

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

County of Lawrence, Pennsylvania,	:	
on behalf of itself and all other	:	
similarly situated Pennsylvania	:	
Counties,	:	
Appellant	:	
	:	
v.	:	No. 2541 C.D. 2010
	:	Argued: June 6, 2011
Hotels.com, LP; Hotels.com GP, LLC;	:	
Hotwire, Inc.; Cheaptickets.com, Inc.;	:	
Expedia, Inc.; Internetnetwork Publishing	:	
Corp. (d/b/a Lodging.com);	:	
Lowestfare.com, Inc.; Maupintour	:	
Holding, LLC; Orbitz, Inc.; Orbitz,	:	
LLC; Priceline.com, Inc.; Site59.com,	:	
LLC; Travelocity.com, Inc.;	:	
Travelocity.com, L.P.; Travelweb,	:	
LLC; Travelnow.com, Inc.	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge**  
**HONORABLE MARY HANNAH LEAVITT, Judge**  
**HONORABLE P. KEVIN BROBSON, Judge (P)**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
PRESIDENT JUDGE LEADBETTER**

**FILED: August 3, 2011**

Lawrence County (County) appeals from the order of the Court of Common Pleas of Lawrence County sustaining the preliminary objections of Hotels.com and 15 other corporations offering online travel services (collectively, Companies) and dismissing the County’s proposed class action, which sought hotel

tax revenue from the Companies. We affirm in part, reverse in part, and remand for further proceedings.

The facts, as alleged in the County's amended complaint, are as follows.<sup>1</sup> The Companies offer consumers the opportunity to book hotel rooms online. The Companies do this by contracting with hotels to book blocks of rooms at a discounted rate, and then passing individual rooms on to consumers at a markup. The County points to publicly available documents attached to their complaint, including annual reports filed by the Companies with the Securities and Exchange Commission, to allege that when the Companies book blocks of rooms from a hotel, they "take title" to those rooms. Therefore, the County alleges that when a consumer books a hotel room at one of the Companies' websites, they are not renting from the hotel, but from one of the Companies. The County argues that Companies are therefore hotel "operators" as defined by its hotel tax ordinance, and are subject to the tax. It appears that the tax is being paid to the County by individual hotels, based on the discounted rate they charge the Companies. The County argues that the tax should be paid by the Companies, based on the higher rate that the Companies charge consumers.

The County filed suit, stating four causes of action. The County's amended complaint included as the first cause of action the allegation that the Companies violated the County Code (the Code)<sup>2</sup> by failing to pay the tax, while the second and third causes of action included a number of common law claims,

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<sup>1</sup> These facts, and the inferences to be drawn therefrom, are sharply contested. However, for reviewing the grant of preliminary objections, we must assume the truth of the facts pled.

<sup>2</sup> Act of August 9, 1955, P.L. 323, *as amended*.

including conversion and unjust enrichment. The fourth and final cause of action sought a declaratory judgment that the Companies are subject to the tax.

The Companies filed multiple preliminary objections, each characterized as a demurrer, based on two main arguments: the failure to exhaust administrative remedies, and that, as a matter of law, the County's hotel tax ordinance did not apply to them. In response, the County declined to defend its second and third cause of action, which stated common law causes of action, but defended its action under the Code and its request for a declaratory judgment. After argument before visiting Senior Judge Alexander, the preliminary objections were granted "without prejudice."<sup>3</sup> An order to that effect was entered, but, before Judge Alexander issued an opinion in this case, he passed away. Therefore, resolution of this appeal involves a certain amount of guesswork. At the hearing, however, Judge Alexander did offer some insight into his thinking. Addressing counsel for the County, he said:

I'm going to dismiss the case . . . without prejudice. . . .  
[I]f you appeal, I will write an opinion . . . I will find every one of their issues is true. I will rule in every issue and not being - - doing it begrudgingly, I just think they're right. I think they're right on the exhaustion. I think they're right on the ordinance itself. I think . . . you jumped the gun. Go to the legislature and get what you need for - - from them, they write the statute and go to the county and get the ordinance. You're trying to do - - you're trying to pull yourselves up by your own bootstraps. And it isn't going to work.

Reproduced Record (R.R.) at 1180-81. An appeal to this court followed.

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<sup>3</sup> We note that preliminary objections were granted by common pleas before a determination was made as to whether this case was an appropriate class action.

As an initial matter, it is self-evident that a trial court which grants a preliminary objection on the basis of failure to exhaust administrative remedies, cannot then go on to rule on the merits of the case. Therefore, after sustaining the procedural objections, the court should have dismissed as moot the demurrers to the merits of the County's claims. Given his actual order, and considering the above quotation from oral argument, we conclude that, had Judge Alexander been able to complete an opinion in this case, he would have set out his view of the merits as an alternative holding should his procedural ruling be dismissed on appeal. At all events, we will proceed accordingly, first considering whether County has failed to exhaust administrative remedies, and then considering the argument that the tax does not apply to the Companies as a matter of law.

The Code authorizes county commissioners to:

impose an excise tax on the consideration received by each operator of a hotel, as defined by this section, from each transaction of renting a room or rooms to accommodate transients. If levied, the tax shall be collected by the operator from the patron of the room and paid over to the county.

Section 1770.6(a) of the Code,<sup>4</sup> 16 P.S. § 1770.6(a). The Code defines a hotel "operator" as:

An individual, partnership, nonprofit or profit-making association or corporation or other person or group of persons who maintain, operate, manage, own, have custody of or otherwise possess the right to rent or lease overnight accommodations in a hotel to the public for consideration.

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<sup>4</sup> Added by the Act of December 22, 2000, P.L. 1019, *as amended*.

Section 1770.6(f) of the Code, 16 P.S. § 1770.6(f). The County has an ordinance authorizing a hotel tax, with language substantially tracking the statute in all meaningful respects, including the definition of “operator.” *See* Lawrence County Ordinance No. 317 of 2002, R.R. at 47-53. The parties disagree over whether the Companies “otherwise possess the right to rent or lease overnight accommodations,” and whether they are therefore “operators” subject to the tax.

Section 15 of the Ordinance requires the County Treasurer to submit rules and regulations for the administration of the tax for approval to the Board of Commissioners. R.R. at 52. This was done, and the Rules and Regulations were approved. *See* R.R. at 324-41.

The County’s Hotel Room Rental Tax Rules and Regulations set out a procedure to be followed in the event of non-payment of all or part of the tax due. Generally, the County is to make a determination of the amount owed and provide the taxpayer with notice, at which point the taxpayer can request a hearing in front of the Treasurer. R.R. at 329-30. If the Treasurer rules against the taxpayer, an appeal may be taken to common pleas. *Id.* The County admittedly took none of these steps before filing suit against the Companies. The Companies argue, and common pleas agreed, that this was a failure to exhaust administrative remedies, necessitating the dismissal of the suit.

We will evaluate this holding with respect to each of the County’s causes of action. With respect to the cause of action under the Code, which seeks certification of a class action to recover damages for failure to pay the tax, common pleas was correct to dismiss.<sup>5</sup> In general, a litigant must first exhaust

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<sup>5</sup> To the extent they are still at issue in this case, common pleas was also correct to dismiss the County’s common law causes of action for the same reason.

administrative remedies before seeking judicial review. *Pa. Pharmacists Ass'n v. Dep't of Pub. Welfare*, 733 A.2d 666 (Pa. Cmwlth. 1999). The County's own Rules and Regulations clearly lay out a mandatory procedure that the County must undertake when seeking the collection of unpaid hotel taxes. The County cannot bring suit to collect hotel tax revenue from an operator without first following its own procedures.

With respect to the County's cause of action for a declaratory judgment, however, we reach a different result. The Declaratory Judgments Act<sup>6</sup> makes clear that the principal of exhaustion simply does not apply to suits seeking declaratory relief, stating that, subject to several enumerated exceptions, declaratory relief:

shall be additional and cumulative to all other available remedies .... Where another remedy is available the election of the declaratory judgment remedy rather than another available remedy shall not affect the substantive rights of the parties ....

42 Pa. C.S. § 7541(b). *See Allegheny Ludlum Steel Corp. v. Pa. Pub. Util. Comm'n*, 447 A.2d 675 (Pa. Cmwlth. 1982). The only exception to this rule that is conceivably applicable to this case is 42 Pa. C.S. § 7541(c)(2), which states that declaratory relief is not available for proceedings "within the exclusive jurisdiction of a tribunal other than a court." If the County's Rules and Regulations set up an exclusive procedure for obtaining the relief sought, declaratory relief would be unavailable. However, the County's action for declaratory relief seeks something other than that for which its administrative procedures are designed: rather than seeking a monetary judgment against a specific entity, it seeks an interpretation of

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<sup>6</sup> 42 Pa. C.S. §§ 7531-7541.

the language in the ordinance and the statute, and a declaration of that language's applicability to the Companies. The fact that the County Treasurer rather than a solicitor is the official designated to hear and rule on the county's assessment of taxes supports the conclusion that the procedure was intended to resolve financial and accounting disputes rather than legal questions. Moreover, requiring that the administrative procedure be exhausted would require that the County, in order to determine the amount of hotel tax due, audit the records of many companies which, in the end, may be determined not to be subject to the tax at all. Finally, the administrative process would not provide a complete remedy to the County because the Treasurer's ruling can be appealed only if it is adverse to the taxpayer.

The question presented in this case is, at its core, a question of statutory interpretation best resolved by a judge, not a county treasurer. Of course, a declaratory judgment is a discretionary remedy that a court may refuse to enter if it would not resolve the uncertainty or controversy at issue. 42 Pa. C.S. § 7537; *see also Wimer v. Pa. Employees Benefits Trust Fund*, 868 A.2d 8 (Pa. Super. 2005), *aff'd*, 595 Pa. 627, 939 A.2d 843 (2007). However, that is not the case here. On remand, we are confident that the courts can best and most efficiently settle the question of the applicability of the hotel tax to the Companies. If the Companies prevail, the controversy will be over. If the County succeeds, it will then be in a position to initiate administrative proceedings to determine the amounts the Companies owe, and to begin the collection process. A declaratory judgment action, therefore, is an appropriate and efficient method of moving this controversy toward a final resolution.

We next evaluate the Companies' second preliminary objection, that the County failed to state a claim because the tax, as a matter of law, does not

apply to them. We evaluate this objection only with respect to the declaratory judgment action, as we have already determined that preliminary objections to the County's other causes of action were properly granted for failure to exhaust administrative remedies. Thus, to the extent that common pleas also erroneously considered these counts on the merits, his cumulative merits dismissals are moot, and we will not address them. However, since we have ruled that the merits of the claim for declaratory relief was properly before common pleas, we must turn to the County's appeal of the dismissal of that count.

The question presented by a demurrer is whether, on the facts averred, the law states with certainty that no relief can be granted; where doubt exists as to whether a demurrer should be sustained, such doubt should be resolved in favor of overruling it. *Powell v. Drumheller*, 539 Pa. 484, 653 A.2d 619 (1995). We believe that it was error to grant the demurrer in this case. A significant question as to the applicability of the tax to the Companies exists, and, while we express no opinion as to the outcome, this claim must be allowed to proceed further through the litigation process. We note that the County has alleged that the Companies take title to the hotel rooms at issue before renting them out to patrons. The County has also alleged that in doing so, the Companies set prices for the rooms, control who occupies them, and function as the merchant of record for the transaction. We note that these allegations are strenuously contested by the Companies, but if they are proven, it would present common pleas with a viable question whether these activities are sufficient to make the Companies hotel "operators" within the meaning of the ordinance. We express no opinion on this issue at this premature stage, but do hold that for this reason, this case should



proceed beyond preliminary objections to discovery, summary judgment and perhaps trial.

We therefore reverse common pleas' grant of the preliminary objections to the declaratory judgment action but affirm the grant of preliminary objections to the remainder of the County's claims. We remand for common pleas to undertake further proceedings on the declaratory judgment action.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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similarly situated Pennsylvania	:	
Counties,	:	
Appellant	:	
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v.	:	No. 2541 C.D. 2010
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Hotels.com, LP; Hotels.com GP, LLC;	:	
Hotwire, Inc.; Cheaptickets.com, Inc.;	:	
Expedia, Inc.; Internetnetwork Publishing	:	
Corp. (d/b/a Lodging.com);	:	
Lowestfare.com, Inc.; Maupintour	:	
Holding, LLC; Orbitz, Inc.; Orbitz,	:	
LLC; Priceline.com, Inc.; Site59.com,	:	
LLC; Travelocity.com, Inc.;	:	
Travelocity.com, L.P.; Travelweb,	:	
LLC; Travelnow.com, Inc.	:	

**ORDER**

AND NOW, this 3rd day of August, 2011, the order of the Court of Common Pleas of Lawrence County is **AFFIRMED** as to the first, second and third causes of action, **REVERSED** as to the fourth cause of action, seeking a declaratory judgment, and **REMANDED** for further proceedings consistent with this opinion as to the fourth cause of action. Jurisdiction relinquished.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge