

Marriott Intl., Inc. v Western Talent Corp.

2008 NY Slip Op 33104(U)

November 5, 2008

Supreme Court, New York County

Docket Number: 602567/07

Judge: Richard B. Lowe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE
Justice

PART 56

Index Number : 602567/2007

MARRIOTT INT'L, INC.

vs.

WEST TALENT CORP.

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 4/4/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

FILED

NOV 14 2008

COUNTY CLERK'S OFFICE
NEW YORK

HON. RICHARD B. LOWE
[Signature]

Dated: 11/5/08

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

-----x
MARRIOTT INTERNATIONAL, INC., a Delaware
corporation, doing business as NEW YORK
MARRIOTT MARQUIS HOTEL,

Plaintiff,

Index No.
602567/07

-against-

WESTERN TALENT CORP., a California
corporation, and JOSEPH FLORES-BEAUCHAMP,
a California resident, both doing business
as iPOP,

Defendants.

FILED
NOV 14 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----x
Hon. Richard B. Lowe, III

In motion sequence 001, plaintiff Marriott International, Inc., a Delaware corporation d/b/a New York Marriott Marquis Hotel (Marriott) moves, pursuant to CPLR 3212, for an order granting it summary judgment on its claim against defendants, and dismissing defendants' counterclaims against it, on the ground that there are no triable issues of fact.

Marriott operates the New York Marriott Marquis Hotel in New York City (the Hotel). A significant portion of Marriott's business is hosting large groups, meetings and events. Marriott alleges that both defendant Western Talent Corp. (Western) and defendant Joseph Flores-Beauchamp (Beauchamp) have done business as "iPOP," the "International Presentation of Performers (IPOP)," and/or "iPOP Corporation."

On December 6, 2005, Beauchamp signed a contract with Marriott, dated November 30, 2005 (the Agreement). The Agreement identifies Beauchamp as president of Western, and sets forth an agreement for "iPOP" to hold three separate events at the

Hotel: June 28-July 6, 2007 (the 2007 Event); June 30-July 8, 2008 (the 2008 Event); and July 29-July 7, 2009 (the 2009 Event).

The first sentence of the Agreement, at the top of page 1, states: "The following represents an agreement between: New York Marriott Marquis, 1535 Broadway, New York, NY 10036 and iPOP, and outlines specific conditions to be provided." Western is named as the "Organization" and Beauchamp is named as the "Contact" and Western's President.

Marriott states that, pursuant to the Agreement, defendants and their attendees were obligated to use 3,160 room nights per event, for a total of 9,480 room nights, to use a significant amount of the Hotel's meeting space and services, and to consume a significant amount of banquet food and beverages. The group room rate set forth in the Agreement is \$259 per night, with a six percent annual increase.

Pursuant to the Agreement, if iPOP cancels its events, Marriott is entitled to liquidated damages to be calculated using a sliding scale, under which the damages would be either 25%, 50%, 75% or 100% of total room revenue, depending on how many days in advance of the date of arrival the cancellation occurred.

In the summer of 2006, defendants held an iPOP event at the Hotel (the 2006 Event), during which defendants were dissatisfied with the services they received from Marriott. As a result, in an August 30, 2006 letter, Western informed Marriott that it was "rescind[ing]" the Agreement and was "cancelling the 2007 New York convention in its entirety."

Marriott contends that defendants thereby breached the Agreement, such that they owe Marriott liquidated damages in the amount of \$1,278,220. Marriott states that, at the

time of the cancellation, it stood ready, willing and able to perform the Agreement and to host the 2007, 2008 and 2009 Events. Marriott asserts that it sustained significant damages as a result of defendants' failure to hold an event at the Hotel in July 2007.

Defendants answered the complaint, denying liability and asserting four counterclaims seeking unspecified damages. Marriott states that it twice served requests for admission on the defendants, to which they failed to respond, and that defendants have also failed to respond to Marriott's first set of interrogatories and its notice of discovery and inspection.

Marriott maintains that there is no legally supportable excuse for defendants' cancellation of the Agreement. It states that the Agreement is separate from the contract for the 2006 Event, and that defendants' alleged dissatisfaction with the 2006 Event does not provide any legal support to excuse their cancellation of the Agreement. Although Marriott denies that it provided deficient services at the 2006 Event, it contends that, for purposes of its summary judgment motion, what occurred at the 2006 event is irrelevant.

Marriott points out that defendants allege consequential damages in each of their four counterclaims, in an amount "to be determined at trial, but believed not to be less than One Hundred Thousand Dollars (\$100,000)." Marriott maintains, however, that defendants have no evidence to support damages suffered in any amount as a result of Marriott's actions. In its discovery requests, Marriott asked defendants to produce documents relating to the consequential damages that they allegedly suffered. Marriott states, however, that defendants did not provide any documents in response to this request. Thus, Marriott argues that defendants' first counterclaim, sounding in breach of contract, and their second counterclaim, alleging breach of the duty of good faith and fair

dealing, must be dismissed.

Marriott contends that defendants' remaining counterclaims are legally unenforceable. The third counterclaim is listed as "for frustration of purpose." Marriott states, however, that "for frustration of purpose" is not a cause of action, but instead is an affirmative defense to non-performance of a contract. Thus, according to Marriott, it must be dismissed as a matter of law.

Marriott states that the fourth counterclaim is listed as "Defendants are entitled to Attorneys Fees." Marriott asserts that, while the Agreement contains an attorney fee recovery for the prevailing party in connection with litigation related to the Agreement, none of defendants' counterclaims arise from the Agreement, and that, therefore, the counterclaim for attorneys' fees must be dismissed.

Marriott maintains that the liquidated damages owed by defendants can be easily calculated, such that the court should enter summary judgment in its favor. Marriott argues that it has presented admissible evidence that the parties entered into the Agreement, that it was ready to perform the Agreement, that defendants cancelled and breached the Agreement, and that, as a result, liquidated damages are due.

According to Marriott, defendants do not offer any valid affirmative defense for the breach. Marriott contends that defendants' counterclaims are legally non-existent and/or cannot be sustained without a showing of damages.

Defendants argue that Marriott's summary judgment motion should be denied, because there are triable issues of fact relating to Marriott's breach of contract claim. Defendants state that, in addition, Beauchamp's motion to dismiss provides support to find that he executed the Agreement on behalf of Western, and not on his own behalf,

thus raising sufficient triable issues of fact to defeat the summary judgment motion as against him.

Defendants maintain that one of the facts in dispute is the number of room nights required under the Agreement. The first page of the Agreement states that the required number of room nights to be used by iPOP is 1,714 per event, which is also the number indicated in an August 30, 2006 letter from Marriott to defendants. Defendants point out, however, that this number is contradicted within the Agreement itself, on a chart on pages 1 and 2 indicating that defendants must use 3,160 rooms at each of the three events. In its summary judgment motion, Marriott states that the number of required rooms per event is 3,160, and it calculates liquidated damages based on that figure.

According to defendants, the number of room nights under the Agreement is an issue of fact that should be decided by a jury. Defendants argue that, because Marriott drafted the Agreement, any inconsistency or ambiguity should be construed against Marriott and in their favor. They further maintain that the Agreement might be found to be invalid if the quantity term is determined to be missing.

Defendants also assert that the Agreement governs the 2006 Event, such that Marriott breached the Agreement by providing inadequate service at the 2006 Event. Marriott, however, proves otherwise by submitting, in its reply papers, another contract between Marriott and iPOP that clearly governs the 2006 Event (the 2006 Agreement). The 2006 Agreement, which was signed by Beauchamp on November 8, 2005, sets out terms and conditions for Marriott to host an iPOP event from June 30, 2006 through July 7, 2006. Thus, Marriott's services at the 2006 Event were not part of the Agreement. Marriott argues, therefore, that, as a matter of law, its provision of allegedly

unsatisfactory service at the 2006 Event cannot constitute a breach of the Agreement.

As to the number of room nights set forth in the Agreement, Marriott contends that defendants' contractual room night obligation is irrelevant to the question of liability. Marriott asserts that there is no inconsistency in the Agreement, which sets forth 3,160 as the minimum number of room nights that iPOP is responsible for using at each event. Marriott contends that it is clear from the Agreement that the parties intended to secure a block of rooms at the Hotel for defendants' use at the 2007, 2008 and 2009 Events. It is equally clear, according to Marriott, that defendants canceled the Agreement and did not use any rooms over the contracted period.

Marriott states that the only issue to which the number of rooms has relevance is the amount of liquidated damages, which is calculated as a percentage of total room revenue, defined as "the dollar amount equal to the number of Total Room Nights multiplied by iPOP average room rate." Marriott explains that pages 1 and 2 of the Agreement list total rooms in a chart, which add up to 3,160, and that that number should be used in the liquidated damages calculation, and not 1,714, which is the number indicated on the Agreement.

Marriott asserts that defendants' opposition to the summary judgment motion does not offer any arguments in support of their four counterclaims against Marriott, nor any admissible evidence to support a claim of damages under any of its counterclaims, such that they should be dismissed as a matter of law.

The court finds that plaintiff is entitled to summary judgment as to liability as against Western. The party seeking summary judgment in its favor must "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient

evidence to eliminate any material issues of fact from the case.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The elements of a cause of action sounding in breach of contract are: (1) the existence of a contract between the parties; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages resulting from defendant’s failure to perform. (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]).

In the instant case, Marriott seeks to enforce the liquidated damages provision of the Agreement, given defendants’ cancellation of the Agreement. The purpose of liquidated damages is to compensate a plaintiff for allowing a defendant to terminate its obligations under a contract. (*Schonzeit v Wiesen*, 154 AD2d 291 [1st Dept 1989]).

Defendants acknowledge that Western is a party to the Agreement. Western is also the entity that sent the August 30, 2006 letter to Marriott rescinding the Agreement and canceling the 2007 Event. Although Western was dissatisfied with Marriott’s performance at the 2006 Event, that event was unrelated to the Agreement and thus does not excuse Western’s cancellation of the Agreement.

Western informed Marriott that it did not intend to perform its obligations under the Agreement. Marriott has indicated that it remained ready, willing and able to perform its obligations under the Agreement. Thus, there is no issue of fact as to Western’s liability for breach of contract. (*See Ryan v Corbett*, 30 AD3d 1062 [4th Dept 2006]).

Given the inconsistency in the figures set forth in the Agreement as to room nights, however, the amount of damages cannot be determined at this stage in the action. Thus, summary judgment as to the question of damages is denied.

As to Marriott's motion for summary judgment as against Beauchamp, Marriott has not shown that he signed the Agreement in his individual capacity, doing business as iPOP. Thus, Marriott is not entitled to summary judgment as against him.

As to defendants' counterclaims, although they do not indicate which contract was allegedly breached, the allegations in their submissions are sufficient to set forth a claim that Marriott breached the 2006 Agreement and also breached its duty of good faith and fair dealing in carrying out the 2006 Agreement. Thus, the first and second counterclaims survive defendants' motion to dismiss them.

Frustration of purpose is not a viable cause of action. Therefore, the third counterclaim is dismissed. The fourth counterclaim seeks attorneys fees. The Agreement contains a provision entitled "Litigation Expenses" that states: "[t]he parties agree that, in the event litigation relating to this Agreement is filed by either party, the non-prevailing party in such litigation will pay the prevailing party's costs resulting from the litigation, including reasonable attorneys' fees." The outcome of the instant litigation, in terms of both the claims and the counterclaims, has not yet been determined. Thus, the fourth counterclaim states a cause of action and survives defendants' motion to dismiss it. Therefore, defendants' third counterclaim is dismissed, but the other three counterclaims continue.

In motion sequence 002, Beauchamp moves, pursuant to CPLR 3211, for an order dismissing the complaint as against him on the grounds that it fails to state a cause of action and based on documentary evidence. He argues that he acted in his capacity as an officer of Western, and, therefore, he cannot be held personally liable for breach of the Agreement.

Beauchamp contends that a review of the Agreement clearly shows that Western, doing business as iPOP, was the party to the Agreement, and that he executed it on behalf of Western as its corporate director, rather than in his individual capacity. He further asserts that the complaint does not contain any allegations specifically directed against him to justify naming him as a defendant. Thus, Beauchamp argues that the complaint should be dismissed in its entirety as against him.

Marriott argues that the Agreement does not support a motion to dismiss Beauchamp as a defendant. It contends that the Agreement does not state conclusively that it was entered into by Western or that Western was doing business as iPOP.

The motion to dismiss, motion sequence 002, is granted. Parts of the Agreement may have been inartfully drafted by Marriott, as the Agreement states that it is between iPOP and Marriott, without specifically indicating which person or entity was doing business as iPOP. Throughout the Agreement, references are made to iPOP and not to Western or Beauchamp.

The complaint does not set forth any factual allegation to support a conclusion that Beauchamp entered into the Agreement in his individual capacity. Western is named as the "Organization" for the 2007, 2008 and 2009 Events, and Beauchamp is identified as its President. On the ninth and final page of the Agreement, Beauchamp's signature is below the words "Approved and authorized by iPOP" and his title is indicated to be "Director." Thus, Beauchamp is never named as a party to the Agreement in his individual capacity. Furthermore, the entity that sent the letter rescinding the Agreement and canceling the 2007 Event in its entirety was Western, not Beauchamp. Thus, there is no indication that Beauchamp entered into the contract in his individual capacity, and his

