

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,
PENNSYLVANIA

ACE GROUP PITTSBURGH LLC,

CIVIL DIVISION

Plaintiff,

No. GD-21-001310

v.

**WRITTEN CLOSING FOLLOWING
HEARING ON PLAINTIFF'S RENEWED
EMERGENCY MOTION FOR
PRELIMINARY INJUNCTIVE RELIEF**

Y HOTEL, LP, Y HOTEL MASTER
TENANT LLC, PITTSBURGH URBAN
INITIATIVES SUB-CDE 8, LP, PNC CDE
35, LP, PNC BANK, N.A., and JOHN
DOE,

Filed on Behalf of Plaintiff:
Ace Group Pittsburgh, LLC

Defendants.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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Y HOTEL, LP, Y HOTEL MASTER TENANT
LLC, PITTSBURGH URBAN INITIATIVES
SUB-CDE 8, LP, PNC CDE 35, LP, PNC
BANK, N.A., and JOHN DOE,
Defendants.

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I. SUMMARY OF ARGUMENT

Ace has shown that it is entitled to preliminary injunctive relief to protect its right to manage the Hotel.¹

As set forth in Ace's briefs and as demonstrated at the June 22, 2021 hearing, the HMA and the SNDA give Ace the right to manage the Hotel unless the HMA is terminated for very specific reasons, none of which apply here. Defendants have attempted to manufacture defaults by Ace in a coordinated effort to (i) avoid paying Ace approximately \$800,000 in past due management fees; and (ii) sell the Hotel as an unencumbered asset to pay off loans. Defendants tried to sell the Hotel while keeping Ace completely in the dark about their plans and even entered into a contract for the sale of the Hotel weeks *before* attempting to terminate the HMA.

And as Ace's President (Brad Wilson) testified, Ace will suffer irreparable harm if it is improperly terminated as the manager of the Hotel because its brand will suffer in ways that cannot

¹ Defined terms are consistent with Ace's brief in support of its renewed emergency motion for injunctive relief.

be quantified by money damages. Indeed, Defendants' plan to reopen the Hotel as an Airbnb would have a devastating impact on Ace's brand.

In addition, the Court should grant Ace's motion because that is the only way to reach a fair result as a practical matter. Without injunctive relief, Ace will be left with nothing. Any damages claim against Owner and Master Tenant—who claim to have no assets—would be worthless. On the other hand, if the Court grants Ace's motion, the parties will be able to reach a business resolution for the Hotel that takes into account Ace's rights.

II. ARGUMENT

A. Ace Had Every Reason to Ensure the Hotel Was Managed Properly.

Brad Wilson testified that as part of convincing Ace to manage the Hotel, Owner gave Ace an indirect equity interest in the Hotel. This equity interest gave Ace every reason to ensure that the Hotel was managed properly because the Hotel's success would benefit Ace financially.

In addition, Mr. Wilson testified that because of this equity interest, Ace decided to defer certain management fees in order to help Owner make its debt service payments for the Hotel. Owner asked Ace to defer its management fees because the Hotel was saddled with significant debt from its \$23 million renovation and the Hotel had financial challenges as a result of being overleveraged.

Mr. Wilson further testified that when he offered suggestions for how to potentially cut expenses for the Hotel, Nate Cunningham (who controls Owner and Master Tenant) pushed back. Mr. Cunningham was concerned that cutting expenses would impact the quality of the Hotel's service. In addition, Mr. Wilson testified that the hotel market in Pittsburgh struggled overall in 2019 due to an oversupply of rooms and that the Hotel significantly outperformed its competitive set that year.

B. Defendants Manufactured Alleged Defaults Following Ace’s Demand for Payment of Its Past Due Management Fees.

Despite Ace’s successful management of the Hotel, Owner struggled to satisfy its burdensome debt repayment obligations. Owner and Master Tenant’s financial condition worsened in 2020 due to the impact of COVID-19. When Ace finally decided to demand repayment of the approximately \$800,000 in past due management fees in April 2020, Owner and Master Tenant started making excuses for why they did not owe Ace. They were looking for a way out from their financial problems, and so they pointed the finger at Ace.

Just *six days* after Ace demanded repayment of its past due management fees, Master Tenant sent a notice of default for the first time. After Ace responded by denying the defaults, offering to provide additional information, and offering to send the parties’ budget dispute to expert resolution pursuant to the terms of the HMA, Master Tenant went silent. *See* Plaintiff’s Exhibit 4 (May 8, 2020 letter from Ace stating that Ace “is willing to utilize the Expert Resolution Process for the Annual Operating Projection discussed in the HMA. Please let us know if Master Tenant agrees to proceed with expert resolution.”)

Defendants’ emails reveal why Master Tenant made no attempt to follow the expert resolution requirements of the HMA: Master Tenant wanted Ace out so it could avoid paying Ace the past due management fees and sell the Hotel as an unencumbered asset.

C. Defendants Left Ace in the Dark about Their Plans to Sell the Hotel.

Owner and Master Tenant made no attempt to keep Ace informed about their efforts to sell the Hotel. Instead, Owner entered into a contract for the sale of the Hotel in October 2020—a few weeks *before* Owner issued the purported notice of termination of the HMA.

With the Hotel under contract for sale, Owner and Master Tenant told the Lenders that terminating Ace was urgent in connection with completing the sale of the Hotel:

We have two important milestones that necessitate us getting the Termination Notice out as soon as we can. One, we are required to give the Buyer satisfactory evidence of the termination of the HMA 14 days prior to the end of the due diligence period. Two, in the event that Ace were to try and file some sort of emergency injunction to the termination (which we have fully prepared to clear), we need some amount of time to be able to clear the attempted injunction prior to closing.

See Plaintiff's Exhibit 10 (November 13, 2020 email from Nate Cunningham). The above email proves that Defendants were attempting to terminate Ace as the manager of the Hotel in order to sell the Hotel as an unencumbered asset to a buyer that was already under contract. Once the buyer was under contract, Owner and Master Tenant also wanted to terminate Ace in order to avoid their obligation to obtain Ace's approval for a sale of the Hotel under the HMA. *See* Complaint, Ex. A at § 12.1 ("Without [Ace]'s Approval, neither Master Tenant nor Owner shall consummate any Ownership Transfer...").²

Another email from Nate Cunningham to the Lenders a few weeks later confirms what was driving Defendants' effort to sell the Hotel: Owner and Lenders wanted the Hotel sold so that Owner could pay back its loans. In response to a payment demand from the Lenders, Mr. Cunningham stated as follows: "Unfortunately, there are no funds available to process this cash memo. However, the property is under agreement and we hope that it will be sold this month, ***allowing us to pay off the loans.***" *See* Plaintiff's Exhibit 11 (December 7, 2020 email from Nate Cunningham) (emphasis added).

² Nate Cunningham claimed at the hearing that Owner and Master Tenant were not required to get Ace's approval to enter into a contract for the sale of the Hotel. He claimed that approval by Ace would have only been necessary before the sale closed if the HMA were still in place, but the purported termination of the HMA made Ace's approval of the sale unnecessary.

D. Defendants' Claim that They Properly Terminated the HMA Is Without Merit.

Nate Cunningham claimed at the hearing that Ace's poor financial performance justified its termination. While Ace disputes that it is to blame for the Hotel's financial struggles (which were caused by Owner's excessive debt rather than any performance shortcomings by Ace), Mr. Cunningham's unsupported allegations are irrelevant because Master Tenant does not have the right under HMA to terminate Ace simply because it wishes that the Hotel were performing better financially.³

There are very specific and limited reasons why Ace can be terminated under the terms of the HMA, and Defendants have not shown that the requirements for termination were met. Indeed, Defendants have not been able to evince *any* specific breaches of the HMA by Ace that would justify Ace's termination. Accordingly, any suggestion that Master Tenant's purported termination of Ace was done in compliance with the HMA is unsubstantiated. As Brad Wilson confirmed in his testimony at the hearing, Master Tenant had no basis to terminate Ace.

In particular, the disputes identified in Master Tenant's purported termination notice regarding whether Ace failed to meet a certain performance standard and whether Ace failed to comply with certain budgetary obligations require expert resolution under the express terms of the HMA. *See* Complaint, Ex. A at § 3.3(g) (addressing whether Ace may be terminated based on a specific performance test and stating that any "[a]ny dispute pursuant to this Section 3.3(g) shall be resolved via the Expert Resolution Process");⁴ *id.* at § 4.2 (addressing the process for Master

³ Mr. Cunningham's claim that Ace "abandoned" the Hotel is also without merit because Mr. Cunningham admitted that Owner and Master Tenant stopped funding the Hotel's operations entirely.

⁴ Mr. Cunningham testified at the hearing that he was sure that Ace disputed Master Tenant's claim that Ace failed the performance test set forth in HMA § 3.3(g). Thus, at a minimum, the dispute over the performance test should have gone to expert resolution before Master Tenant

Tenant and Ace to agree on a budget and stating that if there is any component of the budget that is in dispute, “the component in dispute shall be decided through the Expert Resolution Process”). Despite the requirement for these disputes to be resolved by expert resolution, Nate Cunningham admitted at the hearing that he made no attempt to pursue expert resolution. Rather, he tried to terminate the HMA on the basis of disputes that required expert resolution—without ever pursuing expert resolution. Thus, Master Tenant had no right to circumvent the requirements of the HMA and had no right to terminate Ace.

E. Defendants’ Argument that the SNDA Has Not Been Triggered is a Red Herring.

In addition to claiming that Master Tenant had the right to terminate Ace under the HMA, Defendants have focused their opposition to Ace’s motion on certain language in the SNDA. Specifically, Defendants claim that Ace has no right to injunctive relief because SNDA §3(a) has not been triggered. This subsection of the SNDA requires Lenders to protect Ace’s right to manage the Hotel “[i]n the event of (a) the foreclosure of the Security Instrument (or the Borrower’s or Tenant’s leasehold interest), (b) a conveyance of the Hotel or the Master Lease Agreement in lieu thereof, or (c) *any action by Lender* to pursue its rights under the Security Instrument.” *See* Complaint, Ex. B §3(a) (emphasis added).

As set forth in Ace’s briefs, the Lenders’ September 14, 2020 and October 2, 2020 notices to Owner were themselves an “action” taken by Lenders to pursue their rights under their security interests in the Hotel, thereby triggering Lenders’ obligations under § 3(a) of the SNDA. Lenders’ notices were actions to pursue their rights because they declared that Owner was in default and demanded that Owner comply with its loan obligations. *See* Plaintiff’s Exhibits 1 and 7.

could attempt to terminate the HMA on the basis of the performance test. Brad Wilson also testified that Ace did not fail the performance test because it significantly outperformed its competitive set.

Defendants also attempted to convey the Hotel in lieu of foreclosure, as demonstrated by Lenders' notices threatening foreclosure if Owner did not comply with its loan obligations, Owner's subsequent failure to comply with its loan obligations, and Owner's statement to Lenders that selling the Hotel would allow it to pay off the loans. *See* Plaintiff's Exhibits 1, 7 and 11.

But regardless of whether or not § 3(a) of the SNDA has been triggered, Ace still has the right to manage the Hotel under the HMA and the SNDA and is still entitled preliminary injunctive relief to protect that right. The SNDA does not provide that Ace loses the right to manage the Hotel if § 3(a) has not been triggered. Rather, the HMA and the SNDA require Defendants to protect Ace's right to manage the Hotel for the full term of the HMA—both before SNDA § 3(a) has been triggered and after it has been triggered. Thus, Defendants' argument that their obligations under §3(a) of the SNDA have not been triggered is a red herring and does not provide any basis to deny Ace's motion.

F. Ace's Brand Will Suffer If Ace Is Improperly Terminated as the Manager and Replaced by Airbnb Listings.

As set forth in Ace's briefs and at the hearing, Ace has met all of the requirements for preliminary injunctive relief, including the requirement that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages.

Nate Cunningham testified at the hearing that if the Court denies Ace's motion, he intends to rent out rooms in the Hotel via Airbnb. This would be a dramatic change in the quality and service that guests have come to expect from the Ace Hotel Pittsburgh and it would have a devastating impact on Ace's brand. While being replaced by another hotel operator would harm Ace's reputation significantly, being replaced by Airbnb listings—which provide no guest service whatsoever—would be embarrassing and would be even worse for Ace's brand. The public would see Ace as a complete failure if it is replaced with Airbnb listings.

And as Brad Wilson testified, losing the Hotel would not only damage Ace in ways that cannot be measured by money damages—it would mean that Ace’s years of investment of its intellectual property in the Hotel would be wasted. Ace put so much time and effort into making the Hotel a well-known Pittsburgh destination because it understood that it would manage this Hotel for at least 20 years. Ace certainly did not expect Defendants to attempt to terminate the HMA after only six years because the Owner was unable to satisfy its loan obligations. Indeed, avoiding such an attempt by an insolvent owner to wrongfully terminate Ace is the exact reason why Ace negotiated so many protections in the HMA and the SNDA.

G. Granting Ace’s Motion Will Allow the Parties to Reach a Business Resolution that Recognizes Ace’s Rights.

As a practical matter, if the Court denies Ace’s motion, Ace will be removed as the manager of the Hotel and will be left without a remedy. Any damages claim against Owner and Master Tenant would be worthless because Owner and Master Tenant claim to have no financial resources.

On the other hand, if the Court grants Ace’s motion, the parties will be able to determine a future for this Hotel that takes into account Ace’s rights. Brad Wilson testified that there are investors who are interested in purchasing the Hotel and keeping Ace as the manager. The Lenders would have the right to take over the ownership of the Hotel and keep Ace as the manager, or to convey the Hotel to another party with Ace remaining as the manager. There are solutions for this Hotel that would benefit the parties and protect Ace’s bargained-for rights.

III. CONCLUSION

For the foregoing reasons and the reasons addressed in Ace’s briefs and at the hearing, Ace requests that this Honorable Court **grant** its motion for preliminary injunctive relief.

Dated: July 9, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **WRITTEN CLOSING FOLLOWING HEARING ON PLAINTIFF'S RENEWED EMERGENCY MOTION FOR PRELIMINARY INJUNCTIVE RELIEF** was served via electronic mail, this 9th day of July, 2021, on the following:

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