

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
	)	
NET2000 COMMUNICATIONS INC., et	)	Case No. 01-11324 (MFW)
al.,	)	Jointly Administered
	)	
Debtors.	)	
_____	)	
	)	
OPERATING TELEPHONE COMPANY	)	
SUBSIDIARIES OF VERIZON	)	
COMMUNICATIONS, INC., et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	Civil Action No. 02-146-KAJ
	)	
NET2000 COMMUNICATIONS, INC.,	)	
CAVALIER EAST L.L.C. and CAVALIER	)	
TELEPHONE L.L.C.,	)	
	)	
Appellees.	)	
_____	)	
	)	
OPERATING TELEPHONE COMPANY	)	
SUBSIDIARIES OF VERIZON	)	
COMMUNICATIONS, INC., et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	Civil Action No. 02-232-KAJ
	)	
NET2000 COMMUNICATIONS, INC.,	)	
CAVALIER EAST, L.L.C. and CAVALIER	)	
TELEPHONE, L.L.C.,	)	
	)	
Appellants.	)	

**MEMORANDUM ORDER**

Presently before this court is an appeal by Operating Telephone Company  
Subsidiaries of Verizon Communications, Inc., et al., (“Verizon”) from the January, 10,

2002 order of the Bankruptcy Court approving the purchase agreement between NET2000 Communications, Inc., et al., (“Debtors”) and Cavalier East, L.L.C., (“Cavalier”) (Docket Item [“D.I.”] 10. P. A197; the “Order.”) . For the reasons that follow, that Order is affirmed.

## **I. Background**

On November 19, 2001, Debtors filed a motion with the Bankruptcy Court to sell its assets to Cavalier. (D.I. 10 at A1.) On December 27, 2002, the interested parties appeared before the Bankruptcy Court for consideration of the Debtors’ motion to sell its assets. (D.I. 1, Ex. A at 2.) At that time, counsel for Verizon objected to the proposed sale on the grounds that the sale could not be consummated without the assumption of Verizon’s agreements with Debtor (the “Verizon agreements”). (*Id.* at 48-50.) The Bankruptcy Court judge ruled that Verizon did not have standing to object because the contracts were not being assumed and consequently that issue was not before the court. (*Id.* at 48-50.)

On January 10, 2002 the Bankruptcy Court entered an order:  
(A) Approving Purchase Agreement Between the Debtors and Cavalier East, L.L.C.; (B) Authorizing Sale of Assets Free and Clear of All Liens, Claims and Encumbrances; (C) Authorizing the Assumption and Assignment of Certain Executory Contracts; and (D) Granting Related Relief. (D.I. 10 at A197.)

In that order, the Bankruptcy Court held, “Debtors shall not assume and assign any executory contract to which the operation subsidiaries of Verizon Communication, Inc. ... are a counterparty ....” (D.I. 10 at A207.)

On January 18, 2002, Verizon appealed under 28 U.S.C. Sec. 158(a).

## II. Standard of Review

This court has jurisdiction over appeals from the Bankruptcy Court pursuant to 28 U.S.C. § 158(a). On appeal, this court applies a clearly erroneous standard to the Bankruptcy Court's findings of fact and a plenary standard to its legal conclusions. See *Am. Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999). When reviewing mixed questions of law and fact, this court will accept the Bankruptcy Court's finding of "historical or narrative facts unless clearly erroneous, but [will] exercise plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts." *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (internal quotations omitted).

## III. Discussion

In this appeal there are two main issues: (1) whether the Bankruptcy Court erred in holding that Verizon had no standing to object to the sale of the Debtors' assets, Cavalier was a "good faith" purchaser, and Debtors soundly exercised their business judgment, and, (2) whether under Sec 365(b)(1)(A) there was a *de facto* assumption of the Verizon agreements.

With regard to the first issue on appeal, I find that section 363(m) moots any inquiry into the validity of the Debtor's asset sale. With respect to the second question, I find that there was no *de facto* assumption of Verizon's executory contract.

The question of whether the sale of the Debtors' assets was valid is moot. Section 363(m) of Title 11 of the United States Code provides:

The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m) (2004).

The United States Court of Appeals for the Third Circuit has held that “when a bankruptcy court authorizes a sale of assets pursuant to section 363(b)(1), it is required to make a finding with respect to the ‘good faith’ of the purchaser.” *In re Abbots Dairies of Penn.*, 788 F.2d 143, 149-50 (3d Cir 1986). The Third Circuit went on to state that a finding of good faith is best performed by the bankruptcy court, as it is more familiar with the parties and such a finding “encourages finality of the bankruptcy court’s judgments under section 363(b)(1) ... .” *Id.* at 150. In its order, the Bankruptcy Court, found that Cavalier was a good faith purchaser. (D.I. 10 at 3.) There is nothing in the record to suggest that the bankruptcy court abused its discretion.<sup>1</sup>

If the purchaser is found to have acted in good faith, then this court must apply a two-prong test for mootness under § 363(m): (1) whether the order was stayed pending appeal, and (2) whether vacating the order would affect the validity of the sale. *Cinicola*

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<sup>1</sup> Appellant cites *In re Abbots Dairies*, 788 F.2d at 149, for the proposition that the debtor must show that the purchaser is acting in good faith. (D.I. 9 at 37.) Appellant, however, misapprehends the holdings in that case. In that case the Third Circuit stated that the evidence was insufficient for the district court to find that the purchaser acted in good faith, and as the bankruptcy court had not made such a determination the case should be remanded to the bankruptcy court. 788 F.2d at 149-150. In the instant case the Bankruptcy Court has determined that the purchaser acted in good faith and as such, that line of reasoning is not applicable here.

*v. Scharffenberger*, 248 F.3d 110, 128 (3d Cir. 2001)(citing *Krebs Chrysler-Plymouth v. Valley Motors, Inc.*, 141 F.3d 490, 499 (3d Cir. 1998)). In this case, Verizon concedes that it failed to obtain a stay of the sale pending appeal. (D.I. 9 at 9.) Therefore, the only issue is whether vacating the Bankruptcy Court order to the sell the assets would affect the validity of the sale. The answer is it would.

The settlement has already been approved and, in accordance with the Bankruptcy Court's Order, Debtors' assets have been transferred to the purchasers free and clear of liens. Accordingly, modification or reversal of the Bankruptcy Court's Order would affect the validity of the sale and is impermissible under § 363(m). Consequently, the questions of whether the Bankruptcy Court erred in not allowing Appellant to object to the sale of the Debtors' assets and whether the Debtors soundly exercised their business judgment is moot.

The Debtors did not perform a *de facto* assumption and assignment of Verizon's agreements. Section 365(a) of Title 11 of the United States Code provides: "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." Section 365 does not address a *de facto* assumption. Additionally, Verizon has not offered, nor can I find, any case law to support Verizon's contention that the Debtors could have preformed a *de facto* assumption of the Verizon agreements.

**IV. Conclusion**

Therefore, IT IS HEREBY ORDERED that the January 10, 2002 order of the Bankruptcy Court is AFFIRMED.

Kent A. Jordan  
UNITED STATES DISTRICT JUDGE

DATE: October 5, 2004  
Wilmington, Delaware