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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-09-1007-DHMo
JAC EVEN RESOURCES, INC.,)	Bk. No.	SA 08-11551-ES
Debtor.)		
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JAC EVEN RESOURCES, INC.;)		
THE J CAR WASH COMPANY, INC.,)		
Appellants,)		
v.)	MEMORANDUM¹	
DOLORES LINDAUER-OLIVAREZ;)		
JOSEPHINE LINDAUER; LUTHER)		
LINDAUER,)		
Appellees.)		

Argued and Submitted on June 19, 2009
at Pasadena, California

Filed - June 25, 2009

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Before: DUNN, HOLLOWELL and MONTALI, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 the parties did not intend the 30-year Lease term to commence
2 until certain environmental remediation had been completed.

3 As relevant to this appeal, the leased premises ("Leased
4 Premises") initially consisted of 130,173 square feet on multiple
5 parcels of non-residential real property located in La Habra,
6 California. The car wash premises ("Car Wash Premises")
7 represented 79,871 square feet of the Leased Premises. The
8 initial annual rent was \$20 per square foot. This amount
9 represented 10% of the value of the Leased Premises over one
10 year. The rent was to be paid in equal monthly installments over
11 the course of the year, with the monthly rent deemed late on the
12 5th day of each month under Section 3.01 of the Lease.

13 Section 3.04 of the Lease provided for both "percentage" and
14 "value" adjustments to the rent over the 30-year term. For the
15 first five years of the Lease, the rent, as stated above, was \$20
16 per square foot. For the second five years of the Lease, the
17 rent was to increase 25%. For the third five years of the Lease,
18 the rent would be established based on a new appraisal of the
19 Leased Premises, with the rent to be 10% of the new value of the
20 Leased Premises over one year. Thereafter the Lease provided for
21 rent adjustments every five years, alternating between
22 "percentage" adjustments and "value" adjustments. Section 3.05
23 of the Lease set forth how the "percentage" adjustments were to
24 be calculated and applied. Section 3.06 of the Lease set forth
25 how the "value" adjustments were to be calculated and applied.

26 On February 1, 1994, JERI and the Lessors executed an
27 Amendment to Lease Agreement ("Lease Amendment"). The Lease
28 Amendment provided for a ten-year "Environmental Remediation

1 Term" leasehold and further provided that the original term of
2 the Lease, as stated in Section 2.01 of the Lease, was to
3 commence upon completion of the environmental remediation of the
4 Leased Premises. Until the environmental remediation was
5 complete, the Lease Amendment required payment of rent for the
6 Leased Premises in the amount of \$5,000 per month, with the
7 monthly rent deemed late on the 10th day of each month. The
8 monthly rent due under the Lease Amendment was subject to
9 percentage adjustments as provided for in the Lease Amendment.
10 Once the environmental remediation was complete, the Lease
11 Amendment authorized JERI, at its option, to pay rent
12 attributable to the entire Leased Premises, or to terminate the
13 Lease as to all but the Car Wash Premises.

14 Also on February 1, 1994, JERI, as sublessor, entered into a
15 sublease ("Sublease") with The J Car Wash Company, Inc. ("J Car
16 Wash"), with respect to the Leased Premises. Joel M. Burnstine,
17 as JERI's president, executed the Sublease on behalf of the
18 sublessor. Mr. Burnstine also is J Car Wash's president.

19 Beginning in 2000, multiple lawsuits were filed to resolve
20 issues regarding the Lease and the Lease Amendment, including
21 property contamination and remediation, the rent amount, the
22 effective date of the Lease, and whether JERI had exercised its
23 option to limit the Leased Premises to the Car Wash Premises. By
24 its Minute Order dated March 20, 2008, the Superior Court of
25 California, County of Orange ("State Court"), on remand from the
26 California Court of Appeal, made findings ("Findings") with
27 respect to certain of these disputes. The State Court found,
28 based upon the agreement of the parties, that the environmental

1 remediation was complete on March 26, 2003, such that on
2 March 26, 2003, the Lease Amendment ended, and the 30-year term
3 of the Lease commenced. The State Court also found that JERI had
4 exercised its option to limit the Lease to the Car Wash Premises
5 effective April 2, 2007, and that the Car Wash Premises
6 represented 79,871 square feet, or 61%, of the original Leased
7 Premises. The State Court then proceeded to calculate the rent
8 due to the Lessors after the Lease commenced, i.e., after
9 March 26, 2003. The State Court found that the rent for the Car
10 Wash Premises which came due after April 2, 2007, was "\$2[0]³ per
11 square foot per year, or \$13,311.83 per month" such that, as of
12 the date of the Minute Order, the total unpaid rent was \$159,742.
13 In determining that the rent was \$20 per square foot, the State
14 Court applied Section 3.04 of the Lease and found that the first
15 "value" adjustment to the rent, which had been requested by the
16 Lessors, could not occur until 2013, a date ten years after the
17 March 26, 2003 commencement of the Lease term. Since the State
18 Court Minute Order was entered six days prior to the end of the
19 first five years of the Lease term, the Findings did not address
20 the "percentage" adjustment provisions of Sections 3.04 and 3.05
21 of the Lease.

22 Shortly after entry of the Minute Order, the Lessors served
23 both JERI and J Car Wash with a "Notice to Pay or Quit," which
24

25 ³ The Minute Order states that the rent amount was \$2 per
26 square foot. The parties agree that the State Court actually
27 used \$20 per square foot in its rent calculation. This is the
28 amount for the first five years of the Lease as set forth in
Section 3.04 of the Lease.

1 advised JERI and J Car Wash that unless the \$159,742 overdue
2 unpaid rent for the Car Wash Premises was paid within three days,
3 the Lessors would commence legal proceedings seeking forfeiture
4 of the Lease and the Sublease and recovery of the Car Wash
5 Premises. In response, JERI filed a voluntary chapter 11 case on
6 March 31, 2008, in order to preserve the leasehold interest in
7 the Car Wash Premises.

8 JERI then filed a motion ("Motion") pursuant to § 365 to
9 assume the Lease and to assign it to J Car Wash. J Car Wash
10 joined in the Motion. The Lessors opposed the Motion, asserting
11 that JERI had failed to cure existing defaults under the Lease,
12 and failed to provide adequate assurances of a prompt cure of
13 existing defaults.⁴ In particular, the Lessors pointed out that
14 JERI had made only partial payments of the monthly postpetition
15 rent, where it had paid the \$13,311.83 monthly amount determined
16 in the Minute Order, and not \$16,639.79, the amount to which the
17 monthly rent increased on March 26, 2008, based upon application
18 of the "percentage" rent adjustment provided for in Sections 3.04
19 and 3.05 of the Lease. The Lessors also asserted that they were
20 owed late payment fees because JERI had made its postpetition
21 payments after the 5th day of the month. JERI and J Car Wash
22 countered that the Lease Amendment, not the Lease, controlled
23 both the rent amount and the late payment date. The parties

24
25 ⁴ The Lessors also asserted that because J Car Wash, as
26 subtenant, failed to cure Lease defaults timely, the Lease had
27 been terminated under California law, and the Lease could not be
28 assumed and assigned to J Car Wash. The bankruptcy court
rejected this assertion, and the Lessors do not pursue it on
appeal.

1 supplied conflicting affidavits as to their intent in drafting
2 the Lease Amendment with respect to these issues.

3 The bankruptcy court conducted three nonevidentiary hearings
4 on the Motion. Between the second and third hearings, at the
5 request of JERI and J Car Wash, the bankruptcy court entered its
6 order ("Order") authorizing JERI to assume the Lease and to
7 assign it to J Car Wash. The Order reserved jurisdiction to
8 determine the current amount of the monthly rent and the late
9 payment date. The parties have not appealed the Order.

10 Despite the insistence of JERI and J Car Wash, the
11 bankruptcy court, finding that the documents "speak for
12 themselves," did not conduct an evidentiary hearing on the
13 remaining issues. The bankruptcy court ultimately concluded that
14 the "percentage" rent adjustment provisions of the Lease remained
15 effective, such that the monthly rent during the second five
16 years of the Lease, dating from March 26, 2008, was \$16,639.79,
17 and that the correct late payment date was the 5th of the month
18 as provided in the Lease, not the 10th of the month as provided
19 in the Lease Amendment. The bankruptcy court entered its
20 supplemental order on the Motion ("Supplemental Order"), and JERI
21 appealed. J Car Wash, asserting it is the real party in
22 interest, has joined in the appeal.

23 24 **II. JURISDICTION**

25 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
26 §§ 1334 and 157(b)(1) and (b)(2)(A), (M), and (O). We have
27 jurisdiction over this appeal pursuant to 28 U.S.C. § 158.
28

1 lease. Rule 6006(a) provides that "[a] proceeding to
2 assume . . . [and] assign an . . . unexpired lease, other than as
3 part of a plan, is governed by Rule 9014." Rule 9014 governs
4 contested matters, which are initiated by the filing of a motion.

5 Rule 9014(d) provides that the "[t]estimony of witnesses
6 with respect to disputed material factual issues shall be taken
7 in the same manner as testimony in an adversary proceeding."

8 Rule 9017 specifies that Fed. R. Civ. P. 43 applies in cases
9 under the Bankruptcy Code. When a motion "relies on facts
10 outside the record," Fed. R. Civ. P. 43(c) leaves to the
11 bankruptcy court's discretion whether to "hear" the matter (1) on
12 affidavits, (2) wholly or partly on oral testimony, or (3) on
13 depositions. See, e.g., Miles v. Dep't of the Army, 881 F.2d
14 777, 784 (9th Cir. 1989) (Fed. R. Civ. P. 43(c) is permissive, not
15 mandatory, and is subject to the trial court's wide discretion.);
16 see also In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal.
17 1992), aff'd, 153 B.R. 601 (9th Cir. BAP 1993), aff'd, 24 F.3d
18 247 (9th Cir. 1994). As noted by a leading treatise on the
19 Federal Rules of Civil Procedure, "[m]otions, in actual practice,
20 usually are decided on the papers rather than after oral
21 testimony of witnesses." 9A Charles Alan Wright & Arthur R.
22 Miller, *Federal Practice & Procedure: Civil* 3d § 2416.

23 JERI and J Car Wash assert on appeal that the bankruptcy
24 court abused its discretion when it failed to conduct an
25 evidentiary hearing before deciding the amount of the current
26 monthly rent and the late payment date applicable under the
27 assumed Lease.

28

1 In interpreting the terms of the Lease, the bankruptcy court
2 was required to review not only the Lease itself, but also the
3 Lease Amendment, and, perhaps most importantly, the State Court's
4 Minute Order. The bankruptcy court determined that the
5 "documents speak for themselves," and decided the Motion without
6 further evidence.

7 As a threshold matter, we must decide whether the bankruptcy
8 court's interpretation of the Lease required consideration of
9 "disputed material factual issues" or "relie[d] on facts outside
10 the record." If not, there was no need for testimony.

11
12 1. The State Court's Findings

13 The parties concede that the Findings in the Minute Order
14 are binding upon them. The dispute is whether the Findings
15 encompass the "percentage" rent adjustment and late payment date
16 issues. In our de novo review, we look to the Findings
17 themselves to make this determination.

18 The dispute before us requires a determination of the
19 monthly rent obligation as of March 26, 2008. The State Court
20 determined JERI's monthly rent obligation as of March 20, 2008.
21 In doing so, the State Court made findings which are relevant to
22 this appeal as follows:

- 23 • The Lease Amendment ended March 26, 2003.
24 • The Lease commenced March 26, 2003.
25 • Commencing March 26, 2003, the amount of the monthly rent
26 due under the Lease is determined by Section 3.01.

27 "According to the lease agreement, there are 130,173 square
28 feet in the leasehold . . . Under the lease, the rent for

1 the first ten years is \$260,346 per year, or \$21,695 per
2 month." This tracks the language set forth in Section 3.01.
3 The State Court then calculated \$1,019,665 as the rent due
4 for the 47 months between the date the Lease commenced and
5 the date JERI exercised its option to reduce the Leased
6 Premises to the Car Wash Premises. Thereafter, the annual
7 rent due was calculated at the \$20 per square foot rate set
8 forth in Section 3.01 for the 79,871 square feet comprising
9 the Car Wash Premises, yielding a monthly rent amount of
10 \$13,311.83, without any percentage adjustment as provided
11 for in the Lease Amendment.

- 12 • Commencing March 26, 2003, adjustments to the amount of
13 monthly rent due under the Lease are determined by Section
14 3.04. The Lessors had asserted that, pursuant to the terms
15 of the Lease Amendment, the rent amount effective March 26,
16 2003 was to be determined by the use of a new appraisal
17 under the procedure set forth in Section 3.06 of the Lease.
18 The State Court held that pursuant to Section 3.04, Section
19 3.06 was not available to implement a "value" rent
20 adjustment until the tenth year following the date the Lease
21 commenced, which was the year 2013.

22 Because the State Court found that Sections 3.01 and 3.04 of
23 the Lease applied when the Lease term commenced, we agree with
24 the bankruptcy court that the documents speak for themselves,
25 i.e., are not ambiguous, with respect to the timing and
26 availability of "percentage" rent adjustments and the late
27 payment date. Consequently, there were no disputed facts for the
28 bankruptcy court to determine; nor did the bankruptcy court need

1 to rely on facts outside the record. As a result, there was no
2 need for further evidence in the form of testimony, oral or
3 otherwise. The bankruptcy court did not abuse its discretion
4 when it did not need to exercise that discretion.

5
6 2. The Parol Evidence Rule Does Not Change This Result

7 JERI and J Car Wash assert that the bankruptcy court did not
8 need to find an ambiguity in order to take testimony on the
9 availability under the Lease of a "percentage" rent adjustment or
10 on the appropriate late payment date. They contend that under
11 California's parol evidence rule, it was enough that the
12 affidavits provided in support of the Motion presented an
13 alternative interpretation of the documents. We disagree that
14 the bankruptcy court was required to take further evidence with
15 respect to an alternative interpretation of the documents in this
16 case.

17 California has a liberal parol evidence rule, which permits
18 consideration of extrinsic evidence to explain the meaning of the
19 terms of a contract even when the meaning appears unambiguous.
20 See City of Manhattan Beach v. Superior Court, 13 Cal.4th 232, 52
21 Cal.Rptr.2d 82, 914 P.2d 160, 169 (1996). However, "[t]he test
22 of admissibility of extrinsic evidence to explain the meaning of
23 a written instrument is not whether it appears to the court to be
24 plain and unambiguous on its face, but whether the offered
25 evidence is relevant to prove a meaning to which the language of
26 the instrument is reasonably susceptible." Id., quoting Pacific
27 Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal.2d
28 33, 69 Cal.Rptr. 561, 442 P.2d 641, 644 (1968).

1 JERI and J Car Wash submitted affidavits in the bankruptcy
2 court which presented their alternative interpretation of the
3 impact of the Lease Amendment on the Lease. In particular, the
4 affidavits provide the statements of JERI's president and of the
5 attorney who drafted the Lease Amendment, that it was the intent
6 of the parties (1) that the Lease Amendment was to eliminate
7 Section 3.04 of the Lease as to "percentage" rent adjustments but
8 not as to "value" rent adjustments, (2) that the Lease Amendment
9 was to eliminate Section 3.05 of the Lease, and (3) that the
10 Lease Amendment was to change permanently the late payment date
11 to the 10th of the month in order to be consistent with J Car
12 Wash's Sublease of the Leased Premises.

13 Were it not for the Findings of the State Court, it is
14 plausible that the evidence offered by JERI and J Car Wash might
15 be "relevant to prove a meaning to which the language of the
16 instrument is reasonably susceptible." JERI and J Car Wash
17 contend that these issues were neither presented to nor decided
18 by the State Court. However, while the issues were not directly
19 before the State Court at the time it made its Findings, its
20 Findings that Section 3.01 and Section 3.04 of the Lease
21 continued to apply effective March 26, 2003 govern issues that
22 require interpretation of the Lease and the Lease Amendment with
23 respect to those terms. These issues include both "percentage"
24 rent adjustments under the Lease and the late payment date.

25
26 B. The Court Did Not Err in Its Interpretation of the Lease

27 Section 3.04 of the Lease provides in relevant part: "As
28 used herein the term 'Percentage Adjustment Date' shall mean the

1 first (1st) day of the fifth (5th) year of the Lease Term and
2 every tenth (10th) year thereafter." Section 3.05 of the Lease
3 provides: "Effective on each Percentage Adjustment Date, the
4 Monthly Rent payable by Lessee hereunder shall be one hundred
5 twenty-five percent (125%) of the Monthly Rent paid by Lessee
6 during the immediately preceding Lease Year." Nothing in the
7 Lease Amendment states that any provision of Section 3.04 and
8 Section 3.05 is superseded when the Lease term commences at the
9 end of the Environmental Remediation Term. Indeed, the State
10 Court's finding that the rent for the Leased Premises during the
11 first five years of the Lease term was \$20 per square foot
12 clearly contradicts any argument that the percentage adjustment
13 and other rent provisions of the Lease Amendment supplanted the
14 provisions of the Lease for determining rent during the Lease
15 term. Because the State Court found that Section 3.04 of the
16 Lease controlled adjustments to rent under the Lease, the
17 bankruptcy court correctly determined that effective March 26,
18 2008, the beginning of the second five years of the Lease term,
19 the amount of the rent due increased by 25%. The bankruptcy
20 court did not err when it applied Section 3.04 and Section 3.05
21 of the Lease to determine that the current monthly rent, as of
22 March 26, 2008, is \$16,639.79.

23 Further, because the State Court found that the provisions
24 of Section 3.01 of the Lease, which states that "[r]ent payments
25 shall be deemed 'late' on the 5th day of each month, and
26 thereafter shall [be] subject to a five percent (5%) late payment
27 charge," governed the payment of rent under the Lease, the
28

1 bankruptcy court did not err when it determined that the late
2 payment date is the 5th of the month.

3
4 **VI. CONCLUSION**

5 The State Court previously determined that Section 3.01 and
6 Section 3.04 of the Lease were effective. Therefore the
7 bankruptcy court did not abuse its discretion by refusing to
8 conduct an evidentiary hearing when the issues presented by JERI
9 and J Car Wash through their affidavits in effect requested the
10 bankruptcy court to redetermine whether Section 3.01 and Section
11 3.04 of the Lease continued viable. The bankruptcy court did not
12 err when it adjusted the monthly rent under the Lease to
13 \$16,639.79 effective March 26, 2008, or when it determined that
14 the late payment date is the 5th of the month. We AFFIRM.