IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:	)	In Proceedings
	)	Under Chapter 12
JAMES KIRCHNER,	)	
	)	No. BK 87-40162
Debtor.	)	

O R D E R

This matter is before the Court on motion of Virginia L. Mitchell for immediate surrender of the Mitchell Farm. The 500 acre farm had been leased by the debtor since 1976 with the lease scheduled to run until 1991. On July 7, 1987, after hearing the arguments of the parties, the Court granted Mitchell's motion. The Court then stayed the immediate surrender of the Mitchell farm pending the issuance of this written order.

The debtor filed his petition under Chapter 12 of the Bankruptcy Code on March 11, 1987. On April 1, 1987, he filed his Chapter 12 Plan of Reorganization. Clause VI of the Plan reads: "Any and all executory contracts which have not otherwise been rejected by the debtor shall be affirmed on the effective date of this plan." Mitchell filed her objection to the Plan on April 20, 1987.

On April 23, 1987, debtor filed a motion requesting authority to participate in the federal set-off program for the 500 acres of land constituting the Mitchell lease. The motion alleged that Max and Virginia Mitchell requested that debtor not be allowed to participate in the program on the basis of a termination clause in the lease which provided for its termination, at the landlord's

option, upon lessee's filing of bankruptcy. The debtor's motion asked the Court to declare the termination clause void and to allow debtor to put the leased property into the set-aside program. The Court granted the motion on April 30, 1987.

On May 11, 1987, the Mitchells moved to vacate the April 30, 1987 order on the grounds that they had not received notice of when objections to debtor's motion were to be filed. The Mitchells also alleged that they would be harmed by debtor's participation in the set-off program because they would end up receiving less rent for the property due to the fact that rent payments were based on the value of the crops produced. On May 26, 1987, the Court vacated that portion of the April 30, 1987 order which had permitted debtor to participate in the set-aside program.

In her present motion, Virginia Mitchell alleges that the lease of the Mitchell Farm was terminated by operation of law due to debtor's failure to assume or reject it, pursuant to section 365(d)(4) of the Bankruptcy Code, within sixty days of filing his Chapter 12 petition. Specifically, Mitchell claims that debtor's failure to file a motion to assume the lease within the sixty day period resulted in the lease being, in effect, rejected by debtor. She requests that the Court order the debtor to immediately surrender the Mitchell Farm property.

In response, debtor alleges that the lease was assumed by way of statements in his Plan of Reorganization filed within three weeks of the bankruptcy petition. He further alleges that the Court recognized his right to proceed under the lease when it voided the termination clause. Finally, he claims Mitchell agreed to the assumption of the

lease when, in her motion to vacate, she requested costs and attorney's fees as authorized under the terms of the lease.

Section 365(d)(4), which was added by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, provides that:

> In a case under any chapter of this title, 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 of 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.

The reference to the duty of the trustee specifically applies to a Chapter 12 debtor-in-possession by virtue of §1203. The "date of the order for relief" is the date on which the debtor filed the petition for relief. See §301. The issue in the present case is whether the debtor, who is a debtor-in-possession, assumed the lease of the Mitchell Farm within 60 days of his petition for relief.

There is a split in authority over whether the assumption of an unexpired lease can be by implication or whether it must be by formal motion. See, e.g., In re Ro-An Food Enterprises, Ltd., 41 B.R. 416, 418 (Bankr. E.D. N.Y. 1984)(assumption can be by action less formal than a motion); Matter of J. Woodson Hays, Inc., 69 B.R. 303 (Bankr. M.D. Fla. 1987) (assumption must be by written motion within 60 days of the filing of the petition). However, even those courts which do not require the filing of a written motion to assume have held that, at the very least, the trustee or debtor-in-possession must either manifest an

unequivocal intention to assume the lease or ask the Court for additional time to assume within 60 days of filing the petition. In re Re-Trac Corp., 59 B.R. 251, 255 (Bankr. D. Minn. 1986); In re 1 Potato 2, Inc., 58 B.R. 752, 754-5 (Bankr. D. Minn. 1986); Matter of Burns Fabricating Co., 61 B.R. 955, 958 (Bankr. E.D. Mich. 1981); In re Hodgson, 54 B.R. 688, 690 (Bankr. W.D. Wisc. 1985).

In the present case, debtor never filed a motion to assume the lease, nor did he request an extension of time in which to assume. This Court need not rule of whether debtor's failure to file a formal motion to assume the lease resulted in its termination, as Mitchell claims, because debtor failed to take any action which would manifest an unequivocal intention to assume the lease.

Debtor argues that Clause VI of his Plan of Reorganization, which was quoted earlier in this order, was sufficient to give Mitchell notice of his intent to assume the lease. The problem with that argument is that the clause does not specifically address the Mitchell lease. Another difficulty with using Clause VI as a statement of intent to assume is that it does not set a time limit by which the debtor may assume or reject the lease, and it does not prohibit the debtor from rejecting the lease after the running of the 60 day time period mandated by §365(d)(4). Accordingly, Clause VI of debtor's Plan clearly fails to show an unequivocal intent to assume the lease.

Similarly, the mere fact that debtor listed the Mitchell Farm in an appendix to his Plan is insufficient to operate as a manifestation of intent to assume the lease. Debtor, apparently recognizing this insufficiency, claims that by objecting to the plan, Mitchell conceded

thai the lease had been assumed in that the objection was premised on alleged violations of the lease. In effect, debtor claims that by objecting to the Plan, Mitchell waived any claim that debtor had not assumed the lease.

"It is well established that waiver is the intentional relinquishment of a known right." Pastrana v. Federal Mogul Corporation, 683 F.2d 236, 241 (7th Cir. 1982), citing Larkins v. NLRB, 596 F.2d 240, 247 (7th Cir. 1979) and Shearson Hayden Stone, Inc. v. Leach, 583 F.2d 367, 370 (7th Cir. 1978). A waiver requires the existence at the time of the alleged waiver of a right, privilege, advantage or benefit which.may be waived. In re Spats Restaurant & Saloon, 64 B.R. 442, 445 (Bankr. D. Nev. 1986); Matter of Haute Cuisine, 57 B.R. 200, 203 (Bankr. M.D. Fla. 1986).

A lessor's right to insist upon the termination of an unassumed lease and debtor's immediate surrender of the premises under §365(d)(4) does not arise until after the 60-day period has expired. Until this occurs, there is no right in existence which can be waived. Spats Restaurant, supra. 64 B.R. at 446. "If either waiver or estoppel were applicable, the Congressional intent in enacting the 1984 amendments, eliminating uncertainty regarding the status of non-residential leases and requiring the debtor-in-possession to take affirmative action to assume the lease would be circumvented." In re Chandel Enterprises, Inc., 64 B.R. 607 (Bankr. C.D. Cal. 1986)(citation omitted).

In the present case, there was no waiver by Mitchell because the objections were filed during the 60-day period before the lease had terminated by operation *of* law. Additionally, Mitchell's action in

objecting to the Plan was consistent with actions Mitchell and her husband had taken in the past to try to terminate the lease. Even assuming that waiver was applicable, Mitchell did not manifest the intent necessary to waive her right to permit the lease to terminate. See, Pastrana v. Federal Mogul Corporation, supra. Accordingly there is no basis for debtor's claim that Mitchell waived her right to assert the termination of the lease.

Debtor's argument that this Court's previous rulings implied assumption of the lease is also without merit. On April 30, 1987, the Court ruled that the termination clause of the lease was void and unenforceable and that the debtor was granted authority to participate in the federal set-off program. After Mitchell and her husband moved to vacate the order, the Court, on May 26, 1987, vacated the language in the April 30, 1987 order granting debtor authority to participate in the set-off program.

The net effect of the Court's April 30 and May 26, 1987 rulings is that the lease was valid and that the mere fact that the debtor had filed for bankruptcy was not sufficient to terminate the lease. However, it was still necessary for debtor to manifest an intent to assume the lease within the 60-day period and he failed to do so.

Debtor also argues that Mitchell agreed to the assumption of the lease when she sought to enforce the Teases termination clause against debtor and asked for attorney's fees under the lease. This argument is simply another allegation of waiver which has already been held to be without merit.

IT IS ORDERED that the Motion for Immediate Surrender filed

by Virginia Mitchell is granted.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: August 14, 1987