UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 00-00721-W
Greenville American Limited Partnership, a/k/a American Federal Partnership,	Chapter 11
Debtor.	**JUDGMENT**

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Motion to Assume Unexpired Lease with State Communications Telecom, Inc. filed on January 14, 2000 by Greenville American Limited Partnership a/k/a American Federal Partnership is denied.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 24, 2000.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

MAR 27 2000

JI. McCarthy White Cook Cassidy Grumbine Pryor UST

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

KELLEY MORGAN

Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	)	
	)	
GREENVILLE AMERICAN LIMITED PARTNERSHIP,	)	Chapter 11
Tax ID#: 13-3242935	)	Case No. 00-00721-W
c/o Sierra Management	)	
292 Madison Avenue, 2nd Floor	)	
New York, NY 10017	)	
	)	
Debtor.	)	
	)	

ORDER

I. JURISDICTION AND CASE HISTORY

Greenville American Limited Partnership ("GALP") has moved this court under 11 U.S.C. §365(b)(1) to assume a commercial lease ("the Lease") dated August 19, 1999, between GALP as landlord and State Communications Telecom, Inc., ("SCT"), as tenant.

This court has jurisdiction of this proceeding pursuant to Sections 1334 of Title 28 of the United States Code and Local Civil Rule 83.X.01 of the United States District Court for the District of South Carolina.

On December 10, 1999, the Debtor, GALP filed a Petition in the United States Bankruptcy Court for the Southern District of New York for relief under Chapter 11 of the Bankruptcy Code. On January 6, 2000, TriVergent Communications, Inc., ("TriVergent") formerly known as SCT, moved for an Order under 28 U.S.C. §1412 and Bankruptcy Rule 1014 to transfer venue to the District of South Carolina.

On January 25, 2000, The Honorable Stuart M. Bernstein granted TriVergent's motion and transferred venue to the District of South Carolina. Thereafter, GALP's Motion to Assume the Lease came before this Court for a hearing on March 7, 2000. Prior to the hearing on GALP's Motion to Assume, this Court reviewed the memoranda submitted by GALP and TriVergent, along with the documents attached as exhibits to the memoranda. At the hearing, the Court asked the parties to submit documents which they believed were relevant to the issue of whether the Lease was terminated pre-petition, and pursuant to this request the parties then submitted a group of documents by mutual consent and without objection. Based on these undisputed documents, the undisputed facts as revealed from the parites' memoranda and oral argument, and the legal authorities discussed below, this Court finds and holds that the GALP has no right or ability to assume the Lease.

II. RELEVANT UNDISPUTED FACTS

Having reviewed the parties' pleadings, memoranda, and submitted documents, and having inquired further of the parties at the hearing on March 7, 2000, and, further, having taken judicial notice of certain other facts either already in the records of this Court or appropriate for judicial notice under Rule 201, Federal Rules of Evidence, this Court finds in this action that the following facts either are undisputed or exist by a preponderance of the evidence:

1. GALP is a South Carolina partnership with its principal place of business in New York, New York. It is the owner of the American Federal Building (the "Building") in Greenville, South Carolina, which is its single asset.

2. TriVergent is a telecommunications company headquartered in Greenville, South Carolina, and was formerly known as SCT.

3. Sierra Management Corp. ("Sierra") and its employee, Jay Landesman, served at all relevant times as asset manager and agent for GALP.

4. GALP and SCT entered into the Lease on or about August 19, 1999, whereby SCT was to occupy the second, fourth, and fifth floors of the Building.

5. Effective September 7, 1999, which is after the Lease was signed, SCT changed its name to TriVergent. It appears from the documents produced at the hearing that GALP was notified of this name change on or about September 7, 1999. For purposes of this Order, "TriVergent" and "SCT" are used interchangeably.

6. At the time the parties entered into the Lease, American Federal Bank ("the Bank") leased all five floors of the Building, including those floors to be occupied by TriVergent. The Bank continues to lease the second, fourth and fifth floors. Its current lease expires June 30, 2000. Thereafter, the Bank will lease and occupy the basement, first and third floors of the Building.

7. As a condition to the Lease, GALP was required to obtain the Bank's consent to the TriVergent lease and release of the second, fourth and fifth floors by August 23, 1999. (Lease, Section 19.22.) By way of amendments to the Lease, the date by which GALP was to satisfy this contingency was extended three times. The last amendment extended GALP's deadline to satisfy this contingency to September 14, 1999. (see Third Amendment to Lease.)

8. Furthermore, pursuant to the Lease, GALP was required to complete tenant improvements to the second, fourth, and fifth floors for TriVergent's occupancy. (Lease, Section 2.2 and Lease, Exhibit B.)

9. Under Section 2.2 of the Lease, GALP was to complete the tenant improvements on the second and fourth floors and deliver these floors no later than December 1, 1999. If GALP failed to deliver the second and fourth floors by December 1, 1999, TriVergent could terminate the Lease upon ten days' written notice. (Lease, Section 2.2.)

10. In addition, pursuant to Section 6.5 of the Lease, TriVergent had the right, subject to the Bank's approval, to place its name and logo on the exterior of the Building, and TriVergent had the right to terminate the Lease if such approval was not obtained by the parties' agreed date.

11. GALP was provided photographs of TriVergent's proposed signage even before the Lease was signed. However, it is undisputed that GALP had not obtained the Bank's approval as to signage as of December 1, 1999.

12. By mid-October, 1999, nearly two months after the Lease was signed, GALP had not obtained consent to the Lease and release of the premises by the Bank. Furthermore, GALP did not have financing to begin the necessary tenant improvements.

13. On October 11, 1999, Russell W. Powell, President of TriVergent, wrote GALP's agent, Jay Landesman, and expressed concern over GALP's inability to obtain consent to the Lease and release of the premises by the Bank, as well as GALP's inability to obtain financing to complete the tenant improvements. With his October 11, 1999, letter,

Mr. Powell enclosed a Fourth Amendment to Lease, which proposed to extend the date for GALP's performance under Section 19.22 to October 14, 1999. GALP did not sign the Fourth Amendment to Lease.

14. On October 14, 1999, Mr. Powell again wrote to Mr. Landesman. GALP still had not obtained the Bank's consent to the Lease and releases of the premises, nor had it obtained financing. In this letter, Mr. Powell informed Mr. Landesman that GALP's continued failure to perform constituted default under the Lease.

15. On October 26, 1999, Mr. Powell wrote Mr. Landesman and again expressed concern that GALP had not obtained consent to the Lease and the release of the premises by the Bank. Mr. Powell also voiced his displeasure over GALP's inability to secure financing to upfit the Building for TriVergent's occupancy. Most importantly, as set forth in Mr. Powell's letter, no work had been done on the second and fourth floors of the Building, and GALP could not deliver the premises by December 1, 1999, as required under the Lease. Accordingly, Mr. Powell wrote "...we are left with no alternative but to put you on notice that we intend to exercise our right to terminate the lease pursuant to the provisions of Section 2.2 of the lease agreement."

16. On December 1, 1999, TriVergent's General Counsel, Hamilton E. Russell, III, sent Landesman written notice of TriVergent's termination of the Lease. Mr. Russell's letter states: "...we are left with no alternative but to put you on notice that we intend to exercise our right to terminate the lease pursuant to Section 2.2 of the lease agreement if you have not remedied the above referenced deficiencies within ten days." December 1, 1999,

was the delivery date under Section 2.2 of the Lease. It is undisputed that, as of December 1, 1999, GALP had not satisfied its contingencies under Section 19.22 of the Lease, nor had it even begun the tenant improvements.

17. On December 10, 1999, GALP filed for relief under Chapter 11 of the Bankruptcy Code in the Southern District of New York.

18. On December 13, 1999, the first business day after the ten-day notice period contemplated in Section 2.2 of the Lease, Mr. Russell sent Mr. Landesman a letter indicating that the Lease had been terminated.

19. GALP does not dispute that on December 1, 1999, the Bank had not released the second and fourth floor of the Building and that GALP had not begun to make the leasehold improvements required by the Lease.

III. LEGAL DISCUSSION

GALP has moved to assume the Lease under 11 U.S.C. §365(b)(1), and it is apparent to this court that the parties could offer voluminous evidence and testimony on matters relevant to that statute. However, a motion to assume an executory contract or lease under §365 generally should be a summary proceeding and should not become the forum of an extended breach of contract suit. *In re Orion Pictures Corp. v. Showtime Networks, Inc.*, 4 F. 3d 1095 (2d Cir. 1993); *In re White Glove Enterprises, Inc.*, 1998 Bankr. LEXIS 1303 (Bankr. E.D. Pa.); *In the Matter of Optimum Merchants Services,* 163 B.R. 546 (Bankr. D. Neb.); *In re Docktor Pet Center, Inc.*, 144 B.R. 14 (Bankr. Mass. 1992). Here, the parties have consented to this matter being decided in a summary proceeding based on the law as applied to the facts established by the documents which the parties themselves have

submitted or which otherwise are before the court. (see Transcript of March 7, 2000, hearing, pp. 35-36, 51, 52, 53).

In GALP's Motion to assume the Lease, the existence and viability of the Lease is a threshold issue for summary adjudication. Executory contracts or leases that terminated prepetition are no longer available for assumption or rejection under §365 because there is nothing left for the debtor to assume. The termination must be complete and not subject to reversal either under the terms of the contract or under state law. *In re Gloria Mfg. Corp.*, 734 F.2d 1020 (4th Cir. 1985); *Moody v. Amoco Oil Company*, 734 F.2d 1200 (7th Cir., 1984), cert. denied 469 U.S. 582; *In re Fontainbleau Hotel Corp.*, 515 F.2d 913 (5th Cir. 1975).

The construction of the Lease, and the effectiveness of any leasehold termination, is determined under state law, which in this case is the law of South Carolina (see Section 19.4 of the Lease). *In re Shangra-La*, 167 F.3d 843 (4th Cir. 1999); *In re Henry Thomas Taylor*, 198 B.R. 142 (Bankr. D.S.C. 1996).

TriVergent by the preponderance of the evidence has the initial burden of proving that GALP defaulted under the Lease and that TriVergent complied with any applicable notice provisions of the Lease. GALP then has the burden of proving the Lease has not terminated so as to preclude it from assuming the Lease in this bankruptcy case. *In re Pyramid Operating Authority, Inc.*, 144 B.R. 795 (Bankr. W.D. Tenn. 1992) at 801 and cases cited therein.

Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (S.C. 1994) is controlling authority for a party's right to terminate a commercial lease. The South Carolina Supreme Court in that case held that a commercial lease can be terminated

only if the default is material, and the court then listed several factors relevant to the issue of materiality.

In the case of the Lease between TriVergent and GALP, there can be no plausible doubt that the December 1, 1999, occupancy date in Section 2.2 of the Lease was a material provision of the Lease and that its breach was a material default under the law of South Carolina as stated in *Kiriakides*. The parties themselves elevated the importance of the *December 1 deadline by specifically referring to it in the wording of Section 2.2 and by* giving TriVergent an express right to terminate the Lease if the deadline was not met "[N]otwithstanding anthing to the contrary" elsewhere in the Lease. Further, the parties' relevant correspondence evidences the continuing materiality of the December 1 deadline and the significant problems TriVergent was facing if the deadline was not met. (See TriVergent's letters of October 11, 14, and 26 and December 1, 1999.) [1]

There is no disagreement, and GALP does not deny, that as of December 1, 1999, (1) the Bank had not released the second and fourth floors from its pre-existing lease; (2) GALP did not have the financial ability to perform the agreed leasehold improvements; and, (3) GALP had not performed the agreed leasehold improvements (see paragraphs 26-28 of Debtor's Reply to Response of TriVergent Communications, Inc. Opposing Motion under 11 U.S.C. §365, dated January 24, 2000 [the "GALP Original Memorandum"]; see also TriVergent's letters of October 11, 14, 26 and December 1, 1999, which GALP introduced in its package of documents relevant to the termination issue). Notwithstanding any concerns which GALP now may express regarding TriVergent's performance under Section 2.2 of the Lease, the preponderance of the evidence shows that GALP was financially and

[1] These documents were introduced by GALP, thus establishing their authenticity, receipt and relevance to the termination issue.

legally unable to deliver the improved premises to TriVergent on the December 1 deadline date and that this situation was not due to any action or inaction of TriVergent. [2]

This court therefore holds that GALP's failure to deliver to Trivergent the improved second and fourth floors of the Building on December 1, 1999, free and clear of the Bank's lease, was a material default under the Lease and under the standards of *Kiriakides.* Because it is patently obvious that GALP's failure in this regard was a material breach of the Lease, it is unnecessary to discuss all of the factors relevant to the issue of materiality set forth in *Kiriakides*. However, even if this Court set forth an analysis of all the *Kiriakides* factors, it would still conclude that GALP's default was material.

The remaining question is whether the Lease has terminated so that the debtor may not assume it postpetition. If such termination has occurred, the debtor has no leasehold *interest to assume even if it could fulfill all the criteria of §365(b)(1).*

Although the issue of leasehold termination is disputed, both TriVergent and GALP agree that the termination issue revolves around four separate sections of the Lease:

A. Section 2.2, which in its operative part states:

> Notwithstanding anything to the contrary contained herein, in the event that the Second and Fourth Floors of the Premises are not ready with Landlord's work complete (subject to minor punchlist items) on or before December 1, 1999 (as extended by one (1) business day for every day Landlord is delayed due to causes created by, through or under Tenant or due to any causes as

[2] Nothing before this Court can reasonably be construed to indicate that TriVergent caused any delay in the delivery date or engaged in any conduct whatsoever that would extend the December 1, 1999, deadline under Section 2.2 to deliver the second and fourth floors. Had TriVergent caused any such delay, GALP most likely would have documented it. Furthermore, GALP does not seriously attempt to advance the theory that TriVergent was responsible for delaying the delivery date in its memoranda. In fact, counsel for GALP's statements at the hearing indicate the opposite. Counsel for GALP stated "TriVergent understandably wanted to be in the premises. TriVergent continued from the execution of the lease through late October, together with the debtor to attempt to work with the debtor so that they could be in the premises as soon as practical." (see Transcript of March 7, 2000, hearing, p. 10) These statements are binding on GALP. *Griffin Grading & Clearing, Inc. v. Tire Service Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct.App. 1999); *Frank v. Bloom*, 634 F.2d 1245 (10th Cir. 1980); 7A C.J.S. Attorney & Client § 206. It is simply illogical to conclude that TriVergent's conduct somehow extended the December 1, 1999, deadline when GALP never obtained the Bank's consent to release the premises, nor ever obtained financing to perform the leasehold improvements.

described in Section 19.18 herein), then Tenant shall, upon ten (10) days written notice to Landlord be entitled to terminate this Lease.

B. Section 6.5, which in its operative parts states:

Subject to receipt of prior written approval from American Federal Bank... Tenant shall have the right to place its sign and logo on the exterior of the Building and on the Building directories located in the lobby of the Building. If American Federal Bank's approval has not been obtained prior to August 15, 1999 and the exact location and design of Tenant's exterior sign on the exterior of the Building have not been agreed to by Landlord and Tenant by August 15, 1999, then Tenant shall have the right to terminate this Lease. Tenant agrees to provide a sketch of Tenant's proposed signage promptly after execution of this Lease and not to unreasonably withhold its approval of changes reasonably requested by American Federal Bank.

C. Section 15.3 is the general default provisions of the Lease, which in its operative part states:

It shall be a default under and breach of this Lease by Landlord if it shall fail to observe any term, condition, covenant or obligation required to be performed or observed by it under this lease for a period of thirty (30) days after notice thereof from Tenant; provided, however, that if the term, condition, covenant or obligation to be performed by Landlord is of such nature that the same cannot reasonably be performed within such thirty-day period, such default shall be deemed to have been cured if Landlord commences such performance with said thirty-day period and thereafter diligently undertakes to complete the same....

D. Section 19.22 which in its operative part states:

Tenant acknowledges that the Premises and parking spaces described herein are subject to a lease (the American Federal Lease) between Landlord and American Federal Bank as of the effective date hereof. Notwithstanding any other provision herein, the effectiveness of this Lease and Landlord's obligations hereunder are contingent upon consent to this Lease and release of the Premises herein by American Federal Bank from the American Federal Lease on terms and conditions satisfactory to Landlord.... Landlord shall be required to deliver a notice to Tenant no later than August 15, 1999, indicating whether or not this contingency has been satisfied. If Landlord fails to send such a notice to Tenant on or before August 23, 1999, then this contingency shall be deemed satisfied. If Landlord's notice indicates that the contingency has not been satisfied, then this Lease shall automatically terminate and be of no further force and effect.

With respect to item D., it should be noted that the August 23, 1999, deadline was extended by mutual consent to September 14, 1999 (see Third Amendment to Lease).

TriVergent has asserted three independent grounds for its argument that the Lease terminated prepetition without a cure period: First, TriVergent effectively exercised its termination rights under Section 2.2 of the Lease by sending a letter of termination when the premises were not ready on December 1, 1999; second, that GALP did not meet the signage contingency set forth in Section 6.5 of the Lease, thereby giving TriVergent a right to terminate the Lease; and, third, that the Lease automatically terminated under Section 19.22.

Termination under Lease Section 2.2

Mr. Hamilton Russell of TriVergent on December 1, 1999, by Federal Express sent GALP notice regarding termination of the Lease pursuant to Section 2.2.[3] GALP, however, contends that the notice was deficient or ineffective in the following particulars: (a) the letter was sent in the name of TriVergent as tenant, but the tenant beforehand had not notified GALP pursuant to Section 17.1 of the Lease that SCT had changed its name to TriVergent (see footnote 1 of GALP's Supplemental Memorandum in Support of Motion to Assume Lease, filed March 2, 2000 ["GALP Supplemental Memorandum"]); (b) the letter uses the word "intend," which GALP asserts results in the letter being a statement of future intent to terminate rather than a present announcement of termination (see paragraph 41 of GALP Original Memorandum); (c) Section 15.3 gives GALP a thirty day cure period, which time

[3] TriVergent's letters dated October 11, October 14, October 26, and December 1 indicate that they were sent by Federal Express and facsimile. Because it appears that these letters were sent by a nationally recognized overnight delivery service, notice is deemed to have been given pursuant to Section 17.1 of the Lease. Furthermore, as discussed in more detail in the text, nothing in Section 17.1 prohibits notice from being given in other manners. GALP has never denied receiving these letters and, in fact, it is GALP who submitted them to the Court and who admitted in its motion memorandum that the letter was delivered to GALP. Therefore, even if the letters were not sent via Federal Express, GALP cannot claim that it did not receive proper notice of TriVergent's termination of the Lease.

period still was running when the petition was filed (see page 4 of GALP Supplemental Memorandum); and, (d) even if Section 15.3 does not apply to the termination issue presented by a failure to deliver the premises on December 1, 1999, a termination under Section 2.2 is not effective until the passage of ten days, and the petition was filed before that time passed (see page 3 of GALP Supplemental Memorandum).

GALP has admitted that Mr. Russell's letter of December 1 was delivered to it and that GALP filed this Chapter 11 case on December 10, 1999, in an attempt to preserve any rights it had under the Lease (see paragraph 40-42 of the GALP Original Memorandum). As for the argument that use of the name "TriVergent" was inappropriate, it is apparent from the numerous TriVergent letters and HOK Architect communications which GALP introduced in its document package that the debtor was not misled by the tenant using the name TriVergent, and indeed the tone of GALP's memoranda do not suggest that this is a serious issue.

Further, it appears that TriVergent by its letter of September 7, 1999, notified GALP of the name change. Section 17.1 of the Lease relates to notices, and it is clear under the wording of that provision that its terms are not exclusive, but rather they establish a method by which a notice is "deemed to have been given." There is nothing in the Lease which disallows notices given in different manners, whether verbal or written, but of course such notices are not entitled to the presumptive delivery dates established in Section 17.1 for certified mail notices and overnight delivery service notices. The court also notes that Section 17.1 contains no requirement that the tenant give notice of a name change, nor is this subject addressed elsewhere in the Lease. This court therefore holds that Mr. Russell's

letter of December 1, 1999, was not deficient because it was sent under the name TriVergent rather than SCT.

GALP's second objection relates to the meaning of Mr. Russell's December 1, 1999, letter. A document is to be given its clear and plain meaning. 17A C.J.S. Contracts §301. Likewise, this court notes that under South Carolina law, a lease is to be construed most strongly against the lessor. *Skull Creek Club v. Cook & Book, Inc.*, 313 S.C. App. 283, 437 S.E.2d 163 (1993), cert. dismissed 318 S.C. 515, 458 S.E. 2d 549.

Giving a reasonable interpretation to the language used by Mr. Russell, this court finds that the letter is not ambiguous and that it reasonably expresses a notice by TriVergent that GALP has not delivered the premises by December 1, 1999, as required under the Lease and that TriVergent therefore is exercising its option under Section 2.2 to terminate the Lease by giving ten days prior notice to GALP. Mr. Russell's use of the word "intend" is consistent with the fact that under the wording of Section 2.2, the Lease does not actually terminate on the date of notice, but rather ten days later.

The court's interpretation of Mr. Russell's above letter is buttressed by other correspondence which TriVergent sent. Mr. Russell Powell of TriVergent on October 26, 1999, notified GALP that TriVergent was going to exercise its December 1, 1999, termination right under Section 2.2 and that any work that GALP did in the premises after that date would be at GALP's risk. Further, Mr. Russell on December 13, 1999 (which was the first business day to fall after the tenth day from December 1, 1999) sent GALP a follow-up noting that the Lease now was terminated. Obviously Mr. Russell could not have made that statement in the December 13 letter if the December 1 letter had not started the ten day termination time running. GALP knew the effect of Mr. Russell's December 1

letter, as evidenced by the fact that it filed its Chapter 11 petition on December 10, 1999, in an effort to avoid a termination under Section 2.2 of the Lease.

GALP has asserted that Section 15.3 of the Lease gives it a thirty day right to cure the defaults noted in Mr. Russell's December 1 letter and that this cure period had not expired as of the date it filed its petition. This argument, however, flies in the face of the clear wording of the termination clause in Section 2.2 which, by its very terms, is effective "[N]otwithstanding anything to the contrary contained herein...". Section 2.2 does not provide for a cure period. It is a termination paragraph independent from the remainder of the Lease and, as noted above, by its very wording and existence reflects the importance of that deadline to the contractual parties. This being the case, Section 15.3 and its generalized thirty day cure right is inapplicable to TriVergent's termination of the Lease under the special provisions of Section 2.2.

GALP, in its oral argument before this court, also has asserted that Mr. Russell's December 1 letter could be interpreted to give GALP a ten day grace period to cure its lease default. This means, of course, that GALP in that ten day period would have had to obtain the Bank's release of the premises and to have totally completed the significant tenant improvements required by the Lease, all this in spite of the fact that GALP then had no financing for the improvements and had admitted to TriVergent in October, 1999, that it could not complete the premises by the following December 1 even with an aggressive construction schedule.

Section 2.2 by its terms does not give GALP a grace period or cure right if the premises are not delivered on December 1, 1999, and TriVergent then terminates the Lease for that reason. Although GALP wishes to view Mr. Russell's letter as giving it a cure right,

any such cure right would have been a significant and material amendment of the express terms of Section 2.2. Even assuming that Mr. Russell in his letter actually intended to give GALP a cure right and actually believed that it was possible for GALP to cure its default in ten days, could Mr. Russell's unilateral statement legally amend the parties' written contract as expressed in Section 2.2 of the Lease? The answer is no.

Section 19.10 of the Lease provides that '[N]o provision of this Lease may be amended or added to except by an agreement in writing signed by the parties hereto...." In point of fact, all the intended lease amendments between GALP and TriVergent indeed were written documents signed by both parties (see First, Second and Third Amendments to the Lease"). Accordingly, Mr. Russell's December 1 letter expressly states that its contents shall not be a waiver of any rights available to TriVergent under the Lease or at law or in equity. Further, even if Mr. Russell's letter was interpreted as making GALP an offer to modify the contract, GALP never accepted the offer, nor was any consideration given by any of the parties for such offer. Such elements are prerequisites of any binding contract. *Roberts v. Gaskins,* 324 S.C. 478, 486 S.E. 2d 771 (S.C.App. 1997); *Taylor v. Cummins Atlantic, Inc.*, 852 F. Supp 1279 (D.S.C. 1994), affirmed 48 F.3d 1217 (4th Cir. 1995), cert. denied, 516 U.S. 864. (1995). In fact, even if GALP had accepted the offer and given consideration, there was no objective possibility that the debtor could have cured the default within the ten day period, and thus no contract could have come into existence. It is well established that a contract to perform an objectively impossible task is unenforceable for want of consideration. 17 C.J.S. Contracts, §§ 98, 129.

GALP likewise can show no equitable estoppel flowing from the language of Mr. Russell's letter. It is evident from the documents presented to this court and from GALP's

memoranda that the debtor did not attempt to complete the premises in the alleged ten day cure period and that it did not otherwise rely to its detriment on Mr. Russell's statement. Such passive reaction by GALP is understandable in light of the then unimproved condition of the premises, the continuing presence of the Bank at the premises and Mr. Powell's previous warning letter of October 26. The element of reasonable reliance and a prejudicial change of position are necessary elements in proving equitable estoppel, and none of those elements are present here. *Preferred Risk Mutual Insurance Co. v. Thomas*, 372 F. 2d 227 (4th Cir. 1967).

For the reasons stated above, this court rules that any statement by Mr. Russell regarding a cure period could not, and did not, change the non-cure provisions of Section 2.2. Such statement merely was a gratuitous, nonbinding remark which had no legal significance and which concerned an action that both GALP and TriVergent knew was impossible to perform.

GALP finally argues that even if Mr. Russell's December 1 letter was a proper termination notice under Section 2.2 of the Lease, the termination was not effective for ten days and therefore was negated by GALP's filing its Chapter 11 petition before the ten day time expired. However, this argument fails to take into account that once TriVergent gives the notice under Section 2.2, GALP has no grace period to cure the default and the termination is effective on the tenth day without further action or notice by either TriVergent or GALP. Once this notice is given, there is absolutely nothing that GALP can do to prevent the termination on day ten.

It is well settled that where a contract has no applicable cure period and a termination notice thereunder is given, to become effective in the future, the filing of a

bankruptcy petition does not stop the running of the time period nor does it prevent the termination of the contract. *Moody v. Amoco Oil Company, supra*; *New Media Irjax, Inc. v. DC Comics, Inc. (In the Matter of New Media Irjax, Inc.)*, 19 B.R. 199 (Bankr. M.D. Fla. 1982); *Shell Oil co., Inc. v. Anne Cara Oil Co., Inc. (In re Anne Cara Oil Co., Inc.),* 32 B.R. 643 (Bankr. D. Mass. 1983); *Lauderdale Motorcar Corp. v. Rolls-Royce Motors, Inc. (Matter of Lauderdale Motorcar Corp.), 35 B.R. 544 (Bankr. S.D.Fla. 1983)*; *Edwin M. Lipscomb Farms, Inc.*, 90 B.R. 422 (Bankr. W.D.Mo. 1988); *In re Masterworks, Inc.*, 100 B.R. 149 (Bankr. D. Conn. 1989);

The termination provisions in Section 2.2 are analogous to the termination provisions in the executory contract at issue in *Moody v. Amoco Oil Company*. There the debtor breached its dealership contract with Amoco, which then gave rise to Amoco's right to terminate the contract. The particular lease default was not curable under the terms of the contract, but Amoco in its notice nevertheless said that the termination would be effective ninety days from the date of the termination letter. The debtor filed its bankruptcy petition before the expiration of the ninety day period and attempted to assume the contract:

> Debtor's third argument relates to the timeliness of effectiveness of termination of the dealership contracts. They argue that the terminations were not effective for ninety days from the date of notice, and they filed under chapter 11 before the ninety-day period expired. Thus, according to debtors, the contracts were still executory when they filed and could be assumed under section 365.
>
> Amoco argues that the ninety-day waiting period before the effective date of the termination does not give debtors the right to assume the contracts. After the termination notices were sent, all that remained under the contracts was the passage of time until the terminations were complete. Amoco argues that when debtors filed, there was nothing left to assume under the contract except the remaining time – ninety days – before the contract was terminated completely.

> Section 365 of the Code only gives a debtor the right to assume an executory contract. If a contract has been terminated pre-bankruptcy, there is nothing left for the debtor to assume. However, the termination must be complete and not subject to reversal, either under the terms of the contract or under state law....
>
> As discussed above here the dealership termination notices were effective prior to debtors' filing in bankruptcy. The contract gave debtors no right to cure once the termination notices were mailed. Amoco did not have to take any further action to terminate the contacts; termination was automatic at the end of ninety days. Wisconsin law also gives debtors no right to cure.
>
> The fact that the termination itself was not effective for ninety days does not affect the results. The filing of the chapter 11 petition cannot expand debtors' rights as against Amoco.... When the termination notice was sent, debtors only had a right to ninety days' worth of dealership contracts. The filing of the petition does not expand that right....
>
> 734 F. 2d at 1212-1213

As noted above, once TriVergent proves that a default arose in the Lease and that it exercised its termination rights under the lease, GALP then has the burden of proving that the Lease did not terminate. This court holds that GALP has not met this burden of proof and that the Lease terminated on the tenth day following Mr. Russell's December 1, 1999, letter notwithstanding the filing of the debtor's Chapter 11 petition.

Termination under Lease Section 6.5

The second argument concerning termination of the Lease centers on Section 6.5, which provides that the Bank, by August 15, 1999, must consent to the placement of TriVergent's name and logo on the exterior of the Building, subject, however, to the condition that TriVergent after execution of the Lease gives GALP a sketch of the proposed logo and sign. At the hearing, the parties noted that the August 15 date was four days before the actual date of the Lease and that the dates in Section 6.5 simply were not changed to take

account of that fact. It appears that despite the confused wording of Section 6.5, all parties intended that the Bank have until December 1, 1999, to give its consent to the proposed signage.

On July 19, 1999, Linda Mitchell of HOK Architects sent an e-mail and attached document to Mr. Landesman which described TriVergent's proposed logo and sign as contemplated by Section 6.5. Additionally, GALP on August 20, 1999, wrote TriVergent and, among other things, noted that the Bank had requested alternate signage plans.

There is no contention that the signage sketch sent to GALP was insufficient as a description of the sign and logo TriVergent desired to place on the Building. Although this e-mail and document were sent to GALP before the signing of the Lease rather than "immediately after" its signing (as the signage furnishing date actually is stated in the Lease), the parties have admitted that they did not strictly follow the stated dates in Section 6.5 and that the only deadline date would have been December 1, 1999. Additionally, since GALP already had TriVergent's signage sketch on August 19, 1999, there was no need for TriVergent to have furnished the same information a second time. The law does not require a party to do a useless act. *Jaffe-Spindler Co. v. Genesco*, 747 F. 2d 253 (4th Cir. 1984). The court therefore holds that TriVergent has met its burden of proof to show that it complied with Section 6.5.

At the hearing GALP did not dispute that it had not obtained the Bank's consent to TriVergent's signage on the Building by December 1, 1999. As noted above, once TriVergent proves a default in the Lease, GALP then has the burden of proving that the default did not result in termination of the Lease.

The court notes that Section 6.5 is self-effectuating in that it gives TriVergent a right to terminate the Lease upon the occurrence of a condition: the Bank's failure to give its written consent to TriVergent's logo and name signage by a December 1, 1999, deadline. Also, Section 6.5 does not have a cure period, nor does it provide that TriVergent must give any particular type of notice in order to terminate the Lease under that section.

It likewise is clear that a default under Section 6.5 meets the materiality factors of *Kiriakides v. United Artists Communications, Inc.* The court takes judicial notice of the fact that companies derive substantial benefit from having their names on buildings. Further, it is obvious from the express termination rights granted in Section 6.5 that the parties intended for a signage default to have the most serious consequences.

This court, therefore, finds that TriVergent on December 1, 1999, had a right to cancel the Lease under Section 6.5 and that Mr. Russell's letter of that same date was an effective exercise of that termination right. Because the language of Section 6.5 provides an independent grounds for termination which by its own terms is not subject to cure, the court rejects GALP's argument that Section 6.5 is subject to the cure provisions of Section 15.3. The terms of the Lease will be construed against GALP as the landlord. *Skull Creek Club v. Cook & Book, Inc., supra.*

Neither the Lease nor South Carolina law gives GALP any cure period or other remedial right which would prevent the termination of the Lease under Sections 2.2 or 6.5. Having determined that the Lease was terminable under these sections and that Mr. Russell's letter of December 1, 1999, was an effective exercise of TriVergent's termination rights, there is no need for the court to examine the termination issue under Section 19.22 of

the Lease. Based on these findings and conclusions, this court therefore holds that the *debtor has no right or ability under 11 U.S.C §365(b)(1) to assume the Lease.*

IV. ADDITIONAL GROUND TO DENY DEBTOR'S MOTION

It is clear from the documents submitted in this summary proceeding that the default of GALP under Section 2.2 of the Lease was a material, non-payment default which deprived TriVergent of a crucial benefit of the Lease and which cannot now be cured or otherwise undone.

Even assuming the Lease did not terminate pre-petition, which is contrary to this Court's holding, GALP cannot assume the Lease under § 365(b)(1)(A) unless it cures its default. Congress' intent in imposing this cure condition is to ensure that TriVergent is made whole and receives the full benefit of its bargain if it is forced to continue performance under the Lease. *In re Ionosphere Clubs, Inc.*, 85 F.3d 992 (2d Cir. 1996); *Matter of Superior Toy & Manufacturing Company, Incorporated*, 78 F. 3d 1169 (7th Cir. 1996).

There is a well established line of cases under §365(b)(1)(A) which have held that if the nonpayment default under the contract is material and is an historical fact which cannot be undone, the debtor cannot meet the requirement of §365(b)(1)(A) and cannot assume the lease or executory contract. *Worthington v. General Motors Corporation (In re Claremont Acquisition Corp., Inc.)*, 113 F.3d 1029 (9th Cir. 1997); *In re Carterhouse, Inc.*, 94 B.R. 271 (Bankr. D. Conn. 1988); *In re Deppe*, 110 B.R. 898 (Bankr. D. Minn 1990); *In re Toyota of Yonkers, Inc.*, 135 B.R. 471 (Bankr. S.D.N.Y. 1992).

GALP's lease default was its failure to provide the Lease premises on December 1, 1999. This default is an historic event which already has occurred and which cannot be undone sometime in the year 2000. TriVergent, therefore, should not be forced to continue

performance under the Lease if it has lost the benefit of its bargain and this benefit cannot be restored. GALP's alleged ability to compensate TriVergent for its damages may be relevant to §365(b)(1)(B), but it does not address the cure requirement of subsection (A).

The debtor in the GALP Original Memorandum argues that the rule of *In re Claremont Acquisition Corp., Inc.* should not apply to the facts of this case because here a lease is involved, whereas *Claremont* involved a franchise agreement, and GALP cites *In re Vitanza,* 1998 Bankr. LEXIS 1497 (Bankr. E.D.Pa.) in support of its position.

This court, however, finds that the logic and law underlying *Claremont* are not peculiar to franchise contracts and are equally applicapable to leases. Further, and significantly, the court in *Vitanze* found that the non-payment lease defaults in that case were trivial and without economic harm to the landlord. Under these circumstances the court applied the doctrine of *In re Joshua Slocum*, 922 F. 2d 1081 (3rd Cir. 1990) and held that the debtor would be excused from curing such immaterial and non-harmful defaults even if they were historic defaults.

The trivial nonpayment defaults at issue in *Vitanze*, however, are a far cry from the material, historic default of GALP under the Lease. Therefore, under the particular facts of this case, the court adopts the rule of *Claremont* and holds that the Lease default of GALP cannot be cured as required by §365(b)(1)(A) and that GALP thus cannot assume the Lease.

Therefore, it is

ORDERED that the motion of the debtor, Greenville American Limited Partnership, to assume the Lease is denied.

SO ORDERED.

Columbia, South Carolina

March 24, 2000

John E. Waites
United States Bankruptcy Judge

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

MAR 27 2008

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KELLEY MORGAN

Deputy Clerk

TO: J.I. McCarthy
White
Cook
Cassidy
Grimball
Pryor
UST