Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

x

METROPLAZA TWO ASSOCIATES, LLC, etc., et al.

-against-

HILTON INNS, INC., etc., et al.

x

Index Number 2156 2007

Motion Date July 25, 2007

Motion Cal. Number 46

Motion Seq. No. 8

The following papers numbered 1 to 5 read on this motion by the plaintiffs for, inter alia, an order permitting them to reargue their prior motion for a preliminary injunction.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits	1
Reply Affidavits	2
Other (Memoranda of Law)	3-5

Upon the foregoing papers it is ordered that the motion is denied. (See the accompanying memorandum.)

Dated: September 7, 2007

J.S.C.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

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METROPLAZA TWO ASSOCIATES, LLC, etc., et al.

-against-

HILTON INNS, INC., etc., et al.

INDEX NO. 2156/07

MOTION SEQ. NO. 8

BY: KITZES, J.

DATED: SEPTEMBER 7, 2007

x

Plaintiff Metroplaza Two Associates, LLC and plaintiff Metroplaza III New Jersey Associates, LLC have moved for (1) an order allowing them to reargue their prior motion for a preliminary injunction, inter alia, prohibiting defendant Hilton Inns, Inc. and defendant Promus Hotels, Inc. from terminating a franchise license agreement dated December 17, 2003 permitting the construction and operation of a Homewood Suites hotel located at 120 Wood Avenue South, Iselin, New Jersey, (2) an order modifying a prior order of this court dated June 20, 2007 denying their motion for a preliminary injunction, and (3) a preliminary injunction prohibiting the defendants from, inter alia, "taking any action to inhibit or prevent Plaintiffs from obtaining specific performance of the License, including, without limitation, interfering with Plaintiffs' right to construct and operate the Homewood Suites hotel***."

The facts of this case are given more fully in the decision of this court dated June 20, 2007. Briefly, pursuant to a franchise license agreement dated December 17, 2003, defendant Promus (a subsidiary of Hilton Hotels Corporation), as licensor, granted plaintiff Metroplaza III, as licensee, the right to construct and operate a hotel in Iselin, New Jersey which would be known as a "Homewood Suites" hotel. The parties to the Homewood Suites license agreement contemplated the construction of a $20,000,000 hotel with 125 rooms which would share a complex with the Woodbridge Hilton. The Homewood Suites franchise agreement imposed a schedule of construction deadlines on Metroplaza III which the licensee allegedly failed to meet. Defendant Promus alleges that Metroplaza III has fallen about two years behind schedule on the construction of the Homewood Suites hotel and has not even broken ground on the project. The plaintiffs began this action on January 24, 2007. Defendant Promus sent a notice of default and termination to plaintiff Metroplaza III dated April 3, 2007 stating that the license agreement would terminate 10 days after receipt of the notice. On May 15, 2007, the plaintiffs submitted their prior motion for a preliminary injunction prohibiting the defendants from terminating the license agreement. By decision and order dated June 20, 2007, this court denied the prior motion on the ground that the plaintiffs had failed to establish irreparable injury if provisional relief was withheld.

That branch of the plaintiffs' motion which is for an order permitting them to reargue their prior motion for a preliminary injunction is denied. First, a motion for reargument is a matter addressed to the sound discretion of the court. (See, Carrillo v PM Realty Group, 16 AD3d 611; Long v Long, 251 AD2d 631.) Reargument of the prior motion to obtain the relief sought therein would have no purpose. The parties agree that the defendants have by now already terminated the license agreement. Even if this court were to grant reargument, an injunction will not issue to prohibit a fait accompli. (See, Currier v First Transcapital Corp., 190 AD2d 507; Doe v Roe, 158 AD2d 759; Town of Oyster Bay v New York Tel. Co., 75 AD2d 598.) Second, "[r]eargument is never a vehicle for seeking new forms of relief." (Fox v Abe Schrader Corp., 36 AD2d 591; see, American Trading Co., Inc. v Fish, 87 Misc 2d 193; Wandschneider v Bekeny, 75 Misc 2d 32.) The plaintiffs' prior motion did not seek a preliminary injunction prohibiting the defendants from dealing with another potential franchisee. Third, "[a] motion to reargue does not afford an unsuccessful party an opportunity to advance arguments different from those proffered in the original application***." (People v Cordes, 270 AD2d 430; see, Pryor v Commonwealth Land Title Ins. Co., 17 AD3d 434; Gellert & Rodner v Gem Community Management, Inc., 20 AD3d 388; McGill v Goldman, 261 AD2d 593; William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22.) The plaintiffs herein did not

raise any arguments in the prior motion about, for example, the possibility that the defendants may award the franchise to another party or about the alleged problems of building another hotel under another franchise name.

That branch of the plaintiffs' motion which is for an order "modifying the Order, so as to grant the prior Motion, to the limited extent" of, inter alia, prohibiting the defendants from dealing with another potential franchisee is denied. The plaintiffs essentially seek to reargue their prior motion, and reargument is not warranted.

That branch of the plaintiffs' motion which is for a preliminary injunction prohibiting the defendants from (1) "taking any action to inhibit or prevent Plaintiffs from obtaining specific performance of the License, including, without limitation, interfering with Plaintiffs' right to construct and operate the Homewood Suites hotel***" and (2) "franchising, licensing or granting a franchise or license for a Homewood Suites brand hotel to another franchisee or third party within a five (5) mile radius of the Property" is denied. The plaintiffs did not show that there are changed circumstances which would warrant a second application for a preliminary injunction. In any event, a party who seeks a preliminary injunction must show a likelihood of success on the merits, irreparable injury if provisional relief is withheld, and a weight of the equities in his favor. (See, Aetna Ins. Co. v

Capasso, 75 NY2d 860.) The plaintiffs herein failed to make this showing. The first branch of relief sought by the plaintiffs appears to be no more than an attempt to prevent the defendants from terminating the franchise agreement expressed in different language, and a preliminary injunction toward that end has already been denied for failure to show irreparable injury. The second branch of relief sought by the plaintiffs rests on their surmises about the near term intentions of the defendants, and conjecture and speculation do not justify the issuance of a preliminary injunction. (See, U.S. Re Companies, Inc. v Scheerer, 41 AD3d 152; Faberge Intern. Inc. v Di Pino, 109 AD2d 235.) "[T]he irreparable harm must be shown by the moving party to be imminent, not remote or speculative." (Golden v Steam Heat, Inc. 216 AD2d 440, 442; see, Winkler v Kingston Housing Authority, 238 AD2d 711.)

Short form order signed herewith.

J.S.C.