FILED
Samuel L. Kay, Clerk
United States Bankruptcy Court
Augusta, Georgia
By vrayburn at 4:19 pm, Oct 31, 2007

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:	)	Chapter 11 case
	)	Number 07-10454
SPORTSMAN'S LINK, INC.,	)	
	)	
Debtor in Possession.	)	
	)	
USPG PORTFOLIO TWO, LLC,	)	
	)	
Creditor/Movant,	)	
v.	)	
	)	
SPORTSMAN'S LINK, INC.,	)	
	)	
Debtor/Respondent.	)	
	)	

ORDER DENYING USPG PORTFOLIO TWO, LLC'S MOTION FOR POSSESSION OF PREMISES

By motion, USPG Portfolio Two, LLC ("USPG"), seeks to have the debtor in possession, Sportsman's Link, Inc. ("Debtor"), immediately surrender sixty-three thousand square feet of nonresidential real estate ("Premises") located at 596 Bobby Jones Expressway, Augusta, Georgia.

First, USPG asserts that Debtor must surrender the Premises because Debtor violated the terms of the lease ("Lease") and as a result the Lease terminated prepetition.

Second, USPG argues that even if the Lease were still in effect, as a result of the Georgia Department of Transportation's condemnation of a portion of the Village Plaza shopping center ("Shopping Center"), the Lease would have inevitably been terminated. Third, USPG contends that the Debtor's sporting goods business is no longer viable in its current location. Finally, USPG avers that the Lease has been deemed rejected under 11 U.S.C. § 365(d)(4) because Debtor did not seek permission to assume the nonresidential lease in the prescribed time period.

In response, Debtor points to the decision of this Court at hearing on April 30, 2007, finding that the Lease was not terminated prepetition and remained property of the bankruptcy estate upon filing of the petition. Debtor denies that the Lease was terminated as a result of the Georgia Department of Transportation's condemnation of a portion of the Shopping Center. Debtor argues that its business is a viable entity.

As to the Lease being deemed rejected, Debtor asserts that the Lease is absolutely necessary for an effective reorganization; that throughout these proceedings Debtor has stated a clear and unequivocal intent to assume the Lease; that Debtor has requested the Court's permission to assume the Lease; and that the Debtor assumed the Lease at the conclusion of the June 5, 2007 hearing. Debtor further argues that

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because USPG filed a Motion for Relief from Stay on March 21, 2007, asserting that the Lease had been terminated prepetition, the time period set out by 11 U.S.C. § 365(d)(4) was tolled from March 21, 2007, until April 30, 2007, when the Court made the decision that there had been no prepetition termination of the Lease.

Debtor insists that, at the June 5, 2007 hearing, Debtor carried its burden of proof in demonstrating that it wanted to assume the Lease and that it is capable of assuming the Lease. Debtor asserts that USPG waived its rights to assert failure to assume or reject the Lease when it agreed to withdraw its Motion for Relief and Possession of the Premises ("Motion for Relief"), and stated at the hearing that there would be no further issues regarding prepetition termination of the Lease.

Additionally, Debtor argues that due to the outcome of the June 5, 2007 hearing and USPG's withdrawal of its Motion for Relief from the Stay prior to the deadline set out by 11 U.S.C. § 365(d)(4)(A) amounts to the Debtor assuming the Lease. Debtor also contends that no formal written Motion to Assume Lease was required for Debtor to assume the Lease.

In the alternative, Debtor contends that Debtor's counsel was under the impression that all issues of the Lease, including assumption, were fully and completely litigated. Debtor avers that through inadvertence, mistake, or neglect,

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Debtor's counsel failed to include a request for an extension of time to assume the Lease in the Motion to Extend the Exclusivity Period, filed on July 11, 2007.

For the reasons stated below, and because Debtor has timely requested the Court's permission to assume the Lease, USPG's motion is **DENIED**.

Discussion

The issue now before me is whether Debtor has properly requested permission from the Court to assume this Lease. Pursuant to 11 U.S.C. § 365(d)(4), a debtor-lessee has 120 days following the filing of the bankruptcy petition to decide whether to assume or reject an unexpired lease of nonresidential real property.[1] If the debtor does not assume the unexpired lease within the statutorily prescribed period it is deemed rejected by operation of law, and the leasehold must be immediately surrendered to the lessor. See 11 U.S.C. § 365(d)(4)(A). "Approval of the court is required to assume or

[1] 11 U.S.C. § 365(d)(4)(A) provides:

> [s]ubject to subparagraph (B), an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of -
> (i) the date that is 120 days after the date of the order for relief; or
> (ii) the date of the entry of an order confirming a plan.

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reject a lease." In re Austin, 102 B.R. 897, 899 (Bankr. S.D. Ga. 1989).

I. Procedure to Assume an Unexpired Nonresidential Lease

The Bankruptcy Code does not outline a specific procedure for a debtor to following in order to request the court's permission to assume or reject an unexpired nonresidential lease, except to indicate that all contested matters are governed by Federal Rule of Bankruptcy Procedure ("F.R.B.P.") 6006[2] and F.R.B.P. 9014.[3] "The majority rule is that a debtor must file a *formal written motion* to assume a lease within [120] days of the filing of the petition." In re Six, 2004 WL 420143, at *1 (Bankr. C.D. Ill. Mar. 1, 2004)(citing In re Payless Rental, Inc., 138 B.R. 312, 313 (Bankr. N.D. Ga. 1992))(emphasis added).

A few courts have held that a debtor can assume or reject a lease without filing a formal motion by communicating its intent to the lessor in an unequivocal manner. See In re 1

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[2] F.R.B.P. 6006(a) in pertinent part states "[a] proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014."

[3] F.R.B.P. 9014 (a) provides:

> [i]n a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion."

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Potato 2, Inc., 58 B.R. 752, 755 (Bankr. D. Minn. 1986)(holding that a debtor in possession may assume or reject an unexpired lease by clearly communicating in an unequivocal manner its intentions to do so to the lessor, the debtor "must manifest an unconditional and unambiguous decision");[4] see also In re Re-Trac Corp., 59 B.R. 251, (Bankr. D. Minn. 1986)(finding that a phone call from the debtor's chief executive officer and payment of rent was not an unequivocal act demonstrating its intent to assume; see also Vilas and Summer, Inc. v. Mahoney (Matter of Steel Ship Corp.), 576 F.2d 128, 132 (8th Cir. 1978)(holding that "[a]n assumption may be shown by word or by deed consistent with the conclusion that the trustee intended to assume").

In the present case, Debtor did not file a formal written motion with the court prior to the expiration of the 120-day period set out by § 365(d)(4).[5] USPG contends that a lease cannot be assumed by conduct, and asserts that a formal motion and an express order are required, within the statutorily prescribed time period, in order to assume a lease. (Dkt. # 172:2-3). Further, USPG argues that since the Court did not

[4] I do note that the debtor in 1 Potato 2, Inc., 58 B.R. 752 (Bankr. D. Minn. 1986), did file a formal motion with the court within the time period allowed by the statute.

[5] Debtor filed its chapter 11 petition on March 13, 2007. Pursuant to 11 U.S.C. § 365(d)(4) the time period in which Debtor had to file a motion with the Court for permission to assume or reject the Lease, or for an extension of the time period, expired on July 11, 2007.

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enter an order prior to the expiration of the 120-day period set forth in § 365(d)(4), the Lease is deemed rejected by operation of law, and Debtor must immediately surrender the Premises.

Debtor contends that no written motion was necessary because F.R.B.P. 9013 "alleviates the need for a written motion, if it is made during a hearing;" and that there was an oral motion to assume the lease at the hearing on April 30, 2007, as well as at the June 5, 2007 hearing. (Dkt. # 173:4). Debtor argues that a review of the transcripts from the April 30, 2007 hearing and the June 5, 2007 hearing indicate that an oral motion was advanced. Debtor insists that because this Court heard the issues regarding assumption, i.e., whether any and all defaults had been cured, and ordered the Debtor to comply with the provisions of 11 U.S.C. § 365(a)(1), which went beyond the scope of USPG's Motion for Relief from the Stay, the Court had already ruled that assumption was proper. Essentially, Debtor argues that the Court has held a hearing on whether Debtor will be allowed to assume the Lease, making a written motion unnecessary.

First, I conclude that, pursuant to § 365(d)(4), the court's order allowing assumption or rejection does not have to be entered within the 120-day time period. "Although the court's approval is mandatory, the assumption may precede

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approval and, therefore, there is no requirement that" the court approve the assumption within the statutory period. In re Avery Arnold Constr. Inc., 11 B.R. 34 (Bankr. S.D. Fla. 1981)(internal punctuation omitted).

> Section 365 contemplates two distinct actions, one by the trustee (or debtor in possession) and one by the court. The trustee assumes or rejects, and the court approves.

By-rite Distrib., Inc. v. Brierley (In re By-Rite Distrib., Inc.), 55 B.R. 740, 742 (D. Utah 1985). According to the statute, only the trustee's actions must occur within the 120 days. See id.; accord In re Bon Ton Restaurant & Pastry Shop, Inc., 52 B.R. 850 (Bankr. N. D. Ill. 1985). "The express language of the statute imposes no such deadline for the court's action." In re By-Rite Distrib., Inc., 55 B.R. at 743.

An order approving assumption or rejection of an unexpired lease is distinguishable from an order granting a debtor additional time to decide whether to assume or reject the lease under § 365(d)(4)(B)(i). The Bankruptcy Code provides a specific time period in which a court must decide on whether to extend the debtor's time to decide to assume the unexpired lease. See 11 U.S.C. § 365(d)(4)(B)(i). However, the Code does not expressly provide such a time limitation on the court's decision granting permission with regard to assuming or rejecting a lease. In the context of court approval necessary

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to assume or reject an unexpired nonresidential lease, "Congress never intended to place any time limit on judicial approval of the trustee's decision to assume an unexpired lease." In re By-Rite Distrib., Inc., 55 B.R. at 743.

Secondly, I conclude that, in order to assume an unexpired nonresidential lease, a debtor must bring a formal motion requesting the court's permission to assume the lease within 120 days as set forth in § 365(d)(4). Without a formal motion, a debtor's conduct will not constitute an assumption. See Mut. Life Ins. Co. of New York v. Dublin Pub, Inc. (In the Matter of Dublin Pub, Inc.), 81 B.R. 735 (Bankr. N.D. Ga. 1988). A written motion requesting permission to assume or reject an unexpired lease is the preferred method. See In re Ro-An Food Enter. Ltd., 41 B.R. 416 (E.D. N.Y. 1984)(treating a request for approval to assign a lease as a motion to assume, where the trustee had not acted to specifically assume the lease, but because the validity of the lease was in question and the information was not readily available to the trustee, the efforts to gain court approval to sell the lease were sufficient to be equivalent to a formal act to assume the lease); In re Avery Arnold Contr. Co., 11 B.R. 34 (Bankr. S.D. Fla. 1981)(finding the application for leave to assign the lease, properly noticed to all creditors, as a request for approval to assume the lease because the former necessarily

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presupposes the later). However, pursuant to F.R.B.P. 9013, the formal motion does not have to be in writing, if the request is made during a hearing.

Third, I conclude that Debtor is not deemed to have rejected the Lease. Taking all of the events of record into consideration, while Debtor did not file a written motion, I find that Debtor did timely request the Court's permission to assume the Lease. However, by no means is this case to be an example of the preferred method to request permission to assume a lease, and I limit this holding to the particular facts before me.

Further, this conclusion should not be construed as the Court's permission authorizing assumption of this Lease. This decision only means that Debtor's failure to file a written motion to assume within the 120-day period is "no barrier to its attempt to obtain an approval by the [c]ourt by its motion filed after the expiration of the [120-day] period." In the Matter of J. Woodson Hays, Inc., 69 B.R. 303, 309 (Bankr. M.D. Fla. 1987). Debtor is not relieved of the duty to establish that it is in a position to satisfy the requirements of § 365(b)(1)(A), (B), and (C).

II. Debtor's Counsel's Oral Request to Sublease the Premises

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Pursuant to F.R.B.P. 9013, a request for an order must be in writing, unless it is made during a hearing. In this case, at the April 30, 2007 hearing, on USPG's continued Motion for Relief, Debtor's counsel requested that the court give the Debtor permission, or some direction, as to whether Debtor was allowed to sublease the Premises.[6] (See Hearing Tr. 139, April 30, 2007). Further, Debtor's counsel restated to the court, Debtor's request for permission to be allowed to sublease part of the Premises at the June 5, 2007 hearing.

As in the case of In re Avery Arnold Constr. Inc., 11 B.R. 34 (Bankr. S.D. Fla. 1981), the Lease at issue reserves the right of the landlord to reject a subtenant. And because the request to sublease the Premises necessarily presupposes that Debtor will assume the Lease, I construe Debtor's request to sublease as also being a request to assume the Lease. See In re Ro-An Food Enters. Ltd., 41 B.R. 416 (E.D. N.Y. 1984)(treating trustee's efforts to get court approval for a purchaser of the lease as a motion for approval to assume the

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[6] At hearing on April 30, 2007, Debtor's counsel stated:

> What we would like is some direction from the Court, and I know you are not prepared to do this today, but some direction from the Court about our rights under the lease as far as you know, subletting, display of merchandise, and some of those other issues.
> . . .
> But to avoid future problems, we would like some direction from the Court about what we can and can't do. . . .

(Hearing Tr. 139:4-9, 139:17-18).

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lease); see also In re Avery Arnold Contr. Inc., 11 B.R 34 (Bankr. S.D. Fla. 1981)(treating an application for leave to assign the lease as a request for approval of the assumption of the lease).

While In re Avery is distinguishable from the facts of this case, because there is no estoppel letter from the landlord agreeing to accept an assignee, in light of the repeated hearings and requests to clarify Debtor's rights in the Lease and USPG's withdrawal of their Motion for Relief from the Stay subsequent to Debtor agreeing to cure all prepetition defaults, I conclude that Debtor should be allowed to show that it will be able satisfy the requirements of § 365(b).

III. **Whether the Statutory Time Limit had been Tolled**

This case is analogous to In re Ted Liu's Szechuan Garden, Inc., 55 B.R. 8 (Bankr. D.C. 1985), where the court tolled the time period prescribed by § 365(d)(4) during the time that the court took the matter of whether there was the right of redemption, and therefore a valid lease, under advisement.

In the case of In re Ted Liu's Szechuan Garden, Inc., 55 B.R. 8 (Bankr. D.C. 1985), the landlord moved for relief from the automatic stay in order to continue with eviction proceedings instituted before the debtor filed for chapter 11 relief. Prior to the bankruptcy case, the debtor defaulted

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under the terms of the lease by not paying rent, and the landlord sent a notice of termination and started eviction proceedings under state law, which resulted in a consent judgment in favor of the landlord. The landlord did not immediately commence eviction proceedings, during which time the debtor filed for bankruptcy protection before the writ of possession was executed. Prior to the lapsing of the statutory period, at the hearing on landlord's motion to lift the automatic stay, the court took the issue of whether or not there was an unexpired lease that could be assumed under advisement, and ordered the debtor to pay post-petition adequate protection payments to the landlord. Id. at 11.

Ultimately, after the period set out in § 365(d)(4) had lapsed, the court found that the lease had not expired prepetition, and that the time period in which debtor could assume the lease had been tolled during the time that the matter was under advisement by the court. The court exercising its equitable powers gave the debtor the remainder of the statutory time period within which to assume the lease or seek an order extending the time to assume or reject the lease.[7] Id. at 11.

[7] The court gave the debtor 24 days after entry of the order to assume the lease or seek an extension of time. Under the old version of § 365(d)(4) the time period set out was 60 days. When the court took the issue under advisement, only 36 days had elapsed. In re Ted Lui's Szechuan Garden, Inc., 55 B.R. 8, 11 (Bankr. D.C. 1985).

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The court reasoned that at all times it had been apparent to both the landlord and the debtor that the debtor desired to exercise his state right to redeem and the right to assume the lease. The court noted that at the hearing the debtor's attorney stated, and had two witnesses testify, that the particular premises was essential to the debtor's reorganization; and that the debtor's president testified that it would be able to cure all defaults. Additionally, the court enunciated the "broad rule" that

> whenever some paramount authority prevents a person from exercising his legal remedy, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitations has barred his right even though the statute makes no specific exception in his favor in such cases.

Id. at 11.

The court concluded that the right to assume could not be exercised until the right to redeem had been established; and that the establishment of there being an unexpired lease was a "precondition before the right to assume could be exercised." Id. The court further noted that while taking the issue under advisement did not "positively prevent the debtor from seeking an extension of time . . . Nevertheless, the debtor may well have been lulled into inaction by what the court did." Id. at 11 n.5.

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In the present case, USPG moved for relief from the stay in order to continue with dispossessory proceedings, allegedly arising from Debtor's prepetition defaults under the terms of the Lease. At hearing on April 30, 2007, I found that the Lease was necessary for Debtor's effective reorganization, and that there had been no prepetition termination of the Lease. I ordered Debtor to cure certain prepetition defaults, including paying USPG for unpaid property taxes. I continued matters having to do with determining whether there were any remaining prepetition defaults, and in what manner the Debtor intended to promptly cure such defaults.

USPG asserted in their Brief (Dkt. #34) supporting their Motion for Relief from the Stay (Dkt. # 33), that "there is no assumable or assignable lease" and requested that possession of the Premises be returned to USPG because the Lease had terminated prepetition. (Dkt. #34:2). USPG also advanced the argument that Debtor's "reorganization plan rests upon the (incorrect) assumption that it can continue to operate on the Premises." (Dkt. # 34:3). USPG argued that because the Lease had terminated prepetition, pursuant to 11 U.S.C. § 365(c)(3) Debtor would not be able to assume the Lease, and Debtor was required to immediately surrender the Premises. (See Dkt. #34:3). USPG stated that

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> [u]nder 11 U.S.C. § 365, the standard for determining a debtor in possession's right to assume the lease is a two-part inquiry: (1) has the lease been terminated according to state law prior to filing the petition; and (2) if the lease has been terminated, can termination be reversed under other state law?

(Dkt. #34:5 (citing In re Waterkist Corp., 775 F.2d 1089 (9th Cir. 1985) and In re Windmill Farms, Inc., 841 F.2d 1467 (9th Cir. 1988)).

Debtor filed a Response on April 5, 2007, in which Debtor denied that the Lease had been terminated prepetition and stated that "there is an ongoing Lease Agreement between Sportsman's Link, Inc. and USPG." (Dkt. # 49:¶4). Debtor also maintained that its continued possession of the Premises was lawful; that continued possession did not cause irrevocable harm to USPG; and that USPG was not entitled to immediate possession of the Premises. (See Dkt. #49:¶10.)

At the April 30, 2007 hearing on USPG's continued Motion for Relief from the Stay, in an attempt to clarify the issues being heard, the following exchange occurred between Debtor's counsel and the Court:

> Mr. Klosinski: We don't need to get past the first statement Mr. Keogh said, as he says that the lease was properly terminated. That is absolutely, totally incorrect, Your Honor.
>
> The Court: Well, that is the linchpin here; isn't it? Because if - -
>
> Mr. Klosinski: Yes.

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> The Court: - - it were terminated, I think a clear reading of the code provision, whether Ohio or Georgia law applies, bankruptcy law says if it was terminated, it is all over; right?
>
> Mr. Klosinski: Well, I'm not - - I don't want to give you that point, Your Honor. For the sake of assuming without deciding that you are correct, I don't think - I think that there is some gray area in that part.
>
> The Court: Wait a minute. Let me read this. The trustee may not assume or assign any executory contract, or unexpired lease of the debtor whether or not such contract or lease prohibits or restricts assignment of rights or delegations of duties if such lease is a nonresidential, is of nonresidential real property, and has been terminated under applicable, non-bankruptcy law prior to the order of relief. That sounds pretty clear to me.

(Hearing Tr. 12, April 30, 2007).

The facts contained in the record make it apparent that both parties knew that Debtor intended to assume this Lease. As in In re Ted Lui's Szechuan Garden, Inc., 55 B.R. 8 (Bankr. D.C. 1984), the determination of whether the Lease had been terminated prepetition was a precondition to Debtor assuming the Lease. At the first hearing on USPG's Motion for Relief from the Stay, Debtor stated that this Lease was necessary for a successful reorganization, and Debtor's representative testified that it would be able to cure all defaults. Additionally, Debtor's representative testified at the 341 Meeting of Creditors that Debtor would be assuming the Lease.

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After considering all the evidence, I found that the Lease had not been terminated prepetition and made a preliminary finding that Debtor would be successful on the merits on a final hearing in this matter. (Hearing Tr. 144:1-7, April 30, 2007). The matter was continued for hearing to be held on June 5, 2007. At that time the matter was continued again, based on the request of both parties.

The continued hearings on what defaults remained in dispute between Debtor and USPG are further proof of the parties' knowledge and intentions regarding the Lease. See In re VMS Nat'l Properties, 148 B.R. 942, 954 (Bankr. C.D. Cal. 1992)(holding that landlord's acceptance of payments to cure prepetition defaults after the court ordered date to assume or reject was a very strong indication that the lessor intended to allow the debtor to assume the lease). In fact, as of the June 5, 2007 hearing, USPG's counsel stated that he was

> happy to report to the Court that the parties have worked together and most of [the prepetition defaults] are resolved. There are one or two that are still open but I believe will be resolved if the court will give us time to just follow through."

(Hearing Tr. 6:13-18, June 5, 2007).

Based on the facts of this case I do not have to conclude that the time period set out in § 365(d)(4) was tolled. The facts on record taken in connection with Debtor's counsel's

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repeated oral request seeking permission to sublease part of the Premises leads me to the conclusion that Debtor did request permission to assume the Lease in a timely manner.[8]

As to the other arguments advanced in USPG's Motion for Possession of the Premises: (1) USPG does not offer any support to its assertion that the Georgia Department of Transportation's condemnation of a portion of the Shopping Center have resulted in termination of the Lease; and (2) USPG has not supported its assertion that Debtor no longer has a viable business.

ORDER

It is hereby **ORDERED** that USPG's Motion for Possession of Premises is **DENIED;**

it is further **ORDERED** that Debtor's Motion for Formal Order Providing that it has Assumed an Unexpired Lease Pursuant to 11 U.S.C. § 365 is **DENIED;**

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[8] Like the court in In re Ted Lui's Szechuan Garden, Inc., 55 B.R. 8 (Bankr. D.C. 1985), I note that these continued proceedings on this issue did not positively prevent Debtor from filing a written motion, however in light of the above, Debtor may have been "lulled" by the Court's actions, especially considering that USPG withdrew its Motion for Relief from the Stay after the June 5, 2007 hearing.

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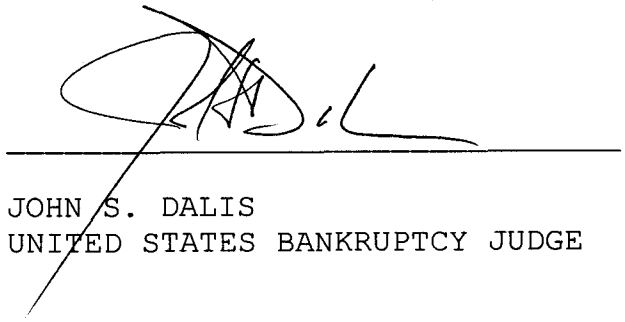
it is further **ORDERED** that a date for hearing shall be set to allow Debtor the opportunity to show that it can satisfy the requirements of 11 U.S.C. § 365(b).



JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Brunswick, Georgia

this 31st day of October, 2007.

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