Eden Roc, LLLP v Marriott Intl., Inc.

2014 NY Slip Op 30377(U)

February 6, 2014

Supreme Court, New York County

Docket Number: 651027/2012

Judge: Melvin L. Schweitzer

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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EDEN ROC, LLLP,

Plaintiff,

- against -

MARRIOTT INTERNATIONAL, INC.,
MARRIOTT INTERNATIONAL DESIGN &
CONSTRUCTION SERVICES, INC. and
RENAISSANCE HOTEL MANAGEMENT
COMPANY, LLC,

Defendants.

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Index No. 651027/2012

DECISION AND ORDER

Motion Sequence No. 006

MELVIN SCHWEITZER, J.:

Defendants Marriott International, Inc., Marriott International Design & Construction Services, Inc., and Renaissance Hotel Management Company, LLC (collectively, Marriott), move, pursuant to CPLR 2221 (d) (2), for leave to reargue Marriott's prior motion to dismiss (Prior Motion) to the extent that the court denied the motion as to the thirteenth cause of action for an accounting.

The motion for reargument as to the accounting claim is granted because the court overlooked Marriott's argument as to this cause of action which was contained in its moving memorandum (*see* CPLR 2221 [d] [2]; *Martin v Portexit Corp.*, 98 AD3d 63, 65 [1st Dept 2012] ["motion for reargument was properly granted because the court overlooked the arguments plaintiff initially set forth in opposition to defendants' motion regarding the electronic signatures on the doctors' affirmations"]).

In the Prior Motion, Marriott moved for dismissal of the entire complaint. As for the thirteenth cause of action for an accounting, Marriott nestled its argument in footnote 9 in a memorandum of law consisting of 35 pages with 14 footnotes, and referenced this footnote 9 in footnote 6 in its reply memorandum. Eden Roc responded to it in footnote 10 in its opposition memorandum, arguing that "[b]ecause the Amended Complaint supports the conclusion that Renaissance [Renaissance Hotel Management Company, LLC] has a fiduciary duty to Eden Roc, the Court should also deny Defendants motion to dismiss the Thirteenth Cause of Action for an accounting (which they make in footnote 9 of their Memorandum of Law)." Nevertheless, the argument was made, and, therefore, this situation comes within the parameters of the remedy afforded by CPLR 2221 (d) (2) (*see e.g. Martin v Portexit Corp.*, 98 AD3d at 65; *Cuomo v Ferran*, 77 AD3d 698, 700-701 [2d Dept 2010], *lv dismissed* 16 NY3d 759 [2011]; *Ickes v Buist*, 68 AD3d 823, 824 [2d Dept 2009]).

Eden Roc asserts that a "motion for reargument 'is not a vehicle permitting a previously unsuccessful party to once again argue the very questions previously decided or to assert new, never previously offered arguments,'" quoting *Kent v 534 E. 11th St.* (80 AD3d 106, 116 [1st Dept 2010]). This assertion is without merit. The basis for the reargument motion is that the court overlooked Marriott's argument in support of dismissal of the accounting cause of action. Thus, Marriott is neither "once again argu[ing] the questions previously decided" nor asserting "new, never previously offered arguments."

Turning to the merits, the thirteenth cause of action of the amended complaint alleges that defendants undertook to operate and manage the Eden Roc Renaissance Hotel (Hotel) solely for the account of Eden Roc, exercising exclusive control over the Hotel's revenue, assets, and books and records. Eden Roc claims that, as the Hotel's owner, it is entitled to an accounting of all Hotel assets (amended complaint, ¶ 228). The claim for an accounting is dismissed, however, because of the dismissal of the fiduciary duty claim (ninth cause of action) (*see CIFG Assur. N. Am., Inc. v Goldman, Sachs & Co.*, 106 AD3d 437, 438 [1st Dept 2013] [accounting claim "dismissed for lack of a predicate fiduciary relationship"], citing *Bradkin v Leverton*, 26 NY2d 192, 198 n 4 [1970] [considering absence of a "fiduciary relationship between the plaintiff and the defendant, the plaintiff has no right to the accounting sought by the second cause of action"]; *see also Eden v St. Luke's-Roosevelt Hosp. Ctr.*, 96 AD3d 614, 615 [1st Dept 2012] ["breach of fiduciary duty and accounting causes of action fail against all defendants, because there was no fiduciary relationship between plaintiff and any of them"]; *Sergeants Benevolent Assn. Annuity Fund v Renck,* 19 AD3d 107, 111 [1st Dept 2005] ["[s]ince the complaint sufficiently alleges a breach of fiduciary duty [regarding] property in which plaintiff has an interest, [accounting claim] should also be reinstated"]).

The parties' relationship is governed by contract which, according to the amended complaint, provides Eden Roc with the right to obtain financial information. For example, paragraph 132 of the amended complaint cites article 11.11 of the "Management Agreement," dated September 28, 2000, between Eden Roc's predecessor-in-interest and Renaissance, which:

> "imposes upon Renaissance a series of obligations upon 'Termination,' including, without limitation, the obligation to (i) release and transfer to Eden Roc of all of Eden Roc's funds held or controlled by Renaissance; (ii) make available to Eden Roc all financial books and records relating to the Hotel; (iii) assign to Eden Roc all operating licenses and permits; and (iv) provide Eden Roc with a list of all account debtors, advance bookings at the Hotel, and such other information as Eden Roc reasonably requires to ensure the continued orderly operation of the Hotel."

Moreover, in its opposition memorandum (page 4), Eden Roc alleges that, under the Management Agreement, Marriott was contractually obligated to:

accounting cause of action where one party controls the financial accounts of the other" (memorandum in opposition at 3). In that decision, the court found that, by the express terms of the parties' contract, "the defendants were required to make accountings and to permit audits so as to determine the compensation" (*id.* at 198). Similarly, as discussed above, Eden Roc contends that it is entitled to financial information pursuant to the Management Agreement. But in the absence of a fiduciary or confidential relationship, Eden Roc is not entitled to maintain a cause of action for an accounting. Moreover, that 1960 trial court decision is not binding on this court, unlike the recent Court of Appeals and First Department decisions cited above.

The same is true for *Scaglione v Castle Restoration Constr. Inc.* (2009 NY Slip Op 31257[u], 2009 NY Misc LEXIS 5793 [May 29, 2009 Sup Ct, Queens County]), also cited by Eden Roc. There, in denying the motion to dismiss the accounting cause of action, the court stated that "the allegations that defendant agreed to pay a percentage of gross revenues to plaintiff in reliance on an agreement, express or implied, may support a finding that defendant owed plaintiff a fiduciary obligation with respect to the allotted percentage of gross revenues." Besides being nonbinding, that decision, involving an employer-employee relationship, is not relevant to the facts presented here.

Accordingly, it is

ORDERED that the motion for reargument is granted, and upon reargument, the thirteenth cause of action for an accounting is dismissed.

Dated: February 6, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER