

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE : BANKRUPTCY NO. 1-02-04784
: CHAPTER 13
MICHAEL E. ZERANCE AND PAM S. :
ZERANCE, DEBTORS :
: :
: :
MUMMA REALTY ASSOCIATES, : MOTION FOR RELIEF FROM STAY
INC., Movant :
: vs. :
: MICHAEL ZERANCE AND CHARLES :
DEHART III, TRUSTEE, Respondents :
: :
: :
MICHAEL E. ZERANCE AND PAM S. : NOTICE OF ASSUMING LEASE
ZERANCE, Movants :
: vs. :
: MUMMA REALTY ASSOCIATES, :
INC., Respondent :

APPEARANCES:

DAVID J. LANZA, ESQ., LEMOYNE, PA, ATTORNEY FOR MUMMA REALTY ASSOCIATES, INC.

CHARLES E. PETRIE, ESQ., HARRISBURG, PA, ATTORNEY FOR DEBTORS

WARREN W. BENTZ, U.S. BANKRUPTCY JUDGE

FEBRUARY 6, 2003

OPINION

Introduction

Michael E. Zerance and Pam S. Zerance ("Debtors") filed their second voluntary Petition under Chapter 13 of the Bankruptcy Code on September 3, 2002 (the "Second Case"). On September 17, 2002, Mumma Realty Associates, Inc. ("Mumma") filed its OBJECTION TO CONTINUANCE OF STAY and a MOTION TO MODIFY STAY. Mumma seeks Orders granting it relief from the automatic stay and immediate possession of commercial property

located at 2550 Paxton Street (rear), Harrisburg, PA (the "Property"). Debtors occupy the Property as tenants under an Agreement of Lease ("Lease") dated November 4, 1999. Debtors have filed a NOTICE OF ASSUMING LEASE. Debtors propose to continue to occupy the Property; to timely pay postpetition charges under the Lease, and to cure prepetition deficiencies through their Chapter 13 Plan. Mumma states in its Response that the Lease was terminated prior to the filing of the Second Case and that there is nothing left to assume. Mumma further asserts that Debtors have no ability to cure either the prepetition or postpetition defaults under the Lease.

Undisputed Facts

Debtors filed a prior Chapter 13 case on May 14, 2002 ("First Case"). Mumma obtained an Order which granted it relief from stay on August 23, 2002. On that same date, the First Case was dismissed. Prior to the filing of the First Case, Mumma initiated eviction proceedings seeking possession of the Property, before District Justice Yanich (the "District Justice"). Following dismissal of the First Case, the District Justice entered judgment for possession in favor of Mumma on August 30, 2002 (the "Judgment"). Mumma obtained a writ of possession immediately prior to Debtors' filing of the Second Case. The Notice to Vacate which was posted on the Property on September 3, 2002 at 11:15 a.m. states in part:

NOTICE TO DEFENDANT TO VACATE

If you, and all the occupants of this property not authorized by the owner to be present thereon, do not vacate this property within ten (10) days after the (date of service) 3 day of Sept 02, the law authorizes me to use, and I must use, such force as may be necessary to enter upon this property, by the breaking in of any door or otherwise, and to eject you and all unauthorized occupants. If necessary, eviction will commence on 9-23-02 after 12:01 AM.

At any time before actual delivery of the real property is made in execution of the Order for Possession, the defendant may, in a case for the recovery of possession solely because of failure to pay rent, satisfy the Order for Possession by paying to the executing officer the rent actually in arrears and the cost of the proceedings.

This language is in accord with Pa. R.C.P.D.J. No. 518 which provides:

Rule 518. Satisfaction of Order by Payment of Rent and Costs

At any time before actual delivery of the real property is made in execution of the order for possession, the defendant may, in a case for the recovery of possession solely because of failure to pay rent, satisfy the order for possession by paying to the executing officer the rent actually in arrears and the costs of the proceedings. The executing officer shall give the defendant a signed receipt for any such payment.

Note: "Rent actually in arrears" means the sum set forth on the order for possession.

Pa. R.C.P.D.J. No. 518.

Debtors admit defaults under the Lease in rental obligations, payment of taxes and insurance and sewer charges in the amount of \$19,664.32.

Debtors have filed a Chapter 13 Plan which provides for a monthly payment of \$2,156 for a period of 60 months, or a total of \$129,360 (60 x \$2,156). Debtors propose that the Chapter 13 Trustee use the funds to pay delinquent taxes in the amount of \$95,860, arrearages to secured creditors of \$16,708, and arrearages to Mumma. The amount payable to Mumma is not stated in the Plan, but Debtors admit a delinquency of \$19,664.¹ The Plan is underfunded. ($\$95,860 + 16,708 + 19,664 = \$132,232$.)

¹We further note that an objection to the Debtors' Plan filed by Barry R. Zerance was sustained and that the Internal Revenue Service has an objection pending. Debtors were ordered to file an amended plan within 21 days of an Order dated December 16, 2002, but have failed to do so.

Discussion

A. Lease Termination

"[A]n executory contract or lease validly terminated prior to the institution of bankruptcy proceedings is not resurrected by the filing of the petition in bankruptcy, and cannot therefore be included among the debtor's assets." In re Triangle Laboratories, Inc., 663 F.2d 463, 467-68 (3d Cir. 1981) (citations omitted). "When a debtor's legal and equitable interests in property are terminated prior to the filing of the petition with the Bankruptcy Court that was intended to preserve the debtor's interest in property, the Bankruptcy Court cannot then cultivate rights where none can grow." Id. quoting In re Butchman, 4 BR 379, 381 (Bankr. SD NY 1980).

Courts look to state law to determine whether a lease has expired or otherwise been terminated prior to the bankruptcy filing. Robinson v. Chicago Housing Auth., 54 F.3d 316, 317-20 (7th Cir. 1995).

"[S]tates establish various phases in the process of termination of a lease, and the point at which tenants lose their right to possession differs considerably from state to state." Id. at 320. "The general rule. . . is that the lease ends when the tenant is no longer entitled to possession." Id. at 321. "Where there is a viable possibility that the tenant could still take action to preserve the lease, the lease has not been terminated. Id.

In this case, the NOTICE TO DEFENDANT TO VACATE ("Notice") was served in accordance with Pennsylvania law upon the Debtors by posting on the Property on September 3, 2002. The Notice stated that the Debtors would be evicted on September 23, 2002, and that Debtors could prior to that date "satisfy the Order for Possession by paying to the executing

officer the rent actually in arrears and the cost of the proceedings."² Thus, when Debtors filed the Second Case, they remained in possession and retained the right to cure the defaults under the Lease. The Lease had not yet been terminated.

Assumption

Under §1322(b)(7) of the Bankruptcy Code, a Chapter 13 Plan may, "subject to Section 365 of this title, provide for the assumption. . .of any. . .unexpired lease. . . ." Section 365(b) in turn provides:

(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—

(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

(C) provides adequate assurance of future performance under such contract or lease.

There is no dispute that the Lease is currently in default. The issue is whether the provisions of Debtors' proposed Plan (1) cures, or provides adequate assurance of a prompt cure, of the default and (2) provides adequate assurance of future performance under the Lease.

The term "promptly" under §365(b)(1) is not defined. The term probably suggests a shorter period of time than the "reasonable time" to cure defaults in a long-term debt under §1329(b)(5). KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY, §4.89 at 4-191 (2d Ed. 1994). Whether a cure is prompt must be determined on the facts and circumstances of each case. The courts have

²The date set for eviction in the Notice is not clearly handwritten. It appears to be September 23, but might be September 13. It makes no difference for purposes of our decision.

consistently held that a proposed cure over a period of two years or more was not "prompt" for purposes of §365(b)(1). See, e.g., In re Flugel, 197 B.R. 92, 97 (Bankr. S.D.Cal. 1996) (proposed cure over 10 years not prompt); In re Embers 86th St., Inc., 184 B.R. 892, 901-02 (Bankr. S.D.N.Y. 1996) (29 months); In re Liggins, 145 B.R. 227 (Bankr. E.D.Va. 1992) (48-60 months); In re Lloyd, No. 92-125088, 1992 WL 167047 (Bankr. E.D.Pa. July 6, 1992) (3-5 years); In re Yokley, 99 B.R. 394 (Bankr. M.D.Tenn. 1989) (2 years).

The three-year "cure" of rental arrearages proposed by the debtor here cannot constitute adequate assurance that the debtor will promptly cure his default. Admittedly, the task of determining what constitutes a "prompt" cure is an arbitrary one. On this record, we readily conclude that three years to cure is not prompt.

In re DiCamillo, 206 BR 64, 72 (Bankr. D NJ 1997). See also In re Allison, 1995 WL 930889 (Bankr. ED VA 1995).

The Chapter 13 Plan as filed by Debtors provides that arrearages due Mumma will be paid through the Plan. The Plan fails to provide an amount or the terms and time over which the cure will be effected.

We are unable to speculate whether the Debtors are able to timely meet their postpetition obligations under the Lease and offer an amended plan that would satisfy the requirements of a prompt cure. Debtors will be afforded a short window of opportunity to present an amended plan which satisfies the requirements, in default of which Mumma will be granted relief from stay.

An appropriate Order will be entered.

_____/s/_____
Warren W. Bentz
United States Bankruptcy Judge

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ORDER

This 6 day of February, 2003, in accordance with the accompanying Opinion, it shall be, and hereby is, ORDERED as follows:

1. Debtors shall remain current on all postpetition obligations under its Lease for the property located at 2550 Paxton Street, in default of which Mumma Realty Associates, Inc. may request an expedited hearing which will be fixed by telephone, on short notice.
2. Debtors shall file an Amended Chapter 13 Plan by February 28, 2003.
3. A continued hearing on the within motions is fixed for 9:30 a.m., March 27, 2003 in the Bankruptcy Conference Room, Third Floor, Federal Building, Third and Walnut Streets, Harrisburg, PA.

_____/s/_____
Warren W. Bentz
United States Bankruptcy Judge

c: David J. Lanza, Esq.
Charles E. Petrie, Esq.
Charles DeHart III, Esq.