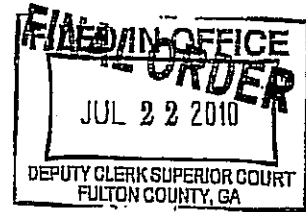


IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



CITY OF ATLANTA, GEORGIA,

Plaintiff,

v.

HOTELS.COM, L.P., *et al.*,

Defendants.

Civil Action No. 2006CV114732

ORDER

The above-styled matter came before the Court for oral argument on July 6 and 7, 2010 on Plaintiff's Motion for Summary Judgment, for Declaratory Judgment and for Injunction, and Defendants' Motion for Summary Judgment. Having considered the arguments of counsel, and after reviewing the record in its entirety, Plaintiff's Motion is **GRANTED in part and DENIED in part** and Defendants' Motion is **GRANTED in part and DENIED in part**.

This action was brought by the City against 17 online travel companies ("OTCs") seeking a declaration that the City's hotel tax ordinance is applicable to the OTCs, a permanent injunction requiring the OTCs to collect and remit hotel room taxes on the retail room rate paid by consumers, and asserting other common law and equitable claims.

On December 12, 2006, this matter was dismissed by this Court¹ upon a finding that the City failed to exhaust the available administrative remedies, and therefore, the Court was divested of jurisdiction. The Court of Appeals affirmed the dismissal. 288 Ga. App. 391 (2007). However, the Supreme Court vacated the judgment of the Court of Appeals and remanded the matter, with direction to this Court "to adjudicate the City's claim for declaratory judgment as to the applicability of the hotel tax ordinance." 285 Ga. 231, 237 (2009). The court held that "until

¹ At that time, this matter was before Judge Michael D. Johnson. This matter was transferred to this Court on July 10, 2009.

the threshold legal issue of applicability of the hotel tax ordinance has been resolved, the City should not be required to submit to the administrative process set forth therein." *Id.* at 233.

At the heart of this matter lay the business model of the OTCs, known as the "merchant model." During oral argument, counsel for both the City and the OTCs spent an ample amount of time explaining the mechanics of this model, by which the OTCs contract with hotels for wholesale room rates. The OTCs then offer the rooms for sale to the public via their websites, at a marked-up price, i.e., "the room rate," which is the price the customer will actually pay for the room. The difference in these two rates is not disclosed to the public. When a customer purchases a room from an OTC, the OTC transmits a reservation to the hotel and charges that customer's credit card for the room rate, plus applicable taxes and fees. The hotel occupancy tax amount is calculated based on the wholesale rate, as opposed to the full room rate. Upon receipt of an invoice from the hotel, the OTC will remit to the hotel the wholesale room rate, plus the applicable tax on that rate, and retains all other funds collected from the customer.

The City contends that, under this model, the hotel occupancy taxes must be based on the room rate, rather than on the negotiated wholesale rate. The Enabling Statute permits the municipalities to impose an excise tax "at the applicable rate on the lodging charges actually collected." O.C.G.A. § 48-13-51(a)(1)(B)(i). Pursuant to the Enabling Statute, the City of Atlanta enacted its Hotel or Motel Occupancy Tax Ordinance, § 146-76, *et seq.*, which imposes "a tax of seven percent of the rent for every occupancy of a guestroom in a hotel in the city." City of Atlanta Code of Ordinances ("City Code") § 146-79. The occupancy tax is imposed upon and collected from the hotel guest. O.C.G.A. § 48-13-51(a)(1)(B)(ii). The person or entity collecting the tax from the hotel guest remits the tax to the governing authority imposing the tax. *Id.* The City thus contends that, pursuant to the Enabling Statute and the applicable ordinances, the OTCs

are liable for the remission of seven percent of the full room rate for the rooms sold in the municipality.

The OTCs, on the other hand, contend that the Enabling Statute and the ordinances do not apply to them because they are neither “innkeepers” nor “operators” as defined by the statute and the ordinances. The Court is inclined to agree. Under the Enabling Statute, “innkeeper” is defined as “any person who is subject to taxation under this article for the furnishing for value to the public any rooms, lodgings, or accommodations.” O.C.G.A. § 48-13-50.2 (2). The verb, to furnish, is defined as “to provide with what is needed; especially, to equip with furniture” and to “supply; give.” The word “implies the provision of any or all essentials for performing a function.” <http://www.merriam-webster.com/dictionary/furnish>. These definitions indicate that “furnishing” relates to something material, here, the actual room. It is clear to the Court that, under the merchant model, the OTCs provide a nonmaterial reservation to the customer; the physical rooms are provided by the hotels.

With regard to the ordinance, there, “operator” is defined as “any person operating a hotel in the city, including but not limited to the owner or proprietor of the premises, lessee, sublessee, lender in possession, license to or any other person otherwise operating the hotel.” City Code § 146-76. Again, it is clear to the Court that the OTCs do not undertake to operate, or manage, the hotels. The Court thus finds that the OTCs are neither “innkeepers” or “operators” within the meaning of the Enabling Statute or of the ordinance. Accordingly, to the extent that the City seeks a declaration that the Enabling Statute and City ordinances are applicable to the OTCs on this account, Plaintiff’s Motion is **DENIED** and Defendants’ Motion is **GRANTED**.

However, the matter does not end there. The City also seeks injunctive and other relief. Furthermore, the Court may not ignore recent developments in the case law that it is bound to

follow. See Expedia, Inc. v. City of Columbus, 285 Ga. 684 (2009); Hotels.com L.P. v. City of Columbus, 286 Ga. 130 (2009).

In Expedia, Inc., the court held that Expedia was a third-party tax collector by virtue of its private agreements with Columbus hotels to collect monies from the customers specifically earmarked for payment of the local occupancy tax. 285 Ga. at 688, 691. The OTCs contend that the language in the contracts at issue in Expedia, Inc. can be distinguished from the language in the contracts at issue here. Having studied the contracts at issue here, the Court finds that many of them do not expressly provide that the OTC “shall collect all applicable taxes from its customers,” as did the contracts in Expedia, Inc. Id. at 684-685. However, the contracts and addendums indicate the applicable state and local tax rate, as well as the negotiated wholesale rates, and provide for a business model by which the hotel charges and invoices the OTC for those rates. Under the contract, then, even if not explicitly stated, the OTC collects the bundled amount actually charged to the customer, which includes the wholesale rate, the difference between that rate and the actual room rate, and an amount to cover the applicable taxes and fees. Upon receipt of the invoice, the OTC remits to the hotel the negotiated wholesale rate along with the taxes based on that rate. The Court is not convinced by the OTCs’ argument on this issue. Regardless of the verbiage in the specific contracts, the Court finds that this model, as described thoroughly by counsel for the Defendants, is the intent underlying the contracts. The Court thus finds, as a matter of fact, that the OTCs “contracted with City hotels and bargained for the right to receive the customer’s tax payment on the hotel’s behalf whenever the customer reserved a hotel room on [their] website[s].” Id. at 688. Therefore, they are third-party tax collectors.

Having so found, the Court further finds that, by virtue of their contracts with the City hotels, the OTCs “have rendered [themselves] duty-bound to remit the taxes it has collected to the

City's taxing authority." Id. The Enabling Statute provides, "[t]he person or entity collecting the tax from the hotel or motel guest shall remit the tax to the governing authority imposing the tax..." O.C.G.A. § 48-13-51(a)(1)(B)(ii). Regardless of whether or not the OTCs are "operators" or "innkeepers," because they undertook to collect monies earmarked for taxes, they are required to remit tax payments owed to the City pursuant to this provision. Expedia, Inc., 285 Ga. at 689.

The Court further finds that the taxable amount is the room rate paid by the customers of the OTCs, as opposed to the lesser wholesale rate negotiated by the OTCs and the hotels. The Enabling Statute provides for an excise tax "at the applicable rate on the lodging charges actually collected..." O.C.G.A. § 48-13-51(a)(1)(B)(i). Pursuant to section 146-79 of the City Code, the City levies a seven percent tax on "the rent for every occupancy of a guestroom in a hotel in the city." The Code defines "rent" as "the consideration received for occupancy valued in money, whether received in money or otherwise, including all receipts, cash, credits and property or services of any kind or nature, and also the amount for which credit is allowed by the operator to the occupant, without any deduction therefrom." City Code § 146-76. The Court thus interprets rent to mean *all* of the money paid by the customer in order to occupy the room (less the allotments for taxes and fees), which amounts to the room rate paid by the customer to the OTC. See Expedia, Inc., 285 Ga. at 689-90 (finding that the City of Columbus' excise tax on the "charge to the public" for a hotel room to apply to the room rate the OTC "demands from the customer for the right of occupancy.>").

In light of the above, pursuant to O.C.G.A. § 13-8-1, the Court declares void as for an illegal purpose those provisions in the OTCs' contracts that provide for the under-remittance of hotel occupancy taxes. To such extent, Plaintiff's Motion is **GRANTED** and Defendants' Motion

is **Denied**.

The Court is not convinced by the OTCs' constitutional arguments. Because the Court expressly found that they are not "innkeepers" or "operators" within the confines of the Enabling Statute or the applicable city ordinances, respectively, the remedies available pursuant to them are of no effect.² Expedia Inc., 285 Ga. at 691. The Court thus fails to detect a due process violation. With regard to the OTC's arguments invoking the Equal Protection Clause, the Commerce Clause, and the Uniformity Clause, these issues have already been decided in Expedia Inc. There, citing Teachers' Retirement System v. City of Atlanta, 249 Ga. 196, 204 (1982), the court found that the occupancy tax is imposed on the guest, and not on the OTC. Id. at 690. By contracting with local hotels to collect taxes belonging to the City, the OTCs have rendered themselves accountable for remitting the taxes they have collected, Id. at 691. Accordingly, the Court rejects the OTCs' constitutional claims.

Additionally, the Court finds as a matter of law that the City has not satisfied the essential elements of its claim for unjust enrichment in that the City has not shown by sufficient evidence that it has conferred a benefit on the OTCs. Engram v. Engram, 265 Ga. 804, 806 (1995). Similarly, the Court finds as a matter of law that the City has not satisfied its claim for money had and received in that the City has not shown by sufficient evidence that it has made a demand for payment on the OTCs. McGonigal v. McGonigal, 294 Ga. App. 427, 429 (2008). Because the remedy of a constructive trust is not a separate cause of action, but is dependent upon the success of an unjust enrichment claim, the Court also rejects the City's claim for constructive trust. St.

² Section § 146-87 of the City Code provides, "[i]f any person fails to make a return for the tax levied in this article, the chief financial officer shall make an estimate of the amount of the gross receipts of the person or, as the case may be, of the amount of the total rentals in this city which are subject to the tax." While "any person" would seem so broad as to include the OTCs, a careful reading of the applicable ordinances reveal that the prospect of a third-party tax collector is not contemplated within the confines of the Code. See §§ 146-80, 146-81, 146-84 (a), 146-85 (a) and (e).

Paul Mercury Ins. Co. v. Meeks, 270 Ga. 136, 137 (1998). Furthermore, the Court declines to grant the City an equitable accounting having retroactive application. To such extent, Plaintiff's Motion is **DENIED** and Defendants' Motion is **GRANTED**.

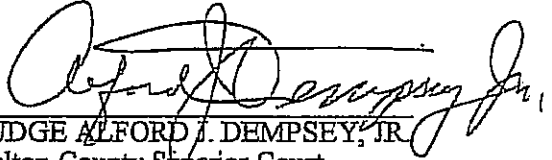
Lastly, the Court finds that permanent injunctive relief is justified here. Because the administrative remedies pursuant to the Enabling Statute and the City ordinances are not available to the City, the Court finds there is no adequate remedy at law. Expedia Inc., 285 Ga. at 691. The Court further finds that the City would suffer irreparable harm by the loss of the use of these tax funds for the promotion and development of tourism. Accordingly, the Defendant OTCs are **HEREBY ENJOINED**:

- (1) to collect the hotel occupancy tax based on the total amount it discloses to the consumer as the room rate, room charge, or other applicable term, so long as the OTCs collect hotel occupancy taxes and/or all applicable taxes from their customers;
- (2) to remit the taxes collected to the City's taxing authority either directly or through the hotels, as is currently done, on or before the twentieth day of the month following each monthly period, so long as the OTCs collect hotel occupancy taxes and/or applicable taxes from their customers;
- (3) to maintain information as to the number of hotel rooms booked through the OTCs and actually occupied in Atlanta, the room rate charged to the consumer for the room, and the hotel occupancy taxes collected and remitted, and to provide such information in a timely fashion to the City's taxing authority either directly or through the hotels, as is currently done, so long as the OTCs collect hotel occupancy taxes and/or applicable taxes from their customers.

This Court retains jurisdiction over this matter for purposes of enforcing, modifying or vacating

this Injunction upon proper application by the parties.

SO ORDERED this 22 day of July, 2010.


JUDGE ALFORD J. DEMPSEY, JR.
Fulton County Superior Court