

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

_____)	
<i>In re:</i>)	Chapter 11
)	
)	Bankruptcy Case No. 00-3663 (JHW)
VIDEO UPDATE, INC., <i>et al.</i>)	
)	(Jointly Administered)
Debtors.)	
_____)	
)	
PALMS ASSOCIATES,)	
)	
Appellant,)	Civil Action No. 03-18 (GMS)
)	
v.)	Adversary Proceeding No. 02-276
)	
VIDEO UPDATE, INC., <i>et al.</i>)	
)	
Appellees.)	
_____)	

ORDER

1. On January 9, 2003, Palms Associates (“Palms”) filed an appeal from the November 25, 2002 Order of the United States Bankruptcy Court for the District of Delaware (“Bankruptcy Court”), which authorized Video Update, Inc., et al.’s (the “debtors”) assumption of a ground lease between Palms and the debtors, and overruled Palms’ objection to confirmation of the debtors’ Plan of Reorganization (the “Plan”).

2. The facts of this action are set forth in the Bankruptcy Court's October 4, 2002 unpublished opinion, *In re Video Update, Inc., et al.*, Case Nos. 00-3663 through 00-3683 (JHW) (D.I. 1789.)
3. The court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 158(a) (2004). In reviewing a case on appeal, the Bankruptcy Court's factual determinations will not be set aside unless they are clearly erroneous. *See Mellon Bank, N.A. v. Metro Comm., Inc.*, 945 F.2d 635, 641 (3d Cir. 1991), *cert. denied*, 503 U.S. 937, (1992). Conversely, a Bankruptcy Court's conclusions of law are subject to plenary review. *See id.* Mixed questions of law and fact are subject to a "mixed standard of review." *See id.* at 641-42. Under this "mixed standard of review," the appellate court accepts findings of "historical or narrative facts unless clearly erroneous, but exercise[s] plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to historical facts." *Id.*
4. After reviewing the opinion of the Bankruptcy Court under a plenary standard of review,¹ the court concludes that the Bankruptcy Court correctly determined that the lease between the parties did not terminate pre-petition (*i.e.* it remained executory on the date that the debtors filed for bankruptcy) and could properly be assumed by the debtors pursuant to 11 U.S.C. § 365(a).
 - a. First, the court agrees with and adopts the Bankruptcy Court's analysis and conclusion that because the October 5, 1999 letter from Palms to the debtors

¹ The parties filed a stipulation with the Bankruptcy Court on January 30, 2002, in which they stipulated to the basic facts of this matter.

contained defects it did not effectively serve to terminate the lease between the parties.

- b. The court also adopts the analysis and conclusion reached by the Bankruptcy Court regarding the Virginia District Court judgment, dated October 29, 1999, namely, that the Bankruptcy Court had to examine whether the lease terminated pre-petition without resort to the District Court judgment. *See Ragan v. Woodcroft Village Apartments*, 497 S.E. 2d 740, 742 (Va. 1998) (“The purpose of this two-tier trial system is to allow a party aggrieved by a final judgment of the general district court to have the case tried again by the circuit court as if the case originally had been instituted there. Such an appeal is in effect a statutory grant of a new trial, in which the perfected appeal annuls the judgment of the district court as completely as if there had been no previous trial.”)
 - c. In addition, the court adopts the Bankruptcy Court’s rationale and conclusion that the Allen Mechanics Lien was not the basis for Palms’ purported termination of the lease. *See In re Video Update, Inc., et al.*, Case Nos. 00-3663 through 00-3683 (JHW), at 6-7 (according to the parties’ stipulation, Palms notified the debtors that the lease was terminated due to only non-payment of September 1999 and October 1999 rents).
5. Lastly, because the court has concluded that the Bankruptcy Court correctly determined the lease could be assumed by the debtors, it concludes that the Bankruptcy Court properly overruled Palms’ objection to the Plan.

For the aforementioned reasons, IT IS HEREBY ORDERED that:

1. The November 25, 2002 Order of the Bankruptcy Court is AFFIRMED.

Dated: May 19, 2005

/s/ Gregory M. Sleet
UNITED STATES DISTRICT JUDGE