Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

METROPLAZA TWO ASSOCIATES, LLC, etc., et al.,	Index Number 2156 2007
Plaintiffs,	Motion Date July 25, 2007
- against -	
HILTON INNS, INC., etc., et al.,	Motion Cal. Number 47
Defendants.	Motion Seq. No. 7

The following papers numbered 1 to 10 read on this motion by defendant Hilton Inns, Inc. and defendant Promus Hotels, Inc. for, inter alia, an order pursuant to CPLR 3211(a)(7) partially dismissing the fourth, fifth, and seventh causes of action in the second amended complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-2
Answering Affidavits - Exhibits.....	3
Reply Affidavits.....	4-5
Other (Memoranda of Law).....	6-10

Upon the foregoing papers it is ordered that the motion is disposed of as follows:

On or about July 19, 2004, plaintiff Metroplaza Two Associates and defendant Hilton Inns, Inc., a subsidiary of Hilton Hotels Corporation, entered into a ten-year license agreement pursuant to which the defendant permitted the plaintiff to operate a hotel located at 120 Wood Avenue South, Iselin, New Jersey as the "Woodbridge Hilton." The plaintiff agreed to renovate the hotel by no later than March 31, 2005 as specified in a spreadsheet known as a "Product Improvement Planner." The plaintiff also agreed to maintain and operate the hotel as required by the licensor's Design and Construction Standards and Brand Standards. Defendant Hilton Inns, Inc. alleges that plaintiff Metroplaza Two did not complete many of the fifty items of renovation work specified in the Product

Improvement Planner and did not operate the hotel in a way that met the licensor's standards, thereby causing the licensee to fail quality assurance audits in 2005 and 2006. On September 22, 2006, defendant Hilton Inns, Inc. issued a notice of default requiring the plaintiff to complete six items of renovation work by certain deadlines. According to the defendant, the plaintiff failed to submit evidence that it had completed five of the six items, and the licensor sent a notice of termination on January 10, 2007 ending the relationship effective March 15, 2007.

Pursuant to a franchise license agreement dated December 17, 2003, defendant Promus Hotels, Inc. (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 with or without reasonable excuse. Defendant Promus sent a notice of default and termination to plaintiff Metroplaza III dated April 3, 2007 stating that the license agreement would terminate ten days after receipt of the notice.

On or about January 24, 2007, the plaintiffs began this action which essentially seeks to prevent the termination of the licensing agreements.

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) partially dismissing the fourth, fifth, and seventh causes of action asserted in the second amended complaint is granted to the extent that those parts of the fourth, fifth, and seventh causes of action which are asserted by plaintiff Metroplaza Two Associates and which are asserted against defendant Hilton Inns, Inc. are dismissed. The fourth, fifth, and seventh causes of action concern the license issued by defendant Promus and seek declaratory, monetary, and equitable remedies respectively. "While it is axiomatic that on a motion addressed to the sufficiency of a complaint the facts pleaded are presumed to be true and accorded every favorable inference *** allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." (Gertler v Goodgold, 107 AD2d 481, 485, affd 66 NY2d 946; see, Maas v Cornell University, 94 NY2d 87; Giustino v County of Nassau, 306 AD2d 376; Mayer v Sanders, 264 AD2dd 827.) In the case at bar, the franchise license agreement for the Homewood Suites Hotel shows

on its face that the licensor is Promus Hotels, Inc., expressly stated therein to be "a subsidiary of Hilton Hotels Corporation," and that the licensee is Metroplaza III New Jersey Associates, LLC. Neither Metroplaza Two Associates, LLC nor Hilton Inns, Inc. are parties to the Homewood Suites license agreement. The allegation by Metroplaza Two Associates that it is a third party beneficiary of the Homewood Suites license agreement cannot save its claims against defendant Promus from dismissal, because section 16[c] expressly provides that "[t]his agreement is exclusively for our [Promus'] and your [Metroplaza III's] benefit, and none of the obligations of either of us *** will run to, or be enforceable by, any other party *** or give rise to liability to a third party ***." Such a provision is dispositive of Metroplaza Two Associates' third party beneficiary claims. (See, A.H.A. General Const., Inc. v Edelman Partnership, 291 AD2d 239; Board of Managers of Alexandria Condominium v Broadway/72nd Associates, 285 AD2d 422.) Insofar as defendant Hilton Inns, Inc. is concerned, it was not a party to the Homewood Suites license agreement and cannot be held liable for its breach. (See, Dember Const. Corp. v Staten Island Mall, 56 AD2d 768.) The plaintiffs' reliance on A. W. Fiur Co., Inc. v Ataka & Co., Ltd. (71 AD2d 370) and Horsehead Industries, Inc. v Metallgesellschaft AG (239 AD2d 171) is misplaced because those cases involved, inter alia, a parent corporation's alleged domination of a subsidiary which signed the contract.

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the sixth cause of action is granted to the extent that claims made by plaintiff Metroplaza Two Associates and claims made against defendant Promus Hotels, Inc. therein are dismissed. The sixth cause of action alleges tortious interference by both defendants with the Homewood Suites license agreement. The elements of a cause of action for tortious interference with contract include "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom ***." (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424.) Insofar as plaintiff Metroplaza Two Associates is concerned, it cannot allege that it is a party to the Homewood Suites license agreement. Insofar as defendant Promus Hotels, Inc is concerned, a party may breach, but cannot tortiously interfere with, its own contract. (See, Waterfront NY Realty Corp. v Weber, 281 AD2d 180; A.J. Temple Marble & Tile, Inc. v Long Island R.R., 256 AD2d 526.) However, insofar as defendant Hilton Inns, Inc. is concerned, the allegations in the complaint supplemented by the plaintiffs' other submissions (see, Rovello v Orofino Realty Co., Inc., 40 NY2d 633;

Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159) set forth sufficient facts in support of the cause of action for tortious interference with contract. Plaintiff Metroplaza III adequately alleged in substance that defendant Hilton Inns induced defendant Promus to breach the Homewood Suites license agreement for the purpose of obtaining "leverage" on the claims involving the Woodbridge Hilton.

That branch of the motion which is for an order pursuant to CPLR 3211(a)(7) dismissing the eighth, ninth, tenth, eleventh, twelfth, and thirteenth causes of action is granted to the extent that the eleventh, twelfth, and thirteenth causes of action are dismissed. The plaintiffs based these causes of action on the New Jersey Franchise Practices Act (N.J. Stat. Ann. 56:10-1 et seq.). In regard to the eighth, ninth, and tenth causes of action, which are asserted by plaintiff Metroplaza Two Associates, paragraph 16(b) of its licensing agreement provides in relevant part: "[with an exception not relevant here] *** any and all disputes between us, whether sounding in contract, tort, or otherwise, are to be exclusively construed in accordance with and/or governed by (as applicable) the laws of the State of New York ***. *** Nothing in this section is intended to invoke the application of any franchise *** law of the State of New York or any other state which would not otherwise apply absent this subparagraph 16.b." The New York Franchise Sales Act (N.Y. Gen. Bus. Law § 680 et seq.) by its terms does not apply to the foreign transactions involved here, and the last sentence in the choice of law clause plainly precludes the application of the New York Franchise Sales Act to the case at bar. (See, Century Pacific, Inc. v Hilton Hotels Corp., 2004 WL 868211, [SDNY] [n.o.r.] ["The provision in plaintiffs' contract, however, unambiguously bars extension of the Act to their franchises. ***[T]he unambiguous carve out of New York franchise law from the parties' choice of law provision must be honored by dismissing plaintiffs' claims under the Act".] An issue arises concerning the parties' intent in creating this "carve out," i.,e. whether the parties intended to make the New Jersey Franchise Practices Act applicable to their transaction or whether the parties intended to make their transaction subject to the franchise acts of neither New York nor New Jersey. Because of the ambiguity, the parties are entitled to submit extrinsic evidence concerning their intent (see, Greenfield v Philles Records, 98 NY2d 562; Tierney v Drago, 38 AD3d 755), and the court will not decide the issue of intent on this CPLR 3211(a)(7) motion without affording the parties an opportunity to submit such extrinsic evidence, if any. (See, Hambrecht & Quist Guar. Finance, LLC v El Coronado Holdings, LLC, 27 AD3d 204.) In regard to the eleventh, twelfth, and thirteenth causes of action, which are asserted by plaintiff Metroplaza III, as this court has already held in its decision rendered on the plaintiff's motion for

a preliminary injunction, the Homewood Suites dispute does not fall within the scope of the New Jersey Franchise Practices Act. (See, Dunkin' Donuts of America, Inc. v Middletown Donut Corp. 100 NJ 166; Business Incentives Co., Inc. v Sony Corp. of America, 397 F Supp 63.)

That branch of the motion which is for an order pursuant to CPLR 603 severing the causes of action relating to the Homewood Suites Hotel from the other causes of action asserted in the second amended complaint is denied. Severance would not serve either the interests of judicial economy or the convenience of the parties. (See, Lelekakis v Kamamis, 41 AD3d 662.)

Dated: September 25, 2007

J.S.C.