

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE:)
)
DAVID A. SAGE,) Case No. 17-02699
)
Debtor.)

ORDER CONDITIONALLY DENYING MOTION FOR RELIEF FROM STAY

This case is before the court on a motion for relief from stay filed by landlord AGLC, LLC (“AGLC”) for relief from stay to allow it to pursue an unlawful detainer action against the debtor in state court. The court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334, and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). This court has jurisdiction to enter a final order.

Debtor and his wife own a limited liability company called Oh So Coastal, LLC, which operates a furniture and accessories store located in Orange Beach, Alabama. Debtor and his wife sublease commercial real estate in a small shopping center from AGLC. The sublease (which is sometimes referred to as “lease” in this order) was executed in September 2003 and has been amended three times. Pursuant to the third amendment, the sublease runs through October 31, 2019.

The parties stipulated that debtor owed AGLC \$34,855.62 as of the July 20, 2017 petition date, consisting of: \$1,295.28 owed on the April rent; May, June, and July 2017 rent at \$9,170.76 a month; CAM (common area maintenance) reconciliation for the prior year in the amount of \$3,418.06; \$2,600.00 in late fees; and \$30.00 in bank charges for returned checks. After the petition was filed, debtor delivered to AGLC on August 1st a check in the amount of \$12,019.76, which would cover August 2017 base rent in the amount of \$9,170.76 and \$2,849.00

toward the prepetition rent arrearage. AGLC acknowledges receipt of the check but has not deposited it.

Debtor opposes the motion for relief from stay, seeking to assume the lease agreement and cure the prepetition default. Under Bankruptcy Code § 365(c)(3), debtor cannot assume an unexpired commercial real estate lease and cure the default if the lease has been terminated prior to the petition date. Although the case is up on lessor's motion for relief from stay, the court must decide if the debtor can assume the lease as part of determining whether there is "cause" to lift stay under § 362(d)(1) and whether the sublease is property of the estate under § 362(d)(2).

The first issue is thus whether the landlord terminated the sublease prior to the petition date. The sublease provides as follows:

REMEDIES OF LANDLORD

35. In the event of an occurrence of any event of default by Tenant as hereinabove set forth or otherwise, at any time and without limiting Landlord in the exercise of any other remedy contained elsewhere in this Lease at law or in equity or otherwise:

35.1 Landlord may immediately terminate this Lease and, thereupon, this Lease and the term hereof granted shall wholly cease and expire, and Tenant shall then immediately quit and surrender to Landlord the Demised Premises, including any and all buildings and improvements thereon, and Landlord may enter into and repossess the Demised Premises by summary proceedings, detainer, ejectment or otherwise, and remove all occupants thereof and property thereon, without being liable to indictment, prosecution or damages therefore: or

35.2 Without terminating this Lease, Landlord may re-enter the Demised Premises and may (but is not obligated to) lease the Demised Premises to any other person upon such terms as Landlord shall deem reasonable in Landlord's discretion and for a term within or beyond the Lease Term; and Tenant shall remain liable for any loss in rent for the balance of the Lease Term, together with any and all expenses or costs incurred by Landlord in re-renting the Demised Premises, including but not limited to the payment of commissions, the making of alterations, costs of leasing same, and otherwise, or at Landlord's option, the entire deficiency, which is subject to ascertainment for the remaining term of this Lease, shall be immediately due and payable by Tenant. Nothing herein, however, shall be construed to require Landlord to pay Tenant any surplus of any

sums received by Landlord on a re-renting of the Demised Premises in excess of the rent provided in this Lease.

[AGLC Exhibit 1, p. 15.] The sublease thus provides two contractual remedies upon default: terminating the lease (§ 35.1) or regaining possession without terminating the lease (§ 35.2).

The parties stipulated that AGLC's managing partner sent debtor a letter on June 14, 2017 which stated in relevant part:

You have failed to comply with the terms of the Lease by failing to pay rent and other charges when due in accordance with the terms of the Lease. There is now due and owing the amount of \$24,084.86, together with interest, late fees, and attorney fees due this firm.

Please be advised that in consequence of your failure to timely pay the rental and other charges due under the Lease, AGLC does hereby terminate your right to the possession of the Property. Therefore, in accordance with the terms and provisions of the Lease, and pursuant to applicable Alabama law, please be advised that AGLC, the present owner of the Property, desires the immediate possession of the Property, and now makes demand for the immediate possession of same. You are hereby notified to quit and deliver up possession of the Property to AGLC without further delay.

If possession of the Property is not restored to AGLC ten (10) days from the date of this letter appropriate proceedings will be instituted against you in the District Court of Baldwin County, Alabama, to secure possession of the Property without further notice or demand. If such legal action is required to obtain possession of the Property, in addition to all other sums now due and owing to AGLC, including legal fees due this firm through the date hereof, AGLC will also seek to recover additional legal fees, all court costs, and all litigation expenses incurred in such litigation. You may avoid these additional costs and fees by complying with the demand here made.

You are advised that termination of your right to the possession of the Property does not terminate your obligation to pay rent and other charges due in accordance with the terms and provisions of the Lease.

[AGLC Exhibit 5.] Following this letter, AGLC filed an unlawful detainer action which was set for trial in the District Court of Baldwin County in late July; however, the action was stayed by the debtor's filing of this case shortly before trial.

AGLC's letter terminated the debtor's right of possession but did not expressly terminate the lease; in fact, it asserted that the debtor remained obligated for unpaid rent pursuant to the terms of the lease. AGLC argues that a termination of a lessee's possessory interest pursuant to the terms of a lease also terminates the lease under state law so that it cannot be assumed under Bankruptcy Code § 365. However, none of the law cited by the parties so holds. Alabama Code § 6-6-310 allows a landlord to sue for unlawful detainer "after the termination of the possessory interest of the tenant ..." and does not require termination of the lease. Neither In re Morgan, 181 B.R. 579 (Bankr. N.D. Ala. 1994) or In re Moore, 290 B.R. 851 (Bankr. N.D. Ala. 2003) deal with the issue of whether termination of possession also terminates a lease under Alabama law. In Morgan, the court held that a residential real estate lease which had been terminated prepetition could be assumed prior to a final state court judgment for eviction; the court in Moore disagreed and did not allow the debtors to assume residential leases which had been terminated prepetition. AGLC also cites Alabama Code § 35-9-6, which allows a landlord upon default to give either ten days' notice to quit or of the termination of the tenancy. Section 35-9-6 does not state that the notice to quit is a termination of the tenancy; it sets them out as alternatives. Bowdoin Square v. Winn-Dixie Montgomery, Inc., 873 So. 2d 1091, 1098 (Ala. 2003) is likewise not exactly on point, but the lease there, like the one here, gave the landlord the option of terminating the lease or retaking the premises.

In the absence of any Alabama law that termination of a lessee's possession under the terms of a lease necessarily terminates the lease, and in the face of Alabama statutes and case law which distinguish the two remedies, this court concludes that the two remedies are not the same. The landlord here thus cannot have it both ways. By expressly not terminating the sublease and

reserving its rights against debtor under the sublease, AGLC left the door open for the debtor to cure the default of the non-terminated sublease under Bankruptcy Code § 365.

The next question is the terms of an assumption and cure. The debtor admitted that he has no additional collateral to provide to the landlord. The debtor faces numerous obstacles in his Chapter 13, including about \$65,000 in tax debt. However, the debtor testified that he has taken substantial steps to turn around his business, including closing other businesses; his wife and him taking over direct management of the store; filing this bankruptcy to deal with the debt owed to a large, high-interest-rate unsecured creditor who was debiting the debtor's bank account; and eliminating excess store employees. Debtor also testified that the business is starting one of its best times of the year as condo owners refurbish after summer rentals.

Bankruptcy Code § 365(b)(1)(A) provides that the debtor must "promptly cure" but does not provide any definition of "promptness." The debtor proposes a year, and the landlord argues that six months should be the maximum. Judge Norton suggests that a year should normally be the outside limit:

A "prompt" cure means prompt. A trustee or debtor in possession may not promptly cure a default by promising to pay the amount due because of the default over a period of years even though the promised payments would include interest. A time period of up to one year is not necessarily in violation of the standard that the cure be prompt although a period to cure extending beyond a year should not be considered prompt in most cases.

Norton Bankruptcy Law and Practice 2d § 39:29.

The court finds here that the debtor's proposal of a year to cure essentially about three months of back rent is reasonable given the tight parameters which the court is going to put on the payment of postpetition rent and the default cure. Although the debtor faces some obstacles, the court finds that the debtor has provided "adequate assurance" of performance and that the lessor will be adequately protected under § 362(d) under the strict terms set out below.

The Court thus denies AGLC's motion for relief from stay on the following conditions:

1. Debtor shall pay to AGLC by the tenth calendar day of each month the basic monthly rent of \$9,170.76 for the months of September 2017 forward. This provision does not change the fact that the lease payments are due on the first of each month and that debtor may be liable for late charges or other charges pursuant to the sublease agreement.

2. AGLC shall apply the check it is holding in the amount of \$12,019.76 to pay the postpetition monthly rent of \$9,170.76 for August 2017 and apply the remaining funds of \$2,849.00 to the prepetition arrearage, leaving a prepetition balance of \$32,006.62.

3. The debtor shall pay to AGLC by the tenth calendar day of each month payments of \$2,667.22 for twelve months beginning September 2018 to resolve the remaining prepetition arrearage of \$32,006.62.

4. Debtor shall comply with all provisions of the sublease, as amended.

5. Payments shall be considered as made when actually received by AGLC.

6. If debtor fails to comply with the requirements of paragraphs 1 and 3, AGLC may file a "notice of termination of stay" with this court and the automatic stay shall lift immediately without further order of the court to allow AGLC to pursue an unlawful detainer action against the debtor. In case of such termination, the sublease shall be deemed automatically rejected and terminated as a matter of law with regard to debtor David Sage, and AGLC will not be required to provide further notice of termination of the sublease as to debtor. The stay termination shall take immediate effect and shall not be stayed pursuant to Bankruptcy Rule 4001(a)(3).

7. Debtor shall file within 10 days a motion to assume the sublease on the terms set out above if not otherwise agreed with AGLC.

Dated: August 29, 2017


HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE