
In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:)
)
W.G. SHUCKERS) Chapter 11 Case
)
) Number 97-40432
Debtor)
)
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CALLEN TRUST)
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Movant)
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)
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v.)
)
W.G. SHUCKERS)
)
Respondent)

MEMORANDUM AND ORDER
ON MOTION FOR RELIEF FROM STAY

This matter comes before the Court on the Callen Trust's Motion for Relief from the Automatic Stay. On April 7, 1997, this Court held a hearing to consider the Motion, after which the Court took the matter under advisement. Based

upon the evidence adduced at the hearing, the record in the file and applicable authorities, I make the following Findings of Fact and Conclusions of Law pursuant to Bankruptcy Rule 7052.

FINDINGS OF FACT

Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code on February 13, 1997. Debtor operates a restaurant located at 225 West River Street, Savannah, Chatham County, Georgia. Debtor does not own its building, but instead leases the premises from the Callen Trust. This dispute concerns whether the parties renewed their lease in September 1996.

Prior to September 1996, Debtor occupied its building as a tenant under a lease that expired September 30, 1996. In early September 1996, Debtor and the Callen Trust, owner of the subject property, entered into negotiations for a new lease. As a result of these negotiations, the parties executed a document on September 12, 1996, entitled "Lease Agreement." The commencement or effective date of the Lease Agreement was October 1, 1996.

Debtor had been in default under the prior lease agreement. The new Lease Agreement addressed Debtor's default by making the duties and obligations

of the parties new Lease Agreement contingent upon Debtor curing its previous default prior to the October 1, 1996, effective date. Specifically, paragraph twenty-four of the new Lease Agreement, entitled, "Condition Precedent to Lease Being Effective as of October 1, 1996," required the Debtor to perform several duties and obligations prior to the contract taking effect or the Lease Agreement would be "null and void."

One of the conditions precedent to the new Lease Agreement required Debtor to bring current all rent obligations under the prior lease by September 30, 1996. It is undisputed that as of September 30, 1996, Debtor still owed \$10,500.00 or approximately two months rent and accordingly did not comply with condition precedent "(a)" of the Lease Agreement. In fact, Debtor does not dispute that it failed to comply fully with any of the conditions precedent to enactment of the Lease Agreement.

The Callen Trust accepted three partial rent payments subsequent to October 1, 1996, totaling \$8,000.00.¹ These payments were not designated as payments either towards the debt arising from the prior lease or the new Lease

¹ On October 23, 1996, December 30, 1996, and February 3, 1997, Debtor paid the Callen Trust and \$2,500.00 respectively.

Agreement. The monthly rental amount under the new lease agreement is \$5,625.00. The Callen Trust contends that these amounts were accepted and applied to the \$10,500.00 debt that existed from the prior lease. Debtor asserts that the payments, although only partial payments, were made pursuant to the new Lease Agreement.

There were few communications between the parties after October 1, 1996, and prior to Debtor's bankruptcy filing on February 13, 1997. Robbie Callen, an agent of the Callen Trust although not a trustee, contacted Debtor on several occasions to inquire about past due rent payments. Robbie Callen informed the Debtor that the Callen Trust would "try to work with him." Robbie Callen and Debtor never specifically discussed the new Lease Agreement. Debtor and the trustees of the Callen Trust have never spoken to each other.

In support of its Motion, Movant, the Callen Trust, contends that Debtor's failure to satisfy the conditions precedent to the new Lease Agreement effectively rendered the Debtor, upon the expiration of the prior lease on September 30, 1996, a tenant-at-will or tenant-at-sufferance who may be dispossessed in accordance with Movant's state law remedies. Movant asserts that the Lease Agreement is a nullity because Debtor failed to comply with the conditions precedent and that Movant was under no obligation or duty to declare the lease "null and void."

Movant also contends that the acceptance of payments after the effective date of the lease only reduced the debt from the prior lease and did not constitute a waiver of the conditions precedent to the new Lease Agreement.

In opposition, Debtor's objection to the Motion is twofold. First, Debtor contends that the Lease Agreement came into effect upon the date of commencement notwithstanding paragraph twenty-four entitled, "Condition Precedent to Lease Being Effective as of October 1, 1996." Debtor interprets the "null and void" language of the lease as requiring the Callen Trust to declare the lease "void" in order to terminate it. Because Movant never declared the lease "void," Debtor asserts that it still may pursue its rights under the lease and in accordance with the Bankruptcy Code. Debtor also asserts that the acceptance of payments by the Callen Trust after October 1, 1996, constitutes a waiver by the Movant of the conditions precedent. Accordingly, under either alternative, Debtor contends that because the estate still holds a possessory interest in the building, Movant's relief should be denied.

CONCLUSIONS OF LAW

Section 362(a) and (b), in relevant part, provides:

(a) Except as provided in subsection (b) of this section, a petition filed . . . operates as a stay, applicable to all entities of--

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(b) The filing of a petition . . . does not operate as a stay--

(10) . . . of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

11 U.S.C. § 362(a)(3) and (b)(10). Pursuant to the above, it is clear and undisputed that the granting of the Motion for Relief depends solely on whether at the time of filing a lease existed between the parties. After reviewing the applicable authorities, I hold that because the Debtor failed to satisfy the Lease Agreement's conditions precedent, which were not waived by the acceptance of payments after the date of commencement, a lease did not exist between the parties and, therefore, Movant's relief is granted.

The relevant provision of the lease states as follows:

24. Condition Precedent to Lease Being Effective as of

October 1, 1996. This new lease will be null and void if by October 1, 1996, each and every one of the following conditions have not been met by Tenant. (emphasis in original).

See Exhibit "A." Debtor first contends that courts interpret the term "null and void" as meaning "voidable" and regardless of whether Debtor satisfied the conditions precedent the burden was on the Callen Trust to terminate the lease. See Stewart v. Griffith, 217 U.S. 323, 30 S.Ct. 528, 54 L.Ed 782 (1910); Burns Mortgage Co. v. Schwartz, 72 F.2d 991, 992 (3rd Cir. 1934); Jones v. Hert, 192 Ala. 111, 68 So. 259, 260 (1915); Metropolitan Life Ins. Co. v. Hall, 191 Ga. 294, 12 S.E.2d 53, 61 (1940); Marshall v. Porter, 73 W.Va. 258, 80 S.E. 350 (1913); McCain v. Cox, 531 F.Supp. 771 (D.Miss. 1982). Movant, the Callen Trust, distinguishes the cases cited by the Debtor by noting that those courts, although interpreting the term "null and void" as "voidable," were reviewing contracts which already had been executed and in existence. In other words, Movant contends that the term "null and void" in conjunction with a condition precedent and not in the context of a fully executed contract should be interpreted in accordance with its plain meaning. I agree.

After reviewing the applicable authorities, I hold that any interpretation of the lease provision contrary to Movant's position would effectively eliminate the use of a "condition precedent" from contract law. At the time the

parties negotiated the new Lease Agreement, Debtor was in arrears and the parties essentially made Debtor's full performance under the prior lease a condition precedent to the granting of the new Lease Agreement. The provision was clearly identified and the term "null and void" emphasized. Although Debtor cites cases that support interpreting "null and void" as voidable, in those instances courts were interpreting the term "null and void" where an existing contract was already in effect between the parties.² The distinction is clear and relevant.

In one instance, the parties, who have yet to begin a relationship, negotiate for the conditions under which they will form a contract. In the other instance, the parties have contracted, and thereafter circumstances develop such that a party earns the right to terminate the contract. The latter requires notice to both parties that the relationship in fact has been terminated whereas under the former no notice is needed because a contract was never consummated. *See* O.C.G.A. § 13-3-4 (condition precedent must be performed before a contract becomes absolute and obligatory upon the other party). Accordingly, in the present case, the plain meaning of the document should be given full effect and because Debtor admittedly never

² Debtor has cited one case which holds that under either Mississippi or North Carolina law the provision "null and void" as used in a "land sales contract" means "voidable." *See McCain v. Cox*, 531 F.Supp. 771 (D.C.Miss. 1982). However, this Court is unpersuaded that a Mississippi "land sales contract" is so closely analogous to a Georgia "lease" as to require a finding in Debtor's favor.

satisfied the conditions precedent of the new Lease Agreement, it is "null and void." Any further inquiry should focus on whether the lessor waived the conditions precedent by his subsequent actions.

Movant, the Callen Trust, did not waive the conditions precedent to the new Lease Agreement. Debtor contends that the acceptance of three payments after October 1, 1996, constituted a waiver of the conditions precedent. Under Georgia law, performance of a condition precedent may be waived. See Heitmann v. Commercial Bank, 6 Ga. App. 584, 65 S.E. 590 (1909). However, "[w]hile a distinct stipulation in a contract may be waived by the conduct of the parties, it must appear that it was the intention of the parties to treat such stipulations as no longer binding." See Chastain v. Spectrum Stores, Inc., 204 Ga. App. 65, 418 S.E.2d 420 (1992) *quoting Prudential Ins. Co. of America v. Nessmith*, 174 Ga. App. 39, 40, 329 S.E.2d 249 (1985). Both parties cite Chastain in support of their position.

Briefly, Chastain involved a lessor and lessee who had entered into a lease agreement subject to a condition precedent, although in that case, unlike the present one, the duty was on the lessor to satisfy the condition precedent. On the effective date of the lease, the lessor had not performed and the lessee delivered the rent with an attached note stating that "this or any subsequent payment of rental shall

not be taken as a waiver of our right to declare the Lease null and void" *See Chastain*, 174 Ga. App. at 66. The lessee subsequently declared the lease void after the lessor failed to satisfy the condition precedent within two months.³ A lawsuit was commenced and after a grant of summary judgment in favor of the lessee the Georgia Court of Appeals affirmed the trial court concluding that a waiver had not occurred. *See Id.* at 67. Debtor cites *Chastain* contending that Movant's acceptance of payments without stating that it was not waiving the condition precedent constitutes a waiver. Movant cites *Chastain* asserting that the acceptance of rent payments after the lease's effective date and prior to the performance all conditions precedent does not constitute a waiver.

As mentioned previously and pursuant to Georgia law, while distinct contract stipulations may be waived by the parties, it must appear that it was the intention of the parties to waive such stipulations. *See Id.* at 67. Here, the evidence revealed that the new lease was to commence October 1, 1996, that the Movant accepted three payments of \$8,500 over the course of the four and a half months after October 1, 1996, and prior to the filing of Debtor's bankruptcy petition on February 13, 1997, and that the amount accepted was less than the amount owed under the

³ In *Chastain*, the lessee declared the lease void although the lease contained a similar "null and void" provision. Thus, the *Chastain* court never addressed the issue of whether a lease with a "null and void" condition precedent is void or voidable upon a party's failure to satisfy the condition.

prior lease. Although this case is not as clear as Chastain where one party expressly reserved his right to rely on the condition precedent, I hold that evidence does not support a finding that the parties intended to waive the condition precedent. Considering the facts, I find that is equally plausible that Movant, the Callen Trust, intended to treat Debtor either as a tenant-at-will or tenant-at-sufferance and not pursuant to the new lease. Although an agent of the Callen Trust, Robbie Callen, stated that "we will try to work with you," no evidence was presented supporting an inference that either party was operating under the new lease, e.g., rents checks written pursuant to the new lease, oral statements waiving the conditions precedent to the new lease, or legal rights being asserted under the new lease prior to this action. Accordingly, Debtor has not established that the parties waived the conditions precedent and, therefore, because Debtor admittedly failed to satisfy the new Lease Agreement's conditions precedent, Movant's relief is hereby granted.

O R D E R

IT IS THEREFORE THE ORDER OF THE COURT that Movant, the Callen Trust, is granted relief from the automatic stay to pursue its state possessory rights in the subject property.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of May, 1997.