IHG Mgt. (Maryland) LLC v West 44th St. Hotel LLC
2018 NY Slip Op 30623(U)
April 9, 2018
Supreme Court, New York County
Docket Number: 655914/2017
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN PART 3
Justice

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IHG MANAGEMENT (MARYLAND) LLC,

Plaintiff,

INDEX NO. 655914/2017

MOTION DATE 04/09/2018

MOTION SEQ. NO. 001

- V -

WEST 44TH STREET HOTEL LLC, TISHMAN ASSET CORPORATION

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 3, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 69

were read on this application to/for Preliminary Injunction

Upon the foregoing documents, it is

ORDERED Plaintiff's Motion for a Preliminary Injunction is GRANTED as stated on the April 4, 2018 record and transcript (Michael Barfield, OCR) at 22:12-29:19; it is further

ORDERED Plaintiff shall remit a bond or undertaking in the amount of $10,000 within 5 days following the Entry of this Order as stated on the April 4, 2018 record and transcript (Michael Barfield, OCR) at 29:20-37:1; it is further

ORDERED while the Court relies on the rationale provided in the above referenced transcript it also explains as follows:

Plaintiff has moved pursuant to CPLR 6301 for a preliminary injunction enjoining Defendants from terminating the Management Agreement, removing Plaintiff as manager of the Hotel and self-operating the Hotel, until a full resolution of this matter on the merits.

To obtain a preliminary injunction, Plaintiff must show (1) a likelihood of success on the merits, (2) irreparable harm absent the injunction, and (3) a balancing of the equities in its favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990).

Likelihood of success on the merits

On a motion for a preliminary injunction, the movant need only make a prima facie showing of a likelihood of success on the merits of its underlying claims. *See Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 553 (1st Dep't 1982). First, Plaintiff argues no event of default occurred entitling Defendants to terminate the HMA. Plaintiff asserts the provisions of the HMA are extremely generic and Plaintiff has satisfied those provisions.

The HMA requires (1) Plaintiff "exercise commercially reasonable, good faith and diligent efforts," (2) use "reasonable discretion and business judgment, consistent with sound and prudent practices of first class hotel operators in the Borough of Manhattan, New York" in operating the Hotel, and (3) comply with the "duties of care, loyalty, good faith and fair dealing and other duties customarily owed by an agent to a principal in an agency relationship to the extent recognized under common law or otherwise." HMA §§1.01, 1.04, 16.01. Plaintiff also argues it has properly passed every performance test outlined in §14.03.

Defendant argues Owner terminated the HMA pursuant to its contractual rights. Defendants provided a detailed statement of all of Plaintiff's alleged defaults in its six-page Notice of Default dated April 18, 2017. Moreover, Defendant asserts the performance test outlined in § 14.03 has nothing to do with Owner's rights to terminate IHG pursuant to the default provisions under Sections 14.01 and 14.02. Contrarily, Plaintiff argues each and every default allegation relates to the bottom-line performance of the Hotel, which is objectively measured by the performance test provided in § 14.03.

In opposition to the motion, Defendants again argue the Managing Agreement is a personal services contract, that cannot be enforced by specific performance or injunction and can be terminated at will. In conjunction with Motion Sequence 002, however, the Court already disposed of the argument that this HMA is exempt from specific performance under both an analysis of applicable Maryland law and an analysis of personal service contracts.

Also, under Section §16.01, the parties expressly agreed the HMA could NOT be terminated at will. Plaintiff also argues specific performance and preliminary injunction are relief available for anticipatory breach under Maryland law. Title 23 of the Maryland Commercial Code provides for specific performance as a remedy for anticipatory breach of a management agreement. Md. Code, Com. Law § 23-102(b). (A court may order the remedy of specific performance for anticipatory or actual breach or attempted or actual termination of an operating agreement notwithstanding the existence of an agency relationship between the parties to the operating agreement).

While the Court is not charged with determining whether Plaintiff ultimately defaulted under the HMA at this time, it does find Plaintiff has made a prima facie showing of a likelihood of success which has not been successfully refuted by Defendants.

Irreparable Harm

Plaintiff argues it will suffer irreparable harm due to (1) loss of a unique and irreplaceable asset and (2) harm to its business reputation and goodwill. Defendants assert where a hotel manager receives fees in return for its services managing the Hotel, the Manager's damages are calculable and thus no irreparable harm exists. *See Woolley v. Embassy Suites, Inc.*, 278 Cal. Rptr. 719, 728 (Ct. App. 1991).

Plaintiff argues the Managing Agreement provides Manager also is entitled to additional benefits, including construction of the Hotel to InterContinental brand standards and specifications, the Hotel would be identified to the public as associated with the InterContinental Brand, and that Manger would be entitled to include the Hotel in its marketing program. *See* Recitals at A, § 1.03, § 1.04(j). The loss of a business reputation and good will sometimes constitute irreparable harm. *See DMF Leasing v. Budget Rent-A-Car of Maryland, Inc.*, 161 Md. App. 640, 651 (Md. Ct. Spec. App. 2005).

Most compelling to this Court is, however, if a Preliminary Injunction is denied Plaintiff will be deprived of its contractual right (under Maryland Law) to seek specific performance of the HMA. It is not disputed if the Preliminary Injunction is not issued, Defendants will follow through on their attempt to terminate the HMA. Therefore, if Plaintiff can demonstrate it did not default, it will be unable to retroactively return as manager to the property. The necessary forfeiture of a contractual right outweighs Defendants alleged harm in having to work with Plaintiff for a few more months.

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Balance of the Equities

Finally, the equities prong "requires the court to look to the relative prejudice to each party accruing from the grant or a denial of the requested relief." *Sau Thi Ma v. Xaun T. Lien*, 198 A.D.2d 186, 186-87 (1st Dep't 1993). Maryland courts have held "with respect to the balance of the equities, in termination cases, courts usually find that the equities tip in favor of a long-term franchisee facing termination, reasoning that maintenance of the status quo will not injure the franchisor while failure to grant an injunction and permit termination might result in destruction of the franchisee's business." *DMF Leasing*, 161 Md. App. at 651.

Plaintiff argues if the injunction is not granted, Plaintiff will be deprived of its day in court. In addition, Plaintiff contends such a decision would cause significant uncertainty with respect to hotel management agreements that are governed by Maryland law. Defendants argue they are being prohibited from managing their own Hotel, and, if forced to continue to employ Plaintiff as manager, Owner might default on its loan obligations. Defendants claim their Owner's debt financing recently matured and all refinancing options are at significantly less favorable terms that may require debt payments in excess of the Hotel's available cash flow.

While Defendants complaints may have credence, the Court is also cognizant that the Defendants voluntarily entered into a long-term management agreement with Plaintiff. To permit Defendants to unilaterally terminate the contract, in violation of Maryland law and without establishing whether the grounds on which the termination is based are valid, would unduly prejudice Plaintiff.

Therefore, the Court finds all factors tip in favor of Plaintiff and GRANTS Plaintiff's motion for a Preliminary Injunction (Motion Sequence 001), enjoining Defendants from terminating the HMA until the action has been resolved.

Consequently, Defendant's motion to vacate the TRO (Motion Sequence 003) is DENIED. (Separate Order issued for Motion Sequence 003).

Bond

Pursuant to CPLR 6312(b), the Court finds Plaintiff needs to pay a bond/undertaking in order to obtain this Preliminary Injunction. Undertakings should be rationally related to the quantum of damages which would be sustained in the event that it is later determined the injunction was not proper. See, *51 W. 62nd Owners Corp. v. Harness Apt. Owners Corp.*, 173 A.D.2d 372, 373 (1st Dep't 1991).

The parties have agreed Plaintiff shall remit a bond in the amount of $10,000 which shall be posted within 5 days of the entry of this Order.

4/ 9 /2018
DATE

EILEEN BRANSTEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE