

MAR 14 2018

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NOT FOR PUBLICATION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

In re:)	BAP No. AZ-17-1291-LKuB
)	
J & M FOOD SERVICES, LLC,)	Bk. No. 2:17-bk-01466-DPC
)	
Debtor.)	
_____)	
J & M FOOD SERVICES, LLC,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM*
)	
CAMEL INVESTMENT L.L.C.,)	
)	
Appellee.)	
_____)	

Argued and Submitted on February 23, 2018
at Phoenix, Arizona

Filed - March 14, 2018

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Daniel P. Collins, Chief Bankruptcy Judge, Presiding

Appearances: Jonathan P. Ibsen of Canterbury Law Group, LLP
argued for Appellant; Teresa H. Foster of Brier
Irish Hubbard & Erhart, PLC argued for Appellee.

Before: LAFFERTY, KURTZ, and BRAND, 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 8024-1.

1 Debtor appeals the bankruptcy court's order denying its
2 motion to assume lease nunc pro tunc and granting Appellee's
3 motion for relief from stay. We AFFIRM.

4 **FACTS**

5 Debtor J&M Food Services, LLC, is an Arizona limited
6 liability company. The original members of the Debtor were Jay
7 Ji-Hoon Chung and Maggie Liao; Ms. Liao is now the sole member of
8 the Debtor. Beginning in May 2014, Debtor leased from Appellee
9 Camel Investment L.L.C. ("Landlord") commercial real property at
10 Camelback-Miller Plaza in Scottsdale, Arizona (the "Premises").
11 Debtor operates a restaurant called Sushi J at the Premises.

12 Sometime in 2015, Landlord approached Mr. Chung about
13 relocating Sushi J from the Premises to Landlord's nearby
14 property in the Camelback-Miller Plaza ("Replacement Premises").
15 Landlord hired an architect and an interior designer to draw up
16 plans for the Debtor's relocation into the Replacement Premises,
17 which was a former Arby's restaurant location. Ms. Liao and
18 Mr. Chung were apparently willing to relocate Sushi J to this
19 building, but even if they had been unwilling, the lease gave
20 Landlord the right to relocate Debtor's operation to another
21 location in the shopping center.

22 On July 8, 2016, the Landlord executed a letter of intent
23 providing for an entity called D'Lite to occupy the Premises
24 beginning April 1, 2017. But rather than relocate the Debtor to
25 the Replacement Premises, Landlord entered into a lease for the
26 Replacement Premises with P&J Food Services, LLC ("P&J"), a
27 limited liability company owned by Pajman Mir Malihi. Ms. Liao
28 claimed that Mr. Chung was a silent partner with Mr. Malihi in

1 P&J, which opened a restaurant named "J's Kaiyo Sushi & Bar" in
2 the Replacement Premises.

3 According to Ms. Liao's trial testimony, Mr. Chung, her ex-
4 boyfriend, began diverting funds from J&M and became physically
5 abusive toward Ms. Liao. As a result, in June of 2016 she asked
6 him to move out of the apartment they shared. Then, in July of
7 2016, Mr. Chung obtained a protective order against Ms. Liao to
8 keep her from the restaurant.

9 In January 2017, Ms. Liao commenced litigation in Arizona
10 Superior Court against Mr. Chung, Landlord, and others, alleging,
11 among other things, that money was being diverted from the Debtor
12 by Mr. Chung and that Mr. Chung had colluded with Landlord to
13 enable Mr. Chung to usurp the Debtor's opportunity to lease the
14 Replacement Premises.¹ The state court appointed a receiver for
15 the Debtor.

16 On February 17, 2017, Landlord sent a letter to the Debtor
17 and to Ms. Liao's attorney declaring a default under the lease
18 due to the state court's appointment of a receiver and declaring
19 the Lease immediately terminated. That night, Richard and Jane
20 Green and Ms. Liao slept in the Premises in hopes of staving off
21 any attempts by the Landlord to shutter the Premises. The next
22 day, fearing a lockout of the Premises by Landlord, Ms. Liao
23 caused the Debtor to file a chapter 11² bankruptcy petition.

24
25 ¹ In the bankruptcy case, Debtor filed an adversary
26 proceeding against Landlord, Chung, Mr. Malihi, P&J, and others,
27 seeking, among other things, damages for stay violations and
28 fraudulent transfers.

² Unless specified otherwise, all chapter and section
(continued...)

1 On March 1, 2017, Landlord filed its motion for stay relief
2 ("First Stay Lift Motion"), claiming the lease was not property
3 of the bankruptcy estate based on its notice of termination.
4 Debtor opposed the First Stay Lift Motion. The court denied the
5 motion after a hearing, finding that the notice of termination
6 violated the receivership order and was thus ineffective to
7 terminate the Lease.

8 It is undisputed that the 120-day deadline under § 365(d)(4)
9 for the Debtor to assume or reject the lease expired on June 18,
10 2017, and that Debtor neither moved to assume the lease nor
11 requested an extension of the deadline. On June 23, 2017, the
12 Landlord filed another motion to lift the automatic stay (the
13 "Second Stay Lift Motion"), seeking relief on the ground that
14 because Debtor failed to file a timely motion to assume the
15 Lease, the Lease was deemed rejected and the Premises must be
16 surrendered to the Landlord. One week later, Debtor filed a
17 motion to assume lease nunc pro tunc ("Assumption Motion"). In
18 the Assumption Motion, counsel explained that the assumption
19 deadline had been missed due to "chaos" at Debtor's counsel's law
20 firm following the sudden death of one of its partners on
21 April 14, 2017. Debtor requested the court use its equitable
22 powers under § 105(a) to allow assumption of the Lease nunc pro
23 tunc. Debtor argued that Landlord knew Debtor intended to assume
24 the Lease based on discussions between its counsel and Debtor's

25
26 ²(...continued)
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and all "Civil Rule" references are to the Federal
Rules of Civil Procedure.

1 counsel, statements made by Debtor's counsel at the First Stay
2 Lift hearing, and the fact that Debtor had paid pre- and
3 postpetition rent. Landlord opposed the Assumption Motion, and
4 the bankruptcy court held a hearing on both motions. After
5 hearing argument, the bankruptcy court set the matters for an
6 evidentiary hearing on whether an oral motion to assume had been
7 made or whether there had been a de facto assumption of the
8 Lease.

9 At the evidentiary hearing, Ms. Liao and Mr. Greene
10 testified on Debtor's behalf, and Fredrick Touton, an employee of
11 Landlord's property manager, testified on behalf of Landlord.
12 Ms. Liao testified that since the petition date, she had brought
13 current postpetition rent and common area maintenance ("CAM")
14 charges, continued to operate the restaurant, performed repairs
15 to the Premises, and protested Jay's Kaiyo Sushi & Bar's liquor
16 license application. Ms. Liao also testified that she had been
17 notified by the City of Scottsdale that the restaurant's grease
18 traps needed to be replaced, and that she or her attorneys had
19 notified Landlord of this issue. Mr. Touton testified that he
20 was unaware of any of these actions until shortly before the
21 evidentiary hearing.³

22 At closing arguments, Debtor's counsel requested production
23 of certain emails between Landlord and D'Lite which Mr. Touton
24 had referred to during cross-examination. The bankruptcy court
25 stated that the emails were irrelevant to the question before it
26

27 ³ The trial exhibits were not included in Appellant's
28 excerpts of record.

1 and denied the request.

2 The bankruptcy court entered written findings and
3 conclusions in its Under Advisement Order Re Commercial Real
4 Property Lease. The bankruptcy court found that the Lease with
5 Landlord was deemed rejected on June 19, 2017, that Debtor had
6 not made either an oral or written motion to assume the Lease,
7 that Landlord had not waived its § 365(d)(4) rights, and that
8 Landlord's conduct had not estopped it from enforcing those
9 rights. The bankruptcy court also declined to invoke its
10 § 105(a) powers to permit a nunc pro tunc assumption of the
11 Lease. Thereafter the court entered its order granting
12 Landlord's Second Stay Lift Motion and denying Debtor's
13 Assumption Motion. Debtor timely appealed.

14 **JURISDICTION**

15 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
16 §§ 1334 and 157(b)(2)(G) and (M). We have jurisdiction under
17 28 U.S.C. § 158.

18 **ISSUES⁴**

19 Whether the bankruptcy court abused its discretion in
20 denying Debtor's request to order Landlord to produce emails.

21 Whether the bankruptcy court erred in denying Debtor's
22 Assumption Motion.

23 **STANDARDS OF REVIEW**

24 We review the bankruptcy court's evidentiary rulings for
25 abuse of discretion; we do not reverse unless the error was
26

27 ⁴ Debtor did not assign error to the portion of the
28 bankruptcy court's order granting the Second Stay Lift Motion.

1 prejudicial. Hudson v. Martingale Inv., LLC (In re Hudson),
2 504 B.R. 569, 573 (9th Cir. BAP 2014). A bankruptcy court abuses
3 its discretion if it applies the wrong legal standard, misapplies
4 the correct legal standard, or if its factual findings are
5 clearly erroneous. TrafficSchool.com, Inc. v. Edriver Inc.,
6 653 F.3d 820, 832 (9th Cir. 2011).

7 We review the bankruptcy court's findings of fact for clear
8 error, and its conclusions of law de novo. Ariz. Appetito's
9 Stores, Inc. v. Paradise Village Inv. Co. (In re Ariz. Appetito's
10 Stores, Inc.), 893 F.2d 216, 218 (9th Cir. 1990).

11 A court's factual determination is clearly erroneous if it
12 is illogical, implausible, or without support in the record.
13 United States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir.
14 2009) (en banc) (quoting Anderson v. City of Bessemer City,
15 470 U.S. 564, 577 (1985)). Where there are two permissible views
16 of the evidence, the factfinder's choice between them cannot be
17 clearly erroneous. Anderson, 470 U.S. at 574; see also Hinkson,
18 585 F.3d at 1260 (recognizing the rule that a trial court's
19 choice between two permissible views of the weight of evidence is
20 not clearly erroneous where the evidence would support a
21 conclusion either way, citing United States v. Yellow Cab Co.,
22 338 U.S. 338, 342 (1949)).

23 **DISCUSSION**

24 Section 365(d) (4) of the Bankruptcy Code governs the
25 assumption or rejection of an unexpired nonresidential lease of
26 real property in a chapter 11 case, providing in relevant part:

27 [A]n unexpired lease of nonresidential real
28 property under which the debtor is the lessee shall be
deemed rejected, and the trustee shall immediately

1 surrender that nonresidential real property to the
2 lessor, if the trustee does not assume or reject the
unexpired lease by the earlier of -

3 (i) the date that is 120 days after the date of
4 the order for relief; or

5 (ii) the date of the entry of an order confirming
6 a plan.

7 The trustee or debtor-in-possession must timely perform all
8 postpetition obligations of the debtor under the lease pending
9 assumption or rejection. § 365(d)(3).

10 Lease rejection upon the expiration of the § 365(d)(4)
11 deadline occurs automatically without need for court approval,
12 and once statutory rejection has occurred, that rejection is
13 conclusive. In re Ariz. Appetito's Stores, Inc., 893 F.2d at
14 219. Once the lease is deemed rejected, the debtor must
15 immediately surrender the leased property to the lessor. See
16 Harvest Corp. v. Riviera Land Co., 868 F.2d 1077, 1079 (9th Cir.
1989).

17 As noted, the parties do not dispute that Debtor did not
18 file a motion to assume the Lease before the expiration of the
19 § 365(d)(4) deadline. Accordingly, Debtor may prevail in this
20 appeal only if there is a basis to override the deadline. The
21 bankruptcy court found none. Specifically, the bankruptcy court
22 concluded that (i) under applicable Ninth Circuit authority, it
23 had no power to deem the parties' actions or inactions as an
24 implicit, de facto, or oral motion to assume the lease; and (ii)
25 neither waiver nor estoppel were available to overcome statutory
26 rejection of a lease under § 365, but even if they were, the

1 evidence did not support either theory.⁵

2 **A. The bankruptcy court did not abuse its discretion in denying**
3 **Debtor's oral motion to produce emails.**

4 At the evidentiary hearing, Debtor's counsel cross-examined
5 Mr. Touton regarding email communications between Landlord and
6 D'Lite, the entity with which Landlord had negotiated a lease of
7 the Premises. Mr. Touton indicated that he had emailed the
8 principal of D'Lite several times after the bankruptcy filing to
9 keep the company abreast of the developments in the bankruptcy.
10 When asked whether he had produced those emails for the
11 evidentiary hearing, Mr. Touton explained that he had not because
12 the "negotiation emails" were requested, which he interpreted as
13 only those emails transmitted before the lease terms had been
14 finalized.

15 After testimony had concluded, Debtor's counsel requested
16 that those emails be produced because they might contain a
17 statement that the Lease had been assumed. The bankruptcy court
18 stated that the emails were irrelevant to the question before it
19 and denied the request. Debtor provides no authority for its
20 assertion that this ruling was an abuse of discretion or that it
21 prejudiced Debtor, stating only: "The lower Court declined to
22 provide Debtor's counsel the negative inference, thereby
23 validating Landlord's intentional misconduct to withhold evidence
24

25 ⁵ The bankruptcy court also ruled that its equitable powers
26 under § 105(a) could not be invoked to save a debtor who failed
27 to timely assume an unexpired lease and that mistake or excusable
28 neglect under Civil Rule 60, applicable via Rule 9024, could not
be invoked to overcome the statutory lease assumption deadline.
Debtor has abandoned these issues on appeal.

1 supportive of a lease Assumption [sic]. This was error." We
2 find no basis to reverse the bankruptcy court's evidentiary
3 ruling.

4 **B. The bankruptcy court did not err in concluding that the**
5 **parties' conduct did not constitute an implicit, de facto,**
6 **or oral motion to assume.**

7 An oral motion to assume a lease must fit the definition of
8 a motion. Sea Harvest Corp., 868 F.2d at 1080. Rule 6006(a)
9 provides that "[a] proceeding to assume, reject, or assign an
10 executory contract or unexpired lease, other than part of a plan,
11 is governed by Rule 9014." Rule 9014, in turn, provides that
12 "relief shall be requested by motion, and reasonable notice and
13 opportunity for hearing shall be afforded the party against whom
14 relief is sought." Additionally, Rule 9013 requires that a
15 request for an order must be made by written motion unless made
16 during a hearing, and that the motion "shall state with
17 particularity the grounds therefor, and shall set forth the
18 relief or order sought."

19 In its Under Advisement Order, the bankruptcy court listed
20 the actions of the Debtor and Landlord that Debtor argued
21 constituted an implicit or de facto assumption. These are
22 (i) Debtor vigorously opposed the First Stay Lift Motion, arguing
23 that without its access to the Premises through the Lease, the
24 Debtor's contemplated chapter 11 plan would be crippled;
25 (ii) Debtor's Pre-Confirmation Report noted that Debtor intended
26 to file a plan of reorganization "that will enable it to continue
27 operating the restaurant postconfirmation"; (iii) the
28 Pre-Confirmation Report suggested the possibility of retaining a
reputation manager to help regain the restaurant's online

1 presence; (iv) a February 27, 2017 letter from Debtor's counsel
2 to Landlord's counsel noted that the Lease was property of the
3 Debtor's bankruptcy estate and referenced Debtor's intentions
4 concerning the Lease;⁶ (v) Debtor objected to the liquor license
5 application of the competing sushi restaurant slated to occupy
6 the Replacement Premises because Debtor feared the damage that
7 competition would cause to the Debtor's business location;
8 (vi) postpetition, Debtor paid the 2016 CAM charges assessed by
9 the Landlord, arguably paid the Landlord for the January 2017
10 rent, and was current on postpetition payments due under the
11 Lease that Landlord demanded and accepted postpetition;
12 (vii) Ms. Liao advanced \$20,000 postpetition to keep the Debtor's
13 restaurant operating at the Premises; (viii) Debtor's prepetition
14 lawsuit against Landlord and others sought damages arising out of
15 Landlord allowing the Replacement Premises to be occupied by a
16 competing business, which was apparently connected to Chung;
17 (ix) Debtor filed an adversary proceeding in this bankruptcy that
18 evidences its intent to run its sushi business in either the
19 Premises or the Replacement Premises; (x) postpetition emails and
20 other communications between the Landlord and the Debtor's
21 representatives concerning rent, grease trap repairs, and the
22 Replacement Premises reflect Debtor's intent to remain in the
23 Premises and that the Landlord knew or should have realized this
24 fact; and (xi) Debtor incurred and paid for several postpetition
25 repair bills at the Premises.

26 Based on the foregoing, the bankruptcy court found that

27
28 ⁶ This letter was not included in the excerpts of record.

1 "Debtor's filings with the bankruptcy court and oral
2 representations before this Court were consistent with the
3 Debtor's intent to assume the Lease, and . . . the Debtor's
4 desire was known (or should have been understood) by the
5 Landlord." But the bankruptcy court rejected the notion that the
6 parties' statements and understandings constituted an oral motion
7 to assume the Lease, noting that at no point did Debtor request
8 that the court enter an order approving the assumption of the
9 Lease, nor was the Landlord given reasonable notice and
10 opportunity for hearing. The evidence supports this finding.⁷

11 As for implicit or de facto assumption, this Panel has held
12 that a lease may not be assumed by conduct. Treat Fitness Ctr.,
13 Inc. v. Rainbow Inv. Co. (In re Treat Fitness Ctr., Inc.),
14 60 B.R. 878, 878 (9th Cir. BAP 1986). In that case, the Panel
15 interpreted § 365 and Rule 6006 to require a formal motion to
16 assume, "thus overruling cases under the former Bankruptcy Act
17 that required courts to judge whether words or deeds, often
18 ambiguous at best, constituted an assumption or rejection of a
19 lease or executory contract." Id. at 879. The bankruptcy court
20 thus concluded that, regardless of its finding that Debtor
21 intended to assume the Lease and the Landlord knew or should have
22 known of this fact, the court could not find a de facto or
23 implicit assumption of the Lease in the absence of a timely
24 motion to assume that complied with applicable Bankruptcy Rules.
25 We find no error in this conclusion.

26
27 ⁷ Despite Debtor's argument that statements made by counsel
28 at the April 27 hearing constituted an oral motion to assume, no
transcript of that hearing was offered into evidence.

1 Debtor urges this Panel to follow the reasoning of USPG
2 Portfolio Two, LLC v. Sportsman Link, Inc. (In re Sportsman's
3 Link, Inc.), No. 07-10454, 2007 WL 7023835 (Bankr. S.D. Ga.
4 Oct. 31, 2007). In that case, the bankruptcy court found that
5 the debtor had timely requested the court's permission to assume
6 a nonresidential real property lease. In so finding, the court
7 interpreted debtor's requests for permission to sublease the
8 premises as an oral motion to assume because such a request
9 necessarily presupposed that the debtor would assume the lease.
10 Id. at *4. But we are not bound by this opinion, which is
11 directly contradictory to applicable Ninth Circuit authority.
12 Sea Harvest Corp., 868 F.2d at 1080.

13 Debtor also contends that the bankruptcy court erred in
14 concluding that there was no de facto assumption of the Lease,
15 citing the fact that the Landlord accepted prepetition rent and
16 CAM charges postpetition.⁸ But under In re Treat Fitness Center,
17 which establishes a bright line rule that an assumption be
18 accomplished by formal motion, the acceptance of prepetition
19 obligations is irrelevant to whether there was a de facto or
20 implicit assumption.

21 **C. The bankruptcy court did not err in concluding that the**
22 **Landlord's position was not barred by the doctrines of**
waiver and estoppel.

23 We have found no controlling authority in the Ninth Circuit
24 regarding whether the doctrines of waiver and estoppel are

25
26 ⁸ As discussed below, the parties disputed whether the CAM
27 charges were pre- or postpetition obligations; the bankruptcy
28 court found that they were prepetition obligations, relying on
In re Ames Dept. Stores, Inc., 136 B.R. 353, 356 (Bankr. S.D.N.Y.
1992).

1 available to bar a lessor from asserting that a lease has been
2 deemed rejected under § 365(d)(4). Bankruptcy courts in this
3 circuit are divided on the issue. See, e.g., In re Sjoquist,
4 484 B.R. 207 (Bankr. C.D. Cal. 2012) (waiver and estoppel
5 defeated landlord's claim of rejection); In re VMS Nat'l Props.,
6 148 B.R. 942 (Bankr. C.D. Cal. 1992) (lessor waived rights under
7 § 365(d)(4) by accepting prepetition rents); In re Chandel
8 Enters., Inc., 64 B.R. 607 (Bankr. C.D. Cal. 1986) (concluding
9 that waiver and estoppel are not available in the context of
10 § 365(d)(4)).

11 In George v. Morro Bay (In re George), 177 F.3d 885 (9th
12 Cir. 1999), the Ninth Circuit Court of Appeals examined whether a
13 lessor that had demanded and accepted rent from the debtors after
14 the expiration of the § 365(d)(4) assumption deadline could be
15 barred by the doctrines of waiver or estoppel from asserting that
16 the lease had been rejected. The Court of Appeals declined to
17 decide whether those doctrines were available at all in the
18 context of § 365(d)(4), instead concluding that the lessor's
19 conduct did not constitute a waiver or justify application of
20 equitable estoppel.

21 Here, the bankruptcy court concluded that waiver and
22 estoppel are not available to contravene the requirements of
23 § 365(d)(4). The court found persuasive In re Chandel
24 Enterprises and rejected the reasoning of In re VMS Nat'l
25 Properties, a case relied upon by Debtor.

26 In In re Chandel Enterprises, the bankruptcy court
27 interpreted this Panel's decision in In re Treat Fitness and the
28 Ninth Circuit's decision in Lovitt v. Appleatchee Riders Ass'n

1 (In re Lovitt), 757 F.2d 1035 (9th Cir. 1985), as precluding the
2 application of waiver or estoppel in the § 365(d)(4) context. In
3 In re Lovitt, the Court of Appeals held that once an executory
4 contract is deemed rejected it is no longer property of the
5 bankruptcy estate. 757 F.2d at 1041.⁹ The bankruptcy court in
6 Chandel concluded that finding an assumption based on a
7 landlord's alleged waiver would defeat the purpose of and the
8 result required by § 365(d)(4). 64 B.R. at 610. As for
9 estoppel, the court found that failure to assume the lease
10 properly resulted in automatic rejection and extinguished any and
11 all interest of the debtor in the leasehold such that the court
12 had no jurisdiction to resurrect it. Id. The bankruptcy court
13 further concluded that Treat Fitness's holding that assumption
14 may only be accomplished by a timely formal motion necessarily
15 precluded using waiver or estoppel to accomplish an assumption.
16 Id. "If either waiver or estoppel were applicable, the
17 Congressional intent in enacting the 1984 amendments, eliminating
18 uncertainty regarding the status of nonresidential leases and
19 requiring the debtor-in-possession to take affirmative action to
20 assume the lease would be circumvented." Id. (citation omitted).

21 In In re VMS National Properties, the bankruptcy court ruled
22 that a lessor waived the assumption deadline under § 365(d)(4) by
23 accepting a partial prepetition cure and postpetition payments
24 after the expiration of that deadline. The bankruptcy court in

25
26 ⁹ Although Lovitt was decided under the Bankruptcy Act,
27 subsequent cases decided under the Bankruptcy Code also hold that
28 the rejection of an unexpired lease removes the lease from the
bankruptcy estate. In re Onecast Media, Inc., 439 F.3d 558, 563
(9th Cir. 2006).

1 VMS did not consider In re Treat Fitness or In re Chandel, and
2 instead cited bankruptcy cases from outside the Ninth Circuit for
3 the proposition that waiver and estoppel are available in the
4 § 365(d)(4) context.¹⁰

5 We find it unnecessary to determine whether, as a matter of
6 law, waiver or estoppel may be applied in the context of
7 § 365(d)(4) because we agree with the bankruptcy court that even
8 if those doctrines are available, they do not apply in this
9 instance.

10 **1. Waiver**

11 To determine that a waiver has occurred, the bankruptcy
12 court would need to find "(1) the existence at the time of the
13 waiver of a right, privilege, advantage or benefit; (2) the
14 actual or constructive notice thereof; and (3) the intention to
15 relinquish such right, privilege, advantage or benefit." In re
16 George, 177 F.3d at 889.

17 It is undisputed that the first two elements are met.
18 Debtor focuses its arguments on the Landlord's intent to
19 relinquish its rights under § 365(d)(4), relying on the conduct
20 listed in section B above. But here, unlike the lessor in In re
21 VMS Nat'l Properties, Landlord took no action post-rejection that
22 was inconsistent with rejection. Landlord filed its Second Stay
23 Lift Motion four days after the lease was deemed rejected.

24
25 ¹⁰ In re Car-Gill, Inc., 125 B.R. 133 (Bankr. E.D. Pa.
26 1991); In re Austin, 102 B.R. 897 (Bankr. S.D. Ga. 1989);
27 In re T.F.P. Resources, Inc., 56 B.R. 112 (Bankr. S.D.N.Y. 1985);
28 In re By-Rite Distrib., Inc., 47 B.R. 660, 670, n.16 (Bankr. D.
Utah 1985), rev'd on other grounds sub nom, By-Rite Distrib.,
Inc. v. Brierley, 55 B.R. 740 (D. Utah 1985).

1 Moreover, per § 365(d)(3), the Landlord's acceptance of
2 postpetition rents could not have been a waiver, as that
3 subsection provides that acceptance of performance of
4 postpetition lease obligations does not constitute a waiver or
5 relinquishment of lessor's rights under the lease. As for the
6 acceptance of prepetition amounts due, the evidence is unclear as
7 to whether or when the January 2017 rent was paid, and, based on
8 Mr. Touton's testimony, the Landlord believed that the 2016 CAM
9 charges were postpetition obligations.

10 **2. Estoppel**

11 A finding of inequitable conduct is necessary to estop a
12 landlord from asserting its § 365(d)(4) rights. Id. at 889-90.
13 Here, the court found that Landlord did not act inequitably
14 postpetition in dealing with the Debtor and its representatives.
15 The bankruptcy court acknowledged that other conclusions might be
16 drawn based on Landlord's prepetition conduct relative to the
17 Relocation Premises, but that conduct was not relevant to a
18 determination of whether Landlord should be equitably estopped
19 from asserting its rights under § 365(d)(4); instead it could be
20 addressed in the pending adversary proceeding or state court
21 action.

22 Debtor contends that the bankruptcy court clearly erred in
23 finding that the Landlord did not engage in inequitable conduct,
24 pointing out that the evidence at trial showed that Landlord's
25 representative stated to Ms. Liao that she "took over the lease"
26 and thus had to pay the prepetition rent and CAM charges.
27 Ms. Liao testified that in April 2017 she went to the Landlord's
28 office to pay the May rent and was told by a man she described as

1 "a skinny guy and like 40 something years old" that she had to
2 pay the 2016 CAM charges "because this summer you ran it only by
3 yourself. You took over the lease. You have to pay for this."
4 Debtor interprets the statement "you took over the lease" as
5 evidence that Landlord thought Debtor had assumed the lease, but
6 it is also plausible that the statement referred to the fact
7 that, prepetition, Ms. Liao had taken over managing the business
8 in place of Mr. Chung. The parties did not elicit testimony to
9 clarify that point, and the bankruptcy court made no finding.
10 Accordingly, the cited testimony, without more, is inadequate to
11 support a finding of inequitable conduct. Thus the bankruptcy
12 court did not err in finding no basis to apply equitable
13 estoppel.

14 **3. Whether the CAM charges arose pre-or postpetition is**
15 **irrelevant to the analysis of whether Landlord waived**
16 **or should be estopped from asserting its rights under**
17 **§ 365(d)(4).**

18 The bankruptcy court concluded that the 2016 CAM charges
19 were prepetition claims pursuant to In re Ames Dept. Stores,
20 136 B.R. at 356 (amounts charged to a debtor for common area
21 maintenance expenses and real estate taxes were unmatured,
22 prepetition obligations, not postpetition obligations subject to
23 immediate payment). Seizing on this conclusion, Debtor argues
24 that Ames Department Stores supports its argument that the
25 Landlord demanded payment of prepetition amounts. Landlord
26 points to the conflicting decision of In re R.H. Macy & Co, Inc.,
27 152 B.R. 869 (Bankr. S.D.N.Y. 1993), in which the bankruptcy
28 court found that even if such a debt arose prepetition, there was
no obligation for the Debtor to perform prepetition. Landlord

