

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW JERSEY

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In Re:

Chapter 11

REVEL AC, INC., *et al.*

Case No. 14-22654 (MBK)

Debtors.¹

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IDEA Boardwalk, LLC,

Plaintiff

v.

Ad. Pro. No. 14-01756 (MBK)

Revel Entertainment Group, LLC,

Defendant.

-----X

APPEARANCES:

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¹ The Debtors in these chapter 11 cases, along with the last four digits of each debtor’s federal tax identification number, are: Revel AC, Inc. (3856), Revel AC, LLC (4456), Revel Atlantic City, LLC (9513), Revel Entertainment Group, LLC (2321), NB Acquisition, LLC (9387) and SI LLC (3856).

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MEMORANDUM DECISION

INTRODUCTION

Before the Court is the cross motion (“Cross Motion”) of IDEA Boardwalk, LLC (“IDEA”), filed in connection with the Debtors’ prior motion to reject certain leases and executory contracts, in which IDEA seeks an order clarifying its rights under 11 U.S.C. § 365(h). In rendering its decision herein, the Court also addresses the respective rights of the Amenity Tenants² and the LDV Tenants³, which subsequently joined in the Cross Motion (hereinafter, IDEA, the Amenity Tenants, and the LDV Tenants may be referred to, collectively, as “the Tenants”). Prior to the bankruptcy filing, each of the Tenants had entered into agreements (“Agreements”) with the Debtors, under which the Tenants operated various retail facilities on the Debtors’ premises. Whether the Agreements are in fact true leases or memorializations of some other form of contractual relationship (e.g., management or joint venture agreements) is an issue in dispute that must be decided in order for the Court to determine whether the Tenants are entitled to protections afforded by § 365(h).

This matter also comes before the Court on the Debtors’ motion to dismiss the first amended adversary complaint (“Complaint”) filed by IDEA against the Debtor/Defendant,⁴ seeking temporary and permanent injunctive and declaratory relief. The Court addresses only Count One of the Complaint, which consists of IDEA’s request to preliminarily enjoin the

² The Amenity Tenants consist of Exhale Enterprises XXI, Inc., GRGAC1, LLC, GRGAC2, LLC, GRGAC3, LLC, Mussel Bar AC, LLC, PM Atlantic City, LLC, RJ Atlantic City, LLC and The Marshall Retail Group, LLC.

³ The LDV Tenants consist of American Cut AC Marc Forgione, LLC, Azure AC Allegretti, LLC, and Lugo AC, LLC. The group of entities that now constitute the LDV Tenants were originally part of the Amenity Tenants, but later obtained separate counsel and received designation as the LDV Tenants.

⁴ After the Court approved a sale of the Debtors’ assets to Polo North Country Club, Inc., (“Polo North”), Polo North stepped into the shoes of the Debtors. On June 22, 2015, an order was entered which substituted Polo North as defendant in this adversary proceeding.

Defendant from engaging in conduct that prevents IDEA from enjoying its possessory rights, including the right to utilities and necessary easements. The Court has heard oral argument on June 11, 2015 and June 24, 2015 and has accepted, in lieu of testimony, the following documents and accompanying exhibits:

- First Amended Verified Complaint in Adversary Proceeding; Ad. Pro. No. 14-01756
- Affidavits of Michael I. Barry, Dkt. Nos. 1521 and 1782
- Affidavit of Kevin DeSanctis, Dkt. No. 1541
- Affidavits of Jason Spillerman, Dkt. Nos. 1828 and 1873
- Affidavit of John Meadow, Dkt. No. 1830
- Affidavit of Barbara Stack, Dkt. No. 1869

For the reasons set forth below, the Court denies the Defendant's pending motion to dismiss and grants, in part, the relief sought by IDEA in its Cross Motion and in Count One of the Complaint.

PROCEDURAL BACKGROUND IN THE MAIN CASE

On June 19, 2014, Revel AC, Inc. and its affiliated debtors and debtors in possession ("Debtors")⁵ each filed a voluntary petition for relief under Chapter 11 of the United States Code ("Bankruptcy Code").

On August 28, 2014, the Debtors filed a motion (the "Rejection Motion") to reject the Agreements held with the Tenants. The Rejection Motion sought rejection of the Agreements *nunc pro tunc* to the Debtors' shutdown date of September 2, 2014 ("Shutdown Date"). On the Shutdown Date, the Debtors ceased operations and barred the Tenants from accessing the

⁵ The Debtors owned and operated a 6.2 million square foot facility that served as a resort and casino, with retail stores, restaurants and bars on the premises.

premises. Each of the Tenants gave notice of its intent to continue exercising possessory leasehold rights under § 365(h).

On April 6, 2015, the Court entered an order (“Sale Order”) approving the sale of the Debtors’ assets to Polo North, pursuant to § 363 of the Bankruptcy Code. The sale closing occurred on the following day. Thereafter, on April 13, 2015, IDEA filed its Cross Motion, seeking clarification of its § 365(h) rights as they related to the pending Rejection Motion. Subsequently, on April 20, 2015, the Court entered an order granting the Rejection Motion.⁶

Polo North adopts the position originally set forth by the Debtor/Defendant, that the Tenants’ § 365(h) elections were invalid because the Agreements are not true leases. Polo North contends that the Agreements are either management or joint venture agreements, and, consequently, there are no possessory rights capable of being retained by the Tenants. As such, the Agreements would not fall within the purview of § 365(h). Needless to say, the Tenants maintain that the dictates of § 365(h) do apply because the Agreements are indeed true leases. At this juncture, the parties seek a determination of their respective rights. For the reasons set forth below, the Court grants IDEA’s Cross Motion in part, by reaffirming the applicability of § 365(h) with regard to the rejected Agreements.

PROCEDURAL BACKGROUND IN THE ADVERSARY PROCEEDING

On September 3, 2014, IDEA filed its initial verified complaint, which commenced an adversary proceeding against the Debtor/Defendant. As noted above, as a consequence of the § 363 sale, Polo North is now deemed the Defendant in this action. On September 26, 2014,

⁶ The Tenants had also made certain administrative expense requests as to lost profits and other damages under the Agreements as a result of the Debtors’ shutdown. The Debtors filed an objection to the administrative claims of the Amenity Tenants and the LDV Tenants. This objection has been resolved pending the Court’s determination of the parties’ respective § 365(h) rights. In other words, the Amenity Tenants and LDV Tenants intend to withdraw their administrative expense requests so long as the Court fixes their possessory rights under § 365(h).

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