

25

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Charles Edward Ramos

53

PRESENT: Hon. \_\_\_\_\_

PART \_\_\_\_\_

Justice

*Hardop et al*

INDEX NO.

*C 604-751-99*

MOTION DATE

- v -

*Partnership Acquisition et al*

MOTION SEQ. NO.

*02*

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits

**FILED**

PAPERS NUMBERED

Answering Affidavits — Exhibits

MAY 03 2000

Replying Affidavits

COUNTY CLERK'S OFFICE  
NEW YORK

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DISPOSED OF  
IN ACCORDANCE WITH THE ACCOMPANYING  
MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED: \_\_\_\_\_

Dated: *4/27/2000*

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

*MD#7*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 53

-----X  
SAMUEL A. HARDAGE, HARDAGE INVESTMENTS,  
INC., f/k/a HARDAGE HOTELS, INC., HARDAGE  
CONSTRUCTION CORPORATION, WOODFIN SUITE  
HOTELS, L.L.C., and HARDAGE SUITE HOTELS  
IV, L.L.C.,

Plaintiffs,

Index No.

-against-

604751/99

PARTNERSHIP ACQUISITION TRUST XVII, THE  
CAPITAL COMPANY OF AMERICAN, L.L.C., f/k/a  
NOMURA ASSET CAPITAL CORPORATION. and  
NOMURA HOLDING AMERICA, INC.,

**FILED**

Defendants.

MAY 03 2000

-----X  
CHARLES EDWARD RAMOS, J.S.C.:

COUNTY CLERK'S OFFICE  
NEW YORK

For convenience, Motions Nos. 002 and 003 shall be treated  
as a single motion.

Defendants move for the dismissal of the complaint.  
Plaintiffs cross-move for partial summary judgment. Defendant  
Partnership Acquisition Trust XVII ("PAT"), in a separate motion,  
moves for a preliminary injunction and for the appointment of a  
temporary receiver.

This action involves the obligations of parties to a joint  
venture operation to contribute equity and provide loans. The  
joint venture, Hardage Hotels IV, is a Delaware Limited Liability  
Company, formed pursuant to an Operating Agreement, dated  
November 26, 1997 (the "Operating Agreement"). The joint venture  
was organized for the purpose of acquiring, constructing and  
improving hotel properties at locations across the United States.  
The signatories to the Operating Agreement and members of the  
joint venture include plaintiffs Samuel Hardage and Hardage

Investments, Inc. f/k/a Hardage Hotels, Inc. ("Hardage Investments") and defendant PAT. Pursuant to the Operating Agreement, PAT acquired an equity interest in the joint venture, the assets of which included 15 hotel properties, valued at \$81.5 million, that were contributed by Hardage. PAT also agreed to contribute up to \$81.5 million in equity capital. Simultaneously with the execution of the Operating Agreement, Hardage Hotels IV, L.L.C. and defendant Nomura Asset Capital Corporation ("NAC") entered into a Master Credit Agreement (the "Master Credit Agreement"). Under this Agreement, NAC agreed to provide up to \$180 million in construction financing and \$225 million in permanent financing for hotel projects undertaken by the joint venture. Before any loans were extended, NAC received consideration, including a \$2.7 million Structuring Fee. On June 29, 1998, NAC assigned its rights and obligations under the Master Credit Agreement to defendant Capital Company of America, L.L.C. ("CCA").

The Operating Agreement established a management committee (the "Committee") to conduct the business and affairs of the joint venture. The Committee consisted of one manager designated by Hardage, a second manager designated by PAT, and a manager designated by the Hardage manager.

Under Section 4.1(b) of the Operating Agreement, within 10 days of PAT's receipt from the joint venture of a notice to contribute capital, PAT was obligated to make the contribution. Under Section 6.9 (a)(ii), an "OA Event of Default" occurs

whenever a member of the joint venture fails to perform any material term or condition of the Agreement, and that failure continues for 15 days following the receipt by the OA Defaulting Member of notice of such failure. It is undisputed that certain of PAT's capital contributions were not made within 10 days. However, PAT paid all of its scheduled payments with interest on its late contributions, as prescribed by the Agreement.

Under Section 6.9(d), a non-defaulting member of the joint venture can also elect to purchase all of the membership interest of the defaulting member. Under Section 6.9(h), the defaulting member's membership interest can be purchased at a price equal to 80% of the fair market value of that interest, as determined in good faith by the managers. Under Section 6.9(g), the non-defaulting member can also require the defaulting member to remove its manager from the Committee.

On May 14, 1998, the Committee voted unanimously to fund hotel projects at 5800 Shellmound Street in Emeryville, California ("the Emeryville Project"), and at 10044 Pacific Mesa Boulevard in San Diego, California ("the Sorrento Mesa" project). The Committee's approval of these projects was recorded in a resolution signed by the three managers on May 26, 1998. Thereafter, plaintiff Hardage Construction Corporation ("Hardage Construction"), as construction manager for the projects, entered into various agreements with contractors to provide necessary materials and services.

#### **Plaintiffs' Allegations**

Since June 1998, PAT was requested by the joint venture to contribute monthly capital payments to the two projects. PAT was untimely in these payments. The other members were forced to advance funds to prevent defaults on obligations owed to various contractors. On October 27, 1998, Hardage sent a notice to PAT that it was applying its right under the Operating Agreement to treat certain of those advances as interest bearing loans to PAT. Section 4.1(d) of the Operating Agreement provides that a non-defaulting party shall have the right to lend to the defaulting member for contribution to the venture any part of the contribution that the defaulting member failed to provide. Alternatively, the non-defaulting member, upon notice to the defaulting member, can make the defaulting member's capital contribution an additional equity contribution of the non-defaulting member. Thereafter, the defaulting member is required to reimburse the non-defaulting member.

On November 23, 1998, the joint venture issued a notice to PAT directing PAT to contribute \$9,279,000 in capital for the Emeryville project and \$3,800,000 in capital for the Sorrento Mesa project. PAT failed to provide the capital within 10 days and refused to respond to a notice during the 15-day cure period. On December 21, 1998, Hardage sent notice to PAT indicating that an OA Event of Default had occurred with respect to PAT, and that Hardage was exercising its right under the Operating Agreement to remove the PAT Manager from the Committee.

On August 12, 1998, plaintiff Woodfin Suite Hotels, L.C.C.

("Woodfin") entered into a purchase agreement to purchase land for the development of an all-suite hotel property in the Tuttle Crossing area of Dublin, Ohio. Woodfin subsequently assigned its rights and obligations under that agreement to plaintiff Hardage Hotels IV. On September 25, 1998 and again on October 20, 1998, the Committee voted to proceed with the acquisition of real estate for the Tuttle Crossing project. On December 22, 1998, the joint venture issued a notice to PAT directing PAT to contribute \$1,488,880 to cover real estate acquisition costs for that project. PAT did not provide the capital within the 10-day period specified in the Operating Agreement and has not done so to this day. On January 11, 1999, Hardage sent notice to PAT that its failure to contribute capital for the Tuttle Crossing project would result in an OA Event of Default if PAT did not provide the requested capital within 15 days of such notice.

Separately, pursuant to the Master Credit Agreement, the joint venture sought loan funding from CCA for the Tuttle Crossing project. The joint venture submitted an Approval Package to CCA consisting of various materials, including a comprehensive market study, which documented the feasibility of the project. On December 30, 1998, CCA informed the joint venture that, notwithstanding previous assurances, it was refusing to provide debt financing for the Tuttle Crossing project. Plaintiffs believe that the refusal to provide financing was in bad faith as part of an effort to undermine the joint venture. The owners of the Tuttle Crossing property have

sued Woodfin on breach of contract grounds and Hardage Hotels IV has intervened as a defendant in that lawsuit.

On October 20, 1998, the Committee voted to fund improvements at hotel properties already owned by the joint venture in El Paso, Texas, Overland Park, Kansas, and Baton Rouge, Louisiana (the "Chase conversion" projects). These projects had been operated as Residence Inn hotels under franchise agreements with Marriott International, Inc. With the impending expiration of those agreements, funding was necessary to "reflag" the properties under the "Chase Suite Hotels" trademark.

On December 4, 1998, the joint venture issued a notice to PAT directing PAT to contribute \$4,313,271 for the Chase conversion projects. PAT did not provide the capital within the 10-day period specified in the Operating Agreement. On December 21, 1998, Hardage sent notice to PAT that its failure to contribute capital for the Chase conversion projects would result in an OA Event of Default within the meaning of the Operating Agreement if PAT did not provide the requested capital within 15 days of such notice. To date, PAT has not provided the capital for the Chase conversion projects.

Meanwhile, on December 13, 1998, Nomura Holding America, Inc. ("Nomura"), which is the corporate parent of PAT and CCA, announced publicly its plan to exit the commercial real estate lending business, laying off employees and putting up for sale its inventory of real estate loans. Plaintiffs contend that this

announcement, coupled with PAT's repeated failure to comply with requests for capital contributions and failure to respond to various notices of default, led them to believe that PAT did not intend to live up to its remaining obligations under the Operating Agreement.

On December 21, 1998, the Committee voted unanimously to call on PAT to contribute \$44,069,896, representing the remaining amount of PAT's commitment under the Operating Agreement. To date, PAT has not made this contribution.

On January 15, 1999, Hardage asked PAT to provide adequate assurance of due performance by depositing funds in escrow, or posting some similar undertaking to secure PAT's obligation to contribute capital under the Operating Agreement. PAT failed to provide any such assurances.

The joint venture located a hotel development opportunity in Schaumburg, Illinois (the "Schaumburg" project). Woodfin entered into an agreement to purchase the land for the project. On February 4, 1999, the joint venture submitted a Approval Package to CCA, requesting loan funding for the Schaumburg project. On February 23, 1999, CCA informed the joint venture that it was refusing to provide the debt funding. Plaintiffs contend that CCA refused to provide funding in bad faith in order to undermine the joint venture.

The joint venture identified a hotel opportunity at a site near Walt Disney World in Lake Buena Vista, Florida (the Lake Buena Vista project). Woodfin entered into an agreement to

purchase land for this project. On February 9, 1999, the joint venture submitted an Approval Package to CCA requesting loan funding for the project. On February 23, 1999, CCA informed the joint venture that while it had purportedly approved loan financing for the Lake Buena Vista project, it anticipated that it would ultimately deny final approval for the loan.

On May 12, 1999, Hardage notified PAT of Hardage's election as the non-defaulting member, pursuant to Section 6.9(d)(i) of the Operating Agreement, to purchase PAT's membership interest in the joint venture at a price equal to 80% of the fair market value of that interest in the joint venture. Hardage provided PAT with an appraisal of the fair market value of consolidated assets of the joint venture. Section 6.9(h) of the Operating Agreement provides that PAT may challenge the appraisal submitted by Hardage by appointing its own qualified appraiser within 10 days. PAT did not do this and has subsequently refused to sell its membership interest to Hardage.

On August 18, 1999, the Committee voted unanimously to call on PAT to provide capital to cover the costs of the Buena Vista project in the amount of \$400,000. PAT refused to provide the funding.

On August 31, 1999, a representative of the joint venture spoke to a representative of Nomura which indicated that CCA would approve the Lake Buena project for financing but would refuse to provide the funds unless Hardage agreed to relinquish his right to remove PAT's manager from the Committee and purchase

PAT's membership interest.

On September 17, 1999, the joint venture issued a notice to PAT directing PAT to contribute \$3,000,000 to cover land acquisition costs for the project. PAT did not provide the capital within the 10-day period. On September 28, 1999, Hardage sent notice to PAT that its failure to provide capital would result in an OA Event of Default if PAT did not provide the requested capital within 15 days. PAT failed to respond to the notice.

On October 1, 1999, the seller of the Lake Buena Vista property notified Woodfin that Woodfin was in default of its obligations under the purchase agreement.

On October 13, 1999, the Committee, acting pursuant to Section 6.11(b) of the Operating Agreement, voted to authorize Hardage to acquire, own or participate in the acquisition or ownership of the hotel projects known as Lake Buena Vista, Schaumburg, Pleasant Hill and Marina del Rey other than through the joint venture.

The complaint includes eleven causes of action, alleging that PAT breached its obligations under the Operating Agreement by failing to provide capital and by refusing to sell its membership interest to Hardage (first cause of action); that plaintiffs are entitled to a declaratory judgment stating PAT committed a material breach and an OA Event of Default under the Operating Agreement and that Hardage had a right to remove PAT's manager from the Committee, to elect to purchase PAT's interest,

and to acquire, own, or participate in the acquisition or ownership of various hotel projects without involving the joint venture (second cause of action); that PAT committed anticipatory repudiation of the Operating Agreement when plaintiffs asked PAT to provide adequate assurances of due performance and PAT failed to provide such assurances (third cause of action); that PAT and Nomura breached its fiduciary duties to plaintiffs (fourth and fifth causes of action respectively); that PAT tortiously interfered with Hardage Construction's contract (sixth cause of action), and Hardage Hotels IV's ability to meet its contractual obligations to the sellers of the Tuttle Crossing real estate (seventh cause of action), and interfered with Woodfin's ability to meet its contractual obligations to the seller of the Lake Buena Vista's real estate (eight cause of action); that Nomura tortiously interfered with Hardage's contractual relations with PAT and induced PAT to breach its fiduciary duties by withholding from PAT funds which would have been provided to the joint venture (ninth and tenth causes of action); and that CCA has refused to loan funds for various hotel projects and has refused to meet its obligations under the Master Credit Agreement in bad faith and in breach of its covenant of good faith and fair dealing (eleventh cause of action).

#### **The Motion to Dismiss**

Defendants move for dismissal of the entire complaint against PAT, pursuant to CPLR 3211(a)(1), (3), and (7), alleging that the documentary evidence establishes that PAT did not

default on any properly issued capital call and did not breach the Operating Agreement; that all plaintiffs other than the joint venture lack standing to assert the claims alleged; that the complaint fails to state tortious interference claims; that the documentary evidence proves that CCA did not breach the Master Agreement; and that the complaint fails to allege facts sufficient to state a cause of action against Nomura.

#### Discussion

The Emeryville and Sorrento Mesa projects were approved on May 14, 1998 and, from the onset of the projects, capital calls were made on a "monthly draw" basis, matching the contributions to the ongoing costs of construction and payments to contractors. At a meeting of the Committee, held on October 13, 1998, and adjourned to and continued on October 20, 1998, Hardage complained that certain of PAT's contributions had not been timely, and proposed a resolution requiring a lump-sum contribution of the remaining equity for the projects. The fact that Hardage's resolution did not pass and was tabled by unanimous vote of the Committee is dispositive. Notwithstanding the Committee's vote, on November 23, 1998, an employee of Hardage wrote a letter to PAT demanding a lump sum contribution, which letter was denominated as a capital call pursuant to the Operating Agreement.

However, pursuant to section 6.4 of the Operating Agreement, a call for additional capital "including the amount to be contributed by each [Committee] Member" requires "the unanimous

approval of the Committee." The November 23<sup>rd</sup> letter did not constitute a proper capital call since Hardage did not convene a properly noticed and constituted meeting, or obtain unanimous approval of the Committee. Hardage's reliance on the vote where two Committee members approved and one abstained in voting for the project is misplaced. The Agreement requires unanimous approval, not a unanimous vote, of the Committee. Thus, this key fact, among others, distinguishes the law which Hardage cites, finding that the requirement of unanimous vote is met despite an abstention.

As for Hardage's claim that, at its May 14, 1998 meeting, the Committee authorized the project manager to issue the capital call, the evidence flatly contradicts such a claim. Even though the Committee directed the manager to execute such documents and take such other action as the manager deemed necessary or desirable to effect the funding, what transpired at the subsequent October 20<sup>th</sup> meeting makes it evident that this resolution did not give the manager the power to require lump sum payments of PAT. It was at the October 20<sup>th</sup> meeting that Hardage requested the committee approve making lump sum demands upon PAT, rather than the monthly draws. Such a request would have been unnecessary if, as plaintiffs argue, the manager had been given such authority at the Committee's May 14<sup>th</sup> meeting. As aforesaid, that request was not approved and tabled. When PAT allegedly failed to make a prompt monthly payment, the November 1998 call for PAT to pay the balance of the capital was

unauthorized.

Because the November 23<sup>rd</sup> letter did not comply with the Agreement, PAT was not required to pay the lump sum. It appears that PAT has continued to honor its prior agreement to fund the projects in accordance with construction draw requests, and eventually PAT contributed all the capital authorized for the Emeryville and Sorrento Mesa projects. Although several payments were untimely made (which may have been in breach of the Agreement), plaintiffs did not declare PAT in default upon that ground. Without relying upon a valid contractual basis for declaring PAT in default, Hardage acted improperly when he sought the removal of PAT's manager from the Committee and to exclude PAT from any participation in the joint venture. This includes the calls for capital contributions and the remedies sought for the alleged defaults. Therefore, the court shall dismiss the breach of contract and breach of fiduciary duty claims in favor of PAT.

In light of this ruling, claims that Hardage, Hardage Investments, Hardage Hotels IV, Hardage Construction and Woodfin lack standing against PAT are moot.

The next issue is whether CCA can be sued. The Master Agreement states that CCA has the discretion to reject an offer to provide capital to a joint venture project. Plaintiffs contend that CCA acted in bad faith and breached its covenant of good faith and fair dealing when it refused to provide funding to the joint venture. In this case, only Hardage Hotels IV, L.L.C.

can bring this claim since it is the only other party to the Master Agreement. The covenant of good faith and fair dealing is implied in each contract. Where parties to a contract are under a duty to perform an obligation which is definite and certain, courts will imply and enforce a duty of good faith performance in order that a party not exceed the obligations it has contracted to perform. See, Mocca Lounge, Inc. v Misak, 94 AD2d 761 (2d Dept 1983). Here, it is alleged that CCA specifically sought to undermine its contractual obligations toward Hardage Hotels IV, L.L.C. by refusing to provide funds. However, its refusal to provide capital was discretionary, as provided in the Agreement. The court finds that the allegations of bad faith are conclusory, and so, the claim against CCA shall also be dismissed.

The next issue is whether the tortious interference claims should be dismissed. Again, in light of the ruling above, this issue is moot. PAT was not contractually obligated to make lump sum payments, and it appears satisfied those payments it was obligated to make. Without facts showing a breach or unlawful interference with a contract or business relationship, plaintiffs' allegation of tortious interference fails to state a claim.

The final issue is whether Nomura is a proper defendant in this action. Nomura is being sued for breach of fiduciary duties, tortious interference with a contractual relationship, and inducing a breach of fiduciary duties. However, Nomura is not a party to either the Agreement or the Master Credit

Agreement. It is not a co-venturer, and thus, does not owe fiduciary duties to plaintiffs. To impose liability against Nomura as the parent company of PAT and CCA, Nomura must exert such domination and control over these subsidiaries that they are mere alter egos of the parent. Since the complaint contains no allegations of Nomura's control over PAT, Nomura cannot be sued for breach of fiduciary duty.

Plaintiffs also allege that Nomura has interfered with the Operating Agreement between Hardage and PAT by failing to provide funds to PAT which would have been provided by PAT to the joint venture. Nomura allegedly induced PAT to breach its fiduciary duty to Hardage by failing to provide funds to PAT which would be provided by PAT to the joint venture. Given this Court's ruling on the claims against PAT, these claims should be dismissed.

As for plaintiffs cross-motion for partial summary judgment, the motion is denied. As aforesaid, PAT was entitled to a Committee meeting before it was ordered to pay a lump sum of the contributions as opposed to monthly payments.

#### **The Motion for Preliminary Injunction**

Defendant PAT moves for an order enjoining Hardage and his agents from proceeding with the foreclosure sale of PAT's senior equity membership interest in the joint venture or from taking any other action to transfer, sell or impair PAT's interest; from excluding PAT's Manager from the Committee; and from taking for himself any business opportunity belonging to the joint venture, including but not limited to the Lake Buena Vista opportunity.

To obtain a preliminary injunction, the movant must demonstrate, by clear and convincing evidence, a likelihood of success on the merits, that irreparable injury will result in the absence of immediate relief, and a balance of equities weighing in its favor. See, Aetna Insurance Co. v. Capasso, 75 NY2d 860 (1990).

PAT argues that Hardage has deliberately attempted to exclude PAT from participating in the joint venture. Arguing that Hardage improperly ordered PAT to provide a lump sum of capital with respect to the Emeryville and Sorrento Mesa projects, PAT seeks an order enjoining Hardage from removing its Manager from the Committee. PAT claims that in addition to making lump sum capital contributions, it had no obligation to fund the cost of converting three existing hotels contributed to the joint venture by Hardage. Thus, it asserts that the alleged loan that Hardage purportedly made to PAT was not bona fide since Hardage, allegedly signed a demand note in PAT's name, and signed a security agreement in PAT's name, pledging PAT's Senior Equity Membership Interest in the joint venture. Hardage also allegedly diverted PAT's \$763,412 annual tax distribution from the joint venture as payment to reduce the debt. PAT claims that the diversion is a misappropriation of its funds. PAT also claims that Hardage has planned to foreclose on Pat's membership in the joint venture at a public sale to satisfy the alleged debt. PAT seeks an order enjoining Hardage from selling the membership interest.

PAT also seeks an order preventing Hardage from acquiring a personal interest in the Lake Buena Vista project, claiming that the project should be maintained by the joint venture. PAT claims that the injunction is necessary because PAT will lose its opportunity to participate in the operations of the joint venture. PAT argues that Hardage has been acting in an arbitrary and selfish manner and should be enjoined from further activities.

As stated above, Hardage's claim that he properly removed PAT's Manager from the Committee after PAT defaulted in failing to honor a capital call for the Emeryville and Sorrento Mesa projects is insupportable. PAT's claim that the Committee had unanimously authorized PAT to pay the capital in monthly installments is contradicted by the evidence. When PAT refused to pay the lump sum, Hardage removed the PAT Manager from the Committee. After that, the Committee made decisions that PAT provide funding to various projects. Yet, PAT no longer had a manager on the Committee and could not vote on any of these projects. Funding for these projects represents the debt which PAT allegedly owes Hardage and that has led to the foreclosure sale of PAT's membership interest in the joint venture. The evidence suggests that the removal was improper and all subsequent decisions made by the Committee with respect to capital calls to PAT were also improper. The Committee's vote to authorize Hardage to develop certain hotel projects outside the joint venture, that the joint venture was unable to pursue due to

PAT's repeated failure to supply funding, is also in question. Thus, PAT has a strong likelihood of success on the merits of its counterclaims against Hardage for breach of the Agreement and of fiduciary duties.

Therefore, the Court will grant an order enjoining Hardage from selling PAT's membership interest and from taking over the Lake Buena Vista project pending the outcome of this action. PAT should not have been removed from the Committee and decisions should not have been made in the absence of PAT's manager from the Committee. To deny this injunction would irreparably injure PAT's right to participate in the affairs of the joint venture. It is deemed appropriate that the status quo be maintained for the duration of this action.

#### **The Appointment of a Temporary Receiver**

PAT seeks a temporary receiver to take control and manage the joint venture property. However, the appointment of a temporary receiver is an extreme remedy which can only be invoked in cases in which the movant has made a clear evidentiary showing of a necessity for conservation of property and the protection of the interests of the movant. DaSilva v DaSilva, 225 AD2d 513 (2d Dept 1996). In the absence of clear proof of danger of irreparable loss or damage, and proof that the receiver is necessary for the protection of the parties to the action and their interests, said receiver should not be appointed. See, Groh v Halloran, 86 AD2d 30 (1<sup>st</sup> Dept 1982).

PAT accuses Hardage of mismanaging the hotel properties.

For example, PAT received a copy of a letter from Marriott International, Inc. ("Marriott") addressed to the joint venture, threatening to terminate the Marriott franchise of one of the hotels owned by the joint venture located in Tampa, Florida, due to the hotel's repeated failure to comply with Marriott's standards, including standards of cleanliness. Hardage allegedly is responsible for the failure to adhere to Marriott's standards.

Moreover, in reviewing the monthly internal financial statements of the joint venture, PAT noticed that the debt on the joint venture's Fullerton, California property increased by \$1,380,000 between the statements for June and July 1999. Because the mortgage loan on the property had a maturity date of December 15, 1999, it is alleged that Hardage refinanced the mortgage for a larger amount and used the \$1.38 million to acquire the Tuttle Crossing property. PAT argues that the Operating Agreement prohibits the incurring of any secured debt without the unanimous approval of the Committee.

In opposition, plaintiffs aver that the mortgage loan for the Fullerton property was refinanced with the unanimous approval of the Committee and that the proceeds generated by the financing were not used to purchase the Tuttle Crossing property. With respect to the Tampa property, plaintiffs contend that it is not of major consequence because all of the joint venture's Marriott franchise agreements are nearing the end of their terms, and the joint venture has decided not to renew them. They deny that Hardage has devalued the property.

The Court finds that there is little evidence that Hardage has dissipated the value of the hotel properties that are owned by the joint venture. Nor is there sufficient proof that these properties are in threat of imminent destruction or danger by Hardage. For that reason, and particularly in light of the aforementioned injunction, the court shall deny the motion for the appointment of a temporary receiver to control and manage the joint venture property.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted; and it is further

ORDERED that plaintiffs' motion for partial summary judgment is denied as moot; and it is further

ORDERED that PAT's motion for a temporary receiver is denied; and it is further

ORDERED that PAT's motion for a preliminary injunction is granted; and it is further

ORDERED that the undertaking is fixed in the sum of \$5000 conditioned that PAT, if it is finally determined that it was not entitled to an injunction, will pay to Hardage all damages and costs which may be sustained by reason of this injunction; and it is further

ORDERED that Hardage, his agents, servants, employees and all other persons acting under his jurisdiction, supervision and /or direction, are enjoined and restrained, during the pendency of this action, from doing, directly or through any attorney,

agent, servant, employee or other person under his control or supervision, any of the following acts: sell, transfer or impair PAT's senior equity membership interest in the joint venture; and own, acquire or participate in the acquisition and ownership of hotel projects owned by the joint venture; and it is further

ORDERED that the action on defendants' counterclaims continues.

DATED: April 27, 2000

ENTER

J.S.C.

**FILED**

MAY 03 2000

COUNTY CLERK'S OFFICE  
NEW YORK