SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

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M&C NEW YORK (TIMES SQUARE), LLC,

Plaintiff,

-against-

ACCOR MANAGEMENT US INC.,

Defendant.

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INDEX No.: 657527/2019

MOT. DATE: 6/26/2020

MOT. SEQ. No.: 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 27, 28, 29, 30, 31
were read on this motion to/for DISMISS

Defendant moves to dismiss the complaint of plaintiff M&C New York (Times Square), LLC ("M&C") in its entirety pursuant to CPLR 3016(b), 3211(a)(1), and 3211(a)(7). For the following reasons, defendant's motion is granted pursuant to CPLR 3211(a)(1).

I. BACKGROUND

As this is a motion to dismiss, the following background is taken from the complaint and are assumed to be true. Plaintiff M&C is a hotel investor and operator with a portfolio of over 145 hospitality assets, including several in New York City (Compl. ¶ 9 [Doc. No. 2]). On June 12, 2014, M&C acquired the Novotel Times Square \Hotel (the "Hotel"), which was previously encumbered by a 25-year management agreement originally entered into between 226 West Fifty-Second Street, LLC, as owner, and Accor Business and Leisure Management LLC, as manager, in February 2012 (*id.* ¶ 10). As of January 1, 2019, the Hotel Management Agreement ("HMA") was transferred to Accor's newly incorporated affiliate, defendant Accor Management US Inc. ("Accor").

Shortly after acquiring the Hotel, M&C was disappointed by its underperformance and, upon investigation, found that Accor was failing to lift the asset through its branding and group services for which M&C was paying substantial fees (*id.* ¶ 11). Among those fees, the HMA permits Accor to charge a sales and marketing fee of 2% of room revenues, of which 50% is

required to go towards building and promoting the Novotel brand in the United States (*id.* ¶ 12). Despite retention of the fee, however, Accor demonstrated little activity or success in expanding the brand (*id.*). Although AccorHotels ranks among the largest chain brand hotel management companies in Europe, the limited Novotel brand recognition and AccorHotels' limited distribution channels in the United Stated resulted in sub-prime performance of the M&C hospitality asset (*id.* ¶ 13).

Beginning in November 2016, M&C prepared an internal audit report uncovering numerous deficiencies across several areas of Accor's management responsibilities, including front office, food and beverage, cashiering, purchasing, and payment functions at the Hotel (*id.* ¶ 14). M&C brought these deficiencies to Accor's attention, to which Accor responded that it would implement the recommended changes immediately but failed to take corrective action (*id.* ¶ 15). In addition to the on-property deficiencies, M&C found the services fees paid for marketing, legal, and TARS reservations produced little to enhance profits of either M&C or the Hotel (*id.* ¶ 16). As a result of these continued deficiencies, M&C served a Notice of Default pursuant to the terms of the HMA on April 29, 2019, identifying nine defaults and demanding reimbursement of $3.2 million related to the identified breaches (*id.* ¶ 17). Accor responded on May 20, 2019, remitting to M&C the $3.2 (*id.* ¶ 18). M&C accepted the payment without reservation of its right to seek greater compensation and has now concluded that the deficiencies and defaults have not been cured (*id.* ¶¶ 18-19).

On August 19, 2019, M&C notified Accor of its failure to cure the underlying defaults, including: (i) intentional reclassification of expenses relating to the room reservation system in breach of HMA §§ 3.1 and 9.2; (ii) failure to implement necessary accounting controls in breach of HMA §§ 7.12 and 7.16; (iii) misuse of marketing funds, breaching HMA Exhibit IV; (iv) failure to verify necessary employee training in breach of HMA §§ 7.2(i) and 7.3(c); (v) failure to prevent bad faith misuse of Hotel funds by employees in breach of HMA §§ 3.1, 7.2(i), and 7.3(c); and (vi) failure to install appropriate corporate oversight of Hotel personnel in breach of HMA ¶¶ 7.2(i) and 7.3(c) (Compl. ¶¶ 20-21). M&C alleges that despite these deficiences, Accor has demanded that M&C pay-back the $3.2 million in damages that has been remitted to date (*id.* ¶ 22). M&C assets it has suffered significant diminution in value of its assets and alleges (i) breach of fiduciary duty, (ii) breach of contract, (iii) breach of the covenant of good faith and fair dealing, and (iv) accounting of the Hotel's management.

II. ARGUMENTS

A. Defendant's Memorandum in Support

Accor begins by arguing that M&C wrongfully terminated the HMA and cannot pursue relief thereunder (Def. Br. at 6 [Doc. No. 5]). The HMA prohibits termination without first complying with the termination provisions, specifically that the parties "irrevocably waive and relinquish any right, power, or authority existing at law or in equity, including, without limitation, any such right, power or authority referred to in *Robert E. Woolley v Embassy Suites, Inc.*, 227 Cal App 3d 1520 (1990), *Pacific Landmark Hotel, Ltd. v Marriott Hotels, Inc. et al.*, 19 Cal App 4th 615 (1993) and their progeny, to terminate this Agreement or Manager's authority hereunder, except in accordance with the express provisions of this Agreement" (*id.*; Def. Aff., Ex. 1 § 15.13 [hereinafter HMA]). Accor argues that this provision clearly expresses the parties' agreement not to terminate extra-contractually, both in view of the language and in the cases cited (Def. Br. at 6). In *Woolley*, the court held hotel owners may terminate management agreements without cause but subject to the operator's right to seek damages. In *Pacific Landmark*, the court followed the *Woolley* holding (*id.*). Accor maintains that New York cases on this subject are similar to *Woolley* and, to the extent that New York law affords owners the "power" to revoke an operator's agency as identified in *Woolley*, the parties here expressly agreed that an exercise of such power by plaintiff would violate the HMA (*id.*). Defendant argues the HMA provides ample means for redress by either party. Section 14.1(a) permits the parties to demand payment for an "Event of Default" consisting of failure to pay a sum owed under the HMA, as well as providing for cure of such default by timely payment after receipt of notice (Def. Br. at 7; HMA § 14.1[a]). Section 14(e) provides for termination after notice for other material defaults if not cured (HMA § 14[e]). Defendant asserts that the parties did not agree that they could terminate by fiat based on an "Event of Default," but rather if a "bona-fide dispute" arises regarding an alleged Event of Default, and the dispute is "submitted to the appropriate court of competent jurisdiction," the "non-defaulting party shall only have the right to terminate this Agreement if the court has made a final non-appealable determination that the alleged act or omission did constitute an Event of Default under this Agreement" (HMA § 14.3).

Defendant next argues that, according to the complaint and documentary evidence, M&C terminated the HMA without complying with its termination provisions (Def. Br. at 7-8). M&C admitted the termination was extra-contractual in the Notice of Termination, writing that it was

acting "pursuant to its common law rights and powers" despite such powers being expressly waived in HMA Section 15.13 (*id.* at 8; Def. Aff. Ex. 5 [Doc. No. 11]; HMA § 15.13). The complaint contains the same admission as it alleges "based on an extinguished trust and confidence, M&C revoked Accor as its agent on December 17, 2019" (Compl. ¶ 25). Although M&C attempted to "cover its tracks" in the Notice of Termination by asserting that "Events of Default have occurred" under HMA Section 14.1, plaintiff cannot invoke 14.1 without also recognizing the procedural requirements of 14.3 which M&C did not follow (Def. Br. at 8). Defendant notes that, when M&C served the Notice of Termination, there was already an action pending in this court, commenced by Accor, seeking adjudication of the dispute regarding the supposed defaults identified in the April 29, 2019 and August 19, 2019 letters, as well as the right to return of the $3.2 million Accor paid under protest (Def. Br. at 8; Heck Aff., Ex. 2 [Doc. No. 14]). Defendant argues the only way to terminate the HMA would have been to proceed with adjudication of the pending action which M&C opted not to do (HMA § 14.3).

Defendant next asserts that, under New York law, the wrongful termination bars M&C's claim (Def. Br. at 8-9). "Where the procedures for cancellation provided for by the contract specify conditions precedent to the right of termination, those procedures must be followed" (*id.*; *Lot 57 Acquisition Corp. v Yat Yar Equities Corp.*, 63 AD3d 1109, 1110 [2d Dept 2009]; *see also Allied-Lynn Assocs., Inc. v Alex Bro, LLC*, 34 AD3d 1247, 1248 [4th Dept 2006]; *Rebh v Lake George Ventures, Inc.*, 223 AD2d 986, 986 [3d Dept 1996]). M&C did not comply with the conditions set forth in the HMA and therefore termination was wrongful (Def. Br. at 9). Defendant further argues that under settled law, the offending party will not be heard offering explanations that it had cause to terminate (*id.*; *Hanson v Capital District Sports, Inc.*, 218 AD2d 909, 911 [3d Dept 1999] ["If there was no cause, defendant had no right to discharge plaintiff. If there was cause, plaintiff could not be discharged absent compliance with the relevant provisions of the employment contract. In view of defendant's demonstrated noncompliance, in either case, the discharge would be ineffective, and plaintiff would be entitled to the relief demanded in the complaint"]). Thus, defendant argues, by terminating based on its purported "common law power" to do so, and in derogation of the required procedure under the HMA, M&C waived the right to argue that the termination was for "cause" (Def. Br. at 9).

Accor argues that permitting M&C to establish cause now would render the termination requirements meaningless, in contravention of the principle that contracts must be construed so

as to give effect to all of their provision (*see e.g. Two Guys from Harrison-N.Y. v S.F.R. Realty Assocs.*, 63 NY2d 396, 403 [1984] ["In construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless"]). Defendant argues that a party that terminates without complying with contractual conditions precedent to termination thereby waives its right to pursue other remedies under the contract (Def. Br. at 10; *Sauer v Xerox Corp.*, 17 F Supp 2d 193, 197 [WD NY 1998]). Plaintiff's decision to terminate in violation of the HMA precludes it from seeking relief based on the HMA (*see e.g. Norcon Power Partners, L.P. v Niagara Mohawk Power Corp.*, 92 NY2d 458, 463 [1998]; *Am. List Corp. v U.S. News & World Report*, 75 NY2d 38, 44 [1989]; *Long Island R.R. v Northville Indus. Corp.*, 41 NY2d 455, 463 [1977]). Defendant states plaintiff has attempted to ignore its termination obligations by asserted that "a principal may always revoke its agent's authority at any time and for any reason" (Compl. ¶ 25 [citing *FHR TB, LLC v TB Isle Resort, LP*, 865 F Supp 2d 1172 [SD Fla 2011]). While New York courts, like California courts, have held that hotel management agreements are personal service contracts that normally cannot be enforced by injunction, it is equally clear that when a party terminates a service agreement based on its "power" to do so at will, it remains accountable under the agreement for damages (Def. Br. at 10-11; *see Wilson Sullivan Co. v Int'l Paper Makers Realty Corp.*, 307 NY 20, 24-25 [1954]; *FHR TB*, 865 F Supp 2d at 1195; *see also Wien & Malkin LLC v Helmsley-Spear, Inc.*, 12 AD3d 65, 71-72 [1st Dept 2004]; *Woolley*, 227 Cal App 3d at 1534).

Defendant next argues the breach of contract claim should be dismissed as a direct application of the principle discussed above (*id.*). The complaint pays lip service to the requirements of a breach of contract claim, alleging, without further elaboration, that M&C "performed all conditions, covenants, and promises it was required to perform" under the HMA (Compl. ¶ 42). Defendant argues, however, that the Notice of Termination, and the complaint refute this allegation, demonstrating that M&C waived the right to terminate extra-contractually and breached that promise by terminating based on a purported common law right to revoke an agency (Def. Br. at 12; Compl. ¶ 25; HMA § 15.13; Def. Aff., Ex 5). These same documents, along with Accor's complaint in the earlier action, demonstrate that full compliance with the termination provisions of the HMA was a condition precedent to termination with which M&C did not comply as it did not await adjudication of the earlier action (Def. Br. at 12). Thus, M&C's own allegations and the documentary evidence provided here conclusively refute the

allegation that M&C complied with the HMA, and the breach of contract claim cannot be maintained (*id.* at 12-13; *see Lot 57*, 63 AD3d at 1110; *Allied-Lynn*, 34 AD3d at 1248; *Rebh*, 223 AD2d at 986; *see also Hanson*, 2018 AD2d at 911; *Norcon*, 92 NY2d at 463; *Am. List.*, 75 NY2d at 44; *Long Island R.R.*, 41 NY2d at 463).

The breach of the implied covenant claim should be dismissed for the same reasons (Def. Br. at 13). Alternatively, this claim is duplicative of the breach of contract claim as the complaint does not allege any facts different from those alleged in that claim (Def. Br. at 13-14; Compl. ¶¶ 44-50 *cf id.* ¶¶ 39-43; *see e.g. Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., Inc.*, 85 AD3d 680, 682 [1st Dept 2011]).

The breach of fiduciary duty claim should be dismissed as well because the wrongful termination of the HMA precludes it and the claim is duplicative of the breach of contract cause of action (Def. Br. at 14). Defendant reiterates that M&C was obligated to pursue this claim within the HMA framework and failed to do so (HMA §§ 15.13, 15.11, 14.1, 14.3). The breach of fiduciary duty claim is duplicative of the breach of contract claim as it is no different in substance from the breach of contract claim (Def. Br. at 15; *see e.g. Superior Officers*, 17 NY3d at 932; *royal Warwick S.A. v Hotel Representative, Inc.*, 106 AD3d 451, 452 [1st Dept 2013]; *LaSalle Hotel Lessee, Inc. v Marriott Hotel Servs., Inc.*, 29 AD3d 464, 465 [1st Dept 2006]; *see also Eden Roc, LLLP v Marriott Int'l, Inc.*, 116 AD3d 486, 487 [1st Dept 2014]). These cases demonstrate the Appellate Division routinely dismisses hotel owners' attempts to pass off contract claims as breach of fiduciary duty claims (Def. Br. at 15-16). Further, the HMA provides that "to the extent any fiduciary duties are inconsistent with, or would have the effect of modifying . . . the express provisions of this Agreement: (A) the terms of this Agreement shall prevail, (B) this Agreement shall be interpreted in accordance with general principles of contract interpretation without regard to the common law principles of agency (except as expressly provided for in this agreement), and (C) any liability between the parties shall be based solely on principles of contract law and the express provisions of this Agreement" (HMA § 5.2). Thus, defendant argues, the parties agreed to cabin any asserted fiduciary duties within the express contract provisions in the HMA (Def. Br. at 16).

Defendant observes that "where parties have entered into a contract, courts look to that agreement to discover . . . the nexus of [the parties'] relationship and the particular contractual expression establishing the parties' interdependency. If the parties . . . do not create their own

relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them" (*Royal Warwick, S.A. v Hotel Representative, Inc.*, 2012 WL 638805, at *8 [Sup Ct New York County 2012]; *see also Mosaic Caribe, Ltd. v AllSettled Grp., Inc.*, 117 AD3d 421, 423 [1st Dept 2014]; *Eden Roc*, 116 AD3d at 486-487). M&C does not allege breaches of fiduciary duty distinct from the alleged contract breaches, much less with the specificity required by CPLR 3016(b) (Def. Br. at 17). Further, the alleged breach of fiduciary duty count is completely conclusory (Compl. ¶¶ 32-33). Defendant argues even allegations incorporated from earlier in the complaint are obviously contractual and controlled by HMA provisions that expressly address their subject matter, such as allegations regarding "accounting controls" and "intentional reclassification of expenses relating to the room reservation system" (Def. Br. at 17; Compl. ¶¶ 21, 27, 34, 40). The repeated allegations that M&C has the power to terminate the relationship only explains why M&C was able to breach the HMA, but does not create any right to do so without being in breach of the HMA (Def. Br. at 17). The remainder of plaintiff's allegations, that Accor failed to expand the brand and that the Hotel should be more profitable, merely show that M&C is unhappy with the contract it entered into which created no obligation to do those things (*id.* at 17-18).

Finally, defendant argues that plaintiff's accounting claim should be dismissed as it merely identifies a remedy M&C would like to have if either the breach of contract or fiduciary duty claims are established (*id.* at 18). Defendant argues, however, that M&C has failed to establish entitlement to relief under those theories due to its repudiation of the HMA (*see Royal Warwick*, 106 AD3d at 452). Further, this claim is duplicative of the other claims at best and should be dismissed (*see e.g. Kurzman Karelson & Frank, LLP v Kaiser*, 283 AD2d 330, 331 [1st Dept 2001]).

B. Plaintiff's Memorandum in Opposition

Plaintiff M&C argues that the complaint states a breach of contract claim as it alleges at least $10 million in damages, breaches by Accor that are harmful to M&C, failure to use commercially reasonable efforts to maximize Hotel profits, failure to keep adequate books and records, diversion of M&C funds for private parties and gifts, and intentional overcharges passed to M&C (Pl. Br. at 7 [Doc. No. 27]); Compl. ¶¶ 40-41; HMA §§ 3.1, 7.16). The complaint alleges that M&C performed its obligations pursuant to the HMA up until the agreement was terminated in response to Accor's breaches (Compl. ¶ 42). The breach of contract

claim cannot be dismissed because: (i) Accor cannot point to any provision of the HMA that M&C breached by terminating the agreement, (ii) M&C was justified in terminating due to Accor's prior breach, (iii) M&C's equitable right to terminate the HMA is specifically contemplated by the HMA, and (iv) any contrary construction of the HMA is contrary to New York law (Pl. Br. at 7-8; HMA § 15.11; *see FHR TB, LLC v TB Isle Resort, LP*, 865 F Supp 2d 1172, 1194 [SD Fla 2011]).

Accor cannot identify how M&C breached the HMA, as the two provisions defendant points to do not constitute a breach (Pl. Br. at 8). As to HMA Section 15.13 which provides "[Owner and Manager] hereby irrevocably waive and relinquish any right, power or authority existing at law or in equity, including, without limitation, any such right, power or authority referred to in *Robert E. Woolley v Embassy Suites, Inc.*[], *Pacific Landmark Hotel, Ltd. v Marriott Hotels, Inc. et al.*[], and their progeny, to terminate this Agreement or Manager's authority hereunder, except in accordance with the express provisions of this Agreement" (*id.*; HMA § 15.13), M&C argues that Accor concedes this waiver provision is unenforceable as against public policy, and M&C retained absolute power at law to terminate the HMA because a principal's power to terminate its agency relationship is "irrevocable" (Pl. Br. at 8; *Robert E. Woolley*, 227 Cal App 3d at 1530 [1990]; *Ravallo*, 2009 WL 612490, at *4; *FHR*, 865 F Supp 2d at 1195). Plaintiff adds it could not violate Section 15.13 because that provision purports to waive the principal's irrevocable power to terminate the agency and is, consequently, unenforceable (Pl. Br. at 9; *see FHR*, 865 F Supp 2d at 1195]). Moreover, HMA Section 15.13 conflicts with Section 15.11 which provides that all remedies at law and equity are available to the parties under the HMA, notwithstanding any other provision (HMA § 15.11). In reconciling these two provisions, plaintiff argues the court must give the HMA meaning that is consistent with public policy (*see Herrera v Katz Commc'ns, Inc.*, 532 F Supp 2d 644, 647 [SD NY 2008]). Under the severability clause of the HMA, recognizing the unenforceability of Section 15.13 does not affect enforceability of the rest of the agreement (HMA § 5.9).

Turning to Section 14.3, Accor asserts that this provision is also inapplicable because M&C terminated the HMA months after the grace period expired. Section 14.3 states:

> Notwithstanding the foregoing or anything to the contrary contained in this Agreement, neither Owner nor Manager shall be deemed to be in default under this Agreement with respect to any of the Events of Default specified in Section 14.1(a), (d) or (e) or Section 14.2(a), (d) or (e), or have the right to

> terminate this Agreement in respect of such Event of Default, if (A) a bona-fide dispute with respect to such Event of Default has arisen between Owner and Manager and (B) either (x) less than fifteen (15) days (or such later period as agreed to in writing by Owner and Manager) has elapsed following the expiration of the cure period applicable to such Event of Default or (y) such dispute has been submitted to the appropriate court of competent jurisdiction pursuant to Section 15.1 prior to the expiration of the fifteen (15) day (or later) period in (x) above.

(HMA § 14.3). Under this section, neither party has a contractual right to terminate when either of two limited conditions exists. Neither applies in this case (Pl. Br. at 10). First, neither party may terminate the HMA within fifteen days after the expiration of the applicable cure period following a notice of default. However this restriction does not apply here because M&C served the Notice of Default on April 29, 2019, triggering a 30-day cure period ending on May 29, 2019 and a 15-day grace period ending on June 13, 2019 (Pl. Br. at 10; Def. Aff., Ex. 2 [Doc. No. 8]). Plaintiff states it terminated the HMA six months later, on December 17, 2019, well after the grace period ended (Pl. Br. at 10). Second, under Section 14.3, neither party has a contractual right to terminate when a bona-fide dispute has been submitted to the competent jurisdiction within the 15-day grace period (*id.*). This condition does not apply because the grace period ended on June 13, 2019, but Accor did not file its complaint until two months later, on August 30, 2019 (*id.* at 10-11). Consequently, plaintiff argues, no dispute was submitted to the appropriate court "prior to the expiration of" the grace period, and Accor has no basis for arguing that M&C's termination of the HMA was inconsistent with Section 14.3 (*id.*).

Plaintiff maintains termination was justified due to Accor's prior material breaches of contract and fiduciary duty (*id.* at 11; *see U.W. Marx, Inc. v Koko Contracting, Inc.*, 124 AD3d 1121, 1122 [3d Dept 2015]). Under New York, the terminating party is not required to adhere to contractual notice and cure provisions and other contractual conditions to termination when doing so would be futile (*Giuffre Hyundai, Ltd. v Hyundai Motor Am.*, 756 F3d 204, 210 [2d Cir 2014]). Here, Accor committed incurable, material breaches of both its fiduciary and contractual duties. Consequently, plaintiff was privileged to terminate the HMA immediately and with impunity (Pl. Br. at 11-12; Compl. ¶¶ 27-43). Plaintiff argues the law of agency dictates that a principal may terminate the contract, and the agency relationship, with impunity in the face of prior, incurable, material breaches by the agent (Restatement [Second] of Agency § 118, cmt. C [1958] ["If there is a contract between principal and agent that the authority shall not be revoked

or renounced, a party who revokes or renounces, unless privileged by the conduct of the other or by supervening circumstances, is subject to liability to the other"]). In other words, a principal will not be subject to liability for terminating the contract if it was "privileged" to revoke the contract by the wrongful conduct of the agent (*see* Restatement [Third] of Agency § 8.01, cmt. D [2006] ["because it constitutes a material breach of the contract by the agent, an agent's breach of fiduciary duty may also privilege the principal to terminate the principal's relationship with the agent in advance of a time set for termination in any contract between them."]). "When an agent has acted to undermine his principal's business, the principal will not be forced to endure the stated contractual period before discharging him. To hold otherwise would afford the disloyal agent the opportunity to continue rather than cure his destructive effort" (*Union Miniere, S.A. v Parday Corp.*, 521 NE2d 700, 703-704 [Ind Ct App 1988]).

Plaintiff argues Accor's reliance on *Woolley* is misguided as the court there pointed out that the principal's termination can constitute a breach of contract entitling the agent to damages, however, it did not address a situation in which the principal's termination is privileged by the prior material breaches of the agent (Pl. Br. at 13; *see Woolley*, 227 Cal App 2d at 1530). Plaintiff argues Accor's position is fundamentally inconsistent with public policy articulated in *Woolley* as the court there explained "it is a cardinal principle of agency of law that a principal who employs an agent always retains the power to revoke the agency," a power which is "irrevocable" (*id.*,). Plaintiff argues courts in New York have held this principle applies in the context of hotel management agreements (*see FHR*, 865 F Supp 2d at 1195]). If Accor's position is to be credited and the principal's termination necessarily and always forfeited the principal's claims for damages, then the power of the principal to terminate a faithless agent would become a dead letter, trapping principals in relationships with faithless agents unless the principal could afford to surrender its claims for damages (Pl. Br. at 13-14). Fortunately, plaintiff argues, this is not the law, and, consequently, Accor may not raise M&C's termination of the HMA as a defense to M&C's valid contract claims.

Next, plaintiff argues it did not forfeit its claims as asserted in the complaint by terminating the HMA (*id.* at 14). Even if M&C failed to comply with conditions precedent to terminating the agreement, courts have repeatedly held that a party's failure to comply with such conditions does not prevent the party from otherwise bringing a suit for breach of contract (*see IMG Fragrance Brands, LLC v Houbigant, Inc.*, 679 F Supp 2d 395, 403 [SD NY 2009];

Teachers Ins. & Annuity Ass'n of Am. v CRIIMI MAE Servs. Ltd. P'ship, 681 F Supp 2d 501, 510 [SD NY 2010]). Courts applying New York law have held that a contractual notice and cure provision "provides a party with a means of curing a default which would otherwise allow the non-defaulting party to terminate the agreement; it does not constitute a condition precedent to a party's right to sue" (*Spanski Enterprises, Inc. v Telewizja Polska, S.A.*, 2013 WL 81263, at *12 [SD NY 2013]; *Allan Block Corp. v County Materails Corp.*, 512 F3d 912, 919 [7th Cir 2008]). The cases relied on by Accor stand for the unremarkable proposition that a party must comply with the conditions precedent to termination before suing for termination or termination damages, neither of which M&C seeks in this case (Pl. Br. at 15). Plaintiff distinguishes *Sauer v Xerox Corp.* as the plaintiff there filed suit before serving a notice of default and before an event of default occurred (17 F Supp 2d 193, 196-197 [WD NY 1998]). Plaintiff further distinguishes *Needham v Candie's, Inc.* as, in that case, the court merely held that compliance with conditions precedent to termination was a precondition to suing for termination damages in the form of unpaid severance pay (2202 WL 1896892, at *4 [SD NY 2002]). Nothing in *Needham* suggests that plaintiff would have been barred from seeking damages for prior unpaid wages or other pre-termination breaches and damages (Pl. Br. at 15). Here, plaintiff argues that nothing in the HMA required it to comply with the conditions precedent to termination before asserting claims for breach of contract, thus M&C did not fail to comply with these conditions (*id.*).

Plaintiff maintains the complaint also states a claim for breach of fiduciary duty, arguing that fiduciary duties inherently arising from an agency relationship "create rules which are *sui generis*" (*id.* at 15-16; Restatement [Second] of Agency 13 1 Intro. Note [1958]). First, M&C stated a separate and independent claim for breach of fiduciary duty, noting that courts have held that "the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself" (Pl. Br. at 16; *Bullmore v Banc of Am. Sec. LLC*, 485 F Supp 2d 464, 470 [SD NY 2007]; *see also Advance 2000, Inc.*, 2019 WL 6725977, at *8). Plaintiff argues the HMA provides that defendant is obligated to maximize the long-term profit of the Hotel, memorializing Accor's fiduciary duty to act in M&C's best interest (HMA § 3.1 ["Manager hereby accepts the appointment on such terms and conditions and agrees to exercise commercially reasonable efforts at all times to operate and manage the Hotel in accordance with the provisions of this Agreement"]). Plaintiff argues the HMA further recognizes that Accor

assumed duties arising out of the relationship created by the HMA but independent of the contractual terms, citing Section 5.2 which states duties "may exist as a result of the relationship between the parties, including without limitation all duties of loyalty, good faith, fair dealing, full disclosure, or any other duty deemed to exist under the common law principles of agency or otherwise" (Pl. Br. at 16-17; HMA § 5.2). As such, the HMA recognizes duties "independent of [the] contract and yet emerg[ing] from a relationship of trust and confidence created by [the] contract, as in the case of a lawyer and client" (*Bullmore*, 485 F Supp 2d at 470). As a fiduciary, Accor assumed the higher duties of a trustee, the "punctilio of an honor the most sensitive" (Pl. Br. at 17; *Meinhard v Salmon*, 249 NY 458, 464 [1928]). Plaintiff further argues Accor's conduct and M&C's injury have the essential character of a tort, citing to the complaint's allegations of: (i) improper reclassification of expenses, (ii) failure to account of $1.8 million in payments and staff expenses, and (iii) allowing staff to spend Hotel funds on personal items and social gatherings (Pl. Br. at 17; Compl. ¶ 21; *Sommer v Fed. Signal Corp.*, 79 NY2d 540, 552 [1992]). These allegations exemplify Accor's violation of fiduciary duties, constituting tortious conduct (Pl. Br. at 18). Plaintiff argues it is entitled to an equitable remedy requiring Accor to disgorge all fees and ill-gotten gains from the time its faithless conduct began, an equitable remedy not available through contract law (*Broadway Nat. Bank v Barton-Russell Corp.*, 585 NYS2d 933, 945 [Sup Ct 1992]; Restatement [First] of Restitution § 197 [1959]; *see also* Restatement [First] of Agency § 469, cmt. A [1933]). Consequently, plaintiff argues Accor's motion to dismiss the breach of fiduciary duty claim must be denied.

Plaintiff also argues the HMA does not limit it's claim for breach of fiduciary duty (Pl. Br. at 18). According to plaintiff, Accor's argument relying on Section 5.2 of the HMA is at odds with the plain meaning of Section 5.2 which states, in relevant part: "[t]o the extent any fiduciary duties are inconsistent with, or would have the effect of modifying, limiting or restricting, the express provisions of this agreement . . . the terms of this Agreement shall prevail . . . [and] any liability between the parties shall be based solely on contract law" (HMA § 5.2). Section 5.2 plainly states that, to the extent any fiduciary duty would conflict with or modify the HMA, the HMA prevails and therefore expressly permits claims for breach of fiduciary duty against Accor including claims based on the existence of fiduciary duties that are consistent with but go beyond the four corners of the HMA (Pl. Br. at 18-19). For example, plaintiff argues it has asserted a claim for breach of Accor's duty of loyalty, based on Accor's diversion of Hotel funds

to pay personal expenses of Hotel employees, a duty not inconsistent with, nor modifying, the terms of the HMA (Pl. Br. at 19). Accor does not argue Section 5.2 waives any fiduciary duties but, instead, exculpates Accor from liability for breaches of fiduciary duties whose existence is beyond dispute (*id.*). To the extent that Section 5.2 could be interpreted to exculpate Accor from breach of fiduciary duty liability, plaintiff argues it is an unenforceable waiver of tort claims because "allegations of willful or grossly negligent acts are not barred by exculpatory clauses as a matter of public policy" (*id.*; *Tratado De Libre Comercio, LLC v Splitcast Technology LLC*, 2018 WL 2335797, at *7 [NY Sup Ct 2018]; *see also* Restatement [Second] of Contracts § 195(1) [1981]).

Plaintiff next argues that the complaint states a claim for breach of the implied covenant, noting that courts have held such a claim can be maintained "even though it arises from the same underlying transactions and occurrences as a breach of contract claim, where it contains allegations that are not duplicative of plaintiff['s] contract claims, but are claims that acts perpetrated by defendants deprived plaintiff . . . of the fruits of the contract" (*Dialcom, LLC v AT&T Corp.*, 20 Misc3d 1111(A), at *10 [Sup Ct Kings County 2008]). Plaintiff argues it has alleged an implied covenant existed between the parties that Accor would invest in and promote the Novotel brand in the United States (Compl. ¶ 13). Accor's breach of this understanding substantially harmed M&C and is the basis for a breach of the implied covenant claim (Pl. Br. at 20). Plaintiff further alleges that "Accor was failing in its obligation to lift the asset through its branding and group services, for which M&C was paying substantial, recurring fees" (Compl. ¶ 11). Plaintiff argues it was denied benefits reasonably expected under the bargain as any hotel management agreement implies the hotel owner's trust that the manager will (i) manage hotel property to maximize long-term profits, and (ii) market and promote the hotel through brand channels (Pl. Br. at 20-21; *Dialcom*, 20 Misc3d 1111, at *9). Consequently, plaintiff argues that Accor's motion to dismiss the breach of implied covenant claim must be denied.

Finally, plaintiff argues that the complaint states an accounting claim, in that it has pleaded a fiduciary relationship and "wherever there is a fiduciary relationship between the parties, as is the situation here, there is an absolute right to an accounting notwithstanding the existence of an adequate remedy at law" (Pl. Br. at 21; *Koppel v Wien, Lane & Malkin*, 509 NYS2d 327, 330 [1st Dept 1986]).

In addition to its opposition, plaintiff requests the court take judicial notice of a video recording interview of Accor's CEO, Sebastian Bazin, in connection with the court's consideration of Accor's motion to dismiss (Doc. No. 29). Specifically, plaintiff draws attention to 6:45 in the interview, wherein Mr. Bazin is asked whether the failure of Accor to stand out in the United States market is a missed opportunity and Mr. Bazin replies:

> Well it's missed in a sense that the two largest hospitality markets on the planet happen to be China and America, so it's actually too bad I'm not in it. But just take a cold shower, who cares. It's in the hands of five super really good American operators, and they're going to crush me if I go there and China is in the hands of three very good Chinese companies and they're going to crush me as well, so I might as well not compete with them.

(Bloomberg TV, *At The Top: Accor CEO Sebastian Bazin*, https://www.bloomberg.com/news/videos/2020-01-24/at-the-top-accor-ceo-sebastien-bazin-video).

Plaintiff does not request that the court take judicial notice of the trust of Mr. Bazin's admission, but instead asks the court to take this statement as evidence of Accor's decision not to compete in the United States market and its indifference to building the Novotel (Pl. Notice of Intent to Request Judicial Notice, at 3).

C. Defendant's Reply Memorandum

In reply, defendant reiterates that M&C wrongfully terminated the HMA, beginning by arguing that M&C's contention, that Section 15.13 of the HMA is unenforceable as against public policy, is meritless (Def. Reply at 3 [Doc. No. 30]). New York law states that, although a waiver cannot be used to prevent or enjoin a common-law termination, such a termination is nonetheless wrongful (*id.*; *see Wilson Sullivan Co. v Int'l Paper Makers Realty Corp.*, 307 NY 20, 24-25 [1954]; *Wien & Malkin LLC v Helmsley-Spear, Inc.*, 12 AD3d 65, 71-72 [1st Dept 2004]). This principle applies to hotel management agreements: owners may have common law power to terminate without following applicable contractual requirements and in breach of a waiver, but the exercise of that power is wrongful and, among other things, makes the owner liable for damages (Def. Reply at 3-4; *see Marriott Int'l, Inc. v Eden Roc, LLLP*, 104 AD3d 583, 583 [1st Dept 2013]; *FHR TB, LLC v TB Isle Resort, LP*, 865 F Supp 2d 1172, 1195 [SD Fla

2011]). Defendant further argues that the waiver and termination provision does not "conflict" with Section 15.11 which states that remedies in the HMA are "cumulative and no exclusive" of other remedies, reaffirming that the HMA contains enforceable waivers while stating that remedies not mentioned in the agreement are preserved (HMA § 15.11). Defendant argues that Section 15.13 is enforceable and terminating in spite of it is wrongful.

III. DISCUSSION

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the documentary evidence is the Hotel Management Agreement at issue.

Defendant's motion to dismiss pursuant to CPLR 3211(a)(1) must be granted. The principal issue on this motion is whether Section 15.13 of the HMA is enforceable. Section 15.13 states that the parties "irrevocably waive and relinquish any right, power, or authority existing at law or in equity, including, without limitation, any such right, power or authority referred to in

Robert E. Woolley v Embassy Suites, Inc., 227 Cal. App. 3d 1520 (1990), *Pacific Landmark Hotel, Ltd. v Marriott Hotels, Inc. et al.*, 19 Cal. App. 4th 615 (1993) and their progeny, to terminate this Agreement or Manager's authority hereunder, except in accordance with the express provisions of this Agreement" (HMA § 15.13). Although plaintiff correctly notes that in a principal-agency relationship, the principal always possesses the power to revoke defendant as an agent, New York courts routinely draw a distinction between a principal's *power* to revoke an agency outside the terms of the contract and the principal's *right* to revoke an agency without liability (*see* e.g. *Wilson Sullivan Co., Inc. v International Paper Makers Realty Corp.*, 307 NY 20, 23 [1954]; *FHR TB, LLC*, 865 F. Supp. at 1194). While plaintiff possessed the authority to terminate the HMA, as it did in December 2019, it did not have the power under the HMA to do so without consequences. As discussed below, plaintiff terminated the HMA in contravention of the agreement.

Defendants' argument in favor of dismissal focuses on whether plaintiff had the right to terminate the HMA pursuant to Section 14.3. That section states:

> Notwithstanding the foregoing or anything to the contrary contained in this Agreement, neither Owner nor Manager shall be deemed to be in default under this Agreement with respect to any of the Events of Default specified in Section 14.1(a), (d) or (e) or Section 14.2(a), (d) or (e), or have the right to terminate this Agreement in respect of such Event of Default, if (A) a bona-fide dispute with respect to such Event of Default has arisen between Owner and Manager and (B) either (x) less than fifteen (15) days (or such later period as agreed to in writing by Owner and Manager) has elapsed following the expiration of the cure period applicable to such Event of Default or (y) such dispute has been submitted to the appropriate court of competent jurisdiction pursuant to Section 15.1 prior to the expiration of the fifteen (15) day (or later) period in (x) above.

(HMA § 14.3).

On the record before the court, neither party had the right to terminate the Agreement in respect of an Event of Default between Owner and Manager as (i) a bona-fide dispute with respect to the Event of Default had in fact arisen between the parties and (ii) the dispute had been submitted to the appropriate court of competent jurisdiction prior to the expiration of the fifteen-day grace period following expiration of the cure period (*see Accor Management US Inc. v M&C New York (Times Square) LLC*, Index No. 655015/2019). Plaintiff attempts to dismiss these facts by arguing that the fifteen-day grace period had expired on June 13, 2019 as it had initially

served its Notice of Default on defendant on April 29, 2019, thereby triggering the 30-day cure period (April 29, 2019 Letter [Doc. No. 8]). This argument fails to address the fact that defendant, in response to the Notice of Default, tendered the requested $3.2 million to plaintiff and promised to effect steps to cure the alleged defaults (Compl. ¶ 18; May 30, 2019 Letter [Doc. No. 9]). It was not until August 19, 2019 that plaintiff responded to defendant stating that defendant had not sufficiently explained how the alleged defaults were cured (August 19, 2019 Letter [Doc. No. 10]). In the letter, plaintiff granted defendant an additional eleven days to provide information about how the defaults identified in the Notice of Default were cured, effectively extending defendant's time to cure (*id.*). Within these eleven days, defendant filed suit regarding the dispute, nearly four months prior to the filing of this action. Consequently, plaintiff had no right to terminate the HMA without liability on December 17, 2019.

In New York, where the procedures for cancellation provided by the contract specify conditions precedent to the right of termination, those procedures must be followed (*see Lot 57 Acquisition Corp. v Yat Yar Equities Corp.*, 63 AD3d 1109, 1110 [2d Dept 2009]). Because plaintiff failed to abide by the conditions precedent to the right of termination, it cannot obtain remedies conditioned on the HMA (*see Sauer*, 5 Fed. App'x at 55; *Filmline (Cross-Country) Prods., Inc. v United Artists Corp.*, 865 F2d 513 [2d Cir 1998]). Consequently, defendant's motion to dismiss must be granted and plaintiff's complaint dismissed.

It is hereby

ORDERED that the motion to dismiss of defendant, Accor Management US, Inc., is GRANTED and the complaint is DISMISSED; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment against plaintiff M&C New York (Times Square) LLC and in favor of defendant Accor Management US, Inc., dismissing the complaint in its entirety together with costs in an amount to be taxed by the Clerk upon submission of an appropriate bill od costs.

For the foregoing reasons, defendant's motion to dismiss is granted.

February 28, 2021
DATE

O. PETER SHERWOOD, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED	[ ]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	