IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

In re: KOPLIN INCORPORATED, t/a O'Reilly's Pizza, Debtor.	
EDWARD KATZ and JOSEPH KEATING, Trustees, Appellants, v. KOPLIN INCORPORATED, t/a O'Reilly's Pizza, Appellee.	Civil Action No. 82-0442-A (Bankruptcy Case No. 82-00023-A) (Adversary Proceeding No. 82-0016-A)

MEMORANDUM

Trustees appeal a decision of the bankruptcy court denying them relief from the automatic stay provisions of 11 U.S.C. § 362. For reasons stated below, the court affirms the decision of the bankruptcy court.

On September 25, 1979, the tenant/appellee was assigned the lease at issue with the approval of trustees. The lease required tenant to pay rent on the first day of each month of the lease term. Tenant failed to pay rent on December 1, 1981.

By letter of December 2, 1981, the trustees' agent gave tenant formal notice of default, and demanded that the default be cured within 7 days. Tenant did not do so. By letter of December 14, 1981, the agent informed tenant that "we hereby terminate your lease effective immediately and ask that you vacate the premises immediately." Tenant then tendered rent, but it was not accepted.

Next, trustees filed an unlawful detainer action against tenant in the General District Court of Fairfax County. The summons on the detainer action was returnable January 8, 1982. On January 7, however, tenant filed its voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code, thereby staying the detainer action through the operation of 11 U.S.C. § 362.

Trustees then sought relief from the section 362 stay, pursuant to 11 U.S.C. §§ 362(d) and (e). They argued that the bankruptcy court should grant relief from the stay of the unlawful detainer action, because trustees terminated the lease before tenant filed its voluntary petition, and a lease terminated at such a time would not be assumable by the debtor under 11 U.S.C. § 365(b).[1]

The bankruptcy court denied appellants relief from the stay, on the ground that trustees did not terminate the lease before the tenant filed its petition. This court agrees with that determination.

LEGAL ANALYSIS

Under Virginia Code § 55-225, a tenant forfeits his right to possession if he continues in default for five days after written notice from the landlord, providing landlord's written notice requires "possession of the premises or payment of rent." However, parties to a lease contract in Virginia may modify their legal rights via terms in the lease. Johnston v. Hargrove, 81 Va. 118 (1885); see tenBraak v. Waffle Shops, Inc., 542 F.2d 919, 925 n.8 (4th Cir. 1976). Paragraph 18 of the lease at issue accomplished such a modification, by providing that "should default continue for Seven (7) days after receipt by LESSEE of written notice thereof, LESSOR may re-enter and repossess [the] premises, with or without process of law...." The statutory reentry provisions have no application when the parties provide by contract for re-entry upon default in the payment of rent Jabbour Bros. v. Hartsook, 131 Va. 176, 108 S.E. 684 (1921).[2]

Accrual of the right to reenter (or forfeiture of the right to possession) does not, however, constitute the termination of a lease ipso facto. When the right to reenter comes into being, a landlord has several options available to him. For instance, he may choose to reenter and terminate, or he may choose not to reenter and sue for accrued rents. Cf. tenBraak, supra, at 925 (on abandonment by lessee, lessor may reenter and terminate, reenter to relet without terminating, or not reenter and sue for

accrued rents). Since trustees did not undertake the unequivocal act of reentry, they did not terminate the lease.

Appellants claim that the letter of December 14, which was mailed and received after the right of reentry accrued, worked a termination of the lease. However, the lease did not provide that the lease would terminate upon the event of default plus failure to cure after a certain number of days' notice, or that the lease would terminate upon the unilateral act of declaring a termination. The clause stating when the right of reentry would accrue cannot be read to provide for termination in this manner. In Virginia, all forfeiture clauses in leases are to be strictly construed in favor of the lessee, not in favor of the lessor. Davis v. Wickline, 205 Va. 166, 135 S.E.2d 812 (1964). Hence it is impermissible to read an automatic termination provision into a right-to-reenter clause in a Virginia lease. Without an explicit provision for termination by notice in the event of default, notice is ineffective to terminate. Compare Davis, supra (violation of covenant to operate drug store on premises did not cause forfeiture, because covenant did not specifically provide for forfeiture as a result of violation), with Jabbour, supra (clause providing that "lessor may cause a notice to be left on the premises of his intention to determine..., and at the expiration of ten days from the time of leaving such notice this lease shall absolutely determine," is valid termination clause superseding Virginia common law and statute), and with In the Matter of Mimi's, etc., 5 B.R. 623, 6 B.C.D. 807 (1980) (termination valid because of agreement among parties that landlord could unilaterally terminate in the event of default).

Appellants also assert that they exercised the right conferred by ¶ 18 to "reenter and repossess [the] premises, with...process of law" when they filed their unlawful detainer action. Such an action permits a "party against whom...possession is unlawfully detained [to] file a motion for judgment in the circuit court alleging that the defendant is in possession and unlawfully withholds from the plaintiff the premises in question." Va. Code § 8.01-124 (1982). Even on the assumption

that a judgment of unlawful detainer from the state circuit court is legally equivalent to a termination, appellants still would not be entitled to relief, because they were unable to obtain such a judgment before institution of the stay that they challenge here. It is equally clear that the mere filing of such an action cannot constitute a termination via the legal equivalent of a reentry on premises.[3] See Shorter v. Shelton, 183 Va. 819, 827, 33 S.E.2d 643, 647 (1945) (in unlawful detainer action, "result, if the plaintiff prevails, is merely to..give possession to one from whom it is being unlawfully withheld" [emphasis added]). It certainly is true that resort to the courts is more civilized and less dangerous than the self-help act of physical reentry; but this consideration does not outweigh the policy enshrined in Virginia decisions giving the lessee the benefit of the doubt as regards the terms of his lease.

Had Virginia wished to require landlords to resort to judicial intervention in order to terminate leases, it could have done so. See, e.g., In re Fontainebleau, 515 F.2d 913 (5th Cir. 1975). However, the Virginia statute provides the landlord an alternative remedy, not an exclusive one, for regaining possession of premises to which he is entitled. See Shorter, supra, at 647. Thus, trustees could have terminated the lease by reentry, but did not do so. Hence the court will affirm the decision of the bankruptcy court.[4]

An appropriate order accompanies this memorandum.

DATE:_____

_____
UNITED STATES DISTRICT JUDGE

OOTNOTES

[1] See Bankruptcy Commission Report at 156: "[A]n... unexpired lease terminated pursuant to a contractual provision or nonbankruptcy law prior to the date of the petiton because of a default of the debtor cannot be assumed under [section 365]." See also In the Matter of Mimi's, etc., 5 B.R. 623, 628, 6 B.C.D. 807 (1980).

[2] Thus the letter of December 2 conformed to ¶ 18 of the lease, demanding payment within the seven days required by the lease instead of the five days required by the statute. Also, the letter of December 2 was not an effective "pay or quit" letter under § 55-225, because it failed to demand payment of rent or possession of the premises. See Va. Code § 55-225.

[3] Indeed, the more natural inference from the act of filing the unlawful detainer action is that trustees chose to waive their right of reentry, not that they chose to exercise it by filing the action. However, the court's disposition of this matter does not depend on a determination that trustees did or did not waive their right of reentry under the lease.

[4] Because of the court's disposition of this appeal on the basis of applicable state law, it need not address appellants' argument that a result other than the one the bankruptcy court reached would effectively contravene 11 U.S.C. § 365(b)(1), and it therefore expresses no opinion regarding the merits of that argument.