

OCT 06 2011

SUSAN M SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	CC-11-1165-PaDKi
		)		
6	IK/S-BAR, LLC,	)	Bk. No.	LA 10-64247-VZ
	Debtor.	)		
7	_____	)		
		)		
8	IK/S-BAR, LLC,	)		
		)		
9	Appellant,	)		
		)		
10	v.	)	<b>MEMORANDUM*</b>	
		)		
11	DIRECT CAPITAL CORPORATION,	)		
		)		
12	Appellee.	)		
	_____	)		

Argued and Submitted at Pasadena, California  
on September 23, 2011

Filed - October 6, 2011

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

Honorable Vincent Zurzolo, Bankruptcy Judge, Presiding

Appearances: Michael Sanford Kogan Esq. of Ervin, Cohen &  
Jessup LLP appeared for appellant IK/S-Bar, LLC.  
No appearance for appellee Direct Capital  
Corporation.

Before: PAPPAS, DUNN and KIRSCHER, Bankruptcy Judges.

\* 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 Appellant, chapter 11<sup>1</sup> debtor in possession IK/S-Bar, LLC  
2 ("IK/S"), appeals the bankruptcy court's order granting the  
3 motion of appellee Direct Capital Corporation ("Direct Capital")  
4 for relief from the automatic stay to enforce its rights under an  
5 equipment lease. We AFFIRM.

6 **FACTS**

7 IK/S filed for protection under chapter 11 of the Bankruptcy  
8 Code on December 21, 2010, and has, since then, continued to  
9 operate its business as a debtor in possession.

10 IK/S is managed by its Managing Member, Ivan Kane ("Kane"),  
11 an entrepreneur who is the principal of several other restaurant-  
12 related corporations and businesses. In 2008, two of Kane's  
13 controlled corporations, Ivan Kane Enterprises, Inc. and The Gin  
14 Joint, LLC (the "Original Lessees"), entered into an Equipment  
15 Lease Agreement (the "Lease") with Capital Network Leasing Corp.  
16 ("Capital Network") pertaining to certain audio and kitchen  
17 equipment. Kane signed the Lease for both of the Original  
18 Lessees as their President. The Lease required the Original  
19 Lessees to make monthly lease payments, and took effect on May 1,  
20 2008, with the signature of Capital Network's authorized  
21 representative. There is no reference in the Lease to IK/S.

22 The Lease contains several provisions relevant in this  
23 dispute: Paragraphs 3 and 6 deal with choice of law, and provide  
24 that the Lease shall be interpreted under the laws of the State

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25  
26 <sup>1</sup> Unless specified otherwise, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
28 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037. All "Civil Rule" references are to  
the Federal Rules of Civil Procedure.

1 of New Hampshire;<sup>2</sup> Paragraph 4 prohibits assignment of the Lease  
2 by the Original Lessees without first obtaining Capital Network's  
3 written consent; and Paragraph 24 prohibits waiver of any of  
4 Capital Network's rights under the Lease absent its prior written  
5 consent.

6 Sometime in 2008, Kane purportedly assigned all rights and  
7 obligations of the Original Lessees to IK/S with an effective  
8 date of March 18, 2008. ER at 78-80. There is no evidence in  
9 the record that IK/S, Kane or the Original Lessees ever notified  
10 Capital Network of the purported assignment of the Lease to IK/S.

11 Capital Network assigned its rights as lessor under the  
12 Lease to Direct Capital on May 1, 2008; this assignment was  
13 acknowledged in writing by Kane. Direct Capital's principal  
14 place of business is 155 Commerce Way, Portsmouth, New Hampshire.

15 After IK/S's bankruptcy filing, Direct Capital filed a  
16 motion for relief from the automatic stay on February 3, 2011,  
17 seeking an order authorizing it to enforce its rights under the  
18 Lease and, presumably, to recover possession of the equipment  
19 from IK/S. As grounds for relief under § 362(d)(1), Direct  
20 Capital alleged that its interest in the equipment was not

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22 <sup>2</sup> Paragraph 3 states that the Lease is intended to be a  
23 Statutory Finance Lease under the laws of New Hampshire.  
24 Paragraph 6 states that the parties agree that the Lease should  
25 be interpreted according to the laws of the state of the Lessor's  
26 principal place of business, or, if assigned, the Lessor's  
27 assignee's principal place of business. Because the parties have  
28 raised no such issue, we express no opinion concerning whether  
the Lease, under applicable state law, is indeed a "true lease"  
which must be assumed or rejected in the bankruptcy case by IK/S  
under § 365, or whether the Lease may be treated as a financing  
arrangement, and its terms restructured via a chapter 11 plan.

1 adequately protected, and that the fair market value of the  
2 leased equipment was declining. Under § 362(d)(2)(A) and (B),  
3 Direct Capital argued that IK/S had no interest in the leased  
4 equipment, and that it was not necessary for an effective  
5 reorganization. It appears undisputed that there had been no  
6 payments made to Direct Capital on the Lease by any party in the  
7 eight months before the filing of the stay relief motion. The  
8 motion was supported by a declaration of Direct Capital's  
9 Collections Supervisor, Ryan Hodsdon.

10 IK/S filed an opposition to this motion on February 11,  
11 2011. In its opposition, IK/S argued that the stay relief motion  
12 should be denied because IK/S had equity in the equipment; the  
13 equipment was critical to IK/S's reorganization efforts; and  
14 Direct Capital was seeking to place its interests ahead of other  
15 secured creditors, and that the value of IK/S's assets would be  
16 enhanced by continuing as a going concern, something it could not  
17 do without the equipment. The opposition was supported by the  
18 declaration of Ivan Kane.

19 The bankruptcy court conducted a hearing on Direct Capital's  
20 motion for relief from stay on March 8, 2011<sup>3</sup> at which counsel  
21 for IK/S and Direct Capital appeared. Direct Capital's attorney  
22 argued that the Lease was not an asset of the IK/S bankruptcy  
23 estate, noting that it had not been signed by IK/S, and that the

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24  
25 <sup>3</sup> IK/S provided the Panel with a partial transcript of the  
26 March 8, 2010 hearing, including only the bankruptcy court's oral  
27 findings and decision announced at the end of the hearing. The  
28 Panel has elected to review the full transcript of the hearing  
found in the bankruptcy court's docket. O'Rourke v. Seaboard  
Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 958 (9th Cir.  
1989).

1 Lease prohibited any assignment by the Original Lessees. Direct  
2 Capital's lawyer next noted that no payments had been made by any  
3 party for the previous nine months.

4 IK/S's attorney responded that all relevant issues had been  
5 addressed in its opposition. Counsel's sole comment concerning  
6 Direct Capital's argument that the Lease was not property of IK/S  
7 was:

8 One other fact that – the issue that was raised a  
9 number of times about [the equipment] not being  
10 property of the estate, [§] 541 is very clear that this  
11 is – that a lease is property of the estate. The  
12 Debtor has an equitable certainly interest in the lease  
13 and the use of the equipment.

14 Hr'g Tr. 4:16-21, March 8, 2011.

15 After considering the record and the arguments of counsel,  
16 the bankruptcy judge announced his findings and decision on the  
17 record. The court focused on whether the Lease was property of  
18 the bankruptcy estate:

19 The moving party has sought relief from stay on two  
20 grounds. The two that I find most pertinent are as  
21 follows: The moving party has given me evidence which  
22 is not controverted by the Debtor that the property []  
23 is subject to a lease and that the lease was made  
24 between the moving party and another entity and that  
25 there is a provision in the lease that prohibits  
26 assignment of rights under the lease without the  
27 consent of the lessor.

28 This is not contradicted by [IK/S]. And that in and of  
itself would constitute cause to grant relief from stay  
under (d)(1).

Hr'g Tr. 5:24-6:10.

The bankruptcy court also noted, as a second reason for its  
decision, that no lease payments had been made. The court  
acknowledged that if a lessor accepts payments from a party other  
than the lessee which is in possession of the property subject to

1 a lease, an argument could be made "not always, but sometimes"  
2 that the lessor had waived the anti-assignment provision in the  
3 lease. Hr'g Tr. 6:11-17. However, the bankruptcy court did not  
4 find that such a waiver had occurred in this case. Instead, the  
5 bankruptcy court concluded that Direct Capital had satisfied its  
6 burden under § 362(d)(1) of showing "cause" and granted relief  
7 from stay. It did not address Direct Capital's claim for relief  
8 under § 362(d)(2).

9 The bankruptcy court entered its order granting Direct  
10 Capital's motion for relief from the automatic stay on April 8,  
11 2011. IK/S filed a timely appeal on April 12, 2011.

#### 12 JURISDICTION

13 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
14 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C. § 158.

#### 15 ISSUE

16 Whether the bankruptcy court abused its discretion in  
17 granting relief from stay to Direct Capital under § 362(d)(1)?

#### 18 STANDARD OF REVIEW

19 An order granting relief from the automatic stay is reviewed  
20 for abuse of discretion. Kronemyer v. Am. Contractors Indem.  
21 Co. (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009). In  
22 applying the abuse of discretion standard, we first "determine de  
23 novo whether the [bankruptcy] court identified the correct legal  
24 rule to apply to the relief requested." United States v.  
25 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). If the  
26 correct legal rule was applied, we then consider whether its  
27 "application of the correct legal standard was (1) illogical,  
28 (2) implausible, or (3) without support in inferences that may be

1 drawn from the facts in the record." Id. Only in the event that  
2 one or more of these three apply are we then able to find that  
3 the bankruptcy court abused its discretion. Id.

#### 4 DISCUSSION

5 As a preliminary matter, we note that the bankruptcy court  
6 granted Direct Capital's motion only under § 362(d)(1), finding  
7 adequate "cause" for relief because IK/S was not a lessee under  
8 the Lease, and consequently, that the Lease was not property of  
9 the estate. As a result, the extensive discussion in IK/S's  
10 appellate brief concerning § 362(d)(2), its "equity" in the  
11 leased equipment, and its critical need for the equipment to  
12 reorganize, is largely irrelevant in this appeal.<sup>4</sup> The standards  
13 for relief set forth in §§ 362(d)(1) and (d)(2) are independent  
14 and alternative. Can-Alta Props., Ltd. v. State Sav. Mortg. Co.  
15 (In re Can-Alta Props., Ltd.), 87 B.R. 89, 92 (9th Cir. BAP

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17 <sup>4</sup> As discussed below, the Panel affirms the bankruptcy  
18 court's decision to grant relief from stay under § 362(d)(1), and  
19 did not consider in its deliberations IK/S's arguments under  
20 § 362(d)(2). Nevertheless, subsequent developments disclosed by  
21 counsel for IK/S at the Panel hearing undercut IK/S's argument  
22 that the Lease and equipment were necessary for reorganization.  
23 Counsel informed the Panel that he had filed IK/S's disclosure  
24 statement and plan of reorganization the previous day. See  
25 Disclosure Statement at dkt. no. 122. Page 9 of the Disclosure  
26 Statement states that the restaurant and all assets of IK/S were  
27 sold and executory contracts were assigned to the new owners,  
28 with the sale and assignment closing on September 14, 2011, or  
one week before the hearing before the Panel. IK/S had received  
the proceeds from the sale and filed a liquidation plan.  
Excluded from the sale and assignment were the Lease and  
equipment at issue in this appeal. See Asset Purchase Agreement  
¶ 1.2(g) at dkt. no. 101. Thus, contrary to the repeated  
arguments of IK/S that the equipment was necessary for a possible  
sale and reorganization, the sale was completed and a liquidation  
plan filed without including the Lease or the equipment.

1 1988). In other words, relief from stay may be granted for  
2 "cause" under subsection (d)(1) despite the existence of debtor's  
3 equity in the property, or its need for the property in its  
4 reorganization. Id.

5 Similarly, IK/S's discussion of adequate protection in this  
6 context is also less than helpful. While a "cause" for stay  
7 relief explicitly referenced in § 362(d)(1) is a lack of adequate  
8 protection, it is but one example of cause, rather than the  
9 exclusive ground for relief under § 362(d)(1). Ellis v. Parr  
10 (In re Ellis), 60 B.R. 432, 435 (9th Cir. BAP 1985). Instead,  
11 what constitutes cause to terminate the stay is determined on a  
12 case by case basis. Delaney-Morin v. Day (In re Delaney-Morin),  
13 304 B.R. 365, 369 (9th Cir. BAP 2003) (citing MacDonald v.  
14 MacDonald (In re MacDonald), 755 F.2d 715, 717 (9th Cir. 1985)).

15 Finally, under § 362(g)(2), the party seeking to preserve  
16 the stay, in this case IK/S, had the ultimate burden of proof on  
17 whether good cause existed to justify relief from the stay. In  
18 re Ellis, 60 B.R. at 435.<sup>5</sup>

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20 <sup>5</sup> At oral argument, counsel for IK/S insisted that Direct  
21 Capital had not sought relief under § 362(d)(1) in that it had  
22 not "checked that box" on the form motion for relief from stay  
23 used in the Central District of California bankruptcy court.  
24 Consequently, counsel argued, IK/S was not required and had no  
25 reason to make an offer of adequate protection to Direct Capital  
26 before the motion hearing. After review of the record, it  
27 appears counsel's representation is incorrect. On its form  
28 motion, Direct Capital checked the boxes marked "3. Grounds for  
Relief from Stay: (a) Pursuant to 11 U.S.C. § 362(d)(1), cause  
exists to grant Movant the requested relief from stay as follows:  
(1) Movant's interest in the Property is not adequately  
protected." IK/S Excerpts of Record at p. 7; see also dkt. no.  
43 at p. 3. Counsel's argument is also not consistent with

(continued...)



1 After its review of the record, the bankruptcy court found  
2 that the only relevant evidence submitted showed that the Lease  
3 had been entered into by entities other than IK/S as lessee, and  
4 that the Lease expressly prohibited assignment of "rights under  
5 the lease or the lessee's interest in the Lease without the  
6 consent of the lessor." Hr'g Tr. 6:1-7. Since insufficient  
7 evidence was presented by IK/S to prove that Direct Capital had  
8 consented to any assignment, the bankruptcy court concluded that  
9 IK/S had no cognizable interest in the Lease. The bankruptcy  
10 court did not err in its decision.

11 If a chapter 11 debtor has no interest in a leased property,  
12 it is not property of the bankruptcy estate. Arizona Appetito's  
13 Stores, Inc. v. Paradise Vill. Investment Co. (In re Arizona  
14 Appetito's Stores, Inc.), 893 F.2d 216, 218 (9th Cir. 1990).<sup>6</sup>  
15 Because IK/S was not a party to the Lease, the enforcement of the  
16 Lease is a matter between Direct Capital and the Original  
17 Lessees, Ivan Kane Enterprises, Inc. and The Gin Joint, LLC.  
18 Since these are all nondebtor parties, that contest must be

19 \_\_\_\_\_  
20 <sup>5</sup>(...continued)

21 IK/S's opposition to the stay relief motion it filed in the  
22 bankruptcy court, where IK/S devoted most of three pages to  
23 responding to Direct Capital's § 362(d)(1) arguments. IK/S  
24 Excerpts of Record at pp. 63-65; see also dkt. no. 56 at 9-11.

25 <sup>6</sup> In a brief comment at the hearing in the bankruptcy  
26 court, IK/S argues that "the issue that was raised by counsel a  
27 number of times about it not being property of the estate, [§]  
28 541 is very clear that this is – that a lease is property of the  
estate. The Debtor has an equitable certainly interest in the  
lease and the use of the equipment." Hr'g Tr. 4:17-21. Although  
IK/S is correct that "a" lease may be property of the estate  
under § 541(a), IK/S has not shown through the facts of this case  
that "this" Lease was property of its bankruptcy estate.

1 adjudicated in state court. As the Ninth Circuit has long held,  
2 "cause" exists for relief from stay under § 362(d)(1) where the  
3 issues are more appropriately adjudicated in a state court.

4 Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.),  
5 912 F.2d 1162, 1169 (9th Cir. 1990); Piombo Corp. v. Castlerock  
6 Props. (In re Castlerock Props.), 781 F.2d 159, 163 (9th Cir.  
7 1986).

8 The commencement of a bankruptcy case creates an estate  
9 comprised of all legal or equitable interests of the debtor in  
10 property, wherever located and by whomever held, as of the  
11 commencement of the case. § 541(a)(1). Although § 541 provides  
12 the framework for determining the scope of the bankruptcy estate,  
13 it does not provide the rules for determining whether the debtor  
14 has an interest in property in the first place. Instead, the  
15 bankruptcy court must look to state law to determine whether, and  
16 to what extent, the debtor has any legal or equitable interests  
17 in property as of the commencement of the case. Butner v. United  
18 States, 440 U.S. 48, 54-55 (1979) ("Congress has generally left  
19 the determination of property rights in the assets of a  
20 bankrupt's estate to state law. . . . Unless some federal  
21 interest requires a different result, there is no reason why such  
22 interests should be analyzed differently simply because an  
23 interested party is involved in a bankruptcy proceeding.");  
24 Gaughan v. Edward Dittlof Rev. Tr. (In re Costas), 555 F.3d 790,  
25 794 (9th Cir. 2009).

26 The bankruptcy court's analysis in this case is consistent  
27 with the law of New Hampshire. The Lease contains two choice of  
28 law clauses governing its interpretation, both instructing that

1 its terms are to be interpreted using New Hampshire law. A forum  
2 selection clause in a contract is presumptively valid. Doe 1 v.  
3 AOL LLC, 552 F.3d 1077, 1083 (9th Cir. 2009) (citing M/S Bremen  
4 v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972)).

5 As a general rule, the courts of New Hampshire will enforce  
6 a contract according to the plain meaning of its terms, and when  
7 interpreting a contract, the "inquiry focuses on the intent of  
8 the contracting parties at the time of the agreement." R. Zoppo  
9 Co. v. City of Dover, 124 N.H. 666, 671, 475 A.2d 12, 16 (N.H.  
10 1984). "In the absence of ambiguity, the parties' intent will be  
11 determined from the plain meaning of the language used. The  
12 words and phrases used by the parties will be assigned their  
13 common meaning, and we will ascertain the intended purpose of the  
14 contract based upon the meaning that would be given to it by a  
15 reasonable person." Greenhalgh v. Presstek, 152 N.H. 695, 698,  
16 886 A.2d 1000, 1003 (N.H. 2005).

17 IK/S has not suggested that terms of the Lease are in any  
18 fashion ambiguous. Specifically, it has not questioned the  
19 meaning of the provisions of the Lease prohibiting an assignment  
20 of lessee rights by the Original Lessees absent the written  
21 consent of the lessor, and prescribing that no waiver of the  
22 Lease's terms is permitted without written approval of the  
23 lessor. IK/S has not argued, nor submitted any evidence to show,  
24 that Direct Capital was notified and consented to the assignment  
25 of the Lease from the Original Lessees to IK/S. Instead, IK/S  
26 argues that Direct Capital impliedly waived the anti-assignment  
27 provisions in the Lease by accepting lease payments directly from  
28 IK/S.

1           Assuming IK/S did indeed make direct lease payments at some  
2 time to Direct Capital, the New Hampshire Supreme Court has  
3 considered a similar case of an equipment lease agreement and its  
4 purported assignment. As in this appeal, in Prime Fin. Group v.  
5 Masters, 676 A.2d 528 (N.H. 1996), the lease agreement precluded  
6 the assignment of the lessee's rights without the written consent  
7 of the lessor. Id. at 529. The lease agreement also contained a  
8 provision forbidding a waiver of any of the lessor's rights under  
9 the lease unless the waiver was in writing. Id. Despite these  
10 provisions, the lessee in Masters assigned its rights to another  
11 party without the lessor's consent. Id. However, unlike the  
12 facts here, the original lessee notified the lessor of the  
13 assignment, and sought its consent. While the lessor did not  
14 grant consent, it thereafter accepted payments from the assignee.  
15 A jury in the trial court determined, based on the facts, that  
16 the parties to the lease had agreed to waive the contractual  
17 provision requiring assignments of the lease to be in writing,  
18 and that the lessor had effectively agreed to the assignment, as  
19 indicated by its conduct. The New Hampshire Supreme Court found  
20 no error in the trial court proceedings, concluding that a waiver  
21 of the anti-assignment provisions could be implied by the conduct  
22 of the parties. Id.

23           We believe a fair view of Masters would require that the  
24 bankruptcy court enforce an anti-assignment clause in a lease  
25 unless, as the trier of fact, it finds that the parties had  
26 agreed to modify that provision. However, the lessor in Masters  
27 had not only accepted payments from the assignee, he had been  
28 notified earlier of the assignment, and requested to consent

1 prior to acceptance of lease payments from the purported  
2 assignee. In other words, it was the lessor's acceptance of  
3 lease payments with both the knowledge of their source, and that  
4 there had been an assignment of the lease, that constituted  
5 evidence of an implied, mutual agreement to modify the anti-  
6 assignment clause which was accepted by the trial jury and  
7 ultimately approved by the New Hampshire Supreme Court.

8 In this appeal, IK/S offered no evidence to the bankruptcy  
9 court to show that the Original Lessees or IK/S had notified  
10 Capital Network or Direct Capital of the assignment of the  
11 lessee's interest to IK/S, nor was the lessor's consent to an  
12 assignment ever sought or obtained. Instead, IK/S bases its  
13 argument that there was waiver on the Kane declaration in the  
14 bankruptcy case by alleging, merely, that "[IK/S] has made all of  
15 the payments in the amount of \$40,579.55 on the Lease." IK/S  
16 repeats this precise claim in its appellate brief. IK/S Op. Br.  
17 at 2. While these words appear to be carefully selected, and  
18 imply that IK/S made all payments required under the Lease, as  
19 confirmed by IK/S's attorney at oral argument, a more precise  
20 statement, according to the supporting documentation provided by  
21 IK/S in the record, would be that "All payments that were made on  
22 the Lease were made by IK/S." Indeed, it is undisputed that no  
23 payments on the Lease were made in the nine months prior to the  
24 hearing on the stay relief motion.<sup>7</sup>

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26 <sup>7</sup> The supporting documentation for IK/S's claim that it was  
27 the source of payments made on the Lease is a one-page list,  
28 headed "IK/S BAR, LLC Equipment Leasing Expense Record." It is a  
simple three column chart that includes the date, vendor (all  
(continued...)

1           Given the evidence submitted by IK/S, the bankruptcy court  
2 did not err in its finding that "no payments have been made."  
3 Hr'g Tr. 6:11-12. The bankruptcy court followed this finding  
4 with an explanation that "if payments had been made consistently  
5 and they're accepted by a lessor from someone who is in  
6 possession of property subject to a lease who is not the lessee,  
7 an argument can be made - not always, but sometimes can be made  
8 with regards to a waiver of the anti-assignment provision. But  
9 I've reviewed the motion and the opposition very carefully, and  
10 the moving party has carried its burden under Section 362(d)(1).  
11 Based upon the foregoing findings of fact and conclusions of law,  
12 the motion is granted." Hr'g Tr. 6:11-21.

13           The Lease included an anti-assignment clause. Consistent  
14 with the New Hampshire case law, it appears the bankruptcy court  
15 considered whether the parties by their conduct had waived the  
16 anti-assignment clause where the lessor purportedly accepted  
17 payments from the assignee. The bankruptcy court declined to  
18 accept the evidence presented by IK/S as adequate to show that it  
19 had made all of the required payments under the lease to Direct  
20 Capital.

21           Whether Direct Capital had impliedly consented to the  
22 Original Lessees' assignment of the Lease to IK/S was a question  
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24           <sup>7</sup>(...continued)  
25 Direct Capital), and amount of alleged payments. No copies of  
26 cancelled checks or other proof of the details of the alleged  
27 payments to Direct Capital were offered. Moreover, the record  
28 also reflects that the business address of the Original Lessees  
is the same as the address of IK/S, and the name of one of the  
Original Lessees, Ivan Kane Enterprises, Inc., is similar to the  
d/b/a of IK/S, Ivan Kane's Café.

1 of fact. Masters, 676 A.2d at 531. That IK/S made some, but not  
2 all of the required lease payments directly to Direct Capital, is  
3 some evidence that Direct Capital consented to the assignment of  
4 the Lease, but the bankruptcy court declined to so find. Where  
5 there are two permissible views of the evidence, the fact-  
6 finder's choice between them cannot be clearly erroneous. United  
7 States v. Working, 224 F.3d 1093, 1102 (9th Cir. 2000)(en banc).

8 We conclude that, on this record, the bankruptcy court did  
9 not abuse its discretion in granting relief from stay under  
10 § 362(d)(1) because the Lease was assigned to IK/S in violation  
11 of its terms.

12 **CONCLUSION**

13 We AFFIRM the decision of the bankruptcy court.  
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