UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
John Henry Walters,	)	Case No. 03-12446C-13G
	)	
Debtor.	)	
	)	

ORDER

This case came before the court on September 16, 2003, for hearing upon a motion for relief from stay to pursue proceedings to evict Debtor from commercial property which was filed on behalf of Linder Ventures III, LLC. William 0. Moseley, Jr. appeared on behalf of Linder Ventures III, LLC ("Ventures") and Dirk W. Siegmund appeared on behalf of the Debtor. Having considered the motion for relief from stay, the Debtor's objection to the motion, the evidence offered at the hearing, the briefs filed by the parties and having heard the arguments of counsel, the court finds and concludes as follows:

1. The Debtor and Ventures are parties to a commercial lease agreement under which certain space in the Carolina Circle Mall in Greensboro, North Carolina, was leased to the Debtor for a period of five years, commencing in February of 2001 ("the Lease").

2. In the motion for relief from automatic stay, Ventures requests that the court find that the Lease was terminated by Ventures prior to the filing of this case. As a result of such termination, Ventures argues that there is cause to grant relief from the stay and prays that the court lift the automatic stay to

the extent necessary to allow Ventures to pursue its state law rights to have the Debtor evicted from the leased premises.

3. Ordinarily, the hearing on a motion for relief from stay is conducted as a summary, expedited proceeding in which the issues addressed are those that arise under § 362(d) such as lack of adequate protection, the debtor's equity in the property, the necessity of the property to an effective reorganization or the existence of other cause for relief from the stay. See In re Dennison, 50 B.R. 950, 954-55 (Bankr. E.D. Pa. 1985). While other, more substantive matters such as affirmative defenses or counterclaims may be considered in determining whether there is cause for granting relief from the stay, such substantive matters generally are not determined on the merits at lift stay hearings. See In re Lopez-Soto, 764 F.2d 23, 26 (1st Cir. 1985); In re Compass Van & Storage Corp., 61 B.R. 230, 234 (Bankr. E.D.N.Y. 1986); Dennison, 50 B.R. at 955. However, in the present case, the termination issue is essential rather than merely collateral in determining whether there is cause to grant relief from the stay. Moreover, both parties in the present case have addressed the termination issue on the merits and have made full evidentiary presentations regarding the termination issue and have fully briefed and argued their legal positions regarding that issue. See In re Nuclear Imaging Systems, Inc., 260 B.R. 724, 731-32 (Bankr. E.D. Pa. 2000)(where the parties fully develop the evidence

regarding a substantive issue and fully argue their legal positions regarding the issue, thus evidencing an expectation that a determination on that issue will be made in the context of the lift stay hearing, the court may decide the issue on the merits rather than deferring the question to future litigation). Therefore, in the present case the court will address the termination issue on the merits. In doing so, the court will place the burden of proof on Ventures to show by a preponderance of the evidence that the Lease was terminated prior to the filing of the Chapter 13 case.

4. Ventures first argues that the Lease was terminated "automatically" when the Debtor failed to pay past due rent within five days after a demand for payment of such rent. This argument is based upon G.S. § 42-3 which provides:

> In all verbal or written leases of real property of any kind in which is fixed a definite time for payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease. Where a written lease establishes a monthly rent that includes water and sewer services under G.S. 62-110(g), the terms "rent" and "rental payments" as used in this Chapter, means base rent only.

While this statute does provide for a form of automatic forfeiture, the North Carolina cases make it clear that the statute "applies only when a lease does not expressly provide for the landlord's

reentry upon nonpayment of rents." Charlotte Office Tower Assoc. v. Carolina SNS Corp., 89 N.C.App. 697, 700, 366 S.E.2d 905, 907 (1988). See also Ryan v. Reynolds, 190 N.C. 563, 130 S.E. 156, 158 (1925) (applying an earlier version of G.S. § 42-3). In the present case, the Lease expressly provides for the landlord's reentry upon nonpayment of rent. In that regard, Section 42(A) of the Lease provides that if the tenant violates any covenant, including the covenant to pay rent, 'and shall fail to comply or commence compliance with said covenant within the cure periods provided above, Landlord may, at its option, re-enter and declare this lease and the tenancy hereby created terminated. ." The cure period is described in Section 41 of the Lease. Section 41 provides that the Tenant has five days after delivery of notice of the violation within which to cure the violation. The inclusion of these provisions in the Lease precludes automatic termination pursuant to G.S. § 42-3. See Charlotte Office Tower, 89 N.C.App. at 701, 366 S.E.2d at 907 ("Where the contracting parties have considered the issue, negotiated a response, and memorialized their response within the lease, the trial court appropriately should decline to apply [G.S. § 42-3]. ").

5. If the Lease was not automatically terminated, Ventures argues that the Lease was terminated pursuant to a letter dated July 23, 2001, to the Debtor from Ventures' attorney. This letter does purport to terminate the Lease based upon Debtor's asserted

failure to comply with the demand in an earlier letter that the Debtor remove materials that the Debtor had stored in the common area and parking lot at the Mall. However, it is undisputed that this letter was followed by an August 14, 2001, letter from Ventures' attorney to Debtor's attorney which states "please accept this transmittal as my written confirmation that the subject lease has not been terminated." Based upon the explicit confirmation that the Lease had not been terminated contained in the August 14 letter, the court rejects the argument that the Lease was terminated by the letter dated July 23, 2001.

6. Finally, Ventures argues that the Lease was terminated as a result of a civil action which Ventures instituted against the Debtor on February 13, 2003. The complaint in that action contains the following language:

> As a result of Defendant's failure to cure his continuing default under the terms of the lease, Plaintiff hereby elects pursuant to the terms of Section 42 of the Agreement of Lease to terminate the Lease and recover possession of the premises by way of ejectment.

It is undisputed that following the filing of the suit, the complaint was served upon the Debtor and that such service occurred prior to the filing of Debtor's Chapter 13 case. The evidence established that on at least two occasions prior to the filing of the civil action on February 13, 2003, Ventures delivered letters to the Debtor which described violations of the Lease and informed the Debtor that if such violations were not cured within five days,

Ventures would declare the Lease terminated. The letters that were delivered to the Debtor include a letter dated August 23, 2001, and a letter dated October 19, 2001, both of which the Debtor admitted receiving. The violation referred to in the October 19, 2001 letter was the failure of the Debtor to pay utilities charges of $11,590.45, which Ventures asserted were owed by the Debtor under the Lease. Although the Debtor initially denied that he owed these charges, it is undisputed that a judgment subsequently was entered imposing liability for these charges upon the Debtor. Finally, it is undisputed that the utilities charges of $11,590.45 had not been paid when the February 13, 2003 civil action was filed, and were still unpaid at the time of the hearing in the present case on September 16, 2003. Given the unequivocal language in the complaint that Ventures "hereby elects pursuant to the terms of Section 42 of the Agreement of Lease to terminate the Lease and recover possession of the premises", the court concludes that the Lease, in fact, was terminated upon service of the complaint upon the Debtor, Ventures having earlier given notice in compliance with the provisions of the Lease of its intention to terminate if Debtor's violations were not cured within five days and the complaint containing an unequivocal statement of Ventures' election to terminate the Lease and recover possession of the premises.

7. Debtor's contention that the language in the complaint indicated an intent to terminate the Lease in the future rather

than a present intent to terminate is not accepted. The language used in the complaint that Ventures "hereby elects . to **terminate"** clearly reflects that it was Ventures' decision to terminate the Lease upon the filing of the complaint and that Ventures was not merely expressing an intent to do so in the future. Nor is the prayer for relief inconsistent with a present intent to terminate the Lease. In the prayer for relief, Ventures prays for an adjudication that a termination of the Lease had occurred and that Ventures was entitled to possession of the premises. A prayer for such relief is not inconsistent with Ventures' position that the Lease was terminated upon the filing and service of the complaint.

8. Debtor's contention that Ventures waived Debtor's violations of the Lease by accepting payments from the Debtor after giving notice of such violations is without merit. There was no showing that Ventures ever accepted any payments on the $11,590.45 which Debtor owed for utilities. In fact, the evidence was that the Debtor contested the amount of the utilities until a judgment was finally entered against him establishing his liability for the entire $11,590.45, and that after the judgment was entered Ventures refused to accept partial payments on the $11,590.45. Moreover, the Lease contains a non-waiver provision which permits the Landlord to accept partial payments and which specifically provides that "Landlord may accept such check or payment without prejudice

to its right to recover the balance due or pursue any other remedy in this lease provided." (Emphasis supplied). Thus, even if the evidence had shown that partial payments were accepted by Ventures post-petition, Debtor would be faced with the non-waiver provisions in the Lease which provide that partial payments may be accepted without waiving other remedies available under the Lease. See Long Drive Apartments v. Parker, 107 N.C.App. 724, 729, 421 S.E.2d 631, 634 (1992); Martin v. Ray Lackey Enterprises. Inc., 100 N.C.App. 349, 358, 396 S.E.2d 327, 333 (1990).

9. Under North Carolina law a tenant is not entitled to remain in possession of leased premises once the lease expires or is terminated. See G.S. § 42-46. In such circumstances, the tenant may be removed or evicted from the premises. Id. Under bankruptcy law, if a lease of nonresidential real property is terminated prior to a bankruptcy filing, the lease may not be assumed or assigned by the debtor or trustee. See 11 U.S.C. § 365(c)(2). Based upon the showing that the Lease was terminated prior to the filing of this case, with the result that under state law the Debtor no longer has any right to remain in possession of the premises or to assume or assign the Lease under bankruptcy law, the court concludes that cause exists for granting relief from the automatic stay in order to permit Ventures to pursue its state law remedies to obtain possession of the leased premises. Ventures' motion for relief from the automatic stay therefore should be

granted.

IT IS SO ORDERED.

This 9th day of October, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge