

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 06CV80446-CIVIL-GOLD

NIGHT BOX  
FILED

AUG 31 2006

CLARENCE MADDOX  
USDC / SDFL / MIA

IN RE:

WELLINGTON VISION, INC.,

Appellant

v.

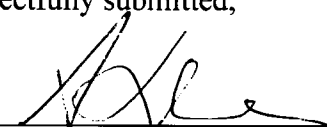
PEARLE VISION, INC.

Appellee.

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AUGUST 29, 2006

REPLY BRIEF OF APPELLANT

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail on August 31, 2006 on Genovese Joblove & Battista, P.A., Carlos E. Sardi, Esq. [csardi@gjb-law.com](mailto:csardi@gjb-law.com).

  
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## REPLY ARGUMENT AND CITATION TO AUTHORITY

- I. THE BANKRUPTCY COURT'S DETERMINATION THAT PEARLE VISION, INC. WAS ENTITLED TO STAY RELIEF AS A MATTER OF LAW WAS CLEARLY ERRONEOUS BECAUSE THE COURT INCORRECTLY HELD THAT THE "DEBTOR IN POSSESSION" COULD NOT ASSUME OR ASSIGN ITS FRANCHISE AGREEMENT**
- A. Interpretation of Section 365 (c)(1) In Accordance With Its Plain Meaning Avoids the Necessity of Adopting or Rejecting a Hypothetical Test**

The issue before the Bankruptcy Court was whether PVI was entitled to relief from the stay imposed by Section 362(a) for cause pursuant to Section 362 (d) as a matter of law on the ground that Section 365(c)(1) prevented the Debtor In Possession from assuming or assigning the PVI Franchise Agreement. Section 365 sets forth a broad policy favoring assumption and assignment of unexpired leases and executory contracts. In re Quantegy, Inc., 326 B.R. 467, 470 (M.D. Ala 2005) citing In re Sunterra Corp., 361 F.3d 257, 266 (4th Cir. 2004). With limited exceptions, Section 365 (a) allows a trustee to assume or reject any executory contract or unexpired lease of the debtor. Id. Section 365 (f) (1) permits a trustee to assign contract rights to third parties even in the face of a contract provisions or applicable law prohibiting or restricting assignment. Id. Section 365(f)(1) provides:

Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or applicable law, that prohibits, restricts or conditions the assignment, the trustee may assign such contract or lease.

Generally both Section 365 (a) and Section 365 (f)(1) operate irrespective of the objections of other parties to the contract. Id.

Section 365 (c)(1) creates a narrow exception to the broad rule. Id. Section 365 (c) provides:

(1) The trustee may not assume or assign any executory contract or unexpired lease of the debtor whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if-----

(A) applicable law excuses a party other than the debtor to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession whether or not such contract or lease prohibits or restricts assignment of rights and delegate of duties

( B) such party does not consent to assumption or assignment.

PVI asserts that the Debtor has argued that the debtor in possession and the trustee are different entities for the first time on appeal. See PVI Answer Brief page 12, footnote 3. PVI states that “the Debtor has waived this argument because it was not raised below ” citing to Access Now, Inc. v Southwest Airlines, Co., 385 F3d 1324, 1331(11th Cir. 2004).

In the first instance, it is not an argument that the debtor in possession and the trustee are different entities. They are. Nor does the term “trustee” plainly include a chapter 11 debtor in possession. Section 365 uses the term trustee independent of the term debtor or debtor in possession. PVI ‘s reliance on Section 1107(a) for the proposition that a trustee and a debtor in possession are the same entity is misplaced. Section 1107(a) provides that a debtor in possession has most of the rights and duties as a trustee, including the power to assume or reject an executory contract, but they are not the same entity.

PVI’s reliance on the case of Access Now, Inc. v Southwest Airlines, Co., is also misplaced. In the case of Access Now a blind individual and a nonprofit advocacy organization

brought an action alleging that the airlines website excluded blind persons in violation of the ADA. *Id.* The District Court dismissed the claims and the plaintiffs appealed. The plaintiffs advanced a very different theory and argument for the first time on appeal which relied upon the “travel service” provision of Title III, 42 USC § 12181(7)(F). The appellate court noted that “we review claims of judicial error in the trial courts. If we were to regularly address questions-particularly fact-bound issues-that districts never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature purpose and competence of an appellate court.” *Id.* at 1331.

The issue before the Court in this case is whether PVI should be granted relief from the stay for cause because PVI asserts it will not consent to assignment, and Section 365 precludes a debtor in possession’s assumption or assignment in the face of a contract provisions or applicable law prohibiting or restricting assignment. The issue has always been the proper construction and interpretation of the provisions of Section 365 and in particular Sections 365 (a); 365 (c)(1) and 365(f) is a pure question of law. Giving effect to the plain meaning of each word in Section 365(c)(1) does not require the introduction of any new facts, nor does it require any discovery. <sup>1</sup>

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A circuit court’s power to entertain an argument for the first time on appeal is not jurisdictional, but merely a rule of practice. *Access Now, Inc. v Southwest Airlines, Co.*, 385 F3d 1324, 1331(11th Cir. 2004). The Eleventh Circuit Court of Appeals has specifically permitted issues to be raised for the first time on appeal in five circumstances, which include consideration of an issue involving a pure question of law and the refusal to consider the issue would result in a miscarriage of justice; where the interest of substantial justice is at stake; ...where the proper resolution is beyond any doubt; or where the issue presents significant questions of general impact or great public concern. *Id.* at 1332. It seems elementary that a question of statutory interpretation is an issue of law. It seems also seems elementary that “trustee” means trustee.

In this case the Debtor is urging the Court to give “plain meaning” to all the words used in Section 365(c)(1). Section 365 (c)(1) is quite logical if one construes the word “trustee” in accordance with its plain meaning to mean “trustee” and not “debtor in possession”. In re Footstar, Inc. 323 B.R. 566, 567 (S.D. N.Y. 2005).

**Section 365 (c)(1) states that the “trustee” may not assume or assign. Id. at 570. The statute does not say that a debtor or debtor in possession may not assume or assign. Nowhere does the Bankruptcy Code define the term “trustee” to be synonymous with the term “debtor” or “debtor in possession”. Id.<sup>2</sup> Therefore Section 365 can and should be construed in accordance with its plain meaning without construing “or” to mean “and”. Id. (emphasis ADDED)**

PVI argues for application of a hypothetical test which would require the Court to construe the word “or” to mean “or”, not “and”. Similarly, the Debtor simply asks that the Court construe the word trustee to mean “trustee”, not “debtor” or “debtor in possession”.

PVI argues that the Eleventh Circuit Court of Appeals “clearly held that Section 365(c)(1) of the Bankruptcy Code creates a hypothetical test-” citing to the case of In re James Cable Partners, L.P., 27 F.3d 534 (11th Cir. 1994) on page 14 of the Answer Brief. The actual

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Section 1107(a) grants the debtor in possession all rights and powers of a “trustee”, but it does not say that the debtor in possession is the “trustee”. Under this grant the debtor in possession has the right to assume contracts. The critical language in Section 1107 for purposes of this dispute is the prefatory clause “subject to any limitations on a trustee...” Consistent with this clause many decisions have held that various limitations on the powers of a chapter 11 trustee apply to debtor’s in possession. In each of these cases, the application is a matter of simple logic and common sense. However, there is no basis to distinguish between the debtor and trustee with respect to the statutory limitation in Section 365 (c)(1) . Id.

“**holding**” of the case is that Section 365 (c) (1) is “not applicable” because “applicable law” did not excuse the City of Jamestown from accepting performance from an entity other than the Debtor. Id. at 538. Accordingly, the Eleventh Circuit has discussed the hypothetical test, but did not adopt the test because the it was not necessary to the decision. Id.

As set forth above, it is not necessary to adopt either the actual or the hypothetical test since Section 365 can and should be construed in accordance with its plain meaning without construing “or” to mean “and”. In re Footstar, Inc. 323 B.R. 566 (S.D. N.Y. 2005). Section 365 (c)(1) is quite logical if one construes trustee in accordance with its plain meaning to mean “trustee” not “debtor in possession”. Id. at 573. The basic objective of Section 365 (c)( 1) is a vindication of the right under applicable law of a contract counterparty to refuse to accept performance from an entity other than the debtor or debtor in possession. Id. at 573-574. A trustee is an entirely different entity from the debtor or the debtor in possession. Id. at 574 Since a de facto assignment to a trustee is in derogation of the basic objective of the statute, it makes perfect sense to say a trustee may not assume or assign a contract. Id.

**B. Applicable Law Does Not Prohibit Assignment Because the Franchise Agreement Contemplates Assignment Under Certain Circumstances**

PVI believes that the Debtor is relying on Sunterra for the proposition that the Franchise Agreement allows for assignment under certain circumstances. PVI fails to consider other cases which have reconciled the conflicting language in Section 365 by finding that a Debtor may assign a contract in a manner consistent with the agreement itself. In re Quantegy, 326 B.R. 476 (M.D. Ala. 2005). See also In re Supernatural Foods, Inc., 268 B.R. 759, 806 (M.D. La.2001). In this case the Paragraph 17 of the Franchise Agreement provides that PVI’s consent to transfer



cannot be unreasonably withheld. In order to obtain relief from the stay, PVI asserts that it would not consent to assumption by anyone under any circumstance, before the Debtor even had an opportunity to make the request. Granting relief from the stay for cause before the Debtor even had an opportunity to seek PVI's consent to a proposed transfer allowed PVI to breach its agreement that "consent cannot be unreasonably withheld." . If the Debtor requested consent from PVI to assign its Franchise to a transferee that did not qualify under paragraph 17, then PVI could reasonably withhold its consent and seek relief based upon "cause. However, by prematurely obtaining stay relief, PVI avoided assignment to a transferee that may have satisfied the provisions in Paragraph 17. Accordingly, the Bankruptcy Court's decision to grant stay before the Debtor sought PVI's consent allowed PVI to act unreasonably and breach its own agreement.

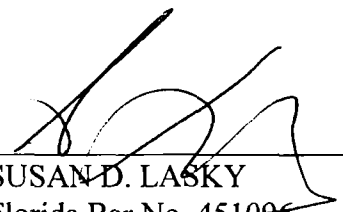
### **CONCLUSION**

Adoption of a hypothetical test which construes the word "and" to mean "and",but does not construe the word "trustee" to mean "trustee". does not comport with the "plain meaning" of all the words used in Section 365 (c)(1), and does not give full effect to the provisions and objectives of Chapter 11, which are designed to foster and not frustrate, the reorganization process and the economic well being of debtor's in possession. This court should give full effect to all of the words used in Section 365 (c) (1). Accordingly, the determination by the Bankruptcy Court, that stay relief should be granted as a matter of law merely by adoption of the

hypothetical test was clearly an error. For the foregoing reasons, the decision of the Bankruptcy Court should be reversed.

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