

Family Suites Resort, LLC v Viacom Intl., Inc.

2011 NY Slip Op 33830(U)

July 7, 2011

Sup Ct, New York County

Docket Number: 650489/10

Judge: Barbara R. Kapnick

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

BARBARA R. KAPNICK

PRESENT:

PART 39

Index Number : 650489/2010
 FAMILY SUITES RESORT, LLC
 vs
 VIACOM INTERNATIONAL, INC.
 Sequence Number : 002
 DISMISS ACTION

INDEX NO.

650489/10

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

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

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

Dated:

7/7/11

[Signature]

BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

-----X

FAMILY SUITES RESORT, LLC and
FAMILY SUITES REAL ESTATE, LLC,

Plaintiffs,

-against-

VIACOM INTERNATIONAL, INC., d/b/a
MTV NETWORKS,

Defendant.

-----X

BARBARA A. KAPNICK, J.S.C.:

DECISION/ORDER
Index No. 650489/10
Motion Seq. No. 002

Defendant Viacom International, Inc. d/b/a MTV Networks ("MTVN") moves, pursuant to CPLR 3211 (a) (1) and (7), for an order dismissing plaintiffs' Complaint which alleges causes of action for breach of contract and fraud, and a claim for attorney's fees, costs and legal expenses.

Plaintiffs Family Suites Resort, LLC and Family Suites Real Estate, LLC (collectively "FSR") own and operate the Nickelodeon Family Suites Resort (the "Hotel") in Orlando, Florida. On September 3, 2003, plaintiffs' predecessor in interest, H.I. Family Suites, Inc. ("HIFS") entered into a Hotel License Agreement (the "Agreement") with MTVN, pursuant to which MTVN conveyed an exclusive license, with respect to a Territory defined as "the entire area included within a 150-mile radius of the Hotel property" to:

(i) develop and operate the Hotel as a Licensed Property-themed hotel which shall be called "Nickelodeon Family Suites Resort by Holiday Inn"...; (ii) use and display the Licensed Property in connection with the Marketing of the Hotel ...; and (iii) use and exploit the Licensed Property in connection with various Hotel services and the sale of certain articles of merchandise. ...

(License Agreement ¶ 1.1). The Licensed Property consists of MTVN's:

service marks and copyrights relative to its NICKELODEON brand and its NICK AT NITE brand,... as used in connection with its television programming services and the advertising and promotion thereof, and ... various television and motion picture properties, together with the characters, characterizations, designs and visual representations which appear therein.

(License Agreement ¶ A).

In May 2005, the newly renovated and renamed 777-suite "Nickelodeon Family Suites Resort" opened for business. According to the Complaint, included among its unique services, the Hotel offers character breakfasts, poolside entertainment with games, music and trivia, "Dive-in movies", and Nickelodeon-themed guest services and merchandise. At the time it opened, the Nickelodeon Hotel was the only Nickelodeon-themed hotel in the world.

A few months before the parties entered into the 2007 Amendment to the Agreement, MTVN, Marriot International, Inc. ("Marriott") and Miller Global Properties, LLC ("MGP"), an affiliate of plaintiffs, entered into a Tri-Party Master Agreement (the "Tri-Party Agreement") in connection with plans to develop hotels using the Nickelodeon brand. The Tri-Party Agreement was terminated in May 2009.

MTVN then undertook two advertising and promotional projects whereby it licensed certain Nickelodeon property to Marriott for use at participating Marriott hotels, all of which are outside the 150-mile Territory.

MTVN launched the first of these two projects on May 15, 2009, which was labeled the "Nickelodeon Getaway" program and was at select Marriott hotels, including two in Florida. Marriott then expanded the program to a third Florida location, also outside the 150-mile territory.

The second project, labeled "Nick Your Stay" promotion, was launched at other Marriott hotels. Like the first program, this project is also limited to hotels outside the Territory.

On May 25, 2010, Marriott and MTVN announced that Marriott was offering "Nickelodeon-themed vacations at 2,000 hotels." The Complaint alleges that MTVN's agreements with Marriott violate their Agreement, and that, at the time that MTVN entered into the Agreement, it knew that it would not comply with it.

With regard to the breach of contract claim, there are two issues to be decided: (1) whether the Nickelodeon-related programs that are being operated in the Marriott hotels located within Florida violate the exclusive rights that the Agreement grants to

plaintiffs, and (2) whether the Nickelodeon-related activities being operated in Marriott hotels, either within or without Florida, violate other provisions of the Agreement.

The Complaint alleges that the three resorts in Florida, the programs of which are at issue here, are located, respectively, in Miami, Naples, and Fort Lauderdale. The Court takes judicial notice that these locations are all more than 150 miles from Orlando. Accordingly, MTVN's agreements with Marriott do not violate the provision of the Agreement that grants plaintiffs certain exclusive rights to the use of the Licensed Property in the area within a 150-mile radius of Orlando.

With regard to the second issue, the parties' disagreement ultimately rests upon the interpretation of section 1.4 of the Agreement which provides in relevant part as follows:

Reservation of Rights

All rights in and to the Licensed Property not expressly granted herein to Licensee are hereby expressly reserved to MTVN, without restriction, including but not limited to MTVN's rights to ... enter into Licensed Property themed promotional, advertising and/or sponsorship agreements with other hotel chains and operators Licensee and MTVN further specifically agree that such Reserved Rights as they relate to the development and/or operation of any other hotel are reserved solely to MTVN to be utilized in connection with *other projects owned and/or operated* by MTVN or by any MTVN affiliates, but, and solely with respect to a Nickelodeon branded hotel, may not be utilized in the Territory during the Term. (emphasis added).

Plaintiffs contend that the word "projects" in the phrase italicized above refers specifically to hotel development projects, and that because it is undisputed that neither MTVN, nor any of its affiliates, owns or operates any of the Marriott hotels, MTVN's agreements with Marriott, which allow Marriott to use Nickelodeon-related programs in the operation of its hotels, violate the Agreement. MTVN argues that it is known not to be in the hotel business, and that to interpret the word "projects" as referring to hotels would be inconsistent with the progressive expansion of MTVN's reserved rights in the structure of section 1.4 of the License Agreement, as well as with MTVN's reservation of rights to enter into "Licensed Property themed promotional, advertising, and/or sponsorship agreements with other hotel chains and operators." (License Agreement, ¶ 1.4).

As an initial matter, the Agreement expressly provides for the possibility that MTVN will operate a hotel. (See the discussion of section 2, below). Further, plaintiffs assert that in the commercial language of the hotel industry the word "project" invariably refers to the construction and operation of a hotel, and point out that the limitation of MTVN's rights, upon which they rely with regard to the "development or operation" of hotels other than those of plaintiffs, is entirely consistent with MTVN's right to enter into agreements with "other" hotels with regard to promotion, advertising and sponsorship. Plaintiffs point to the distinction that is drawn in the Agreement between "use [of] the

Licensed Property in the form of character appearances within the Hotel, and in the form of walkaround Nickelodeon costumed characters," as to which plaintiffs contend that the Agreement limits MTVN's rights in relation to other hotels, and "use [of] Licensed Property (including Nickelodeon costumed characters) in the advertising, marketing, promotion and publicity (collectively, "**Marketing**") of the Hotel" (Licensing Agreement, Introductory ¶ C), as to which plaintiffs agree that MTVN has full rights, outside of the Territory.

A motion to dismiss, on the basis of documentary evidence, may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002); see also *Leon v Martinez*, 84 NY2d 83, 87 (1994). Here, it appears difficult to reconcile the word "projects" with the phrase "owned and/or operated by MTVN," if, as MTVN urges, the word "projects" is interpreted to mean the activities in which MTVN engages when it licenses its brand. One is not customarily said to "own" activities in which one engages. MTVN argues that plaintiffs' interpretation of the word "projects" is at odds with the geographical limitation on the exclusivity of the license granted by the Agreement, inasmuch as that interpretation would limit MTVN's rights anywhere in the world. However, there is no contradiction between the grant by one party to another of certain exclusive rights in a limited geographical

area and a limitation on the otherwise unfettered freedom of the granting party outside of that geographical limitation.

MTVN also argues that adoption of plaintiffs' interpretation would render the provision for first negotiation, which appears in section 2 of the Agreement, meaningless. That provision states, in relevant part:

[i]n the event that MTVN receives an offer from a third party to obtain a license to develop and/or operate a Licensed Property-themed hotel outside the Territory but within the State of Florida, or in the event MTVN elects to seek such third party licensee or *develop* such a hotel in any manner, Licensee shall have a right of first negotiation with respect to such right

(emphasis added). This section clearly contemplates MTVN granting licenses to third parties, such as those that it granted to Marriott. However, this section also clearly contemplates the possibility that MTVN, itself, might "develop" a Licensed Property-themed hotel. Accordingly, this section does not unambiguously foreclose plaintiffs' construction of section 1.4 of the Agreement. Since MTVN has not shown conclusively that its interpretation of the Agreement is the only reasonable one, that portion of defendants' motion seeking to dismiss plaintiffs' cause of action for breach of contract is denied.¹

¹ The parties also discuss the 'covenant of good faith and fair dealing, which is expressly set forth in section 16.9 of the Agreement. This section pertains principally to consents and approvals that the Agreement requires plaintiffs to obtain from MTVN. Plaintiffs do not specifically allege a breach with regard to those consents and approvals, nor is there a separate cause of action in this Complaint for breach of the covenant of good faith and fair dealing. Section 16.9 is simply an express statement of

Plaintiffs' sole allegation in support of their claim for fraud is the allegation that, approximately two years after MTVN entered into the Agreement, MTVN commenced the "Nickelodeon Getaway" program with the Marriott hotels located in Miami and Naples, Florida. To the extent that that program may constitute a violation of the Agreement, plaintiffs' fraud claim is duplicative of their breach of contract claim. To the extent that plaintiffs allege that, at the time that MTVN entered into the Agreement, it intended not to comply with it, that allegation, standing alone, is insufficient to support their claim of fraud. See e.g. *Town House Stock LLC v Coby Hous. Corp.*, 36 AD3d 509 (1st Dep't 2007).

The third cause of action seeks attorneys' fees and costs, as provided for in section 16.1 of the Agreement. MTVN does not specifically seek dismissal of this cause of action.

Accordingly, defendant's motion to dismiss is granted only to the extent of dismissing the second cause of action for fraud, and the motion is otherwise denied.

The first and third causes of action are severed and continued.

the covenant, which, even if left unexpressed, is nonetheless implied in every contract. *Aventine Investment Management, Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513 (1st Dep't 1999). This Court makes no specific determination at this time as to the merits of plaintiffs' potential assertion of breach of this section of the Agreement.

Defendant shall serve an Answer to the remaining causes of action within 20 days of the date of this Order.

Counsel for both parties shall appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on September 14, 2011 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: July 7, 2011



BARBARA R. KAPNICK
J.S.C.
BARBARA R. KAPNICK
J.R.G.