 89 A.D.2d 548 (1st Dep't. 1982). Further, Plaintiff is required to post a bond in the amount of $843,000 for prospective costs otherwise due on termination of the Management Agreement should Plaintiff not prevail on the merits.

Plaintiff must deposit the aforementioned sum and post the surety within ten (10) days of this Decision and Order. During this period of time, the temporary restraining order shall remain in effect. Should Plaintiff be unable to fund the working capital account or undertaking, the temporary restraining order shall be vacated and the award of a preliminary injunction denied.

The Court schedules a further conference on this matter for July 29, 2020 at 2:00 p.m.

This shall constitute the Decision and Order of this Court.

Hon. Emilio Colaiacovo, J.S.C.

DATED: June 22, 2020
Buffalo, New York

GRANTED