

Lois Lane Travel, Inc. v Majestic Hotel Corp.

2009 NY Slip Op 32486(U)

October 19, 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: Hon. Doris Ling-Cohan

PART 36

Index Number : 600680/2008

LOIS LANE TRAVEL

VS.

MAJESTIC HOTEL

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 2

3

4

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 *by defendant for summary judgment is denied in accordance with the attached memorandum decision.*

FILED
OCT 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 10/19/09

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 36

-----x
LOIS LANE TRAVEL, INC.,

Plaintiff,

Index No.

-against-

600680/08

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

Motion Seq. No.
004

FILED
OCT 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

DORIS LING-COHAN, J. :

Defendant moves for summary judgment dismissing the complaint.

Plaintiff is a travel agency based in New York. Defendant is a corporation operating a hotel located at 122 East 28th Street in New York City. From 2002 to 2007, plaintiff recommended defendant's hotel to its clients who required hotel accommodations in that region, and also promoted the hotel to its clients in exchange for reduced rates. Plaintiff made bookings for its clients and received commissions from defendant. As of November 21, 2007, defendant no longer permitted plaintiff to use defendant's reservation system to make bookings. Other than with certain room bookings made in 2007, which defendant had accepted for 2008, defendant decided not to extend 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 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 for which plaintiff seeks damages, including punitive damages.

Defendant previously moved for summary judgment based on the following arguments:

(1) since plaintiff fails to identify an existing contractual term that defendant failed to perform, plaintiff is not entitled to relief for breach of contract; (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 that 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.

This court denied defendant's previous motion for summary judgment, citing an issue of fact as to whether defendant paid all of the commissions owed to plaintiff in full. The court also found an issue of fact as to whether the parties entered into an oral agreement in 2002 that bound them to mutual obligations, and whether written proof existed to constitute agreements to renew the terms of the original agreement. The court dismissed plaintiff's claim for punitive damages.

Defendant moves for summary judgment again, based upon documentary evidence. Defendant seeks dismissal of the complaint on the ground that all debts were paid to plaintiff, and that plaintiff has no claim for damages. Submitted with the new motion are copies of plaintiff's invoices to defendant and an affidavit from Marcello Munoz, general manager of defendant hotel. In the affidavit, Munoz states that he reviewed each invoice from plaintiff. With respect to each invoice, he noted whether defendant had previously accepted the invoice for payment. If defendant previously accepted the invoice for payment, defendant's check number and amount and date of payment were provided; otherwise, he specified on the invoice the reason the invoice was rejected or not counted in favor of plaintiff. Defendant rejected or did not count an invoice to plaintiff's credit if the invoice duplicated a prior submitted invoice which defendant

had paid or the invoice provided for unearned commissions with respect to one or more room nights for which plaintiff's customer vacated earlier than scheduled. Based on the records, defendant asserts that it has paid all of the invoices.

Plaintiff opposes the motion, claiming that it is a motion to reargue that is time-barred. Plaintiff claims that defendant is raising old issues that existed in the first motion for summary judgment.

Plaintiff states that defendant has admitted, through its general manager, that plaintiff did not always send invoices for bookings that it made to defendant hotel. For a period during the parties' dealings with each other, defendant would allegedly generate statements and pay plaintiff the commissions reflected on its own statements without receiving any invoice from plaintiff. Plaintiff asserts that in reviewing its records, it has found discrepancies indicating that the issue of unpaid commissions on reservations made by plaintiff remains open and unresolved.

Plaintiff also states that it has not received commissions for extended stays by its clients, even though it was entitled to and had demanded payment. Plaintiff argues that much of its damages have arisen from defendant's refusal to allow plaintiff to make reservations at the hotel for the last part of 2007 and all of 2008 in breach of their contract. Thus, defendant allegedly precluded plaintiff from earning commissions that it otherwise would have earned. Plaintiff also argues that it suffered damages as a result of defendant's direct solicitation and booking of plaintiff's clientele using information that plaintiff had provided before defendant unilaterally refused to honor its agreements.

Plaintiff contends that this motion is premature because defendant has not yet submitted to a deposition and plaintiff has not obtained all the documents it has required defendant to

produce.

“Multiple summary judgment motions should be discouraged in the absence of newly discovered evidence or sufficient cause”. *National Enterprises Corp. v. Dechert Price & Rhoads*, 246 AD2d 481 (1st Dept 1998)(citation omitted). In its papers, defendant states that it did not obtain the invoices until after it made its first motion. Apparently, the invoices were not available at the time of the first motion; however, such invoices can hardly be considered “newly discovered evidence”.

Moreover, in its complaint, plaintiff alleges damages that are not limited solely to invoices that it submitted to defendant. Plaintiff is also seeking damages based upon what it considers unwarranted cancellations by defendant. Plaintiff alleges that the unilateral cancellations of reservations resulted in damages. These allegations surround the breach of contract claims in the complaint. The issue of what debts, if any, are owed to plaintiff precludes the granting of summary judgment at this time.

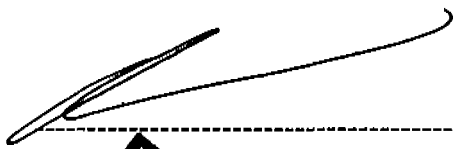
Accordingly, it is

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

ORDERED that both sides shall expeditiously complete discovery.

DATED: October 19, 2009



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

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