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11 USC § 365(d)(2)  
11 USC § 365(d)(4)  
Rejection  
Termination

Eagle Creek Enterprises, Inc. v.  
Water Front Recreation, Inc. Adv. No. 99-3272-rld  
(In re Eagle Creek Enterprises, Inc.) Case No. 397-37929-rld11  
11/18/99 RLD Unpublished

Debtor was the lessee by assignment of a Cabin Site Lease dated 4/24/97 and terminating 6/1/2025. Debtor was in default pre-petition, and Lessor had made demand pre-petition for payment of the 1997-98 annual rent. Debtor, through error of its counsel, did not assume the Lease within 60 days of the petition date and did not assume the Lease in its plan of reorganization confirmed 4/10/98. Debtor initiated an adversary proceeding to determine what rights if any remained under the Lease in view of its failure to assume the Lease. The matter was heard on cross-motions for summary judgment.

The court held that the Lease was rejected. The court also held that the leasehold was residential in character and that 11 USC § 365(d)(2) rather than § 365(d)(4) applied in determining the effect of debtor's rejection of the Lease. The court further held that rejection under § 365(d)(2) constitutes a breach of an unexpired lease, but does not automatically terminate the Lease. Whether the Lease was terminated depends on the terms of the agreement and applicable non-bankruptcy law. Further proceedings were necessary to determine whether the Lease was terminated.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case
	)	No. 397-37929-rld11
EAGLE CREEK ENTERPRISES, INC.,	)	
	)	
Debtor-in-Possession.	)	
_____	)	
EAGLE CREEK ENTERPRISES, INC.,	)	
an Oregon corporation,	)	Adversary No. 99-3272
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	
v.	)	
	)	
WATER FRONT RECREATION, INC.,	)	
a Washington corporation,	)	
	)	
Defendant.	)	
_____	)	

The parties' cross-motions for summary judgment in this adversary proceeding were heard on October 26, 1999. James Ray Streinz of McEwen, Gisvold, Rankin, Carter & Streinz, LLP appeared in behalf of the Plaintiff, Eagle Creek Enterprises, Inc. ("Eagle Creek"), and Thomas W. Stilley of Sussman, Shank, Wapnick, Caplan & Stiles LLP appeared in behalf of the Defendant, Waterfront Recreation, Inc. ("Waterfront"). This is a core proceeding over

1 which this court has jurisdiction pursuant to 28 U.S.C. Sections  
2 157(b) (2) (O) and 1334.

3 **Factual Background**

4 Eagle Creek filed its petition for relief under chapter 11 of  
5 the Bankruptcy Code on September 26, 1997.

6 At the time of filing its bankruptcy petition, Eagle Creek  
7 was the holder, by assignment, of the lessee's interest in a Cabin  
8 Site Lease (the "Lease"), dated April 24, 1977, between Waterfront  
9 as lessor and Vivian L. Collier as lessee.

10 Relevant provisions of the Lease are as follows:

11 1.01 Term. This lease is granted for the period  
12 beginning April 24, 1977 and terminating on June 1, 2025,  
unless sooner terminated as hereinafter provided.

13 1.02 Master Lease. Lessor holds the above described  
14 premises under a lease hereinafter referred to as the "master  
15 lease", dated August 11, 1970, from the State of Washington,  
acting by and through the Department of Natural Resources.

16 4.01 Permitted Use. The cabin site shall be used only  
17 for residential purposes. No building shall be erected,  
18 altered, placed, or permitted to remain on the cabin site  
other than one detached single family dwelling and buildings  
incidental to residential use, and the cabin site shall not  
be further subdivided into building lots.

19 5.03 Completion. Cabins must be completed from all  
20 outward appearance within one (1) year from the time such  
21 construction is started. Cabin construction must be started  
within three years from the date of the signing of the Cabin  
Site Lease.

22 5.07 Ownership of Improvements. The master lease  
23 provides as follows:

24 8.04 Ownership of Sub-Lessee Improvements. All  
25 buildings and improvements, excluding removable  
26 personal property and trade fixtures on the lease site  
[North Woods] erected by sub-lessee [lessee herein]  
will remain on said site after expiration of this lease  
[master lease] or termination prior to the term of this

1 lease [master lease] of any sub-lease [this lease] held  
2 by the State under the provisions of paragraph 5.09;  
3 provided, however, that upon the expiration of the  
4 lease [master lease], if the State is unsuccessful in  
5 re-releasing the leased site [North Woods], as a unit,  
6 then each sub-lessee [lessee herein] shall have a  
7 preferential right as allowed by law to re-lease from  
8 the State its sub-leased area; provided, further, upon  
9 the termination or expiration of this lease [master  
10 lease] or a sub-lease [this lease] assigned under  
11 paragraph 5.09 that as a condition to any re-lease of  
12 the lease site or sub-lease site to any other party  
13 made during the three-year period following, the State  
14 shall require the subsequent lessee to purchase the  
15 sub-lessee's [lessee herein] interest in the  
16 improvements as allowed by law. Expiration, as used in  
17 this paragraph, shall mean the expiration of the lease  
18 as of May 31, 2025.

19 The parties hereto agree that the terms and conditions  
20 of the above quoted paragraph shall be applicable provided:

21 (a) That lessee is not in default under any of the  
22 terms and conditions of this lease; and

23 (b) That lessee's lease expires May 31, 2025. In the  
24 event of earlier expiration of this lease, all buildings and  
25 improvements located upon the premises shall be the property  
26 of lessor.

The parties hereto further agree that the benefits of  
paragraph 8.04 of the master lease shall be enforceable  
solely against the State of Washington.

8.01 Default and Notices. If any default shall be made  
on the part of the lessee in the observance or performance of  
any of the terms, covenants, agreements, or provisions of  
this lease by him to be observed and performed and such  
default continues for sixty (60) days after written notice,  
the lessor may, at its option, immediately terminate this  
lease, forfeit lessee's interest therein, and forthwith  
exclude the lessee from the premises and from all rights  
hereunder, but the lessee shall nevertheless be liable to the  
lessor for all liabilities hereunder prior to such  
termination.

The original lessee under the Lease built a cabin (the  
"Cabin") on the leased site (the "Leasehold"), which Cabin was  
purchased by Eagle Creek. There is no allegation that the Cabin was

1 not completely constructed within the deadlines established pursuant  
2 to paragraph 5.03 of the Lease.

3 Duncan Brinkley, the president of Eagle Creek, and his family  
4 were permitted to use the Cabin as a vacation home, and they stayed  
5 in the Cabin approximately eight times a year following Eagle  
6 Creek's purchase of the Cabin and succession as lessee by assignment  
7 under the Lease.

8 On September 9, 1997, shortly before Eagle Creek's chapter 11  
9 filing, Waterfront made demand on Eagle Creek for payment of the  
10 1997-98 rent of \$1,127.83. Eagle Creek intended to assume the Lease  
11 because of its value, and during the course of its chapter 11 case,  
12 Eagle Creek paid real property taxes that were due with respect to  
13 the Leasehold and opposed efforts by Waterfront to terminate the  
14 Lease. However, Eagle Creek did not assume the Lease within 60 days  
15 following the date of its bankruptcy filing and further, through an  
16 oversight of Eagle Creek's attorney, did not assume the Lease in its  
17 plan of reorganization (the "Plan"). The Plan was confirmed by  
18 order of this court on April 10, 1998, and in these circumstances,  
19 the Lease was rejected.

20 Eagle Creek did not realize that the Lease had been rejected  
21 until August 1998. Eagle Creek sent Waterfront a first installment  
22 payment of unsecured debt and a new lease certificate for the  
23 Leasehold in July 1998. Counsel for Waterfront wrote back, by  
24 letter dated August 11, 1998, stating that it was his assumption in  
25 light of the Lease not being assumed in the Plan, that Eagle Creek  
26 had abandoned the Lease, and with the court's entry of the

1 confirmation order, the Lease had ended.

2 On or about September 15, 1998, Eagle Creek's attorney wrote  
3 to counsel for Waterfront, enclosing an Affirmation of Cabin Site  
4 Lease signed by Eagle Creek's president and a check in the amount of  
5 \$1,300 to cover the 1998-99 Lease payments. Eagle Creek's attorney  
6 also requested that Waterfront approve assignment of Eagle Creek's  
7 interest in the Lease to a third party assignee. The purported  
8 Affirmation of Cabin Site Lease stated the following:

9 Eagle Creek Enterprises, Inc. ("Eagle Creek") hereby  
10 affirms the liabilities and responsibilities of lessee under  
11 the Cabin Site Lease, dated April 24, 1977 ("Lease"), between  
12 Water Front Recreation, as Lessor, and Vivian Collier, as  
Lessee, the lessee's interest in which was assigned to and  
assumed by Eagle Creek by Assignment, Assumption and Consent  
Form Dated October 19, 1994.

13 By executing this Affirmation Eagle Creek admits and  
14 affirms its liability for payment of rents, taxes, insurance  
15 and all other liabilities of the lessee under the Lease, and  
16 assumes all other responsibilities of lessee under the Lease.  
17 To the extent that the Lease may be considered breached by an  
18 alleged rejection of the Lease by Eagle Creek in a Chapter 11  
19 case in the Bankruptcy Court for the District of Oregon, Case  
No. 397-37929-rld11, Eagle Creek is affirming the Lease to  
cure that breach. If the Lease was rejected, Eagle Creek  
waives any rights it has based upon the rejection, and  
voluntarily affirms its liabilities and responsibilities  
pursuant to the Lease.

20 The attorney for Waterfront did not accept the check or  
21 Affirmation in behalf of his client and wrote back that: "My client  
22 treats the lease as rejected by your client, which is what the Court  
23 ruled in its order confirming the Plan."

24 The Leasehold is included among approximately 210 cabin sites  
25 under Waterfront's master lease with the state of Washington. The  
26 cabins were intended and are used almost exclusively (approximately

1 95%) for vacation cabins. There is no electric service to the  
2 cabins. Consequently, there are few permanent residents in the  
3 cabins.

4 The Lease requires the lessee to provide fire, casualty and  
5 liability insurance. Eagle Creek has not provided any proof of  
6 insurance coverage for the Cabin after April 1998.

7 Eagle Creek asserts that pursuant to the Plan, it has paid  
8 its unsecured creditors, including the claim of Waterfront for  
9 prepetition rent, in full. Waterfront denies that it has been paid  
10 its claim for prepetition rent. However, Waterfront acknowledges  
11 that it has received two checks from Eagle Creek for 1997-98 and  
12 1998-99 rent that it has not cashed. Waterfront further states that  
13 Eagle Creek has not paid the 1999-2000 rent or 1998-99 and 1999-2000  
14 real property taxes for the Leasehold. Finally, Waterfront states  
15 that other than offering in writing to assume the obligations of the  
16 Lease and tendering checks for the 1997-98 and 1998-99 rent, Eagle  
17 Creek has not provided any adequate assurance of future performance  
18 under the Lease.

19 **Issues**

20 There are two principal issues for resolution in this case:

21 (1) If a lease is rejected under provisions of Section  
22 365 of the Bankruptcy Code,<sup>1</sup> does rejection mean termination  
23 or merely a breach of the lease?

24 (2) If rejection constitutes a breach of the Lease,

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25 <sup>1</sup> Unless otherwise indicated, all section references are to  
26 the Bankruptcy Code, 11 U.S.C. §§ 101-1330.





1 In a case under chapter 9, 11, 12, or 13 of this title, the  
2 trustee may assume or reject an ... unexpired lease of  
3 residential real property ... of the debtor at any time  
4 before the confirmation of a plan.... (Emphasis added.)

5 Section 365(d)(4) provides:

6 Notwithstanding paragraphs (1) and (2), in a case under any  
7 chapter of this title, if the trustee does not assume or  
8 reject an unexpired lease of nonresidential real property  
9 under which the debtor is the lessee within 60 days after the  
10 date of the order for relief, or within such additional time  
11 as the court, for cause, within such 60-day period, fixes,  
12 then such lease is deemed rejected, and the trustee shall  
13 immediately surrender such nonresidential real property to  
14 the lessor. (Emphasis added.)

15 If Section 365(d)(4) applies, upon the 61<sup>st</sup> day following  
16 Eagle Creek's bankruptcy filing without an assumption of the Lease,  
17 the Lease was deemed rejected and Waterfront was entitled to  
18 immediate surrender of the Leasehold. In effect, the game would be  
19 over, as Eagle Creek would be left only with whatever rights a  
20 lessee in breach may have under state law upon termination of a  
21 right to occupy leasehold premises.<sup>2</sup> Therefore, it is critical to

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22 <sup>2</sup> The current provisions of Section 356(d)(4) were adopted as  
23 part of the 1984 amendments to the Bankruptcy Code. Section  
24 365(d)(4) was designed "in part to prevent tenant space in shopping  
25 centers from remaining vacant for periods of time while a bankrupt  
26 tenant neither assumed nor rejected a lease." 130 Cong. Rec. S8894-  
95 (daily ed. June 29, 1984). In other words, Congress enacted  
Section 365(d)(4) in order to provide a relatively expedited  
mechanism to allow nonresidential landlords to get rid of delinquent  
bankrupt tenants and their leaseholds so that space could be relet.

27 The Ninth Circuit and the Ninth Circuit Bankruptcy Appellate  
28 Panel consistently have stated and substantively have held that  
29 rejection under Section 365(d)(4) terminates a debtor-lessee's  
30 interest in a nonresidential leasehold. See In re George, 177 F.3d  
31 885 (9<sup>th</sup> Cir. 1999); Sea Harvest Corp. v. Riviera Land Co., 868 F.2d  
32 1077 (9<sup>th</sup> Cir. 1989) ("Sea Harvest's argument that 'deemed rejected'  
(continued...)

1 determine whether the Leasehold is residential or nonresidential.

2         The Bankruptcy Code does not define the terms "residential"  
3 and "nonresidential." Accordingly, determining the status of  
4 leasehold property for Section 365 purposes is dependent upon the  
5 facts presented in evidence.

6         Eagle Creek is a corporation. It leased the Leasehold and  
7 bought the Cabin, but it could not and cannot occupy the Cabin as a  
8 residence. It purchased the Cabin as an investment and allowed its  
9 president and his family to use the Cabin as a vacation home about  
10 eight times a year. Waterfront argues that the Cabin, like other  
11 cabins on its ground lease property, was intended to be occupied as  
12 a vacation getaway by tenants on an episodic basis and was not  
13 intended to be occupied as a residence.

14  
15 \_\_\_\_\_  
16                 <sup>2</sup>(...continued)  
17 does not constitute 'terminated' is wholly without merit and  
18 contrary to the plain language of 11 U.S.C. § 365."); In re Port  
19 Angeles Waterfront Associates, 134 B.R. 377, 380 (9<sup>th</sup> Cir. BAP 1991)  
20 ("The Ninth Circuit has clearly ruled on the issue in this case:  
21 once rejected, the lease was terminated."); In re Southwest Aircraft  
22 Services, Inc., 66 B.R. 121, 123 (9<sup>th</sup> Cir. BAP 1986), rev'd on other  
23 grounds, 831 F.2d 848 (9<sup>th</sup> Cir. 1987) ("The debtor contends that  
24 rejection under section 365(d)(4) does not terminate a lease. We  
25 disagree. To us, 'rejection' normally implies termination of the  
26 debtor's interest. The statute is even more explicit here, however,  
because it adds that if the lease is deemed rejected 'the trustee  
shall immediately surrender such nonresidential real property to the  
lessor.'").

23         To the extent Eagle Creek attempts to extrapolate from the  
24 decision of the Bankruptcy Court for the Central District of  
25 California in In re Locke, 180 B.R. 245 (Bankr. C.D. Cal. 1995),  
26 that a debtor-lessee may resuscitate a leasehold interest pursuant  
to provisions of a lease that has been deemed rejected under Section  
365(d)(4), I reject that interpretation as inconsistent with the  
Bankruptcy Code and binding Ninth Circuit precedent.

1 On the other hand, the Lease specifically provides that:

2 The cabin site shall be used only for residential purposes.  
3 No building shall be erected, altered, placed, or permitted  
4 to remain on the cabin site other than one detached single  
5 family dwelling and buildings incidental to residential use,  
6 and the cabin site shall not be further subdivided into  
7 building lots. (Emphasis added.)

8 If one accepts Waterfront's argument that the above-quoted provision  
9 of the Lease was designed primarily to prohibit use of the Leasehold  
10 as a commercial enterprise, the provision still clearly expresses an  
11 intent that the Cabin to be erected on the Leasehold be used for  
12 residential purposes, even if such use was contemplated to be  
13 relatively infrequent and for recreational purposes only. In  
14 addition, there is evidence in the record that at least some of the  
15 cabin sites (approximately 5%) within Waterfront's ground lease are  
16 being used as permanent residences by their occupants.

17 In this proceeding, the residential purpose set forth in the  
18 Lease is consistent with the Cabin's actual use as a periodic  
19 vacation residence by the president of Eagle Creek and his family.  
20 The fact that Eagle Creek acquired the Leasehold for investment  
21 purposes does not invalidate the Cabin's essential residential  
22 character and usage. See, e.g., In re Bonita Glen II, 152 B.R. 751,  
23 754-55 (Bankr. S.D. Cal. 1993).

24 In the Bonita Glen case, the court considered a ground lease  
25 upon which a commercial apartment building had been constructed. In  
26 determining whether the assumption/rejection deadlines of Sections  
365(d)(2) or (d)(4) applied, the court concluded that "[e]ven though  
§ 365(d)(4) may have been intended to apply to leaseholds other than

1 those in shopping centers, the term 'nonresidential' is not  
2 synonymous with commercial." Id. at 754. The Bonita Glen court  
3 went on to hold that the ground lease did not constitute a lease of  
4 nonresidential property because people resided in the apartment  
5 building on the property, even if the lessee used the property for  
6 commercial purposes, and that Section 365(d)(2) applied. Id. at  
7 754-55. See also In re Harris Pine Mills, 79 B.R. 919, 923 (D. Or.  
8 1987), aff'd, 862 F.2d 217 (9<sup>th</sup> Cir. 1988), in which the court  
9 suggests that it is appropriate to construe Section 365(d)(4)  
10 narrowly in accordance with its purpose to provide protection from  
11 the disadvantages of a commercial vacuum resulting from prolonged  
12 delay in the decision to assume or reject a lease.

13         Based on the foregoing facts and legal authorities, I find  
14 that the Leasehold is residential, and Section 365(d)(2) rather than  
15 Section 365(d)(4) applies in determining the effects of rejection in  
16 this proceeding.

17 C. Does Rejection Equate with Breach or Termination in Section  
18 365(d)(2)?

19         The terms "reject" and "rejection" are not defined in the  
20 Bankruptcy Code. Although a number of decisions at all levels in  
21 the Ninth Circuit have dealt with the meaning and effects of  
22 rejection of a lease under Section 365(d)(4), neither the parties  
23 nor this court have been able to find any decisions in the Ninth  
24 Circuit analyzing the meaning of rejection of a lease in the  
25 365(d)(2) context. In the absence of such authority, the starting  
26 point for interpretation must be the language of Section 365(d)(2)

1 itself in the overall context of Section 365.

2         At the outset, it is tempting to conclude that since the  
3 concept of rejection is common to both Section 365(d)(2) and Section  
4 365(d)(4), rejection should be interpreted the same way in the  
5 application of both subsections. While such an interpretation is  
6 appealing for purposes of uniformity of approach, it ignores the  
7 differences in language between the two subsections and the specific  
8 purpose behind Section 365(d)(4)'s enactment.

9         Section 365(d)(2) provides that a chapter 11 debtor "may  
10 assume or reject an ... unexpired lease of residential real property  
11 ... at any time before the confirmation of a plan." Section  
12 356(d)(4) provides that if a chapter 11 debtor lessee "does not  
13 assume or reject an unexpired lease of nonresidential real property  
14 ... within 60 days after the date of the order for relief, ... then  
15 such lease is deemed rejected, and the trustee shall immediately  
16 surrender such nonresidential real property to the lessor."

17 (Emphasis added.)

18         In reviewing the Ninth Circuit and Ninth Circuit Bankruptcy  
19 Appellate Panel decisions interpreting Section 365(d)(4), in spite  
20 of some general language equating rejection with termination of a  
21 lease, see footnote 2 supra, it is at least arguable that the  
22 deciding factor in determining that rejection of a nonresidential  
23 lease effectively equals termination is the language of Section  
24 365(d)(4) requiring immediate surrender of the leasehold premises to  
25 the lessor. See, e.g., In re Southwest Aircraft Services, Inc., 66  
26 B.R. at 123 ("To us, 'rejection' normally implies termination of the

1 debtor's interest. The statute is even more explicit here, however,  
2 because it adds that if the lease is deemed rejected 'the trustee  
3 shall immediately surrender such nonresidential real property to the  
4 lessor.'" (Emphasis added.)).

5 Such interpretation also is consistent with the clear purpose  
6 of Section 365(d)(4) to require an early decision on assumption or  
7 rejection, so that if the lease is rejected, the debtor lessee's  
8 leasehold interest is terminated, and the landlord can place a new  
9 tenant in the shopping center or other nonresidential space. See In  
10 re Moreggia & Sons, Inc., 852 F.2d 1179, 1185 (9<sup>th</sup> Cir. 1988).

11 There is no such clear legislative purpose behind the  
12 language of Section 365(d)(2), and Section 365(d)(2) does not  
13 include any provision for immediate surrender of the residential  
14 leasehold premises following rejection of the lease. I find that  
15 language difference to be meaningful. Accordingly, I conclude that  
16 rejection in the Section 365(d)(2) context should not be interpreted  
17 necessarily in the same way as rejection under Section 365(d)(4).

18 How then to interpret rejection in the Section 365(d)(2)  
19 context? Some clues are provided by other subsections of Section  
20 365.

21 Section 365(g) generally provides that "the rejection of an  
22 executory contract or unexpired lease of the debtor constitutes a  
23 breach of such contract or lease...." The legislative history of  
24 Section 365(g) reflects an assumption that rejection constitutes a  
25 breach of an unexpired lease of the debtor as lessee. Section  
26 365(g) was designed to establish the time of the breach as on the

1 date immediately preceding the date of the debtor's bankruptcy  
2 filing. The purpose of Section 365(g) was to allow for the  
3 treatment of rejection claims as prepetition claims. See H. Rept.  
4 No. 95-595 to accompany H.R. 8200, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1977) at  
5 pp. 347-50. Section 365(g) characterizes rejection only as a breach  
6 of an unexpired lease of the debtor. There is no reference in  
7 Section 365(g) to rejection constituting termination of an unexpired  
8 lease.

9 In addition, Section 365(h) (1) (A), dealing with the debtor as  
10 lessor of real property, provides:

11 If the trustee rejects an unexpired lease of real property  
12 under which the debtor is the lessor and-(i) if the rejection  
13 by the trustee amounts to such a breach as would entitle the  
14 lessee to treat such lease as terminated by virtue of its  
terms, applicable nonbankruptcy law, or any agreement made by  
the lessee, then the lessee under such lease may treat such  
lease as terminated by the rejection...." (Emphasis added.)

15 The nonbankrupt lessee is given an option to treat the lease as  
16 terminated, but only if the breach arising from rejection is such a  
17 breach as would entitle the lessee to treat the lease as terminated  
18 pursuant to its terms or pursuant to applicable nonbankruptcy law.  
19 For purposes of Section 365(h) (1) (A), rejection is treated as a  
20 breach of a subject lease, but termination is by no means  
21 automatic.<sup>3</sup>

22 \_\_\_\_\_  
23 <sup>3</sup> Section 365(i) (1) provides that in the event an executory  
24 contract of the debtor seller for the sale of real property or a  
25 timeshare interest under a timeshare plan is rejected, the purchaser  
26 has the option to treat the contract as terminated. However, again,  
such termination is not automatic, and in the alternative, the  
purchaser has an option to remain in possession of the real property  
(continued...)

1 In the context of rejection of an executory contract, at  
2 least one court has held that although rejection constitutes a  
3 breach of the contract by the debtor,

4 rejection has absolutely no effect upon a contract's  
5 continued existence. The contract is not otherwise canceled,  
6 repudiated, or in any other fashion terminated. (Citations  
7 omitted.) Accordingly, rejection of an executory contract  
8 does not ipso facto terminate rights and obligations that  
9 arise from rejected contracts. In re South Motor Co. of Dade  
10 County, 161 B.R. 532, 545-46 (Bankr. S.D. Fla. 1993).

11 Also see Michael T. Andrew, "Executory Contracts in Bankruptcy:  
12 Understanding 'Rejection,'" 59 U. Colo. L. Rev. 845 (1988); Jay  
13 Westbrook, "A Functional Analysis of Executory Contracts," 74 Minn.  
14 L. Rev. 227 (1989); and Michael T. Andrew, "Executory Contracts  
15 Revisited: A Reply to Professor Westbrook," 62 U. Colo. L. Rev. 1  
16 (1991).

17 In light of the foregoing analysis and review of authorities,  
18 I conclude that rejection under Section 365(d)(2) constitutes a  
19 breach of an unexpired lease of the debtor lessee but does not  
20 automatically terminate the subject lease. Rejection may result in  
21 termination of a lease, but such effect is dependent upon the terms  
22 of the lease agreement between lessor and lessee and/or the  
23 provisions of applicable nonbankruptcy lease law.

24 Accordingly, I find that Eagle Creek is entitled to partial  
25 summary judgment on the issue of the impact of Eagle Creek's  
26 rejection of the Lease through failure to assume the Lease in the

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27 <sup>3</sup>(...continued)  
28 or timeshare interest. See also § 365(h)(2).



1 Plan. I find that rejection constituted a breach of the Lease but  
2 did not terminate the Lease. However, that does not end the matter.  
3 I must consider the consequences of Eagle Creek's breach under the  
4 facts presented in evidence in this proceeding.

5 D. Have Eagle Creek's Actions Subsequent to Plan Confirmation Cured  
6 Breach of the Lease?

7 The parties' remedies in the event of breach of the Lease by  
8 the lessee are governed by Section 8.01 of the Lease. Section 8.01  
9 provides for a 60-day cure period for the lessee following written  
10 notice of default in performance by lessee under the Lease. Eagle  
11 Creek insists that once it realized that the Lease inadvertently was  
12 rejected through failure to assume the Lease in the Plan, it took  
13 timely steps to cure its breach of the Lease by paying prepetition  
14 rent pursuant to the provisions of the Plan and delivering the check  
15 for 1998-99 rent and the signed Affirmation of Cabin Site Lease to  
16 counsel for Waterfront.

17 Waterfront denies that its claim for prepetition rent has  
18 been paid, even though it received checks for 1997-98 and 1998-99  
19 rent that it has not cashed. Waterfront further asserts that Eagle  
20 Creek has not paid the rent for 1999-2000 or the 1998-1999 and 1999-  
21 2000 real property taxes on the Leasehold. Also, Waterfront states  
22 that Eagle Creek has not provided proof of required insurance  
23 coverage on the Leasehold since April 1998 or any adequate  
24 assurances of future performance under the Lease. Accordingly,  
25 Waterfront alleges that Eagle Creek's breaches of the Lease have not  
26 been cured.

1           In considering the parties' positions on what requirements of  
2 the Lease have been breached and whether an adequate cure has been  
3 tendered, I face a number of questions: Was the letter from counsel  
4 for Waterfront to counsel for Eagle Creek dated August 11, 1998, the  
5 written notice of breach contemplated by Section 8.01 of the Lease?  
6 If it was, did it provide adequate notice to Eagle Creek of the  
7 Lease defaults that would need to be cured, including proof of  
8 insurance, real property tax payments, and adequate assurance of  
9 future performance, if all, in fact, are required under the Lease or  
10 applicable nonbankruptcy law? If it was not, has such written  
11 notice been provided to Eagle Creek, and if so, when?

12           Were Eagle Creek's tenders of Lease payments pursuant to the  
13 Plan and in conjunction with the delivery of the Affirmation of  
14 Cabin Site Lease sufficient to cure Eagle Creek's defaults in  
15 payments of rent under the Lease? Was Eagle Creek's delivery of the  
16 Affirmation of Cabin Site Lease sufficient to cure any and all other  
17 defaults under the Lease?

18           I find that the factual record presented in this proceeding  
19 is not adequate to allow me to determine the issue as to whether  
20 Eagle Creek's breaches under the Lease, whether resulting from  
21 rejection or otherwise, have been cured for purposes of summary  
22 judgment. Material questions of fact remain on both sides.  
23 Accordingly, I will deny the parties' cross-motions for summary  
24 judgment, except for my prior ruling granting partial summary  
25 judgment to Eagle Creek, based upon my determination that rejection  
26 did not terminate the Lease automatically.

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**Conclusion**

This Memorandum Opinion contains the court's findings of fact and conclusions of law, which will not be stated separately.

Based upon the record in evidence in this case and the law as discussed above, Eagle Creek is entitled to partial summary judgment on my finding that rejection of the Lease did not automatically terminate the Lease, and partial summary judgment is granted on that issue. Otherwise, the parties' cross-motions for summary judgment are denied.

Counsel for Eagle Creek shall prepare and submit within ten days following the date of entry of this Memorandum Opinion a form of order denying summary judgment and granting partial summary judgment consistent herewith.

The court will schedule a further status conference to discuss further scheduling for disposition of this proceeding.

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RANDALL L. DUNN  
Bankruptcy Judge

cc: James Ray Streinz  
Thomas W. Stilley  
U.S. Trustee