IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

NNN 300 FOUR FALLS 1, LLC, *et al.*	:	APRIL TERM, 2013
Plaintiffs,	:	NO. 4085
v.	:	COMMERCE PROGRAM
THOMPSON NATIONAL PROPERTIES, LLC, *et al.*,	:	Control No. 13043644
Defendants.	:	

DOCKETED
JUN 15 2013
C. HART
CIVIL ADMINISTRATION

ORDER

AND NOW, this 13th day of June 2013, upon consideration of the Motion for Preliminary Injunction of Plaintiff NNN 300 Four Falls 1, LLC, *et al.*, all responses in opposition thereto, the evidence presented at the hearing, the parties respective briefs, and responses of all the parties and all matters of record, it hereby is **ORDERED** as follows:

1. FAMECO Management Services Associates, L.P. ("FAMECO" or "temporary receiver") is hereby appointed as a temporary receiver for the property known as 300 Four Falls Corporate Center in West Conshohocken, Pennsylvania ("property"). This appointment shall continue until the last to occur of the following events: (a) the special servicer for the first mortgage loan on the property approves National Asset Services, Inc. ("NAS") as the replacement property and asset manager for the property; (b) Plaintiff tenant-in common ("TIC") owners succeed in obtaining the consent of the remaining TICs, NNN 300 Four Falls, LLC, NNN 300 Four Falls 4, LLC, and NNN 300 Four Falls 34, LLC, to the appointment of NAS as the new property and asset manager, or exercise their call option under section 11.2 of the Tenant-in-Common Agreement

Nnn 300 Four Falls 1, L-ORDER

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and acquire the interest of any remaining TICs who do not consent to NAS's appointment as the new property and asset manager; or (c) in lieu of subsection (b), the arbitrator in the related arbitration pending before the American Arbitration Association, Case No. LLC 14 115 00612 13, declares that the Property and Asset Management Agreement ("PMA") between the TICs and defendant TNP Property Manager, LLC ("TNPPM") is terminated and that NAS is appointed as the new property and asset manager (hereafter, items 1(a)-(c), above are referred to as "triggering events").

2. Plaintiffs are directed to actively pursue one, if not all, of the triggering events outlined in paragraph 1. This Injunction is subject to being vacated in the event that Plaintiffs do not actively pursue one, if not all, of the triggering events.

3. Defendants are directed to forthwith make available to Plaintiffs' counsel any contact information for any TIC not a party in the present action. Following receipt of information from Defendants, Plaintiffs are to forthwith join missing TICs.

4. FAMECO shall have the following rights and duties as temporary receiver:

a. Manage the property in compliance with all applicable laws, regulations, loan documents, the TIC agreement and leases;

b. Take such action as may be reasonably necessary to comply with all applicable laws, regulations, loan documents, the TIC agreement and leases;

c. Control and have signature authority over all bank accounts associated with the property, including all operating accounts, reserve accounts and escrow accounts;

d. Collect rental payments, receipts and other income from the property;

e. Pay all expenses associated with ownership and operation of the property, including operating expenses, tenant and capital improvement costs, leasing commissions and debt service payments and have the authority to negotiate and compromise such expenses, as may be appropriate;

f. Manage all leasing activity at the property, including all new leases, renewals, amendments and extensions;

g. Make capital expenditures if reasonably required for the efficient and safe operation of the property;

h. Obtain and maintain insurance for the property;

i. Contract with and supervise the services of third parties as required for the management, operation, maintenance and repair of the property and act on behalf of the co-owners in any dealings with the lender or otherwise as it pertains to the co-owners' investment in the property;

j. Hire, discharge and supervise employees as required for the management, operation, maintenance and repair of the property;

k. Maintain the books and records of the property and provide reports regarding the financial condition of the property to the TIC owners at reasonable intervals, at least quarterly;

l. Sign all contracts, including but not limited to, third party contracts, leases and amendments on behalf of the property;

m. Pursue tax appeals on behalf of the property;

n. Enforce all of landlord's remedies under any existing or new lease, or any service contract;

o. Distribute to the TIC owners any funds in excess of those needed for payment of debt service, expenses and reserves; and

p. Take all such other actions as may be customary or appropriate in the operation and maintenance of an office building of the quality and location of the property.

5. Defendants TNPPM and Thompson National Properties, LLC ("TNP") are hereby directed to cooperate to enable FAMECO to carry out the duties and responsibilities provided for in this Order.

6. Within ten (10) days from the date of docketing of this Order, Defendants TNPPM and TNP shall prepare and file with the Court and serve on Plaintiffs and the temporary receiver a detailed accounting of all income, expenses, receivables, and payables relating to the property since January 1, 2012.

7. Within ten (10) days of the date of docketing of this Order, Defendants TNPPM and TNP shall provide to the temporary receiver all of the following:

a. All keys to entrance doors, storage and boiler rooms, common areas, offices, and rental units of the property;

b. Copies of all leases or amendment thereto in effect for the tenants and equipment at the property;

c. Copies of all current rent rolls and tenancy lists relating to the property;

d. A reconciliation of all security deposits and accounts, and a list setting forth each account number and the name of the depository wherein each account is maintained;

e. Copies of all current financial statements, including but not limited to all documentation concerning delinquent tenants at the property;

f. All documents containing references to all utility accounts including but not limited to electricity, gas, heat, water, telephone services, and internet service;

g. The names and account numbers of all utility companies servicing the property;

h. Copies of all insurance policies in effect for the property and any part thereof;

i. Copies of all contracts relating in any way to the property, including but not limited to contracts with vendors and other service personnel;

j. A list of suppliers and copies of all contracts currently enforced, including service and vendor contracts;

k. An employee roster and payroll information;

l. A list of any proceedings in any court regarding or relating to the property or leases on the premises;

m. Copies of any court stipulation for payment of rent or arrearages;

n. An equipment and inventory list; and

o. Such other items, records, or documents that the temporary receiver may reasonably require to lease, manage, and maintain the property.

8. Within fifteen (15) days of the date of docketing of this Order, Defendants TNPPM and TNP shall provide to the temporary receiver the following:

a. All environmental reports in their possession relating to the property or any portion thereof;

b. All tax records, including real estate taxes since January 1, 2011;

c. Copies of cumulative monthly operating statements for the property generated since January 1, 2011;

d. All architectural, engineering and electrical plans for the property;

e. All site plans available for the property;

f. An inventory of all personalty located at the property;

g. A list of all leased equipment which is located at the property;

h. All warranties or bonds relating to the roof of the property;

i. All warranties on equipment located at the property; and

j. All documents relating to legal actions between Defendants TNPPM and TNP and any tenant or vendor arising out of any services, property, or interest at the property.

9. Defendants TNPPM and TNP shall permit existing insurance coverage for the property to remain in force until the expiration of the current paid up term under such policy or policies and shall notify the insurance carrier(s) immediately of the appointment of the temporary receiver. The temporary receiver shall be added to any liability policy or policies as an additional insured. Upon the expiration of the paid up portion of such policy or policies, the temporary receiver shall have the responsibility for keeping the property insured as required by the mortgage and may at its option keep in force the existing insurance coverage or obtain new coverage for the property, which shall include the name of the temporary receiver as an additional insured on any liability policy.

10. The temporary receiver is authorized as it deems necessary to employ personnel to operate the property, including any individual to be hired in place of or to replace any employee(s) presently or previously employed by Defendants TNPPM and TNP. The temporary receiver is further authorized to employ counsel, accountants, property management specialists, and such other professionals and support personnel as may be necessary to carry out its duties pursuant to the appointment.

11. The temporary receiver is authorized to advertise for new tenants and to enter into new or renewed leases. The temporary receiver shall, within ten (10) days of entering into a new or renewed lease, provide Defendants TNPPM and TNP with a copy of such lease, which shall direct that rents be paid directly to temporary receiver.

12. The temporary receiver is authorized to enforce all of landlord's remedies under any existing lease or any lease entered into by the temporary receiver. The temporary receiver shall, within ten (10) days of sending to a tenant any correspondence or pleading seeking to enforce a remedy of the landlord, provide Defendant with a copy of such documents.

13. The temporary receiver is authorized to pay all bills associated with the ordinary upkeep and maintenance of the property from revenues received from the property.

14. The temporary receiver is authorized to make repairs, improvement, and restorations to the property.

15. Notwithstanding the foregoing, (a) the temporary receiver shall have no obligation to expend funds in excess of the revenues actually received by the temporary receiver and (b) Defendants TNPPM and TNP shall have no right to contest, dispute, or otherwise interfere with or become involved in the performance by the temporary receiver of its rights, powers, privileges, and duties hereunder.

16. Defendants TNPPM and TNP and their respective agents, servants, employees, representatives, and attorneys are hereby enjoined from interfering in any way with the management of the property by the temporary receiver.

17. Defendants TNPPM and TNP are directed to cooperate with temporary receiver to ensure an orderly transfer of the management of the property.

18. Defendants TNPPM and TNP shall immediately transfer to the temporary receiver all rents, profits and proceeds of the property which Defendants TNPPM and TNP, their representative and/or their property manager have collected from tenants of the property which have not been expended in the operation and maintenance of the property, and shall immediately

transfer all security deposits of tenants of the property in Defendants' possession and provide an accounting thereof.

19. Defendants TNPPM and TNP shall not collect, remove, transfer or divert or in any way dispose of rents, profits or proceeds of the property and shall not exercise control or dominion over the operations and conduct of the property or interfere with the temporary receiver's control of the property.

20. Defendants TNPPM and TNP will not collect or receive any management fee or any other money from rents, profits and proceeds of the property.

21. FAMECO shall provide a status report to the Court and counsel for the parties on the 15th day of each month commencing on July 15, 2013.

22. As compensation for its services, FAMECO shall be entitled to receive a fee, paid monthly, equal to the greater of 2.75 percent of gross receipts or $20,000.

23. It is understood that provisions of this Order are temporary in nature and that FAMECO is not being appointed as a replacement property manager pursuant to this Order.

24. Defendant TNPPM shall, notwithstanding the terms of this Order, remain the official property and asset manager at the property until such time as the triggering events listed in paragraph 1(a)-(c) occur.

25. Plaintiffs shall post a bond in the amount of $50.00 pursuant to Pa.R.C.P. 1531(b) and 1533(a).

BY THE COURT,

Albert John Snite, Jr.

ALBERT JOHN SNITE, JR., J.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Albert John Snite, Jr., J..June 13, 2013

HISTORY OF THE CASE

In April 2013, Plaintiffs, NNN 300 Four Falls 1, LLC, NNN 300 Four Falls 2, LLC, NNN 300 Four Falls 5, LLC, NNN 300 Four Falls 6, LLC, NNN 300 Four Falls 7, LLC, NNN 300 Four Falls 8, LLC, NNN 300 Four Falls 9, LLC, NNN 300 Four Falls 11, LLC, NNN 300 Four Falls 12, LLC, NNN 300 Four Falls 13, LLC, NNN 300 Four Falls 14, LLC, NNN 300 Four Falls 15, LLC, NNN 300 Four Falls 16, LLC, NNN 300 Four Falls 17, LLC, NNN 300 Four Falls 18, LLC, NNN 300 Four Falls 19, LLC, NNN 300 Four Falls 20, LLC, NNN 300 Four Falls 21, LLC, NNN 300 Four Falls 22, LLC, NNN 300 Four Falls 23, LLC, NNN 300 Four Falls 24, LLC, NNN 300 Four Falls 26, LLC, NNN 300 Four Falls 27, LLC, NNN 300 Four Falls 29, LLC, NNN 300 Four Falls 30, LLC, NNN 300 Four Falls 31, LLC, NNN 300 Four Falls 32, LLC, NNN 300 Four Falls 33, LLC ("Plaintiffs"), filed a Petition seeking a Preliminary Injunction against

Defendants Thompson National Properties, LLC ("TNP") and TNP Property Manager, LLC ("TNPPM") (collectively "Defendants"), alleging that Defendants have grossly mismanaged 300 Four Falls Corporate Center ("property") and are causing irreparable harm to the property. Also in April 2013 Plaintiffs initiated an arbitration proceeding against TNPPM. According to Plaintiffs, in late 2012 they discovered that Defendants had mismanaged the property's finances to such an extent that liens were placed against the property, there is a capital deficit in excess of two million dollars, payables are overdue in the amount of hundreds of thousands of dollars, and there is a risk of defaulting on the mortgage loan. Plaintiffs filed this request for Preliminary Injunction as well as a Complaint for injunctive relief, intentional interference with contract, and an accounting against TNP, TNPPM, as well as NNN 300 Four Falls, LLC ("TIC 0"), and NNN 300 Four Falls 4, LLC ("TIC 4"). An evidentiary hearing was conducted on May 9, 10, and 13, 2013, at which the following evidence was adduced.

FINDINGS OF FACT

I. BACKGROUND

1. Each of the Plaintiffs is a Delaware limited liability company that is an owner of a fractional interest in 300 Four Falls Corporate Center ("property"), located in West Conshohocken, Pennsylvania. Plaintiffs hold the property as tenants in common ("TICs"). (Prelim. Inj. ¶¶ 9-10, Margulies Aff. ¶ 9).
2. In February of 2006 the TICs entered into a Tennant in Common Agreement ("TIC Agreement") which controls the administration of the property and delegates authority and responsibility for the operation and management of the property. (TIC Agreement).

3. Together, Plaintiffs own in excess of 84 percent of the property. (Prelim. Inj. ¶ 12, Ex. 20).
4. The property is a 298,371 square foot Class A commercial office building. (Prelim. Inj. ¶ 13, Zipf Aff. ¶¶ 8, 62).
5. In 2006, the TIC owners purchased the property for $113,500,083, with an investment of $41,500,083 by the TIC owners and a $72,000,000 loan from Wells Fargo, N.A., originally held by Wachovia Bank, N.A. The terms of the loan are contained in the Open-End Mortgage, Security Agreement and Fixture Filing ("mortgage"). The balance of the loan as of April 22, 2013 is $67,901,755. (Prelim. Inj. ¶ 14, Margulies Aff. ¶ 6, Pls.' Ex. 24).
6. The loan is evidence by a Promissory Note signed by Louis Rogers, President of Triple Net Properties, LLC ("Triple Net"), on behalf of NNN 300 Four Falls, LLC, NNN 300 Four Falls 1, LLC, NNN 300 Four Falls 2, LLC, NNN 300 Four Falls 4, LLC, and NNN 300 Four Falls 5, LLC. (Defs.' Ex. 2).
7. Louis Rogers signed an Indemnity and Guaranty Agreement ("Indemnity Agreement") as the indemnitor, on behalf of NNN 300 Four Falls, LLC, NNN 300 Four Falls 1, LLC, NNN 300 Four Falls 2, LLC, NNN 300 Four Falls 3, LLC, NNN 300 Four Falls 4, LLC, and NNN 300 Four Falls 5, LLC, for the principal loan amount of $72,000,000. (Defs.' Ex. 4).
8. Section 1(i) of the indemnity states "[i]ndemnitor hereby assumes liability for, hereby guarantees payment to the Lender of, hereby agrees to pay, protect, defend and save Lender harmless from and against, and hereby indemnifies Lender from and against any and all liabilities, obligations, losses, damages, costs and expenses (including,

without limitation, attorneys' fees), causes of action, suits, claims, demands and judgments of any nature or description whatsoever (collectively "Costs") which may at any time be imposed upon, incurred by or awarded against Lender as a result of: [b]orrower's termination or attempted termination of the [PMA] or replacement of the property manager without Lender's prior written consent[.]" (Defs.' Ex. 4, § 1(i)).

9. The Consent and Assumption Agreement ("Consent Agreement") requires that a substitute indemnitor assume the obligations and liabilities of the indemnitor under the Indemnity Agreement. The substitute indemnitor agrees "that it will be bound by all of such terms and provisions, promptly pay all such liabilities and promptly observe and perform all such covenants and obligations, with the same force and effect as if [s]ubstitute [i]ndemnitor had originally executed and delivered the Indemnity Agreement." (Defs.' Ex. 3 § 3).

10. Anthony Thompson signed the Consent Agreement as the substitute indemnitor in his capacity as CEO of Thompson National Property, LLC ("TNP") and individually. (Defs.' Ex. 3).

11. Defendant TNP Property Management, LLC ("TNPPM") is a Delaware limited liability company. TNPPM was appointed property manager pursuant to the Property and Asset Management Agreement ("PMA") entered into by Plaintiffs and TNPPM on May 11, 2009. (Prelim. Inj. ¶ 17, Margulies Aff. ¶ 11). Under the PMA TNPPM is to perform as follows:

    a. Undertake all tasks necessary for the proper and efficient management, operation, and maintenance of the property in a diligent and professional manner. (PMA § 2.1.2).

b. Keep the property clean and in good repair. (PMA § 2.8).

c. Pay operating, maintenance, and repair expenses with respect to the property. (PMA § 7).

d. Manage property's finances including compliance with the Wells Fargo loan and maintenance of reserves for capital expenditures, tenant improvements, and leasing commissions. (PMA §§ 2.4.1, 2.11, 2.13, 6.1, 6.3, 7).

e. Use its best efforts to retain existing tenants and procure and retain new tenants. (PMA § 2.6.4).

12. Defendant TNP is a Delaware Limited liability company. TNP is the parent company and 100 percent owner of Defendant TNPPM. (Prelim. Inj. ¶¶ 18-19, Margulies Aff. ¶ 14).

13. Both TNP and TNPPM are controlled by Anthony Thompson. (Prelim. Inj. ¶ 20).

14. NNN 300 Four Falls, LLC ("TIC 0"), which has not been named as a defendant in this action, owns 2.889 percent of the property. (Defs.' Answer Prelim. Inj. ¶ 21).

15. NNN 300 Four Falls 34, LLC ("TIC 34"), which has not been named as a defendant in this action, owns 5.77 percent of the property. (Defs.' Answer Prelim. Inj. ¶ 21).

16. Defendant NNN 300 Four Falls 4, LLC ("TIC 4") is a Delaware limited liability company, owned and controlled by Anthony Thompson, that owns 2.75 percent of the property. (Defs.' Answer Prelim. Inj. ¶ 21).

17. Michael Margulies is a co-owner of JP Associates, LLC, which is a general partner in 350 Seventh Avenue Associates, LP, which is the sole member of NNN 300 Four Falls 20, LLC, a TIC owner of the property. NNN 300 Four Falls 20, LLC owns 13.614 percent of the property. (Margulies Aff. ¶2).

18. Karen E. Kennedy is President of National Asset Services, Inc. ("NAS"), a national commercial real estate management company headquartered in California. (Kennedy Aff. ¶ 2).

19. Lawrence R. Zipf is the President of FAMECO Management Services Associates, LP ("FAMECO"), a commercial property management company headquartered in Conshohocken, Pennsylvania. (Zipf Aff. ¶ 2).

20. Richard Miller is the property manager at the property and an employee of TNPPM. (Hearing, May 13, 2013).

21. Louis J. Rodgers is the founder and chief executive officer of Capital Square Realty Advisors, LLC, a real estate investment and advisory firm that structures Delaware Statutory Trust programs for high net worth investors seeking qualifying replacement property for Section 1031 exchanges. (Defs.' Ex. 6).

22. S. Sidney Mandel is an investor on behalf of five different TICs, representing 29 percent ownership interest in the property. (Hearing, May 13, 2013).

23. Following Plaintiffs' Motion for Preliminary Injunction, all responses in opposition thereto, the evidence presented at the hearing on May 9, 10 and 13, 2013, the parties respective briefs, and responses of all the parties and all matters of record it was determined that liens exist on the property, accounts payable are overdue, distributions were made to the TIC owners in 2011 and 2012, TNPPM procured a property management fee in 2011 and 2012, maintenance issues existed on the property, the parties are at an impasse, and that the parties are bound by an arbitration clause. However, TNP is not a party to either the PMA or the mortgage.

II. LIENS AND ACCOUNTS PAYABLE

24. Pursuant to the mortgage with Wells Fargo the placement of a lien on the property is an event of default. (Pls.' Ex. 24, § 4(k)).

25. On February 28, 2013, Cresa Partners of Pennsylvania ("Cresa"), one of the property's leasing agents, obtained judgment on a broker's lien against the property in the Montgomery County Court of Common Pleas. The lien, in the amount of $153,165.31, was for leasing commissions earned in 2011.[1] (Prelim. Inj. ¶¶ 43-44).

26. In October 2010, the West Conshohocken Municipal Authority filed a lien against the property in the amount of $14,601.24 for unpaid sewer rental fees.[2] (Prelim. Inj. ¶ 48, Margulies Aff. ¶ 50).

27. As of June 10, 2013 plaintiffs have negotiated and settled in full both the Cresa lien and the municipal lien.[3]

28. Defendants, in the past, failed to disclose the municipal lien and the Cresa lien to TIC owners. (Prelim. Inj. ¶66, Margulies Aff. ¶ 44, 51, Zipf Aff. ¶ 43).

29. As of April 2013 there was approximately $383,522.52 due to leasing agents and brokers and contractors. (Prelim. Inj. ¶ 51, Margulies Aff. ¶ 58).

30. As of April 2013 there was approximately $439,867.28 overdue in accounts payable, excluding the amount owed to leasing commissions and contractor payments, for the property's routine operating expenses. Service providers with outstanding accounts

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[1] Plaintiffs, in a letter sent June 10, 2013, submitted that they have negotiated full settlement and release of the Cresa lien.

[2] Defendants have intimated during the hearing that the municipal lien was imposed by mistake due to embezzlement by a county official who failed to properly credit the Four Falls Corporate Center for payments made. Defendants have not presented proof in Court such as a cancelled check or other such similar proof. Defendants present no explanation for what efforts were made, or have been made, to have the municipal unit remove the lien. Defendants also claim the responsible party has been convicted. One would assume that in the process of conviction there would be evidence that appropriate payment had been received from Four Falls, and embezzled by the county official.

[3] *See* Plaintiffs' letter dated June 10, 2013 and Defendants' response letter attached.

include, but are not limited to, Otis Elevator, Allied Barton, janitors, and the heating, ventilation, and air conditioning servicer. (Prelim. Inj. ¶ 52, Margulies Aff. ¶¶ 57-58, Zipf Aff. ¶ 53).

31. As of April 2013, the total overdue accounts payable at the property was approximately $837,991.04. (Prelim. Inj. ¶ 59).

32. Defendants failed to keep the TIC owners fully informed as to the status of overdue accounts payable. In the first and second quarter 2012 reports Defendants assured TIC owners that the "vast majority" and a "substantial portion" of the accounts payable were already paid. This led the TIC owners to believe that Defendants were paying creditors as bills became due. (Prelim. Inj. ¶ 64, Margulies Aff. ¶ 34-35, Pls.' Ex. 3, Pls.' Ex. 4).

33. As of March 2013, the leasing commissions and tenant improvement reserve account held only $186. Plaintiffs estimate that the reserves should be approximately $2.1 million. (Prelim. Inj. ¶¶ 79, 81 Margulies Aff. ¶ 25, Pls.' Ex. 5).

34. "[T]he [p]roperty's reputation is rapidly deteriorating due to its non-payment of bills. Leasing agents and brokers are blacklisting the [p]roperty and refusing to recommend it to prospective tenants because the agents and brokers believe they will not receive their commissions if they successfully bring a tenant to the [p]roperty. This will exacerbate the [p]roperty's financial situation because it will be unable to fill vacant space and may lose tenants at a time when increased rental income is critical."[4] (Margulies Aff. ¶ 60, Prelim. Inj. ¶ 42).

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[4] The Court recognizes that Mr. Margulies' belief relies upon some measure of hearsay and speculation. Nonetheless, it is practically inevitable that this is true if brokers have filed a lien for unpaid commissions.

35. Mr. Miller, the property manager, testified that he makes a schedule containing the total amount of payments due, submits the schedule to TNP, and that TNP ultimately decides what bills to pay. (Hearing, May 13, 2013).

III. PROPERTY MANAGEMENT FEE AND DISTRIBUTIONS

36. Under the PMA, Defendants are to receive a property management fee equal to 2.75 percent of the annual gross tenant revenue payable monthly. If distributions to the TIC owners are less than 4 percent of the TIC owner's original equity contributions, then the management fee of 2.75 percent will be deferred pro rata. This means that if no distribution is made to the TIC owners, no property management fee is paid to Defendants. (PMA §§ 9.1, 9.7).
37. Despite the existing liens on the property and the overdue accounts payable, in 2011 Defendants made distributions to the TIC owners in the amount of $1,245,000. (Pls.' Ex. 34).
38. Between January and September of 2012 Defendants made additional distributions of approximately $900,000. (Prelim. Inj. ¶ 70, Marguilies Aff. ¶ 18, Zipf Aff. ¶ 46).
39. Paying distributions in 2011 and 2012 to TIC owners allowed Defendants to continue to receive the management fee outlined in § 9.1 of the PMA. (Prelim. Inj. ¶73, PMA §§ 9.1, 9.7, Margulies Aff. ¶¶19-20).
40. In 2012 Defendants received $151,086.65 in management fees. (Prelim. Inj. ¶74).
41. On June 6, 2012, after making distributions, Defendants issued a capital call to the TIC owners for $715,000 needed to pay for operating expenses and tenant improvements. (Prelim. Inj. ¶ 75, Pls.' Ex. 9).
42. The June capital call was unsuccessful. (Prelim. Inj. ¶ 76).

43. On September 18, 2012, Defendants issued another capital call to the TIC owners for $1,000,000 needed to make emergency repairs, pay the cost of leasing commissions, and tenant improvements. (Prelim. Inj. ¶77, Pls.' Ex. 10).

44. The capital calls were necessary to adequately reserve funds to pay for operating costs, leasing commissions, tenant improvements, and repairs. (Prelim. Inj. ¶ 78).

45. Under the mortgage with Wells Fargo "[a]ll Rents and Profits generated by or derived from the Property shall first be utilized solely for current expenses directly attributable to the ownership and operation of the Property…none of the rents and profits generated by or derived from the Property shall be diverted by Borrower and utilized for any other purposes unless all such current expenses attributable to the ownership and operation of the Property have been fully paid and satisfied." (Pls.' Ex. 24, § 2.26).

46. Section 2.26 of the mortgage requires that all income from the property first be used to pay expenses of the property, such as liens and overdue accounts payable, before any money is paid to the TIC owners. Any payment of distributions before payment of expenses constitutes a diversion of the borrower under the meaning of section 2.26 of the mortgage. (Pls.' Ex. 24, § 2.26).

IV. MAINTENANCE ISSUES

47. Until recently, the window washing scaffold anchors on the roof of the building were non-functioning. As a result, the windows of the building were not washed for approximately three years, in direct violation of leases with tenants. (Prelim. Inj. ¶¶84-85, Margulies Aff. ¶ 30).

48. Defects in building stairways were not timely repaired. Due to the delay in repairing the defects the cost of repairs surpassed the estimated $50,000 and cost approximately $480,000. (Prelim. Inj. ¶ 86, Margulies Aff. ¶ 48, Margulies Testimony).

V. TERMINATION, REPLACEMENT, AND RENEWAL

49. Under the PMA, more than 80 percent of the undivided interests in the property may terminate the agreement, at any time, without cause, upon 30 days prior written notice to the property manager. (PMA § 10.1).

50. The PMA is subject to renewal on each anniversary date. Renewal may only be obtained by unanimous consent of the TIC owners. (PMA § 10.1).

51. Under the TIC Agreement and IRS Revenue Procedure 2002-22 the TICs must approve by unanimous vote the hiring of a property manager, or any such substitute property manager. (TIC Agreement § 1.3).

52. Therefore, if the PMA is terminated by 80 percent or not renewed by unanimous consent, the PMA shall terminate only on the appointment of a replacement property manager selected by unanimous consent of the TIC owners. (PMA § 10.1, TIC Agreement § 1.3).

53. The new property manager must then be approved by the lender Wells Fargo. (PMA § 10.1).

54. Failure to renew the PMA without a replacement property manager acceptable to Wells Fargo may create a default or event of default under the mortgage. (PMA § 10.1).

55. Although Wells Fargo is not currently a party to this action[5], its mortgage servicer, CW Capital, has recently approved FAMECO as property manager at another property in Georgia. (Hearing May 9, 2013).

56. Any attempted or actual amendment or modification of the TIC Agreement without lender approval or any attempt to apply to a court for a receiver or actual appointment of a receiver may be deemed an event of default under the mortgage. (Pls.' Ex. 24, §§ 4.1(g), 4.1(k), 4.1(n), 4.1(p), 2.34(e)).

57. Wells Fargo has the right to terminate the PMA through its own action or by directing the TICs during the term of the loan in accordance with the mortgage. (PMA § 10.3).

58. Plaintiffs hold more than 80 percent of the ownership interests in the property and voted to terminate the PMA with TNPPM. Additionally, plaintiffs rejected renewal of the PMA. (Prelim. Inj. ¶ 88).

59. On February 28, 2013 counsel for Plaintiffs sent notice of termination to TNPPM. (Prelim. Inj. ¶ 91, Pls.' Ex. 14, Margulies Aff. ¶ 39).

60. On March 6, 2012 counsel for Plaintiffs sent Defendants a letter setting forth additional grounds for termination of the PMA and naming NAS and FAMECO as replacement asset manager and property manager, respectively. (Prelim. Inj. ¶ 94, Pls.' Ex. 18, Margulies Aff. ¶ 54).

61. Defendants responded to Plaintiffs' termination on March 22, 2013 rejecting the purported termination of the PMA and denied mismanagement of the property. (Prelim. Inj. ¶ 95, Pls.' Ex. 19, Margulies Aff. ¶ 55).

62. Anthony Thompson controls both TNP and TNPPM and owns and controls TIC 4. As such, TIC 4 refuses to consent to termination of the PMA and appointment of

[5] If Wells Fargo wishes at any time to be heard by this Court, the Court will be amenable to their input.

NAS and FAMECO as asset and property managers. Without TIC 4, unanimous consent cannot be reached. (Prelim. Inj. ¶¶ 18-20, Defs.' Answer Prelim. Inj. ¶ 21, Hearing May 9, 10 and 13, 2013).

63. The PMA has not been unanimously renewed nor has it been terminated upon unanimous consent of a replacement property manager. The parties are at an impasse. (Prelim. Inj. ¶¶ 18-20, Defs.' Answer Prelim. Inj. ¶ 21, Hearing May 9, 10 and 13, 2013).

VI. ARBITRATION

64. Under the PMA any dispute claim or controversy arising out of or relating to the PMA shall be determined by arbitration in the City of Philadelphia, Pennsylvania in accordance with the laws of the Commonwealth of Pennsylvania. (PMA § 13).

65. Under the TIC Agreement any dispute claim or controversy arising out of or relating to the TIC Agreement shall be settled by arbitration in Orange County, California in accordance with the rules of the American Arbitration Association. (TIC Agreement § 12.2).

66. On April 26, 2013 Plaintiffs initiated arbitration through the American Arbitration Association against TNPPM for declaratory relief, injunctive relief, breach of contract, and an accounting. (Prelim. Inj. ¶ 7).

67. TNP is not a party to the PMA or any other contract with the TIC owners, and as such, has not agreed to arbitrate any disputes with the TIC owners.

CONCLUSIONS OF LAW

I. JURISDICTION

A. Pendency of Arbitration.

Although there is pending arbitration, Pennsylvania law permits injunctive relief from a Court of Common Pleas. *See Myerowitz v. Pathology Lab Diagnostics, Inc.*, 678 A.2d 404, 408 (Pa. Super. Ct. 1996); *Langston v. National Media Corp.*, 617 A.2d 354. 357-58 (Pa. Super Ct. 1992). Additionally, it is clear to the Court that TNP, who is not subject to the arbitration agreement, is making all of the critical decisions. In essence, TNP is "calling the shots."

B. Necessary/Indispensible Parties.

There are approximately 35 Tenants in Common ("TICs"). Defendants control 1 TIC, TIC 4, reflecting approximately 2.75% of the ownership. The plaintiffs represent approximately 31 TICs reflecting approximately 88% of the ownership. 2 TICs are not in the litigation, and reflect approximately 8% of the ownership.[6]

A necessary party is indispensible "when its rights are so connected with the claims of the litigants that no decree can be made without impairing its rights..." *Grimme Combustion, Inc. v. Mergentime Corp.*, 595 A.2d 77, 81 (Pa. Super. Ct. 1991). Necessary parties are those whose presence, while not indispensible, is essential if the Court is to completely resolve the controversy before it and render complete relief. *Id.*

I first note that under the Property Management Agreement ("PMA"), 80% of the ownership interest is required to terminate the property manager. As such, more than 80% of the ownership has currently elected to terminate the property manager, and

[6] At the hearing on May 9, 10, and 13, plaintiffs proffered that one of the two remaining TICs sent in a ballot to terminate the current property manager.

therefore sufficient parties exist for that action. As 100% are required to name a new property manager, I decline plaintiffs' original invitation to actually name a new property manager and asset manager. This matter will be left to the arbitration and/or other contractual remedies.

The issue now to be addressed is whether I should appoint an interim property and/or asset manager pending these future possible proceedings.[7]

I do not believe that the two missing TICs are either necessary or indispensible in a literal sense. For the sake of these proceedings, I can assume that they will take a position contrary to plaintiffs. Therefore, the precise issue is whether 88% of the TICs may vote to terminate the property manager and request that an interim property manager and asset manager be installed by Court Order. My conclusion of law is that there is no prohibition from doing so, as long as the other requirements of injunctive relief are present.

However, and as is reflected in this Order, the plaintiffs *are* required to gather all of the TICs in this lawsuit, either by having them be joined as defendants or by having them consent to be represented by the plaintiffs.

Although defendants have strenuously argued that nothing can go forward without every last TIC in place, I am not now insisting upon this. This is particularly so where it is the property manager's contractual duty to inform every TIC of the existence of litigation.[8] Additionally, defendants presented no evidence of any effort to notify the two missing TICs; nor for that matter, to permit plaintiffs' access to the two remaining TICs.

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[7] The asset manager, defendant TNP, is not a party to the arbitration agreement, but is a party to the injunctive action and the Complaint.

[8] Under § 12 of the PMA "Each [TIC] hereby designates the Property Manager as the party to receive all notices (including but not limited to service of process) on behalf of the [TICs and] upon receipt of any material notice from a third-party...promptly forward such notice to the applicable [TICs]."

I find it inequitable for defendants to demand all parties be present, on one hand; and then to secrete some of the parties.

The current defendant property manager has been terminated by a sufficient number of TICS, and as 100% of the TICs have not, or will not, name a new property manager, this Court has jurisdiction to act with regard to an immediate, but temporary, solution.

From the evidence presented to me, I find a profound mismanagement of the property.[9] Specifically, significant liabilities of accounts payable arising through normal operating activities have been kept from the investors, liens have been lodged against the property (these being events of default under the financing documents with the lender), routine maintenance has been deferred, venders have threatened work-stoppages, and necessary reserve accounts have dwindled to close to zero. All the while, distributions have been made to the investors so that the property manager could receive its payment. Following distribution to investors, and payment to the property manager, additional capital calls were made to fund the property.[10] This is, essentially, the unrebutted evidence presented.

Under these circumstances this Court finds that it has the jurisdiction to entertain an injunction.

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[9] I find that the local property manager, Richard Miller, is completely restricted in what he is able to do by the actions of defendant TNP.

[10] The PMA requires all expenses and reserves to be attended to *before* there can be a return to the investors. Only after a specified return to the investors is made can the property manager be paid. The process that was actually engaged in not only was improper, but it temporarily concealed the nature of the poor financial position.

II. ELEMENTS OF INJUNCTIVE RELIEF

A. Immediate and Irreparable Harm.

This country has seen unsettled periods of economic activity, and the current state of affairs which began about five years ago has been described as the second worst instance of unrest. It is common knowledge that in these unsettled times, small errors in business choices can be fatal. If Four Falls does not quickly act to regain the status of a well managed property,[11] it could be out of business. One could say that damages could be calculated as the $41.5 million paid in by the investors. However, it is not equity's position to see $41 million of investors' money, and $72 million of a bank's money, collapse while something might be implemented to prevent this.

Likewise, it would be extremely difficult for the investors to prove damages if the present state of affairs drags on. Exactly how many tenants will not enter leases at Four Falls because of current problems, or exactly how many tenants who might not renew leases, will do so because they worry about the property, as opposed to legitimately moving on to another property, or they simply failed themselves.

This is a large investment, with damages short of $113 million being very difficult to ascertain. As such, the first element for injunctive relief has been established.

B. Greater Injury.

If current defendants can prove the legitimacy of its actions before an arbitrator, then it will not be harmed by the temporary appointment of a property manager and asset

[11] By well managed, I mean an existence devoid of the problems just described above. One of the liens was a brokers' lien. If brokers do not get paid their commissions, they will not steer prospective tenants to such a property. The plaintiffs, recognizing this, have very recently settled their brokers' lien and the municipal lien that the current management did not cure for more than two years.

manager.[12] It is hard to imagine that any commission would be forthcoming to defendant in the near future in light of the current state of affairs, if the correct priority of payments is adhered to.

The lender will be in a stronger position if funds go to paying bills and establishing reserves. Investors will answer capital calls if they trust their managers will adhere to the priority of payments under their contract. Consequently, this element is satisfied.

C. Status Quo.

Defendants take the position that the appointment of an interim manager will alter the status quo rather than maintain it.

This Court defines the "status quo" as managers properly managing, adhering to the priority of payments in the contract, and not concealing financial and operational information from its investors. This is the "status quo" that should be maintained. This is the status quo that a Court appointed receiver can guarantee.

D. Success on the Merits.

As outlined through plaintiffs' unrebutted presentation, it is plainly this Court's belief that plaintiffs will prevail on the merits.

E. Abatement of Offending Activity.

The unrebutted evidence demonstrates that defendants' failure to perform as the contract envisions has resulted in a cessation of capital. An interim property manager under the Court's supervision will manage the contractual requirements, and will hopefully have additional capital be made available to it.

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[12] Again, defendants have essentially defended this action on the basis of the perceived lack of jurisdiction as opposed to the merits of substantial and unrebutted claims of mismanagement.

F. Public Interest.

This is, essentially, a private matter among investors, both individuals and a bank, and commercial managers. As such, it appears that the public interest will not be greatly affected. Further, to the extent that a functioning office building can remain usable, some positive public interest might result.

G. Other Considerations.

Defendants have also defended on the basis that the critical nature of the instant state of affairs has been caused, in large part if not totally, by the actions of the plaintiffs. After all, plaintiffs have failed to respond to two capital calls. Defendants also aver that the TIC Agreement is an extremely sophisticated investment, entered into by sophisticated persons, where the investors are aware that just one TIC can veto everyone else's reasonable opinions. Further, the investors are also aware that any alteration of the meticulously prepared TIC Agreement requiring unanimous approval for a replacement property manager would directly contravene IRS Revenue Procedure 2002-22 governing TIC. This, in turn, would result in the loss of TIC tax preferred status and cause significant and detrimental tax consequences. Finally, defendants point out that the contract permits buyouts of holdout TICs, the only available remedy in this particular business model.

First, the fact that the investors have failed to answer capital calls is defendants' most compelling complaint. The immediate cash crunch can be attributed to plaintiffs' failure to answer capital calls. However, and once again, the unrebutted testimony justifies the investors' decision to halt payments to these managers.

Second, although these agreements are very strict, this does not mean that until the matter is finally adjudicated, whether before arbitrators or courts, the situation should be permitted to deteriorate to an irreparable degree. Further, plaintiffs admit that they are fully aware that the appointment of an interim property manager is a direct contravention of IRS Revenue Procedure 2002-22 and could conceivably result in the loss of TIC tax preferred status and cause significant and detrimental tax consequences. However, plaintiffs are willing to take such a risk. Additionally, the relief ordered herein only temporarily changes the situation. As soon as a contractual remedy or arbitration is completed, unanimous consent to appoint a new property manager can be achieved thus returning the TICs to tax preferred status. Additionally, the IRS directives appear to be guidelines, as opposed to any type of self-executing disability.

Third, it is my understanding that plaintiffs are in the process of exercising their contractual remedies, but that a substantial amount of time could be expended in the protracted contest that is assured.

Finally, defendants argue that the emergency nature of this situation is belied by the fact that plaintiffs have recently, on their own, satisfied two liens that totaled $167,766. I do not view plaintiffs' activities as proof that the situation is not an emergency. I view the actions as proof of just the opposite. Plaintiffs are so convinced that the state of affairs is dire, that they will resort to dire measures (not involving any defendant) to protect their investment.

III. CHOICE OF INTERIM MANAGER

The law gives this Court the power to appoint any competent entity to be a manager. Ordinarily, I would not want to appoint one party's choice. I would see if both parties could agree upon an interim manager, or appoint my own nominee.

In this case, I will appoint plaintiffs' nomine. They have the current approval of at least 88% of the ownership; they understand the project and have consented to serve. Their vetting, familiarity, and the likelihood that they will become the ultimate property manager makes sense, both financially and logistically. As the current managers are defendants contesting this matter, it would be useless to spend more time and money to look for anyone else.

IV. CONCLUSION

The Court grants plaintiffs' Petition for Preliminary Injunction and appoints FAMECO Management Services Associates, L.P. as a temporary receiver for the property.[13] This Court believed this action will preserve the viability of the office building, and is not rewriting any of the provisions in the contract.

Defendants must supply all the information they have to identify any TICs presently unheard from. Plaintiffs must attempt to bring all TICs into this litigation.

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[13] Defendants have argued that an appointment of a receiver is an event of default under the mortgage. However, the Court notes that the placement of a lien on the property is also an event of default and Wells Fargo did not foreclose on the mortgage as a result of the Cresa and municipal liens. The liens have been removed from the property, the mortgage is currently a performing mortgage, and this Court has been presented with no evidence that Wells Fargo plans to foreclose on the mortgage as a result of the appointment of an interim property manager.

Plaintiffs must also seek its other contractual remedies to achieve unanimity with respect to a replacement property manager and asset manager.

BY THE COURT,

ALBERT JOHN SNITE, JR., J.

KLEHR | HARRISON | HARVEY | BRANZBURG LLP

Michael K. Coran
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June 10, 2013

VIA ELECTRONIC MAIL
The Honorable Albert John Snite
Court of Common Pleas of Philadelphia
692 City Hall
Philadelphia, PA 19107

Re: NNN 300 Four Falls 1, LLC, et al. v. Thompson National Properties, LLC, et al., No. 13-04-04085 (Commerce Program)

Dear Judge Snite:

As you know, on May 16, 2013, defendants Thompson National Properties, LLC, TNP Property Manager, LLC and NNN 300 Four Falls 4, LLC filed an Emergency Application for Extraordinary Relief in the Nature of a Writ of Prohibition with the Pennsylvania Supreme Court ("Emergency Application"). We understand that, on Friday, June 7, the Pennsylvania Supreme Court denied the Emergency Application and lifted the stay on proceedings in this Court. We want to alert the Court as to this disposition so that the Court may resume its consideration of Plaintiffs' Petition for Preliminary Injunction.

At the time of the hearing on Plaintiffs' Petition for Preliminary Injunction, there were two liens on the property at issue, one filed by Cresa Partners of Philadelphia ("Cresa") for $153,165.31, and one filed by the West Conshohocken Municipal Authority, for $14,601.24. In response to the Court's suggestion in the May 22, 2013 e-mail from your Honor's law clerk, and in furtherance of the plans presented by Plaintiffs at the hearing, Plaintiffs have negotiated full settlements and releases of the Cresa and municipal liens. With the assistance of Larry Zipf, President of Fameco Asset Management Services Associates, my clients' proposed replacement local property manager, these settlements were effected between Plaintiffs and the lien-holders directly, using Plaintiffs' personal funds. Defendants were not involved in the negotiations, settlements or payments.

If you need any further information, do not hesitate to let me know.

Respectfully yours,

Michael K. Coran

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L A M B | M c E R L A N E PC

A T T O R N E Y S   A T   L A W

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June 10, 2013

The Honorable Albert John Snite
Court of Common Pleas of Philadelphia
692 City Hall
Philadelphia, PA 19107

Re: *NNN 300 Four Falls 1, LLC, et al. v. Thompson National Properties, LLC, et al.*
No. 13-04-04085 (Commerce Program)

Dear Judge Snite:

Defendants are in receipt of Plaintiffs' letter to Your Honor dated today, June 10, 2013. First and foremost, Defendants express their extreme dismay at Plaintiffs' attempt to engage in *ex parte* communication and to present additional "evidence" to the court in a case where the record *has been closed for over three weeks* and Defendants are completely unable to cross-examine witnesses or test the veracity or accuracy of any statements made. Defendants are also extremely dismayed at Plaintiffs' attempt to further promote the virtues of Mr. Zipf and FAMECO before Your Honor, who as Your Honor is aware, Plaintiffs have asked this Court to appoint as a receiver in this case, again, without any ability by Defendants to cross-examine Mr. Zipf on these issues. While Defendants are reluctant to engage in similar *ex parte* communications with the Court, given Mr. Coran's letter and Ms. Johnson's recent email regarding Your Honor's intent, Defendants would simply point out that, if what Plaintiffs say is true—and the liens have now been satisfied—Plaintiffs have rendered moot **one of the primary reasons** they claim injunctive relief was necessary in this case.

This Court lacks jurisdiction over Plaintiffs' claims. This case remains a case for damages with no need for extraordinary relief.

Respectfully,

LAMB McERLANE PC

Maureen M. McBride

MMM/rw
cc: Michael K. Coran, Esquire (via emailmcoran@klehr.com)
Helen Mountain, Esquire
Kerry Slade, Esquire (via email kslade@klehr.com)