



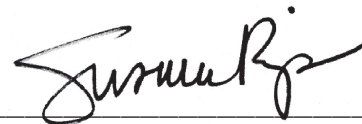
in which a party has discretion to execute tasks that cannot be objectively measured, is a classic example of a personal services contract that may not be enforced by injunction (see e.g. *Wien & Malkin LLP, v Helmsley-Spear, Inc.*, 12 AD3d 65, 71-72 [1st Dept 1991], *revd on other grounds*, 6 NY3d 471 [2006][property management agreement a personal services contract]; *Woolley v Embassy Suites, Inc.*, 227 Cal App 3d 1520, 1534, 278 Cal Rptr 719 [Cal App 1st Dist 1991]; Restatement 2d of Contracts, § 367).

While it is unnecessary to reach the question, we note that, contrary to defendant's contention, the agreement is not an agency agreement. Defendant lacks control over plaintiff, the alleged agent, since the agreement provides for plaintiff to have unfettered discretion in managing the hotel's operations (see *Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 96-97 [1st Dept 2009]).

Defendant failed to present evidence that the \$400,000 undertaking was not rationally related to its potential damages (*Kazdin v Putter*, 177 AD2d 456 [1st Dept 1991]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 26, 2013

A handwritten signature in black ink, appearing to read 'Susan R. [unclear]', written over a horizontal line.

CLERK