UNITED STATE BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:	Case No. 08-53104-wsd
Greektown Holdings, L.L.C., et al.	Chapter 11
Debtors.	Hon. Walter Shapero

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OPINION GRANTING DEBTOR'S MOTION FOR ENTRY OF AN ORDER AUTHORIZING ASSUMPTION OF EXECUTORY CONTRACT

The matter before the Court is the Debtors' Motion for Entry of an Order Authorizing Assumption of an Executory Contract.

I.

The Debtor, Greektown Casino, L.L.C. and associated entities ("Greektown"), filed its Chapter 11 petition on May 29, 2008. It owns and operates a gambling casino and associated operations. Greektown has yet to file a plan and disclosure statement. Previously, Greektown, the City of Detroit ("City"), and the Economic Development Corporation of the City of Detroit entered into a Revised Development Agreement on August 2, 2002, which was amended in July 2003, covering construction and operation of a casino. It is hereinafter referred to as the "Development Agreement."

Greektown seeks authority from the Court to assume the Development Agreement. The City argues in its objection to the motion that Greektown cannot assume it because: (1) Greektown is in default under various provisions and it is legally incapable of curing two

historical non-monetary defaults, and (2) Greektown has not provided any evidence regarding its ability to promptly cure these defaults or to provide adequate assurance of future performance with the Development Agreement, as the statute requires. Greektown argues that it is not in default under the Development Agreement and/or if it is in default, it can comply with the statutory cure requirements and can provide adequate assurance of future performance. An evidentiary hearing preceded this opinion.

II.

Section 365 of the Bankruptcy Code provides, in pertinent part:

> (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
>
> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –
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> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default . . .
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
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> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365.

Courts initially apply a "business judgment" and "benefit to the estate" test under § 365(a) to determine whether or not a debtor should be allowed to assume an executory contract. *In re Beare Co.*, 177 B.R. 879, 882 (Bankr. W.D. Tenn 1944). Neither the City nor any other

party has objected to the assumption based on a claimed failure to meet that test. Rather, the City's objections are on the above noted grounds, which are premised on the existence of default(s) by Greektown under the Development Agreement.

A debtor seeking to assume an executory contract has the burden of proving that requirements for assumption have been met. *In re Rachels Indus., Inc.*, 109 B.R. 797, 802 (Bankr. W.D. Tenn. 1990). A party who objects to assumption then has the burden of establishing evidence of a default. *Id*. If a default is established, then the burden shifts back to the debtor to provide satisfactory proof that the default has either been cured, or will promptly be cured, and that there is adequate assurance of future performance. *Id*. (citing *In re OK Kwi Lynn Candles, Inc.* 75 B.R. 97, 101 (Bankr. N.D. Ohio 1987)).

The City argues that Greektown is in default under five separate provisions of the Development Agreement, to wit: (1) a failure to complete a required theater component simultaneously with the casino, (2) a failure to complete construction of the entire casino complex, including the theater component, by the contract completion date, (3) a failure to comply with certain government (city) regulations, namely, zoning requirements, (4) a failure to pay development process costs, and (5) a failure to conduct a required essentially local public offering of a certain amount of the stock of Greektown.

Under the statute, the cure and other stated requirements incident to an assumption only come into play if the debtor is in "default." Thus, a threshold question is whether or not the Greektown was in default at the critical time. In this case, that time is agreed by the parties to have been the date the assumption motion was filed: to wit March 11, 2009.

To determine whether a default exists under a contract, the Court looks to state law. *In re Rachels Indus., Inc.*, 109 B.R. at 803-4. "Under Michigan law, contracts are not open to judicial interpretation and must be enforced as written, 'absent ambiguity or internal inconsistency.'" *In re Plastech Engineered Prods., Inc.*, 382 B.R. 90, 113 (Bankr. E.D. Mich. 2008) (quoting *Universal Underwriters Ins. Co. v. Kneeland*, 464 Mich. 491, 494 (Mich. 2001)). "Contract terms are ambiguous if they 'are reasonably and fairly susceptible to multiple understandings and meanings.'" *Plastech*, 382 B.R. at 113 (quoting *Equitable Life Assurance Soc'y of the United States v. Poe*, 143 F.3d 1013, 1016 (6th Cir. 1998)). If the contract language is clear, however, "the contract is construed as a matter of law and enforced as written." *In re Big Buck Brewery & Steakhouse*, 399 B.R. 820 (E.D. Mich. 2009) (citing *Quality Products and Concepts Co. v. Nagel Precision, Inc.*, 469 Mich. 362, 375 (2003)).

Generally speaking, the Development Agreement first defines events of default and then requires a written notice of default, which in turn triggers specific and various periods within which such defaults may be cured. Thus, Section 6.1 of the Development Agreement provides:

> The occurrence of any of the following shall constitute an "Event of Default" under this Agreement:
>
> (a) Subject to Force Majeure, if Developer or City fails to substantially perform or comply with any commitment, agreement, covenant, term or condition (other than those specifically described in any other subparagraph of this Section 6.1) of this Agreement, including those certain covenants set forth in Section 3.5 hereof, and in such event if said defaulting party shall fail to remedy any such default within thirty (30) days **after receipt of written notice of default** with respect thereto, provided, however, that if any such default is reasonably susceptible of being cured within one hundred eighty (180) days, but cannot with due diligence be cured by the defaulting party within thirty (30) days, and if the defaulting part commences to cure the default within thirty (30) days and diligently prosecutes the crew to completion, then **the defaulting party shall not during such period of diligently curing be in default hereunder as long as such default is completely cured within one hundred eighty**

(180) days of the first notice of such default to said defaulting party; provided, however, that if the cure can be accomplished by the payment of money, the failure to pay is not a diligent commencement of a cure; (emphasis added)

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(h) If the final Completion does not occur by the Final Completion Date;

Section 14.1 states in relevant part:

Notices shall be given as follows:

(a) Any notice, demand or other communication which any party may desire or may be required to give to any other party shall be in writing delivered by (i) hand delivery, (ii) a nationally recognized overnight courier, (iii) telecopy, or (iv) mail (but excluding electronic mail, i.e., "e-mail") addressed to a party at its address set forth below, or to such other address as the party to receive such notice may have designated to all other parties by notice in accordance herewith . . .

(b) Any such notice, demand or communication shall be deemed delivered and effective upon the earlier to occur of actual delivery or, if delivered by telecopier, the same day as confirmed by telecopier transmission or the first Business Day thereafter if telecopies on a non-Business day.

As a fair reading of these provisions indicates the Development Agreement first defines what is an "Event of Default;" then if such an event occurs, there (a) is a required written notice of default and (b) are specified cure periods depending on the nature of the defaults. The Court concludes therefrom that the issuance and proper service of the stated formal notice of default is a requirement for the existence of a default under the Development Agreement.[1]

It is both apparent from presented evidence and agreed to by Greektown and the City that the required notice of default has not yet been given. The specific evidence is that the City had

[1] Arguably - though not in any way actually or predictably decided here because it is not necessary to do so - the expiration of the applicable cure period(s) might also be a precursor to the existence of a "default" for § 365 purposes.

brought some, if not all, of the claimed defaults to Greektown's attention at various times prior to the filing of the assumption motion, both orally and in writing. However, none of those communications were tantamount to, or met the contractual requirements of, the required notice of default. Indeed, after the bankruptcy filing in May 2008, Greektown asked the City to refrain from issuing a formal notice of default because of certain perceived negative affects it could have on then pending construction completion and other matters. Although it was free to do otherwise if it believed it was in its best interest to do so, the City decided, at least at that point, not to give the required notice of default. Construing the clear language of the Development Agreement, no default for § 365 purposes exists at least until the contractually required formal written notice of default is given and appropriately served. Therefore, Greektown was not in default under the Development Agreement when the assumption motion was filed.

In so concluding, the Court notes that the specific and detailed default and notice requirement in the Development Agreement cannot or should not, be passed off or ignored, either as niceties and/or legal technicalities, or something which is subject to the somewhat amorphous and ambiguous doctrines of waiver or estoppel. Indeed, there are specific provisions of the Development Agreement which reinforce a conclusion that the Development Agreement generally, and its default provisions in particular, should be read and construed literally. *See Revised Development Agreement, Sections 14.2 and 14.14*. In addition, particularly in this case, the Court believes the assumption statute contemplates and favors affording Greektown (and the City as well) the full range of the benefits and obligations of, and in, their carefully negotiated bargain. In doing so, it leaves the rights and obligations of the parties thereunder to be played

out later (and litigated if necessary) largely within the framework of applicable non-bankruptcy law.

Further reinforcing that result is the fact that a myriad of costly and important consequences, including material damages, penalties, and rights of termination, flow from a default by the Greektown under the agreement. Also, the Michigan Gaming Control Board, if not in one sense the proverbial elephant in the room, is an important player which, applying applicable law, has its own duties and responsibilities as a public body to which the Greektown must answer. Some of those responsibilities and duties may or may not relate to or affect whether or not Greektown is in default under the Development Agreement. It should be carefully noted at this juncture that the Court makes no finding or ruling in that regard here. Further, the tax rollback and other potential issues relating to any potential sale of Greektown's assets, which might be materially and likely adversely affected by whether, and/or when, the Greektown is in default under the Development Agreement. Additionally, the very fact that the Development Agreement includes contractual cure periods reinforces the importance of there being a clear and unambiguous starting point, i.e. a formal required notice of what the claimed defaults are, as a necessary basis and roadmap to any permitted contractual cure process, let alone any statutory cure opportunities that Greektown might be afforded. Finally, it is also to be noted and somewhat relevant in this particular situation that there exists Greektown's request to change or amend the theater facility requirement, a requirement which constitutes the basis for one of the major default claims, pending before the City. Greektown's request for such a change appears to have been initially approved, but that approval was later withdrawn - the same apparently being the subject of a pending request for reconsideration.

The sum and substance of the foregoing requires the conclusion that the application and nature of the cure provisions of § 365 require more certainty as to what has to be cured, and when, than is present at this point. Such can best be provided in the first instance by strict adherence to, and at the very least, construction of, the default notice provisions of the Development Agreement before there can be said to have been the "default" under that agreement necessary to invoke the § 365 cure requirements.

The City argues that Greektown should be estopped from arguing that it is not in default due, for instance, to the required notice not having been given, arguing that Greektown made statements or representations to the City that were a substantial reason why no formal notice of default was ever issued. Specifically, the City argues that it never sent formal written notice of default because Greektown, claiming that such notice would lead to a "nuclear meltdown," pleaded with the City to refrain from doing so. Under Michigan law, estoppel is proper where there is "misleading conduct or language of one person which, being relied on, operates to the prejudice of another, and is applied to the wrongdoer by the court in denial of some right, which otherwise might exist. . . ." *Dellar v. Frankenmuth Mut. Ins. Co.*, 173 Mich. App. 138, 146 (1989). The City was fully aware of the provisions in the Development Agreement which set forth the procedure for establishing a default. Although Greektown may have pleaded with the City to refrain from sending formal notice of default, the City made a conscious decision to refrain from doing so on several occasions. The Court does not agree that estoppel or waiver are doctrines appropriately applicable in this situation, where the parties negotiated the terms of the contract and the City made a conscious decision to refrain from sending the proper notice while clearly aware of the potential consequences of its inaction.

One recognizes the possibility of the City hereinafter taking whatever steps might be necessary for it to give the required formal notice. Such could then potentially trigger further, and possibly arguments similar to those made in connection with the hearing on this assumption motion, regarding whether or not there are defaults, and if so, what are they, what is the effect of the contractual cure periods, and their consequences, etc. If so, so be it. But such should more appropriately be dealt with in the context of an approved assumed contract and the law applicable thereto, rather than by prematurely being a bar to an otherwise business justified assumption. Today's decision should not be read to either preclude or encourage such. Nor are those possibilities a rationale or justification for a different decision. This decision merely puts Greektown and the City, as well as other interested parties, where they ought to be, i.e.: in the posture of dealing with and, if need be, attempting to enforce the terms of the Development Agreement and/or any consequences arising from any claimed or actual breach.

For the abovementioned reasons, Greektown's motion is granted and it should present an appropriate order.

Signed on May 13, 2009

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge