

<b>Morgans Hotel Group v Tourico Holidays, Inc.</b>
2022 NY Slip Op 33861(U)
November 15, 2022
Supreme Court, New York County
Docket Number: Index No. 651543/2022
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART 14**

*Justice*

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MORGANS HOTEL GROUP,

Plaintiff,

- v -

TOURICO HOLIDAYS, INC., KUONI GLOBAL TRAVEL  
SERVICES (SCHWEIZ) AG, HOTELBEDS USA, INC.,  
HOTELBEDS USA HOLDCO, INC., GTA AMERICAS, LLC,

Defendant.

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INDEX NO. 651543/2022

MOTION DATE 10/31/2022

MOTION SEQ. NO. 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 31, 32, 33

were read on this motion to/for DISMISSAL.

Defendants’ (Tourico Holidays, Inc., Hotelbeds USA Holdco, Inc., and GTA Americas, LLC) motion to dismiss plaintiff’s complaint is denied.

**Background**

This action arises out of an alleged breach of contract. Beginning on September 21, 2012, plaintiff, a hotel group, contracted with Tourico Holidays (“Tourico”) and GTA Americas, LLC (“GTA”), travel agencies, wherein plaintiff provided hotel rooms to Tourico’s and GTA’s clients. Tourico and GTA engaged in separate contracts with plaintiff. These contracts were renewed at least three times between 2012 and 2019. Pursuant to the agreements, Tourico and GTA were required to remit a fee to plaintiff for every room contracted at rates decided upon in the contracts. From June 10, 2013 until July 9, 2019, plaintiff supplied defendants with the rooms, but defendants allegedly never remitted a fee to plaintiff as required by the contract.

Plaintiff alleges that Tourico breached the contract between the parties and is indebted to plaintiff in the sum of \$192,073.56. Similarly, plaintiff alleges that GTA is indebted to plaintiff in the sum of \$280,343.41.

Tourico, GTA, and co-defendant, Hotelbeds USA Holdco, Inc. (“Hotelbeds”), move to dismiss plaintiff’s claims for breach of contract, account stated, open account, and unjust enrichment pursuant to CPLR 3211(a)(1) and 3211 (a)(7). The remaining defendant (Kuoni Global Travel Services [Schweiz] AG) is not a movant on this motion. Defendants contend that Hotelbeds is not a party to the contracts because it did not “merge” with Tourico as plaintiffs allege. Additionally, defendants state that plaintiff’s claims are time-barred, or alternatively should be dismissed under the doctrine of laches because plaintiff delayed filing its complaint despite knowing that Tourico and GTA did not pay plaintiff’s invoices since 2013 and 2014, respectively.

In response, plaintiff contends that defendants’ attempt to demonstrate no merger occurred is futile as affidavits cannot be used as documentary evidence. Plaintiff further contends that the claims are not time-barred because these breaches were a continuation of wrongs occurring with each contract renewal. Finally, plaintiff claims that laches cannot apply to a legal claim as it is an equitable doctrine, and defendants failed to demonstrate that they suffered an injury or prejudice as a result of plaintiff’s delay.

In reply, defendants contend the affidavit is appropriate and further supports other documentary evidence submitted. Nevertheless, because defendants seek dismissal pursuant to both CPLR 3211(a)(1) and (a)(7), they claim that the affidavit is admissible under CPLR 3211(a)(7). Defendants further assert that the continuing wrong doctrine does not apply because defendants committed a single breach (failing to pay the invoices) that led to damages

accumulating thereafter. Additionally, defendants contend that laches is an available defense and that because plaintiff waited so long to file the complaint, many of the individuals involved in signing the contracts are no longer employees of either party and many documents related to the claim may no longer exist.

### Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] 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 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 53 NYS3d 598 [2017] [citation and internal quotations omitted]).

"Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," (*Leon v Martinez*, 84 NY2d 83, 88).

"Dismissal under CPLR 3211(a)(7) is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 150 NYS3d 79 [2021] [internal citations and quotations omitted]).

As an initial matter, defendants' documents fail to demonstrate that Hotelbeds is not a party to the contracts. Defendants present an affidavit illustrating the merger agreement dated February 5, 2017. Essentially, defendants claim that Hotelbeds is a parent company to Travel Holdings Parent, LLC, which is the parent company of Travel Holdings, Inc., the parent company of Tourico. Even if defendants' claim that Tourico and Hotelbeds did not merge is true, the corporations represented themselves as one and the same. In fact, on September 19, 2018, defendants informed their clients that Hotelbeds, Tourico, and GTA "moved under the same ownership in 2017," and represented to their clients that had "plans to unify all contracts from [the] legacy organizations into the Hotelbeds Group," (NYSCEF Doc. No. 32 at 6). This Court recognizes that parties who did not sign a contract should not ordinarily be held to the obligations of that contract, but defendants failed to provide sufficient documentation that Hotelbeds is not a party to the contract at this stage of the case.

### **Breach of Contract CPLR 3016(f) – First Cause of Action**

Pursuant to CPLR 213 (2), the statute of limitations for a contractual obligation is six years which "generally accrues at the time of the breach," (*Hahn Automotive Warehouse Inc., v American Zurich Ins. Co.*, 18 NY3d 765, 771, 944 NYS2d 742 [2012]).

Plaintiff brings this cause of action only against defendants Tourico and Hotelbeds. Plaintiff claims these defendants breached the contract by failing to make the payments they owed plaintiff, and as proof plaintiff annexed its ledgers to the complaint (NYSCEF Docs. 8 and 9). These contain transactions between the parties dating back to 2013 and form the basis of defendants' motion on statute of limitations grounds.

Defendants' moving papers state that "the statute of limitations has long expired for the majority of [plaintiff's] claims against [defendants]" (NYSCEF Doc. No. 13 at 18). Defendants further state "to the extent [plaintiff] attempts to collect on amounts due before 2016, more than seven years have passed since said payments came due," (*id.*).

Despite plaintiff's claim that defendants fail to specify dates to which the statute of limitations should be applied, defendants clearly claim that all debts allegedly accruing before 2016 should be dismissed from this case, which was started in 2022.

However, while defendants have moved for a cutoff point of everything before January 1, 2016, that fails to take into account the actual date the payments were due. Because the ledgers only list the date of the charge, that is not the date of the breach – the date of the breach is the date the bill was due and not paid. This Court has no idea – because defendants failed to demonstrate – whether the fee due for a room booked on January 1 was due 30, 60 or 90 days later or something else. Or perhaps all the rooms booked in a month were sent in a bill the following month, to be paid within thirty days of the bill. Or perhaps it was billed quarterly, or yearly. Or maybe there were no bills. This Court has no idea because defendants did not bother to show it, and it is defendants' burden. The point is that just because a room shows up in plaintiff's ledger as being booked on December 15, 2015, it does not mean that the breach was on that day; it is safe to conclude that it was no earlier than that day, but the actual date that the booking fee was due to plaintiff is still a mystery. Therefore, without more, this Court cannot just arbitrarily dismiss everything in plaintiff's ledger dated in 2015 and so the branch of the motion to dismiss based on statute of limitations is denied.

**Account Stated –Third and Fourth Causes of Action**

“An action based on an account stated accrues on the date of the last transaction in the account” *Stewart R. Fink, PC v Weiss* 7 Misc3d 138(A), 801 NYS2d 242 [2nd Dept. 2005] [internal quotations and citation omitted].

Defendants offered a ledger of the transactions between defendants and plaintiff. The last transaction between Tourico and plaintiff is dated July 7, 2019. Similarly, the last transaction between GTA and plaintiff is dated February 19, 2021. Both these dates are within the statute of limitations, and the motion to dismiss these causes of action on that ground is denied.

**Open Account—Fifth and Sixth Causes of Action**

The statute of limitations for an action based on an open account begins to run at “the time of the last transaction in the account on either side,” *Stankevich v Apple Bank for Sav.*, 43 Misc3d 11, 1, 983 NYS2d 392 [2d Dept 2014].

Defendants offered a ledger of the transactions between defendants and plaintiff. The last transaction between Tourico and plaintiff is dated July 7, 2019. Similarly, the last transaction between GTA and plaintiff is dated February 19, 2021. Again, both these dates are within the statute of limitations, and the motion to dismiss these causes of action on that ground is denied.

**Unjust Enrichment—Seventh and Eight Causes of Action**

An unjust enrichment claim is rooted in "the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Thus, in order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain

what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516, 950 NYS2d 333 [2012] [internal quotations and citations omitted]).

The parties agreed that plaintiff would provide hotel rooms to defendants' clients and defendants agreed to pay plaintiff for that service. Plaintiff fulfilled its obligations and booked the rooms but was not paid and defendants got the hotel rooms without paying what defendant (allegedly) promised to pay plaintiff. Therefore, plaintiff has alleged that defendants got a benefit without paying plaintiff, that plaintiff never intended to do it for free, that just isn't fair, and the Court should not allow defendants to get away with it. Because defendants have not shown how a statute of limitations has run, this cause of action is not dismissed.

#### **Breach of the Covenant of Good Faith and Fair Dealing – Ninth Cause of Action**

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153, 746 NYS2d 131 [2002] [internal quotations and citations omitted]).

Plaintiff brings this claim against Tourico and Hotelbeds claiming they engaged in creating corporate shell transactions to frustrate the contract. As noted, claims based on contractual liabilities are limited to a six-year statute of limitations. Therefore, plaintiff's claim

for breach of the covenant of good faith and fair dealing dating is not time-barred as the merger occurred in 2017, within the six-year timeframe.

**Summary**

The Court notes that defendants claim laches as a defense to plaintiff’s claims. However, defendants failed to demonstrate the prejudice they have experienced as a result of plaintiff’s delay in bringing this action. The mere possibility that documents no longer exist (despite continuing to do business with plaintiff as recently as 2019) is not a concrete harm at this stage of the case, especially when discovery has not yet begun.

Accordingly, it is hereby


ORDERED that defendants’ motion to dismiss plaintiff’s first, third, fourth, fifth, sixth, seventh and eighth causes of action is DENIED; and it is further

ORDERED that defendants are instructed to file an answer pursuant to the CPLR.

A conference is scheduled in this matter for December 6, 2022 at 12:00 p.m.

By November 29, 2022, the parties are directed to upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether a conference is necessary (i.e., if the parties agree, then an in-person conference may not be required). The failure to upload anything will result in an adjournment of the conference.

11/15/2022  
DATE

  
ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE