

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ORIN R. KITZES

PART 17

Justice

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**METROPLAZA TWO ASSOCIATES, LLC,
Individually and on behalf of Lasalle Bank N.A.,
as Trustee for the Registered holders of Wachovia
Bank Commercial Mortgage Trust, Commercial
Mortgage Pass Through 2006-C24, and
METROPLAZA III NEW JERSEY ASSOCIATES,
LLC,**

Plaintiff,

-against-

**HILTON INNS, INC., a Delaware corporation, and
PROMUS HOTELS, INC.,**

Defendants.

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**LASALLE BANK NATIONAL ASSOCIATION,
as Trustee for the Registered Holders of Wachovia
Bank Commercial Mortgage Trust, Commercial
Mortgage Pass Through 2006-C24, by and through
its Special Servicer, LNR Partners, Inc.,**

Plaintiff-Intervenor,

-against-

**HILTON INNS, INC., a Delaware corporation,
Defendant.**

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The following papers numbered 1 to 14 read on this motion by Defendants for an order vacating the Order of this Court, entered December 14, 2007, which preliminarily enjoined Hilton Inns, Inc. fro terminating that certain July 19, 2004 Amended and Restated Franchise License Agreement between Hilton Inns, Inc. and plaintiff Metroplaza Two Associates LLC; and cross-motion by Plaintiffs for an order striking scandalous and/or prejudicial statements in the affirmation in support of the instant motion.

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Upon the foregoing papers it is ordered that this motion by Defendants for an order vacating the Order of this Court, entered December 14, 2007, which preliminarily enjoined Hilton Inns, Inc. from terminating that certain July 19, 2004 Amended and Restated Franchise License Agreement between Hilton Inns, Inc. and plaintiff Metroplaza Two Associates LLC; and cross-motion by Plaintiffs for an order striking scandalous and/or prejudicial statements in the affirmation in support of the instant motion is decided as follows:

On or about July 19, 2004, plaintiff Metroplaza and defendant Hilton Inns, Inc., a subsidiary of Hilton Hotels Corporation, entered into a new ten-year license agreement pursuant to which the defendant permitted the plaintiff to operate a hotel located at 120 Wood Avenue South, Iselin, New Jersey as the "Woodbridge Hilton." Plaintiff Metroplaza has held a franchise license for the Woodbridge Hilton for over twenty-three years. The plaintiff agreed to renovate the hotel by no later than March 31, 2005 as specified in a spreadsheet known as a "Product Improvement Planner." The plaintiff also agreed to maintain and operate the hotel as required by the licensor's Design and Construction Standards and Brand Standards. Defendant Hilton Inns, Inc. alleges that plaintiff Metroplaza Two did not complete many of the fifty items of renovation work specified in the Product Improvement Planner and did not operate the hotel in a way that met the licensor's standards, thereby causing the licensee to fail quality assurance audits in 2005 and 2006. Deirdre O'Rourke Hemingway, the Director for International Quality Assurance for Hilton Inns, Inc., personally conducted an audit of the Woodbridge Hilton on June 28, 2006, and she allegedly observed that "the Hotel was woefully below Hilton's standards." She allegedly noted, inter alia, that (1) elevators shuddered and did not stop flush with landings, (2) the porte cochere (hotel entryway) had not been renovated, (3) external walkways to entrances had not been upgraded, (4) metal roofs on exterior overhangs were buckled, (5) carpeting was badly worn throughout the building, and (6) there were holes in the walls of showers where clotheslines had been removed. On September 22, 2006, defendant Hilton Inns, Inc. issued a notice of default requiring the plaintiff to complete six items of renovation work by certain deadlines. The plaintiff allegedly failed to demonstrate to the defendant that it had completed five of the six items, and the licensor sent a notice of termination on January 10, 2007 ending the relationship effective March 15, 2007.

On or about January 24, 2007, the Plaintiffs began this action which essentially seeks to prevent the termination of the licensing agreement for the Woodbridge Hilton and the termination of another licensing agreement for a proposed Homewood Suites Hotel. By memorandum dated

June 20, 2007, this court granted plaintiff Metroplaza's motion for a preliminary injunction, inter alia, prohibiting defendant Hilton Inns, Inc. from terminating the Amended and Restated Franchise License Agreement dated August 1, 2004 pursuant to the notice of termination sent on January 10, 2007.

Shortly after this court granted the Plaintiff's application for a preliminary injunction, defendant Hilton sent another notice of default and termination dated July 10, 2007 which sought to terminate the franchise license effective as of September 15, 2007. The second notice of default and termination is based on two inspections conducted by Hilton, the first on June 28, 2006 when the hotel was "graded 'Unacceptable' for failure in Condition and Brand Standards" and the second on January 30, 2007, when the hotel was "graded 'Unacceptable' for failure in Condition, Brand Standards and SALT." The second notice threatened: "Unless the Hotel receives at least an overall 'Acceptable' score on the Special Product Evaluation scheduled for August 31, 2007, the Hotel will be removed from the Hilton Hotel System "

By memorandum, dated October 12, 2007, this Court discussed allegations of Bruce Wolosin, a quality assurance manager for the Hilton Hotels Corp., regarding his quality assurance audit on August 31, 2007. He gave plaintiff Metroplaza a failing grade on the audit which purportedly is "an objective, fact-based evaluation of a hotel's physical condition, customer service, and management processes, as measured against Hilton Inn's brand-wide standards." Wolosin allegedly observed that, inter alia, (1) the parking lot had not been resurfaced, (2) the porte cochere had not been renovated, (3) the walkways to all public entrances had not been upgraded, (4) the building's exterior had not been washed clean of streaks and stains, (5) glass panels on lobby entry doors had not been replaced, (6) elevators shuddered, (7) buckled roofing had not been repaired, and (8) some doors to guest rooms did not lock automatically.

This Court also reviewed allegations of Anne Baykowski, the corporate controller for Metroplaza Hotel Holdings, Inc., regarding inter alia, that (1) some of the alleged defects upon which the second notice of termination is based are the same as the alleged defects upon which the first notice of termination is based, and the first notice has already been stayed by this court, (2) some of the alleged defects are insignificant, (3) Metroplaza has already cured or has begun to cure other alleged defects, such as resurfacing the parking lot, fixing the porte cochere, and removing stains from the exterior of the building.

This Court granted those branches of the motion which were for a preliminary injunction for the following reasons:

[I]n order to obtain a preliminary injunction, plaintiff Metroplaza had to show (1) a likelihood of ultimate success on the merits, (2) irreparable injury if provisional relief is withheld, and (3) a weight of the equities in its favor. (See, Aetna Insurance Co. v Capasso, 75 NY2d 860.) Plaintiff Metroplaza successfully

carried this burden. In regard to the first requirement, "[i]t is enough if the moving party makes a prima facie showing of his right to relief; the actual proving of his case should be left to the full hearing on the merits ." (Tucker v Toia, 54 AD2d 322, 326; Time Square Books, Inc. v City of Rochester, 223 AD2d 270; Bingham v Struve, 184 AD2d 85; Gambar Enterprises, Inc. v Kelly Services, Inc., 69 AD2d 297.) In the case at bar, plaintiff Metroplaza showed prima facie that defendant Hilton has attempted to terminate its franchise without adequate grounds. Although factual issues exist in this case, they do not in themselves preclude the issuance of a preliminary injunction. (See, CPLR 6312[c]; Egan v New York Care Plus Ins. Co., 266 AD2d 600; Board of Managers of 235 East 22nd Street Condominium v Lavy Corp., 233 AD2d 158.) "[T]he existence of a factual dispute will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance ." (Melvin v Union College, 195 AD2d 447, 448.) In regard to the second requirement, the record shows that equitable relief is a more efficient remedy than monetary damages. (See, People by Abrams v Anderson, 137 AD2d 259; Poling Transp. Corp. v A & P Tanker Corp., 84 AD2d 796.) The interference with an ongoing business risks injury for which monetary damages may not be adequate. (See, Mr. Natural, Inc. v Unadulterated Food Products, Inc., 152 AD2d 729; U.S. Ice Cream Corp. v Carvel Corp., 136 AD2d 626.) In regard to the third requirement, plaintiff Metroplaza demonstrated that the alleged irreparable injury to be sustained by it is more burdensome than the harm that will be caused to the defendant through imposition of the injunction. (See, Reuschenberg v Town of Huntington, 16 AD3d 568; Credit Index, L.L.C. v Riskwise Intern. L.L.C., 282 AD2d 246; Mr. Natural, Inc. v Unadulterated Food Products, Inc., *supra*; McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co., Inc., 114 AD2d 165; Metropolitan Package Store Ass'n, Inc. v Koch, 80 AD2d 940; Nassau Roofing & Sheet Metal Co., Inc. v Facilities Development Corp., 70 AD2d 1021; 67A NY Jur2d, "Injunctions," § 31.) Plaintiff Metroplaza, which employs over 250 individuals at the hotel, has been a Hilton franchisee for over twenty-three years

The motion to vacate the December 14, 2007 preliminary injunction is denied. First, the Court properly issued the December preliminary injunction. Second, Defendants have failed to show a compelling or changed circumstance exists which renders the continuation of the injunction as inequitable or that the basis for the granting of the injunction no longer exists. Based upon the submissions, this Court is satisfied that the information submitted in support of the injunction do not contain falsehoods that would nullify the grounds on which this Court's

findings were made. Third, any new alleged violations by Plaintiffs cannot support the instant motion since the injunction is based upon different grounds. In any event, these new allegations are not sufficiently dispositive of actions taken by Plaintiff in running the Hotel. Accordingly, the previously issued injunction remains in full force.

The cross-motion by Plaintiffs for an order striking scandalous and/or prejudicial statements in the affirmation in support of the instant application is denied. There is no basis for this Court to strike “scandalous” matters from an affirmation in support of an Order to Show Cause. CPLR 3024 allows for striking matter from pleadings and an affirmation is not a pleading. CPLR 3011.

Dated: April 22, 2008

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ORIN R. KITZES, J.S.C.