

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE:	:	CASE NO. 00-41598
	:	
PEACH AUTO PAINTING & COLLISION, INC.	:	CHAPTER 11
Debtor,	:	
	:	
	:	
RONALD E. WAGES,	:	
Movant,	:	
	:	
vs.	:	
	:	
PEACH AUTO PAINTING & COLLISION, INC.	:	
Respondent.	:	

MEMORANDUM OPINION

On March 7, 2001, the court held a hearing on the motion of Ronald E. Wages ("Movant") to compel Debtor to surrender leased premises. At the conclusion of the hearing, the parties were given an opportunity to submit briefs. Movant filed a brief and Debtor filed a letter brief in response. On March 16, 2001, Movant filed an additional motion requesting an evidentiary hearing to determine Debtor's interest in the subject property.¹ After considering the parties' briefs and the applicable statutory and case law, the court will deny Movant's motion to compel Debtor to surrender the leased premises. The court will

¹ This motion is actually captioned as "Motion for Reconsideration and/or Rehearing." However, given the substance of the motion, the court will consider this motion as a request for an additional evidentiary hearing.

also deny Movant's request for an evidentiary hearing.

FACTS

On January 21, 1994, Movant entered into an agreement ("the lease") with Lenward C. Wilbanks, Jr. ("Wilbanks") in which Wilbanks leased from Movant, the property located at 3556 Lawrenceville Highway, Tucker, GA ("leased premises"). After the lease was executed but prior to Debtor's bankruptcy petition, Wilbanks, who is the equity owner of Debtor, allowed Debtor to use the premises as an automobile body paint and repair shop. On July 25, 2000, Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code. ("Code").

On September 15, 2000, Debtor filed a motion to extend the time to accept or reject the lease. (Doc.# 23). On September 18, 2000, the court entered an order extending the time to October 12, 2000. On October 12, 2000, the court entered an another order extending the time to December 1, 2000. (Doc.# 38). This latter extension expired and Debtor never moved to accept or reject the lease.

On December 11, 2000, Movant filed a motion for relief from the automatic stay based on alleged violations of lease provisions resulting in the deterioration of the property. On January 19, 2001, the court held a hearing on Movant's motion which was granted allowing Movant to pursue its remedies in state

court. Soon thereafter, Movant filed a state court dispossessory complaint against Debtor and Wilbanks. At the relief from stay hearing, it was conceded that because Debtor did not assume the lease or move to assume the lease before the last extension expired, the lease was deemed rejected by operation of law. Therefore, any rights that Debtor may have had in the lease, were terminated at that time.

At the March 7, 2001 hearing, the parties confirmed these facts established at the relief from stay hearing. Both parties stipulated that Wilbanks was the holder of the leasehold because there had been no written assignment of the lease and that Debtor's rights in the leasehold were terminated once the lease was deemed rejected.

Movant asserts that the court should compel Debtor to surrender the leased premises pursuant to § 365(d)(4) of the Code. He maintains that Wilbanks assigned the lease to Debtor therefore, resulting in a valid sublease. Movant also presents an estoppel argument based on Movant's acceptance of rent from Debtor.

Debtor, however, asserts that its rights in the lease, sublease or otherwise, were terminated when the lease was deemed rejected. Debtor explains that it is occupying the leased premises with the express permission of Wilbanks. Debtor argues that its right to occupy this property is completely dependent upon the rights of Wilbanks, which are being determined in the

case currently pending in state court. Debtor further asserts that it would be premature for the bankruptcy court to order Debtor to surrender the leased premises before the state court determines Wilbanks' right to remain as a tenant.

DISCUSSION

Section 365(d)(4) of the Code provides:

[I]f the trustee [or debtor-in-possession] does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(d)(4).

Applying the above statutory provision to the facts of this case, it is clear that Debtor's interests in the lease were terminated on December 1, 2000. Debtor did not move to accept or reject the lease, nor did Debtor request additional time within which to file such motion. Therefore, the court finds that on December 1, 2000, the lease was deemed rejected pursuant to § 365(d)(4).

The focus in this case, however, is whether the bankruptcy court has the authority to order a debtor out of the leased premises. Some courts have held that a deemed rejection under § 365(d)(4) "merely places the creditor [lessor] in a position to pursue remedies under the state law. . . ." In re Adams, 65 B.R. 646, 649 (Bankr. E.D. Pa. 1986); See also In re Re-Trac, 59 B.R.

251 (Bankr. D. Minn. 1986). However, this court rejects that view and adopts the "majority and far more persuasive view. . ." that the bankruptcy court can issue such an order. Anderson v. Elm Inn, Inc. (In re Elm Inn, Inc.), 942 F.2d 630, 634 (9th Cir. 1991); See also In re U.S. Fax, 114 B.R. 70 (Bankr. E.D. Pa. 1990)(rejecting In re Adams); In re Chris-Kay Foods East, Inc., 118 B.R. 70 (Bankr. E.D. Mich. 1990); In re Damianopoulos, 93 B.R. 3, 6 (Bankr. N.D.N.Y. 1988)(holding that a deemed rejected lease is no longer property of the estate).

The difficulty in this case is the fact that there is a third party involved. If Wilbanks and his agreement with Movant were not in the picture, this would be a straightforward application of the above authority. Movant would be entitled to an order requiring Debtor to surrender the leased premises. However that is not the case - Debtor is occupying the premises at the permission of Wilbanks - a third party who is rightfully entitled to possess the premises.

Therefore, the court agrees with Debtor and finds that Debtor's right to possess the premises is dependent upon Wilbanks' right. If the state court finds that Wilbanks' right to possession should be terminated and Debtor then still remains in possession, the Movant would be entitled to a surrender order from the bankruptcy court. However, such an order would not be needed because Debtor is a party to the state court dispossessory action.

As to Movant's motion to request an additional evidentiary hearing, Movant relies on In re Elm Inn for the proposition that the court should conduct a hearing to determine Debtor's interest in the lease. Although the Ninth Circuit in In re Elm Inn did remand for such purposes, there was a dispute in that case whether the holder of the leasehold assigned its interests in the lease to the debtor corporation. In this case, there is no such dispute. The parties have stipulated that Wilbanks is the holder of the leasehold and that Debtor is possessing the leased premises with the permission of Wilbanks. Therefore, the court finds that no dispute exists requiring the court to conduct such a hearing.

Accordingly, the court will deny Movant's motion to compel Debtor to surrender the leased premises. The court will also deny Movant's request for an additional evidentiary hearing.

An order in accordance with this Memorandum Opinion will be entered.

DATED this _____ day of March, 2001

JOHN T. LANEY III
UNITED STATES BANKRUPTCY JUDGE