HONORABLE WILLIAM H. GINDIN BANKRUPTCY BENCH BAR CONFERENCE JUDGES' PANEL

MAY 3, 2024 2:45 – 3:45 P.M.

PANELISTS:

Honorable Michael B. Kaplan, C.U.S.B.J.
Honorable Christine M. Gravelle, U.S.B.J.
Honorable Stacey L. Meisel, U.S.B.J.

MODERATOR:

Richard D. Trenk, Esq.
Trenk Isabel Siddiqi & Shahdanian P.C.

I. TREATMENT OF CONDOMINIUM ASSOCIATION LIENS IN CHAPTER 13

A condominium association is formed through a **Master Deed**. Unit owners are also subject to the Association's **Bylaws**. These documents are recorded with the county pursuant to the provisions of the New Jersey Condominium Act, N.J.S.A. 46:8B-1, et. seq. (the "Condo Act").

Almost universally, an Association's Master Deed and Bylaws will provide for a lien for unpaid common expenses and assessments against the unit owner and in favor of the Association.

The Condo Act also contains language providing for a lien for unpaid common expenses and assessments AND provides for a limited priority for an association lien:

> a. The association shall have a lien on each unit for any unpaid assessment duly made by the association for a share of common expenses or otherwise, … upon proper notice to the appropriate unit owner, . . . Such lien shall be effective from and after the time of recording in the public records of the county in which the unit is located of a claim of lien … Such claim of lien shall include only sums which are due and payable when the claim of lien is recorded. . . Except as set forth in subsection b. of this section, all such liens shall be subordinate to any lien for past due and unpaid property taxes, the lien of any mortgage to which the unit is subject and to any other lien recorded prior to the time of recording of the claim of lien.
>
> b. A lien recorded pursuant to subsection a. of this section shall have a limited priority over prior recorded mortgages and other liens, except for municipal liens or liens for federal taxes, to the extent provided in this subsection. This priority shall be limited as follows:
>
> 1) to a lien which is the result of customary condominium assessments as defined herein, the amount of which shall not exceed the aggregate customary condominium assessment against the unit owner for the six-month period prior to the recording of the lien. This limited priority shall be cumulatively renewed on an annual basis as necessary.

N.J.S.A. § 46:8B-21.

A. How can Condominium Liens be treated through a Chapter 13 Plan?

1. The Anti-Modification Provision:

11 U.S.C. § 1322(b)(2) permits a plan to modify the rights of holders of secured claims ". . . other than a claim secured only by a **security interest** in real property that is the debtor's principal residence."

Nobleman v. Am. Sav. Bank, 508 U.S. 324 (1993)- bifurcating claim into secured and unsecured violates anti-modification provision.

In re McDonald, 205 F.3d 606 (3d Cir. 2000)- a wholly unsecured mortgage is not subject to the anti-modification clause and may be crammed down.

2. What is a security interest?

11 U.S.C. § 101(51): The term "security interest" means lien created by an agreement.	11 U.S.C. § 101(36): The term "judicial lien" means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding
11 U.S.C. § 101(53): The term statutory lien means arising solely by force of a statute on specified circumstances or conditions . . . but **does not include a security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute**.	

The distinction is important because the legislative history of the Bankruptcy Code states:

The "three categories are mutually exclusive and are exhaustive except for certain common law liens." H.R. REP. NO. 595 at 312, reprinted in 1978 U.S.C.C.A.N. 5963, 6269.

3. How are Condo Liens classified? Anti-Modification Clause does NOT apply

In re Rones, 531 B.R. 526 (Bankr. D.N.J. 2015) (Honorable Christine M. Gravelle, U.S.B.J.), *rev'd in part*, 551 B.R. 162 (D.N.J. 2016):

> This Court finds that no benefit is conferred until the unit owner purchases the condominium unit, thereby becoming a member of the association and obligated by its master deed and bylaws. It is the act of purchasing the condominium unit, and voluntarily accepting and recording the unit
> deed, that gives rise to the lien.

. . . . . .

> By bargaining for, voluntarily accepting, and subsequently recording a deed to a condominium unit that incorporates the Master Deed and Bylaws, the unit owner agrees to be bound by the rules and regulations of each. Debtors agreed to pay condominium assessments and consented to the Lien when they purchased the Property.
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> . . . . . .
>
> [T]he Master Deed acknowledges that the Lien is subordinate to real estate taxes and prior recorded instruments. The Debtors and Whispering Woods agreed to this and that agreement defines their relationship. This conforms to the reasoning in Nobleman, and highlights the distinguishable nature of a mortgage versus a condominium association lien in New Jersey.

4. Security Interest/Anti-Modification Clause DOES Apply

In re Rones, 551 B.R. 162 (D.N.J. 2016) (Honorable Freda L. Wolfson, C.U.S.D.J.):

> The parties have not appealed, and this Court will not disturb, the Bankruptcy Court's determination that the Association's Lien was a consensual lien and, therefore, a security interest.
>
> . . . . . .
>
> [T]he Condominium Act merely altered the priority of a portion of the Lien. Therefore, the Condominium Act does not serve as a source of collateral which would remove the Lien from the protection of the Anti-Modification Clause.

In re Spradley, 2019 WL 460224 (D.N.J. Feb. 6, 2019) (Honorable Peter G. Sheridan, U.S.D.J.) - followed the analysis of the District Court in Rones.

In re Holmes, 573 B.R. 549 (Bankr. D.N.J. 2017) (Honorable Rosemary Gambardella, U.S.B.J.), *rev'd and remanded* 603 B.R. 757 (D.N.J. 2019) (Honorable Kevin McNulty, U.S.D.J.) - rejecting the "two lien" theory, and finding a Condo Lien to be a security interest, as it first arises pursuant to the Master Deed:

> [H]ere the lien first arose by agreement when Debtor purchased the Property and agreed to the terms in the Master Deed. The statutory framework of the Act also supports the conclusion that the lien first arose by agreement. Pursuant to N.J.S.A. 46:8B–8, a condominium association is created and established by the recording of a master

> deed. Further, the Act requires that the master deed contain specific provisions in order to bring the association under the jurisdiction of the Act. N.J.S.A. 46:8B–9. These provisions, read together, establish that the recording of a master deed is a necessary prerequisite for the Act to apply. It follows that absent a master deed, an association can have no priority lien under N.J.S.A. 46:8B–21(a).

In re Lynch, 630 B.R. 745 (Bankr. D.N.J. 2021) (Honorable Christine M. Gravelle, U.S.B.J.) - single, recorded Claim of Lien could not be logically viewed as two separate liens. Additionally, the Condo Act is reliant on the Master Deed and so the lien does not arise solely by statute:

> This is demonstrated by the additional language in the Condo Act which provides that " 'Master deed' means the master deed recorded under the terms of section 8 of this act, as such master deed may be amended or supplemented from time to time, being the instrument by which the owner in fee simple or lessee of the property submits it to the provisions of this chapter." N.J.S.A. § 46:8B-3(m) (emphasis added). It is therefore not only the land that is subjected to the Condo Act through the Master Deed, but also the unit owner, who acknowledges and consents to as much.

5. Two Liens Arise- One statutory, one consensual: the Anti-Modification Clause does NOT apply

In re Keise, 564 B.R. 255 (Bankr. D.N.J. 2017), *rev'd and remanded on other grounds*, No. 17-cv-1832, 2018 WL 624105 (D.N.J. Jan. 30, 2018) (Wolfson, J.):

> [T]his Court views the Association's claim as secured simultaneously by two separate liens—one consensual lien created by the Declaration, and one statutory lien created by the New Jersey Condominium Act—with each lien available to the Association to enforce its claim. Indeed, each lien offers both benefits and burdens with regard to creation, perfection and enforcement. By way of example, creation of a lien under the Act requires a detailed process of recording notices, not similarly necessary to enforce the lien created under the Declaration. Likewise, the Act grants a limited priority for the statutory lien, unavailable to the Association absent application of the Act.

In re Smiley, 569 B.R. 377 (Bankr. D.N.J. 2017) (Honorable Stacey L. Meisel, U.S.B.J.) - adopted the reasoning of the Keise court.

In re Holmes, 603 B.R. 757 (D.N.J. 2019)- further analyzing the "two lien" theory and finding that the Master Deed and Condo Act create distinct liens. Because the Anti-Modification

Clause requires that a claim be secured ONLY by a security interest, it could not apply on account of the independent statutory lien.

> [A] statutory lien under N.J. Stat. § 46:8B-21 arises because certain factual conditions are met (and the existence of a consensual security interest is disqualified as such a condition). Those conditions are the existence of an unpaid assessment and notice to the unit owner. If those facts are present, the lien becomes effective upon recordation. A lien under N.J. Stat. § 46:8B-21, then, does not depend on, refer to, or contemplate the existence of a master deed or other contractual document. Nor does the Condominium Act require that any such document, such as a master deed, contain its own lien-creating language. See N.J. Stat. § 46:8B-9.13 True, there is a requirement that a master deed contain "a statement submitting the land described in the master deed to the provisions of the Condominium Act." N.J. Stat. § 46:8B-9(a). But that general reference, to my way of thinking, stops far short of melding a consensual, master-deed-created lien (if the deed even contains such a provision) with the automatic statutory-lien provision of the Act.

6. Judgment Lien as Second (Third?) Lien

In re Guice, 2019 WL 994659 (Bankr. D.N.J. Feb. 28, 2019) (Honorable John K. Sherwood, U.S.B.J.) - Condo association obtained an *in personam* judgment lien against the debtor instead of pursuing a foreclosure. Judge Sherwood did not need to make a determination as to whether the Condo Act and Master Deed create two independent liens because the judgment lien created an interest separate from either a security or statutory lien and therefore the Anti-Modification Clause could not apply.

II. MARITAL TORTS/TEVIS CLAIMS

In re Ghazali A. Chaudry, 569 B.R. 372 (Bankr. D.N.J. 2017)

Debtor and estranged wife were engaged in pre-petition state court divorce proceedings. Wife's amended divorce complaint included a marital tort claim ("Tevis claim") based upon alleged assault committed by debtor upon wife. Debtor listed wife as a creditor in his bankruptcy. She did not file an adversary complaint contesting the dischargeability of her Tevis claim prior to the entry of the order discharging debtor.

Several months after discharge, wife filed a motion seeking a determination that the Tevis claim survived discharge. A marital tort claim is colloquially referred to as a Tevis claim based upon the New Jersey Supreme Court decision Tevis v. Tevis, 79 N.J. 422 (1979). That case held that based upon the single controversy doctrine any marital tort claims are to be presented in connection with a divorce action. Id. at 434. Wife adhered to that directive by including her tort claim in the divorce proceeding. Because the claim was a part of her divorce complaint, she took

the position that it was "incurred in the course of the divorce," and thus was not dischargeable under 11 U.S.C. § 523(a)(15).

Debtor argued that the claim fell under 11 U.S.C. § 523(a)(6), which excepts from discharge "any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity." As to the Tevis claim the divorce complaint utilized language referencing reckless, wanton, and malicious assault, thus implicating § 523(a)(6).

The distinction was critical because unlike § 523(a)(15), there is a temporal requirement for determining the dischargeability of a debt under § 523(a)(6). Pursuant to Fed. R. Bankr. P. 4007(c) for a determination as to the dischargeability of a debt under § 523(a)(6), a creditor must file an adversary proceeding within 60 days after the first date set for the meeting of creditors under § 341(a). Because wife failed to timely file an adversary proceeding, debtor took the position that any debt based upon her Tevis claim was discharged.

The Court relied on New Jersey caselaw holding that a spouse is not barred from filing a marital tort claim against another spouse during the course of the marriage. Tevis v. Tevis, 79 N.J. at 429. So, the fact that the claim was included in the divorce complaint does not mean that it was "incurred in the course of the divorce," as required for a claim to fall under § 523(a)(15). This can be distinguished from, for example, equitable distribution claims which arise when the divorce complaint filed. See Vander Weert v. Vander Weert, 304 N.J. Super. 339, 348-49 (App. Ct. 1997).

Because the claim was properly construed as one under § 523(a)(6), and because no timely adversary proceeding was filed the debt for the Tevis claim was discharged.

III. STATUTORY TRUSTS PACA

Debts arising from a statutory trust pursuant to the Perishable Agricultural Commodities Act ("PACA") are non-dischargeable even if assigned to a third-party. See In re Guarracino, 575 B.R. 298 (Bankr. D.N.J. 2017) (Honorable Stacey L. Meisel, U.S.B.J.).

Factual Background:

Debtor was in the wholesale produce business for thirty (30) years. He was the sole owner, shareholder and operator of GFP Distributors Inc. ("GFP"). GFP operated for approximately twenty (20) years supplying produce to various customers in the tristate area. GFP purchased wholesale produce from Krisp-Pak Sales Corp., a wholesale produce supplier licensed under PACA. GFP received sale proceeds from the produce purchased from Krisp-Pak which went into the GFP operating account. Defendant/Debtor had sole authority to write checks. GFP struggled financially over 4 to 5 years before it went out of business in 2012.

The Krisp-Pak proceeds deposited into the GFP business account were used to pay rent, insurance and wages.

On October 6, 2014, Debtor filed a voluntary Chapter 7 petition. Alliance, as successor in interest to Krisp-Pak, filed the non-dischargeability complaint was filed under 11 U.S.C. §523(a)(4).

Analysis:

The Opinion provides important background to the Congressional protections which were provided beginning in 1930. In the early 1980s, Congress re-examined PACA with the "belief that produce sellers needed even greater protection from defaulting buyers." Id. at 307. In 1984, Congress amended PACA to "include a floating trust provision." 7 U.S.C. §499e(c). That provision provides that the proceeds do **not** need to be held in a segregated account in order to meet the statutory requirements. Id.

While the statute does not address "individual officer, director, or shareholder liability . . . the Third Circuit, . . . has held that individual officers and shareholders in a position to control payment out of the funds received from the sale of perishable agricultural commodities to PACA suppliers may be held personally liable for the debt." Id. at 308 (internal citations omitted).

The Court also addressed whether an assignment of the judgment is valid. The Court found that the Execution Order transferred the "rights and credits" of Krisp-Pak to Alliance and authorized Alliance to "liquidate the rights and credits in appropriate proceedings." Thus, the Court found that it must give "full faith and credit" to the State Court Order. The Court found that "bankruptcy principles generally do not prohibit the assignment of non-dischargeable claims." Id. at 310.

Finally, the Court found that the elements of 11 U.S.C. §523(a)(4) were met.

An expressed trust was established because the PACA trust existed; Debtor owed a fiduciary to the vendor; and Defendant committed a fraud or defalcation in violation of his fiduciary duty. As to the last element, the Court found that Plaintiff "must demonstrate that Defendant had actual knowledge of the breach or that he conscientiously disregarded a substantial or unjustifiable risk." Id. at 313 citing Bullock v. Bankchampaign, N.A., 569 U.S. 267, 133 S. Ct. 1754, 1759 (2013). The Court stated that "Defendant's 30 years of experience in the produce industry, as well as his challenge as to whether Krisp-Pak or Alliance were PACA-licensed [demonstrate] that Defendant is familiar with the requirements of PACA." Id. Thus, the Court found that the Debtor either intentionally violated PACA or acted with reckless disregard of his fiduciary obligations. Id.

IV. EXPUNGEMENT OF ADMINISTRATIVE EXPENSE CLAIM/THE CART DOES NOT ROLL WITHOUT THE HORSE

Debtor brought a motion to expunge and disallow administrative expense request of Sussex County Board of Chosen Freeholders. The Court granted the motion. In re Mountain Creek Resort Inc., 617 B.R. 45 (Bankr. D.N.J. 2020) (Honorable Stacey L. Meisel, U.S.B.J.). In response to a motion to approve a settlement between the Debtors and various municipal entities including Vernon Township, the County objected to the settlement and argued that the terms were contrary to State law. Various mediation occurred and a settlement eventually occurred which Sussex County "blessed . . ." The final settlement reflected various revisions and Sussex County claimed that it made a substantial contribution because it helped the Debtor to make certain modifications to the proposed settlement. The Debtor contested same. The revised settlement was approved. Sussex County sought an administrative expense claim of nearly $200,000 under 11 U.S.C. §503(b). The Debtor asserted that Sussex County could not be reimbursed for its legal fees. The Court found that Sussex County was not a creditor. The County never filed a proof of claim nor did the Debtor list the County on its schedules. While the County referenced some remote potential harm, that required "a number of things must go wrong . . . to have any potential liability . . ." Id. at 51. A subsidiary or related entity does not create standing. The County cannot establish creditor status through Vernon Township which is a separate entity. The Bankruptcy Code does not recognize the terms "remote creditor or indirect creditor." Id. at 52.

The County asked the Court to examine whether a "substantial contribution" existed and "*then* go back and review the issue of standing . . ." Id. at 49 (italics in original). The Court refused. The County "suggested on how to proceed backwards and akin to putting the cart before the horse. The cart does not roll without the horse." Id. at 50. The Court found that under "no scenario" has the County demonstrated that it is a creditor. The Court searched the Bankruptcy Code and found the phase "party in interest" used approximately 83 times and the phase "interested party" and "interested parties" used approximately 56 times.

V. TRADEMARK ASSIGNMENTS 11 U.S.C. §§ 363 and 365

In re Crumbs Bake Shop, Inc., 522 B.R. 766, (Bankr. D.N.J. 2014)

Crumbs Bake Shop, Inc., ("Debtors") specialized in the retail and sale of cupcakes, baked goods, and beverages. Id., At 769. As part of their business model Debtors entered into licensing agreements with third parties, which allowed the third parties to utilize Debtors' trademark and trade secrets and sell products under the Debtors' brand name. 522 B.R. at 769. Debtors entered into an agreement with Brand Squared Licensing ("BSL") in which BSL procured License Agreements with multiple licensees (the "Licensees") for use of Debtors' trademark and trade secrets. Id. Due to severe liquidity problems Debtors ceased operations on July 7, 20214. Debtors filed voluntary Chapter 11 petitions and managed their businesses as Debtors in Possession ("DIPs") and entered a credit bid Asset Purchase Agreement ("APA") with Lemonis Fischer Acquisition Company, LLC ("LFAC") for the sale of substantially all of Debtors' assets. Id. The Court entered a Sale Order which approved the sale of Debtors' assets free and clear of liens, claims, encumbrances, and interests to LFAC. Id. Debtors then filed a motion to reject the License

Agreements held with the Licensees. Id. BSL filed a response asserting that under § 365(n), Licensees could elect to retain their rights under their respective License Agreements and sought entitlement to royalties in the event the Licensees elected to continue using the licensed intellectual property. Id. The Court entered an order authorizing the rejection of some of the executory contracts, unexpired leases, and licenses, but excluding those involving Licensees. Id. Currently, the parties are left seeking a determination of the effect of the Sale Order on their respective rights. Id.

Three (3) issues were presented before the Court: (i) whether trademark licensees to rejected intellectual property licenses fell under the protective scope of § 365(n); (ii) whether a sale of Debtors' assets pursuant to §§ 363(b) and (f) trumps and extinguishes the rights of third-party licensees under § 365(n); and (iii) which party is entitled to the collection of royalties generated as a result of third-party licensees' use of licensed intellectual property. Id. at 768.

(i) As to the first issue, notwithstanding that "trademarks" are not explicitly include in the Bankruptcy Code definition of "intellectual property", the Court held that trademark licensees to rejected intellectual property licenses fell under the protective scope of § 365(n), Id. at 769. The Court acknowledged Congress's failure to explicitly include trademarks in § 365(n) but agreed with Judge Ambro's concurring opinion and reasoning in In re Exide Technologies 607 F.3d 957, 966 (3d Cir. 2010), that by negative inference, itis improper in the context of the rejection of trademark licenses. Id. at. 771. Rather, the Court looked to Congress' explanation on the bill for § 365(n) to support the position that it was Congress's intent for the bankruptcy courts to exercise their equitable powers and to decide on a case-by-case basis whether trademark licensees may retain the rights under § 365(n). Id. at 772. The Court found that it would be inequitable to strip the Licensees of their rights in the event of a rejection because those rights were bargained away by Debtors. Id. The Court further explained that there was no reason that § 365(n) rights of third parties "should succumb to the interests of maximizing the bankruptcy estate in liquidation contexts" because bankruptcy estates already benefit from the ability to assume or reject executory agreements. Id.

(ii) the Court held that a sale of Debtors' assets pursuant to § 363(b) and (f) did not trump nor extinguish the rights of third-party licensees under § 365(n) in the absence of consent. Id. at 774. The Court first addressed the issue of consent, finding that Licensees "were not provided with adequate notice that their rights were at risk of being stripped away as a consequence of the sale." Id. The Court supported this by noting that there was no language in any of Debtors' submissions regarding the treatment of the Licensees or the effect that the sale would have on their rights, nor was there any specific language that would have placed Licensees on notice that their rights were to be extinguished upon execution of the sale. Id. at 776. While the Proposed Order addressed that the sale was to be clear of licensees' rights, the reference was "a mere ten [10] words, buried within a single twenty-nine- (29) page document" and the Debtors' papers "collectively failed to direct attention specifically to the proposition that the sale would strip Licensees of their rights or to bring such consequence" to their attention. Id. at 776–77. The Court held that it would be inequitable to find that the Licensees consented to the termination of their rights. Id. at 777.

Next, the Court addressed the interplay of §§ 363 and 365, finding that without consent, nothing in § 363(f) trumped, superseded, or otherwise overrode the rights granted to Licensees under § 365(n). Id. The Court based its conclusion on two (2) factors: (1) "the principle of statutory

construction that the specific governs the general, and (2) the legislative history of § 365." Id. The Court cited to case law that demonstrated it is well established that the specific governs over the general in statutory construction, and reasons that § 365(n) is "specific in granting certain rights to licensees of rejected intellectual property licenses" and this specific language "should not be overcome by the broad text of § 363(f)." Id. at 778. Additionally, the Court noted that the legislative history of § 365(h) demonstrated Congress' desire "to protect the rights of those who are lessees of debtors." Id.

(iii), the Court held that Debtors were the only party entitled to the collection of royalties generated because of Licensees' use of licensed intellectual property. Id. at 779. Relying on the Third Circuit's decision in In re Cellnet Data Sy., Inc., 327 F.3d 242 (3d Cir. 2003), where the Court held that the debtor was entitled to royalties generated under the license agreement, the Court found that because the License Agreements themselves were not sold and were neither assumed nor assigned, LFAC did not receive any rights under the agreements. Id. at 779–80. Thus, the rights to the License Agreements remain with Debtors and Debtors are entitled to the post-closing royalties. Id. at 780.

VI. LEASE REJECTION IMPACT ON POSSESSORY INTERESTS

In re Revel AC, Inc., 532 B.R. 216, 220 (Bankr. D.N.J. 2015)

Prior to the bankruptcy filing, Amenity Tenants, LDV Tenants, and IDEA Boardwalk, collectively referred to as "the Tenants" entered into Agreements with Revel AC, Inc., ("Debtors") where the Tenants operated various retail facilities on Debtors' premises. 532 B.R. at 220. Debtors each filed voluntary petitions for relief under Chapter 11. Id. at 221. In the main bankruptcy case, Debtors filed a Rejection Motion to reject the Agreements held with the Tenants. Id. Shortly thereafter, Debtors ceased operations and barred the Tenants from accessing the premises, and each Tenant provided notice of its intent to continue exercising possessory leasehold rights under § 365(h). Id. The Court entered a Sale Order approving the sale of the Debtors' assets pursuant to § 363 to Polo North, the Defendant in this action. Id. One of the Tenants, IDEA Boardwalk, LLC ("IDEA"), filed a Cross Motion seeking clarification of its § 365(h) rights relating to the Rejection Motion. Id. The Court subsequently granted the Rejection Motion. Id. Polo North and the Tenants disagreed about whether the Agreements were true leases, and on the applicability of § 365(h). Id. IDEA filed Complaint which commenced an adversary proceeding, and in Count One, IDEA sought to preliminary enjoin Debtors from engaging in conduct that prevented IDEA from enjoying its possessory rights. Id. at 222. Debtors filed a motion to dismiss the Complaint. Id.

Before the Court was IDEA's Cross Motion. Id. at 220. The Court addressed whether the Agreements were true leases or just memorialization's of some other form of contractual relationship to determine whether the Tenants are entitled to protections afforded by § 365(h). Id. on The Court also addressed Debtors' motion to dismiss IDEA's Complaint against Debtors, seeking temporary and permanent injunctive and declaratory relief. Id. The Court acknowledged that it must address Count One of the Complaint, which was IDEA's request to preliminarily enjoin Debtors from preventing IDEA from enjoying its possessory rights. Id.

Under the Cross Motion, the Court held that the Agreements were true leases, and because all of the Tenants were each found to hold true leases, they were also entitled to their respective possessory rights of the premises pursuant to § 365(h) notwithstanding a § 363 sale of Debtors'

assets. Id. at 227. To determine whether the Agreements were true leases under New Jersey law, the Court looked to Thiokol Chem. Corp. v. Morris County Bd. of Taxation, 41 N.J. 405, 197 A.2d 176 (1964). Id. at 225–26. The Court explained that the Agreements were true leases under the Thiokol standard because of the express terms and language included in the Agreement and supporting affidavits "ma[d]e it clear" that the parties had the intention of entering true leases, such as repeated use of the terms "tenant," "lease," "landlord," and "rent," as well as the inclusion of quiet enjoyment provisions. Id. at 226. The Court then considered factors listed in Thiokol and found further support that the Agreements were true leases because they provided for the payment of rent, provided for a set term of years with options to renew at the end, gave the Tenants possessory interests and exclusive rights to use the specified premise during the specified term, and were only revocable upon certain events of default. Id. at 226–27. The Court also held that the Tenants were entitled to their possessory rights under § 365(h) and that a § 363 sale did not and could not trump the rights granted to the tenants by § 365(h). Id. at 227. The Court noted that it previously addressed the interplay between §§ 363 and 365 in In re Crumbs Bake Shop, Inc., 522 B.R. 766, 777 (Bankr. D.N.J. 2014), holding that nothing in § 363(f) trumped, superseded, or otherwise overrode the rights of licensees under § 365(n) because the specific governed over the general when construing a statute and Congress specifically gave lessees the option to remain in possession after a lease rejection. Id. at 228. Further, the Court in Crumbs considered the legislative history of § 365(h) to show that Congress had a desire to protect the rights of those who lessees of debtors. Id. at 227. The Court concluded that the same reasoning applied in this case regarding the Tenants' rights under § 365(h). Id.

The Court granted, in part, IDEA's preliminary injunction request, finding that IDEA qualified for preliminary injunctive relief relying on the standard used in New Jersey and Third Circuit case law because (1) IDEA had demonstrated a likelihood of success on the merits because § 365(h) protected IDEA's rights under the Agreement that are in or appurtenant to the real property; (2) IDEA would suffer irreparable harm if the Court denied the injunction because without the right to possession and access to the property's systems, the very existence of the business would be threatened; (3) there was nothing before the Court suggesting that IDEA's continued use of the leased premises would result in greater harm to Polo North, and (4) the public interest favored relief because it was consistent with and in furtherance of the Bankruptcy Code, and the recommencement would have contributed to the creation of jobs and revitalization of Atlantic City. Id. at 229–30. The Court concluded that Polo North would be preliminarily enjoined from interfering with IDEA's ability to avail itself of the rights under the Agreement and belonging to the real property. Id. at 230. The Court declined to grant IDEA an easement or a license because the Court believed granting IDEA with such tangible interest would enhance their rights rather than preserve them. Id.

Following the Court's ruling in this case, IDEA filed a summary judgment motion against Polo North seeking judgment on Counts I, II, VI, and VIII of the Complaint. In re Revel AC, Inc., 2016 Bankr. LEXIS 3805 (Bankr. D.N.J. Oct. 21, 2016). The remaining dispute was centered around Count VIII, under which IDEA sought declaratory relief as to its rights and obligations under § 365(h) regarding its commercial lease, which were previously rejected by the Debtors. Id. at 2. The parties requested that the Court determine whether IDEA was entitled to a credit against the rent it owed on account of the "Recoupment Amount" provided under the lease as a mechanism for IDEA to recapture all or a portion of its Capital Contribution. Id. at 2–3. The Court granted the summary judgment motion, finding that IDEA was required to comply with all terms and

agreements set forth in the Lease, subject only to its offset rights under § 365(h). Id. at 42. Additionally, Polo North remained obligated to comply with the recoupment of capital provisions under the Lease. Id.