Madison 92nd St. Assoc., LLC v Courtyard Mgt. Corp.
2016 NY Slip Op 32287(U)
November 7, 2016
Supreme Court, New York County
Docket Number: 653449/2015
Judge: Eileen Bransten

[* 1]

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

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MADISON 92ND STREET ASSOCIATES, LLC,

Plaintiff,

-against-

COURTYARD MANAGEMENT CORPORATION,

Defendant.

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Index No. 653449/2015
Motion Date: 6/13/2016
Motion Seq. No. 001

BRANSTEN, J.

This matter comes before the Court on Defendant Courtyard Management Corporation's motion to dismiss pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7). Plaintiff Madison 92nd Street Associates, LLC, opposes. For the foregoing reasons, Defendant's motion is granted in part and denied in part.

I. Background

A. Factual History

Plaintiff Madison 92nd Street Associates, LLC, is the developer and former owner of a hotel at 410 East 92nd Street in Manhattan (the "Hotel"). *See* NYSCEF No. 1, Summons and Complaint ("Compl.") ¶ 18. Defendant Courtyard Management Corporation is a wholly owned subsidiary of Marriott International, Inc. ("Marriott") which

manages and operates hotels under the brand name "Courtyard by Marriott." *Id.* ¶¶ 2, 11, 19-20.

The Management Agreement

In early 2001, Plaintiff entered into negotiations with Defendant and Marriott to manage the Hotel under the Courtyard brand name. Compl. ¶ 19. On or about October 7, 2002, the parties signed a management agreement (the "MA") setting forth the terms of the parties' rights and responsibilities with respect to operation of the Hotel. *Id.* ¶ 21. Among other provisions, the MA set forth that "[t]he operation of the Hotel shall be under the exclusive supervision and control" of Defendant, which "shall be responsible for the proper and efficient operation of the Hotel as part of the [Courtyard by Marriott] System." *Id.* ¶ 22. The MA further established that Defendant "will act as a reasonable [and] prudent operator of the Hotel, having regard for the status of the Hotel and maintaining the System Standards." *Id.*

The "Secret Agreement"

The Complaint alleges that, around the time of the signing of the MA, Defendant and Marriott formed a secret agreement with a hotel workers' trade union to provide the union with favorable treatment at Plaintiff's Hotel in return for the union's promise to forebear any union activity at several of Marriott's prized hotels (the "Preferred Hotels")

elsewhere in Manhattan. Compl. ¶¶ 9, 54-55. The secret agreement between Marriott, Defendant, and the union allegedly included the following provisions:

> (i) the Union would refrain from organizing the Preferred Hotels; (ii) Marriott and Courtyard would rig employee votes at the Non-Preferred Hotels to ensure unionization; (iii) Marriott and Courtyard would grossly overstaff the Non-Preferred Hotels with unnecessary Union employees in order to funnel dues back to the Union; and (iv) Marriott and Courtyard would continue to employ the extraneous Union employees even if their presence on the payroll was causing financial detriment to the Non-Preferred Hotels.

Id. ¶ 54. The Complaint further alleges that the secret agreement included a provision that Marriott and Defendant would "pressure the owners of Non-Preferred Hotels to sign an 'Owner's Letter,' agreeing that in the event Marriott/Courtyard ceased managing the Hotel, the successor operator would recognize the Union as the exclusive bargaining representative for the Hotel. *Id.*

Implementing the Secret Agreement

According to the Complaint, this secret agreement resulted in a series of actions by Marriott, Defendant, and the trade union which were detrimental to the hotel's economic performance and ultimately led to Plaintiff's loss of the Hotel through foreclosure. *See, e.g.*, Compl. ¶¶ 9, 81, 227, 232.

The first of these alleged actions occurred on November 5, 2002, when Marriott sent the hotel trade union a draft letter agreement ("the "Letter Agreement") purportedly obligating Marriott and its subsidiaries (including Defendant) to allow for a neutral

procedure for determining whether Hotel employees could unionize. *Id.* ¶ 53. By its terms, the Letter Agreement applied to all properties Marriott "owns, manages, or operates," except for (1) the LaGuardia Marriott Hotel, (2) the Marriott Marquis, (3) the New York Marriott Financial Center Hotel, (4) the New York Midtown East Courtyard by Marriott, and (5) any properties owned, managed, or operated by Marriott prior to July 2001. *Id.* The Letter Agreement between Marriott and the union was formally executed in April 2003. *Id.* ¶ 56.

The Complaint further alleges that, pursuant to the secret agreement, Defendant then began transferring active union members from other "Non-Preferred" hotels to staff the Hotel and otherwise hired pro-union employees in an effort to rig the vote in favor of unionization at the Hotel. *Id.* ¶¶ 58, 59. Once Hotel employees successfully unionized, Defendant allegedly "began increasing the Hotel's staff count with unnecessary Union employees for the purpose of kicking back dues to the Union." *Id.* ¶ 60. Defendant maintained these high staffing levels as Hotel performance began to decline during the economic recession, despite the fact that such high staffing levels allegedly "had no legitimate business justification." *Id.* ¶¶ 62, 71. According to the Complaint, Defendant was not contractually obligated to maintain these union staffing levels because the 2006 collective bargaining agreement governing Hotel employment "expressly granted hotel operators the right to lay off Union employees." *Id.* ¶ 64.

As a direct result of the overstaffing of the Hotel with union employees pursuant to the secret agreement, the Complaint alleges that "Madison lost substantial revenue and profits, defaulted on its senior loan with [General Electric Capital Corporation], and was forced to seek bankruptcy protection and eventually sell the Hotel in foreclosure at a fire-sale price." *Id.* ¶ 81.

Mismanagement of the Hotel

The Complaint further alleges that Defendant separately violated the MA through a series of actions seemingly unrelated to the "secret agreement." These additional alleged breaches include Defendant's failing to take "meaningful steps to generate business for the Hotel until 2010," (Compl. ¶¶ 95-98); illicitly filing certain tax documents in Plaintiff's name, (*id.* ¶¶ 99-105); hiring and failing to fire an unqualified general manager, (*id.* ¶¶ 106-107); violating zoning laws, (*id.* ¶¶ 108-113); siphoning funds from the Hotel via the "Marriott Rewards" program, (*id.* ¶¶ 115-138); abusing Marriott's status as a "workers' compensation self-insurer," (*id.* ¶¶ 139-147); and illicitly changing its accounting practices to inflate management and other fees, (*id.* ¶¶ 148-151).

B. Procedural History

The Initial State Court Complaint

On September 4, 2009, Plaintiff filed a complaint against Defendant arising from its management of the Hotel. NYSCEF No. 22, Exhibit 11 to Defendant's Affidavit in Support of Motion. On July 13, 2010, Justice Barbara Kapnick granted in part and denied in part Defendant's motion to dismiss. Specifically, the decision denied Defendant's motion with respect to Plaintiff's claims for breach of contract, breach of the covenant of good faith and fair dealing, and accounting. The decision dismissed Plaintiff's claims for declaratory judgment, breach of fiduciary duty, and fraudulent misrepresentation. NYSCEF No. 11, Exhibit 1 to Defendant's Affidavit in Support of Motion (the "Kapnick Decision").

The Foreclosure Proceeding

Separately, on October 30, 2009, GECC sued to foreclose on its loan to Plaintiff regarding the Hotel. Compl. ¶ 229. On December 6, 2010, Justice Billings granted GECC's motion for summary judgment in the foreclosure action. NYSCEF No. 12, Exhibit 2 to Defendant's Affidavit in Support of Motion ("Billings Decision"). Following the sale of the Hotel itself, Plaintiff's action against Defendant resumed with the filing of an amended complaint on January 4, 2013 before Justice Kapnick. NYSCEF No. 17, Exhibit 7 to Defendant's Affidavit in Support of Motion.

The Federal Action

Shortly thereafter, Plaintiff filed a complaint in federal court against Defendant, Marriott, the union, and two other parties, asserting federal antitrust, RICO, and pendent state law claims relating to the management and unionization of the Hotel. [1] NYSCEF No. 18, Exhibit 8 to Defendant's Affidavit in Support of Motion. Defendants subsequently removed the state court action and consolidated it with the federal action in front of District Court Judge Colleen McMahon. NYSCEF No. 40, Exhibit 5 to Plaintiff's Affidavit in Opposition to Motion. On July 28, 2014, Judge McMahon issued an order and opinion dismissing Plaintiff's federal causes of action with prejudice, and dismissing its state causes of action without prejudice to their refiling in state court. NYSCEF No. 13, Exhibit 3 to Defendant's Affidavit in Support of Motion.

The Instant Action

On October 15, 2015, Plaintiff initiated the instant action by filing the Complaint. NYSCEF No. 1. The Complaint alleges eight causes of action arising from Defendant's management of the Hotel: breach of contract arising from the alleged "secret agreement;" (Count One); breach of contract arising from the alleged mismanagement of the Hotel (Count Two); breach of the covenant of good faith and fair dealing (Count Three);

[1] The state law claims in Plaintiff's federal action alleged specifically against Courtyard included negligent misrepresentation, fraudulent inducement, breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and accounting.

fraudulent inducement (Count Four); negligent misrepresentation (Count Five); breach of fiduciary duty (Count Six); accounting (Count Seven); and unjust enrichment (Count Eight).

On December 17, 2015, Defendant filed a motion to dismiss. NYSCEF No. 9, Memorandum of Law in Support of Defendant's Motion to Dismiss ("Def. Mov. Br.")). Defendant seeks dismissal of each Count with the exception of a portion of Count Two.

II. Standards of Review

In considering a motion to dismiss for failure to state a claim under CPLR § 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). While factual allegations contained in a complaint are accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v. Sud,* 211 A.D.2d 423 (1st Dep't 1995). The motion must be denied if the factual allegations contained within "the pleadings' four corners . . . manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 151-52 (2002).

Where a motion to dismiss is based on documentary evidence under CPLR § 3211(a)(1), the claim will be dismissed "only where the documentary evidence

utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002); *see also Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). In considering such a motion, the court is required to determine "whether the proponent of the pleading has a cause of action, not whether he has stated one." *Ark Bryant Park Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150 (1st Dep't 2001).

Finally, CPLR § 3211(a)(5) provides for dismissal where "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, *res judicata*, statute of limitations, or statute of frauds." CPLR § 3211(a)(5).

III. Discussion

Defendant seeks dismissal of each of the Complaint's eight Counts, with the exception of a portion of Count Two. Defendant's motion raises numerous grounds for dismissal, including statute of limitations, failure to state a claim, and duplicative claims. The Court will address these arguments with respect to each Count below.

A. Count One: Breach of Contract Based on the Alleged Secret Agreement

Defendant argues that Plaintiff's claim for breach of contract based on the alleged secret agreement (Count One) must be dismissed for exceeding the six-year statute of

limitations. Def. Mov. Br. at 22 n.29. Plaintiff responds that, while Defendant's breach may have first become apparent more than six years prior to its initiation of this suit on September 4, 2009, the Complaint also alleges a series of "continuing breaches" of the MA which occurred well into the operating period of the Hotel beginning in 2006. Pl. Opp. Br. at 11-12. For the foregoing reasons, the Court agrees with Defendant and concludes that Count One is barred by the statute of limitations.

The statute of limitations for breach of contract in New York is six years. *See* CPLR § 213(2). Generally, the statute of limitations for breach of contract begins to run at the time of breach. *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993) (citing CPLR § 203(a)). "If, however, a contract requires continuing performance over a period of time, each successive breach may begin the statute of limitations running anew." *Guilbert v. Gardner*, 480 F.3d 140, 150 (2d Cir. 2007) (applying *Bulova Watch Co. v. Celotex Corp.*, 46 N.Y.2d 606 (1979)). In such circumstances, only where "the wrong is not referable exclusively to the day the original wrong was committed" will the cause of action for breach accrue anew for each subsequent injury. *1050 Tenants Corp. v. Lapidus*, 289 A.D.2d 145, 146 (1st Dep't 2001).

Here, because the alleged injuries flowing from the implementation of the "secret agreement" are attributable to the time that the agreement itself was entered into, the Court concludes that the allegations related to implementation of the agreement do not constitute

independent "continuing breaches" for the purposes of calculating the relevant statute of limitations period.

This situation is analogous to the one presented in the New York Court of Appeals decision *Ely-Cruikshank Co. v. Bank of Montreal*. 81 N.Y.2d 399 (1993). In *Ely-Cruikshank*, the plaintiff, a real estate broker, signed a brokerage agreement with the defendant bank in 1980. *Id.* at 401. The agreement stated in part that all negotiations regarding the lease of a particular building would be "conducted by or under the direction of" the plaintiff. *Id.* at 401. The defendant lawfully terminated the agreement on November 30, 1983, and sold the building without the participation of the plaintiff on February 1, 1984. *Id.* at 402. On January 26, 1990, the plaintiff sued for breach of contract, alleging that the defendant had secretly negotiated the building sale prior to terminating the agreement and thus deprived the plaintiff of its right to negotiate and earn a commission pursuant to the contract. *Id.* at 402. The defendant moved to dismiss, in part, on the grounds that the action was barred by the six-year statute of limitations. *Id.* at 401.

In its analysis, the Court of Appeals noted that the plaintiff did not—and could not—allege that the sale of the building itself constituted a breach of the parties' contract, since the sale occurred after the contract was terminated. *Ely-Cruikshank Co.*, 81 N.Y.2d. at 402. Furthermore, the contract granted the plaintiff rights to a commission for the *lease* of the building, not its *sale*. *Id.* at 402. Given these facts, the Court concluded that "the alleged breach, if any, occurred when the bank purportedly failed to reveal its preliminary

discussions with [the buyer] prior to termination of the brokerage agreement." *Id.* at 403. Because the alleged breach thus occurred prior to the November 30, 1983 contract. termination—more than six years prior to initiation of the suit—the Court concluded that the claim was barred by the six-year statute of limitations, regardless of the actual date of the building's sale. *Id.* at 404.

Here, Plaintiff alleges multiple breaches of the MA, beginning with the alleged secret agreement. According to the Complaint, the secret agreement first manifested itself in the form of the November 2002 draft copy and April 2003 signed copy of the Letter Agreement. *See* Compl. ¶¶ 53-57. Following the consummation of the secret agreement, Plaintiff alleges a series of continuing breaches involving a sustained period of over-hiring during the economic recession pursuant to that agreement. *Id.* ¶¶ 3, 58, 62.

However, as Defendant notes, and the Complaint itself alleges, the MA provides Defendant with exclusive authority to make all employment decisions (including hiring and firing) on behalf of Plaintiff. *See* Compl. ¶ 22 ("Section 1.02(c) of the Management Agreement provides that '[t]he operation of the Hotel shall be under the exclusive supervision and control of [Defendant] which, except as otherwise specifically provided in the Agreement, shall be responsible for the proper and efficient operation of the Hotel as part of the System.'"); Def. Mov. Br. at 5 ("the MA provided Courtyard with 'absolute discretion with respect to all personnel employed at the Hotel,' including sole discretion to '[r]ecruit, employ, supervise, direct and discharge employees at the Hotel.'").

In implicit acknowledgment of this fact, Plaintiff does not support its theory of liability under Count One by arguing that each instance of over-hiring constituted a breach because the act of hiring *itself* violated the MA. Rather, Plaintiff argues that each decision to hire constituted a breach of the MA because such decisions were made *pursuant to the wrongful "secret agreement."* *See* Pl. Opp. Br. at 12 ("each time Courtyard improperly hired or retained employees pursuant to the Secret Agreement . . . is an actionable breach.").

Such backward-looking rationale for the allegedly breaching activity suggests that the later alleged wrongs are in fact "referable exclusively to the day the original wrong was committed," and indicates that the instances of over-hiring are not independent enough from the original wrong such that each one could restart the statute of limitations period anew. *See Ely-Cruikshank Co.*, 81 N.Y.2d at 403-404. The Court therefore concludes that the actual beach (if any) occurred when Defendant, Marriott, and the union committed to the "secret agreement" itself. *See id.*

As noted above, it appears from the Complaint—and Plaintiff's briefing—that this commitment occurred at or prior to the signing of the Letter Agreement in April 2003. *See* Compl. ¶¶ 4, 5, 56 (alleging that the secret agreement consisted of "oral agreements" and the April 9, 2003 Letter Agreement); Pl. Opp. Br. at 21 n.21 (arguing that the "secret agreement" predated the October 2002 Management Agreement). Thus, Plaintiff's claim for breach of contract based on the secret agreement accrued by April 2003, and the six-year statute of limitations began to run by that time. *See Ely-Cruikshank Co.*, 81 N.Y.2d

at 402. Because Plaintiff first brought its claim arising from these facts on September 4, 2009—more than six years from the date of accrual—any claim for breach of contract based on these facts is barred by the six-year statute of limitations. Accordingly, Count One is dismissed *with prejudice*.

B. Count Two: Breach of Contract Based on Alleged Mismanagement of the Hotel

Regarding Count Two, the Court notes that Defendant does not seek dismissal of the claim in its entirety. Rather, Defendant argues only that Plaintiff is collaterally estopped from arguing that it was unaware of the Hotel's unionization in connection with Count Two because Justice Billings had previously concluded that Plaintiff *was*, in fact, aware of the potential for unionization of the Hotel at all relevant times. Def. Mov. Br. at 19 n.21, and at 19-20 (citing Billings Decision at 6-8).

The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." *Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 500 (1984). In order for collateral estoppel to apply, the issue sought to be precluded in the present action must be identical to the one "which has necessarily been decided in the prior action or proceeding." *Id.*

Here, Defendant has failed to establish that the issues raised by Plaintiff in Count Two are identical to the issues resolved in the Billings Decision. Specifically, while Justice

Billings premised her decision on the conclusion that Plaintiff was (or should have been) aware of the Hotel's unionization, the instant Complaint explicitly alleges that Plaintiff "understood before it executed the Management Agreement that unionization of the Hotel in the ordinary course was a possibility." Compl. ¶ 9. Indeed, Count Two's allegations of Hotel mismanagement appear to be independent of the allegations related to unionization or the "secret agreement" itself. *See, e.g.*, Compl. ¶ 162 (alleging that Defendant breached the MA by, *inter alia*, "providing to Madison false and/or incorrect financial and staffing reports related to the current and future financial condition of the Hotel").

Because Count Two thus alleges breach of the MA without regard to Plaintiff's awareness of the Hotel's unionization status, Defendant has failed to show an "identity of issues" between the Billings Decision and Count Two such that collateral estoppel could apply. *See Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d at 500. Accordingly, Defendant's motion to dismiss Count Two is denied.

C. Count Four: Negligent Misrepresentation[2]

Defendant argues that Count Four must be dismissed because it fails to sufficiently allege a "special relationship" between Plaintiff and Defendant as required to state a claim for negligent misrepresentation. Def. Mov. Br. at 20 n.23.[3]

To state a claim for negligent misrepresentation, a plaintiff must allege "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148 (2007).

In the commercial context, "special relationships" have been imposed on parties "who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Kimmell v. Schaefer*, 89 N.Y.2d 257, 263 (1996). Where a negligent misrepresentation claim is brought in the context of a breach of contract action, the alleged misrepresentation may survive a motion to dismiss only where it "concerns a matter which is extraneous to the contract itself." *Alamo Contract Builders, Inc. v. CTF Hotel Co.*, 242 A.D.2d 643, 644 (2nd Dep't 1997) (citing *Kimmell*, 89 N.Y.2d at 263). In the absence of

[2] The Court notes for reference that Count Three (breach of the implied covenant of good faith and fair dealing) is discussed in Section III.F of this Opinion, below.

[3] While Defendant raises these points in the context of the "collateral estoppel" section of its moving brief, the Court determines that the substance of this section is also sufficient to raise these issues in the "failure to state a claim" context.

express contract terms explicitly creating a relationship of trust and confidence, an allegation that one party possesses "unique or special expertise" alone is insufficient to create such relationship. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 36 Misc. 3d 1215(A) at *3 (Sup. Ct. N.Y. Cnty. 2010), *aff'd as modified, MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287 (1st Dep't 2011); *M & T Bank Corp. v. Gemstone CDO VII, Ltd.*, 68 A.D.3d 1747, 1750 (4th Dep't 2009) (citing *Kimmell,* 89 N.Y.2d at 264).

Plaintiff argues that it had a "special relationship" of trust and confidence with Defendant which derived from several sources: (1) the MA itself; (2) "the ongoing course of conduct between Courtyard and Madison, including but not limited to Courtyard's transacting business and handling money on behalf of Madison"; (3) "Madison's reliance on Courtyard's far greater expertise and established reputation in the hotel industry"; and (4) "Madison's limited access to information concerning the management of the Hotel." Compl. ¶¶ 190, 192; s*ee also* Pl. Opp. Br. at 22 n.23 and at 23-24.

The Court concludes that none of these alleged sources are sufficient to show the existence of a special or privity-like relationship between Plaintiff and Defendant. Regarding the first alleged source, the MA itself does not appear to explicitly establish a special relationship or set forth a duty on Defendant to impart correct information to Plaintiff. While Plaintiff does not point to a particular provision of the MA which allegedly

creates a special relationship, Section 11.03 of the MA (labelled "Relationship") states in relevant part:

> In the performance of this Agreement, [Defendant] shall act solely as an independent contractor. Neither this Agreement nor any agreements, instruments, documents, or transactions contemplated hereby shall in any respect be interpreted, deemed or construed as making [Defendant] a partner, joint venturer with, or agent of, [Plaintiff].

NYSCEF No. 15, Exhibit 5 to Affirmation in Support of Motion, Management Agreement ("MA Excerpt" § 11.03). As Defendant argues, this provision appears to establish an arms-length independent contractor relationship between the parties and expressly disclaims several forms of more closely-intertwined business relationships. *See* MA Excerpt § 11.03; Def. Mov. Br. at 20 n.23.[4] Thus, the MA itself does not appear to create either an implicit or explicit special relationship. *See United Safety of Am., Inc. v. Consol. Edison Co. of New York*, 213 A.D.2d 283, 286 (1st Dep't 1995) (noting that "[a] simple arm's length business relationship is not enough" to create a special relationship).

Regarding the second alleged source, Plaintiff's allegation that Defendant "transacted business" and "handled money" on its behalf cannot serve as the basis of a special relationship because Plaintiff does not allege that these activities occurred outside the scope of the MA. *See Alamo Contract Builders, Inc. v. CTF Hotel Co.*, 242 A.D.2d

[4] In further support of the arms-length nature of the parties' relationship, the Court notes that the MA was signed after more than a year of negotiations between representatives of the parties, both of whom possessed at least some experience in the hotel industry prior to signing the MA. *See* MA Excerpt § 11.16 (stating that Plaintiff and Defendant "are both business entities having substantial experience with the subject matter [of the MA], and each has fully participated in the negotiation and drafting of this Agreement"); *see also* Compl. ¶¶ 18-21.

643, 644 (2nd Dep't 1997) (citing *Kimmell*, 89 N.Y.2d at 263) (holding that a special relationship may exist only where it "concerns a matter which is extraneous to the contract itself"). Rather, it appears that this aspect of the parties' business relationship is governed by the language of the MA, and does not create any additional duties beyond those explicitly set forth in the MA itself. *Alamo Contract Builders, Inc.*, 242 A.D.2d at 644.

Regarding the third and fourth alleged sources of a special relationship between the parties, the Court concludes that Plaintiff's general allegations that Defendant had "far greater expertise," "an established reputation in the hotel industry," and a greater degree of "access to information concerning the management of the Hotel," (Compl. ¶¶ 190, 192), are insufficient to create such a relationship. Indeed, "knowledge of the particulars of [a defendant's] business or the true situation underlying the misrepresentations pertaining to that business . . . . [do] not constitute the type of 'specialized knowledge' that is required to impose a duty of care in the commercial context." *JP Morgan Chase Bank v. Winnick*, 350 F. Supp. 2d 393, 402 (S.D.N.Y. 2004) (applying New York law). As such, these allegations do not support Plaintiff's claim of a special or privity-like relationship giving rise to extra-contractual duties on the part of Defendant. *See id.*

Plaintiff's implicit invocation of the "special facts" doctrine is similarly of no avail. *See* Pl. Opp. Br. at 23 n.24 (citing *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 378 (1st Dep't 2003). Under that doctrine, "a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure

inherently unfair." *P.T. Bank Cent. Asia*, 301 A.D.2d at 378. Application of the doctrine requires a two-part test: the material facts must have been "peculiarly within the knowledge" of the defendant, and the information could not have been discovered through the "exercise of ordinary intelligence." *Jana L. v. W. 129th St. Realty Corp.*, 22 A.D.3d 274, 278 (1st Dep't 2005). In pleading the second element, it is insufficient "to simply make the conclusory statement that the information of an incident giving rise to liability could not have been obtained [by it] through the exercise of ordinary intelligence." *Id.* at 278 (internal quotation marks omitted).

Here, the Complaint fails to meet the second element of the doctrine. The Complaint contains only vague and conclusory allegations that Plaintiff made "diligent attempts" to uncover relevant facts, and "could not have discovered through the exercise of reasonable diligence, the Secret Agreement, the true reasons for overstaffing at the Hotel, or the falsity of Courtyard's statements in that regard," until the litigation process began. (Compl. ¶ 74). Such conclusory pleading of the elements of the special facts doctrine, without more, is insufficient to support the application of the doctrine to this case. *See Jana L.*, 22 A.D.3d at 278.

Based on the above analysis, none of the relevant allegations in the instant Complaint alter Justice Kapnick's conclusion that "the Management Agreement was the result of an arm's-length relationship between sophisticated business entities after negotiations." *See* Kapnick Decision at 9. The Court therefore concludes that the

Complaint fails to adequately plead the existence of a special or privity-like relationship as required to state a claim for negligent misrepresentation. *See MBIA Ins. Corp.*, 36 Misc. 3d 1215(A) at *3. Accordingly, Count Four is dismissed *with prejudice*.

D. Counts Five and Six: Fraudulent Inducement and Breach of Fiduciary Duty

Defendant similarly argues that Counts Five and Six fail to allege a fiduciary relationship as required to state a claim for fraudulent inducement and breach of fiduciary duty. *See* Def. Mov. Br. at 14, 20, and at 20 n.23.

In opposition, Plaintiff cites to *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 20 (2005), and *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 122, (1st Dep't 1998) for the proposition that the "immensity" of the disparity between the parties' relevant expertise, magnified by Defendant's greater access to relevant information, combine to create a fiduciary duty on Defendant. *See* Pl. Opp. Br. at 24.

However, neither case supports Plaintiff's position. While those cases held generally that the ongoing relationship between parties may give rise to a fiduciary relationship even where not explicitly set forth in writing, both cases are distinguishable on the facts. In *Wiener*, the First Department found that the trial court erred by (1) determining the relationship between the plaintiff and defendant was analogous to a lender and borrower, from which no fiduciary duty could arise, and (2) concluding that an executive of the defendant corporation had not acted as the agent of the plaintiff by

negotiating a contract on Plaintiff's behalf. *Wiener*, 241 A.D.2d at 122-23. Here, however, there are no allegations of either an agency or lender-borrower relationship. Similarly, in *EBC I*, the Court of Appeals held that a fiduciary duty existed based on "an advisory relationship that was independent" of the parties' contract. *EBC I, Inc.*, 5 N.Y.3d at 26. Here, there is no allegation of an "advisory relationship" that existed outside the confines of the MA.

Rather, as discussed above in the context of Count Four, and as Justice Kapnick previously held, Plaintiff's allegations indicate nothing more than an arms-length relationship resulting from a negotiated agreement between sophisticated business entities. Accordingly, Counts Five and Six are dismissed *with prejudice*. *See Golub v. Tanenbaum-Harber Co.*, 88 A.D.3d 622, 623 (1st Dep't 2011) (dismissing plaintiff's fraudulent inducement and breach of fiduciary duty claims where plaintiff failed to allege a special or fiduciary relationship with defendant).

E. Count Eight: Unjust enrichment

Next, Defendant argues that Count Eight should be dismissed in part because it is duplicative of Plaintiff's breach of contract claims. Def. Mov. Br. at 22. In response, Plaintiff argues that its unjust enrichment claim can be pled in the alternative to breach of contract claims because the unjust enrichment claim independently alleges that the contract itself was induced by fraud. Pl. Opp. Br. at 24-25. In support, Plaintiff cites to *Pramer*

S.C.A. v. Abaplus Int'l Corp., which held that "a claim for unjust enrichment is not duplicative of a breach of contract claim where the plaintiff alleges that the contracts were induced by fraud." 76 A.D.3d 89, 100 (1st Dep't 2010).

However, since *Pramer* was decided, the Court of Appeals has since held that "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract *or tort claim*." *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 790 (2012) (emphasis added). Thus, following *Corsello*, a claim for unjust enrichment cannot lie where the complaint also alleges either fraud or breach of contract based on the same underlying facts. *Corsello*, 18 N.Y.3d at 790.; *see also Weisblum v. Prophase Labs, Inc.*, 88 F. Supp. 3d 283, 297 (S.D.N.Y. 2015) (applying *Corsello*, 18 N.Y.3d at 790) (dismissing unjust enrichment claim where plaintiff "has not shown that his unjust enrichment claim differs from his contract and tort claims").

Here, Count Eight alleges unjust enrichment resulting from Defendant's alleged fraud in inducing Plaintiff to sign the MA and other related agreements. Compl. ¶¶ 210-220. While these facts may be independent of Plaintiff's breach of contract claims, they nevertheless duplicate and restate the same allegations as Plaintiff's fraudulent inducement claim. As such, Plaintiff's claim for unjust enrichment is duplicative of its claim for fraudulent inducement. Accordingly, Plaintiff's unjust enrichment claim is dismissed *with prejudice*. *See Corsello*, 18 N.Y.3d at 791.[5]

[5] The Court notes that the duplicative nature of the unjust enrichment claim mandates its dismissal regardless of the success or failure of the claim which it duplicates. *See Corsello*, 18 N.Y.3d at

F. Count Three: Breach of the Implied Covenant of Good Faith and Fair Dealing

Defendant similarly argues that Plaintiff's claim for breach of the implied covenant of good faith and fair dealing should be dismissed as duplicative of Plaintiff's breach of contract claims. Def. Mov. Br. at 24-25.[6]

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). Where a contract provides for the exercise of discretion, the implied covenant includes a "promise not to act arbitrarily or irrationally in exercising that discretion." *Id.*

However, where a plaintiff alleges breach of contract based on the defendant's failure to exercise discretion pursuant to contract or industry-based standards, a separate claim for breach of the implied covenant of good faith and fair dealing premised on the bad faith exercise of that discretion will be dismissed a duplicative. *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 297 (1st Dep't 2011).

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791 ("[t]o the extent that [plaintiff's contract and tort claims] succeed, the unjust enrichment claim is duplicative; if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects.")

[6] In response, Plaintiff argues only that Defendant is collaterally estopped from opposing Count Three on "duplicative" grounds because Justice Kapnick rejected this argument in her 2010 decision on Defendant's previous motion to dismiss. Pl. Opp. Br. at 25. However, for collateral estoppel to apply, there must be "a final judicial determination which necessarily decided the very cause of action or issue that a party now seeks to litigate in a subsequent action or proceeding." *Ott v. Barash*, 109 A.D.2d 254, 262 (2nd Dep't 1985) (citing *Peterson v. Forkey*, 50 A.D.2d 774 (1st Dep't 1975). Here, because Justice Kapnick denied Defendant's motion to dismiss on this issue, this aspect of the Kapnick Decision is not "final" for collateral estoppel purposes. As such, it has no preclusive effect on Defendant's "duplicative" argument. *See id.*

Here, Plaintiff's claims for breach of contract based on mismanagement of the Hotel (Count Two) and breach of the implied covenant of good faith and fair dealing (Count Three) are both based on a similar failure to live up to contractual and industry standards.

For example, Count Two alleges that Defendant breached the MA by "failing to ensure the 'proper and efficient operation of the Hotel,' failing to 'act as a reasonable [and] prudent operator,' and failing to manage the Hotel 'under standards comparable to those prevailing in other hotels' in the Courtyard system." Compl. ¶ 160 (quoting MA Excerpt §§ 1.02(B) and (C)). Count Two alleges that Defendant failed to meet these standards by, *inter alia*, abusing the Marriott Rewards Program, failing to provide a proper accounting to Plaintiff, and improperly changing its accounting practices. Compl. ¶¶ 166, 168, 169.

Similarly, Count Three of the Complaint alleges that "[s]ince the Management Agreement contemplated that Courtyard would exercise its discretion on behalf of Madison in running the Hotel, ensure the Hotel's 'proper and efficient operation,' act as 'reasonable [and] prudent operator,' and manage the Hotel 'under standards comparable to those prevailing in other hotels' in the Courtyard system, Courtyard was prohibited from acting arbitrarily or irrationally in exercising that discretion." Compl. ¶ 176. Count Three does not allege independent facts leading to a breach of the implied covenant, but rather incorporates Defendant's "acts and omissions" alleged elsewhere in the Complaint. *See* Compl. ¶ 177.

Thus, while Count Two couches the alleged wrong in terms of a contractual violation and Count Three couches the alleged wrong in terms of an arbitrary or irrational exercise of discretion, it is clear that both are premised on Defendant's alleged failure to live up to standards set forth in the contract and established by the hotel management industry. As such, Count Three is dismissed *with prejudice* as duplicative. *See MBIA Ins. Corp.*, 87 A.D.3d at 297 (dismissing plaintiff's claim for breach of implied covenant of good faith and fair dealing upon concluding that "[t]he allegation that [defendant] exercised its discretion in bad faith merely restate[d] the contract-based claims that [defendant] failed to abide by industry standards").

G. Count Seven: Accounting

Finally, Defendant argues that Count Seven fails to state a claim for an accounting. Def. Mov. Br. at 23-24. Defendant contends that, while Plaintiff doesn't specify the legal basis for its accounting claim, it nevertheless fails to adequately plead entitlement to either an equitable or contractual accounting. *Id.*

It is well settled that an action for equitable accounting will not lie "in the absence of a fiduciary relationship between the parties.'" *Mexican Hass Avocado Importers Ass'n v. Preston/Tully Grp. Inc.*, 838 F. Supp. 2d 89, 97 (E.D.N.Y. 2012) (applying New York law) (quoting *Gersten-Hillman Agency, Inc. v. Heyman,* 68 A.D.3d 1284, 1286 (3rd Dep't 2009)). However, where the parties provide for the right to an accounting by contract, "the

parties could by agreement determine the manner in which such an accounting should be had, and thereafter could, upon the statement of an account, fix by agreement the amount due to each." *Kensington Pub. Corp. v. Kable News Co.*, 100 A.D.2d 802, 803 (1st Dep't 1984).

Here, because the Court held above that no fiduciary relationship exists between the parties, no claim for equitable accounting can lie. *See Mexican Hass Avocado Importers Ass'n*, 838 F. Supp. 2d at 97. Further, because the Hotel was sold in 2012, it appears that the terms of the MA are no longer binding as between Plaintiff and Defendant. *See* Compl. ¶ 228 (alleging that Hotel was sold in 2012); MA Excerpt § 11.05 (stating that the terms and provisions of the MA shall run with the land and with Plaintiff's interest therein). As such, Plaintiff's claim for an accounting under the MA is dismissed.[7]

IV. Conclusion

Based on the foregoing, Defendant's motion to dismiss is granted *with prejudice* with respect to Counts One, Three, Four, Five, Six, Seven, and Eight. Defendant's motion to dismiss a portion of Count Two on collateral estoppel grounds is denied.

[7] The Court's dismissal of Count Seven does not foreclose Plaintiff from obtaining the records it seeks through this Count. As Defendant notes in its reply brief, Count Seven demands an accounting of records relevant to Defendant's alleged mismanagement of the Hotel, which also serves as the basis of Count Two. *See* Compl. ¶¶ 158-171; 207-209. Because Count Two survives the instant motion to dismiss, Plaintiff may still be entitled to these records through discovery in connection with Count Two.

Accordingly, it is

ORDERED that Defendant Courtyard Management Corporation's motion to dismiss is granted *with prejudice* with respect to Counts One, Three, Four, Five, Six, Seven, and Eight of the Complaint; and it is further

ORDERED that Defendant's motion to dismiss with respect to Count Two is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on December 13, 2016 at 10:00 A.M.

Dated: November 7, 2016
New York, New York

ENTER

Hon. Eileen Bransten, J.S.C.