

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

UNIVEST I CORP., derivatively on behalf
of 470 PEARL STREET, LLC,

Petitioner,

v.

Index No.:

SKYDECK CORPORATION d/b/a PAY2PARK,
BUFFALO DEVELOPMENT CORPORATION, and
Nominal Respondent 470 PEARL STREET, LLC

Pursuant to Article 4 of the CPLR
and Article 7 of the RPAPL

Respondents.

VERIFIED PETITION

Petitioner, Uninvest I Corp. (“Uninvest”) derivatively on behalf of 470 Pearl Street, LLC (“470 Pearl Street” or “the LLC”), by and through its attorneys, Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC, alleges as follows:

THE PARTIES

1. 470 Pearl Street is now and has been a limited liability company organized and operating under the laws of the State of New York with its principal place of business located at 294 Franklin Street, Buffalo, New York 14202.

2. 470 Pearl Street is the title owner of a 142-space parking lot located at 470 Pearl Street, Buffalo, New York (the “Parking Lot”) that is the subject of this action. The

Parking Lot is commercial real property and the sole asset of the LLC. A copy of the Bargain and Sale Deed of the Parking Lot to 470 Pearl Street, including a legal description of the property, is attached hereto as Exhibit A.

3. Univest is a corporation organized and existing under the laws of the State of New York with its principal place of business located at 100 Corporate Parkway, Suite 500, Amherst, New York 14226. Univest is a fifty percent (50%) member of 470 Pearl Street.

4. Respondent, Skydeck Corporation d/b/a Pay2Park (“Skydeck”) is, upon information and belief, a corporation organized and existing under the laws of the State of New York with its principal place of business located at 257 Franklin Street, Suite 300, Buffalo, New York 14202. Skydeck is a holdover tenant of the Parking Lot and previously was a party to a certain lease agreement between 470 Pearl Street and Skydeck dated January 31, 2005 (the “Lease Agreement”). A copy of the Lease Agreement is attached hereto as Exhibit B.

5. Respondent, Buffalo Development Corporation (“BDC”) is, upon information and belief, a corporation organized and existing under the laws of the State of New York with its principal place of business located at 257 Franklin Street, Buffalo, New York 14202. BDC is a fifty percent (50%) member of 470 Pearl Street.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this special proceeding because it concerns the possession, use, and enjoyment of commercial real property (the Parking Lot), located in Erie County, New York.

7. This Court further has jurisdiction over this special proceeding because, in a related matter already pending before this Court (*Univest I Corp. et al. v. BDC, et al.*, 809598/2014, Hon. Timothy J. Walker, J.C.C.) (the “Related Case”), Skydeck and BDC have consented to jurisdiction over the subject matter of this special proceeding.

8. This proceeding properly is maintained in the Commercial Division pursuant to N.Y.C.R.R. 202.70 (b)(3) because it involves a transaction concerning commercial real property.

9. This Court is the proper venue for this proceeding because the location of the subject commercial real property (the Parking Lot) is located within Erie County, New York, and one or more of the parties has a principal place of business in Erie County, New York, and/or resides in Erie County.

STANDING

10. Univest has standing to maintain this proceeding pursuant to Real Property Actions and Proceedings Law § 721 (1) insofar as it is brought by Univest derivatively on behalf of the landlord and lessor of the Parking Lot, 470 Pearl Street.

11. The Operating Agreement vested managerial authority of the LLC in BDC. As such, BDC has a fiduciary obligation to act solely in the best interests of the LLC, especially with respect to the LLC's sole asset, the Parking Lot.

12. In a letter dated May 28, 2014, BDC admitted that Skydeck is an affiliated entity of BDC, and self-servingly stated that “[i]t would not be in the best interest of 470 Pearl Street, LLC to have a competitor [of Skydeck] operating the lot.” A copy of the May 28, 2014 letter is attached hereto as Exhibit C.

13. Upon information and belief, in addition to having ownership and/or beneficial financial interests in both BDC and Skydeck, according to the New York State Department of State Mark D. Croce is both the President of BDC (managing member of the lessor) and the Chief Executive Officer of Skydeck (holdover tenant).

14. BDC, the LLC's manager, is an affiliated and interested entity of Skydeck, and therefore is incapable of making an impartial managerial decision as to whether to bring this special proceeding to remove Skydeck from possession of the Parking Lot.

15. Univest has standing to pursue these derivative claims as a member of the LLC because a demand upon the LLC and/or BDC, as managing member, to remove Skydeck and/or commence this proceeding would be futile.

16. A demand also would be futile because BDC is a self-interested party to the now-terminated Lease Agreement, and previously has declined to remove Skydeck from occupancy and possession of the Parking Lot.

17. Any demand and/or notice to Skydeck, as a holdover tenant, is futile because Skydeck previously refuted Univest's proper termination of the lease, and remains in possession of the Parking Lot. A copy of Skydeck's letter of August 1, 2014 refusing to recognize Univest's prior termination of the Lease Agreement is attached hereto as Exhibit D.

FACTUAL ALLEGATIONS

18. The facts and circumstances underlying this dispute and supporting this application are set forth herein and have been verified by Michael J. Montante, Vice President of Univest. They are further set forth in the contemporaneously-filed affirmation of Matthew D. Miller, Esq., sworn to October 3, 2014.

19. On January 31, 2005, 470 Pearl Street entered into the Lease Agreement with Skydeck for use of the Parking Lot as a licensed parking lot. *See* Ex. B, ¶ 1.

20. Skydeck has been operating the Parking Lot continuously since January 31, 2005, still is in possession of the Parking Lot, and refuses to surrender possession.

21. The Lease Agreement provided that 470 Pearl Street, as lessor, had the right to terminate the lease at any time upon sixty (60) days notice. *See* Ex. B, ¶ 16. The Lease Agreement also provided that upon termination, Skydeck was required to vacate the Parking Lot, remove all of its property, and return the Parking Lot to the condition in which it received the Parking Lot. *Id.*

22. The 470 Pearl Street Operating Agreement (“the Operating Agreement”) provides in Section 6.02 that “any member has the right, without the consent or approval of any other Member or Members, to cause 470 Pearl [Street] to terminate a certain Parking Lease entered into between 470 Pearl [Street] and Skydeck Corporation pursuant to the termination provisions of said lease.” *See* the Operating Agreement, §6.02, attached hereto as Exhibit E.

23. Univest, as a member of the LLC, exercised its right under the Operating Agreement to terminate the Lease Agreement by sending a letter to Skydeck and BDC dated May 27, 2014 (the “Termination Letter”), putting both on notice the termination would take effect on July 27, 2014. A copy of the May 27, 2014 Termination Letter is attached hereto as Exhibit F.

24. On August 1, 2014, Skydeck sent a letter to 470 Pearl Street advising that it considered the lease termination notice from Uninvest defective and without effect; in essence refusing to acknowledge its validity. *See* Exhibit D.

25. On August 22, 2014, Uninvest commenced the Related Case in this Court requesting, among other things, a determination that the Lease Agreement properly was terminated.

26. On September 18, 2014, after oral argument in the Related Case on Uninvest's preliminary injunction and declaratory relief application, this Court determined that the Lease Agreement properly was terminated by Uninvest, that the Lease Agreement no longer is in effect, and that Skydeck has been a holdover tenant since July 27, 2014. An order was granted and entered in the Erie County Clerk's Office on September 26, 2014. Notice of entry was served on September 30, 2014. Copies of this Court's order and the notice of entry are attached hereto as Exhibit G.

27. Despite the Court's order declaring the termination of the Lease Agreement proper and effective, Skydeck remains in possession of the Parking Lot as a holdover tenant and refuses to vacate the lot unless removed.

28. As evidence of BDC's inability to make an impartial managerial decision on behalf of the LLC, upon questioning from this Court during oral argument on September 18,

2014 in the Related Case, counsel for BDC informed the Court that in the event the Lease Agreement was terminated, Skydeck would not willingly vacate the Parking Lot and would remain in possession “until removed,” and confirmed Skydeck’s intention to become a holdover tenant. *See* the transcript from the September 18, 2014 oral argument attached hereto as Exhibit H, p. 35, lines 6-23 (relevant portions only).

29. Any demand upon 470 Pearl Street or BDC to issue any additional termination notice, or any other notice to quit, on Skydeck is therefore futile.

30. Skydeck received the Termination Letter in May of 2014, and has actual notice of Uninvest’s intent and desire to recover possession of the lot for the LLC so that the LLC can maximize its profitability. Counsel for BDC and Mr. Croce, Robert E. Knoer, Esq., accepted service of the summons and complaint in the Related Case on behalf of Skydeck.

31. The removal of Skydeck as a holdover tenant of the Parking Lot and the awarding of possession of the Parking Lot to the LLC is in the best interest of the LLC and would enable the LLC to immediately obtain a new tenant ready, willing, and able to operate the Parking Lot and pay a market rate rent pursuant to a new lease agreement.

32. Upon information and belief, there exist multiple potentially viable tenants for the Parking Lot willing to step into Skydeck’s shoes and operate the Parking Lot, while paying a market rental rate well in excess of the current rental rate paid by Skydeck. The longer

Skydeck remains as a holdover the tenant, the more potential income and revenue the LLC sees go by the wayside.

33. Uninvest reasonably has requested that BDC agree to engage in a fair and reasonable confidential Request for Proposal (“RFP”) process that would enable the LLC and its members to bear the fruits of the market. To date, BDC has refused to agree to a fair, reasonable, and confidential bidding process designed to maximize the economic benefit to the LLC, contrary to its fiduciary duty to do so. Attached hereto as Exhibit I is a draft of proposed RFP for the Parking Lot, which demonstrates the fair and reasonable nature of Uninvest’s request.

34. Despite respondents’ claims to the contrary, a seamless transition to a new tenant can easily be accomplished without harm to the LLC, its members, or the public.

35. Petitioner’s proposed confidential, sealed RFP process resolves each and every one of BDC’s concerns and is a fair and reasonable process designed to maximize the benefit to the LLC and its members. As separate legal entities, the LLC (with purportedly acting in the LLC’s best interest), should be far less concerned about difficulties removal of Skydeck will create for Skydeck, and instead should unquestionably be focused on the ability of the LLC to maximize its profitability for its members.

36. An RFP process, whether the proposed RFP attached as Exhibit I or another RFP crafted by the Court or the parties, will provide a substantial economic benefit to

the LLC and will keep the Parking Lot open and available to the public during the process. If the Court grants this petition, petitioner will not displace Skydeck from the Parking Lot until after the RFP process plays out and a new tenant is identified, ready, willing and able to step in and operate the lot.

37. Any RFP process, whether the proposed RFP attached as Exhibit I or otherwise, should be overseen by the Court or by an independent accounting or law firm. All bids should be provided sealed, after which the top two bidders can be notified to resubmit their best and final bid. A successful bidder will thereafter be determined from the best and final bids. BDC's request for a right of first refusal to any bid is unreasonable, and will not benefit the LLC. In fact, any such right of first refusal that is infused into an RFP process will only work to chill the bidding process and ultimately be a detriment to the LLC.

38. Finally, the public will not be harmed in any way if the Court grants this petition and fashions a form of relief consistent with petitioner's request. No parking spaces will be eliminated and the Parking Lot will not lay fallow. The alleged impossibility of a competitor operating the Parking Lot simply is a red herring. The Parking Lot can be operated by any other tenant, just as Skydeck is doing so now. No additional curb cuts will be necessary and Skydeck still will maintain access to its adjacent lots from Pearl and Franklin Street.

39. Accordingly, because the Lease Agreement was terminated, because Skydeck improperly is a holdover tenant, and because replacement of Skydeck will inflict no

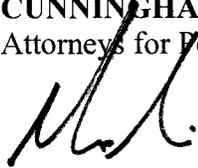
harm on the LLC, its members, or the public – but will instead benefit the LLC – this petition should be granted in all respects.

WHEREFORE, petitioner, Uninvest I Corp., derivatively on behalf of 470 Pearl Street, LLC, respectfully requests an Order of this Court granting this petition and awarding possession of the Parking Lot to the LLC; granting this petition and issuing a warrant to remove Skydeck from possession of the Parking Lot; granting this petition and ordering the parties to submit a confidential Request for Proposal for a new tenant for the Parking Lot; together with such other and further relief as the Court deems just and proper, including all costs and disbursements pursuant to RPAPL § 747(1), and all reasonable attorneys’ fees.

Dated: October 3, 2014
Buffalo, New York

**RUPP, BAASE, PFALZGRAF,
CUNNINGHAM & COPPOLA LLC**
Attorneys for Petitioner

By: _____


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