

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

IN RE: )  
RAYMOND D. CAPLINGER and )  
MARY KAY CAPLINGER, ) Bankruptcy Case No. 98-40339  
Debtors. )

and

IN RE: )  
GAIL N. MEEHAN, )  
Debtor. ) Bankruptcy Case No. 98-30641

OPINION

This matter having come before the Court pursuant to a Motion for Relief from Stay filed by and on behalf of Dairy Queen Enterprises, Inc.; a hearing having been held on this matter; and the Court, having reviewed this matter, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

On or about April 10, 1987, Dairy Queen Enterprises, Inc. ("DQ/Lessor") entered into a sublease with Raymond D. Caplinger and Mary Kay Caplinger, his wife, and Gail N. Meehan (jointly referred to as "Lessees"), with respect to commercial real property located at 4130 West Main Street, Belleville, Illinois. In November 1997, the Lessor, through counsel, sent to the Lessees a five (5) day demand for rent alleging that the Debtors were in default in making their rent payments for October 1997 and November 1997. The sum the Lessor alleged was in default was \$3,150.00. On November 14, 1997, a Forceable Entry and Detainer action was filed by the Lessor. On February 27, 1998, prior to the entry of any judgment in the Forceable Entry and Detainer action, the Lessees filed Petitions for Relief Pursuant to Chapter 11 of the United States Bankruptcy Code.

Pursuant to 11 U.S.C. §362, the automatic stay provisions of the Bankruptcy Code bar a landlord's commencement or continuation of state eviction proceedings. The Lessors filed a Motion for Relief From Stay in order to proceed with the state eviction action. Prior to the hearing on the Motion for

Relief From Stay, both parties filed proposed Findings of Fact and Briefs in support of their respective positions. At the hearing on the Motion for Relief From Stay, the Court advised the parties that it was inclined to follow the decision of the United States District Court for the Northern District of Illinois in the case of Bennett vs. St. Steven Terrace Apartments, 211 B.R. 265 (N.D. Ill. 1967) in which the Court considered the issue of when a lease is terminated and no longer assumable in a bankruptcy proceeding. Counsel for the Lessor then made an Offer of Proof consistent with the proposed Findings of Fact he had filed with the Court. Counsel for the Lessees stated that the Lessees disagreed with the amounts alleged due in the Offer of Proof and that certain refunds were available to the Lessees to apply to any alleged defaults in the rent payments. Counsel for the Lessees also stated that the ordinary course of business between the parties was such that the Lessees did not believe they were in default as a result of not making the rent payments. Counsel for the Lessees also argued that due to the fact that no judgment of possession had been entered, the Lessees still had a right to revive the lease and therefore it was not terminated.

Magna Bank, a secured creditor, holding an assignment of the Debtors' interest in the lease, filed a Motion to Intervene. Based upon the conclusions set forth below, the Motion of Magna Bank to Intervene is denied.

### **CONCLUSION**

The critical question before the Court is whether the lease terminated prior to filing the Petition for Bankruptcy. The Illinois Forceable Entry and Detainer statute, 735 I.L.C.S. 5/9-209, provides:

"A landlord or his or her agent may, any time after rent is due, demand payment thereof and notify the tenant, in writing, that unless payment is made within a time mentioned in such notice, not less than five (5) days after service thereof, the lease will be terminated. If the tenant does not within the time mentioned in such notice, pay the rent due, the landlord may consider the lease ended ...

The Courts in Illinois are split on the issue of when a lease terminates. Some Courts have held that a lease terminates when a tenant fails to pay rent and is given a written five (5) day notice, during which time the tenant fails to pay or, at the latest, when a landlord files a forceable suit.<sup>1</sup> The Seventh Circuit,

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<sup>1</sup>See, e.g., *In re Williams*, 201 B.R. 948 (1996) ("*Williams*"); *Cunningham v. Lifelink Corp.*, 159 B.R. 230 (N.D. Ill. 1993); *In re Maxwell*, 40 B.R. 231 (N.D. Ill. 1984); *Rosenberg v. Holmes*, 237 Ill. App. 226 (1<sup>st</sup> Dist. 1926); *Jefferys v. Hart*, 197 Ill. App. 514 (1<sup>st</sup> Dist. 1916); *Drew v. Mosbarger*, 104 Ill. App. 635 (3<sup>rd</sup> Dist. 1902)

however, has held that a lease terminates only when a judgment is entered in a Forceable Entry and Detainer proceeding. Robinson v. Chicago Housing Authority, 54 F.3d 316 (1995).

This Court is swayed by the Seventh Circuit opinion as well as the opinion in Bennett vs. St. Steven Terrace Apartments, 211 B.R. 265 (N.D. Ill. 1997). This Court adopts the view that a lease terminates when a judgment is entered in the forceable proceeding. The Seventh Circuit in Robinson set forth a two-prong test to determine if the tenant is entitled to possession: (1) whether the landlord has not yet taken all the essential procedural steps; and (2) whether the Debtor still retains legal recourse to revive the lease. Robinson at 321. If either prong of this test is satisfied, the tenant is entitled to possession. The fact that a Debtor still retains legal recourse to revive the lease is indicative of the fact that the Debtor still retains an interest in the leasehold. Thus, the lease itself could not be terminated in its entirety. The Lessee still maintains an interest to revive the lease and that interest is what prevents the lease from being fully terminated unless a judgment of possession has been entered. The Court in Bennett stated that the "legal recourse to revive the lease" mandated by the Seventh Circuit continues until judgment in the forceable proceeding is entered. Bennett at 268.

This Court follows the Bennett analysis which reviewed the Robinson case as to when a lease terminates. Illinois law provides the forceable proceeding forum to resolve any dispute about whether a tenancy has terminated. Simply because a tenancy is considered terminated by a landlord does not mean that the lease cannot legally be revived, if a tenant can show that the termination was wrongful. Due to the fact that the lease can be revived as a result of defending the lease in a forceable proceeding, it can be a part of the Debtor's bankruptcy estate. This is because the Debtor continues to have an "interest" in the lease until there is an adverse judgment in the forceable proceeding.

Following the decisions in Robinson and Bennett, this Court concludes that the lease was unexpired at the time the Bankruptcy Petition was filed. Therefore, the Motion for Relief from Stay is denied.

ENTERED: May 28, 1998.

/s/ GERALD D. FINES  
United States Bankruptcy Judge

