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ADV. NUMBER: None
JUDGE: M. A. Mahoney
PARTIES: Phillip H. Bellew, Pate Joint Venture
CHAPTER: 7
ATTORNEYS: A. R. Maples, Jr., I. Grodsky
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KEY WORDS:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

PHILLIP H. BELLEW, Case No. 88-11261

Debtor.

ORDER PARTIALLY SUSTAINING CLAIM OBJECTION

A. Richard Maples, Jr., Mobile, AL for Debtor
Irvin Grodsky, Mobile, AL for Pate Joint Venture

This matter came before the Court upon the objection by Debtor to Claim No. 12 filed by Pate Joint Venture ("Pate"). The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(B).

Debtor filed for Chapter 11 bankruptcy relief on July 21, 1988. On February 13, 1992, the case was converted to Chapter 7. Prior to conversion, on October 11, 1988, Pate filed a proof of claim in the amount of $70,380 for breach of a lease agreement. Debtor filed an objection to this claim alleging that it should be disallowed because the claim is contingent and unliquidated and the amount of the claim is disputed. For the reasons indicated below, Debtor's objection to the claim is partially sustained and Pate's claim is allowed as a general unsecured claim in the amount of $6,800.

FACTS

On April 20, 1982, Debtor[1] and Pate entered into a four-year lease for office space at 605 Bel Air Boulevard in Mobile, Alabama. The monthly rent started at $1,000, increasing in graduated steps to $3,400 monthly by the end of the four-year term.

[1]The contract was signed by Debtor on behalf of Bogan & Bellew, CPAs.

Debtor and Bogan satisfied their obligation under this four-year lease. Debtor and his partner, Bogan, terminated their professional corporation around the time the lease expired. Debtor alone continued to occupy the premises and pay rent at $3,400 in the name Bellew & Company, his successor sole proprietorship business, until August 31, 1987. At trial, both Debtor and John E. Pate, the principal of Pate Joint Venture, testified that no formal written extension of the 1982 lease was ever entered into between the parties. From May 1986 to August 1987, Bellew & Company timely paid Pate $3,400 in monthly rent. Debtor also investigated the possibility of purchasing the building from Pate, but was unable to secure financing.

Mr. John E. Pate testified that "in his mind" Debtor had renewed the lease for a three-year period, ultimately satisfying only 18 months of this new obligation. According to Pate, if this three-year extension was fulfilled to term, Debtor would owe Pate an additional $61,200. This is the basis for his $70,380 claim. The remaining $9,180 of Pate's claim is for costs and attorney fees. To exercise this three-year option, the lease itself states that Debtor had to give Pate "written notice" of such a decision. (See Pate Exhibit 1, page 2.) Both parties testified that no such written notice was provided. Pate Exhibit 3, which is a letter from Debtor to John E. Pate dated November 13, 1987, states that negotiations in regard to a lease occurred but that no deal was struck.

The lease contained a "holdover clause" (page 8 of Pate Exhibit 1). The clause provides:

> 15. **HOLDING OVER.** If the Tenant retains possession of the premises . . . after the termination of the term . . . the Tenant shall pay the Landlord rent at double the rate payable for the year immediately preceding said holdover computed on a per month basis. . . . Any retention of the premises after the termination of this lease . . . shall be considered as a month to month holdover unless otherwise agreed to in writing by both parties.

Mr. John Pate stated, and Debtor did not deny, that Debtor promised to pay Pate three months rent upon his departure and merger with another CPA firm. Debtor moved out in August 1987. He paid $3,400 to Pate in September 1987.

Because of this dispute, Pate retained counsel to collect the $61,200 it alleges Debtor owes. The lease (Pate Exhibit 1) provided for attorney fees in item number 16(g) at page 10, in the event a default under the terms of the lease occurs. Based on the $70,380 claim by Pate, these fees must total $9,180.

LAW

Proofs of claim, pursuant to 11 U.S.C. § 502(a), are prima facie evidence that the claim is valid. *Gardner v. New Jersey*, 329 U.S. 5565, 91 L. Ed. 504, 67 S. Ct. 467 (1947), *reh'g denied*, 330 U.S. 853, 91 L. Ed. 1296, 67 S. Ct. 768. If a claim is objected to, the objecting party must present sufficient evidence to rebut this prima facie evidence. *In re Dahlman Truck Lines, Inc.*, 59 B.R. 218 (Bankr. W.D. Wis. 1986). More than a mere filing of an objection is required to overcome the prima facie validity of a claim. *Whitney v. Dresser*, 200 U.S. 532, 50 L. Ed. 584, 20 S. Ct. 316 (1906); *In re Equipment Services, Ltd.*, 36 B.R. 241 (Bankr. Alaska 1983). If the objecting party satisfies this standard, the burden of proof switches, and the party that filed the claim must prove by a preponderance of the evidence that its claim is valid. *Whitney v. Dresser*, *supra*; *In re Fidelity Holding Co.*, 837 F.2d 696 (5th Cir. 1988).

In the immediate case, Debtor has satisfactorily met his burden by establishing a valid dispute about the extension of the lease. Pate filed its objection and Debtor raised valid concerns. Therefore, the ultimate burden of proof in this case rests on Pate. Pate must establish by a preponderance of the evidence the validity of its $70,380 claim. *Id.*; *see also*, *In re Katz*, 168 B.R. 781 (Bankr. S.D. Fla. 1994); *In re South Motor Co. of Dade County*, 161 B.R. 532 (Bankr. S.D. Fla. 1993).

According to the testimony, Debtor and Pate discussed various options and alternatives regarding Debtor's continued tenancy. Correspondence was exchanged and meetings took place, yet no formal written extension was finalized. The correspondence indicates that Pate invited the Debtor to "negotiate" a renewal. The lease itself mandated that the three-year extension could only be exercised in writing. (Pate Exhibit 1.) Based on this lack of evidence, the burden of proof as to a full three-year lease has not been met.

Mr. Pate also alleged alternatively that the holdover provision of the lease applies essentially because Debtor remained on the premises and paid rent monthly, and the parties were in a month to month situation as stated in the holdover clause. In Alabama, a continuous tenancy upon a monthly rental basis is a "tenancy at will," commonly called a tenancy from month to month. *Arbuthnot v. Thatcher*, 237 Ala. 593, 188 So. 249 (1939). A tenant at will is governed by the common law and is thus entitled to no more than reasonable notice to vacate. *Melson v. Cook*, 545 So. 2d 796 (Ala. 1989); *citing*, *Womack v. Huche*, 503 So. 2d 832 (Ala. 1987). The Debtor paid rent for May 1986 through August 1987 and then vacated the premises. He paid September 1987 rent after vacation. Thirty days of additional rent would be sufficient for notice purposes. However, Pate claims that he is owed $6,800 per month rent for 16 months (May 1986 through September 1987) under the holdover clause and Bellew only paid $3,400 per month. Therefore, Bellew still owes $54,400. However, Pate did not produce any evidence to show that he intended to collect $6,000 per month. He accepted the $3,400 per month for 16 months without protest. He waived his right by his silence to enforce the holdover clause rent.

CITE

Pate also alternatively alleged he is entitled to a claim of $6,800 based on Mr. Pate's uncontroverted testimony that Debtor promised three months rent upon vacation. Debtor paid one month ($3,400) of this obligation in September 1987. Debtor was not obligated otherwise to

pay this rent; therefore, this Court believes that the payment shows Debtor and Pate had struck some arrangement requiring this payment. Mr. Pate's testimony is unrebutted on this point. The Debtor owes Pate $6,800.

Pate's attorney fees and costs of $9,180 are not a proper part of the claim. The lease specifically provided for such fees and costs, but the $6,800 obligation to pay rent after vacation is outside this contract. Therefore, Bellew does not owe them.

Therefore, it is ORDERED that Debtor's objection to Pate's $71,300 claim is sustained to the point of disallowing all of the claim except an unsecured, nonpriority claim of $6,800.

Dated: February ___, 1996

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MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE