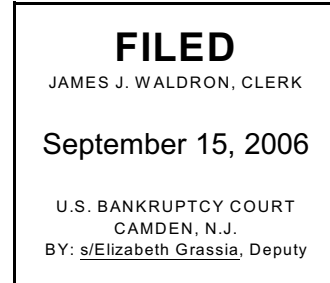


NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY



IN RE:

NICKELS MIDWAY PIER, LLC,

Debtor.

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CHAPTER 11

CASE NO. 03-49462 (GMB)

MEMORANDUM OPINION

APPEARANCES:

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Before the Court is a motion by Nickels Midway Pier, LLC (the “Debtor”) to Determine Pre-Petition Defaults and Termination of Business Lease and Oral Contract of Sale By Wild Waves, LLC.

I. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(a), and the Standing Order of the United States District Court for the District of New Jersey dated July 23, 1984, referring all bankruptcy cases to the bankruptcy court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Venue of this case is proper in the District of New Jersey pursuant to 28 U.S.C. §§ 1408 and 1409. The following shall constitute findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

II. FACTUAL BACKGROUND

Nickels Midway Pier, LLC is in the business of purchasing, leasing and managing real estate. Nickels owns two pieces of property in Wildwood, New Jersey. At issue in this case is a pier (the “Pier”) located at 3500 Boardwalk, Wildwood, New Jersey. Nickels purchased the Pier in November of 1976. In 1999, Nickels and Wild Waves, LLC (“Wild Waves”) entered into a written lease agreement, whereby Wild Waves would lease approximately 70 percent of the Pier for the purpose of constructing and operating a water park. Wild Waves asserted that the written lease was part of an agreement to sell the Pier. Wild Waves constructed new concrete foundations and made other improvements to the property for the purpose of constructing a water park. Wild Waves has been operating its water park on the Pier since 2000. On the remaining

30 percent of the Pier are located several buildings and kiosks leased to a variety of tenants on the boardwalk.

The parties disagreed on the issue of whether Nickels had agreed to sell the Pier to Wild Waves. Wild Waves asserted that Nickels agreed orally to sell it the Pier, while Nickels argued that it never entered into an agreement to sell the Pier and that Wild Waves merely held a leasehold interest in the portion of the Pier occupied by the water park. Neither party completed performance of the alleged sale contract; i.e., Wild Waves did not furnish a deposit or the purchase price, and Nickels did not deliver the deed.

In 2001, Nickels initiated a civil action in the New Jersey Superior Court, Chancery Division and Wild Waves filed counterclaims prior to the filing of the bankruptcy. Wild Waves' counterclaim sought a determination that an oral contract for the sale of the Pier existed between the parties. A trial in that matter commenced on December 3, 2003.

On December 8, 2003, Nickels filed for chapter 11 bankruptcy and on December 16, 2003, Nickels filed a motion to reject its lease with Wild Waves, pursuant to 11 U.S.C. § 365. Subsequently, Wild Waves filed a motion for stay relief for the purpose of pursuing its counterclaim in the Chancery Division. On February 20, 2004, the Court granted Wild Waves' motion for stay relief and reserved its decision on whether Nickels could reject Wild Waves' lease until resolution of the state court litigation.

The parties tried their state court litigation before the Honorable George L. Seltzer in the Chancery Division on December 3 and 4, 2004, February 7, 8, and 9, 2005, and on March 1, 2005. On April 25, 2005, Judge Seltzer entered an order declaring that

Nickels Midway Pier, LLC and Wild Waves, LLC entered into a binding Agreement respecting Nickels Midway Pier, pursuant to which Wild Waves was to lease a portion of the Pier pursuant to a Business Lease dated May 15, 1999 and then to purchase the entire Pier in accordance with the terms contained in a written (but unexecuted) Agreement of Sale accepted into evidence as D-21.

Judge Seltzer determined the purchase price of the Pier in 2003 to be \$5,500,000.00. Currently, Nickels has received offers to purchase the Pier for \$15,000,000.00 and \$15,400,000.00, which included various conditions.

Upon resolution of the state court litigation, on July 25, 2005, the Debtor sought to proceed with its motion to reject the executory contract, filed December 16, 2003. Wild Waves filed an objection to Nickels' motion to reject and Nickels filed a response thereto on August 1, 2005. On July 28, 2005, the Court held a pre-trial conference with the parties, at which it determined that it would consider the following issues at the August 9, 2005 hearing: (1) whether the Agreement of Sale (the "Agreement") was an executory contract; (2) if so, whether Nickels satisfied the business judgment test when it decided to reject the Agreement; and (3) if Nickels may reject the Agreement, whether Wild Waves is "in possession" of the Pier under § 365(i). A plenary hearing was held in this matter on August 9, 2005, at which time the Court directed the parties to submit post-trial briefs by August 11, 2005. The parties asserted the following arguments in support of their respective positions:

A. Nickels' Arguments in August, 2005

First, Nickels argued that Wild Waves was judicially estopped from asserting that the Agreement was terminated pre-petition, and therefore nonexecutory. Second, Nickels argued

that the Agreement is executory, because substantial performance remains due by both parties. Specifically, Nickels argued any performance rendered by Wild Waves was performed in accordance with its obligations under the lease. Third, Nickels argued that rejection is required in order for Nickels to exercise its best business judgment, because it may obtain a significantly higher sale price from a third party, and because Wild Waves' damage calculations are inaccurate. Finally, Nickels argued that Wild Waves is not a purchaser "in possession" under § 365(i), and thus, is not entitled to the protections set forth in that section. Specifically, Nickels argued that Wild Waves occupies only 70 percent of the Pier, and that it has no connection with the remaining, more valuable 30 percent of the Pier. Nickels also argued that the fact that the water park may be dismantled and moved speaks against permanence and possession.

B. Wild Waves' Arguments in August, 2005

First, Wild Waves argued that the Agreement is not executory, because (a) the Agreement was terminated pre-petition as a result of Nickels' anticipatory repudiation thereof, and (b) Wild Waves' substantial performance of the Agreement rendered it nonexecutory.

Second, Wild Waves argued that Nickels' decision to reject the Agreement was not made in sound business judgment, because (a) Wild Waves' damages are likely to absorb any profit Nickels may realize from a sale to another party; (b) the other offers to purchase the Pier are not a "sure thing," and are subject to several contingencies that potentially may not occur, whereas Wild Waves is prepared to close in the near future; and (c) a sale to Wild Waves would result in a 39.14 percent distribution to creditors, while a sale to a third party would only result in a 37.66 percent distribution to creditors.

Third, Wild Waves argued that Nickels is not entitled to reject the Agreement, because Wild Waves is entitled to specific performance of the Agreement. As such, Wild Waves held an equitable remedy that does not give rise to a payment, and therefore, is not a claim as defined by § 101(5).

Finally, Wild Waves argued that if the Court determines that Nickels is entitled to reject the Agreement under § 365(a), Wild Waves is entitled to the benefits set forth in § 365(i), because it is a purchaser “in possession.”

C. This Court held, on September 1, 2005, that the Lease/Land Sale Agreement Is Executory.

By Memorandum Opinion on September 1, 2005, this Court held: (1) The Lease/Land Sale Agreement is executory because substantial performance was due by both parties; (2) The Agreement was not terminated pre-petition; (3) The doctrine of judicial estoppel precluded Wild Waves from asserting that the Agreement was terminated pre-petition because it successfully argued in the state court that a valid, binding contract of sale was entered into by the parties; (4) Nickels could not have anticipatorily breached the Agreement until there was a determination of its existence.

After finding that the contract is executory, the Court examined whether the Debtor may reject the Agreement under § 365(a), and if so, whether Wild Waves is entitled to the protections provided by § 365(i) for purchasers “in possession.” The Court found that the Debtor may reject under § 365(a), but that Wild Waves is a purchaser “in possession,” and therefore, entitled to the protections afforded under § 365(i).

On September 26, 2005, Debtor moved for reconsideration of the Court's determination that Wild Waves is entitled to protection under § 365(i). After further extensive briefing, Debtor's motion for reconsideration was denied by the Court on November 2, 2005.

D. On Appeal, the District Court Impliedly Held that Each of Two Separate, Divisible Contracts Are Executory.

On Appeal, the District Court, the Honorable Joseph E. Irenas, held there existed two divisible contracts, one for the sale of land and a separate lease agreement, and remanded to this Court to determine: (1) "the legal consequences of the rejection of each aspect of the parties' agreement, including the impact, if any, of Wild Waves' arrearages under the lease," and (2) "whether rejection of the Lease or the oral contract for sale meets the standard of the business judgment rule." In re Nickels Midway Pier, LLC, 341 B.R. 486, 500, 501 (D.N.J. 2006).

There was nothing in Judge Irenas' decision that shed doubt on the existence of two executory contracts; Judge Irenas' decision was very clear in the mandate to this Court to decide the two issues on remand, both involving the consequences of rejection.

Certain issues decided by Judge Irenas are now on appeal to the Third Circuit Court of Appeals under Docket Number 06-2671. The appeal is still in the briefing stage as Appellant, Wild Waves', first brief was due on 8/14/06.

Wild Waves presents three issues to the Third Circuit: "(1) Did the District Court err in determining that Wild Waves is not entitled to the rights and/or protections of 11 U.S.C. § 365(i), in failing to properly apply the ruling of the Superior Court of New Jersey, Chancery Division for Atlantic County, by which it was bound, or that Wild Waves was otherwise not entitled to the

protections of 11 U.S.C. § 365(i)?; (2) In the alternative, did the District Court err in determining that Wild Waves' damages are capable of being reduced to a "claim," as that term is defined in 11 U.S.C. § 101(5), and thus not entitled a right of specific performance under New Jersey law, which right would not be subject to a discharge under the Bankruptcy Code?; (3) In the alternative, did the District Court err in determining that the contract between Wild Waves and Debtor was executory, and thus subject to rejection under 11 U.S.C. § 365, instead of having been repudiated and not subject to rejection under 11 U.S.C. § 365?

Notwithstanding Wild Wave's framing of the three issues on appeal to the Third Circuit, the three issues decided by this Court in its Memorandum Opinion of September 1, 2005, which were appealed to the District Court, were that: (1) the Agreement is executory; (2) Nickels may reject the Agreement pursuant to § 365(a); and (3) Wild Waves is entitled to the protections set forth in § 365(i). Pre-petition termination was not before the District Court and is not now before the Third Circuit Court of Appeals. That issue is now properly before this Court.

E. This Court, on Remand, Scheduled a Plenary Hearing on the Question of Rejection of the Contracts.

On remand, on June 22, 2006, the Court relisted Debtor's Motion to Reject, which was filed roughly one week after the case was commenced, on December 16, 2003.

Notwithstanding this Court's September 1, 2005 Memorandum Opinion and later Order and the District Court's April 24, 2006 Decision and Order, in response to the relisting of the Motion to Reject, Debtor made this motion to determine pre-petition termination on July 14,

2006, with supplemental briefing filed on July 28, 2006. In addition, a lengthy hearing was held on the matter on August 9, 2006, where Debtor requested that the issue of rejection be redirected to pre-petition termination because, in its view, it could not determine whether rejection was in its best business judgement (to satisfy the rejection standard) unless this Court first determined whether it would be liable to Wild Waves for pre-petition breaches and to what extent.

Nickels now asserts that it would be imprudent for it to seek to reject the Business Lease and/or Oral Contract of Sale without this Court first determining: “(i) whether there were pre-petition breaches under the Business Lease and/or Oral Contract of Sale and who caused such breaches and; (ii) whether such breaches resulted in the termination of the Business Lease and/or Oral Contract of Sale.”

Debtor asserts that, “If Wild Waves is in pre-petition breach, or waived its rights to cure, and the Business Lease and Oral Contract of Sale were terminated pre-petition, they can not survive the filing of the petition. An executory contract terminated pre-petition precludes such a contract from being included among the Debtor’s assets and may not be thereafter resurrected post-petition.” July 14, 2006 Memorandum of Debtor.

Debtor argues, it claims in the alternative, that Wild Waves is in continuing post-petition default and therefore, this Court can terminate the contracts on that basis alone, mooted the issue of rejection under section 365. Post-petition default and termination, however, is not before the Court today. Whether Wild Waves is in post-petition breach of the Lease Agreement will be resolved at a later date.

Wild Waves contends that Debtor should not be permitted to reject either contract because such rejection is not in sound business judgment and would be made in bad faith. Wild Waves argues that rejection of the land sale contract would not be in the Debtor's sound business judgment because it would be entitled to rejection damages that could exceed the sale price of the property. Wild Waves also claims that rejection of the oral contract of sale would not be in the sound business judgment of the Debtor because Wild Waves will not vote for any plan that does not include the sale of the Pier to Wild Waves, and therefore Debtor will not be able to get to confirmation of a plan.

Further, Wild Waves asserts that if Debtor is permitted to reject the lease, Wild Waves would be permitted to remain in possession of the leased premises under section 365(h) for up to 25 years, impeding any development of the Pier.

III. THIS COURT HAS ALREADY HELD THE LEASE/LAND SALE CONTRACT IS EXECUTORY; ANALYZING EACH CONTRACT SEPARATELY DOES NOT ALTER THE OUTCOME IN THIS CASE.

Because the District Court held that it was in error for this Court to conflate the two Agreements for the purpose of the determination on whether the Agreements are executory and subject to rejection, this Court will revise its earlier analysis to treat each contract separately.

A. The Oral Contract for Sale of Land

The term "executory contract" in section 365 is not defined in the Code. In re R.M. Cordova Int'l, Inc., 77 B.R. 441, 445 (Bankr. D.N.J. 1987). The Third Circuit has adopted the following definition expounded by Vern Countryman:

[An executory contract] is a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.

Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp., 872 F.2d 36, 39 (3d Cir. 1989) (quoting Countryman, Executory Contracts in Bankruptcy, Part I, 57 MINN. L. REV. 439, 460 (1973)).

The appropriate time for determining whether a contract is executory is the date of filing. In re HQ Global Holdings, Inc., 290 B.R. 507, 510 (Bankr. D. Del. 2003).

In the context of land sale contracts, a contract is executory where the buyer has not furnished the purchase price and where seller has not transferred title to the buyer. McCannon v. Marston, 679 F.2d 13, 18 (3d Cir. 1982).

It is undisputed that Wild Waves has not furnished a deposit or the sale price of the Pier and that Debtor has not transferred title to the Pier. There can be little doubt that the contract for the sale of land is executory and Debtor may reject that contract under section 365(a), if such rejection is in the Debtor's sound business judgment.

In addition, the District Court disregarded Wild Waves' argument that Nickels anticipatorily breached the oral contract for sale and therefore the contract was no longer executory. 341 B.R. at 500, n.16. Judge Irenas' Opinion correctly reminded Wild Waves that anticipatory repudiation is a breach of contract, not contract termination. Id. Those two concepts are not synonymous. The District Court also cited to In re W & L Assocs., Inc., 71 B.R. 962, 965 (Bankr. E.D. Pa. 1987), for the proposition that a pre-petition breach of a contract does not render the contract non-executory.

Wild Waves has no basis in law or fact for its assertion that the Oral Contract for the Sale of Land was terminated pre-petition due to Debtor's anticipatory repudiation and therefore may not be rejected under § 365 because the contract was not executory as of the filing of the petition. Moreover, whether anticipatory repudiation precludes rejection was already determined by this Court in its September 1, 2005 Memorandum Opinion and later Order. Analyzing each contract separately does not change the result under these facts.

B. The Lease

Section 365(a) provides that a Debtor may assume or reject any executory contract or unexpired lease of the Debtor. Notwithstanding Debtor's argument that due to pre-petition breaches by Wild Waves the lease terminated prior to the bankruptcy, this Court held that the Lease is executory and may be rejected by the Debtor, subject to the provisions of § 365.

In addition, the District Court clearly implied that the Lease is executory in instructing the bankruptcy court to, "reconsider its ruling that rejection is in the best interests of the debtor's estate, and analyze separately whether rejection of the Lease or the oral contract for sale meets the standard of the business judgment rule." 341 B.R. at 500–501.

That the Lease Agreement is executory is supported by the fact that under the Countryman test described supra, substantial performance was due by both parties under the terms of the Lease Agreement as of the date of the petition: under the terms of the lease, Wild Waves was required to pay rent as of the petition date and Debtor was required to allow Wild Waves to remain in possession of the area of the property occupied by Wild Waves according to

the terms of the written Lease Agreement. Notwithstanding contentions by both parties of other pre- and post-petition breaches, that substantial performance was due by both parties as of the date of the petition, the Lease Agreement is executory for the purposes of § 365(a).

The District Court agreed with this analysis. Its recitation of the facts highlights the applicable sections of the Lease:

The Lease specifies a term of approximately sixteen years, beginning on May 15, 1999, and terminating on December 31, 2014. (Lease at ¶ 3; NA:20) The Lease also provides that Wild Waves may extend the Lease for three additional five-year terms. (Lease at ¶ 34; NA:27) Nickels was required to give possession of the leased premises to Wild Waves on October 1, 1999, although Wild Waves was permitted limited access to the leased premises before that date. (Lease at ¶¶ 7, 10; NA:21-22) Wild Waves was obligated to make five rental payments of \$50,000 each year, beginning on January 1, 2000, with an increase in rent effective January 1, 2003. (Lease at ¶ 4; NA:20) Wild Waves was also required to pay annually to Nickels one-third of the real estate taxes for the entire Pier. (Lease at ¶ 9; NA:21)

341 B.R. at 490.

While the District Court did not explicitly hold that the Lease was an executory contract (as it did for the Oral Contract of Sale), it did clearly imply that it considered the Lease to be executory in detailing the performance due on both sides of the contract in its recitation of the facts and in instructing this Court to reconsider its ruling on whether the Debtor's rejection of the Lease meets the business judgment test.

This Court, therefore, holds that both agreements were executory as of the date of the petition and may be rejected under § 365, if such rejection satisfies the business judgment test as described supra. Today's holding does not depart from this Court's September 1, 2005

Memorandum Opinion and later Order, notwithstanding that each contract was analyzed separately per the remand instructions of the District Court.

IV. THERE WAS NO PRE-PETITION TERMINATION.

Notwithstanding this Court's earlier holding that the two Agreements were executory as of the date of the filing of the petition, this Court will undertake a separate analysis as to whether either or both of the contracts were terminated pre-petition such that as of the date of the petition, no such contract(s) existed and therefore, rejection under § 365 is a moot issue.

A. While Both Parties Have Alleged Various Breaches of the Two Agreements, Breaches Do Not Constitute Termination.

Throughout the pendency of this bankruptcy case, both Debtor and Wild Waves have asserted that the other breached one or both of the agreements or that the contracts were terminated pre-petition due to breaches. Still lost on both of the parties is the fact that breach of contract and termination are two very different concepts. As a matter of black-letter law, breach of contract merely gives rise to contract damages. See U.S. v. Winstar Corp., 518 U.S. 839, 885, n.30 (1996) (citing RESTATEMENT (SECOND) OF CONTRACTS § 346, cmt. a (1981); 3 E. FARNSWORTH, CONTRACTS § 12.8, at 185 (1990)). On the other hand, deeming a contract "terminated" is tantamount to finding that the contract ceased to exist as of the instant of termination. 31 WILLISTON ON CONTRACTS § 78:30 (4th ed. 2006).

That a terminated contract may not be assumed or rejected is both logical—a debtor may not assume or reject a contract which doesn't exist—and supported by the concept of property of

the estate. As of the filing of the petition in bankruptcy, the estate is created and all of debtor's non-exempt (or otherwise statutorily excluded) assets become property of the estate. 11 U.S.C. § 541. If a contract, to which Debtor was a party, terminated pre-petition, then Debtor would have no interest in the contract as of the moment of the filing of the petition, and therefore that terminated agreement would not be property of the estate. Under the Bankruptcy Code, only those contracts which are property of the estate may be assumed or rejected under § 365.

The case law supports the notion that a contract or lease which is terminated pre-petition may not be assumed or rejected under § 365. Matter of R.M. Cordova, Intl., Inc., 77 B.R. 441 (Bankr. D.N.J. 1987). If the contract was terminated pre-petition, the filing of a petition in bankruptcy will not resurrect an otherwise terminated contract. See, e.g., In re Coast Cities Truck Sales, Inc., 147 B.R. 674, 677 (D.N.J. 1992) (citing Matter of Triangle Laboratories, Inc., 663 F.2d 463, 467–8 (3d Cir. 1981)).

In determining whether a contract or lease was terminated pre-petition, courts look to the status of the contract as of the date the petition was filed in bankruptcy. Matter of Dunes Casino Hotel, 63 B.R. 939, 48 (D.N.J. 1986). Courts generally look to state law to determine whether an agreement was terminated pre-petition. In re Great Feeling Spas, Inc., 275 B.R. 476, 478, n.3 (Bankr. D.N.J. 2002) (citing Butner v. United States, 440 U.S. 48 (1979)).

Finding the termination of a contract under New Jersey state law requires:

Under New Jersey law, a material breach of a contract on the part of one party entitles the other party to terminate the contract. Young Travelers Day Camps, Inc. v. Felsen, 118 N.J. Super. 304, 310, 287 A.2d 231 (Dt. Ct.1972). A material breach is one which goes to the essence of the contract. Id. See also Medivox Productions, Inc. v. Hoffman-LaRoche, Inc., 107 N.J. Super. 47,

75, 256 A.2d 803 (Law Div. 1969). Termination of an agreement is thus inappropriate unless an alleged breach is material.

In re Carlisle Homes, 103 B.R. 524, 537 (Bankr. D.N.J. 1988).

Further, pre-petition termination may result from the expiration of the agreement by its own terms. Matter of Triangle Laboratories, Inc., 663 F.2d at 466–7. Pre-petition termination may also occur as the result of a court judgment. In re Smith, 269 B.R. 629, 633 (Bankr. E.D. Tex. 2001). A lease may be validly terminated notwithstanding there is no actual state court determination that the contract was terminated. Matter of Escondido West Travelodge, 52 B.R. 376, 378–9 (S.D. Cal. 1985). Moreover, to affect the right to assume or reject a contract or lease, the pre-petition termination of said agreement must be complete and not subject to reversal either under the terms of the agreement or under applicable state law. In re Tudor Motor Lodge Assocs. Ltd. Partnership, 102 B.R. 936, 949 (Bankr. D.N.J. 1989).

B. There Was No Pre-Petition Termination in this Case of Either the Land Sale Agreement or the Business Lease.

It is undisputed that no court has determined that either of the Agreements were terminated prior to the filing of the petition. Under the case law cited supra, however, a court judgment rendering a contract terminated is not required. Because there has been no court judgment rendering the agreements terminated, Debtor would have to show that the agreements terminated per their terms.

While both Debtor and Wild Waves have alleged various breaches of both the Contract for the Sale of Land and the Business Lease, this Court is being asked to determine whether those

breaches constituted a material breach sufficient to terminate the contracts pre-petition. The definition of a material breach, as described supra, is one that goes to the “essence of the contract.” Young Travelers Day Camps, Inc. v. Felsen, 287 A.2d at 231.

This Court will analyze each contract separately, per the remand instructions of the District Court:

1. The Contract for the Sale of Land

As of the date of the petition, neither party had performed on the Contract for the Sale of Land. The contract provided that the sale was contingent upon Wild Waves receiving a written commitment from an institutional lender to make a mortgage loan in the amount of \$5.4 million dollars on or before three months of the date of the closing. 341 B.R. at 491; Agreement for the Sale of Land at ¶ 4. The date for the closing was set for January 31, 2003. 341 B.R. at 491. The Agreement also provided that either party, upon written notice, had the right to cancel the agreement if Wild Waves was unable to secure the mortgage loan commitment within that time period. 341 B.R. at 491, n.6; Agreement for Sale of Land at ¶ 4.

Nickels filed its chapter 11 petition on December 8, 2003, some ten months after the date set for closing and the right to cancellation expired, per the terms of the Agreement. Therefore, as of the petition date, neither party had the right to cancel the Agreement for the Sale of Land because that right expired upon the date set for closing, January 31, 2003. While either or both parties may be entitled to damages for breaches of the Sale Agreement, as of the date of the closing, neither party had exercised its right, in writing, to cancel the Agreement. Therefore, the Agreement was never terminated pre-petition, per the terms of the Agreement.

Moreover, because neither party had performed on the Sale Agreement—sale price was not paid by the buyer, title not transferred by the seller—it can hardly be said that one party could have so materially breached the Sale Agreement as to effect a termination.

Therefore, as of the date of the petition, the Agreement for Sale of Land had not been validly terminated by either party.

2. The Business Lease

Each party alleges various breaches of the Business Lease. It is undisputed that Wild Waves discontinued paying rent pre-petition and refused to escrow the \$400,000 security payment required under the lease, until by Order of this Court. Wild Waves asserts that Debtor breached the integrated Agreement by refusing to sign the Sale Agreement, by changing a boundary line to the Water Park and by limiting access to the boardwalk by placing kiosks operated by insiders in front of the Water Park's entrance.

None of these breaches constitute the kind of material breach that “goes to the essence of the contract” and gives rise to termination. As of the date of the petition, one or both parties may have been in breach of the Agreement, but neither of the parties have submitted evidence sufficient for this Court to find that one of the parties so materially breached the Agreement as to terminate the Agreement.

Moreover, this Court has not been able to find any terms in the language of the Agreement which give one or the other party the right to cancel or terminate the Agreement prior to the end of the initial lease term.

As of the date of the petition, Wild Waves was in possession of a part of the Pier and was operating its water park. Also as of the petition date, Debtor had not won a judgment from the state court regarding its right to evict Wild Waves for non-payment or for material breach of the contract. On the contrary, Debtor filed for bankruptcy and almost immediately filed its motion to reject the lease.

There is nothing in the Business Lease that authorized a pre-petition termination of the Lease. There has been no court adjudication that the Business Lease was terminated. Moreover, the conduct of the parties is not indicative of those acting under the assumption of the non-existence of a contract.

V. ABSTENTION

Notwithstanding that neither party requested nor briefed the issue in the papers filed with regards to this motion, counsel for Wild Waves insisted at oral argument that this Court should abstain, either through the mandatory abstention provision in 28 U.S.C. § 1334(c)(2) or through permissive abstention in 28 U.S.C. § 1334(c)(1), from determining the issue of whether the contracts had been terminated pre-petition.

The Court has considered counsel's request and finds that the determination of a state-law issue raised as part of a motion to reject under § 365 is not subject to mandatory abstention under 28 U.S.C. § 1334(c)(2), as it is a proceeding "arising under title 11," and not "related to title 11." Second, this Court declines to permissively abstain under 28 U.S.C. § 1334(c)(1), as this Court routinely decides state-law issues with respect to contract rejection under § 365 and the delay and

expense of litigating this matter in state court is not justified at this juncture in this chapter 11 case. Moreover, bankruptcy goals and policies are served by this Court's moving this case along toward the claims process.

VI. CONCLUSION

As this Court has now found that the agreements were not terminated pre-petition, and separately, that the agreements were executory as of the petition date, Debtor now must decide whether it is in its sound business judgment to reject those two Agreements under § 365. The issue of damages arising from pre-petition breaches, post-petition breaches and rejection will be determined during the Claims Process.

Based on the foregoing, the Court finds that the Agreements are executory and that Debtor is estopped from arguing that the Agreements were terminated pre-petition. Debtor's motion to determine pre-petition defaults and termination of business lease and oral contract of sale by Wild Waves, LLC is hereby **DENIED**.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'G. Burns', is written over a horizontal line. The signature is fluid and cursive.

GLORIA M. BURNS
United States Bankruptcy Judge