

United States Bankruptcy Court,

S.D. Florida,

Miami Division.

In re KEY LARGO WATERSPORTS, INC., Debtor.

No. 07-12820-BKC-RAM.

Aug. 10, 2007.

Background: Landlord which had obtained prepetition judgment of eviction moved for relief from stay to exercise its rights in leased premises, and Chapter 11 debtor filed competing motion to assume lease.

Holding: The Bankruptcy Court, [Robert A. Mark](#), J., held that mere fact that Chapter 11 debtor's landlord, while commencing prepetition eviction action against debtor based on its default, had elected not to terminate lease in order to hold debtor liable for difference between the rent which was owing under lease and rent which it ultimately obtained by reletting premises did not prevent lease from expiring prepetition, upon entry of judgment of eviction that terminated debtor's possessory rights in leased premises.

Landlord's motion granted; debtor's motion denied.

West Headnotes

[\[1\]](#) Bankruptcy 51  3107

[51](#) Bankruptcy

[51IX](#) Administration

[51IX\(C\)](#) Debtor's Contracts and Leases

[51k3105](#) Contracts Assumable; Assignability

[51k3107](#) k. Leases. [Most Cited Cases](#)

Landlord and Tenant 233 285(6)

[233](#) Landlord and Tenant

[233IX](#) Re-Entry and Recovery of Possession by Landlord

[233k279](#) Actions for Recovery of Possession

[233k285](#) Jurisdiction and Proceedings

[233k285\(6\)](#) k. Judgment and Enforcement Thereof. [Most Cited Cases](#)

Mere fact that Chapter 11 debtor's landlord, while commencing prepetition eviction action against debtor based on its default, had elected not to terminate lease in order to hold debtor liable for difference between the rent which was owing under lease and rent which it ultimately obtained by reletting premises did not prevent lease from expiring prepetition, upon entry of judgment of eviction that terminated debtor's possessory rights in leased premises; accordingly, mere fact that landlord had elected not to terminate lease to preserve its rights thereunder did not enable debtor to assume lease in attempt to revive possessory rights which had terminated prepetition, though debtor's bankruptcy petition was filed before writ of possession issued in eviction action could be executed. [11 U.S.C.A. § 365](#).

[\[2\]](#) Landlord and Tenant 233 99

[233](#) Landlord and Tenant

[233IV](#) Terms for Years

[233IV\(F\)](#) Termination

[233k99](#) k. Eviction. [Most Cited Cases](#)

Under Florida law, judgment of eviction does not necessarily terminate lease for all purposes.

[\[3\]](#) Landlord and Tenant 233 198

[233](#) Landlord and Tenant

[233VIII](#) Rent and Advances

[233VIII\(A\)](#) Rights and Liabilities

[233k198](#) k. Recovery of Possession by Landlord. [Most Cited Cases](#)

Under Florida law, if landlord retakes possession without terminating lease, it may hold tenant responsible for difference between the rent under lease and amount which landlord receives from reletting premises.

[4] Bankruptcy 51 2541

51 Bankruptcy

51V The Estate

51V(C) Property of Estate in General

51V(C)2 Particular Items and Interests

51k2541 k. Leases. Most Cited Cases

Bankruptcy 51 3107

51 Bankruptcy

51IX Administration

51IX(C) Debtor's Contracts and Leases

51k3105 Contracts Assumable; Assignability

51k3107 k. Leases. Most Cited Cases

Landlord and Tenant 233 285(6)

233 Landlord and Tenant

233IX Re-Entry and Recovery of Possession by Landlord

233k279 Actions for Recovery of Possession

233k285 Jurisdiction and Proceedings

233k285(6) k. Judgment and Enforcement Thereof. Most Cited Cases

Under Florida law, mere fact that landlord may choose not to terminate lease for purposes of making election among remedies available for tenant's breach does not mean that tenant retains any property interest in leased premises following entry of judgment of eviction, such as would be included in property of the estate and allow tenant to assume lease and

continue in possession if tenant subsequently filed for bankruptcy. [11 U.S.C.A. § 365](#).

[\[5\]](#) Bankruptcy 51 3107

[51](#) Bankruptcy

[51IX](#) Administration

[51IX\(C\)](#) Debtor's Contracts and Leases

[51k3105](#) Contracts Assumable; Assignability

[51k3107](#) k. Leases. [Most Cited Cases](#)

Landlord and Tenant 233 285(6)

[233](#) Landlord and Tenant

[233IX](#) Re-Entry and Recovery of Possession by Landlord

[233k279](#) Actions for Recovery of Possession

[233k285](#) Jurisdiction and Proceedings

[233k285\(6\)](#) k. Judgment and Enforcement Thereof. [Most Cited Cases](#)

Although lease which has been terminated prior to commencement of debtor-tenant's bankruptcy case cannot be assumed in bankruptcy, this does not mean that the converse is true, and that any lease that has not been terminated prepetition can be assumed by debtor-tenant in bankruptcy, regardless of whether landlord has obtained prepetition judgment of eviction; to the contrary, whether or not terminated for all purposes, tenant's property interest, i.e., its right of possession, is extinguished under state law when final judgment of eviction is entered. [11 U.S.C.A. § 365](#).

[\[6\]](#) Bankruptcy 51 3102.1

[51](#) Bankruptcy

[51IX](#) Administration

[51IX\(C\)](#) Debtor's Contracts and Leases

[51k3102](#) Assumption, Rejection, or Assignment

[51k3102.1](#) k. In General. [Most Cited Cases](#)

Bankruptcy 51 3107

[51](#) Bankruptcy

[51IX](#) Administration

[51IX\(C\)](#) Debtor's Contracts and Leases

[51k3105](#) Contracts Assumable; Assignability

[51k3107](#) k. Leases. [Most Cited Cases](#)

Bankruptcy 51 3114

[51](#) Bankruptcy

[51IX](#) Administration

[51IX\(C\)](#) Debtor's Contracts and Leases

[51k3114](#) k. Curing Defaults; Adequate Assurance. [Most Cited Cases](#)

While bankruptcy statute authorizing debtors to assume or reject executory contracts and unexpired leases is powerful tool that enables debtors to cure defaults and assume and assign leases, this tool cannot and does not revive an expired lease and breathe new life into debtor's already extinguished property interests. [11 U.S.C.A. § 365](#).

*739 [Joel M. Aresty](#), Esq., Miami, FL, for Debtor.

ORDER GRANTING LANDLORD'S MOTION FOR STAY RELIEF AND DENYING DEBTOR'S MOTION TO ASSUME LEASE

[ROBERT A. MARK](#), Bankruptcy Judge.

The Court conducted hearings on May 29, 2007 and June 28, 2007 on the Motion for Complete Relief from the Automatic Stay (the "Stay Relief Motion") (CP# 19) filed by the Whitehurst Family Partnership ("Landlord"). The Landlord seeks stay relief to complete eviction proceedings against the Debtor who is occupying property owned by the Landlord under a Lease Agreement dated July 1, 2003 (the "Lease").

The Landlord claims that the Lease is not a lease which may be assumed under [11 U.S.C. § 365](#) arguing that the Lease was terminated prior to the filing of this bankruptcy case on April 19, 2007. As proof of termination, the Landlord

relies on a termination letter sent to the Debtor on November 3, 2006 (Landlord's Ex. 3, May 29, 2007 Hearing) and on an Amended Order of Default for Immediate Possession ("Eviction Order") (Landlord's Ex. 9) entered in an eviction action in the Circuit Court, Monroe County, Florida on January 17, 2007, nunc pro tunc, January 5, 2007, Case No. 06-CA-316-P (the "Eviction Action"). A Writ of Possession was issued in the Eviction Action on January 10, 2007 (Landlord's Ex. 8), but the Debtor filed this case before the Writ was executed.

[1] The Debtor argues that neither the November 3, 2006 letter nor the Eviction Order terminated the Lease. As such, it argues that the Lease is unexpired and may be assumed under [§ 365](#).

After the second stay relief hearing on June 28th, the court completed its review of the record, including the exhibits introduced*740 by each side at the May 29th hearing, the Stay Relief Motion, Landlord's Memorandum in Support of [the Stay Relief Motion] (CP# 38), and Debtor's Memorandum of Law in Opposition to Motion for Relief from Stay (CP# 39). Upon that review, and after considering the arguments presented by counsel at the May 29th and June 28th hearings and reviewing applicable law, the Court announced its findings and conclusions at a hearing on other contested matters in this case on July 24, 2007.

The findings and conclusions announced on the record at the July 24th hearing are incorporated here by reference with one modification. In its bench ruling, the Court overlooked two cases cited in the Debtor's Memorandum when it stated that the Debtor cited no cases in which courts held that leases could be assumed under [§ 365](#) after entry of state court eviction judgments. In fact, the Debtor had cited two cases in which eviction judgments were entered prepetition, but the court found that the leases were subject to assumption under [§ 365](#), [*In re Stress Simulation Systems, Inc.*, 130 B.R. 351 \(Bankr.M.D.Fla.1991\)](#) and [*In re GLSC, Inc.*, 130 B.R. 346 \(Bankr.M.D.Fla.1991\)](#).

[2][3] The Court has reviewed these two decisions by Judge Paskay. This Court agrees with a portion of Judge Paskay's analysis. A judgment of eviction does not necessarily terminate a lease for all purposes. Under Florida law, if a landlord retakes possession without terminating, it may hold the tenant responsible for the difference between the rent under the lease and the amount the landlord receives from reletting the premises. See [*Jimmy Hall's Morningside, Inc. v. Blackburn & Peck Enterprises, Inc.*, 235 So.2d 344, 345-46 \(Fla.App.1970\)](#) (landlord may retake possession on account of the tenant subject to a duty to mitigate); [*Hudson Pest Control, Inc. v. Westford Asset Management, Inc.*, 622 So.2d 546, 548 \(Fla. 5th DCA 1993\)](#).

[4] The Court disagrees, however, with the conclusion that absent termination, a lease may be assumed if there was a prepetition final judgment of eviction. A landlord may choose not to terminate for purposes of electing remedies but this does not mean that the tenant retains any property interest which would allow assumption and continued possession in bankruptcy.

Instead, as stated in the Court's July 24th bench ruling, and reaffirmed in this Order, this Court concludes that a prepetition final order or judgment of eviction extinguishes the Debtor's right of possession and the lease is *not* an unexpired lease which may be assumed in bankruptcy under [§ 365](#).^{FN1}

^{FN1}. This Court has held that a lease remains unexpired under [§ 365](#) if a debtor voluntarily surrenders possession prepetition. [*In re CHS Electronics, Inc.*, 265 B.R. 339, 342 \(Bankr.S.D.Fla.2001\)](#). That decision

may be distinguishable since it involved voluntary surrender to a landlord who expressly reserved all rights and the issue was administrative rent obligations. However, if the Court's conclusion in this Order is inconsistent with its conclusions in *CHS Electronics*, the Court stands by its conclusion here.

The Court's conclusion that termination is not the relevant issue in this case does not mean that analyzing whether a lease was terminated prepetition is never relevant in bankruptcy cases. To the contrary, the issue of whether or not a lease has been terminated prepetition is often the critical issue in the absence of a prepetition eviction judgment since a terminated lease cannot be assumed. [11 U.S.C. § 365\(c\)\(3\)](#). See also *In re Foxfire Inn of Stuart Florida, Inc.*, [30 B.R. 30, 31 \(Bankr.S.D.Fla.1983\)](#) (although judgment *741 of eviction had not been entered, that lease was not assumable because the landlord effectively terminated the lease under its terms and in accordance with the relevant state statutes).

Thus, bankruptcy courts often must analyze a lease and the actions taken pursuant to the lease to determine whether the lease was terminated prepetition. Compare *In re Hickory Point Industries, Inc.*, [83 B.R. 805, 807 \(M.D.Fla.1988\)](#) (examining termination letter and holding that landlord effectively terminated the lease because the termination letter “clearly evidence[d] an intent by the [landlord] to terminate the lease”) with *In re PAVCO Enterprises, Inc.* [172 B.R. 114, 118 \(Bankr.M.D.Fla.1994\)](#) (examining purported termination letter and holding that landlord failed to terminate the lease prepetition because the purported termination letter did not indicate an express intent to terminate.) Absent the Eviction Order, the Court would have undertaken a similar analysis in this case to determine whether the November 3, 2006 letter terminated the Lease.

[\[5\]\[6\]](#) Although a terminated lease cannot be assumed, this does not mean that the converse is true. That is, the fact that a lease was not terminated prepetition does *not* mean that it may be assumed. To the contrary, whether or not terminated for all purposes, a tenant's property interest, its right of possession, is extinguished under state law when a final judgment of eviction is entered. The state law right of possession is lost regardless of whether the bankruptcy petition is filed before the tenant is physically evicted. Because the right of possession is extinguished, the lease is expired, that is, it is no longer “unexpired” as that term is used in [§ 365](#). Although [§ 365](#) is a powerful tool allowing debtors to cure defaults and assume and assign leases, this tool cannot and does not revive an expired lease and breathe new life into a debtor's already extinguished property interest.

In sum, for the foregoing reasons and the additional reasons stated on the record in the Court's July 24, 2007 bench ruling, it is-

ORDERED as follows:

1. The Stay Relief Motion is granted and the Landlord may proceed with state court remedies to conclude its eviction. This Order does *not* grant stay relief to pursue a money judgment against the Debtor.

2. The Debtor's Motion to Assume Lease filed on July 11, 2007 (CP# 56) is denied.

3. This Order is stayed for 10 days after entry under [Rule 4001\(a\)\(3\), Fed.R.Bankr.P.](#) The stay will remain in place

if the Debtor files a motion for rehearing within the 10 day period until such motion is resolved. The stay will also remain in effect if the Debtor files a Notice of Appeal and a Motion for Stay Pending Appeal within the 10 day period until the Court rules on the Motion for Stay Pending Appeal.

Bkrtey.S.D.Fla.,2007.

In re Key Largo Watersports, Inc.

377 B.R. 738, 58 Collier Bankr.Cas.2d 1468, 48 Bankr.Ct.Dec. 286, 21 Fla. L. Weekly Fed. B 51

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KEYCITE

C [In re Key Largo Watersports, Inc.](#), 377 B.R. 738, 58 Collier Bankr.Cas.2d 1468, 48 Bankr.Ct.Dec. 286, 21 Fla. L. Weekly Fed. B 51 (Bankr.S.D.Fla. Aug 10, 2007) (NO. 07-12820BKCRAM)

Citing References

Positive Cases (U.S.A.)



Cited

H

- [1](#) In re S & I Investments, 411 B.R. 447, 451 (Bankr.S.D.Fla. Jun 17, 2009) (NO. 08-26220-BKC-RBR)

Secondary Sources (U.S.A.)

C

- [2](#) Construction and effect of provision of lease or bond saving liability of tenant or sureties in case of forfeiture of lease or re-entry by landlord, 99 A.L.R. 42 (1935)
- [3](#) Bankruptcy Service Lawyers Edition s 21:92, Resurrection or revival of contract or lease (2010) **HN: 1,6 (B.R.)**
- [4](#) Bankruptcy Service Lawyers Edition s 21:95, Conduct terminating contract or lease--Reduction to judgment (2010) **HN: 1,5 (B.R.)**
- [5](#) Federal Reg. of Real Estate & Mortgage Lending s 6:6, Types of real estate leases or sales contracts that may be assumed or rejected--Has the real estate lease or sales contract been terminated prior to bankruptcy? (2010) **HN: 5 (B.R.)**
- [6](#) FL Jur. 2d Landlord & Tenant s 218, Choice of remedies upon breach by tenant (2011)
- [7](#) FL Jur. 2d Landlord & Tenant s 270, Generally (2011)
- [8](#) No Post-Eviction Assumption of Lease, 11-14-07 West's Bankruptcy Newsletter 18 (2007) **HN: 1 (B.R.)**

Court Documents

Appellate Court Documents (U.S.A.)

Appellate Briefs

- 9 In re: Lori D. RITENOUR and Steven G. Ritenour, as co-Trustees of The Lori D. Ritenour and Steven G. Ritenour Revocable Living Trust U/A dated October 29, 2004, and A. Lorraine Vreeland as Trustee of The A. Lorraine Vreeland Revocable Living Trust dated February 11, 2009, Appellants, v. Leslie S. OSBORNE, Trustee of S & I Investments, Appellee., 2010 WL 4711603, *4711603+ (Appellate Brief) (11th Cir. Jul 21, 2010) **Initial Brief of the Appellants** (NO. 10-12627-G) ★★

Trial Court Documents (U.S.A.)

Trial Motions, Memoranda and Affidavits

- 10 In re: Lori D. RITENOUR and Steven G. Ritenour, as co-Trustees of The Lori D. Ritenour and Steven G. Ritenour Revocable Living Trust U/A dated October 29, 2004, A. Lorraine VREELAND as Trustee of The A. Lorraine Vreeland Revocable Living Trust dated February 11, 2009, Appellants, v. Leslie S. OSBORNE, Trustee of S & I Investments, Appellee., 2010 WL 2218270, *2218270+ (Trial Motion, Memorandum and Affidavit) (S.D.Fla. Mar 01, 2010) **Amended Consolidated Initial Brief of the Appellants** (NO. 009CV61276) ★★
- 11 In re GLASS SLIPPER, LLC, Debtor; Metzler I Scottsdale Waterfront, LP, Movant, v. Glass Slipper, LLC, Respondent., 2008 WL 5643082, *5643082 (Trial Motion, Memorandum and Affidavit) (Bankr.D.Ariz. Dec 18, 2008) **Metzler I Scottsdale Waterfront, LP's Motion for Relief from Automatic Stay to Allow Recovery of Possession of Premises Located at 7135 East Camelback Road, Suite 170, Scottsdale, Arizona** (NO. 208-BK-18249-SSC) " ★★
- 12 In re: BAY IMAGE GROUP, INC., Debtor., 2010 WL 4775411, *4775411+ (Trial Motion, Memorandum and Affidavit) (Bankr.S.D.Fla. Sep 22, 2010) **State-Court Receiver's Motion for Relief from Stay and Request for Expedited Hearing** (NO. 10-37807-LMI) ★★
- 13 In re: SLATER CORPORATION, Debtor., 2008 WL 7329723, *7329723 (Trial Motion, Memorandum and Affidavit) (Bankr.S.D.Fla. May 14, 2008) **Port 1100 Llc's Motion for Relief from Automatic Stay and in the Alternative Motion for Adequate Protection** (NO. 008BK15723) ★