United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions

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Judge:	Susan Pierson Sonderby

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
Kmart Corporation, et al.,	)	Case No. 02 B 2474
	)	(Jointly Administered)
	)	
Debtors.	)	Hon. Susan Pierson Sonderby

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes to be heard on the objection of Kmart Corporation to claims 37506, 37507, 37508, 37509, 37733, 37734, 37735, and 37773 filed by Rubloff Development Group, Inc. An evidentiary hearing was held and the court makes the following findings of fact and conclusions of law. For the reasons stated, the court will disallow the claims.

I. FINDINGS OF FACT

Background Facts

Kmart was a Michigan corporation with a principal place of business in Troy, Michigan. Rubloff Development Group ("Rubloff") is a diversified real estate development company. (Transcript of Proceedings ("Transcript"), p. 10).

Between October 1998 and July 2000, Kmart, as sublessor and Rubloff, as subtenant, entered into thirteen subleases of vacant "big-box" Kmart stores located in Illinois and Michigan (the "Subleases"). (Joint Pretrial Statement, Pt. II, ¶ 1); (Transcript, pp. 12-13). Eight of those subleases are involved in this dispute. Kmart leased the stores from various third-parties (the "Master Landlords") pursuant to Master Leases. (Joint Pretrial Statement, Pt. II, ¶ 1). The rent that Rubloff owed to Kmart under the Subleases was less than the rent that Kmart owed to the Master Landlords under the Master Leases. (Id., ¶ 2). Rubloff obtained approximately $12 million from various lenders to improve and, in some cases, subdivide the stores for the purpose of attracting sub-

subtenants. (Transcript, pp. 13-15). Rubloff was successful in that endeavor by obtaining retail sub-subtenants such as Hobby Lobby, Old Navy, and Shoe Carnival. (Id.). There is nothing in the record, however, as to what rents Rubloff was receiving from the sub-subtenants. Rubloff's obligations to its lenders are secured by subleasehold mortgages and the personal guarantees of Rubloff's owners. (Id., pp. 16; 19-20).

Prior to filing for bankruptcy, Kmart was a party to more than 2,000 unexpired leases primarily relating to retail stores located across the nation. On January 22, 2002, Kmart and thirty-seven of its affiliates filed voluntary petitions for reorganization under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code"). (Joint Pretrial Statement, Pt. II, ¶ 3). On that same day, Kmart filed a Motion for Order Pursuant to 11 U.S.C. §§ 105(a) and 365(a) Authorizing (a) Rejection of Certain Unexpired Real Property Leases and (b) Approving Procedures for Rejecting Other Unexpired Leases (the "Rejection Motion"). (Stipulated Joint Exhibit ("Joint Ex.") 2). Two schedules listing more than 300 of Kmart's unexpired leases were attached to the Rejection Motion. (Id.). Kmart proposed to immediately reject the leases listed on Schedule A, with the date of the Rejection Motion being the effective date of rejection. (Id.). In an affidavit attached to the Rejection Motion, Kmart's then chief executive officer, Charles C. Conaway, averred, *inter alia*, that Kmart had determined that the Schedule A leases were of no value to the estate and should be rejected to reduce postpetition administrative costs and the ongoing drain on cash resources. (Rubloff's Ex. 1, ¶¶ 218-25).[1]

Kmart did not propose immediate rejection of the leases on Schedule B. Rather, Kmart

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[1] The Rejection Motion reported that Kmart had terminated their business operations at each of the stores covered by the 300 leases. (Joint Ex. 2, ¶ 15).

asked for approval of an "orderly process" which would give Kmart authority to reject the Schedule B leases without the need to prepare, file, and present additional separate rejection motions. (*See* Joint Ex. 2). If Kmart decided to reject a Schedule B lease, it would then send a notice of rejection to the other party to the lease. (Id.). Kmart, however, reserved "the right not to reject a [Schedule B lease] and, therefore, not to send a Rejection Notice, so that [Kmart] may, subject to further order of the Court, assume and assign such a [lease] on terms advantageous to the estates." (Id., ¶ 23(c)). Kmart advised that it would "issue the ten day notice only in those circumstances where they reasonably believe that retention of [the Schedule B lease] would not provide a greater return to the estates." (Id., ¶ 31, n. 2). Rejection of a Schedule B lease became effective ten days after delivery of the notice. (Id., ¶ 23(b)).

Except for the leases for the Bolingbrook, Illinois and Kentwood, Michigan stores, the Master Leases and Subleases involved here were all listed on Schedule A, and thus slated for immediate rejection. At that time, Kmart required additional time to investigate the value of the Bolingbrook and Kentwood stores before determining whether to include them in the Rejection Motion. (Joint Pretrial Statement, Pt. II, ¶ 7).

Rubloff contacted Kmart within a day or so of the filing of the Rejection Motion. (Id., ¶ 4); (Transcript, p. 23). Greg Bell of Kmart's real estate department told Rubloff's president, Mark Robinson, that the Master Leases and Subleases were going to be rejected based on Kmart's real estate advisor's analysis. (Transcript, p. 24). Indeed, Kmart made it clear in a number of communications that, in the absence of coming to a satisfactory agreement regarding assumption and assignment, it intended to reject the Master Leases and Subleases. (Joint Pretrial Statement, Pt. II, ¶ 6).

Rubloff was concerned that if the Master Leases were rejected by Kmart, Rubloff would have been taken out of its subleasehold position causing a default under the subleasehold mortgages. (Transcript, p. 26). Rubloff also believed that the rejection of the Master Leases exposed it to sub-subtenant claims for lost profits and reimbursement of tenant improvement costs. (Id.). In an attempt to avoid those results, Rubloff asked Kmart to move the Master Leases and Subleases from Schedule A to Schedule B in order to give Rubloff an opportunity to negotiate taking an assignment of Kmart's interests in the Master Leases. (*See* Transcript, p. 33).

Kmart refused to agree unless Rubloff covered all of the contractual liabilities under the Master Leases from January 22, 2002 through either the date of assumption or the date of rejection. (Joint Pretrial Statement, Pt. II, ¶ 5). Although feeling pressured because of Kmart's "shotgun negotiations," Rubloff agreed to Kmart's conditions. (Transcript, pp. 74-75, and 86). On January 24, 2002, the parties reached an agreement providing for the assignment of Kmart's interests in the Master Leases to Rubloff after Kmart assumed the Master Leases. (Transcript, pp. 31, 71 and 82-84).

On January 25, 2002, this court entered an Order approving the Rejection Motion. Schedules A and B were attached to that order, but this time, the Master Leases and Subleases were included on Schedule B. (Joint Ex. 4); (Transcript, p. 84). As such, Kmart was authorized to reject the Master Leases and Subleases, but rejection would not be effective unless and until ten-days prior notice was delivered to "the statutory committee and (or 20 largest creditors, if no committee has yet been formed) . . . the lessor under that particular Real Property Lease." (Id., ¶ 1). As noted, however, the parties here envisioned the assumption of the Master Leases followed by the assignment of same to Rubloff. Kmart also determined that the leases for the Kentwood and

Bolingbrook stores could also be assumed and assigned by Rubloff, consistent with the terms of the agreement reached with respect to the other Master Leases. (Joint Pretrial Statement, Pt. II, ¶ 9).

On February 1, 2002, Kmart and Rubloff executed the Lease Assignment and Assumption Agreement, (the "Assignment Agreement") pursuant to which the "Leases" (as defined in the Assignment Agreement), including the Kentwood and Bolingbrook store leases, would be assumed and assigned to Rubloff subject to the terms thereof. (Id., ¶ 10); (Joint Ex. 5). On February 4, 2002, Kmart filed its Motion for Order Pursuant to § 365 and Fed. R. Bank. P. 6006 Authorizing Debtors to Assume and Assign Certain Unexpired Real Property Leases to Rubloff Development Group, Inc. (the "Assignment Motion"). (Joint Ex. 6). The Assignment Motion noted that if Kmart were simply to reject the subject leases, the estates would be exposed to significant rejection claims. (Id., ¶ 16). Kmart posited that "[s]uch claims can be avoided entirely by assumption and assignment of the Real Property Leases to Assignee pursuant to the terms of the Assignment Agreement." (Id.).

The court held a hearing on the Assignment Motion and thereafter entered seven orders approving the assumption and assignment of the Master Leases. (Joint Ex. 7). All rents due under the Master Leases were current when the orders were entered. (Joint Pretrial Statement, Pt. II, ¶ 17); (Transcript, p. 61). The obligation under the Subleases to provide Rubloff with possession and quiet enjoyment of the stores was also current. (Joint Pretrial Statement, Pt. II, ¶ 14); (Transcript, pp. 60-61).

On July 29, 2002, Rubloff filed eight proofs of claims totaling $28,660,212.21 (collectively, the "Rubloff Claims") in the bankruptcy case. (Joint Ex. 1). The Rubloff Claims state that they are "contract claim[s]." (Id.). Specifically, Rubloff contends that the filing of the Rejection Motion,

assertions in the Conaway Affidavit, and/or verbal communications to Rubloff that the Master Leases were going to be rejected, evidence Kmart's unequivocal announcement that Kmart did not intend to perform the obligations under the Subleases. (Transcript, pp. 37 and 72). That purported anticipatory repudiation of the Subleases caused Rubloff to take an assignment of Kmart's position as tenant under the Master Leases in order to avoid the loss of the Subleases and the resultant claims of its lenders and sub-subtenants. (Id., pp. 35-36). By taking the assignments, Rubloff now pays the higher Master Lease rents and has therefore lost the benefit of its bargain to pay the lower Sublease rents. In other words, "[w]hen Rubloff was forced to accept assignment of the Master Leases, it lost the spread," *i.e.*, the "difference between what Rubloff has to [now] pay under the Master Leases [as a result of Rubloff taking an assignment of Kmart's interests] and what Rubloff was obligated to pay under the [Subleases]." (Joint Ex. 9, ¶ 8). That "spread amount" is the amount asserted in the Rubloff Claims.

Rubloff did not assert that all or part of the Rubloff Claims are secured or entitled to priority. (Joint Ex. 1). Accordingly, the Rubloff Claims, if allowed, would be general unsecured claims against the estate. Kmart agrees that if Kmart had rejected the Master Leases and Subleases, the claims against the estate would have exceeded the amount of the Rubloff Claims. (Joint Pretrial Statement, Pt. II, ¶ 15).

Kmart objected to the Rubloff Claims in its Twentieth Omnibus Objections to Claims. (Joint Ex. 8). The court previously denied cross-summary judgment motions with respect to the objection to the Rubloff Claims. (Joint Ex. 10). An evidentiary hearing was held at which both parties asked the court to rule on whether the Rubloff Claims can be allowed at all before reaching the determination of the amount. (Transcript, pp. 4-5).

II. CONCLUSIONS OF LAW

Jurisdiction and Venue

This court has jurisdiction over this matter which concerns the allowance of a claim asserted against the estate of a bankrupt debtor. 28 U.S.C. § 1334(b). This is a core proceeding and venue is proper in this court. 28 U.S.C § 157(b)(2)(B); 28 U.S.C. § 1409(a).

Determination of the Claims

Section 502(b) of the Bankruptcy Code provides that when an objection to a claim is made, the court shall determine the amount of the claim and allow the claim in that amount, subject to certain exceptions that are not applicable here. 11 U.S.C. § 502(b). "Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code." Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15, 20 (2000). Here, the parties agree that Illinois or Michigan laws govern depending on the location of the store covered by the particular Sublease. As will be discussed, however, section 365 of the Bankruptcy Code qualifies the determination of the Rubloff Claims.

Under Illinois and Michigan law, anticipatory repudiation occurs when a party to a contract unequivocally announces or otherwise manifests an intent not to perform its contractual obligations when the time for performance comes due. In re Arlington Hospitality, Inc., 368 B.R. 702, 716 (Bankr. N.D. Ill. 2007)(citations omitted)(Illinois law); Paul v. Bogle, 193 Mich. App. 479, 493-94, 484 N.W.2d 728, 735-36 (Mich. Ct. App. 1992)(Michigan law). Repudiation relieves the nonrepudiating party from its obligation to perform, In re C & S Grain Co. Inc., 47 F.3d 233, 237 (7th Cir. 1995); Bogle, 484 N.W.2d at 735, and allows it to immediately sue for damages without

waiting for the date the obligation is due. Central States, Southeast and Southwest Areas Pension Fund v. Basic American Industries, Inc., 252 F.3d 911, 915 (7th Cir. 2001); Bogle, 484 N.W.2d at 735. The doctrine of anticipatory repudiation is designed to protect the nonrepudiating party from having to continue to incur the costs of performance when it is clear that the other party has no intention to perform its obligations under the contract. Central States, 252 F.3d at 915-16. To prevail on a cause of action for anticipatory repudiation, the nonrepudiating party must show, *inter alia*, an unequivocal, definitive statement from the other contract party that it will not perform its obligations. *See* Builder's Concrete Co. of Morton v. Fred Faubel & Sons, 58 Ill.App.3d 100, 103, 373 N.E.2d 863, 867 (3rd Dist. 1978); Stoddard v. Manufacturers Nat. Bank of Grand Rapids, 234 Mich. App. 140, 163, 593 N.W.2d 630, 640 (Mich. Ct. App. 1999).

In this matter, Kmart argues that the doctrine of anticipatory repudiation does not apply to real estate leases pursuant to Illinois and Michigan law. Kmart relies on case law premised on the common law proposition that "a rent covenant did not give rise to a present obligation to render performance in the future as did, for example, a promise to pay in installments for goods purchased, and no obligation was held to exist until the rent day." People ex rel. Nelson v. West Town State Bank, 373 Ill. 106, 111, 25 N.E.2d 509, 512 (1940). As such, "[t]here was no doctrine at common law that a material breach of the lease would give rise to a cause of action for breach of the entire lease, and there was, *a fortiori*, no doctrine of anticipatory breach of a lease." Id. at 512. In other words, the common law did not allow the landlord to recover its contingent future rent claim via a claim of anticipatory repudiation. Id. at 511 (*citing*, Manhattan Properties, Inc. v. Irving Trust Co., 291 U.S. 320 (1934)). Accordingly, "[a]bsent an express provision in the lease, the doctrine of anticipatory repudiation does not apply to leases under Illinois law." Infinity Broad. Corp. of Ill.

v. Prudential Ins. Co. of Am., 869 F.2d 1073, 1078 (7th Cir. 1989)(citing Nelson, 25 N.E.2d at 519; Keep Productions, Inc. v. Arlington Park Towers Hotel Corp., 49 Ill.App.3d 258, 264-65, 364 N.E.2d 939, 944 (1st Dist. 1977)). Rubloff counters that the Infinity holding based on Nelson is limited to attempts to recover future rents. To Rubloff, Nelson and Infinity cannot be read to mean that anticipatory repudiation does not apply to *any* dispute involving a lease, particularly one where the landlord is the repudiating party and the damages do not concern future rents. *See* Boltz v. Crawford & North Aves. Theatre Co., 13 N.E.2d 844, 847 (1st Dist. 1938)(concluding that tenant stated a cause of action for repudiation of lease requiring landlord to provide tenant with possession). The court need not decide that issue because even assuming the theory of anticipatory repudiation applies to the Subleases here as a matter of state law, section 365 of the Bankruptcy Code qualifies the ability of Rubloff to use that theory to recover from the bankruptcy estate under the circumstances here. *See* 23 Samuel Williston, WILLISTON ON CONTRACTS § 63:50 (4th ed. 2007)("The effect of bankruptcy on the question whether an anticipatory repudiation has taken place is governed in large part by federal law, as § 365 of the Bankruptcy Code allows the trustee in bankruptcy to assume or reject the contract, and the parties' rights under the contract must therefore await the exercise of this right by the trustee."); *see also*, In re Whitcomb & Keller Mort. Co., 715 F.2d 375, 379 (7th Cir. 1983)(quoting Fontainebleau Hotel Corp. v. Simon, 508 F.2d 1056, 1059 (5th Cir. 1975)(" . . . general principles governing contractual benefits and burdens do not always apply in the bankruptcy context. The purpose of the Bankruptcy Code is to 'suspend the normal operation of rights and obligations between the debtor and his creditors.'")

Clearly, the mere filing of a bankruptcy case cannot be considered an anticipatory repudiation of the debtor's contractual obligations. Central States, 252 F.3d at 916; In re Econ.

Lodging, 226 B.R. 840, 846 (Bankr. N.D. Ohio 1998)(citing Beeche Sys. Corp. v. D.A. Elia Const. Corp. (In re Beeche Sys. Corp.), 164 B.R. 12, 16 (N.D.N.Y. 1994)). The Central States case concerned the issue of when a statute of limitations started to run on a pension plan's lawsuit against companies who were jointly and severally liable with the chapter 11 debtor/employer for withdrawal liability. The Court concluded that the debtor/employer could have defaulted under the pension plan in two ways - when it failed to make a payment when it came due, or when it repudiated the obligation to pay prior to the due date. Central States. 252 F.3d at 915. Either default would have constituted a breach. To determine when the statute started running, the Court analyzed if and when a repudiation occurred. The Court concluded that a repudiation did not occur when the bankruptcy was filed, reasoning:

> Filing for bankruptcy, though by virtue of the automatic stay it prevents the payee from invoking the usual remedies for breach of contract, and enables the contract if still executory to be rescinded by the trustee in bankruptcy (or debtor in possession, if, as in this case at the relevant time, there is no trustee), § 365(a) is not anticipatory repudiation per se. For the trustee or debtor in possession can affirm the contract even if it contains a clause (a so-called "ipso facto" clause) that makes filing for bankruptcy a ground for termination. Affirmance is the opposite of repudiation, and the affirmance option thus makes it impossible to consider the declaration of bankruptcy itself, whether or not there is an ipso facto clause, a repudiation of a creditor's claim. If the trustee or debtor in possession exercises the discretion that the Code gives him to reject the contract, that of course is repudiation.

Id. at 916 (internal citations omitted); *see also* In re StarNet, Inc., 355 F.3d 634, 637 (7th Cir. 2004)("Section 365(a) gives debtors a right to walk away before the contract's end (with the creditor's entitlement converted to a claim for damages . . .)"); In re Chicago, Rock Island & Pac. R. Co., 604 F.2d 1002, 1003 (7th Cir. 1979)(referring to rejection as the bankruptcy trustee's repudiation); In re Mount Carbon Metro. Dist., 242 B.R. 18, 38 (Bankr. D. Colo. 1999)(likening

rejection in a bankruptcy context, which "acts as a breach," to repudiation in a contractual context).

This court is not being asked whether the filing of a bankruptcy case amounts to anticipatory repudiation. Rather, the question before this court is whether statements of the debtor in possession after the bankruptcy filing and prior to an anticipated, but ineffective, rejection can constitute anticipatory repudiation. Specifically, can Kmart's various manifestations of an intent to reject the Master Leases, which ultimately did not occur, be considered an anticipatory repudiation of the Subleases, giving rise to a damage claim against the estate in favor of the subtenant, Rubloff.

Although the context of this dispute differs from that in Central States, its reasoning applies in this scenario as well. When a debtor files for chapter 11, unless and until a trustee is appointed, it is a debtor in possession of the estate. 11 U.S.C. § 1107(a). The debtor in possession has a great many of the responsibilities and powers of a chapter 11 trustee, including the power to assume unexpired leases from itself as the debtor. In re Comdisco, Inc., 272 B.R. 671, 673 (Bankr. N.D. Ill. 2002). "Essentially, an assumption is the [debtor in possession's] judicially approved postpetition undertaking to fully perform all obligations under the lease for its remaining term, in return for which the other party of the lease must perform its obligations." Collen, Buying and Selling Real Estate in Bankruptcy, (1997) ¶ 7.02[1]. Rejection, on the other hand, means the debtor in possession has refused to undertake the unexpired lease. The rejection by the debtor in possession is deemed a breach of the lease, which gives the other party to the lease a right to assert damages against the estate. 11 U.S.C. §§ 365(g) and (h); StarNet, 355 F.3d at 637. The breach, however, is deemed to occur on the petition date, and thus damages arising therefrom are only entitled to general nonpriority status and, in some circumstances, capped. 11 U.S.C. § 365(g)(1); 11 U.S.C. § 502(b)(6).

The debtor in possession's decision whether to assume or reject a lease is ideally based on

which course of action is more beneficial to the estate, taking into account the profitability of the lease in a reorganization scenario and the possible claims against the estate resulting from the decision. *See* L. Cherkis & S. Abramowitz, Collier Real Estate Transactions and the Bankruptcy Code, pp. 3-60 to 3-62 (2006). The debtor in possession will likely also consider whether it is possible and beneficial to the estate to assume the lease in order to assign it to a third-party purchaser in exchange for consideration.

The debtor in possession's decision to assume or reject an unexpired lease is subject to court approval after notice and hearing. 11 U.S.C. § 365(a). Rejection is not effective until court approval. In re Thinking Machs. Corp., 67 F.3d 1021, 1025 (1st Cir. 1995); *see also* Whitcomb, 715 F.2d at 380. Accordingly, even if the debtor in possession decides to reject an unexpired lease, until that rejection becomes effective, there is always the possibility, albeit slim, that the debtor in possession may ultimately end up "exercising the affirmance option." Indeed, that is what happened in this matter with respect to the Master Leases. As discussed, Kmart and Rubloff worked out an arrangement for Rubloff to take an assignment of Kmart's interest in the Master Leases after Kmart assumed them.

That open assumption option makes it impossible to consider the debtor in possession's statements that a master lease will be rejected a repudiation of the obligations under the sublease. Until rejection of the master lease is effective, the subtenant must wait to file a claim for damages resulting from the breach.[2] However, while it performs its obligations, the subtenant can expect and

[2] Importantly, when a debtor-lessor rejects a lease, the tenant has the choice of treating the lease as terminated and file a rejection claim, or retain its rights under the lease, remain in possession and offset its damages against future rents. 11 U.S.C. § 365(h)(1)(A)(ii). That choice is not available, however, until rejection. *See* Precision Indus. Inc. v. Qualitech Steel SBQ, LLC, 327 F.3d 537, 546 (7th Cir. 2003).

demand that the debtor in possession meet the lease obligations, not because the debtor in possession has become contractually obligated, but because the Bankruptcy Code requires it to do so. 11 U.S.C. § 365(d)(3); *see also* In re Handy Andy Home Improvement Ctr., Inc., 144 F.3d 1125, 1127 (7th Cir. 1998); In re Montgomery Ward Holding Corp., 268 F.3d 205, 209 (3d Cir. 2001); In re PCH Associates, 804 F.2d 193, 199 (2d Cir. 1986).

Stated another way, to conclude that the mere filing of the Rejection Motion, and/or other statements of Kmart amounted to an anticipatory repudiation of the Subleases would render section 365 meaningless. *See* Beeche Sys., 164 B.R. at 16 (finding that debtor's bankruptcy filing, failure to notify other contract party of its bankruptcy, and failure to assume the contract did not amount to repudiation); In re Asia Global Crossing, Ltd., 326 B.R. 240, 256 (Bankr. S.D.N.Y. 2005)(finding that the mere filing of a motion to sell assets pursuant to section 363, which like a section 365(a) motion requires court approval, did not amount to anticipatory repudiation of a performance guaranty).

From yet another perspective, that of the creditor's burden of proof, no matter how unequivocal a debtor in possession's statements are prior to the rejection becoming effective, those statements are effectively rendered equivocal because of the operation of section 365 of the Bankruptcy Code. The non-debtor party to the lease would thus be unable to prove a necessary element of anticipatory repudiation - a definitive unequivocal statement of an intent not to perform by the other party to the contract.

Rubloff argues that it was a foregone conclusion that Kmart would have rejected the Master Lease but for its agreement to take an assignment. Even if it is virtually certain that the Master Lease would have been rejected, however, absent effectiveness of the rejection, the certainty cannot

serve as a reason to treat the Sublease as repudiated and immediately sue for breach, *i.e.*, file a proof of claim.

Rubloff also points out that the court approved the rejection of the Master Leases when it gave Kmart authority to reject upon ten-days notice. Rubloff ignores that the process provided that the rejection was not effective until the notice was given and Kmart reserved the right to not send the notice. Rubloff did not object to, or appeal from, the order approving the process and in fact participated in it when it asked to have the leases moved to Schedule B and then agreed to take an assignment after assumption of the Master Leases. Rubloff cannot argue now that rejection was effective prior to delivery of the notice. *See* Comdisco, 272 B.R. at 673.

For these reasons, Rubloff has not demonstrated that it is entitled to claims based on anticipatory repudiation. Even if Rubloff were entitled to those claims, however, they were effectively released by Rubloff by virtue of certain terms of the Assignment Agreement and Subleases. Moreover, if not released, the claims were waived when Rubloff failed to raise them when it took the assignment.

In the Assignment Agreement, Rubloff agreed to assume Kmart's liability under the "Leases" and indemnify Kmart for all claims arising in connection with the "Leases." (Joint Ex. 5). Rubloff contends that the defined term "Leases" in the Assignment Agreement does not include the Subleases, so it cannot be said that Rubloff agreed to assume liability for claims arising in connection with the Subleases.

The Assignment Agreement provides that Kmart would assume and assign its interest under,

> certain leases more particularly described in Schedule 1 attached hereto and made a part hereof (as the same may have been amended, supplemented, or extended from time to time), and together with any and all other leases or agreements affecting the Premises . . . ,

> (individually, a "Lease" and collectively, the "Leases"), whereby [Kmart] leases from the landlord set forth in Schedule 1 [a chart describing the Master Leases] certain real property more particularly described in Schedule 1 and the Leases.

(Joint Ex. 5). Schedule 2 describes the Subleases. The meaning of the word "Leases" in the quoted language is ambiguous. The words "together with any and all other leases" before the parenthetical definition of Leases could be read to include the Subleases. On the other hand, the words after the parenthetical, "whereby Kmart leases from the landlord" could be read to exclude the Subleases. The court may consider extrinsic evidence to clear up the ambiguity. Wonderland Shopping Ctr. Venture L.P. v. CDC Mort. Capital, Inc., 274 F.3d 1085, 1092 (6th Cir. 2001)(Michigan law); Air Safety, Inc. v. Teachers Realty Corp., 185 Ill.2d 457, 462, 706 N.E.2d 882, 884 (1999)(Illinois law).

The court has reviewed the evidence in the record including an email exchange between counsel for Kmart and Rubloff. (*See* Joint Ex. 3). Based on that review, the court concludes that the word "Leases" used in the Assignment Agreement includes the Subleases. So, if Rubloff were entitled to the "spread damages" claim, it agreed to assume that liability pursuant to the Assignment Agreement. Rubloff further agreed in the Assignment Agreement to hold Kmart harmless from all claims and damages "arising in connection with the Leases," which encompasses the spread damages claim. (Joint Ex. 5, ¶ 5).

Moreover, the Subleases provide that if and after Kmart transferred its interests in the Master Leases, Rubloff could look only to Kmart's assignee [in this matter, Rubloff] for the performance of, *inter alia*, "any term, covenant, [or] obligation" of Kmart under the Subleases. (Joint Ex. 1). The assignment was effective February 1, 2002 and Rubloff acknowledges that the claim is "essentially the spread for the rental amounts beginning on . . . February 1st 2002, forward." (Transcript, p. 99).

Finally, Kmart persuasively argues that Rubloff waived the claims it asserts here when

Rubloff took an assignment of the assumed Master Leases. *See* In re Aerovias Nacionales de Columbia S.A. Avianca, 323 B.R. 879, 889 (Bankr. S.D.N.Y. 2005). In Aerovias, aircraft lessors and the debtor in possession entered into an agreement providing for the modification of certain leases to lower the rental rates before the debtor in possession assumed the leases. Id. After the assumption of the modified leases was approved, the lessors filed a proof of claim asserting damages based on the rent differential. Id. The court denied the claim, concluding that the right to assert the differential claim was waived during the assumption process. Id. The court observed "[f]or [the lessors] to have retained such a right, and if it had been the intention of the parties that this right be reserved, it would have to be *explicitly* provided for in the papers." (emphasis in original) (citation omitted).

Here, as noted, the Assignment Motion provided that if Kmart were simply to reject the subject leases, the estates would be exposed to significant rejection claims and that "[s]uch claims can be avoided entirely by assumption and assignment of the real property leases to assignee pursuant to the terms of the assignment agreement." (Joint Ex. 6, ¶ 16). Rubloff did not argue that point and it made no attempt to reserve a right to assert "spread damages" resulting from a purported

repudiation of the Subleases in connection with the assumption and assignment process.

III. CONCLUSION

For the foregoing reasons, the court will enter a separate order disallowing Claim Nos. 37506, 37507, 37508, 37509, 37733, 37734, 37735, and 37773 filed by Rubloff Development Group, Inc.

Dated: November 20, 2007

ENTER:

/s/ Susan Pierson Sonderby
Hon. Susan Pierson Sonderby
United States Bankruptcy Judge