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MAR 28 2014

C. HART
CIVIL ADMINISTRATION

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

LEI SS INVESTOR, L.P.

Plaintiff

v.

DCI—STATION SQUARE NEW GROUP, L.L.C.,
DEWEY COMMERCIAL INVESTORS, L.P.,
KLEHR HARRISON HARVEY BRANZBURG, L.L.P.,
JOHN M. DEWEY
and
KENNETH C. DEWEY

Defendants

: March Term, 2014
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: Case No. 00856
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: Commerce Program
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: Control No. 14035039
:

ORDER

AND NOW, this 28th day of March, 2014, upon consideration of the motion for special and preliminary injunctions of plaintiff, LEI SS Investor, L.P., the response in opposition of defendants DCI—Station Square New Group, L.L.C., Dewey Commercial Investors, L.P., John M. Dewey, Kenneth C. Dewey and Klehr Harrison Harvey Branzburg, L.L.P., the respective *memoranda* of law, the reply brief of plaintiff, all matters of record and in accordance with a **MEMORANDUM OPINION** issued simultaneously herewith, the Court **FINDS** as follows:

- A. Defendants DCI—Station Square New Group, L.L.C., Dewey Commercial Investors, L.P., John M. Dewey and Kenneth C. Dewey breached the Escrow Agreement dated January 18, 2013.
- B. Defendants DCI—Station Square New Group, L.L.C., Dewey Commercial Investors, L.P., John M. Dewey and Kenneth C. Dewey breached the Amended

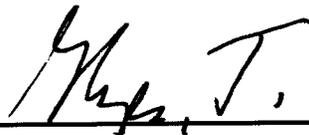


and Restated Agreement of Limited Partnership of DCI—Station Square, LP (the “Partnership”), dated January 23, 2013.

In light of the above, it is **ORDERED** as follows:

- I. Defendant Klehr Harrison Harvey Branzburg LLP is directed to immediately release and deliver to plaintiff LEI Investors, L.P. all Replacement Transfer Documents described in the Escrow Agreement executed by the parties therein.
- II. All Defendants are prohibited from obstructing or interfering with any activity necessary for plaintiff to transfer to itself Defendants’ interest in the above referenced Partnership.
- III. Plaintiff LEI SS Investor, LP is directed to post bond in the amount of \$100.00.¹

BY THE COURT,



GLAZER, J.

¹ PA. R.C.P. 1531(b). Should Defendants appeal this Order, they shall comply with PA. R.A.P. 1733(a) (empowering the court to “impose such terms and conditions as it deems just,” while requiring an appeal to operate as a *supersedeas* only upon the filing of appropriate security, as defined in PA. R.A.P. 1734). In light of the facts of this case, the court believes that \$15 million would represent a just and appropriate amount of security under Pa. R.A.P. 1733(a).

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

LEI INVESTOR SS, L.P.	:	March Term, 2014
<i>Plaintiff</i>	:	Case No. 00856
v.	:	
DCI—STATION SQUARE NEW GROUP, L.L.C., DEWEY COMMERCIAL INVESTORS, L.P, KLEHR HARRISON HARVEY BRANZBURG, L.L.P, JOHN M. DEWEY and KENNETH C. DEWEY	:	Commerce Program
<i>Defendants</i>	:	Control No. 14035039

MEMORANDUM OPINION

The motion for special and preliminary injunctions requires this court to determine whether mandatory injunctive relief may be granted where plaintiff established each required element thereof. For the reasons below, this court finds that plaintiff established each element and the motion is granted.

Background

Plaintiff, LEI SS Investor, LP (“LEI” or “Plaintiff”), is a Delaware limited partnership with an address in California. Defendants DCI—Station Square New GP, LLC and Dewey Commercial Investors, LP are respectively a Delaware limited liability company and a Pennsylvania limited partnership (collectively, “Defendants”). Defendants formed a partnership for the purpose of acquiring and developing an apartment complex in Lansdale, Pennsylvania (the “Property”). In 2004, Defendants obtained a loan from LEI’s predecessor in interest to acquire and develop the Property.

In 2009, LEI provided Defendants with additional funds in the guise of a mezzanine loan. This mezzanine loan was junior to a senior loan provided to Defendants by an entity not a party in the instant litigation. In January 2013, Defendants sought to refinance the senior loan; however, the senior lender would agree to the operation only if LEI retired the mezzanine loan. To allow refinancing, LEI agreed to retire and reclassify the unpaid balance of its mezzanine loan, in excess of \$12 million, into a senior class of preferred equity in the partnership.¹ To carry out this intent, LEI and Defendants entered into an Amended and Restated Agreement of Limited Partnership of DCI—Station Square, LP (the “Limited Partnership Agreement”), on January 23, 2013. As a result of the Limited Partnership Agreement, LEI became 100% owner of the “Class A” interest in the Limited Partnership, while Defendants retained ownership of 80% the “Class B” interest therein. The Limited Partnership Agreement contains a provision requiring Defendants to redeem by a stated date the entire Class A interest in the Limited Partnership owned by LEI. The specific provision states:

Redemption of Class—A Limited Partner; termination Events

[LEI] hereby consents to the redemption of its entire Partnership Interest upon payment [by DCI—Station Square New GP, LLC and Dewey Commercial Investor, LP] to [LEI] of the amount due under Section 6.2(a) [repayment in full of LEI’s Capital Contribution and Partnership Interest]. Upon Payment to [LEI] of the amount due under Section 6.2(a) [LEI] shall surrender its entire Partnership Interest to the Partnership. If the Partnership has not redeemed [LEI’s]

¹ Amended and Restated Agreement of Limited Partnership of DCI—Station Square, LP, Exhibit B to the motion for special and preliminary injunctions of plaintiff LEI, p. 2, 9th “Whereas Clause.” See also Memorandum Opinion issued by the U.S. Bankruptcy Court for the Eastern District of Pennsylvania, In re: Dewey Commercial Investors, LP, Case No. 13-17294 (MDC), p. 4.

Partnership Interest in full by paying to [LEI] of the amount due under Section 6.2(a) on or before the six (6) month anniversary of the Effective Date [July 23, 2013] ... then the General Partner [DCI—Station Square New GP, LLC] and Dewey Commercial Investor, LP shall transfer their Partnership Interests to [LEI] without further consideration.²

On January 23, 2013, the same date in which the Limited Partnership Agreement was executed, LEI and Defendants entered into an “Escrow Agreement.” Pursuant to this agreement, Defendants agreed to place in an escrow all their Class B interest in the Limited Partnership.³ Furthermore, the Escrow Agreement provided that if Defendants failed by a specific date to redeem the entire Class A interest of LEI in the Limited Partnership, and if LEI satisfied certain conditions, then the escrow agent, herein defendant Klehr Harrison Harvey Branzburg LLP (“Escrow Agent” or “Klehr Harrison”), was required to release to LEI all of Defendants’ Class B interest in the Limited Partnership.⁴

Defendants failed to buy-out or redeem LEI’s Class A interest in the Limited Partnership by the agreed-upon date of July 23, 2013.⁵ On August 23, 2013, defendant Dewey Commercial Investors, LP filed a voluntary Chapter 11 bankruptcy action in the United States Bankruptcy Court for the Eastern District of Pennsylvania.⁶ On September 20, 2013, herein plaintiff, LEI, filed a motion to dismiss the bankruptcy action. On December 16, 2013, the Bankruptcy Court issued its Memorandum Opinion

² Id. § 8.4.

³ Escrow Agreement, Exhibit C to the motion for special and preliminary injunctions of plaintiff LEI, ¶¶ 1–2.

⁴ Id. ¶ 3.

⁵ Admission of John M. Dewey dated September 25, 2013, Exhibit D to the motion for special and preliminary injunctions of LEI, p. 4:132–17.

⁶ In re: Dewey Commercial Investors, LP, Case No. 13-17294 (MDC), Factual Background, p.5.

upon LEI's motion. In the Memorandum Opinion, the Bankruptcy Court found that "the only significant asset ... the Debtor owns is its interest in the [Limited] Partnership which in turn owns the Property."⁷ The Bankruptcy Court also held that:

Debtor did not file its bankruptcy in furtherance of a valid reorganization purpose. The Debtor did not file for Chapter 11 relief for the purpose of maximizing property available to creditors. Rather, this Court finds that the Debtor filed its bankruptcy for the purpose of frustrating [LEI's] efforts, in accordance with the terms of the Partnership Agreement, to transfer to itself ownership of the Partnership. On this basis, [LEI's] request to dismiss Debtor's bankruptcy case will be granted.⁸

On March 5, 2014, LEI forwarded a letter to defendant Escrow Agent. The letter stated:

Pursuant to Paragraph 2(b) and 3 of the Escrow Agreement, LEI hereby demands immediate release and delivery to its counsel of the Replacement Transfer Documents being held in escrow by Escrow Agent. As defined in the Escrow Agreement, the Replacement Transfer Documents include those transferring both the General Partner's partnership interest [the Class A interest] and the DCI Partnership's partnership interest in the [Limited] Partnership [Defendants' Class B interest].⁹

On March 7, 2014, Defendants wrote a letter to the Escrow Agent directing the latter not to deliver to LEI any of the escrowed documents. Defendants explained their directives on grounds that a "real dispute under the Escrow Agreement" existed between Defendants and LEI.¹⁰ To this day, the Escrow Agent has not released the documents requested by LEI.

⁷ *Id.* Factor VIII, p. 9.

⁸ *Id.* pp. 15–16.

⁹ Letter from LEI to Escrow Agent, Exhibit F to the Complaint, p. 1.

¹⁰ Letter from Dewey Companies to Klehr Harrison, Exhibit H to the reply brief of LEI in support of its motion for special and preliminary injunctions.

On March 7, 2014, LEI filed a complaint against Defendants, including Escrow Agent Klehr Harrison. Simultaneously, LEI filed the instant motion for special and preliminary injunctions. The motion for special and preliminary injunctions asks the court to issue an Order compelling Escrow Agent Klehr Harrison to immediately release and deliver to LEI the Replacement Transfer Documents in accordance with the Escrow Agreement, and prohibiting all defendants from interfering with the release and delivery of said documents, or from taking any actions that could hinder the transfer of Defendants' ownership interest to LEI. Attached to the motion for special and preliminary injunctions is documentary evidence showing that LEI has complied with all the requirements necessary to trigger transfer of the Class B interest from Defendants to LEI.¹¹ On March 14, 2014, Defendants filed their timely response in opposition to LEI's motion for special and preliminary injunctions.¹² The motion and the response in opposition thereto have been briefed and are ripe for a ruling.¹³

Discussion

I. The court asserts jurisdiction over the motion for special and preliminary injunctions.

In the response in opposition to LEI's motion, Defendants argue that this court should decline to assert its jurisdiction over the motion because LEI has not exhausted all the contractual remedies contemplated under paragraph 7 of the Escrow Agreement.

¹¹ On December 16, 2013, the United States Bankruptcy Court for the Eastern District of Pennsylvania found that only two requirements of LEI under the Limited Partnership Agreement remained unfulfilled. In re: Dewey Commercial investors, LP, Bankruptcy No. 13-17294 MDC, p. 6. Since the ruling from the Bankruptcy Court, LEI has fulfilled the remaining two conditions required under the Limited Partnership Agreement. See Exhibit L attached to LEI's reply brief in support of the motion for special and preliminary injunctions.

¹² Defendants' response in opposition does not admit or deny any averment of fact in plaintiff LEI's motion. In Pennsylvania, "[a]verments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial ... shall have the effect of an admission." PA. R.C.P. 1029(b).

¹³ On March 18, 2014, plaintiff LEI also filed a reply brief in support of its motion for special and preliminary injunctions.

Specifically, Defendants assert that LEI has failed to comply with a provision requiring the Escrow Agent to continue to hold the escrowed documents for 30 days pending appointment by LEI of a new, neutral escrow agent.¹⁴

In Pennsylvania,

Every contract ... imposes on each party a duty of good faith and fair dealing in its performance and its enforcement. Good faith has been defined as honesty in fact in the conduct or transaction concerned.¹⁵

The obligation to act in good faith in the performance of contractual duties varies somewhat with the context, and a complete catalogue of types of bad faith is impossible, but it is possible to recognize certain strains of bad faith which include: **evasion of the spirit of the bargain**, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.¹⁶

In this case, the court is mindful that the underlying Bankruptcy Action was not filed by defendant Dewey Commercial Investors L.P. for a valid objective, but merely for the purpose of “frustrating [LEI’s] efforts ... to transfer to itself ownership of the Partnership.”¹⁷ The court finds that the underlying Bankruptcy Action amounted to a bad faith attempt to evade the spirit of the Escrow Agreement, and to deny LEI of its property rights. This attempt was tantamount to a material breach of the Partnership and Escrow Agreements. By materially breaching the Escrow Agreement, Defendants acquired unclean hands and may not now argue that LEI has failed to exhaust the requirements contemplated under the same contract which Defendants previously

¹⁴ Defendants’ memorandum of law in opposition to the motion for special and preliminary injunctions, p. 17.

¹⁵ Donahue v. Fed. Exp. Corp., 2000 Pa. Super 146, 753 A.2d 238, 242 (Pa. Super. 2000).

¹⁶ Somers v. Somers, 418 Pa. Super. 131, 136-37, 613 A.2d 1211, 1213 (Pa. Super. 1992) (emphasis supplied).

¹⁷ In re: Dewey Commercial Investors, LP, Case No. 13-17294 (MDC), Factual Background, p, 15–16.

breached.¹⁸ For this reason, the court shall exercise jurisdiction over LEI's motion for special and preliminary injunctions.

II. LEI has satisfied each element required for injunctive relief.

In Pennsylvania, a plaintiff seeking an injunction must establish that:

- 1) relief is necessary to prevent immediate and irreparable harm;
- 2) a greater injury will occur from refusing the injunction than from granting it;
- 3) the injunction will restore the parties to the status quo;
- 4) the alleged wrong is manifest and the injunction is reasonably suited to abate it; and
- 5) the plaintiff's right to relief is clear.

A party seeking injunctive relief also must show that granting the request will not adversely affect the public interest.¹⁹

A distinction must be made between prohibitory and mandatory injunctions.... While the purpose of all injunctions is to preserve the *status quo*, prohibitory injunctions do this by forbidding an act or acts while mandatory injunctions command the performance of some specific act that will maintain the relationship between the parties.

[A] mandatory preliminary injunction is an extraordinary judicial act and should be issued only in rare cases, and certainly more sparingly than an injunction which is merely prohibitory.... The court must exercise extreme care and act in only the clearest of circumstances.²⁰

Finally,

A court shall issue a preliminary or special injunction only after written notice and hearing **unless** it appears to the satisfaction of the court that immediate and irreparable injury will be sustained before notice can be given or a hearing held, in which case the court may issue a preliminary

¹⁸ "[A] material breach by one party to a contract entitles the non-breaching party to suspend performance." Widmer Eng'g, Inc. v. Dufalla, 2003 Pa. Super 391, 837 A.2d 459, 467 (Pa. Super. 2003). The "unclean hands doctrine forecloses ... relief when wrongdoing directly relates to matter in controversy, affects relationship between parties, and doctrine can be raised by the court *sua sponte*). In re Estate of Scharlach, 2002 Pa. Super. 279, 809 A.2d 376, 383 (Pa. Super. 2002).

¹⁹ Ambrogi v. Reber, 2007 Pa. Super. 278, 932 A.2d 969, 974—976 (Pa. Super. 2007).

²⁰ Moore v. Mobil Oil Co., 331 Pa. Super. 241, 255; 480 A.2d 1012, 1019 (Pa. Super. 1984).

or special injunction without a hearing.... In determining whether a preliminary or special injunction should be granted and whether ... a hearing should be required, the court may act on the basis of the averments of the pleadings or petition and may consider affidavits of parties or third persons or any other proof which the court may require.²¹

Examination of the record shows that LEI has established all the elements required for the granting of a mandatory special and preliminary injunction.

- First, LEI has established that it will suffer irreparable harm unless the motion is granted and the Class B interest is immediately transferred to LEI. LEI will suffer irreparable harm because without immediate ownership of Defendants' Class B interest, and without control over the Property thereof, LEI would be deprived of its right to determine, *inter alia*, whether it should hold the Property in the long run, or attempt to sell it at anytime.
- Second, LEI has established that a greater injury would occur if the requested relief is not granted. In this case, Defendants would suffer no injury upon transfer of the Class B interest to LEI because Defendants no longer own any interest in the Property and have no right to exercise control thereon. LEI, conversely, would suffer great injury if it continues to be deprived of its right to control, maintain or divest itself of its Property.
- Third, LEI has established that granting the motion would restore the parties to the status quo as it existed when Defendants defaulted. In this case, LEI became owner of Defendants' Class B interest as soon as Defendants failed to redeem the interest of LEI. When LEI became owner of Defendants' Class B interest, it acquired the right to make any business decision concerning the Property. Soon

²¹ PA.R.C.P. No. 1531(a) (2014) (emphasis supplied).

thereafter, however, the property rights of LEI were substantially impaired by the unnecessary filing of the underlying Bankruptcy Action. In this case, granting the instant motion would restore LEI's right to the position of control over the Property which LEI acquired immediately upon Defendants' default.

- Fourth, LEI has established that the wrong perpetrated by Defendants is manifest, and that granting the injunction is a reasonable way to abate that wrong. This element has been easily established because granting the injunction, and requiring Defendants to surrender the escrowed Class B interest, would effectively end their improper control over assets which they do not have a right to own or control.
- Fifth, LEI's right of relief is clear because the language in the Partnership Agreement clearly and unambiguously allows LEI to own the Class B interest of Defendants in the event of their default. In this case, LEI is entitled to own the Class B interest of Defendants because Defendants clearly defaulted on their obligation to redeem LEI's interest in the Partnership. Indeed, Defendants' representative, John M. Dewey, admitted during the underlying Bankruptcy Action that Defendants had failed to raise the funds necessary to redeem LEI's interest by the agreed-upon date.²²
- Finally, LEI has established that granting the injunction will not adversely affect the public's interest. Far from having a negative impact, this court's decision to grant the injunction will safeguard a fundamental public interest –namely, the interest of protecting property owners in the exercise of their rights. For these

²² Admission of John M. Dewey dated September 25, 2013, Exhibit D to the motion for special and preliminary injunctions of LEI, p. 4:132–17.

reasons, LEI has established each strict element required for granting mandatory injunctive relief. In addition, the requested relief is granted without the need for a hearing because it appears to the satisfaction of this court that immediate and irreparable injury would be sustained by LEI if the court ruled otherwise.²³

BY THE COURT,



GLAZER, J.

²³ In the response in opposition to LEI's motion, Defendants assert that the decision of the Bankruptcy Court has been appealed; thus Defendants argue, the instant case should be stayed pending resolution thereof. However, Defendants do not cite any law in support of this argument. Moreover, Defendants have stated in their brief that they "[have been] actively marketing the Property for some time now, and [have] reached the final stages of the sale process." See Memorandum of law in opposition to the motion of LEI, pp. 14–15. The court finds that Defendants' efforts to sell the Property runs counter to their plea for a stay pending appeal of the Bankruptcy Court's decision.