

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ACE GROUP PITTSBURGH LLC,

Plaintiff,

v.

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.

) CIVIL DIVISION

) No. GD 21-001310

) Code: 020

) **THE NON-HOTEL DEFENDANTS'**
) **CLOSING STATEMENT FOR JUNE 22,**
) **2021 EVIDENTIARY HEARING ON**
) **PLAINTIFF'S MOTIONS FOR**
) **PRELIMINARY INJUNCTIVE RELIEF**

) Filed on behalf of Defendants Pittsburgh
) Urban Initiatives Sub-CDE 8, LP, PNC CDE
) 35, LP, and PNC Bank, N.A.

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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

ACE GROUP PITTSBURGH LLC,)	CIVIL DIVISION
)	
<i>Plaintiff,</i>)	No. GD 21-001310
)	
v.)	Code: 020
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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,)	
)	
<i>Defendants.</i>)	

**THE NON-HOTEL DEFENDANTS’ CLOSING STATEMENT FOR
JUNE 22, 2021 EVIDENTIARY HEARING ON PLAINTIFF’S
MOTIONS FOR PRELIMINARY INJUNCTIVE RELIEF**

Ace’s¹ Motions for Preliminary Injunctive Relief (collectively the “Motion”), like its Complaint in this matter, seek relief pursuant to Section 3(a) of the SNDA. For that relief to be available, PUI CDE and PNC CDE must have caused an event of “Transfer,” as defined in that contractual provision, that could disrupt Ace’s position as manager of the Y Hotel. Only three events qualify as a “Transfer” under Section 3(a) of the SNDA: a foreclosure of the Hotel by the CDEs, a conveyance of a deed or master lease agreement to the CDEs in lieu of foreclosure, or any act by the CDEs to pursue their rights to the security for the QLICI Loans. Absent one of these events of “Transfer” by the CDEs, Ace is not entitled to any protection under Section 3(a) of the SNDA.

At the June 22, 2021 hearing on Ace’s Motion, Ace bore the burden of establishing evidentiary support for the theory that the CDEs caused one of these events of “Transfer”.² Not

¹ All capitalized terms not otherwise defined herein shall have the meanings set forth in the “Glossary of Terms” that has been filed and served by the Non-Hotel Defendants contemporaneously with this Closing Statement.

² A request for preliminary injunctive relief should be denied unless the movant has established “all of the following prerequisites”: “1. The movant’s right to relief is clear; 2. The injunction is necessary to prevent

only did it fail to carry that burden, but the defendants offered evidence that affirmatively disproved that theory. There is no basis for this Court to impose or sustain any injunction sought by Ace through the Motion or its Complaint, and there is no basis for granting Ace any of the relief it has sought.

* * * * *

The case Ace presented at the June 22, 2021 consisted of testimony that was uninformed or unhelpful to Ace, a studious avoidance of the SNDA, documents and communications cited without context, and unsupported speculation. None of this amounts to anything that satisfies the elements Ace must establish to obtain the relief it seeks here.

Ace began its case with the testimony of Brad Wilson, president of Ace Group Pittsburgh, LLC. Mr. Wilson offered no testimony about the terms of the SNDA, nor did he identify any acts by the CDEs that constituted a “Transfer” under Section 3(a) of that agreement. He conceded that he lacked an understanding of how the financing arrangement for the Y Hotel redevelopment project worked (though he recognized that the tax credit compliance period was meaningful to that arrangement), and he expressed a belief that the CDEs *were not* the principal sources of debt funding for the project. No part of Mr. Wilson’s testimony supported any aspect of Ace’s claim that the CDEs have caused an event of “Transfer” under the SNDA.

The testimony of Ace’s next witness, Nate Cunningham, flatly contradicted Ace’s allegations about the occurrence of a “Transfer” under Section 3(a) of the SNDA. Mr. Cunningham pointedly testified that the CDEs never foreclosed on the Hotel, never received a

immediate and irreparable harm that cannot be adequately compensated by damages; 3. Greater injury would result from refusing the injunction than from granting it; and the injunction will not substantially harm other interested parties in the proceedings; 4. The injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 5. The injunction is reasonably suited to abate the offending activity; and, 6. The injunction will not adversely affect the public interest.” *Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). This Court may deny the Motion if at least one of the necessary elements is not established. *Id.* Ace has failed to establish *any* of these elements.

deed or assignment of the master lease agreement in lieu of foreclosure, and never took any action to pursue the CDEs' rights under the security for the QLICI Loans. Mr. Cunningham also explained that it would have made no sense for the CDEs to do any of these things, as they could have jeopardized the tax credits the CDEs and PNC Bank were pursuing through their participation in the project. Mr. Cunningham went on to testify about a number of events of default by Ace under the HMA, which Mr. Cunningham said have never been cured.

The documentary evidence offered by Ace was just as thin as its testimonial evidence. Ace appears to rely heavily on three documents to suggest that a "Transfer" occurred: two "Notice of Reservation of Rights" letters from the CDEs to Owner dated September 14, 2020 and October 2, 2020, respectively (the "ROR Letters"), and a separate letter from the CDEs to Owner, Master Tenant, and certain other entities dated September 23, 2020, in which the CDEs stated they had "no objection to Master Tenant's proposed plan to terminate the [HMA]" (the "No-Objection Letter"). None of these documents can bear the weight that Ace places on them.

By their clear and unambiguous terms, the ROR Letters do not amount to any event of "Transfer" under the SNDA. Rather, they memorialize certain conditions of default by Owner under the QLICI Loans, and identify potential remedial actions that the CDEs *could* take as a result. Logic dictates that this does not constitute a foreclosure, the conveyance of a deed or lease in lieu of foreclosure, or the pursuit of rights to security for the QLICI Loans. Section 3(a) of the SNDA itself supports that conclusion, by addressing Ace's right to remain as manager notwithstanding a "Transfer" in terms of a situation involving "purchaser of the Hotel or transferee of the Master Lease Agreement . . . including Lender if Lender steps into the responsibilities of Borrower or Tenant for the Hotel" There is no purchaser of the Hotel or transferee of the Master Lease Agreement here, and the CDEs have not stepped into the roles of

Owner or Master Tenant. The ROR Letters did not disturb any of Ace's rights under the HMA, and Ace has not even alleged as much. Ace has not established and cannot establish that the ROR Letters constitute an event of "Transfer" under the SNDA.

The No-Objection Letter is even less relevant to Ace's case. That letter expressed the CDEs' position that Master Tenant's plan to terminate the HMA was not objectionable under the QLICI Loan documents. Neither Master Tenant's termination of the HMA, nor the CDEs' position on whether such termination would be objectionable under the QLICI Loan documents, constitutes a "Transfer" under the SNDA. The SNDA protects Ace from being displaced as the hotel manager as a result of certain enumerated acts *by the CDEs*; it does not regulate relations between Master Tenant and Ace under the HMA. Under questioning by Ace's counsel, Mr. Cunningham testified that Ace's defaults under the HMA justified Master Tenant's decision to terminate the HMA, and that Master Tenant had asked the CDEs for their position on Master Tenant's plan to terminate the HMA months before the CDEs sent the September 23, 2020 letter. Ace offered no evidence suggesting that the CDEs sought to displace Ace, or that the CDEs' position on Master Tenant's plan to terminate the HMA was part of any act by the CDEs to foreclose on the Hotel, receive a transfer of the deed or the master lease agreement, or pursue the CDEs' rights to security for the QLICI Loans.

Beyond this unavailing testimony and documentary evidence, all that is left of Ace's case is supposition that does not and cannot justify the imposition of relief against the CDEs. Ace described the Y Hotel project as "over-leveraged," in an apparent attempt to suggest that Owner's efforts to sell the Hotel must have been driven by the CDEs' desire for repayment of the QLICI Loans. Yet Ace failed to elicit any testimony that supported this theory, and not a single document Ace offered indicated that the CDEs pursued repayment of any of the QLICI Loans.

In fact, the Notes that Ace offered into evidence, which documented Owner's obligations under the QLICI Loans, established that no principal repayments could be made until the tax credit compliance periods had ended in May 2021. Moreover, Ace failed to tie this theory to the specific elements of Section 3(a) of the SNDA.

In sum, Ace bore the evidentiary burden at the June 22, 2021 hearing, and it failed to carry it.

* * * * *

By contrast, the evidentiary record compiled by the defendants contradicts Ace's theory of the case on every essential element. The testimony and documentary evidence offered by the defendants establishes that the CDEs *did not* take any action that triggered Ace's entitlement to protection under Section 3(a) of the SNDA. It also dispelled Ace's theory that the CDEs were orchestrating a scheme to displace Ace so that Owner could sell the Hotel and make significant principal repayments to the CDEs under the QLICI Loans.

During his examination as a witness for Owner and Master Tenant, Nate Cunningham offered detailed testimony about the financing arrangement for the Y Hotel redevelopment project, explaining that the QLICI Loans from the CDEs were not traditional debt. Mr. Cunningham described how the QLICI Loans instead constituted funding that originated from sources other than the CDEs that the CDEs repackaged in the form of loans to Owner, in order to generate tax credits for which the project was eligible. Mr. Cunningham also explained the history behind Owner's attempts to sell the Hotel, clarifying that the impetus for a potential sale came from interested purchasers and from the ownership group's desire to move onto new projects, not from the CDEs or PNC Bank. He added that, had the Hotel been sold prior to the end of the tax credit compliance period for the QLICI Loans, the sale proceeds would not have

been realized by the CDEs themselves, but rather would have been held to repay the sources of debt funding that had been repackaged into the QLICI Loans. Mr. Cunningham also provided appropriate context for Master Tenant’s plan to terminate the HMA due to various events of default by Ace under that agreement dating back before the beginning of 2020 that remain uncured, and he explained that this plan originated with and was driven by Master Tenant and Owner, not the CDEs or PNC Bank.

The testimony of Kristin A. Klingenberg (for PNC CDE and PNC Bank) and Rebecca Davidson-Wagner (for PUI CDE) went even further to disprove the allegations and theories on which Ace staked its case. Like Mr. Cunningham, these witnesses established that the CDEs did nothing to cause an event of “Transfer” under Section 3(a) of the SNDA. They explained that, had the CDEs in fact taken such action, it could have jeopardized exactly what the CDEs and PNC Bank had gotten involved in the project to seek – the tax credits. They also provided necessary context for the ROR Letters and the No-Objection Letter. Their testimony made clear that the CDEs never made any attempt to recover in the security for the QLICI Loans, and that instead, the CDEs were always most concerned about avoiding anything that could jeopardize the tax credits produced by the project, which were the single-most important benefit for the CDEs (and PNC Bank) from the project’s very start.

Although Ms. Klingenberg and Ms. Davidson-Wagner were both present at the June 22, 2021 hearing, Ace chose not to cross-examine either one. This sharply contrasted with Ace’s attempt to challenge Mr. Cunningham’s testimony through cross-examination and through its presentation of Mr. Wilson as a rebuttal witness. As such, the testimony of Ms. Klingenberg and Ms. Davidson-Wagner was received into evidence without contest or contradiction. The Court

should give their testimony full credit and weigh it heavily, particularly as against the tenuous and unsupported elements of Ace’s case.

* * * * *

Ace’s claims against PNC Bank here merit particular and specific consideration. Unlike the CDEs, PNC Bank is not defined as a “Lender” in the SNDA, and none of the events of “Transfer” (or any other terms) set forth in Section 3(a) of the SNDA are defined to include or involve PNC Bank. PNC Bank had no obligations of any kind under Section 3(a) of the SNDA. As explained in Ms. Klingenberg’s uncontested testimony, PNC Bank had been the owner of a 99% membership interest in Master Tenant (which it acquired in exchange for an investment in Master Tenant) in order to pursue certain historic redevelopment tax credits for which the Y Hotel project was eligible. However, as Ms. Klingenberg further testified, PNC Bank exited this position as of May 7, 2021 as a result of the end of the compliance period applicable to the historic tax credits for which the project was eligible, and PNC Bank no longer holds any interest of any kind in Master Tenant.

Ace has failed to set forth any coherent, legitimate, or legally cognizable basis to impose relief against PNC Bank in this case. Its presentation at the June 22, 2021 hearing was devoid of any evidence that support any claims against PNC Bank. There is not even a theoretical basis on which to sustain any relief of any kind in Ace’s favor against PNC Bank in this case.

* * * * *

Ace failed to carry its burden of establishing an entitlement to preliminary injunctive relief under Section 3(a) of the SNDA at the June 22, 2021 hearing. Its hearing presentation made one thing clear, though: Ace and Master Tenant (and Owner) hotly contest whether Ace is in default under the HMA. Much of Ace’s hearing presentation, and a good deal of Owner’s and

Master Tenant’s presentation, focused on that very issue, without touching on anything involving the CDEs, PNC Bank, or any triggers under the SNDA. Although this issue could be relevant to the Court’s decision of this Motion, the Court can resolve the Motion without reaching the issue of whether Ace has defaulted under the HMA.

Ace cannot prevail on its Motion unless the Court determines that Ace has established, under the standard applicable for preliminary injunctive relief,³ **both** that (1) the CDEs caused an event of “Transfer” under the terms of Section 3(a) of the SNDA, **and** (2) Ace is not in default under the HMA past any applicable cure period. Conversely, the Court can deny Ace’s requested relief without reaching the issue of Ace’s default under the HMA if the Court determines that no event of “Transfer” has occurred under Section 3(a) of the SNDA. The evidentiary record compels such a determination, for the reasons stated above.

Despite Ace’s best efforts to paint the CDEs and PNC Bank as the dark forces lurking behind Ace’s apparent dislocation as manager of the Hotel, the evidence presented at the June 22, 2021 hearing disproved that theory, and confirmed that the real dispute here is one among Owner, Master Tenant, and Ace over alleged breaches of the HMA – a dispute that does not create a controversy under the SNDA. The CDEs and PNC Bank have no desire to be involved in the HMA dispute; indeed, with all applicable tax credit compliance periods having now passed, their participation in the Y Hotel project has reached a natural end. PNC Bank already has exited its role as the historic tax credit investor in the project. The CDEs are seeking to exit the project – without pursuing repayment of the QLICI Loans – by having their interests in the QLICI Loans and related documents (including the SNDA) assigned to Y Hotel Leverage Lender, LLC, the entity that transmitted the debt funding the CDEs repackaged into the QLICI

³ See footnote 2, *supra*.

Loans. A closing on this assignment transaction is pending. That the CDEs could pursue such an assignment was specifically addressed in Section 4(h) of the SNDA in clear, unambiguous, and unconditional terms to which Ace agreed in 2014, at the very start of the Y Hotel redevelopment project.

As such, the CDEs and PNC Bank have no continuing economic interest in who manages the Hotel going forward, or in whether or not Ace is in default under the HMA. The evidentiary record provides a clear basis for the Court to deny Ace's Motion without getting into those issues, and the Court should do so. To the extent any additional consideration of the issues regarding defaults under or breaches of the HMA is necessary or appropriate for the other parties in this case, the CDEs and PNC assert that it should proceed only after Ace's Motion has been denied, the CDEs' exit from the project has been completed, and the CDEs and PNC Bank have been dismissed as parties to this lawsuit.

Dated: July 9, 2021,

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

Submitted by: *Pittsburgh Urban Initiatives Sub-CDE 8, LP, PNC CDE 35, LP, and PNC Bank, N.A.*

Signature: *s/Andrew J. Muha*

Name: *Andrew J. Muha, Esq.*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *The Non-Hotel Defendants' Closing Statement for June 22, 2021 Evidentiary Hearing on Plaintiff's Motions for Preliminary Injunctive Relief* has been served on this 9th day of July 2021 by electronic mail only to the following counsel:

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