

IHG Mgt. (Md) LLC v West 44th St. Hotel LLC

2020 NY Slip Op 31552(U)

April 29, 2020

Supreme Court, New York County

Docket Number: 655914/2017

Judge: Joel M. Cohen

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOEL M. COHEN **PART** **IAS MOTION 3EFM**

Justice

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INDEX NO. 655914/2017

IHG MANAGEMENT (MARYLAND) LLC,

Plaintiff,

MOTION DATE N/A

MOTION SEQ. NO. 004

- v -

WEST 44TH STREET HOTEL LLC, TISHMAN ASSET
CORPORATION

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155

were read on this motion to DISMISS.

This matter involves a dispute between a hotel chain – Intercontinental located in Times Square - and its management company. By way of brief background, the dispute between these companies dates to 2017, when Defendant W. 44th Street Hotel (Owner) complained that Plaintiff, IHG Management (Maryland) LLC (IHG), poorly performed its duties and sought to terminate the hotel management agreement (HMA) with IHG. In turn, IHG commenced this action and sought a preliminary injunction preventing its immediate termination, which was granted by decision of this Court (Bransten, J.). That decision was affirmed on appeal.

Owner then filed an answer asserting counterclaims for breach of contract, breach of fiduciary duty, and attorneys’ fees. Broadly speaking, the Hotel alleges that IHG breached the HMA in its: (1) failure to update reservations systems and marketing efforts which were not consistent with practices of first-class hotel operators; (2) overreliance on third-party booking sites that impose high fees on the defendant-owner; and (3) mishandling of personnel (*see generally* NYSCEF Doc. 138 [verified answer with counterclaims]).

IHG now moves to dismiss the Hotel's counterclaims pursuant to CPLR 3211 (a) (1) and (a) (7). For the reasons that follow, the motion is granted in part and denied in part.

Analysis

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference” (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994] [internal citation omitted]). However, bare legal conclusions and “factual claims which are either inherently incredible or flatly contradicted by documentary evidence” are not “accorded their most favorable intendment” (*Summit Solomon & Feldman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under subsection (a) (1) is warranted where the documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88).

IHG is a limited liability company formed under the laws of Maryland subject to the substantive law of that state (*e.g. R2 Invs, LDC v. Icahn*, 117 A.D.3d 632, 633 [1st Dept 2014]).

1. Breach of Contract (HMA) (First Counterclaim)

IHG contends that the breach of contract counterclaim must be dismissed for failure to state a viable claim as the counterclaim allegations rely on only conclusory, generic breaches of HMA provisions requiring IHG to use “commercially reasonable” efforts and to act with diligence and in “good faith.” The Court disagrees. While the allegations may not be abundantly detailed, they are adequate to survive dismissal at this pre-discovery stage.

The HMA requires IHG to: manage and operate the hotel business “consistent with sound and prudent practices of first class hotel operators in the Borough of Manhattan, New York, New York” (NYSCEF 139, § 1.04); “exercise commercially reasonable, good faith and diligent

efforts” in operating the Hotel for Owner (*id.* § 1.01); and adhere to its “fiduciary duties of care, loyalty, good faith and fair dealing and other duties customarily owed by an agent to a principal in an agency relationship.” (*id.* § 16.01). Those overarching standards apply to each of the specific requirements in the HMA, such as IHG’s duties relating to: marketing, advertising, and promoting the hotel (*id.* §§ 104 §§ 1.04 [j], 1.08 [a] [i]-[ii]); (b) involving the business in travel, marketing, and promotional programs (*id.* § 1.08 [a] [v]-[vi]); (c) negotiating labor union contracts/collective bargaining agreements in accordance with an Owner-approved strategy (*id.* § 5.03 [c]-[d]); and, (d) generally, considering Owner’s requests concerning management of the business (*see id.* § 1.05).

Owner adequately sets forth the basis of its breach of contract counterclaim in the verified answer (*see e.g.* NYSCEF 138, ¶¶ 25-74, 78-79, 83-86). For instance, Owner alleges that IHG declined to update/improve the allegedly outdated reservation system, implement cost-savings measures suggested in a third-party report that Owner commissioned, develop alternative sources of revenue, mismanaged and/or failed to improve the loyalty program, and mismanaged the hotel restaurant’s staff such that the restaurant was forced to close as a result of its financial instability (*see id.* ¶¶ 28-29, 31-35, 46-53, 57-60). Furthermore, though Owner refers to performance-based metrics to identify some of these alleged breaches (*see e.g. id.* ¶¶ 37-42 [alleging IHG’s marketing system has failed to live up to HMA standards and the hotel’s business traveler guests decreased at a rate nearly quadruple that of industry competitors], 40-42 [alleging IHG improperly relies on third-party online travel agencies to fill room vacancies, despite earning marketing fees above standard management fees, causing lost revenue and resulting in additional fees for Owner]), those allegations do not preclude Owner from stating a viable breach of contract cause of action.

Contrary to IHG's arguments, at this pre-discovery phase, the allegations are adequate to survive this Motion and most, if not all, of the counterclaim allegations and IHG's obligations under the HMA involve issues of fact that cannot be resolved on this dismissal motion (*see generally e.g. Eden Roc, LLLP v Marriott Intern., Inc.*, 2013 N.Y. Slip Op. 32287[U], 2013 WL 5345864 [Sup Ct, NY County 2013], *affd* 116 AD3d 486 [1st Dept 2014]; *cf. Baron Fin. Corp. v Natanzon*, 509 F Supp 2d 501, 509-510 [D Md 2007] [concluding that Maryland law does not preclude contract claims premised on a breach of "best efforts" provisions], citing *First Union Nat. Bank v Steele Software Sys. Corp.*, 154 Md App 97, 140, 838 A2d 404 [Md Ct Spec App 2003]; *cf. also Ambling Mgt. Co. v University View Partners, LLC*, 581 F Supp 2d 706, 716 [D Md 2008] [finding issues of fact existed, precluding summary judgement, as to contract claims involving alleged breach of "first class manner" provisions]).

The Court rejects IHG's argument that there can be no objective test for a breach of the provisions requiring it to use "commercially reasonable, good faith and diligent efforts" and perform its obligations within the "reasonable discretion and business judgment, consistent with sound and prudent practices of first class hotel operators" in Manhattan.

2. Breach of Fiduciary Duty (Second Counterclaim)

Owner's breach of fiduciary duty claim is premised upon the same allegations that form the basis of its contract claim and seeks identical relief apart from the punitive damages sought in connection with the fiduciary duty claim. The parties' rights and obligations are defined by the contract. Thus, the breach of fiduciary counterclaim is duplicative of the contract claim and must be dismissed (*e.g., CMMF, LLC v J.P. Morgan Inv. Mgt. Inc.*, 78 AD3d 562, 564-565 [1st Dept 2010]).

Separately, under Maryland law, while “there is no universal or omnibus tort for the redress of breach of fiduciary duty by any and all fiduciaries . . . [t]his does not mean that there is no claim or cause of action available for breach of fiduciary duty”; however, to establish a breach of fiduciary duty claim: “Counsel are required to [(1)] identify the particular fiduciary relationship involved [; (2)] identify how it was breached[; and (3)] consider the remedies available, and select those remedies appropriate to the client's problem” (*Estate of Moore through Ellis v Jones*, 2018 WL 300294, *7 [Md Ct Spec App Jan. 5, 2018] [internal citations and quotation marks omitted] [alterations in original]). Similarly, under New York law (*see* CPLR 3016 [b]), a claim for breach of fiduciary duty must be pleaded with particularity. Here, Owner has failed to adequately plead a claim under New York *or* Maryland law.

3. Attorneys’ Fees and Costs (Third Counterclaim)

Under § 20.07 of the HMA: “Should Owner or Manager engage in litigation to enforce its respective rights under this Agreement, the prevailing party shall have the right to indemnity from the non-prevailing party for an amount equal to the prevailing party’s reasonable attorneys’ fees, court costs and expenses arising therefrom” (NYSCEF 139). Here, as the contract claim survives this Motion 004 and IHG’s case in chief remains pending, neither party is the “prevailing party” and, thus, neither is entitled to attorneys’ fees or costs at this time.

An award of attorneys’ fees is a form of relief, not an independent cause of action (*see Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217, 217 [1st Dept 2006] [“Plaintiff may not maintain a separate cause of action for attorneys’ fees, which are only recoverable as an element of contract damages if a breach of the sublease is proven.”]). Dismissal of the third counterclaim is without prejudice to the “prevailing party” seeking attorneys’ fees and costs as a remedy at the appropriate time.

The Court has considered the parties' remaining arguments with respect to all three counterclaims and finds that they are unavailing.

Accordingly, it is

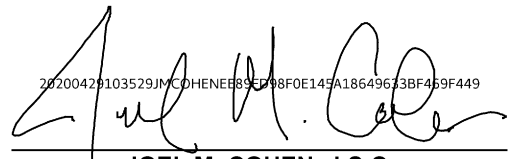
ORDERED that Motion Sequence No. 004, the motion of plaintiff IHG MANAGEMENT (MARYLAND) LLC, is **granted** with respect to the second and third counterclaims and **denied** with respect to the first counterclaim; and it is further

ORDERED that the second counterclaim, alleging breach of fiduciary duty, and third counterclaim, for attorneys' fees, in the verified answer with counterclaims of defendant WEST 44TH STREET HOTEL LLC are **dismissed**; and it is further

ORDERED that IHG shall serve an answer to defendants' remaining counterclaim within 20 days of the court's entry of this decision and order on NYSCEF; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 9, 2020 at 10:00 AM.

This constitutes the decision and order of the Court.


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JOEL M. COHEN, J.S.C.

4/29/2020

DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER
 INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER
 FIDUCIARY APPOINTMENT

REFERENCE

CHECK IF APPROPRIATE: