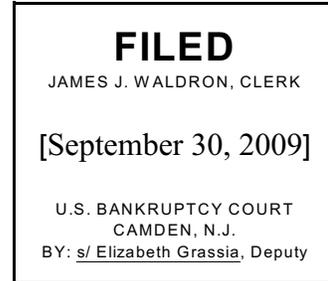


NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY



IN RE:

NICKELS MIDWAY PIER, LLC,

Debtor.

CHAPTER 11

CASE NO. 03-49462 (GMB)

MEMORANDUM OPINION

APPEARANCES:

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Before the Court are the cross-claims of Nickels Midway Pier, LLC (the “Debtor”) and Wild Waves, LLC (“Wild Waves”) regarding an agreement between the parties (the “Agreement”) that is comprised of: (1) a lease under which Wild Waves leased a portion of pier (the “Pier”) from the Debtor (the “Lease”), and (2) a contract for the sale of the Pier whereby the Debtor would sell the Pier to Wild Waves (the “Contract”). The pleadings that substantially reflect the issues in dispute are: (1) the Debtor’s January 14, 2004 Complaint for Lease Defaults and Declaratory Judgment, (2) the Debtor’s June 30, 2004 motion to expunge the claim of Wild Waves, (3) Wild Waves’ amended proof of claim filed on November 5, 2004, and (4) the Debtor’s July 14, 2006 motion seeking a determination of “pre-petition defaults and termination of business lease and oral contract of sale by Wild Waves” (the “Termination Motion”). A hearing on this matter was held June 26-29, 2007 and September 4-6, 2007 (the “Claims Litigation Trial”), and the parties submitted post-trial briefs on December 14, 2007.

Subsequently, because of the existence of continuous litigation in this matter, the Court held a telephone conference on December 30, 2008 to clarify the issues in which the parties and the Court believe are still outstanding. This decision will address: (1) whether liabilities exist between the parties in regard to both parties’ claims for Lease breaches; (2) whether consequences, such as damages for a breach or termination for a material breach of a component of the agreement, exist regarding those liabilities; and (3) whether the executory Contract still exists to be assumed or rejected by the Debtor.

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 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 AND PROCEDURAL BACKGROUND

The background facts of this case and the history of litigation between the Debtor and Wild Waves have been chronicled in several opinions by this Court and the District Court, as well as an opinion from the Third Circuit.¹ The following facts are pertinent to the issues in this decision.

The Debtor is the owner and lessor of the Pier located at 3500 Boardwalk, Wildwood, New Jersey. The Debtor entered into the Agreement with Wild Waves which is composed of: (1) the written Lease dated May 15, 1999,² whereby Wild Waves would lease approximately seventy percent of the Pier for the purpose of constructing and operating a water park (the “Water Park”); and (2) the oral Contract,³ whereby the Debtor promised to sell the Pier to Wild Waves for \$5.5

¹ See Nickels Midway Pier, LLC v. Wild Waves, LLC (In re Nickels Midway Pier, LLC), 383 B.R. 595 (D.N.J. 2008); In re Nickels Midway Pier, LLC, No. 2006 WL 4457349, at *1 (Bankr. D.N.J. 2006), aff’d in part and vacated in part, 372 B.R. 218 (D.N.J. 2007); In re Nickels Midway Pier, LLC, 332 B.R. 262 (Bankr. D.N.J. 2005), rev’d, 341 B.R. 486 (D.N.J. 2006), aff’d, 255 F. App’x. 633 (3d Cir. 2007).

² The Lease was originally executed on March 29, 1999 yet was dated May 15, 1999, “apparently . . . in order to avoid triggering an obligation to pay a commission to a real estate broker.” Nickels, 341 B.R. at 490 n.1. The Debtor and Wild Waves entered into a September 29, 1999 Amendment to Lease (the “Amendment”) and an October 14, 1999 Addendum to Lease (the “Addendum”).

³ Representatives of Wild Waves executed the Contract and sent it to the Debtor via letter dated July 13, 1999, advising the Debtor that Wild Waves would forward the \$10,000 due pursuant to paragraph 3(a) of the Contract as soon as it received the fully-executed Contract from

million on January 31, 2003 (the “Closing Date”).⁴ As a result of the Agreement, Wild Waves has been operating the Water Park on the Pier since 2000.

The premises to be leased pursuant to the Lease were supposed to be delineated in a survey attached to the Lease as Exhibit A (“Exhibit A”), but no Exhibit A was attached to the Lease or any amendment or addendum thereto; accordingly, the parties’ obligations with respect to the Pier were not graphically memorialized in the Lease. The parties presented conflicting testimony to the Court with regard to why Exhibit A was not incorporated into the Lease, but it is undisputed that Andrew Weiner (“Weiner”)⁵ executed the Lease on behalf of Wild Waves, John Nickels⁶ executed the Lease on behalf of the Debtor, and B.J. Nickels⁷ was present at the time the Lease was executed in Weiner’s office.

Owing to the fact that Exhibit A was not attached to any Lease documents, a dispute as to the boundary of the leased premises arose toward the end of 1999 and continues today. To illustrate, over a year after the Lease was executed, on April 10, 2000, the Debtor’s counsel advised Weiner that the Debtor “hope[d] to have a Survey available within the next ten (10) days

the Debtor; the Debtor never executed the Contract, and Wild Waves never provided the \$10,000 due upon execution.

⁴ Judge George L. Seltzer of the New Jersey Superior Court, Chancery Division initially made the determination in a letter opinion dated April 12, 2005 (“State Court Opinion”) that an oral contract for sale of the Pier existed between the Debtor and Wild Waves. See Nickels Midway Pier v. Wild Waves, No. CPM-53-01 (N.J. Super. Ct. Ch. Div. 2005) (determining that the agreement to sell was reached in May of 1999 even though the Contract was never executed).

⁵ Andrew Weiner is an owner and the managing member of Wild Waves.

⁶ John Nickels is an equity holder of the Debtor, holding one-third of the Debtor’s equity.

⁷ B.J. Nickels had been the general manager of the Debtor and currently is the president of Midway Game Corporation, an entity that operates and leases stores from the Debtor.

which can be used to delineate the leased area.” The Debtor and Wild Waves exchanged facsimiles on May 3, 2000 and May 4, 2000, thereby suggesting that there were still outstanding issues that needed to be resolved relative to the leased portion of the Pier.

After the Water Park commenced operations in the mid-summer of 2000, additional disputes arose between the parties on account of Wild Waves’ complaints that the Debtor was engaging in activities that obstructed access to or otherwise disturbed the Water Park’s operations. For instance, Wild Waves claimed that the Debtor limited access to the Water Park by inserting kiosks and games between the entrance to the Water Park and the boardwalk; moreover, Wild Waves objected to the manner in which the Debtor disposed of its garbage because the Debtor allegedly failed to remove trash stored outside the leased premises. In 2001, Wild Waves discontinued paying rent, allegedly because it was not making progress resolving outstanding Lease and Contract disputes with the Debtor. The Debtor instituted a civil action against Wild Waves in the New Jersey state court regarding the Agreement (the “State Court Action”). Wild Waves filed counterclaims in the State Court Action, seeking a determination that an oral contract for the sale of the Pier existed between the parties.

In 2002, there were two separate fires on the Pier. On January 16, 2002, a fire destroyed a prominent structure on the Pier (the “Haunted Castle and Dungeon”). Then, on July 16, 2002, a second fire occurred on the Pier, and Wild Waves decided to close the Water Park for the remainder of the 2002 season.

The State Court Action trial regarding the Wild Wives counterclaims commenced on December 3, 2003. On December 8, 2003, the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On December 16, 2003, the Debtor filed a motion to reject

the Lease pursuant to 11 U.S.C. § 365 (the “Motion to Reject”), and on December 19, 2003, Wild Waves filed a motion for relief from the automatic stay to pursue its counterclaims in the State Court Action. On February 20, 2004, the Court granted Wild Waves’ motion for stay relief but reserved decision on whether the Debtor could reject the Lease until the State Court Action was resolved, and an order was entered to that effect on March 23, 2004.

Following the Superior Court’s determination that a contract of sale regarding the Pier existed between the parties, State Court Opinion at 14, and that the lease was “simply one component of a transaction that was intended to culminate in a sale of the entire premises,” State Court Opinion at 11, on July 25, 2005, the Debtor proceeded with its Motion to Reject. Regarding the Debtor’s Motion to Reject, this Court ruled, inter alia, that the Debtor was entitled to reject the lease/sales Agreement in accordance with 11 U.S.C. § 365(a) because the lease/sales Agreement was executory as of the Debtor’s bankruptcy petition date, the lease/sales Agreement was not terminated pre-petition, and the rejection of the lease/sales Agreement was the product of reasonable business judgment. Nickels, 332 B.R. at 268-72. In an opinion issued on April 24, 2006, the Honorable Joseph E. Irenas (“Judge Irenas”) of the United States District Court for the District of New Jersey (“District Court”) determined that under New Jersey law the lease and sale components of the Agreement were divisible and could operate independently. Nickels, 341 B.R. at 494. Because the two components should have been treated as two divisible aspects of a contract as opposed to one seamless agreement, the District Court remanded the case for this Court to consider independently (1) the Debtor’s attempt to reject the Lease, and (2) the Debtor’s attempt to reject the Contract. Id. at 494-98. The Third Circuit Court of Appeals affirmed the District Court’s decision, finding that the Lease and Contract are divisible components of the

Agreement, and the Contract component of the Agreement is executory. Nickels, 255 F. App'x. at 633.

On remand, this Court re-listed the Debtor's Motion to Reject. In response, on July 14, 2006, the Debtor filed its Termination Motion, requesting that the Court, before proceeding further with the Debtor's Motion to Reject, first determine whether there were pre-petition breaches of either the Lease and/or Contract and if such breaches terminated either component of the Agreement or both. In regard to the Termination Motion and on remand, the Court, analyzing the Lease and Contract components of the Agreement separately as directed by the District Court, held that: (1) both the Lease and the Contract were executory as of the petition date; (2) neither the Lease nor the Contract were terminated pre-petition; and (3) the Debtor would need to decide whether it is in its sound business judgment to reject the Lease and/or the Contract pursuant to 11 U.S.C. § 365. Nickels, 2006 WL 4457349, at *7-10. On appeal, in an opinion issued on August 2, 2007, the District Court affirmed this Court's September 2006 Opinion "except to the extent that the Court declined to decide the alleged breaches of the lease," Nickels, 372 B.R. at 228, because, unlike the alleged breaches of the Contract, the alleged breaches of the Lease are "not likely to be raised in the claims process," id. at 225.

The District Court remanded the case for this Court to "decide whether the Lease has been breached before deciding the Motion to Reject" so as to enable the Debtor to determine "whether, in its business judgment, rejection of the Lease is appropriate." Id. Further, the District Court instructed this Court to "address fact discovery and adjudication of the alleged Lease breaches." Id. The Claims Litigation Trial concluded on September 6, 2007, at which time the Court directed the parties to submit post-trial briefs following their receipt of the transcripts. The

parties addressed the following alleged breaches of the Lease⁸ and asserted the following facts and arguments in support of their respective positions regarding this issue:

A. Wild Waves' Allegations of Lease Breaches by the Debtor

1. Modifications of the Boundaries of the Leased Premises

Wild Waves asserts that Debtor breached the Lease by changing a boundary line to the Water Park and, more specifically, by demanding that Wild Waves relocate the agreed-upon southeasterly boundary for the Water Park. Although Exhibit A was not incorporated into the Lease to serve as a legal description of the leased premises, major disputes as to the leased premises themselves did not arise amongst the parties until December 1999 and January 2000. During that period, the Debtor allegedly forced Wild Waves to give up space originally intended to be part of the leased premises, resulting in the Water Park being located further from the boardwalk and thereby diminishing the Water Park's exposure to potential customers. Weiner testified extensively on this alleged Lease breach, suggesting that he only agreed to the concessions as a result of duress and that the changes made to the Pier's layout prevented Wild Waves from constructing a grand entrance to effectively entice customers into the Water Park; in particular, Weiner noted he had already committed a great deal of time and money into the

⁸ Issues pertaining to alleged breaches of the Contract were also presented to the Court during the Claims Litigation Trial, such as: (1) claims by each party that the other party was not ready, willing, and able to close on the Contract on the Closing Date; (2) the Debtor's related assertion that Wild Waves failed to secure a mortgage commitment on or before three months of the Closing Date pursuant to paragraph 4 of the Contract; (3) the Debtor's claim that Wild Waves breached the Contract by failing to tender the \$10,000 deposit payable "upon execution" pursuant to paragraph 3(a) of the Contract; (4) Wild Waves' argument that the Debtor failed to designate Wild Waves as an additional insured under its Property Damage Policy pursuant to paragraph 12(b) of the Contract; and (5) Wild Waves' claim that the Debtor did not cooperate with Wild Waves to enable Wild Waves to renew its construction financing pursuant to paragraph 21(g) of the Contract.

project, construction of the Water Park was well underway by the time the Debtor demanded the additional space, and there was no flexibility as to timing because he could not afford to engage in meaningful boundary disputes (and potential litigation) when the Water Park's scheduled opening was to occur in a matter of months.

The Debtor had a different understanding of how far east the leased boundary would run and asserts that the parties mutually resolved their disputes on a number of occasions, the Debtor in no way coerced Wild Waves into entering into such resolutions, and it was actually Wild Waves that received additional leasehold property as a result of the various negotiations, not the Debtor.

2. Debtor's Water Park Obstructions

Wild Waves also asserts that the Debtor's insiders operated several kiosks and games in front of the Water Park's entrance, starting with the 2000 season, thereby obstructing and/or denying access to the Water Park. As such, Wild Waves argues that the Debtor violated the implied covenant of good faith and fair dealing as well as paragraph 19 of the Lease, which, in pertinent part, provides:

During the Lease Term, [the Debtor] agrees to maintain the existing access to and egress from the Leased Premises in its current condition, so as to insure a free flow of pedestrian traffic into and out of the Leased Premises.

To illustrate, Weiner testified that the Debtor installed a basketball game, a "Frogger" game, and a water gun game, all of which were placed in front of the entrance and admission area to the Water Park, obstructing access to the Water Park. Additionally, Weiner claimed that the Debtor sometimes left trash receptacles in the rear of the leased premises.

The Debtor counters that it has acted in accordance with the Lease in its maintenance of access to and from the leased premises. Specifically, the Debtor notes that the various structures that purportedly obstructed access to the Water Park had been located on the leased premises for several years prior to the execution of the Lease. Further, Jack Silar, a former Wild Waves employee who testified as a witness for the Debtor, stated that he relocated some of the allegedly non-compliant structures in the spring of 2000 without any input from Weiner. Additionally, the Debtor asserts that Wild Waves has not adequately proven that the Debtor's actions in operating the kiosks on the Pier, rather than the Water Park's allegedly-uninviting outward appearance, were the direct and proximate cause of Wild Waves' alleged damages.

3. Debtor's Failure to Repair or Rebuild Haunted Castle and Dungeon

Wild Waves argues that, following the 2002 fires, the Debtor did not comply with its obligation under paragraph 24 of the Lease to repair the damaged areas. The relevant portion of the Lease provides that:

If the Leased Premises is partially damaged by fire or other casualty, the [Debtor] shall repair it as soon as possible. This includes the damage to the Leased Premises and fixture (sic) installed by the [Debtor]. The [Debtor] need not repair or replace anything installed by [Wild Waves].

The Debtor did not rebuild or repair the Haunted Castle and Dungeon after it was destroyed in January 2002. Steve Nickels testified that it was impossible to duplicate the Haunted Castle and Dungeon because the artisans responsible for its design some thirty years ago were no longer available. There were discussions amongst the parties to replace the Haunted Castle and Dungeon with another structure, a Mayan temple structure, but the parties did not come to an agreement.

The Debtor responds by noting that it would be premature for the Court to decide this particular alleged breach because of an ongoing action before the Honorable Jerome B. Simandle (“Judge Simandle”) of the United States District Court for the District of New Jersey whereby the Debtor’s fire insurer, pursuant to its subrogation rights, was accusing Wild Waves of causing the fire or of contributing to the amount of damage caused by the fire. See Scottsdale Ins. Co. v. Weiner, No. 03-3857 (D.N.J. June 17, 2009). In support of its response, the Debtor pointed to additional language in paragraph 24 of the Lease, which provides that:

If the fire or other casualty is caused by the act or neglect of [Wild Waves] or [Wild Waves’] employees, agents, or customers, [Wild Waves] shall pay for all repairs and all other damage.

The Debtor asserted that its position would cause no prejudice to Wild Waves because the parties would need to return to this Court once the District Court action before Judge Simandle was resolved, presumably to address the amount of damages due to one party.

On June 17, 2009, Judge Simandle rendered his decision in Scottsdale finding, inter alia, that: (1) Wild Waves’ “negligence brought about the Castle’s destruction through neglect,” No. 03-3857, at *65; (2) Wild Waves breached the Lease by deactivating the sprinkler system and discontinuing electric services, id. at 75; and (3) the Debtor made no plan to rebuild the Haunted Castle and Dungeon, offered no meaningful opportunity for Wild Waves to rebuild, and were not prevented by Wild Waves from rebuilding the Haunted Castle and Dungeon, id. at 36. Wild Waves has filed a motion for reconsideration of the June 17, 2009 Scottsdale decision, and the motion for reconsideration is still pending.

B. The Debtor's Allegations of Lease Breaches by Wild Waves

1. Wild Waves Non-Payment of Rent and Taxes

Wild Waves discontinued paying rent, and its apportioned share of real estate taxes, as required by the Lease after paying the first required installment in 2001. Wild Waves acknowledges that it discontinued paying rent but maintains that it declined to pay rent because of disputes it was having with the Debtor and only after the Debtor had breached its obligations under the Agreement. Wild Waves alleges that it put the Debtor on notice – via a May 23, 2001 letter to its attorney – that it would have no alternative but to withhold rent if the parties could not satisfactorily resolve disputes concerning the leasehold boundaries, access to the Water Park, and the Contract. Weiner testified, and the May 23, 2001 letter implies, that, beginning in the summer of 2000 and up until the second 2001 installment was due, he had tried to resolve these matters through discussions with the Debtor – Steve Nickels, in particular.

On February 4, 2005, this Court held a hearing to determine the amount to be paid for the use and occupancy of the leased premises by Wild Waves. This Court determined the seasonal fair rental value of the Property to be \$87,000 (the “Use and Occupancy Obligation”) plus Wild Waves’ share of the real estate taxes, which was determined to be 19.2% of the yearly taxes based on the value of Wild Waves’ use and occupancy of the entire pier by square footage (the “Tax Obligation”). On March 29, 2005, an interim order was entered, requiring Wild Waves to pay the 2004 Use and Occupancy obligation within 30 days.⁹ Further, the Court’s March 29,

⁹ Per the March 29, 2005 order, the 2005 Use and Occupancy Obligation was made payable in the same amount as the 2004 Use and Occupancy Obligation and was ordered to be made in two equal installments—on August 1, 2005 and on October 1, 2005. Moreover, on May 4, 2006, a hearing was held whereby it was determined that Wild Waves would pay the Use and Occupancy Obligation for 2006 under the same terms as set forth in the March 29, 2005 order.

2005 Order directed Wild Waves to make quarterly Tax Obligation payments to the Debtor within 20 days of receipt of the quarterly tax bills.

On May 16, 2006, the Debtor moved to compel Wild Waves to pay rent and real estate taxes pursuant to the Lease. The Court held a hearing on June 22, 2006, ruling that Wild Waves was occupying the Pier pursuant to a valid lease and as such was required to pay rent and real estate taxes according to the Lease beginning with the July 1, 2006 payment. The Court reviewed Wild Waves' assertion that payments under the Lease should be subject to abatement stemming from the destruction of the Haunted Castle and Dungeon,¹⁰ conducting an evidentiary hearing on October 31, 2006 and on December 7, 2006 to allow the parties to provide evidence regarding the extent (if any) to which Wild Waves was entitled to an abatement of rent because of the loss of the Haunted Castle and Dungeon (the "Rent Abatement and Escrow Hearing"). On January 4, 2007, the Court ruled that, because the complete destruction of the Haunted Castle and Dungeon was not specifically addressed by the Lease and because there was ample evidence showing that the parties believed that the attraction would provide income sufficient to offset the rental obligations arising under the Lease, an abatement of the rent obligation was justified; more specifically, per Court order dated March 6, 2007, the Court found that payments under the Lease should be subject to abatement for the year 2006 and thereafter from the yearly rental obligation as provided for by the Lease (\$250,000) to the seasonal fair rental value of \$87,500 plus 19.2% of the real estate taxes.

¹⁰ Wild Waves argued that, because the Haunted Castle and Dungeon income-producing asset was destroyed and no income-producing asset was built to replace it, Wild Waves was entitled to a rent abatement for the amount of income Wild Waves anticipated the attraction would produce.

2. Wild Waves' Non-Payment of the \$400,000 Collateral Deposit

Wild Waves concedes that it did not pay a \$400,000 collateral deposit as required under the Lease until the payment was ordered by this Court on July 10, 2006. The Amendment to the Lease provides that Wild Waves would pay \$400,000 in two separate installments to the Debtor as additional collateral in exchange for the Debtor's willingness to allow Wild Waves to fully encumber the Pier to obtain construction financing for the Water Park; more specifically, the initial \$200,000 installment was due on or before July 30, 2000, and the final \$200,000 installment was due on or before July 30, 2001. Wild Waves did not make either payment by the deadlines imposed by the Amendment and did not post the entire collateral deposit until the Court ordered it to do so on July 10, 2006.

In the context of the Rent Abatement and Escrow Hearing, Wild Waves argued that the \$400,000 collateral deposit was the product of economic duress and that, as a result, the provision in the Amendment requiring such deposit should be invalidated. On January 4, 2007, the Court found that although Weiner (on behalf of Wild Waves) was certainly under pressure while negotiating the collateral deposit provision in the Amendment, it was not the kind of pressure that robbed Weiner of his unfettered will and did not constitute a wrongful threat to justify the invalidation of the provision based on a theory of economic duress. Accordingly, the Court refused to set aside the collateral deposit provision and ordered the \$400,000 to remain in escrow pursuant to the Court's July 10, 2006 Order.

Similar to the alleged breach regarding the non-payment of rent and taxes, Wild Waves defends its decision to not tender the collateral deposit based on the ongoing disputes with the Debtor and because of Wild Waves' belief that the Debtor breached the Agreement before this

purported Lease breach. Wild Waves notes that the Debtor did not adhere to paragraph 27 of the Lease because it neither declared the non-payment of the collateral deposit to be a default under the Lease nor afforded Wild Waves an opportunity to cure the alleged breach. Paragraph 27 of the Lease sets forth the remedies available to the Debtor upon breaches by Wild Waves of monetary and non-monetary Lease provisions.¹¹

3. Wild Waves' Non-Compliance with the Americans With Disabilities Act

The Debtor claims that Wild Waves breached the lease by failing to make the leased premises accessible to individuals with disabilities in violation of the Americans with Disabilities Act of 1990 (the "ADA").¹² The relevant Lease provision for the alleged breach is found in paragraph 18(a) of the Lease, providing that:

[a]t all times that this Lease is in effect, [Wild Waves], at [Wild Waves'] sole cost and expense, shall . . . [p]romptly comply with all laws, orders, rules and requirements of governmental authorities, insurance carriers, board of fire underwriters, or similar groups.

¹¹ For example, the Debtor must give Wild Waves written notice of its intention to commence eviction proceedings against Wild Waves for the non-payment of rent. Additionally, the Debtor agreed to provide Wild Waves with a 30-day cure period for any breach of a non-monetary Lease provision and a 10-day cure period for any monetary Lease breach.

¹² 42 U.S.C. §§ 12101-12300 (2006). In the context of the Claims Litigation Trial, the Court was made aware of a lawsuit filed by an individual against Wild Waves' principals for certain alleged ADA violations in which the plaintiff engaged the same expert as the Debtor in connection with its ADA claim hereunder. See Carmena Stoney v. Andrew Weiner, No. 5560-05 (N.J. Super. Ct. Law Div. filed June 24, 2005) (the "Stoney Action"). Following the Claims Litigation Trial, Wild Waves indicated to the Court that the Stoney Action had been resolved via a consent order and explained that it would be fully compliant with the ADA following the close of the 2008 summer season and prior to the opening of the Water Park for the 2009 season.

The Debtor's expert on ADA issues, John Paul Scott ("Scott"), had visited the Water Park on January 7, 2003¹³ and on April 2, 2004 and testified that Wild Waves was in violation of the ADA because he did not observe any wheelchair-accessible bathroom facilities at the Water Park during his January 2003 visit; instead, he noticed restrooms which were situate below the boardwalk and only accessible via a staircase. Accordingly, the Debtor submitted Scott's expert report, which asserted that Wild Waves materially breached the Lease by failing to make the leased premises accessible to individuals with disabilities.

In response, Wild Waves suggests that the Debtor made this ADA accusation to extricate itself from having to perform under the Lease and the Contract. Wild Waves asserts that this particular alleged default was not declared by the Debtor until its attorney's February 3, 2003 letter to Wild Waves, which was after both the Closing Date and the parties became embroiled in the State Court Action. Further, Wild Waves asserts that its compliance or non-compliance with the ADA has no affect on the Debtor because a suit under the ADA would, at worst, result in an injunction against Wild Waves to bring the Water Park into compliance with the ADA or damages would be awarded against Wild Waves—not the Debtor—for the violation. Additionally, Wild Waves maintains that Scott's expert report was replete with exaggerations and inaccuracies; to illustrate, Scott's inspection was conducted after the 2002 fires, which supposedly destroyed the Water Park's ADA-compliant restrooms, and Scott's Report altogether failed to account for the replacement of an ADA-compliant restroom in the northwest quadrant of

¹³ Following his January 7, 2003 visit, Scott provided a report to the Debtor, dated February 2, 2003, on various issues pertaining to the Water Park, including: (1) Wild Waves' claim that the Debtor caused a denial of access by the public to the leased premises, (2) the public's perception of access to the Water Park and its entrance, and (3) site access and the Pier's condition after the 2002 fires.

the Water Park. Wild Waves submitted its own expert report from Jerry Aldrich (“Aldrich”) that offered suggestions on how to increase accessibility for the Water Park’s patrons with disabilities and noted that Wild Waves had made progress in bringing the Water Park into compliance with the ADA.

4. Construction Liens Filed Against the Pier

The Debtor argues that the filing of certain liens against the Pier that were not removed within 120 days constitute a default by Wild Waves pursuant to the Lease. The Amendment specifies that:

[Wild Waves] further agrees that it shall not permit any additional liens or construction liens [other than the permitted encumbrances in connection with Wild Waves’ construction financing] to be filed against the Leased Premises. In the event a construction lien is filed, [Wild Waves] shall within one hundred twenty (120) days have the lien removed or be in default under this lease.

Similarly, the Lease itself, in paragraph 20(a), provides that:

[Wild Waves] shall not permit any Mechanic’s Lien or other claim to be filed against the Leased Premises. If any lien or claim is filed against the Leased Premises, [Wild Waves] shall have it promptly removed.

The Debtor asserts that certain filings were made by various contractors and suppliers and were recorded in July 2000 and that these purported liens remained on the Pier for at least 120 days.

Initially, Wild Waves challenges whether the filings themselves constitute liens against the leased premises. Alternatively, Wild Waves states that it was not served with a notice of default or a demand to cure until the letter from the Debtor’s attorney dated February 3, 2003, approximately two-and-a-half years after the relevant filings had been of record and thus well after the filings had been discharged as a matter of law because the entities that filed the claims

never took steps to enforce them. Additionally, Wild Waves argues that the filings against the Pier could not have had any negative consequences to the Debtor because the liens could only attach to Wild Waves' leasehold interest and not the Debtor's property interest.

5. Water and Sewer Liens Filed Against the Pier

The Debtor alleges that Wild Waves permitted a water and sewer lien to remain on the Pier in violation of several provisions of the Lease, including: (1) the aforementioned language in the Amendment, (2) paragraph 20(a) of the Lease, which prohibits Wild Waves from permitting encumbrances to be filed against the leased premises, (3) paragraph 18(a) of the Lease, which compels Wild Waves to comply with governmental requirements, and (4) paragraph 17 of the Lease, which provides:

On or before October 1, 1999, [the Debtor] will arrange for separate metering of the Leased Premises and all utilities shall be placed in [Wild Waves'] name. [Wild Waves] shall be responsible for the payment of all utilities serving the Leased Premises, including, but not limited to, gas, electric, municipal water, municipal sewer, and telephone.

Wild Waves allegedly failed to pay water and sewer invoices in a timely manner, and the City of Wildwood (the "City") did issue a tax sale notice on November 17, 2003. Wild Waves concedes that the tax sale notice was issued by the City; however, Wild Waves states that it disputed some of the payments the City claimed were due, believing that it was incorrectly billed for certain charges. Additionally, Wild Waves asserts the tax sale notice was duly redeemed and discharged by Wild Waves, and as such the water and sewer liens did not adversely impact the Debtor.

6. Wild Waves' Excessive Water Discharge from the Water Park

The Debtor claims that, on May 26, 2002, Wild Waves negligently and/or intentionally discharged water from the Water Park onto nearby tenants in breach of the Lease. In relevant part, subsections (k) and (m) of paragraph 18 of the Lease provide that:

At all times that this Lease is in effect, [Wild Waves], at [Wild Waves'] sole cost and expense, shall . . . [d]o nothing to destroy the peace and quiet of other tenants, or persons in the neighborhood [and m]aintain the public areas, roofs and exterior walls in good condition.

The Debtor indicates that water was discharged from the Water Park's towers onto an adjacent tenant's trailer while the Water Park was closed and that the incident was the subject of a police report. Further, the Debtor asserts that Wild Waves caused damage to a nearby Burger King because the restaurant's inventory was damaged when the Water Park's water discharge flooded the restaurant's basement.

Wild Waves characterizes the allegations of excessive water discharge as unintentional and unavoidable in the operation of a water park. In particular, Wild Waves notes that due to wind such incidents are somewhat inevitable but that it nevertheless took immediate steps to remedy the problems when they were brought to its attention. Moreover, Wild Waves considers this an isolated incident because there have been no reported water discharge problems since the one that was the subject of the police report.

7. Wild Waves' Closure of the Water Park After the Second Fire

The Debtor asserts that Wild Waves violated the implied covenant of good faith and fair dealing by closing the Water Park for the balance of the season after the July 2002 fire damaged certain portions of the Pier. In general, the Debtor asserts that it was commercially unreasonable

for Wild Waves to close the Water Park for the remainder of the season, especially since the Debtor relied on Wild Waves as the anchor tenant on the boardwalk to generate pedestrian traffic for the benefit of nearby tenants and, in turn, rental income for the Debtor. Further, Scott's testimony and his report suggest that Wild Waves could have restored operations within two weeks of the fire because only one water slide was minimally damaged and that, even if the damage was more serious than it appeared to him, the undamaged areas of the Water Park could have reopened while the damaged areas could have had signs indicating that they were closed for maintenance.

Wild Waves responds to the allegation that it violated the implied covenant of good faith and fair dealing by failing to reopen the Water Park after the second fire by outlining its reasons for halting operations. First, Weiner testified that the 2002 season had been going well for Wild Waves, suggesting that it would have promptly reopened the Water Park if it were feasible to do so. Second, Weiner explained that there was widespread damage to the leased premises as a result of the July 2002 fire and described the areas that were affected, which included: the main slide, Wild Waves' offices, the maintenance area, the food storage area, certain decks for access to the Water Park, and the locker areas. Third, Weiner noted that there was an intense smell of smoke in the area that would have been unpleasant for Wild Waves' customers. Fourth, the slide manufacturer would not re-certify the Water Park's damaged main slide, causing the need for a large section of the slide to be replaced. As such, Wild Waves thought it did not have a choice but to close the Water Park for the rest of the 2002 season.

Additionally, Wild Waves asserts that: (1) the Lease provisions do not specify when or whether Wild Waves must operate its Water Park; and (2) alternatively, the Debtor's did not

serve Wild Waves with a timely notice of the alleged non-monetary breach to allow Wild Waves an opportunity to cure pursuant to paragraph 27 of the Lease.

8. Wild Waves' Certificate of Occupancy Violation

The Debtor alleges that Wild Waves did not have a Certificate of Occupancy for the northwest section of the Pier in violation of the Lease. Again, the Debtor points to paragraph 18(a) of the Lease, which provides that:

At all times that this Lease is in effect, [Wild Waves], at [Wild Waves'] sole cost and expense, shall . . . [p]romptly comply with all laws, orders, rules and requirements of governmental authorities[.]

The Debtor notes that the City sent a notice to Wild Waves on August 15, 2007, indicating that the City's construction office had no record of a paper Certificate of Occupancy issued for that portion of the Pier and ordering Wild Waves to promptly rectify the violation.

Wild Waves claims that the issue has been resolved and that Wild Waves has received a Certificate of Occupancy for the northwest quadrant deck on the Pier. In particular, Weiner testified that a temporary Certificate of Occupancy had been issued in 2002 but that the City had no record of a final Certificate of Occupancy being issued, which prompted the notice in 2007. Consequently, Wild Waves addressed the matter as soon as it was aware of the problem.

9. Collective Analysis of Wild Waves' Lease Breaches

Finally, the Debtor requests that this Court view the Wild Waves' Lease breaches globally because it contends that a collective analysis will demonstrate that Wild Waves did not intend to honor the Lease and thus materially breached the Lease.

III. DISCUSSION

The most recent District Court decision, as the law of this case, governs the proceedings on remand, the parties' rights going forward, and the matters to be decided herein. Judge Irenas determined that "the Bankruptcy Court should address fact discovery and adjudication of the alleged Lease breaches before reaching the Motion to Reject." Nickels, 372 B.R. at 225. As such, the Court will analyze each party's allegations to determine what, if any, liabilities exist between the parties, considering: (1) whether there are breaches of the Lease, and whether any breaches of the Lease are material; and (2) if breaches of the Lease exist, the consequences of such breaches. Once these determinations are made, the Debtor will be in a position to decide if it should assume or reject the Lease pursuant to 11 U.S.C. § 365(a).

Additionally, the Court will again address whether the executory Contract existed at the time of the Debtor's Chapter 11 filing and therefore continues to exist to be assumed or rejected by the Debtor.

- A. The Debtor is liable to Wild Waves for the Lease breach involving Water Park obstructions, and Wild Waves is liable to the Debtor for the Lease breaches involving: (1) non-payment of rent and taxes, (2) nonpayment of the collateral deposit, (3) non-compliance with the ADA, (4) construction and water and sewer liens against the Pier, (5) excessive water discharge from the Water Park, and (6) Certificate of Occupancy violation; but neither parties' Lease breaches are material.**

This Court's most recent written decision in this proceeding and Judge Irenas' 2007 decision articulated several principles of New Jersey contract law that pertain to the matter at hand. A breach of contract "automatically occurs upon a party's failure to perform." Nickels, 372 B.R. at 223. A material breach of a contract, pursuant to New Jersey law, "goes to the essence of the contract." Nickels, 2006 WL 4457349, at *8 (citing Ross Systems v. Linden Dari-

Delite, Inc., 173 A.2d 258, 265 (N.J. 1961)). Further, a material breach has been described as possibly occurring:

[w]here a contract calls for a series of acts over a long term, a material breach may arise upon a single occurrence or consistent recurrences which tend to “defeat the purpose of the contract.”[citation omitted] In applying the test of materiality to such contracts a court should evaluate “the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probabilities or improbability that such a breach will be repeated.”[citation omitted]

Magnet Res., Inc. v. Summit MRI, Inc., 723 A.2d 976, 981 (N.J. Super. Ct. App. Div. 1998) (citing Medivox Prods., Inc. v. Hoffman-La Roche, Inc., 256 A.2d 803, 809 (N.J. Super. Ct. Law Div. 1969)).

In a state contract law case for a state in which the state’s supreme court had not yet addressed the issue of material breach, the Third Circuit reviewed the Restatement, recognized that the state’s courts had been citing to the Restatement as that state’s law for materiality, and proceeded to use the Restatements’s five factors to determine whether a breach was material. See Norfolk S. Ry. Co. v. Basell USA Inc., 512 F.3d 86, 92-96 (3d Cir. 2008) (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)). The Third Circuit noted that such materiality factors, while not singularly dispositive, are “to be applied in the light of the facts of each case in such a way as to further the purpose of securing for each party his expectation.” Id. (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 cmt. a (1981)). The five factor test for determining materiality cited in Norfolk Southern includes:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. at 92. In practice, the five factors are applied as follows: (1) the first factor “focuses on the deprivation of the ‘benefit’ bargained for,” Norfolk Southern, 512 F.3d at 93; (2) the second factor “is a corollary of the first” and “[d]ifficulty . . . in proving with sufficient certainty the amount of that loss will affect the adequacy of compensation,” id. at 94 (citing RESTATEMENT (SECOND) OF CONTRACTS § 241 cmt. c (1981)); (3) the third factor examines “the extent to which the breaching party will suffer forfeiture if the non-breaching party is permitted not to perform,” id., and such a breach is less likely to be regarded as material where it occurs late or after substantial performance, see RESTATEMENT (SECOND) OF CONTRACTS § 241 cmt. d; (4) the fourth factor “asks whether it is likely that the breaching party will perform its contractual duties going forward, not merely whether such performance is theoretically possible,” Norfolk Southern, 512 F.3d at 95; and (5) the fifth factor considers whether “the breaching party’s behavior comported with standards of good faith and fair dealing,” id.

Like Norfolk Southern, here, the New Jersey Supreme Court has not directly addressed this issue, but the New Jersey Appellate Division has referred to the RESTATEMENT (SECOND) OF

CONTRACTS § 241 (1981) in order to determine whether a breach goes to the essence of the contract. See, e.g., Magnet Res., 723 A.2d at 981. As such, this Court will apply the principles outlined in Norfolk Southern to the alleged breaches because the principles provide guidance in ruling upon critical issues concerning materiality.

Finally, New Jersey, consistent with the RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981), implies a covenant of good faith and fair dealing into all contracts. See Palisades Props. Inc. v. Brunetti, 207 A.2d 522, 531 (N.J. 1965) (recognizing that the covenant requires that “neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract”) (citing 5 WILLISTON ON CONTRACTS § 670 (3d ed. 1961)). This standard of good faith and fair dealing can be measured by the fifth factor of Norfolk Southern.

Here, evidence has been presented to the Court in support of the assertion that certain events or series of events constitute material breaches of the Lease. Applying the materiality test laid out in Magnet Res. for “a contract [that] calls for a series of acts over a long term,” the Court finds that: (1) the ratio quantitatively that the each breach here bears to the contract as a whole is insubstantial because of the nature of the transaction – a multi-year, multi-million dollar deal; and (2) even if the each breach were to reoccur, the reoccurrences still would not “defeat the purpose of the contract.” A.2d at 981. Therefore, the Court concludes that the events or series of events that occurred do not constitute material breaches of the Lease.

The Court will now address the alleged breaches one-by-one to analyze specifically whether a breach exists and whether the balance of considerations lies on the side of materiality

pursuant to the Norfolk Southern factors, both with respect to specific breach allegations and the breaches collectively.

1. Wild Waves' Allegations of Lease Breaches by the Debtors

a. Modifications of the Boundaries of the Leased Premises

Because the Court is unpersuaded by either parties' arguments with respect to the boundary disputes concerning the Water Park, the Court finds that the boundary modifications do not constitute a breach of the Lease. In particular, the parties' inability to incorporate Exhibit A into the Lease—either initially upon execution or thereafter upon the Amendment or the Addendum—severely impairs their breach arguments because there is no express contractual language or graphical depictions in the Lease itself for the Court to look to in considering this alleged breach. The Court does not find the testimony presented by the Debtor's representatives regarding Weiner's actions in connection with the execution of the Lease to be convincing as the Court has already found that there was no impropriety on Weiner's part with respect to the Lease's execution. Undoubtedly, the parties' intentions with respect to the Water Park's boundaries were memorialized in the various conceptual drawings prepared for Wild Waves and submitted to the City's planning board after the Lease had been executed, all of which were signed by Steve Nickels on behalf of the Debtor. The Court finds Wild Waves' testimony on the boundary dispute issue to be more credible than the testimony presented by the Debtor; specifically, the Court does not doubt that Weiner capitulated to demands made by the Debtor, which resulted in the Water Park being located further from the boardwalk, so as to avoid litigation and to move the project along. However, Wild Waves failed to adequately protect its contractual rights during the time period in which the boundary dispute was ongoing; therefore,

the Court cannot find that Wild Waves reasonably expected to benefit from having tenancy rights over the portion of the Pier it contemplated would be graphically memorialized in Exhibit A when such exhibit was not attached to the Lease. Because the parties never followed through with their intention to graphically memorialize the leased premises in Exhibit A, Wild Waves has not adequately proven that the Debtor breached the Lease by demanding the relocation of the allegedly agreed-upon southeast boundary of the Water Park.

b. Debtor's Water Park Obstructions

As to the alleged water park obstruction breach, the Court finds that the Debtor did breach the Lease where its kiosks and games on the leased premises obstructed access to the Water Park, but the Court finds that the breach is not material. The Debtor breached the Lease in that paragraph 19 of the Lease unambiguously states that access should be maintained in its "current condition" as of May 15, 1999, which was before the Pier was open for business and thus before the games and kiosks were placed thereon. Even accepting the Debtor's assertions that such structures were used on the Pier in the pre-Lease years, the Debtor was not in compliance with the Lease when it placed the games and kiosks in such a way as to prevent the free flow of traffic into and out of the Water Park. This non-compliance constitutes a failure of the Debtor to perform the Lease, thus is a breach of the Lease.

Nevertheless, the Court, aware of the critical nature of the Water Park's access to and visibility from the boardwalk, cannot find that the breach was material in the scheme of transactions between the parties and pursuant to the Norfolk Southern materiality factors. The Court finds that the benefit Wild Waves reasonably expected, unobstructed pedestrian traffic to and from the Water Park, was not denied in a meaningful way because, having reviewed the

exhibits submitted in support of this argument, the Court can see that the placement of the games and kiosks were somewhat obstructive but that pedestrians could easily negotiate around such minor obstructions. Wild Waves has a claim for damages and will have the opportunity to argue the amount of that claim to compensate it for any lost benefit. Although the obstructions became an issue only a year or so into the Lease, substantial performance had already occurred for Wild Waves to open and operate the Water Park on the Pier. Finally, although animosity may exist between the parties to this dispute, the evidence presented to the Court suggests that the Debtor did not act in bad faith but merely sought to operate its games and kiosks as it had in the years leading up to the Lease. Therefore, although the Debtor breached the Lease by obstructing access to the Water Park, under the Norfolk Southern factors, the breach was not material.

c. Debtor's Failure to Repair or Rebuild Haunted Castle and Dungeon

This Court agreed with the Debtor that a ruling on whether the Debtor breached the Lease by failing to repair or rebuild the Haunted Castle and Dungeon after the structure was destroyed by the January 2002 fire would have been premature given the pendency of the Scottsdale Insurance Co. v. Weiner matter before Judge Simandle, but now that a decision has been rendered in the Scottsdale action, this Court will address the alleged breach.

Because Judge Simandle found that, through neglect, Wild Waves was negligent regarding the January 16, 2002 fire that destroyed the Haunted Castle and Dungeon, this Court concludes that the Debtor did not breach the Lease when it failed to repair or rebuild the Haunted Castle and Dungeon. Although the language of paragraph 24 of the Lease states that the Debtor is to repair the Leased Premises as soon as possible if damaged by fire, the same paragraph also states that Wild Waves “shall pay for all repairs and all other damage” if its neglect causes the

fire. Since the language of the Lease specifically addresses the responsibility of payment if Wild Waves's neglect causes a fire, the Court finds that it was reasonable for the Debtor to delay funding the repair or rebuilding of the Haunted Castle and Dungeon for a determination of negligence; therefore, the Debtor did not breach the Lease.

2. The Debtor's Allegations of Lease Breaches by Wild Waves

a. Wild Waves Non-Payment of Rent and Taxes

Although the Court finds Wild Waves did breach the lease when it discontinued paying rent, New Jersey jurisprudence supports its position that doing so was permissible under the circumstances and thus was not a material breach. To illustrate, in Reste Realty Corp. v. Cooper, the New Jersey Supreme Court held that since the covenant of quiet enjoyment and the covenant to pay rent were mutually dependent, the landlord's breach of the covenant of quiet enjoyment justified the tenant's vacation of the leased premises and constituted a constructive eviction. 251 A.2d 268, 275-77 (N.J. 1969). In this way, the landlord's breach of the covenant of quiet enjoyment also served as the tenant's defense to the landlord's action to recover rent after the tenant had removed itself from the leased premises. Id. at 276.

Although the facts in Reste, where the tenant vacated the leased premises on account of intolerable flooding conditions, 251 A.2d at 271, are distinguishable from the facts here, where Wild Waves chose to continue its business operations on the Pier despite the various concerns it had with the Debtor, the holding in Reste is relevant to this case because it indicates how the New Jersey "Supreme Court has heralded, if not commanded, the demise of the doctrine of independent covenants in commercial leaseholds." Ringwood Assocs., Ltd. v. Jack's of Route 23, Inc., 398 A.2d 1315, 1319 (N.J. Super. Ct. App. Div. 1979) (describing how tenant vacated

premises because landlord unreasonably withheld consent for tenant to assign the leasehold interest); see also Westrich v. McBride, 499 A.2d 546, 556 (N.J. Super. Ct. Law Div. 1984) (holding that “a lease, whether it be for a residence or for commercial purposes, is a set of mutually dependent covenants; i.e., the tenant’s covenant to pay rent is dependent (among other things) on the landlord’s covenant permitting the tenant the quiet enjoyment of the leased premises”). Further, the Reste Court signaled in dicta that a further expansion of equitable principles may be warranted to assist tenants in defending such suits regarding the non-payment of rental obligations in appropriate situations, noting:

Where the facts warrant the conclusion that the landlord has breached any dependent covenant of the lease (for example, that of quiet enjoyment) or an implied warranty against latent defects in such a manner as to warrant vacation of the premises by the tenant but the tenant is willing to remain in possession and pay a sum representing their reasonable rental value in their defective or reduced-value condition, should he not be entitled to do so for the remainder of the term and to have the court fix the reasonable rental value for that period . . . ?

251 A.2d at 277 n.1.

The New Jersey Appellate Division has addressed a factual scenario in which a residential tenant withheld rent altogether—while maintaining sufficient funds to cure the arrears, depending upon the outcome of the summary dispossess proceeding—on the basis that certain conditions rendered the leased premises uninhabitable. Stanger v. Ridgeway, 410 A.2d 59, 60 (N.J. Super. Ct. App. Div. 1979). Although the issue in Stanger was whether a tenant could terminate summary dispossess proceedings by paying back rent before the issuance of a warrant for removal, the Appellate Division expressed an equitable policy against forfeiture of leased premises in New Jersey. See id. at 61 (noting that “[t]he purpose of [the summary

dispossess procedure under the Landlord and Tenant Act] is to prevent a forfeiture when the rent, though late, is eventually paid”); see also Vineland Shopping Ctr., Inc. v. De Marco, 173 A.2d 270, 274 (N.J. 1961) (stating that “[i]t has long been settled that in a proper case equity will relieve a tenant from forfeiture of his lease by reason of non-payment of money, upon the theme that the forfeiture provision was designed to insure performance and hence, performance having been had, such relief should be granted”). The Stanger court concluded that the tenant had withheld rent in good faith to raise a habitability defense and thus dismissed the action. 410 A.2d at 63.

Under New Jersey law, a tenant may be removed from leased premises “[w]here such person shall hold over after a default in the payment of rent, pursuant to the agreement under which the premises are held.” N.J. STAT. ANN. § 2A:18-53. Here, Paragraph 27 of the Lease explicitly permits the Debtor to commence eviction proceedings against Wild Waves for the non-payment of rent after the expiration of a 10-day cure period. The Debtor sought rent payments from Wild Waves in the proceeding before Judge Seltzer, but the parties’ representations to this Court suggest that Judge Seltzer either denied all such requests or reserved judgment on the issue; therefore, a judgment for eviction has not been entered against Wild Waves.

The facts with respect to this alleged breach are unique and are not particularly comparable to other cases. This is not a run-of-the-mill commercial tenancy scenario because Wild Waves entered into the Lease under the assumption that it would be entitled to purchase the leased premises pursuant to the Contract; as such, Wild Waves justifiably did not simply vacate the leased premises due to complications that arose in its dealings with the Debtor. This is not a case where the commercial tenants asserting equitable defenses to summary dispossess actions

for the non-payment of rent are “actually professional men renting relatively small premises for the delivery of personal services.” Demirci v. Burns, 306 A.2d 468, 469 (N.J. Super. Ct. App. Div. 1973). Instead, the commercial tenant, Wild Waves, is a sophisticated business entity renting a substantial parcel of real estate to operate its Water Park. As of the petition date, the Debtor had not prevailed in the State Court Action regarding its right to evict Wild Waves for non-payment or for material breach of the Lease, and this Court has already ruled that Wild Waves is entitled to an abatement in rent. For the above reasons, this Court finds that the non-payment of rent was an immaterial breach.

The Norfolk Southern materiality factors support the Court’s conclusion that the breach was immaterial under the circumstances. The Court does not deny that the Debtor has been deprived of the expected benefit (rental money) of the Lease, but the Court finds that: (1) the Debtor was or should have been aware of the possibility that Wild Waves would withhold rent if the parties’ outstanding Agreement issues were not resolved; (2) the Debtor can seek compensation for unpaid rent from Wild Waves; (3) the parties had already substantially performed obligations under the Lease by the time Wild Waves withheld rent; (4) the inability of Wild Waves to cure the non-payment of rent default has not been an issue, and Wild Waves has paid rent when ordered to do so; and (5) Wild Waves acted in accordance with standards of good faith and fair dealing when it withheld rent with the hope that doing so might facilitate an amicable resolution of the issues it had with the Debtor. Therefore, although the Court finds that Wild Waves breached the Lease, the breach is not material.

b. Wild Waves Non-Payment of the \$400,000 Collateral Deposit

Wild Waves did not pay the collateral deposit, thus failing to perform and breaching the Amendment of the Lease, but the Court finds that the breach is not material. Though not dispositive on the issue, the fact that Wild Waves was obligated to pay a \$400,000 collateral deposit pursuant to the Amendment to the Lease rather than the original Lease cautions against a finding of materiality with respect to Wild Waves' non-payment – if the collateral deposit truly went to the “essence of” the Lease, then the parties would have inserted it into the Lease when it was first executed. Further, as with the non-payment of rent, Wild Waves had legitimate concerns with regard to its treatment as a tenant/purchaser of the Pier, justifying its hesitation in posting the collateral deposit in a timely manner.

A review of the Norfolk Southern materiality factors indicates that Wild Waves' failure to pay the \$400,000 in accordance with the Amendment was not material because: (1) the collateral deposit was integrated into the Lease documents in exchange for the Debtor's willingness to allow Wild Waves to encumber the Pier to obtain construction financing for the Water Park, and the actual amount of the collateral deposit pales in comparison to the total consideration the Debtor expected from the entire transaction; (2) Wild Waves has already posted the collateral deposit upon this Court's order; (3) it is undisputed that Wild Waves financially could have cured this breach and did so once ordered by the Court; and (4) even though the Court rejected Wild Waves' argument that the collateral deposit was the product of economic duress, the Court nonetheless finds that Wild Waves adhered to standards of good faith and fair dealing in its refusal to post the collateral deposit until being ordered to do so. Therefore, although Wild Waves breached the Amendment to the Lease, the breach was not material.

c. Wild Waves Non-Compliance with the ADA

Wild Waves has breached the Lease with its non-compliance of the ADA, but the Court does not find that such non-compliance constituted a material breach of the Lease. Wild Waves' expert, Aldrich, acknowledged that the Water Park was not in full compliance with the ADA via his various recommendations for increasing accessibility for the Water Park's patrons with disabilities. Congress enacted the ADA to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C.

§ 12101(b)(1). Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation¹⁴ by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C.

§ 12182(a). Further, the ADA defines "discrimination" within the meaning of 42 U.S.C.

§ 12182(a) to include:

[A] failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the

¹⁴ The parties did not brief the issue, but the Court finds that Wild Waves qualifies as a place of "public accommodation." See 42 U.S.C. § 12181(7)(I) (stating that a place of "public accommodation" means a facility operated by a private entity, whose operations affect commerce and fall within at least one of the stated categories, one of which includes "a park, zoo, amusement park, or other place of recreation"). The language set forth in 42 U.S.C. § 12182(b)(2)(A)(iii) "provide[s] an affirmative defense for an entity to demonstrate that compliance would fundamentally alter the nature of the goods and services provided" and that such an entity "consequently . . . bears the burden of persuasion regarding fundamental alteration and undue burden." Colo. Cross Disability Coalition v. Hermanson Family Ltd. Partnership I, 264 F.3d 999, 1003 (10th Cir. 2001). Wild Waves raises no such affirmative defense in this case.

nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.

42 U.S.C. § 12182(b)(2)(A)(iii).¹⁵ As the parties' expert reports make clear, Wild Waves neither is currently ADA-compliant nor was ADA-compliant when the Debtor filed for bankruptcy, thus Wild Waves did breach paragraph 18(a) of the Lease.

As to the materiality of the breach, several courts, in applying virtually the same “obey all laws” provision at issue here—albeit in the context of franchise agreements—have held that a failure to comply with federal or local law is a material breach warranting termination of the agreement. See, e.g., Dunkin’ Donuts Inc. v. Barr Donut, LLC, 242 F.Supp.2d 296, 309-10 (S.D.N.Y. 2003) (holding that franchise agreement’s obey all laws provision was violated by defendant/franchisee’s criminal behavior and warranted termination); Dunkin’ Donuts, Inc. v. Gav-Stra Donuts, Inc., 139 F.Supp.2d 147, 154 (D. Mass. 2001) (holding that franchisees’ commission of tax fraud breached obey all laws provision to warrant termination); Dunkin’ Donuts, Inc. v. Taseki, 47 F.Supp.2d 867, 877-78 (E.D. Mich. 1999) (enforcing franchisor’s termination of franchise agreement under obey all laws provision where franchisees under-reported sales, under-paid their obligations, and falsified financial records); Dunkin’ Donuts of Am., Inc. v. Middletown Donut Corp., 495 A.2d 66, 75-76 (N.J. 1985) (upholding franchisor’s right to terminate franchise agreements where franchisee intentionally under-reported sales and thereby committed tax fraud). However, such cases are distinguishable from the case at bar in two respects: (1) the grounds for termination were based on criminal behavior by the franchisees

¹⁵ The Debtor does not cite to a specific ADA section as the basis for the alleged ADA violation, but this section seems most in line with its position as opposed to the other “discrimination” prohibitions regarding eligibility criteria, policies, practices, or procedures, and barriers. See 42 U.S.C. § 12182(b)(2)(A)(i), (ii), (iv), and (v).

whereas Wild Waves merely faces potential civil liability for its alleged breach; and (2) the decisions were based, at least in part, on considerations of preserving goodwill for the franchisor on account of the breaches by the various franchisees. See, e.g., Gav-Stra Donuts, 139 F.Supp.2d at 153-54.

_____ Based on the language of the obey all laws provision set forth in paragraph 18(a) of the Lease, the Court neither condones the length of time it is taking Wild Waves to become ADA-compliant nor agrees with Wild Waves' contention that its failure to comply with the ADA has no effect upon the Debtor. Paragraph 18 of the Lease does not require that the Debtor be financially liable for any breach, only that Wild Waves comply with the law. Even so, the Court finds that, in view of the entire transaction between the parties, this particular breach is not material and is justifiable given the events leading up to the Debtor's default notice regarding ADA non-compliance.

The Norfolk Southern materiality factors support that Wild Waves' non-compliance with the ADA was not material. First, although the obey all laws provision gives the Debtor the right to enforce its bargained-for contract rights to do business only with law-abiding lessees, the Dunkin' Donuts' franchisee cases cited above illustrate that terminations due to breaches of such provisions normally result from more egregious, intentional failures to comply with laws (e.g., tax evasion) rather than a lessee's inability to comply with the ADA; therefore, the Court finds that the Debtor is being deprived of the benefit of a law-abiding lessee only to a small extent when considering all relevant circumstances. Regarding the second materiality factor, adequate compensation is presently inapplicable because the Debtor has not yet suffered redressible harm and merely has exposure to potential liability for the Water Park's ADA violations as the owner

of the Pier. The third factor does weigh in favor of materiality because the breach occurred early in the Lease's term¹⁶ and has yet to be cured by Wild Waves. As to the fourth factor, despite the Debtor's arguments to the contrary, Wild Waves has made efforts to cure this breach, as evidenced by Aldrich's report, detailing the steps Wild Waves has taken to comply with the ADA and the resolution of the Stoney Action. Finally, even if it has taken several years for Wild Waves to get ADA-compliant, the Court finds that its actions have comported with standards of good faith and fair dealing with respect to the ADA issue. Therefore, although Wild Waves has breached the obey all laws provision of the Lease, the breach was not material.

d. Construction and Water and Sewer Liens Filed Against the Pier

Wild Waves did breach the Lease in permitting several liens—construction and mechanic's liens and a water and sewer lien—to be filed against and to remain on the leased premises for some time, but the Court does not find the breaches to be material under the arrangement between the Debtor and Wild Waves. The Debtor clearly bargained for the right to have its Pier unencumbered by Wild Waves via the Amendment and paragraph 20(a) of the Lease; at the same time, the Debtor did implicitly acknowledge that, due to the magnitude of the steps needed to make the Water Park operational, certain liens would inevitably be filed against the Pier and as a result demanded in the Amendment that Wild Waves have any such liens removed. Wild Waves failed to comply with the Lease in allowing liens to remain against the Pier for periods of time of at least 120 days, but the fact that the Debtor served Wild Waves with

¹⁶ The Debtor claims that this breach was first alleged in the context of the State Court Action in 2001 (i.e., a mere eighteen (18) months into the thirty-one (31) year Lease), but the February 3, 2003 letter from the Debtor to Wild Waves appears to be the only default notice in accordance with the manner by which the Debtor is supposed to declare defaults under the Lease.

a notice of default regarding this matter on February 3, 2003, after the lien claimants had forfeited their rights to enforce the liens pursuant to New Jersey law,¹⁷ renders such breaches immaterial. As for the tax sale notice issued by the City because of Wild Waves' failure to pay water and sewer invoices in a timely manner, the Court does not regard that occurrence as material where Wild Waves disputed the City's claims and resolved the matter in short order.

The Norfolk Southern factors do not support materiality of Wild Waves Lease breaches caused by liens on the Pier because: (1) the liens filed against the Pier were not acted upon by claimants thus the Debtor was not deprived of much as a result of Wild Waves' failure to remove the liens or to pay water and sewer invoices; (2) the Debtor has not shown that it has incurred losses as a result of these breaches, and even if it did, it would still have a claim for damages to compensate for any lost benefit; (3) although the breaches occurred relatively early on in the Lease's term, Wild Waves had already prepared and performed many of its obligations under the Lease to ready the Water Park for operation; (4) the liens have long since been forfeited, and the water/sewer invoices were paid, therefore, the likelihood of curing such defaults is no longer relevant; and (5) Wild Waves adhered to standards of good faith and fair dealing by addressing the liens filed against the Pier and the tax sale notice. Therefore, although Wild Waves has breached the no liens against the Pier provisions of the Lease, pursuant to the Norfolk Southern factors, the breach was not material.

¹⁷ See N.J. STAT. ANN. § 2A:44A-14(a) (stating that “[a] claimant filing a lien claim shall forfeit all rights to enforce the lien, and shall immediately discharge the lien of record, if the claimant fails to bring an action in the Superior Court, in the county in which the real property is situated, to establish the lien claim . . . [w]ithin one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed”).

e. Wild Waves Excessive Water Discharge from the Water Park and Certificate of Occupancy Violation

The Court finds the Debtor's claims that Wild Waves inappropriately discharged water onto nearby tenants and did not have a Certificate of Occupancy for a portion of the Pier to be breaches of the Lease but that the breaches are immaterial. Wild Waves cannot "destroy the peace and quiet of other tenants" on the Pier under the Lease, so the incident involving the discharge of water onto an adjacent tenant's trailer is a breach of the Lease; however, the incident was the only documented public disturbance by Wild Waves presented to the Court, suggesting it was an isolated occurrence that was promptly rectified by Wild Waves. Similarly, Wild Waves explained that the Certificate of Occupancy issue was a matter of updating the City's records; beyond Wild Waves' explanation, the notice that underlies this purported breach was sent by the City to Wild Waves several years after the Debtor's bankruptcy filing, making it difficult for the Debtor to argue that the breach constituted a material breach sufficient to terminate the Lease.

The Norfolk Southern factors weigh in favor of finding that these two breaches are not material. First, the breaches are so minor in nature that the Debtor can hardly be said to be deprived of expected benefits. Second, the Debtor does not seem to have been injured as a result of the breaches. Third, substantial performance had already occurred regarding the Lease. Fourth, these breaches were isolated incidents over the course of a lengthy business transaction, and Wild Waves confronted the incidents without delay and quickly cured the breaches. Fifth, there are no allegations of bad faith or unfair dealing on the part of Wild Waves with respect to these two breaches. Therefore, although Wild Waves has breached the Lease in regard to destroying the peace and quiet of other tenants with its water discharge and with its violation of

the obey all laws provision by lacking a Certificate of Occupancy for a portion of the Pier, these breaches are not material.

f. Wild Waves Closure of the Water Park After the Second Fire

The Court finds that Wild Waves did not violate the implied covenant of good faith and fair dealing when it closed the Water Park for the remainder of the season in the wake of the July 2002 fire on the Pier. The Third Circuit has noted that the RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) implies a duty of good faith and fair dealing for all contracts. Myers v. Martin, 91 F.3d 389, 393 (3d Cir. 1996). New Jersey has recognized this implied covenant for several decades. See Palisades Props., 207 A.2d at 531.

While good faith is a concept that defies precise definition, it refers generally to community standards of reasonableness and requires the parties to refrain from conduct that would injure the right of the other party to receive intended benefits under the contract. See Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 864 A.2d 387, 395-96 (N.J. 2005). Further, “[e]ach case is fact-sensitive,” id. at 396, and a party may be liable for a breach of the covenant of good faith and fair dealing even if its conduct does not violate express contract terms, see Wilson v. Amerada Hess Corp., 773 A.2d 1121, 1126 (N.J. 2001). As the New Jersey Supreme Court explained in Wilson, a party does not breach the implied covenant of good faith and fair dealing merely because its decisions disadvantaged another party, and “contract law does not require parties to behave altruistically toward each other.” 773 A.2d at 1130 (internal citation omitted). Significantly, proof of “[b]ad motive or intention is essential” to an action for breach of the covenant of good faith and fair dealing. Id. The Third Circuit has cautioned that the covenant should not be construed too broadly as it “could become an all-

embracing statement of the parties' obligations under contract law, imposed unintended obligations upon parties and destroying the mutual benefits created by legally binding agreements." Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 92 (3d Cir. 2000)).

Here, the Court finds that Wild Waves did not violated the implied covenant of good faith and fair dealing because it had good cause to shut down operations for the remainder of the 2002 season. The testimony of and evidence submitted by the Debtor's experts relating to the Water Park closure did not support a finding that Wild Waves' broke with industry customs. Scott's testimony and expert report are diminished by the fact that his site visit was not made until several months after the fire; as a result, he was not on the ground in July 2002 to witness the damage from the fire and its affects and to opine with certainty that the Water Park could have been promptly reopened. Wild Waves indicated that certain sections of a damaged slide had to be replaced and that numerous other problems existed (e.g., offices could not be used, the maintenance area was severely damaged, portions of the deck were destroyed, etc.), which influenced its decision to shut down operations at that time.

Although the Debtor may have been disadvantaged by Wild Waves decision to close the Water Park for the remainder of the 2002 season, this is not enough for the Court to find that Wild Waves breached the implied covenant of good faith and fair dealing. The Debtor has not provided proof of Wild Waves improper motives or bad faith in closing the Water Park. The Court does find that Weiner presented ample support for the contention that he (on behalf of Wild Waves) exercised reasonable business judgment in electing to shut down the Water Park for the season after the July 2002 fire and thus did not breach the implied covenant of good faith and fair dealing.

g. Collective Analysis of the Wild Waves' Lease Breaches

Although Wild Waves has breached several of the Lease provisions, the Court finds that the various breaches by Wild Waves, collectively, are not material when considering the transaction as a whole: WW was to lease the space until the purchase went through, and it is a multi-year, multi-million dollar deal. After globally reviewing Wild Waves' Lease breaches, the Court is still not persuaded that Wild Waves did not intend to honor the Lease. The Court has found that the individual breaches are immaterial. The Court also finds that Wild Waves' Lease breaches, even collectively, do not go to the essence of the Agreement.

The Norfolk Southern materiality factors weigh in favor of finding that Wild Waves' collective Lease breaches are not material because: (1) although the Debtor has been deprived of the expected benefit of the Lease, the Debtor was or should have been aware of the possibility that Wild Waves would breach the Lease from time to time, and the Debtor did provide for the noticing of such defaults, both monetary and non-monetary, in the terms of the Lease; (2) the Debtor can seek compensation for Wild Waves' breaches, collectively and individually; (3) substantial performance has occurred with Wild Waves' opening and operation of the Water park; (4) Wild Waves has cured or attempted to cure its failure to perform on most of the breaches; and (5) Wild Waves acted in accordance with standards of good faith and fair dealing for all of the individual breaches, and the Court has no reason to change that finding in a collective analysis. Therefore, although Wild Waves has breached several provisions of the Lease, these breaches, collectively and individually, are not material.

B. Because the Court finds the Lease breaches in which the parties are liable are immaterial, the Lease and Contract are and have not been terminated.

“Breach of contract merely gives rise to contract damages.” Id. (citing United States v. Winstar Corp., 518 U.S. 839, 885 n.30 (1996)). A material breach of a contract “entitles the other [non-breaching] party to terminate it.” Young Travelers Day Camps, Inc. v. Felson, 287 A.2d 231, 235 (N.J. Super. 1972)).

This Court has already determined that the Lease was not terminated pre-petition by the expiration of the Lease per its terms, by either parties’ actions or noticed election to terminate the Lease, or by way of a court judgment. Nickels, 2006 WL 4457349, at *9-10. The District Court affirmed this Court’s September 2006 findings. Nickels, 372 B.R. at 223-24. In accordance with the Court’s determinations that the Lease breaches, individually and collectively, are not material, the Court finds that the Lease was not terminated pre- or post-petition and thus continues to exist to be assumed or rejected by the Debtor.

As to the Lease breaches, which are breaches of contract that give rise to contract damages, the parties have requested and are aware that the Court will address the issue of damages at a later stage in the litigation process through further proofs and hearings.

C. The Court continues to find that the Contract exists and is executory.

The issue of whether the Contract component of the Agreement was terminated pre-petition has already been determined in this Court’s September 2006 findings, Nickels, 2006 WL 4457349, at *7-10, which was affirmed by the District Court, Nickels, 372 B.R. at 222-225. This Court found that the Contract had not been terminated as of the petition date, reasoning that: (1) “neither party had exercised its right, in writing [as provided by the Contract], to cancel the

[Contract]” before the closing date; and (2) because the buyer did not pay the sales price to the seller, and the seller did not transfer title to the buyer, neither party had performed, and thus there was no material breach of the Contract. Nickels, 2006 WL 4457349, at *9.

Since the Court’s September 2006 determination regarding the existence of the Contract, neither party has provided the Court with evidence that a breach has occurred that goes to the essence of the Contract thereby warranting a finding of materiality and termination. The Court continues to find that the Contract is not terminated, that the Contract is executory, and as such the Debtor’s may make the determination regarding the assumption or rejection of the Contract pursuant to § 365.

IV. CONCLUSION

After considering the testimony of the witnesses at the Claims Litigation Trial, the extensive documentary evidence, and the pleadings of the parties, the Court concludes that the Debtor is liable to Wild Waves for the Lease breach involving the Water Park obstructions and Wild Waves is liable to the Debtor for the Lease breaches involving the non-payment of rent and taxes, the nonpayment of the collateral deposit, the non-compliance with the ADA, the construction and water and sewer liens against the Pier, the excessive water discharge from the Water Park, and the Certificate of Occupancy violation. The Court will address whether damages will be awarded and the amount of the award after the parties present proofs of damages and after the occurrence of further hearings.

The Court also concludes that the above listed Lease breaches are not material, and, therefore, the Lease has not been terminated. The Debtor is now in a position to determine whether it will assume or reject this executory component of the Agreement. Finally, the Court

previously concluded and continues to conclude that the Contract has not been terminated, is executory, and can be assumed or rejected by the Debtor.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Gloria M. Burns', written over a horizontal line.

GLORIA M. BURNS
United States Bankruptcy Judge

Dated: September 30, 2009