

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
SPORTSMAN’S WAREHOUSE, INC., et al.)	Case No. 09-10990 (CSS)
)	
Reorganized Debtors.)	Jointly Administered
)	
SPORTSMAN’S WAREHOUSE, INC.,)	
)	
Plaintiff,)	
)	
v.)	Adv. No. 10-50818 (CSS)
)	
MCGILLIS/ECKMAN INVESTMENTS-)	
BILLINGS, LLC,)	
)	
Defendant.)	
)	
MCGILLIS/ECKMAN INVESTMENTS-)	
BILLINGS, LLC,)	
)	
Plaintiff,)	
)	
v.)	Adv. No. 10-52913 (CSS)
)	
SPORTSMAN’S WAREHOUSE, INC.,)	
)	
Defendant.)	

OPINION

RICHARDS LAYTON & FINGER, P.A.
Russell C. Silberglied
Marcos A. Ramos
Cory D. Kandestin
920 North King Street
Wilmington, Delaware 19801

MORRIS, NICHOLS, ARSHT
& TUNNELL LLP
Gregory W. Werkheiser (Argued)
William M. Alleman, Jr.
1201 North Market Street
Wilmington, DE 19899-1347

-and-

O'MELVENY & MYERS LLP
Stephen H. Warren (Argued)
Matthew W. Close
Kelsey M. Larson
400 Hope Street
Los Angeles, California 90071

Counsel for Sportsman's Warehouse, Inc.

Dated: February 7, 2013

Sontchi, J. 

-and-

BLACKBURN & STOLL, LC
Bryce D. Panzer
257 East 200 South, Suite 800
Salt Lake City, Utah 84111

Counsel for McGillis/Eckman
Investments-Billings, LLC

INTRODUCTION

This is a case of contract interpretation.

Under a pre-petition lease between landlord and debtor/tenant, debtor was required to purchase the leased property "on or before the Initial Term Expiration Date of December 25, 2008." Debtor failed to purchase the property by that deadline but remained in possession of the property on a month-to-month basis.

Debtor filed bankruptcy in March 2009. Shortly thereafter, landlord and debtor entered into an agreement (without court approval) that lowered the base rent and extended the "Initial Term" of the lease to March 1, 2010. The amendment makes no mention of the purchase of the property but does state that "[t]he Lease shall remain in full force and effect and shall remain unaltered, except to the extent specifically amended herein."

In July 2009, debtor sought to assume and assign the lease. Debtor proposed a cure amount of \$0.00, no objection was filed and the Court approved the assumption of the lease.

The following February, landlord asserted that debtor had anticipatorily breached the lease for failure to provide notice of its intent to purchase the property by the extended termination date of March 1, 2010. Debtor exited the property and litigation ensued. Before the Court is debtor's motion for summary judgment.

The resolution of this case hinges on whether debtor's obligation to purchase the property expired on December 25, 2008 or was generally tied to the expiration of the "Initial Term" of the lease. Based upon the plain meaning of the agreements, the Court finds, as a matter of law, that debtor's obligation to purchase the property expired on December 25, 2008. As the purchase deadline was tied to a specific calendar date that had expired, the obligation was not part of the lease as it was extended month-to-month and ultimately to March 1, 2010. Debtor's failure to purchase the property by December 25th was a pre-petition breach of contract and a default under the lease. Debtor provided notice to landlord of debtor's intent to assume the lease with a proposed cure amount of \$0.00. As landlord did not object to the proposed cure or assumption, it may no longer assert any claim for violation of the purchase option.

Thus, summary judgment will be entered in favor of debtor.

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). This Court has the judicial power to enter a final order.

FACTUAL BACKGROUND¹

On March 21, 2009, Sportsman's Warehouse, Inc. ("SWI" or "Tenant") filed a voluntary petition for relief under chapter 11 in the United States Bankruptcy Court for the District of Delaware.

SWI, a Utah Corporation, is a retail outlet that sells sporting, hunting and fishing apparel. In 2007, SWI was in the process of expanding its business and territory. One market where SWI saw opportunity was Billings, Montana. SWI and its then CEO, Stuart Utgaard, sought the financing necessary for the development of a stand-alone location. Mr. Utgaard was in communication with, among many others, Richard McGillis and Robert Eckman about securing financing for the purchase and development of such a property. Messrs. McGillis and Eckman were business associates of Mr. Utgaard's for many years and had previously done business with SWI as lenders offering short-term loans. Together, Messrs. McGillis and Eckman formed McGillis/Eckman Investments-Billings, LLC, a Utah LLC ("Landlord") created specifically for the purchase and development of the real property subject to this

¹ The relevant facts are generally not disputed. Any fact in dispute has been stated in a light most favorable to the non-moving party, *i.e.*, landlord.

dispute (the "Premises"). Landlord purchased the Premises upon which it constructed a Sportsman's Warehouse store. In due course, SWI occupied the Premises on which it operated a store.

A. The Lease and Confirmation Memorandum

On March 28, 2008, SWI and Landlord entered into the *Sportsman's Warehouse, Inc., Lease Billings, Montana* (the "Lease").² Under section 2.2 of the Lease, "the initial term of this Lease ('Initial Term') shall be [120 days] commencing on the Rent Commencement Date."³ The Rent Commencement Date is tied to SWI's occupation of the Premises and serves as the starting date for SWI's payment of "Base Rent."⁴

As to the termination of the Lease, Tenant has "no right to renew the Term of this Lease" with "Term" being defined as ending at the expiration of the Initial Term.⁵ In addition, "[s]hould Tenant hold over the Premises or any part thereof after the expiration of the Term of this Lease, unless otherwise agreed in writing, such holding over shall constitute a tenancy from month-to-month only."⁶

The last section of the Lease is entitled "Option to Purchase."⁷ Under this section, Landlord grants SWI "the exclusive option and right to purchase the Premises pursuant to the Section for an amount equal to the sum of (a) Landlord's Total Costs

² Transmittal Affidavit of Cory D. Kandestin ("Kandestin Aff."), Exh. C.

³ Lease § 2.2.

⁴ *Id.* at § 4.

⁵ *Id.* at § 2.

⁶ *Id.* at § 30.

⁷ *Id.* at § 45.

and (b) [\$500,000] (the ‘Purchase Price.’).”⁸ The Lease immediately goes on to state that “this option *may* be exercised at any time during the Term, provided Tenant has provided Landlord with written notice of Tenant’s exercise of this purchase option (‘Exercise Notice’) at least fifteen (15) days prior to the desired closing date of such purchase . . .”⁹ But, “notwithstanding any other provision of this [Lease, SWI] *shall* exercise its option to purchase the Premises and will acquire the Premises during the Term.”¹⁰

Finally, the Lease provides that “[w]ithin a reasonable time following the Rent Commencement Date, Landlord and Tenant shall enter into a memorandum confirming the Rent Commencement Date and the expiration date of this Lease and such other matters as may be reasonable pursuant to the terms and conditions of this Lease (‘Confirmation Memorandum’).”¹¹ On September 12, 2008, SWI and Landlord entered into the *Sportsman’s Warehouse, Inc, Lease Confirmation Memorandum Billings, Montana*, which is the “Confirmation Memorandum” contemplated by the Lease.¹²

The Confirmation Memorandum is a one page document that makes six amendments to the Lease, three of which are relevant to the matter before the Court:

1. Rent Commencement Date. The Rent Commencement Date is agreed to be August 27, 2008.

⁸ *Id.*

⁹ *Id.* at § 45.1 (emphasis added).

¹⁰ *Id.* (emphasis added).

¹¹ *Id.* at § 2.2.

¹² Kandestin Aff., Exh. D.

2. Initial Term Expiration Date. The expiration of the Initial Term is agreed to be December 25, 2008.

5. Purchase Date. The Tenant, or its assigns, will purchase the property on or before the Initial Term Expiration Date of December 25, 2008.¹³

B. The Lease Amendment

SWI filed bankruptcy on March 21, 2009. In April, SWI and Landlord entered into the *Sportsman's Warehouse, Inc. Amendment to Lease* effective as of March 1, 2009 (the "Lease Amendment") without seeking approval of the Court.¹⁴ The Lease Amendment is a one page document, the primary purpose of which is to lower the Base Rent through March 1, 2010. In addition, it provides:

Capitalized terms not otherwise defined herein shall have the meaning set forth in the Lease.

The Initial Term is extended until: March 1, 2010.

The Lease shall remain in full force and effect and shall remain unaltered, except to the extent specifically amended herein.

Nothing in this Amendment constitutes an assumption or rejection of the Leases under bankruptcy Code section 365, and Tenant retains all rights under the Bankruptcy Code to either assume or reject the Lease notwithstanding its entry into this Amendment.¹⁵

¹³ *Id.*(emphasis in original).

¹⁴ Kandestin Aff., Exh. I.

¹⁵ *Id.*

C. The Assumption of the Lease and Plan Confirmation

On July 14, 2009, SWI filed *Debtors' Motion for Order Under 11 U.S.C. §§ 105(a) and 365(a) and Fed. R. Bankr. P. 6006 (I) Authorizing the Assumption of the Debtors' Unexpired Nonresidential Real Property Leases and (II) Fixing Cure Amounts* (the "Assumption Motion").¹⁶ Through the Assumption Motion, SWI sought, among other things, to assume the Lease. In addition, SWI proposed a cure amount of \$0.00. Although Landlord received notice of the Assumption Motion, it did not object to the assumption or the proposed cure.

On July 30, 2009, the Court entered the *Order Under 11 U.S.C. §§ 105(a) and 365(a) and Fed. R. Bankr. P. 6006 (I) Authorizing Assumption of the Debtors' Nonresidential Real Property Leases and (II) Fixing Cure Amounts* (the "Assumption Order").¹⁷ The Assumption Order provides that the "Debtors may assume the Leases listed on Exhibit A and Exhibit B attached hereto upon the effective date of a confirmed plan of reorganization."¹⁸ It also provides that the "Cure Amounts for the Leases on Exhibit A are fixed as set forth in Exhibit A."¹⁹ The Lease appears on Exhibit A with a cure amount of \$0.00. That same day, the Court confirmed the *Second Amended Joint Plan of*

¹⁶ Kandestin Aff., Exh. M.

¹⁷ Kandestin Aff., Exh. N.

¹⁸ Assumption Order at p.2 (emphasis in original).

¹⁹ *Id.* at p. 2 (emphasis in original).

Reorganization of Sportsman's Warehouse, Inc and Affiliate Debtors (the "Plan").²⁰ The Plan went "effective" on August 14, 2009, at which time SWI assumed the Lease.²¹

Six months later, on February 16, 2010, Landlord informed SWI that it was in breach of the Lease for its failure to express its intent to purchase the Premises by issuing the Exercise Notice at least 15 days prior to the end of the Initial Term, which was an "express repudiation of this obligation" to purchase the Premises.²² As such, Landlord demanded SWI surrender the Premises by the end of the Initial Term.²³ SWI vacated the Premises by no later than March 1, 2010.

PROCEDURAL BACKGROUND

A. The Montana Litigation

Days after Landlord's letter addressing SWI's purported breach of the purchase obligation in the Lease, Landlord filed a complaint against SWI in Montana state court. By its complaint, Landlord seeks to compel SWI to purchase the Premises for \$3 million plus 10% interest as well as unpaid rent, and real estate taxes, for a total purchase price of approximately \$7.5 million. Alternatively, Landlord requests damages on account of SWI's breach.

²⁰ Kandestin Aff, Exh J.

²¹ *Notice Of (A) Entry Of Order Confirming Second Amended Joint Plan Of Reorganization Of Sportsman's Warehouse, Inc And Affiliate Debtors, (B) Effective Date And (C) Bar Dates For Filing Administrative Claims, Professional Fee Claims And Contract/Lease Rejection Claims.* Kandestin Aff., Exh. K.

²² Letter dated February 16, 2010, Kandestin Aff., Ex. P.

²³ *Id.*

B. The SWI Adversary Proceeding

Shortly after Landlord filed its complaint, SWI filed this adversary proceeding. In its complaint, SWI asserts five counts, the first of which is for entry of a declaratory judgment that the purchase clause of the Lease is an option that may be executed at SWI's discretion and does not obligate SWI to purchase the Premises. In addition, SWI asserts, in the alternative, four further counts.²⁴

By Count II, SWI asserts that the Lease is a disguised financing arrangement that could not have been assumed by SWI without violating the Bankruptcy Code.

By Count III, SWI asserts that, as the Lease is a disguised financing arrangement, Landlord is deemed under the Plan to hold a "Miscellaneous Secured Claim" that is secured by the Premises. Because the Plan provides that any such claim is deemed fully satisfied if SWI relinquishes the collateral to the creditor, SWI asserts that it fully satisfied Landlord's claims by vacating the Premises and relinquishing possession to Landlord.

By Count IV, SWI seeks a declaratory judgment that Landlord's failure to object to the motion to assume the lease and to assert its right to a cure payment bars Landlord's claims against SWI under the Lease.

Finally, by Count VI, SWI asserts that (1) the purchase provision is void to the extent that it was assumed as part of the Lease Agreement, (2) the doctrines of waiver

²⁴ Counts II, III, IV and VI ask the Court to assume, *arguendo*, that the purchase clause to the Lease creates a mandatory obligation to purchase the Property. A plaintiff may plead alternative theories to his claim "regardless of whether such theories [are] consistent with one another." *Scott v. District of Columbia*, 101 F.3d 748, 753 (Fed. Cir. 1996).

and estoppel bar Landlord's claim for damages, and (3) any damages awarded to Landlord's must be reduced because Landlord failed to mitigate its damages.²⁵

It is on these counts that SWI has sought entry of summary judgment.

C. Consolidation of the Actions

The Montana litigation was removed to the United States District Court in the District of Montana (the "Montana Court"). There, SWI moved for a transfer of venue to the District of Delaware with referral to this Court while Landlord moved for remand. The Montana Court denied Landlord's motion for remand because it found that the District Court had jurisdiction based on the close nexus between Landlord's complaint and the SWI bankruptcy. The Montana Court went on to grant SWI's motion for transfer of venue based on its findings that the action was related to the bankruptcy.

Upon transfer, the Delaware District Court promptly referred the action to this Court. The parties then agreed to a consolidation of the action provided it does not affect or alter which party has the burden of proof based on each party's claims. The Court approved this agreement and consolidated the actions.

D. Motion to Dismiss

Previously, Landlord moved to dismiss SWI's complaint for lack of subject matter jurisdiction and, alternatively, for failure to state a claim upon which relief can be granted. As to subject matter jurisdiction, the Court denied the motion, finding that the bankruptcy court has, at least, "related to" jurisdiction. As for failure to state a claim, the Court granted the motion as to Count V and the portion of Count VI that

²⁵ As set forth below, Count V and a portion of Count VI were previously dismissed.

alleges the unclean hands doctrine as an affirmative defense. The remaining counts survived the motion to dismiss.²⁶

E. SWI's Motion for Summary Judgment

Before the Court is SWI's motion for summary judgment on Counts II, III, IV, and VI. SWI argues that summary judgment should be entered on its behalf for the following reasons:

1. SWI's failure to purchase the Premises by December 25, 2008 was a pre-petition breach of contract and a default under the Lease that SWI was required to cure for the Lease to be assumed. But, since Landlord did not object to assumption of the Lease or the cure amount of \$0.00, the default is deemed cured and Landlord's claims are barred.

2. The Lease is a disguised secured financing or mortgage. As such, Landlord has a secured claim against SWI with the Premises as collateral. Such a claim is a Miscellaneous Secured Claim under the Plan, which can be satisfied by the return of the collateral. As SWI returned the Premises to Landlord by no later than March 1, 2010 Landlord's claim has been satisfied in full under the terms of the Plan and further relief is barred.

3. The Court should vacate its order approving assumption of the Lease under Rule 60(b) of the Federal Rules of Civil Procedure²⁷ because (a) the Initial Term expired on December 25, 2008 as the Lease Amendment extending the Initial Term to

²⁶ See *In re Sportsman's Warehouse*, 457 B.R. 372 (Bankr. D. Del. 2011).

²⁷ Rule 60(b) is incorporated by Rule 9024 of the Federal Rules of Bankruptcy Procedure.

March 1, 2010 is a post-petition transaction outside SWI's ordinary course of business and, thus, voidable; or (b) the Lease is a financial accommodation for the purchase of the Premises making the lease non-assumable under section 365(c) of the Code.

LEGAL DISCUSSION

A. Summary Judgment Standard

The standard governing summary judgment is well-known. In short, summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."²⁸ When requesting summary judgment, the moving party must "put the ball in play, averring an absence of evidence to support the nonmoving party's case."²⁹ In order to continue, the burden shifts to the nonmovant to identify "some factual disagreement sufficient to deflect *brevis* disposition."³⁰ Not every discrepancy in the proof, however, is enough to forestall a properly supported motion for summary judgment; the "disagreement must relate to some genuine issue of material fact."³¹

This case involves the interpretation of contracts governed by Montana law.³² In Montana, "[t]he construction and interpretation of a contract is a matter of law."³³

²⁸ Fed. R. Civ. P. 56, which is incorporated by Fed. R. Bankr. P. 7056.

²⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

³⁰ *Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991).

³¹ *Id.*

³² Lease § 33 ("This Lease shall be construed and enforced in accordance with the Laws of the State in which the Premises is located," *i.e.*, Montana).

³³ *Corporate Air v. Edwards Jet Center*, 190 P.3d 1111, 1120 (Mont. 2008)

Under Montana law, a contract is interpreted by its plain, ordinary meaning,³⁴ and must be as the parties intended when entering into the contract.³⁵ The contract, specifically one written, shall not be interpreted from isolated phrases, but rather the court “will grasp the instrument by its four corners and in the light of the entire instrument” to garner its meaning.³⁶ “Particular clauses of a contract are subordinate to its general intent”³⁷ and those terms wholly inconsistent with the general nature of the contract or the primary intention of the parties are to be rejected.”³⁸

Under the summary judgment standard, “a court faces a conceptually difficult task” in interpreting a contract because the court must “determine whether as a matter of law, [if] the contract is ambiguous or unambiguous on its face.”³⁹ Under Montana law, if the language of the contract is plain and unambiguous, it is to be applied as written.⁴⁰ Typically, a court may only grant summary judgment when the terms are unambiguous.⁴¹ However, “where a court . . . determines as a matter of law that the contract is ambiguous, it may yet examine evidence extrinsic to the contract that is included in the summary judgment materials, and if that evidence is, as a matter of law,

³⁴ *Orphus v. Fritz*, 11 P.3d 1192, 1196 (Mont. 2000).

³⁵ *Corporate Air*, 190 P.3d at 1120 (citing Mon. Code Ann § 28-3-202).

³⁶ *Krajacich v. Great Falls Clinic, LLP*, 276 P.3d 922, 926 (Mont. 2012) (quoting *Rumph v. Dale Edwards, Inc.*, 600 P.2d 163, 168 (Mont. 1979)).

³⁷ Mont. Code Ann § 28-3-307.

³⁸ *Krajajich*, 276 P.3d at 926 (citing Mon. Code Ann. § 28-3-503).

³⁹ *World-Wide Rights Ltd. P'ship v. Combe Inc.*, 955 F.2d 242, 245 (4th Cir. 1991).

⁴⁰ *Orphus*, 11 P.3d at 1196.

⁴¹ See *Tamarind Research Assocs. v. Virgin Islands*, 138 F.3d 107, 110 (3d Cir. 1998) (“[I]t is a fundamental principle of contract law disputes involving the interpretation of unambiguous contracts are resolvable as a matter of law, and are, therefore, appropriate cases for summary judgment.”) (internal quotations omitted).

dispositive of the interpretive issue, grant summary judgment on that basis.”⁴² Under Montana law, the extrinsic evidence may clarify the terms of the contract, “but such evidence is not admissible to add to, vary, or contradict the terms of the contract.”⁴³ A contract is only ambiguous if it is objectively “susceptible to at least two reasonable but conflicting meanings.”⁴⁴ Ambiguity is not determined simply because the parties to the contract have differing interpretations.⁴⁵

B. The Purchase Option

The Lease, Confirmation Memorandum and Lease Amendment are clear and unambiguous on their face. No extrinsic evidence is required for the Court to determine the meaning of the contracts and entry of summary judgment is appropriate.

The central issue is when, if ever, did SWI’s obligation to purchase the Premises expire. This question is linked to, but ultimately separate from, the Initial Term of the Lease.

The “Initial Term” of the Lease was to expire 120 days after the Rent Commencement Date. The use of “Initial Term” is somewhat deceptive. Under the Lease, the Term of the Lease expires when the Initial Term expires.⁴⁶ Thus, the Lease itself expires on the expiration of the Initial Term. Upon expiration, SWI has no right to renew the Lease and the tenancy becomes month-to-month.

⁴² *World-Wide*, 955 F.2d at 245.

⁴³ *Corporate Air*, 190 P.3d at 1120.

⁴⁴ *Performance Machinery Co., v. Yellowstone Mountain Club, LLC*, 169 P.3d 394, 402 (Mont. 2007).

⁴⁵ *Krajajich*, 276 P.3d at 928.

⁴⁶ The Initial Term is preceded by the “Construction Term.” Lease at §§ 2, 2.1 and 2.2.

Turning to the “Purchase Option,” it provides SWI with the option to purchase the Premises at any time under the Term of the Lease. But, it also provides that “Tenant shall exercise its option to purchase the Premises and will acquire the Premises during the Term.” This is to say that SWI was required to purchase the Premises by no later than the expiration of the Initial Term. However, the Lease did not assign a specific date to the Rent Commencement Date or the expiration of the Initial Term because occupation of the Premises would depend upon the construction schedule.

On September 12, 2008, SWI and Landlord entered into the Confirmation Memorandum. The Confirmation Memorandum alters the definition of the Rent Commencement Date by assigning it the specific date of August 27, 2008. Under the Lease, this, in and of itself, would set the expiration of the Initial Term as 120 days after August 27th, which was December 25, 2008. But, the parties did not rely on the calculation in the Lease. Rather, they created a *new* definition of Initial Term in the Confirmation Memorandum. The expiration of the Initial Term was no longer 120 days after the Rent Commencement Date. Rather, it was specifically set as December 25th. Although the dates are identical, they are derived in different ways.

Turning to the Purchase Option. Again, under the Lease, the setting of the expiration of the Initial Term as December 25th, in and of itself, would set the deadline by which SWI was required to purchase the Premises, i.e., during the Term. But, as with Initial Term, the parties did not rely on the calculation in the Lease but created a *new* definition. Under the Confirmation Memorandum, SWI was required to purchase the Premises “on or before the Initial Term Expiration Date of December 25, 2008.”

Importantly, “Initial Term Expiration Date” is not a defined term under the Lease or the Confirmation Memorandum. The effect of this amendment in the Confirmation Memorandum was to set a *specific deadline* of December 25, 2008 for SWI to purchase the Premises. Further changes of the Initial Term would not, in of themselves, alter the purchase deadline because the definition of that deadline had been divorced from the Initial Term.

SWI neither purchased nor vacated the Premises by December 25th. Thus, under the terms of the Lease and the Confirmation Memorandum, commencing on December 26th, SWI’s occupation of the Premises became a month-to-month tenancy. Under Montana law, the terms of the Lease continued to apply after the expiration of the Initial Term.⁴⁷ But, the month-to-month tenancy did not alter the Rent Commencement Date, the expiration of the Initial Term or the purchase deadline because those dates had been pegged to specific calendar days that has already expired.

In April, 2009, SWI and Landlord entered into the Lease Amendment, which changed the definition of Initial Term to March 1, 2010. The remaining provisions of the Lease were unchanged and applied to SWI’s occupancy just as they had in the month-to-month tenancy. But, just as before, the deadline by which SWI was required to purchase the Premises was independent of the meaning of “Initial Term” and remained December 25, 2008. Ultimately, the Lease was allowed to expire on March 1, 2010 and SWI vacated the Premises so that no further holdover tenancy occurred.

⁴⁷ See MONT. CODE ANN. § 70-26-204; *Nevala v. McKay*, 583 P.2d 1065, 1068 (Mont. 1978).

SWI's failure to purchase the Premises by December 25, 2008 was a breach of contract and a default under the Lease and the Confirmation Memorandum.⁴⁸ Nonetheless, the window in which SWI was required or even able to exercise its purchase option never changed.

As stated earlier, the Court finds the above description of the Lease, Confirmation Memorandum and Lease Amendment to be correct as a matter of law. Having made that determination, the motion for summary judgment can be quickly dispatched.

C. The Assumption Order Bars Landlord's Claims

Pursuant to Count IV of the complaint, SWI asserts that its failure to purchase the Premises by December 25, 2008 was a pre-petition breach of contract and a default under the Lease that must be cured for the Lease to be assumed. But, since Landlord did not object to assumption of the Lease or the cure amount of \$0.00, the default is deemed cured and Landlord's claims are barred.

The Bankruptcy Code requires that before any executory contract or lease can be assumed any default must be cured or compensated.⁴⁹ It then goes to reason that "[w]hen a bankruptcy court approves the assumption of an executory contract, it necessarily finds that no uncured defaults exist. Thus, the nonbankrupt party to an executory contract bears the burden to assert any defaults prior to the assumption. Where the nonbankrupt party has knowledge of facts sufficient to place the party on

⁴⁸ Lease § 20.

⁴⁹ See 11 U.S.C. 365(b)(1).

notice that a potential pre-confirmation breach has occurred, res judicata bars that party from later asserting a claim based upon a pre-petition breach.”⁵⁰

This is exactly what occurred in this case. SWI’s failure to purchase the Premises by December 25, 2008 was a breach of contract and a default under the Lease. SWI filed the Assumption Motion seeking to assume the Lease. In order for SWI to assume the lease it was required to cure the default. However, SWI took the position that no default had occurred and that there was nothing to cure. Thus, in connection with the Assumption Motion, SWI proposed a cure amount of \$0.00. Landlord received notice of the proposed assumption of the Lease and the proposed cure amount. Nonetheless, Landlord did not object. The Court then entered the Assumption Order, approving assumption of the Lease and “fixing” the cure amount at \$0.00.

Under the Assumption Order approving assumption of the Lease, SWI’s default for failure to purchase the Premises by December 25, 2008 was cured upon the effective date of the Plan, *i.e.*, August 14, 2009. As the deadline to purchase the Premises was not extended beyond December 25th there is no current breach or default under the Lease. Thus, SWI is entitled to summary judgment on Count IV of its complaint.

D. Landlord’s Claim Based On SWI’s Failure To Purchase The Premises Is Not A Miscellaneous Secured Claim Under The Plan.

Under Count III of the complaint, SWI argues that, if the Lease is a disguised secured financing or mortgage, Landlord has a secured claim. Such a claim is a Miscellaneous Secured Claim under the Plan, which can be satisfied by the return of the

⁵⁰ *In re Cellnet Data Sys., Inc.*, 313 B.R. 604, 608 (Bankr. D. Del 2004) (internal quotations and citations omitted).

collateral.⁵¹ SWI argues that since it relinquished the Premises to Landlord by no later than March 1, 2010, Landlord's claim has been satisfied in full under the terms of the Plan and further relief is barred.

SWI's argument is based upon an incorrect premise. As there was no longer an obligation for SWI to purchase the Premises after December 25, 2008, the Lease is a "true lease" and not a disguised financing or mortgage. It follows, of course, that Landlord does not have a secured claim, miscellaneous or otherwise, and the turnover of the Premises was not a return of collateral.

Under Montana law, a secured lien may be placed on a debt of real property that is transferable where a party has an interest in that property by a mortgage.⁵² The "mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change in possession."⁵³ Even where the parties may refer to a transaction as something other than a mortgage, the court is not bound

⁵¹Section 3.2(d) of the Plan states "the Holder of such allowed Miscellaneous Secured Claim shall receive at the election of the Reorganized Debtors, in full satisfaction, settlement, release and discharge of an in exchange for, such Allowed Miscellaneous Secured Claim . . . (ii) the return of the Holder's Collateral securing the Miscellaneous Secured Claim."

⁵² In its decision on the motion to dismiss this case, this Court found that "if the lease agreement is deemed to be a mandatory purchase obligation, then the Lease Agreement could be determined to be a security agreement under Montana law" *In re Sportsman's Warehouse, Inc.*, 457 B.R. at 397. The Court's extension of Art. 9 of the U.C.C. to real property was erroneous. *Id.* at 393 n. 58. In making its decision this Court relied on *United Airlines, Inc. v. HSBC Bank USA, N.A.*, 416 F.3d 609, 615 (7th Cir. 2005). In that case, the Seventh Circuit held that it does not make sense that state law would define a lease for personal property and leave it to the federal government to define a lease for real property. The Court went on to apply California law governing real property. The confusion arises because California applies its personal property law under Article 9 of the U.C.C. to real property. *Id.* at 616 (*citing Burr v. Capital Reserve Corp.*, 458 P.2d 185 (Cal. 1969)). Montana, unlike California, does not apply Art. 9 to real property. The scheme that Montana uses to determine whether a security agreement on real property, known as a mortgage, is discussed *infra*. Therefore, Art. 9 is inapplicable. All that said, however, the result here as well as under the previous motion to dismiss is the same regardless of whether Article 9 or Montana's real property law is applied.

⁵³ MON. CODE ANN. § 71-1-101.

by it.⁵⁴ That being the case, the Montana Supreme Court has found the existence of a mortgage in equity where there has been a conveyance of the property with a continued indebtedness.⁵⁵ An equitable mortgage would create a secured lien even where the parties have not defined it as such.

Here, because there was no formal creation of a mortgage, the only way a secured lien could be created as an equitable mortgage. As stated, an equitable mortgage requires a conveyance and continued indebtedness. Under Montana law, “the term conveyance . . . embraces every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged, or encumbered or by which *the title to the real property may be affected, except wills*”⁵⁶ Such instruments may include “leases that create interests amounting to estates in real property.”⁵⁷

At its inception, the Lease was arguably a conveyance with continued indebtedness due to the purchase obligation, which could have created an equitable mortgage. But, the parties amended the Lease. The purchase obligation no longer exists - as it expired on December 25, 2008. Thereafter, SWI’s sole obligation was to pay monthly rent as a holdover tenant and then, after the Lease Amendment, as a tenant under the Lease. Even if SWI had wanted to purchase the Premises it could not because, under the terms of the Lease, that option terminated on December 25th as

⁵⁴ See *Bermes v. Serling*, 587 P.2d 377, 383 (Mont. 1978).

⁵⁵ See *id.* (“The vital test in determining [if there is a mortgage] is whether the indebtedness continues to exist. If the indebtedness remains uncanceled the absolute deed is treated in equity as a mortgage.”) (quoting *Nikles v. Barnes*, 454 P.2d 608, 610 (Mont. 1969)).

⁵⁶ Mon Code. Ann. 70-21-301 (emphasis added).

⁵⁷ Joyce Palomar, 2 Patton and Palomar on Land Titles § 331, Deeds of Conveyance (3d ed. 2012).

well.⁵⁸ There are no facts here that would render the Lease, as amended by the Confirmation Memorandum, a conveyance of the Premises to SWI giving rise to an equitable mortgage. As there is no security interest there is no secured claim and Section 3.2(d) of the Plan relating to Miscellaneous Secured Claims is inapplicable.

SWI's motion for summary judgment under Count III will be denied.

E. The Assumption Order Is Not Void Under Rule 60(b) of the Federal Rules of Civil Procedure.

Finally, SWI seeks to void the Assumption Order under Federal Rules of Civil Procedure 60(b)(1) and (6).⁵⁹ SWI argues that the Assumption Order should be vacated because: 1) the Lease Amendment, which extended the Initial Term until after the Lease was assumed, is an unauthorized post-petition transaction outside the ordinary course of business under Section 363(b) and, thus, void; and 2) the Lease, Confirmation Memorandum and Lease Amendment constituted a financial accommodation by Landlord that was not assumable under section 365(c). Landlord disagrees with SWI on each of these substantive grounds but also argues that, as a threshold matter, relief under Rule 60 is not available here. The Court need not address the threshold argument, however, as SWI's claims fail on their merits.

⁵⁸ The Court is entirely confident that Landlord would not have prevented SWI from buying the Premises even if its option to purchase had expired.

⁵⁹ Rule 60(b) is incorporated by Rule 9024 of the Federal Rules of Bankruptcy Procedure.

1. Whether the Lease Amendment was an unauthorized post-petition transaction outside the ordinary course of business is moot.

SWI argues that the Lease Amendment, which extended the Initial Term of the Lease to March 1, 2010, was an unauthorized post-petition transaction outside the ordinary course of business. Under sections 1107(a) and 1108 of the Bankruptcy Code, a debtor in possession such as SWI is authorized to operate its business. Concomitantly, Section 363(c)(1) allows the debtor in possession to enter into transactions in the ordinary course of business without notice to creditors and approval from the Court. Notice and Court approval is required, however, when the transaction is outside the ordinary course of business.⁶⁰ In determining whether a transaction is in the ordinary course of business, the Third Circuit has adopted the two-part horizontal and vertical dimension test.⁶¹

The Court need not analyze the matter further, however, because, even if the Lease Amendment was an unauthorized post-petition transaction outside the ordinary course of business, the question is moot. The issue before the Court relates to SWI's obligation to purchase the Premises. As stated earlier, as a matter of law, the deadline by which the purchase was required to occur was tied to the specific date of December 25th not to the expiration of the "Initial Term." The subsequent extension of the Initial Term, whether inside or outside the ordinary course of business, has no effect on the purchase obligation. The Court need not consider the issue further.

⁶⁰ 11 U.S.C. 363(b)(1).

⁶¹ See *In re Roth American, Inc.*, 975 F.2d 949, 952 (3d Cir. 1992).

2. The Lease, Lease Confirmation and Lease Amendment are not a financial accommodation under section 365(c)(2) of the Code.

SWI's final argument is that the Lease, Lease Confirmation and Lease Amendment are a financial accommodation, which is specifically not assumable under section 365(c)(2) of the Code. Section 365(c) states that the "trustee may not assume or assign any executory contract or unexpired lease . . . if . . . (2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor."⁶² As with the issue of whether an equitable mortgage exists, at the inception of the Lease the transaction may very well have been a financial accommodation. Once the deadline to purchase the Premises passed, however, the transaction became nothing more than a run of the mill lease.

Thus, SWI's motion for summary judgment under Rule 60(b) based on Counts II and VI of the complaint will be denied.

CONCLUSION

A great deal of ink has been spilled over if and when SWI was required to purchase the Premises. At heart, however, this is a simple case of contract interpretation. The Confirmation Memorandum amended the deadline under the Lease by which SWI was required to purchase the Premises. The deadline was no longer measured in relation to the expiration of the Interim Term. Rather, it became a specific date – December 25, 2008. That date was never amended nor extended.

⁶² 11 U.S.C. § 365(c)(2)

SWI's failure to purchase the Premises by December 25th was a breach of contract and a default under the Lease. Nonetheless, SWI subsequently sought and obtained Court approval to assume the Lease with a proposed cure amount of \$0.00. Landlord received notice of the Assumption Motion but did not object to either the assumption or the proposed cure. The Assumption Order approving assumption of the Leased cured, as a matter of law, SWI's default for failure to purchase the Premises. As Landlord's claims are based upon a breach of contract that has been cured, summary judgment will be entered in SWI's favor on Count IV of the complaint.

SWI's remaining arguments, however, are unavailing. They are based upon facts that the Court has found, as a matter of law, to be incorrect. Thus, the balance of SWI's motion for summary judgment will be denied.

SWI is directed to submit an Order and Judgment under certification of counsel.