

**Lois Lane Travel, Inc. v Majestic Hotel Corp.**

2009 NY Slip Op 30791(U)

April 3, 2009

Supreme Court, New York County

Docket Number: 600680/08

Judge: Doris Ling-Cohan

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

PRESENT: **JUSTICE DORIS LING-COHAN**  
*Justice*

PART 36

Lois Lane Travel, Inc.,

INDEX NO. 600680/08

MOTION DATE \_\_\_\_\_

- v -

Majestic Hotel Corp.  
dlbla Park South Hotel

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 7 were read on this motion <sup>or cross-motion</sup> to/for summary judgment

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

PAPERS NUMBERED

1, 2

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

5, 6

*interim order dated 12/16/08*

7  
3, 4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion <sup>or cross-motion</sup> for summary judgment are decided in accordance with the attached memorandum decision.

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

**FILED**

APR 08 2009

CLERK OF THE COURT  
STATE OF NEW YORK

Dated: 4/3/09 \_\_\_\_\_  
**JUSTICE DORIS LING-COHAN** *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

-----X  
LOIS LANE TRAVEL, INC.,

Plaintiff,

-against-

Index No.

MAJESTIC HOTEL CORP. d/b/a PARK SOUTH  
HOTEL,

600680/08

Motion Seq. No.: 001

Defendant.

-----X  
DORIS LING-COHAN, J. :

**FILED**  
APR 09 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action, defendant has moved for summary judgment dismissing the complaint and plaintiff has cross-moved for partial summary judgment.

Plaintiff is a travel agency based in New York. Defendant is a corporation operating a hotel located at 122 East 28<sup>th</sup> Street in New York City. From 2002 to 2007, plaintiff recommended defendant's hotel to its clients who required hotel accommodations in that neighborhood, and otherwise promoted the hotel to its clients in exchange for reduced rates. Plaintiff made bookings for its clients and received commissions from defendant. As of January 1, 2008, defendant no longer desired to offer room bookings to plaintiff at a reduced rate and no longer permitted plaintiff to use defendant's reservation system to make bookings. Other than with respect to certain room bookings made in 2007, which defendant had accepted for various periods in 2008, defendant decided not to extend the reduced rates from its listed rate to plaintiff beyond 2007.

Plaintiff commenced this action on or about March 24, 2008. Four causes of action are alleged in the complaint: (1) specific performance requiring defendant to honor its contract with plaintiff; (2) deprivation of the benefits of the contract including loss of revenue due to

defendant's breach ; (3) failure to pay for commissions due in accordance with the parties' contract; and (4) tortious interference with plaintiff's business relationships in which plaintiff seeks damages, including punitive damages.

Defendant has moved for summary judgment dismissing the complaint, arguing that no agreement was ever executed by the parties. Annually, until the end of 2007, defendant issued a rate sheet which set forth the discounted rates that defendant would extend to plaintiff's clients. Defendant contends that the rate sheet contained a caveat that the rate was subject to plaintiff's annual room production. Defendant denies that the rate sheet constituted a binding agreement.

Defendant asserts that the reason the hotel did not extend a discount to plaintiff for 2008 was because in 2007, plaintiff did not generate sufficient room night reservations to justify a discount and plaintiff cancelled or modified various reservations at the last minute which prevented the hotel from re-booking the room, causing a loss in revenue. Defendant also asserts that for six years, plaintiff would invoice defendant for its commissions on room bookings and defendant would pay the invoices promptly on receipt. Defendant avers that there are no outstanding invoices based upon a review of the hotel's accounting and room reservation records.

Defendant's legal arguments for dismissal are as follows: (1) since plaintiff fails to identify an existing contractual term that defendant failed to perform, plaintiff is not entitled to relief; (2) plaintiff has no damages which are recoverable as a matter of law; (3) since extraordinary damages, such as punitive damages, were not within the contemplation of the parties as the probable result of a breach at the time or prior to contracting, recovery is barred; and (4) in the event that an oral agreement may exist, the statute of frauds would bar the enforcement of said agreement after one year.

Plaintiff opposes defendant's motion and cross-moves for partial summary judgment on the issue of liability with respect to the first and second causes of action and the dismissal of the affirmative defenses in the answer. Plaintiff states that as of 2002, there was an agreement between the parties to which plaintiff agreed to recommend defendant's hotel to its clients in consideration for reduced rates for those clients booked into the hotel and payment of commissions by defendant to plaintiff based upon the industry's standard terms on those bookings. Plaintiff claims that the agreement had an initial term of one year, which was renewed annually at plaintiff's option.

Plaintiff states that it renewed the agreement, via a contract renewal letter, every year, including 2008. Plaintiff argues that the contract renewal letter is the same document as the rate sheet, and constitutes a contract on its own. Additionally, plaintiff asserts that in the course of negotiating a renewal of the agreement, defendant referred to a "2008 contract." Plaintiff further argues that if the court finds that the agreement was an oral one, plaintiff claims that it was not subject to the statute of frauds because it could have been performed within one year.

Plaintiff seeks summary judgment on its first cause of action based upon breach of contract, when defendant refused to allow plaintiff to make bookings for reservations and cancelled or refused to accept reservations from plaintiff at any rate. Plaintiff seeks specific performance with respect to the reservations. Plaintiff also seeks summary judgment on its second cause of action based upon breach of contract for the alleged loss of revenue due to the cancellation and refusal of reservations by defendant and the non-payment of extended stay commissions.

Plaintiff further seeks summary judgment dismissing the affirmative defenses in the

answer. Under the first affirmative defense, defendant alleges that it was not properly served with plaintiff's summons and complaint. Plaintiff seeks dismissal of this defense on the ground that defendant did not move to dismiss the complaint within 60 days after service of the answer. Under the second and ninth affirmative defenses, defendant alleges that the complaint fails to set forth facts sufficient to constitute a cause of action upon which relief can be granted. Plaintiff seeks dismissal of these defenses on the ground that it has set forth claims sounding in breach of contract and tortious interference with contract and/or business relations. Under the third affirmative defense, defendant alleges that the complaint fails to plead fraud with specificity pursuant to CPLR 3016(b). Plaintiff seeks dismissal on the ground that plaintiff has not brought a fraud claim against defendant. Under the fourth affirmative defense, defendant alleges that the parties did not enter into a contract. Plaintiff seeks dismissal on the ground that a contract existed between the parties. Under the fifth and seventh affirmative defenses, defendant alleges that none of its agents were authorized to enter into a contract with plaintiff. Plaintiff seeks dismissal on the ground that defendant's agents had actual and/or apparent authority to bind defendant to a contract with plaintiff. Under the sixth affirmative defense, defendant alleges that the contract falls under the statute of frauds and is invalid. Plaintiff seeks dismissal on the ground that the contract could be performed in one year and that the contract was reduced to, confirmed and memorialized annually, in writing, referring to the alleged contract renewal letters. There is no eighth affirmative defense.

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993), quoting

*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. *See Alvarez v Prospect Hospital*, 68 NY2d 320, *supra*.

The function of the court on a summary judgment motion is issue finding, not issue determination. *Super v Abdelazim*, 108 AD2d 1040, 1042 (3d Dept 1985). Nevertheless, the court must evaluate whether the alleged factual issues presented are genuine or unsubstantive. *Assing v United Rubber Supply Co.*, 126 AD2d 590 (2d Dept 1987).

In this case, there is no dispute that defendant has barred plaintiff from currently making reservations for its clients. Defendant contends that in the absence of contractual obligations, defendant can, at any time, prevent plaintiff from making reservations for any rate. There is no dispute that defendant had previously paid commissions to plaintiff in exchange for plaintiff delivering its clients to defendant's hotel. There is, however, a dispute as to whether defendant has paid all of the commissions owed to plaintiff, in full.

Further, there is an issue of fact as to whether the parties entered into an oral agreement in 2002 that bound them to mutual obligations. It is apparent that no formal written agreement is in existence since neither party has submitted such. Defendant argues that the possibility of an oral agreement would violate the statute of frauds. The purpose of the statute of frauds, rendering unenforceable an oral agreement which by its terms is not to be performed within one year, is to prevent fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury. *See Forster v Kovner*, 44 AD3d 23, 26 (1<sup>st</sup> Dept 2007). Here, the evidence submitted indicates that the agreement, if any, provided terms that would be performed within a year, avoiding any violation of the statute of frauds; thus, defendant's affirmative defense based

upon statute of frauds is dismissed.

Also at issue is the annual letters sent to plaintiff that list the reservation rates for each given year. These could constitute agreements to renew the terms of the original agreement. A copy of one such letter is signed by agents of the parties. If these letters are found to constitute contracts, the signatures would bind the parties to their terms and conditions. The submission of e-mail documents makes a strong but not conclusive showing that these letters were taken to be more than preliminary information.

The existence of these issues of fact precludes the granting of summary judgment as to either to either party. The court grants, however, the portion of defendant's motion which seeks to dismiss plaintiff's claim for punitive damages as the facts alleged do not establish willful, gross or wanton fraud or other morally culpable or reprehensible conduct such as to warrant the imposition of punitive damages (see *Cohen v. Mazoh*, 12 AD3d 296, 297 [1<sup>st</sup> Dept 2004]; see also *New York University v. Continental Insurance Company*, *supra*, 87 NY2d at 315-316 [punitive damages available only in limited circumstances where it is necessary to deter gross, morally reprehensible or wantonly dishonest conduct or egregious conduct directed at the public generally]).

Additionally, the court will grant the portion of plaintiff's motion which seeks to dismiss defendant's first affirmative defense based upon lack of service, as defendant failed to move within 60 days of service of its answer, for dismissal on such basis, in accordance with CPLR §3211(c). The court further dismisses defendant's third affirmative defense of failure to adequately plead fraud, as plaintiff has not asserted a cause of action for fraud in this action.

Accordingly, it is

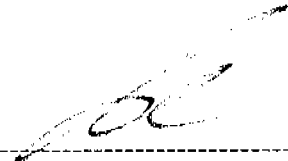
ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment is denied except for the dismissal of the first (improper service), third (fraud) and sixth (statute of frauds) affirmative defenses in the answer; and it is further

ORDERED that the remainder of this action shall continue; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant with notice of entry.

DATED: 4/26/09

  
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Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\lois lane travel.majestic hotel.wpd

**FILED**  
APR 08 2009  
COUNTY CLERK'S OFFICE  
NEW YORK