STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

WOODCLIFF ASSOCIATES, L.P.,

Plaintiff,

v.

WIDEWATERS HOTELS, LLC, WIDEWATERS ERA HOTEL PROPERTY LLC, WIDEWATERS DICEPHALOUS HOTEL PROPERTY, LLC, WIDEWATERS TPA HOTEL PROPERTY, LLC, and WIDEWATERS III HOTEL,

Defendant.

DECISION AND ORDER

Index #2007/00693

Plaintiff, Woodcliff Associates, L.P., moves pursuant to CPLR 3212 for an order granting it summary judgment. Defendants cross-move for summary judgment.

Defendants are corporations and entities that either purchased or now operate the Woodcliff Lodge, following the bulk sale in July 2006. At the time the parties closed, the New York State Department of Taxation and Finance had not yet issued a release of plaintiff's liability with respect to sales tax collections, and plaintiff has uncollected amounts of accounts receivable outstanding in defendants' possession.

Plaintiff and defendants Widewaters Era Hotel Property LLC, Widewaters Dicephalous Hotel Property, LLC, Widewaters TPA Hotel Property, LLC, and Widewaters III Hotel Property LLC entered into an agreement on July 26, 2006, providing for defendants' collection and holding of the amounts receivable, until plaintiff

obtained sales tax clearance from the New York State Department of Taxation and Finance. On October 19, 2006, a release of the bulk sale liability was issued by New York State. A demand for turnover of the accounts receivable was then made upon defendants. This action was commenced because defendants have not turned those amounts over to plaintiff, totaling $106,074.09.

Defendant's refusal to turn over the funds stems from a $53,664.00 alleged offset resulting from the placement of an order of Frontier Yellow Page advertisements on July 13, 2006, just before the closing. Peter McCrossan, the former General Manager of Woodcliff, alleges that he was told by the defendant-purchasers prior to closing to continue running Woodcliff in the same manner he had been running it. As such, McCrossan states that he renewed the advertising consistent with past practices. Post-closing, defendants' representative Robert Pope discussed the Yellow Pages ads with both McCrossan and Joseph Scotto, a Frontier representative. Although both of these conversations occurred during the time frame within which it is alleged that the advertisements still could have been cancelled, plaintiff alleges that Mr. Pope indicated that the ads should be canceled. Mr. McCrossan was terminated as General Manager of Woodcliff on August 30, 2006. Plaintiff alleges that the decision to cancel the advertising was not made until after a newly appointed General Manager for Woodcliff was hired. At that point, however,

it was too late to cancel the advertising.

Plaintiff's complaint states the following causes of action: (1) breach of contract, alleging damage in the amount of $106,074.09; (2) unjust enrichment, alleging damage in the amount of $106,074.09, and (3) breach of fiduciary duty arising from defendant's holding of the accounts receivable in a claimed constructive trust. In their answer, defendants allege the following affirmative defenses: unjust enrichment; and fraud, deception, and/or negligent misrepresentation; failure to state a cause of action as against defendant Widewaters Hotels, LLC, an entity not a party to the contract; and failure to state a cause of action on the third cause of action for breach of fiduciary duty. Defendants also state a counterclaim, alleging that plaintiff's unauthorized execution of the advertising contracts with Frontier caused defendants to incur an expense of $53,664. Defendant alleges that amount should be set-off against any monies due and owing to plaintiff. In its reply to the counterclaim, plaintiff alleges the following affirmative defenses: estoppel due to failure to cancel orders before and after the sale, defendant satisfied the orders by accepting the benefits, waiver, and unjust enrichment.

Summary judgment was granted on the breach of contract claim and an accounting was ordered for the purpose of ascertaining damages. Decision was reserved on plaintiff's motion for summary

judgment on the breach of fiduciary duty claim, and its claim for attorney fees, and additional submissions were received and considered by the court.

The parties' collection agreement, resulting from an arm's length business transaction between sophisticated commercial entities, WIT Holding Corp. v. Klein, 282 A.D.2d 527, 529 (2d Dept. 2001)("an arms-length business relationship does not give rise to a fiduciary obligation"), did not create an escrow or otherwise create a fiduciary relationship, inasmuch as defendant's duties under the agreement merely called upon it to collect accounts receivable and pay them over, less a ten percent service fee, to plaintiff. Flat-Marks Realty Corp. v. silver's Lunch Stores, 74 F.2d 210, 211-12 (2d Cir. 1934)(L. Hand, J.)("merely to collect the sub-rents and account for them"); Walts v. First Union Mortgage Corp., 259 A.D.2d 322, 323 (1st Dept. 1999), aff'g. in relevant part, 178 Misc.2d 234, 240-41 (Sup. Ct. N.Y. Co. 1998); Alpert v. Sebo, 269 App. Div. 433 (1st Dept. 1945); Moore v. Coyne & Delaney Mfg. Co., 113 App. Div. 52 (1st Dept. 1906). Compare, in the insurance broker context, Bohlinger v. Zanger, 306 N.Y. 228, 239 (1954); Marine Office-Appleton & Cox Corp. v. Van Wagner, 83 A.D.2d 800 (1st Dept. 1981). Compare also, Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 121-23 (1st Dept. 1998)("plaintiffs alleged that Meyer had acted on their behalf in assuming negotiations with Crossland,

and that they had relied upon him specifically because of Lazard's expertise and reputation, because of Meyer's alleged "inside connection" with a highly placed Crossland executive and because Crossland apparently preferred to deal with plaintiffs through Lazard rather than directly with plaintiffs").

"Even though an accounting were required to ascertain the amount of damages, that fact would be insufficient to support a claim for equitable relief unless a fiduciary relationship is shown." Terner v. Glickstein & Terner, 283 N.Y. 299, 303 (1940).[1] See also, Murray Schwartz Enterprises Employee Pension Plan Trust v. Four Corners Productions, Inc., 293 A.D.2d 388, 389 (1st Dept. 2002)("does not include any responsibility either to oversee how Roundabout generated and managed its operating profits or to procure an accounting"). Compare id. 293 A.D.2d at 388-89 ("the loan agreement between defendant Four Corners and plaintiff Trust constituted not merely a debtor-creditor relationship, but an entrustment of funds for an investment in a theatrical production, which gave rise to a fiduciary relationship").

Plaintiff suggests the creation of a resulting trust. "A

[1] The court ordered an accounting on September 7, 2007, not to shift the burden of proving damages away from plaintiff and to defendant, but merely to provide any discovery plaintiff needed to calculate its damages. To the extent the parties may misconceive the nature of the accounting as one due upon an interlocutory decree for equitable relief, they are now disabused of that notion.

resulting trust springs into being '(1) where an express trust fails in whole or in part; (2) where an express trust is fully performed without exhausting the trust estate; (3) where property is purchased and the purchase price is paid by one person and at his direction the vendor conveys the property to another person.'" Savlia v. Savlia, 31 A.D.2d 640 (3d Dept. 1968)(quoting Scott on Trusts (2d ed.), §404.1, p. 2922), modified, 25 N.Y.2d 80 (1969). A resulting trust did not "spring into being" in this case. In Re Lane, 937 F.2d 694, 697 n.5 (1st Cir. 1991)(applying N.Y. law). Nor did a constructive trust arise; there was no "transfer in reliance on . . . [a] fiduciary promise, or in reliance on . . . fiduciary status." Id. 937 F.2d at 697 n.5 (citing Sharp v. Kosmalski, 40 N.Y.2d 119, 122 (1976)). This is not a situation as in Palazzo v. Palazzo, 121 A.D.2d 261, 264 (1st Dept. 1986), in which strict adherence to the element of a transfer was excused.

But even if a fiduciary relationship could be shown, however, plaintiff's remedy is on this record confined to a breach of contract claim, because the breach of fiduciary duty claim is "based on the same facts and theories as . . . [the] breach of contract claim and [i]s properly dismissed as duplicative." Brooks v. Key Trust Co. Nat. Assoc., 26 A.D.3d 628, 630 (3d Dept. 2006). Compare Moser v. Devine Real Estate, Inc. (Florida), 42 A.D.3d 731, 734 (3d Dept. 2007), where "issues

of fact exist[ed] as to whether - apart from the terms of the contract - sufficient allegations . . . [were] set forth which 'created a relationship of higher trust than would arise from [the contract] alone.'" (quoting EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 20 [2005]); La Barte v. Seneca Resources Corp., 285 A.D.2d 974 (4th Dept. 2001).

In short, given the comprehensive agreement between the parties, and the failure of them to have bargained for a fiduciary relationship, and the lack of any conduct between them subsequent to execution of the collection agreement creating or importing into their relations fiduciary obligations, the courts should not imply one. Northeast General Corp. v. Wellington Advertising, Inc., 82 N.Y.2d 158, 162-65 (1993). Accordingly, plaintiff fails to satisfy its initial burden on summary judgment to show the existence of a fiduciary relationship, thus requiring denial of its motion. Defendants' cross-motion for summary judgment dismissing the breach of fiduciary duty claim is granted on the strength of their showing in support of their motion that no fiduciary relationship existed, and on their additional showing that, if one existed, plaintiff's claim is indistinguishable from its breach of contract claim, and because plaintiff fails to raise an issue of fact.

SO ORDERED.

_____
KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: November 2, 2007
Rochester, New York