

IN THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT, IN
AND FOR FLAGLER COUNTY, FLORIDA

TWO COMMERCE, LLC,

Plaintiff

CASE NO.: 2019 CA 000803

vs.

PALM COAST DATA, LLC, STUDIO
MEMBERSHIP SERVICES, LLC,
MEDIA DATA RESOURCES, LLC, and
FULCIRCLE MEDIA, LLC,

Defendants.

**PALM COAST DATA, LLC'S MOTION FOR STATUS CONFERENCE,
FOR EXTENSION OF DEADLINES, AND TO PREVENT PLAINTIFF FROM
SEEKING ENTRY OF A FINAL JUDGMENT WITHOUT NOTICE AND
OPPORTUNITY TO BE HEARD**

Defendant, PALM COAST DATA, LLC ("Palm Coast"), by and through its undersigned counsel, and in light of Chief Judge Zambrano's March 17, 2020 administrative order Re: Emergency Court Procedured (COVID-19) Ref: Z-2020-030 (the "Emergency Order"), and the rapidly changing situation throughout the State of Florida, United States and the World, moves this Honorable Court for an Order Setting Status Conference, to extend and modify deadlines, and to prevent Plaintiff from seeking entry of a Final Judgment *ex parte* and without notice and hearing, and in support thereof states:

1. Prior to execution of the lease and guaranty which are the subject of this action, Plaintiff or its related and affiliated entities and their owners were the owner of Palm Coast. The lease and guaranty which are the subject of this action are a small piece of a much larger and complicated transaction-- the sale of Palm Coast to its current owners by entities and persons related to and affiliated with Plaintiff, pursuant to, among multiple related

documents, that certain Membership Interest Purchase Agreement dated April 26, 2019 (collectively the “Palm Coast Sale”).

2. In the Fall of 2019, discussions commenced between the Plaintiff, its related entities, and their respective principals (collectively, “Sellers”) and Palm Coast and its now owners and related entities (collectively, “Buyers”) for among other things, the purchase and sale of the real property known as 11 Commerce Boulevard, Palm Coast, FL 32164 (“11 Commerce”).¹ After that transaction did not materialize, disputes began to arise between the parties, including claims by Palm Coast and Buyers that Plaintiff and Sellers made numerous material misrepresentations in connection with the Palm Coast Sale and likewise failed to disclose numerous material facts to Buyers.
3. Those disputes lead to Plaintiff filing its Complaint in this action against Palm Coast and others, which sought possession of 2 Commerce Boulevard, Palm Coast, FL 32164 (“2 Commerce”) and damages.
4. Palm Coast filed an Answer and Affirmative Defenses to Count I of the Complaint, and a Motion to Determine Rent on January 7, 2020. Plaintiff then filed an Emergency Motion regarding rents, and the parties resolved the pending rent motions via agreed order entered by the Court on or about February 3, 2020.
5. Subsequent thereto, Plaintiff and Defendants (and the Sellers and Buyers) engaged in significant discussions and negotiations to resolve their various disputes, including this lawsuit and the related lawsuit, and for the purchase of 11 Commerce. The Settlement Agreement and its numerous exhibits, each of which was incorporated into the Settlement

¹ A party related to Plaintiff has filed a separate action against Palm Coast for eviction of 11 Commerce and damages, known as Commerce Boulevard Holdings, LLC v. Palm Coast Data, LLC, et. al., Case #2019 CA 000802, which case has to date been administered together with this matter.

Agreement by reference, was finalized on February 18, 2020. A true and correct copy of the Settlement Agreement, together with its Exhibits is attached hereto as Exhibit "1".

6. The Settlement Agreement is complex and multi-faceted, and includes, among other things, a Purchase Agreement whereby Sellers would sell 11 Commerce to Buyers, a complex set of loans (notes and mortgages) regarding same between Buyers and Sellers, a payment schedule, releases, lease amendments, and stipulated judgments in the event of default, in amounts to be determined based on what was owed and what was paid at the time any alleged default occurred.

7. The Settlement Agreement provides in pertinent part:

1. This Contract contains the entire agreement between PCDH, SMS and PCD and there are no other terms, conditions, promises, understandings, statements or representations, express or implied, concerning the transaction contemplated hereunder. **All exhibits attached hereto, or to be attached hereto, are incorporated herein by reference.** This Contract shall inure to the benefit of and bind the parties hereto, their personal representatives and successors and assigns. **This Contract shall be governed by and construed in accordance with the internal laws of the State of New York without giving effect to any choice or conflict of law provision or rule (whether of the State of New York or any other jurisdiction).**

5. ...**The Exhibits referred to herein shall be construed with, and as an integral part of, this Contract to the same extent as if they were set forth verbatim herein.** All remedies, rights, undertakings, obligations, and agreements contained in this Contract shall be cumulative, and none of them shall be in limitation of any other remedy, right, undertaking, obligation or agreement of either party.

11. The parties hereto understand and agree this settlement is the compromise of disputed claims, and the agreements and payments set forth herein are not to be construed as admissions of liability by any party, which liability is expressly denied.

Emphasis Added.

8. In the month since the execution of the Settlement Agreement and Exhibits, Palm Coast has paid Plaintiff a total of Six Hundred and Twenty-Five Thousand Dollars (\$625,000.00). While not necessarily specified in the Settlement Agreement, the \$625,000.00 paid to Plaintiff in the last month was in reality the payment of rent due under the 2 Commerce lease and the 11 Commerce lease.
9. In that same time, unforeseen, impossible to imagine events have caused a seismic shift in the world, the gravity and severity of which we have yet to truly contemplate and imagine. But as the world struggles to come to grips with its current and then likely reshaped future reality, it has at the same time stopped spinning-- economies are crumbling, credit markets are essentially frozen, businesses are closed, services have been suspended, toilet paper has become a work commodity, and everyone is struggling to function.
10. In this country, these cataclysmic events have all occurred essentially in the last week, and during the financing contingency period set forth in the Purchase Agreement attached to the Settlement Agreement as Exhibit "A". While Buyers had originally been told that their contemplated first mortgage loan (identified in the settlement documents) would be approved, it was in fact ultimately denied after the corona virus panic ensued. Buyers advised Sellers of that denial upon its occurrence.
11. The Purchase Agreement (incorporated into the Settlement Agreement by its very terms) provides in pertinent part:

ARTICLE VI - DUE DILIGENCE PERIOD--.... Purchaser may terminate this Purchase Agreement at any time on or before March 23, 2020 if Purchaser is unable to obtain a commitment for financing in the amount of the Purchase Money Financing at an annual interest rate as of the date of such commitment of not more than 5.5% (whether on a fixed or floating rate basis), a principal amortization period of not less than 25 years and a term of not less than 10 years. Purchaser shall exert its best efforts in pursuing, applying for and obtaining such a commitment for financing. In the event that Purchaser does not provide notice of

its election to exercise its right to terminate this Purchase Agreement pursuant to this paragraph on or before March 23, 2020, this financing contingency shall be deemed waived by Purchaser.

14. If by any reason of any acts or circumstances beyond the reasonable control of either party, including acts of God, flood, fire, earthquake, tornadoes, hurricanes, explosion, embargoes, governmental actions and regulations, war, invasion or hostilities (whether war is declared or not), terrorist threats or acts, riot, civil unrest, national emergency, revolution, insurrection, epidemic, lock-outs, labor shortages, strikes or other labor disputes (whether or not relating to either party's workforce), restraints or delays affecting carriers or inability or delay in obtaining supplies of adequate or suitable materials, materials or telecommunication breakdown or power outage, either party is prevented from complying with any term or condition of this Contract, then while so prevented the term or condition shall be suspended and the party shall be relieved of the obligation of complying with such term or condition and shall not be liable for damages for failure to comply with it. Unless otherwise specifically stated herein, any obligation of either party shall be extended for as long as it is so prevented from complying with any condition or term in this Contract....

Emphasis Added.

12. There is no doubt that the current pandemic and pandemonium to global markets and credit markets constitutes a force majeure, and serves to extend the financing contingency regarding the purchase of 11 Commerce, the most critical part of, and integral and paramount to the Settlement Agreement. Moreover, per the terms of the Settlement Agreement itself, the Exhibits and their provisions (including the force majeure provision) are incorporated into the Settlement Agreement.
13. Defendants/Buyers, immediately upon being advised of the denial of financing, attempted to discuss these issues, and other issues relating to the Settlement Agreement (including a \$325,000 payment due March 20, 2020) with Plaintiff/Sellers, and address reasonable short term extensions of deadlines given the uncertainty of the ability to obtain

financing, the uncertainty as to the length of the force majeure event, and the uncertainty as to whether a financing would be approved even after the passing of the force majeure event.

14. Rather than attempt to come to some accommodation given the circumstances and global pandemic, Plaintiff/Sellers, as has been their modus operandi throughout, attempted to strong arm, pressure and take advantage of Defendants/Buyers.
15. Defendants believe based on the conduct and the behavior of Plaintiff/Sellers, that Plaintiff may seek to file the Joint Stipulation for Final Judgment for Possession, Eviction, and Damages attached as Exhibit "I" to the Settlement Agreement, and have the Court enter the Stipulated Final Judgment for Possession, Eviction, and Damages attached thereto as Exhibit "1", without proper hearing and consideration of the numerous complexities of the Settlement Agreement and its related and incorporated Exhibits. As a preliminary matter, the submission of the Stipulation and/or the attempt to have the Final Judgment entered would need to address the \$625,000.00 which Defendants paid Plaintiff in the last month under the Settlement Agreement representing rent.
16. Defendants understand and acknowledge that the matters set forth herein, together with the suspected attempt by Plaintiff to file the Joint Stipulation and obtain the Final Judgment, are not in any way mission critical issues as set forth in Judge Zambrano's Emergency Order, and do not need this Court's immediate attention. However, while Defendants appreciate the gravity of the current pandemic, this Court's limited resources, and the dictates of the Emergency Order limiting the Courts to address mission critical issues, given the behavior of Plaintiff, this Motion is filed simply in an abundance of caution to prevent an attempt at a surprise filing by Plaintiff seeking to utilize the current emergency to obtain a judgment without an opportunity for Defendants to be heard on the

numerous matters, including the Defendants' payment of \$625,000.00 to Plaintiff over the last month to be fully addressed.

WHEREFORE, Palm Coast respectfully requests that this Court schedule a status conference when the Emergency Order is lifted and the Court returns to normal business, extend the various deadlines in the Settlement Agreement and its Exhibits through that status conference and the current force majeure situation, and to prevent Plaintiff from seeking entry of a final judgment without notice and opportunity for Defendants to be heard, together with such other and further relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts e-filing portal to Richard D. Shane, Esq. and Michael J. Shuman, Esq., rdshane@duanemorris.com and mjshuman@duanemorris.com, DUANE MORRIS LLP, 201 South Biscayne Boulevard, Suite 3400, Miami, Florida 33131 on March 22, 2020.

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