

In the United States Bankruptcy Court

for the

Southern District of Georgia at 9 O'clock & 30 min. A.M.

Savannah Division

FILED

Date 8-11-92

MARY C. BERTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

In the matter of:

HUEY'S, INC.
d/b/a Huey's
d/b/a Acadia's

Debtor

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Chapter 11 Case

Number 91-41391

MEMORANDUM AND ORDER ON MOTION FOR RECONSIDERATION

FINDINGS OF FACT

Debtor filed its voluntary Chapter 11 bankruptcy petition on July 9, 1991. The Order for Relief was granted on July 11, 1991. At the time of filing, Debtor operated two River Street restaurants, Huey's and Acadia's, respectively. Debtor leased the restaurant property from Factor's Walk Partners. On August 5, 1991, Factor's Walk Partners (Factor's Walk) filed an Application to Compel Assumption or Rejection of Leases, as the two restaurant property leases were executory pursuant to 11 U.S.C. Section 365 and must be assumed or rejected by the Debtor. Factor's Walk alleged in the application to compel that the leases were in default and not in compliance with Section 365 which requires the debtor-in-possession to perform the obligations of a lease until assumption, to cure default, and to provide assurance of future performance.

A hearing on the application was held September 4, 1991. At this hearing, Debtor announced that it intended to assume both leases and cure pre-petition and post-petition arrearages. I announced that the settlement was approved, with Debtor's attorney to forward an order to the Court.

On October 30, 1991, Debtor filed a Consent Order on the Application to Compel Assumption or Rejection of Leases. This Consent Order provided that Debtor was to assume both leases. However, Debtor also filed a Motion for Reconsideration of Assumption of Lease on October 30, 1991, requesting that the Court allow Debtor to reject the Acadia's lease. Subsequent to the September 4, 1991, hearing Debtor determined that Acadia's could not be operated profitably and closed Acadia's. Debtor alleged in its Motion that Acadia's generated no income for the estate and that the best interests of the Debtor, creditors and the estate required rejection of the lease.

The Consent Order on the application was signed by the Court and filed on November 11, 1991. This Order provided for the assumption of both leases on November 11, 1991, *nunc pro tunc* September 4, 1991, the date of the prior hearing. Debtor's separate Motion for Reconsideration was set for a hearing on December 12, 1991. For reasons not relevant to this Order, the December hearing was continued as was the scheduled January 22, 1992, hearing.

On March 25, 1992, the Motion for Reconsideration and other issues were heard before this Court. At the end of the March 25th hearing, I announced that I was inclined to deny Debtor's Motion and requested Factor's Walk to submit a proposed order. Also, Debtor was given

ten days to respond to the Factor's Walk order. However, the proposed order submitted by Factor's Walk was signed by me on April 2, 1992, and filed April 3, 1992.

Debtor filed, on April 8, 1992, a Motion for Reconsideration of my April 3rd Order. Debtor contended that the April 3rd Order was signed before expiration of Debtor's ten day period in which to file a response. By Order dated April 21, 1992, I granted Debtor's second Motion for Reconsideration and vacated the April 3rd Order.

Debtor has since filed a response alleging that Debtor was entitled to revoke his assumption of the Acadia's lease and that the lease was voidable according to its terms. Debtor's basis for asserting that the lease is voidable is found in paragraph 25 of the lease which provides as follows:

Landlord as a condition precedent to Tenant's obligations under this Lease shall procure a written recordable commitment, in form acceptable to Tenant, from any lender or creditor having a lien or interest in demised premises superior to that of the Lease. If such commitment is not obtained, this Lease shall be void.

See Letter Brief of Lewis Robert Isaacson filed May 18, 1992. Debtor contends that landlord/mortgagee has failed to obtain the requisite subordination agreement pursuant to paragraph 25 of the lease and that such failure allows Debtor to void the lease, and in effect reject the lease despite the September 4, 1991, assumption.

Factor's Walk argues that obtaining the subordination agreement constituted a condition precedent to Debtor's obligations under the lease and that Debtor, by performing under the lease for over two years, has waived this condition.

Debtor argues that the intent of the parties was to afford Debtor the opportunity to cease performance and "reject" the lease if the subordination agreement was not consummated.

CONCLUSIONS OF LAW

Section 365 of the Bankruptcy Code allows a debtor to assume or reject an executory lease. The section is designed to promote the debtor's chances for reorganization by allowing the debtor to assume leases which will benefit the estate and to reject leases that burden the estate. See Richmond Leasing Co. v. Capital Bank, N.A., 762 F.2d 1303, 1310 (5th Cir. 1985). Where the debtor has defaulted under a lease, the debtor must do more than provide for a technical assumption of the lease; the debtor must do the following in order to assume the lease:

- 1) Cure the default or provide adequate assurance of a prompt cure;
- 2) Provide the other party to the contract with compensation or adequate assurance of compensation for actual pecuniary loss from the default; and
- 3) Provide adequate assurance of future performance under the lease or contract.

See §365(b). See also Richmond Leasing Co., *supra* at 1310; In re Windmill Farms, Inc., 841 F.2d 1467, 1473 (9th Cir. 1988); In re Corporacion de Servicios Medicos Hosp., 805 F.2d 440, 447 (1st Cir.

1986); In re Airlift International, Inc., 761 F.2d 1503, 1508 (11th Cir. 1985); In re Rachels Industries, Inc., 109 B.R. 797, 802 (Bankr. W.D.Tenn. 1990).

Adequate assurance of future performance must be provided where there has been a default. In re Rachels, 109 B.R. at 803. The requirement of adequate assurance was designed to protect the lessor from a debtor who may continue to default. Id. In re Natco Industries, Inc., 54 B.R. 436, 440-41 (Bankr. S.D.N.Y. 1985). Although the Code does not define adequate assurance, the courts in finding adequate assurance have examined whether or not debtor has "an income stream sufficient to meet its obligations, the general economic outlook in the debtor's industry, and the presence of a guarantee." Richmond Leasing Co., 762 F.2d at 1310. Adequate assurance must be provided as to general performance and to each covenant within the agreement. In re Rachels Industries, 109 B.R. at 803.

When an executory contract is assumed, the entire contract must be assumed. Richmond Leasing Co., 762 F.2d at 1311. The Debtor cannot accept the benefits of a contract and at the same time attempt to reject the burdens of the contract. Id., Dept. of Air Force v. Carolina Parachute Corp., 907 F.2d 1469 (4th Cir. 1990); In re Chicago, Rock Island and Pacific R.R. Co., 860 F.2d 267 (7th Cir. 1988); In re Holland Enterprises, 25 B.R. 301, 303 (D.C.N.C. 1982).

At the September 4, 1991, hearing, Debtor announced its settlement and intent to assume the Acadia's lease. Debtor presented a consent order to the Court providing for the assumption. The Consent Order specifically states that assumption "is in the best interest of the

Debtor, its creditors, and the estate." Consent Order on Motion to Approve Assumption of Leases filed November 11, 1991. Debtor also agreed to cure the arrears as announced at the September hearing and to make future payments. Thus, Debtor provided assurances of its obligations as required by Section 365.

Debtor's actions at the September hearing and subsequent submission of the Consent Order indicated Debtor's intent to assume and continue performance under the lease. The Consent Order also reflected the landlord's desire to have the lease assumed. Believing the assumption to be in Debtor's best interests and the parties to have resolved their disputes, I signed the Consent Order.

I conclude that Debtor assumed the lease in accordance with the Consent Order signed November 11, 1991, *nunc pro tunc*, September 4, 1991. Assumption is not effective until an explicit order is signed by the Court. See In re Whitcomb & Keller Mortgage Co., Inc., 715 F.2d 375 (7th Cir. 1983).

Debtor asks that the Court allow Debtor to revoke its prior acceptance of the lease or reject the lease. I can find no authority for vacating the November 11, 1991, Order and allowing Debtor to reject the lease as if there had never been an assumption. The Order on assumption established the rights of the parties and provided a final resolution to those issues. However, Debtor changed its mind, and understandably so if the lease would be unprofitable and burdensome. As Debtor wishes to reject the lease after the assumption order was signed, Debtor must bear the burden

and cost associated with changing its previous decision. As stated by the Third Circuit in In re Italian Cook Oil Corp., 190 F.2d 994, 997 (3rd Cir. 1951): "The trustee [or debtor-in-possession] . . . may not blow hot and cold. If he accepts the contract, he accepts it *cum onere* . If he receives the benefits, he must adopt the burden. He cannot accept one and reject the other." *See also* Dept. of Air Force v. Carolina Parachute Corp., 907 F.2d at 1475. Debtor must assume the lease and perform or reject the lease and cease performance.

Debtor also argues that paragraph 25 of the lease allows the Debtor to treat the lease, even if assumed, as void since no subordination agreement was signed.

Paragraph 25 of the lease specifically states that "as a condition precedent" the subordination agreement should be obtained or "this [l]ease shall be void." There is no ambiguity in the language of the lease, which requires the subordination agreement as a condition precedent; if the subordination agreement were not produced, then the lease would be void. Thus, no parol evidence may be admitted to modify or add to the terms in the written instrument. Kusuma v. Metamatrix, Inc., 191 Ga. App. 255, 381 S.E.2d 322 (1989).

This "condition precedent" was added for the benefit of the lessee to protect the lessee from those with superior liens on the property. A court should give more consideration to waiver by a party of a particular contract provision where the provision was inserted solely for that party's benefit. *See generally* C.P.D. Chemical Company, Inc. v. National Car Rental Systems, Inc., 148 Ga. App. 756, 252 S.E.2d 665 (1979); Grimes Bridge Associates v. Doctors Building Partners, 192

Ga. App. 809, 386 S.E.2d 388 (1989).

Factor's Walk asserts that by performing under the lease and never mentioning or trying to enforce paragraph 25 before filing its Motion for Reconsideration, Debtor has waived any protections this "condition precedent" would have bestowed upon the Debtor. CPD Chemical Company, Inc. v. National Car Rental System, Inc., *supra*, quoting 17A CJS 691, Contracts §491a, holds that "the parties may, by their acts or conduct, waive a provision that their contract may not take effect or constitute a binding agreement . . . where the provision was inserted into the agreement solely for such party's protection."

According to Georgia law

A waiver may be express, or may be inferred from actions, conduct, or a course of dealing . . . waiver of a contract right may result from a party's conduct showing his election between two inconsistent rights . . . Acting on the theory that the contract is still in force, as by continuing performance, demanding or urging further performance, or permitting the other party to perform and accepting or retaining benefits under the contract, may constitute waiver . . .

Kusuma v. Metametrix, Inc., 191 Ga. App. at 257 [quoting 17A JS, Contracts §492(1)].

In Kusuma, *supra*, the lease provided that lessee "may elect to cancel this lease" when or if another lessee, a doctor, vacated the building. When the doctor vacated the building, the tenant/lessee failed to cancel the lease. Subsequently another doctor moved into the building taking

over the office of the first doctor. The lessee finally elected to terminate the lease eighteen months after the first doctor vacated the building. First, the Court concluded that the "right to cancel" provision was not ambiguous and excluded consideration of any parol evidence. The Court further held that the eighteen month delay gave rise to a question of fact regarding the lessee's intent and possible waiver of the right to cancel. The Court noted that the lessee continued to pay rent and use the premises during the period in which they alleged they could cancel. I conclude that the "condition precedent" requiring the subordination agreement is waived by Debtor's conduct. Debtor's use of the premises from the inception and subsequent to filing its Motion for Reconsideration is indicative of an intent to perform the contract and not an indication of intent to void the contract. I conclude that Debtor's actions and conduct result in a waiver of its right to void the contract.

The Motion to Reconsider is denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 10th day of ~~July~~, 1992.
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