

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION

IN RE: )  
 )  
Ronald S. Raczkowski, ) Case No. 01-80140  
 )  
Debtor. )

ORDER

This case came before the court on January 24, 2002, for hearing upon a Motion by West Side Limited Partnership ("West Side") for relief from stay to take possession of non-residential real property that is the subject of a pre-petition lease under which such property was leased by West Side to Debtor and three other individuals. Appearing at the hearing were Eric W. Hinson, attorney for West Side, and Clyde A. Wootten, attorney for Debtor. When the motion was called for hearing, the attorneys reported that a settlement had been reached and submitted to the court a proposed consent order entitled "Consent Order for Assumption of Lease". The proposed order recites that with the consent of the parties, "the Court finds it proper to permit the Debtor to assume that certain Retail Lease Agreement, attached and identified in the said motion, for that certain non-residential real property known and located at 306 West Franklin Street, Suite G, Chapel Hill, North Carolina 27516, containing 2,637 square feet, more or less, (the 'Premises')." The proposed order concludes with a decretal paragraph under which the court orders that Debtor's assumption of the Retail Lease Agreement is approved. For the reasons that

follow, the court has concluded that the proposed order should not be signed by the court.

Under bankruptcy law assumption of an executory contract or unexpired lease occurs under § 365 of the Bankruptcy Code. Section 365(a) provides that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." (Emphasis supplied). According to the plain language of this provision, authority to assume or reject an unexpired contract or lease is granted to the trustee. Hence, in a Chapter 7 case, the Chapter 7 trustee is the only party with authority to assume or reject an unexpired lease of the Debtor. See In re Del Grosso, 115 B.R. 136 (Bankr. N.D. Ill. 1990) (Chapter 7 debtor does not have standing to assume or reject an executory contract or lease because this decision solely belongs to trustee); In re Price Chopper Supermarkets, Inc., 19 B.R. 462 (Bankr. S.D. Cal. 1982); In re Standard Furniture Co., 3 B.R. 527 (Bankr. S.D. Cal. 1980)). See also In re Bacon, 212 B.R. 66 (Bankr. E.D. Pa. 1997). There being no authority for Debtor to assume the lease, the court is unwilling to sign an order purporting to approve the Debtor doing so.

An additional reason why the relief specified in the order cannot be granted is that the lease referred to in the order already has been rejected by operation of law. Section 365(d)(4) states that "if the trustee 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 . . . then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor." Debtor filed for Chapter 7 relief on January 17, 2001. No motion to extend the time to assume or reject the lease was filed. Therefore, since the lease was not assumed or rejected by the trustee within 60 days after the petition was filed, the lease was rejected as of 60 days after the filing of this case.

A third reason why the order cannot be signed and entered is that it embodies an agreement by the Debtor to reaffirm a pre-petition debt which does not comply with § 524 of the Bankruptcy Code. Under § 524 a debtor may enter into an agreement to repay a pre-petition debt by entering into a reaffirmation agreement with the creditor provided that such reaffirmation agreement complies with the requirements of § 524(c)-(d). Section 524(c) sets forth the following requirements for a valid reaffirmation agreement: (1) debtor must enter into such agreement with the creditor before discharge is granted; (2) the agreement must contain a clear and conspicuous statement which advises the debtor that the agreement may be rescinded prior to discharge or within 60 days after the agreement is filed with the court, whichever occurs later; (3) the agreement must contain a clear and conspicuous statement which advises the debtor that such agreement is not required by law; and

(4) debtor's attorney must represent that debtor has entered into a fully informed and voluntary agreement, that the agreement does not impose a hardship on debtor or a dependent, and that the attorney has advised debtor of the legal effect and consequences of entering into a reaffirmation agreement and defaulting under such agreement. Section 524(d) grants authority to the court to hold a hearing in which the debtor must appear, and the court shall advise debtor of the requirements of § 524(c) if the debtor enters into the reaffirmation agreement without being represented by an attorney.

The effect of the Chapter 7 discharge is to eliminate the debtor's personal liability on pre-petition "debts" that are not excepted from discharge under § 523. A debtor's obligation under a pre-petition lease is a "debt" that is subject to discharge. See In re Motley, 268 B.R. 237 (Bankr. C.D. Cal. 2001) (Chapter 7 debtors' obligation on a pre-petition guaranty of a corporate tenant's rental obligations should be classified as pre-petition debt that is subject to discharge); In re Locke, 180 B.R. 245 (Bankr. C.D. Cal. 1995); In re Ahrens, 64 B.R. 5 (Bankr. E.D. Pa. 1986). Thus, when the Debtor (through counsel) signed the consent order, purporting to assume (i.e., pay) the pre-petition lease, he was agreeing to pay (i.e., reaffirming) a pre-petition "debt". At the same time, the consent order complies with none of the safeguards contained in § 524(c)-(d), and therefore cannot be

recognized by the court as a binding reaffirmation agreement.

For the foregoing the reasons, the court declines to enter the proposed consent order and hereby ORDERS that the proposed consent order be mailed back to the attorney for West Side, since he is the attorney who submitted the order to the court.

This 13th day of February, 2002.

**William L. Stocks**

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WILLIAM L. STOCKS  
United States Bankruptcy Judge