IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
VILLA RESIDENTIAL CARE HOMES -	§	
ARLINGTON I, L.P.,	§	
Debtor.	§	
	§	CASE NO. 4-03-41793-DML-11

VILLA RESIDENTIAL CARE HOMES -	§	
ARLINGTON I, L.P.,	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
HEALTH CARE PROPERTY INVESTORS, INC.,	§	
Defendant.	§	ADV. NO. 03-04185-DML-11

Memorandum Opinion

Before the court are cross motions for summary judgment (the "Villa Motion," the "HCPI Motion" and, collectively, the "Motions") filed in this adversary proceeding by Villa Residential Care Homes - Arlington I, L.P. ("Villa" or "Plaintiff") and Health Care Property Investors, Inc.[1] ("HCPI" or "Defendant"). The parties have field briefs in support of the Motions, and each has responded to the brief filed by the other. The court has before it summary

[1] In its answer to Villa's original complaint, HCPI noted (at ¶ 4) that the proper party defendant in this adversary proceeding is Texas HCP Holding, L.P. ("Holding"). Counsel for HCPI and Holding accepted service, and it appears Holding is the assignee of HCPI and stands in the shoes of HCPI. For convenience, the court's references in this memorandum opinion to HCPI will include Holding, as the court has been offered no reason why the transfer by HCPI to Holding would have any legal effect on its decision.

judgment evidence consisting of numerous exhibits, affidavits and excerpts of depositions. This adversary proceeding is subject to the court's jurisdiction pursuant to 28 U.S.C. §§ 1334(b) and 157(b)(2)(K) and 157(c)(2). This memorandum opinion comprises the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

I. **Background**

In 1992 an affiliate of Villa owned real property in Arlington, Texas (the "Property"), on which William A. Shirley ("Shirley"), Villa's principal, wished to build an assisted living facility. After a lengthy search for financing, in 1993 Shirley contacted HCPI, which was willing to enter into a series of transactions by which it (1) acquired the Property; (2) advanced funds to Villa to build an assisted care facility (the "Improvements") on the Property (the Property and Improvements together shall be referred to herein as the "Facility"); and (3) leased the Facility, following its completion, to Villa. These transactions are documented, respectively, in (1) a Contract of Acquisition (the "Contract"); (2) a Development Agreement (the "Agreement"); and (3) a lease (the "Lease"), all between HCPI and Villa and all dated December 10, 1993.

Unable to find a source of conventional financing, Shirley accepted HCPI's terms. Though Shirley was told that HCPI would only deal with Villa through a lease arrangement, he perceived the transactions with HCPI as being tantamount to a conventional financing. The Lease has a term of 20 years, and rent is largely determined by reference to interest rates.[2] The

[2] The Lease does contain a term that provides for calculation of supplemental rent, based in part on a percentage of Villa's gross receipts. Lease, ¶ 3.1(b). Otherwise, rent is calculated based on treasury notes, to be recalculated upwards, if appropriate, in years 10 and 15.

Lease provides few duties or obligations for HCPI as lessor and allows Villa to acquire the Facility at the end of the lease for the greater of (1) HCPI's cost of the Property plus funds advanced pursuant to the Agreement; and (2) the fair market value of the Facility.

The parties carried out the Contract and the Agreement. Thereafter, Villa held and operated the Facility pursuant to the Lease. By 2003, however, Villa's cash flow was not sufficient to cover payments due under the Lease, and, on March 20, 2003, Villa filed for relief under chapter 11 of the Bankruptcy Code (the "Code").[3]

Subsequently, Villa has operated the Facility as a debtor in possession (Code §§ 1107 and 1108). Since commencement of its chapter 11 case, Villa has made no payments to HCPI. However, Shirley guaranteed the Lease and posted a letter of credit (the "LC") for one year's rental payments, and HCPI has drawn down the LC at this writing.

On April 17, 2003, Villa filed its Complaint to Declare Transaction to be a Financing (the "Complaint"), thus initiating this adversary proceeding. By the Complaint Villa asks that this court deem the Lease to be, in fact, a mortgage. If Villa were successful in this adversary proceeding it would own the Facility subject to HCPI's secured claim.

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[3] 11 U.S.C. §§ 101 *et seq.*

II. Issue

The single issue presented to the court is whether the Contract, Agreement and Lease amounted to a financing such that HCPI should be treated in Villa's chapter 11 case as a lender rather than as a lessor.[4]

III. Discussion

A. Standard for Summary Judgment

Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). *Jenkins v. Chase Home Mortg. Corp*., 81 F.3d 592, 595 (5th Cir. 1996). It is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is inappropriate when conflicting inferences and interpretations may be drawn from the evidence. *Askanase v. Fatjo*, 130 F.3d 657, 665 (5th Cir. 1997); *James v. Sadler,* 909 F.2d 834, 836-37 (5th Cir. 1990). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 247.

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4 Villa has suggested in its briefs that it has sought more than one type of relief – i.e., that it asks the court, if the Lease is a lease, to determine, independent of its financing argument, that section 365 of the Code does not apply to it. While the Complaint *does* ask that the court find section 365 inapplicable, it does so in the Complaint's conclusion in the context of recharacterization of the Lease as a financing transaction. The court therefore will limit its decision to whether the parties entered into a financing transaction or, instead, the Lease is a true lease.

In the instant case, the parties essentially agree that the facts – the evidence – are not in dispute. The court concurs. Except for the need to interpret documents, the court is not here required to weigh contradictory evidence. Summary Judgment is thus appropriate.

B. Standard for Determining Character of Transaction

If the facts in this case are essentially undisputed, the parties disagree about what test the court should apply to determine whether Villa and HCPI are lessee and lessor or mortgagor and mortgagee. Defendant argues that Texas law controls and that the denomination of the key document as a lease is virtually dispositive. Alternatively, Defendant urges that the court look to the definition of a true lease in the Texas version of the Uniform Commercial Code (the "UCC") (the Texas Business and Commerce Code) and find the Lease does not meet a two-prong test claimed by Defendant to be necessary under the UCC to recharacterize a lease as a financing instrument.

Plaintiff, on the other hand, maintains that, due to the existence of a federal interest in the determination of the Lease's character, the court should not look to Texas law but instead should undertake a fact-based "totality of circumstances" analysis of the sort advocated in *In re Morregia & Sons, Inc.,* 852 F.2d 1179 (9th Cir. 1988) and *In re PCH Associates*, 804 F.2d 193 (2d Cir. 1986). Plaintiff points to a recent Fifth Circuit case, *Reaves Brokerage Company, Inc. v. Sunbelt Fruit & Vegetable Company, Inc.,* 336 F.3d 410 (5th Cir. 2003), as evidence that the "totality of circumstances" test is applicable in this circuit.

Moreover, Plaintiff argues that Defendant mischaracterizes the test of a true lease in the UCC. Rather than creating a prerequisite for recharacterizing a lease as a mortgage, UCC § 1-

201(37) provides that a lease *must* be recharacterized as a mortgage if it meets that section's two-prong test. Otherwise, Plaintiff states, the UCC requires the same sort of factual analysis as found in *PCH* and *Morregia*.

The court is not prepared to hold that *PCH* and *Morregia* are the proper guides in analyzing the transaction between Villa and HCPI. Each of these cases involved a question of application of section 365 of the Code. In the case at bar the issue is whether or not HCPI should be dealt with as the holder of a claim governed by section 506 of the Code. Viewing a transaction in terms of applicability of section 365 may well involve federal concerns not present in the determination necessary to Plaintiff's case that the Facility is property owned by the estate and subject to Defendant's secured claim.[5] The court's view in this regard is not inconsistent with *Sunbelt*, a case arising under the Perishable Agricultural Commodities Act ("PACA"). In *Sunbelt* the Court noted, 336 F. 3d at 416, that its holding was dependent on "the policies behind PACA" and was limited to construing transactional documents in that context.

On the other hand, the court does not share Defendant's conviction that denomination of a document as a lease is virtually dispositive of its character.[6] Indeed, while Texas law is less than clear as to the dividing line between lease and leasehold versus mortgage and fee

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5 What is property of the estate and what constitutes a lien on property will typically be determined by state law. *See* Anderson v. Conine (In re Robertson), 203 F.3d 855, 859 (5th Cir. 2000) *citing* Butner v. United States, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law."). As discussed below, the test applied by the court is a factual analysis informed by the allocation of risk methodology of *Sunbelt*. The court believes the conclusion it reaches would not be different if any of the analyses suggested by the parties were adopted instead.

6 The court does consider it Plaintiff's burden to show by a preponderance of the evidence that the Lease (together with the Contract and the Agreement) should be treated as something other than what it purports to be.

ownership, there is certainly support for a factual analysis such as that applied in *PCH, Morregia,* and *Sunbelt* courts.[7]

As to using the UCC as a guide, the court agrees with Plaintiff that Defendant misreads section 1-201 (37). That provision also calls for a case-by-case analysis of the facts in determining whether a true lease exists. The two prong test described in the section, if met, disposes of the issue in favor of finding no true lease. *See In re Newsome*, 2003 Bankr. Lexis 514 (Bankr. N.D. Tex. May 8, 2003). In sum, the proper way to determine the nature of the transaction in the case at bar is through a review of the facts – principally the documents that govern the transaction between the parties.

C. The Merits

Each party would have it that the position it takes is obviously correct. The court does not find interpretation of the facts before it so easy.

1. Plaintiff's Position

Plaintiff would equate this case with *PCH* and *Morregia*. Yet, unlike the "lessor" in *PCH,* HCPI here funded almost the entirety of the cost of the Facility. HCPI holds title to both the Property and the Improvements. In *PCH* the "lessor" owned only the real property on which a hotel (owned by the debtor) was located. There is nothing before the court that would suggest the price paid by HCPI for the Property was other than fair value. In *PCH*, on the other

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[7] *See, e.g.,* Johnson v. Cherry, 726 S.W.2d 4, 6 (Tex. 1987) (whether an instrument is a deed or mortgage is a question of fact which is resolved by ascertaining the intent of the parties as disclosed by the contract or attending circumstances or both) *citing* Wilbanks v. Wilbanks, 330 S.W.2d 607, 608 (Tex. 1960) *and* Wells v. Hilburn, 98 S.W.2d 177, 180 (Tex. 1936).

hand, the "price" paid for the land was dictated by financing needs of the debtor in its acquisition of the hotel. Unlike the case at bar, in *PCH* the "lease" was subordinate to debt secured by the hotel and would be subordinate to certain future debt of debtor. HCPI, in distinction, not Villa, can mortgage the Facility without regard to the effect on Villa's rights to the Facility. Whereas in the instant case, increase in value of the Facility redounds to HCPI's benefit, the "lessor" in *PCH* gained nothing from appreciation in the value of the land it "owned." In *PCH* the transaction was structured as a sale and leaseback to suit the needs of both parties. HCPI, over the protests of Villa, required the transaction here to be in the form of a lease.

Morregia offers even less support for Plaintiff. In *Morregia*, the debtor's rental payment obligations ended many years before its rights to the leasehold terminated. Whatever the *Morregia* court had before it, it was not, as the "lessor" insisted, an executory lease subject to forfeiture.

Nor does either *PCH* or *Morregia* provide a firm precedent that a certain type of "lease" must be treated as a mortgage. In fact, though the *PCH* court indicated it considered the transaction before it a financing, it did not so hold. Rather, like the *Morregia* court, it simply held that a provision of section 365 of the Code was not applicable to something that clearly was not an executory lease of real property.

Neither does *Sunbelt* provide direct support for Plaintiff. *Sunbelt* is limited to its facts, and the Court of Appeals recognizes that, in other contexts, even the transaction there at issue might have been found to be a true sale (as opposed to a lending transaction). The very fact that the Court was differentiating between a sale and a pledge – as opposed to a lease and a loan – is significant. PACA, under which *Sunbelt* was decided, establishes a trust for sellers of produce. The rights of the seller created by the law in a debtor's accounts are invalid as against a bona fide purchaser of those accounts. Thus, the question before the Court was whether a factor-assignee took accounts receivable free of the statutory trust. *See Sunbelt*, 336 F.3d at 413.

Sunbelt also adopts a more focused test than "totality of the circumstances" advocated by Plaintiff. The Court of Appeals rather tested the transaction before it based on which party bore the *risks* attendant on ownership. 336 F.3d at 414. If *Sunbelt* arises in so different a context as to be inapposite to the case at bar, its formulation of the manner for weighing facts in determining the nature of a transaction seems to this court logical and appropriate to its analysis of the relationship between Villa and HCPI.

2. Defendant's Position

Defendant's view of the facts and law – and its certainty that the transaction with Plaintiff could not be seen as a financing – is mistaken. The Agreement, largely ignored by the parties, is much more like a construction loan than a "development agreement." HCPI's total exposure is capped; Villa must make good any deficiency in the cost of constructing the Improvements. (Agreement, ¶¶ 2.1 and 9.2). If the commitment of HCPI exceeds total cost of the Improvements, however, the savings remain with HCPI, rather than profiting Villa. (Agreement, ¶ 2.1). Villa must pay points to gain HCPI's commitment. (Contract, ¶ 2.6; Agreement, ¶ 6.1 – though it is not clear from the evidence if the latter was in fact paid and, per ¶ 6.2, Villa received a development fee). Funds are advanced by HCPI for construction more as they would be by a bank than by a prospective owner of the Facility. (Agreement, Art. 9).

Under certain circumstances, Villa must pay interest (versus rent) to HCPI (Agreement, ¶¶ 2.1 and 3.2).

The Lease also can be seen as a device to satisfy a lender for the advance of money. While it is true that a triple net lease relieves a lessor of burdens of ownership[8] to the detriment of the lessee, the Lease is particularly onerous. Virtually all risks concerning harm to the property are imposed on Villa. (Lease, ¶¶ 9.1, 14.2 and 14.3). Villa also has all the incidental responsibilities of ownership (taxes, imposts, etc.) and was required to indemnify HCPI should the operation of law impose on the lessor some unanticipated cost. (Lease, Art. XXIII).

Finally, though the Contract, the Agreement and the Lease purport to be separate instruments, they are so intertwined that, in fact, they should be treated as a single agreement. *See Nat'l Union Fire Ins. Co. v. Turtur*, 892 F.2d 199, 204 (2nd Cir. 1989) (stating that two documents executed at the same time may be considered one agreement if the parties so intended); *In re T & H Diner, Inc.*, 108 B.R. 448, 454 (D.N.J. 1989) (lease and purchase agreement inextricably intertwined). It certainly appears to have been the intent of the parties that the Contract, Agreement and Lease were so interdependent that performance of each depended on the others. Not only are the documents cross-defaulted (Lease, ¶ 16.1(a), Contract, ¶ 3.3, Agreement, ¶ 8.1(a)), but other provisions of each document ties it to the others. A few examples will suffice: Agreement, ¶ 10.4, conditions HCPI's obligation to advance upon Villa's proper performance of the Contract and Lease (see, similarly, Contract, ¶ 3.17); reimbursement

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8 *See* BLACK'S LAW DICTIONARY 899 (7th ed. 1999) (defining triple net lease as "a lease in which the lessee pays all the expenses, including mortgage interest and amortization, leaving the lessor with an amount free of all claims").

of closing costs to Villa are governed by the Agreement (Contract, ¶ 2.5); the Lease and the Agreement must be executed upon closing of the Contract (Contract, ¶ 1.1 and Recitals); the term of the Lease is defined by the Contract and the Agreement (Lease, ¶ 1, relying on "Commencement Date," defined in ¶ 2 as the earliest of the opening of the Facility, the "Completion Date," as defined in the Agreement, or the first anniversary of closing of the Contract).

3. Court's Analysis

The court concludes that the nature of the transaction – here, whether HCPI loaned money or leased the Facility to Villa – depends on the facts. However, just as the facts vary depending on the transaction, so, too, interpretation of the facts may vary in two respects depending on the context. First, that a transaction is deemed, on its attributes, to be of a given type in one context does not mean it will always be so characterized. Thus, in *PCH*, that the agreement of the parties was a lease for tax purposes did not require that the transaction also be viewed as a lease in the "lessee's" bankruptcy. Second, a given fact which may weigh heavily in determining the character of one transaction may be of little weight in defining the nature of another. The term of the leases in *PCH* and *Morregia* was significant to the courts' determination that they were not governed by section 365 of the Code. That does not mean that the long term of an agreement will always weigh against it being a lease. Leases of single use facilities or pads on which buildings are constructed are likely to be for long terms; that does not convert the transaction from being a lease into one of fee ownership subject to a mortgage.

Keeping in mind the need to focus on the ultimate question before the court – ie., whether HCPI is a secured creditor or a lessor for purposes of Villa's chapter 11 case – rather than attempting to cull facts to match factors developed by other courts facing different situations, the court will evaluate the Villa – HCPI transaction in the manner suggested by *Sunbelt*. Simply put, the court must decide whether HCPI is a secured creditor or a lessor based on whether the risks it assumes – and concomitantly the benefits it receives – are those of an owner of property or of a mortgagee of property.[9]

In arriving at a conclusion as to whether HCPI or Villa bore the risks and enjoyed the rewards of ownership, questions regarding rental calculation[10], internal accounting[11] and

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9 Obviously the controlling documents and the intent of the parties have some relevance to the nature of their relationship. On their face, the documents purport to create a sale and leaseback arrangement. As to intent, whatever may have been Shirley's wishes, HCPI from outset made clear to Shirley that it intended a lessor-lessee relationship as opposed to that of lender and borrower. *See, e.g., C. Kent Harrington Letter of June 25, 1992* (Defendant's Exhibit K) (though Defendant's case is not so strong as represented to the court; Villa's counsel most emphatically did *not* opine, as Defendant intimates, that the Lease was not a financing transaction; Defendant's Exhibit G, p.7, ¶ (*l*)). In any case, the court cannot find, on the record before it, that the parities' common intent was to create anything other than a lease. Intent or facial characterization of documents, however, is not dispositive of their effect, especially in a bankruptcy context, in which other creditors who were not party to the Lease, the Agreement and the Contract, have an interest in whether the Facility itself is an asset of the estate or the estate instead possesses only a leasehold.

10 Plaintiff argues that rental rates (Lease, ¶ 3.1) are not set by real estate market factors but rather by HCPI's required return on its investment. Return on investment is not an unreasonable method for fixing rent, especially for a single-use property like the Facility. The court has no evidence that there were comparables from which the parties could have deduced a "market" rental. No doubt the cost of the Facility was related in some fashion to the revenue it could be expected to generate. This also would support establishment of a rental rate based on a reasonable return on the owner's investment.

11 The parties agree that federal income tax calculations for each assumed the lease of the Facility. Plaintiff argues, however, that Defendant accounted for "rental"payments as if they were mortgage payments (and that rent was calculated as if for a mortgage), pointing to a column in HCPI's books for recording principal payments. Defendant argues that column contains no entries – though, in fact, it does (HCPI ledger sheets, Plaintiff's Exhibit 18), as well as entries for loan interest (knowing the high ethical standards of Defendant's counsel, the court assumes this misstatement, the inaccurate intimation concerning Defendant's Exhibit G and the misreading of UCC 1-201(37)

allocation of costs associated not only with ownership but also with possession and use of the Facility[12] seem to the court of limited significance. Rather the court must focus on two areas. First, which party bears the risk to the value of the Facility in the case of its destruction or other loss. Second, which party stands to gain or lose if the value of the Facility changes during the life of the lease. These are the risks an owner of real estate runs, and which of Villa and HCPI bears their burden must be the test of whether Plaintiff or Defendant prevails in the instant case.

Turning first to the risk of loss of the Facility, the terms of the Lease are so draconian as to burden Villa with most of the risks. That Villa is liable for rent during a period when the Facility is unusable (Lease, Art. V) is not necessarily troubling. But requiring that Villa, at its own cost, reconstruct the Facility if its is destroyed in a way not covered by insurance *and* at the same time continue to pay rent (Lease, ¶ 14.3, Art. XXII) is imposing on Villa both lessee *and* ownership risks (see, also, Lease, ¶ 14.2.3, requiring Villa to make up the difference between insurance proceeds and the cost of repair). In the alternative scenario – where insurance proceeds exceed the cost of repair – HCPI, unsurprisingly, keeps the difference (Lease, ¶ 14.1).

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were not advertent). Given the payoff required of Villa to acquire the Facility, the court does not find inclusion of "principal" and "interest" entries in HCPI's books significant, as they had no effect on the price which Villa would have paid at the end of the Lease to acquire the Facility.

12 It is a typical feature of a triple net lease to shift to the tenant costs such as taxes, insurance and repairs. *See, for example,* Cent. States Southeast & Southwest Areas Pension Fund v. White, 258 F.3d 636, 642 (7th Cir. 2001) (describing a triple net lease as "one in which the tenant incurs many of the obligations of rental such as maintenance, operating expenses, real estate taxes and insurance"); James v. Commissioner, 899 F.2d 905, 906 (10th Cir. 1990) (describing a triple net lease as a "lease whereby the lessee was responsible for installation, maintenance, taxes, and insurance"); Kallman v. Tandy Corp., 2001 U.S. Dist. LEXIS 25238, *2 (N.D. Ill. Jan. 16, 2001) (stating that lessee was obligated under a triple net lease "to pay the real estate taxes, insurance, and utilities for the property and was responsible for maintenance and repairs").

Moreover, in the event of a default, HCPI can *require* that Villa purchase the Facility for the greater of HCPI's cost (the price of the Property under the Contract plus HCPI's construction costs of the Improvements under the Agreement) and fair market value. Once again, Villa's risk is more akin to that of an owner than a lessee's.

On the other hand, total condemnation or a taking that renders the Facility unusable terminates the Lease (Lease, ¶ 15.3). If the Facility is not rendered unusuable, HCPI is obligated to use the compensation for the taking to reconstruct it. Even in the condemnation provisions, though, HCPI is insulated partially against loss at Villa's expense. If payment made for a taking is based partly on damage to Villa, nevertheless up to the entire award, including Villa's share, must be used to pay to HCPI its loss (Lease, ¶ 15.6; here HCPI's loss is defined as the cost of construction of the Improvements plus the greater of the cost or fair market value of the Property). On balance, therefore, it is Villa, not HCPI, that bear's the owner's risk of loss through extraordinary circumstances.

Balanced against this conclusion is the fact that, if the Lease runs its term, it is HCPI that will suffer loss through a drop in the value of the Facility – or benefit from its appreciation.[13] Villa is granted an option to acquire the Facility at the end of the Lease's 20 year term at the greater of cost or fair market value (Lease ¶ 35.2) and is offered a right of first refusal should HCPI elect to sell the Facility (Lease, ¶ 35.1). But Villa suffers no penalty should it choose not to exercise these options. Even if Villa ceases to perform during the term of the Lease, HCPI is not entitled to repayment of monies it advanced but simply to remaining rent under the Lease.

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[13] The court considers it significant as well that HCPI may mortgage the Facility during the term of the Lease (Lease, ¶ 36.1).

That remaining rent claim would be limited in this bankruptcy case by section 502(b)(6) of the Code.

Moreover, whatever the Lease may provide, HCPI will have the same joint liability with Villa that any other owner would share with its tenant. The Agreement and Lease may indemnify or purport to excuse HCPI from liability to materialmen and mechanics, for example, but HCPI's protection extends only so far as Villa's ability (and that of Shirley as guarantor) to pay. Should Villa cause environmental damage to the Property, under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq*., HCPI, unlike a lender, will be liable. *Kelley ex rel. Mich. Natural Resources Comm'n v. Tiscornia*, 810 F. Supp. 901, 905 (W.D. Mich. 1993) (without participating in the management of a facility, a lender is not liable under CERCLA); 42 U.S.C. § 9607(a)(2). In sum, if all went well under the Lease – and even in the present context of chapter 11 – it is HCPI that bears the risks of an owner, risks that would not be a concern of a lender.[14]

IV. Conclusion

The Court of Appeals for the Fifth Circuit has wisely noted that transactions in the modern business world are often hybrid in character. *See Sunbelt*, 336 F.3d at 416. Whether a transaction is sale or pledge, as in *Sunbelt*, or a lease or loan as in the case at bar is typically not an easy question. *Id.* That is so here.

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[14] Besides escaping the risks under CERCLA and of (junior) artisan's liens, a lender's claim would not be subject to section 502(b)(6) in a chapter 11 case and would, in fact, if non-recourse, benefit from section 1111(b)(1).

Nevertheless, the court is mindful that the transaction here is labeled as a lease. The court has held Defendant, at least, intended it to be a lease. Whatever Shirley may have believed – or wished – the transaction to be, he knew HCPI planned its relationship with Villa to be that of lessor with lessee. The Contract, Agreement and Lease were intensively negotiated.

The evidence before the court is certainly mixed. But there is unquestionably a record sufficient to support characterization of the Lease as a lease, and there is not sufficient evidence to the contrary to satisfy Plaintiff's burden of proof that it should rather be treated as a mortgage.

For the foregoing reasons, the HCPI Motion will be granted and the Villa Motion denied. Defendant shall prepare and submit to the court a judgment in conformity with this opinion.

Signed this the ____ day of December 2003.

DENNIS MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE