

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

IN RE:)	In Proceedings
)	Under Chapter 7
ROGER WILLIAM SELLE,)	
)	No. BK 86-40142
Debtor.)	
ROGER WILLIAM SELLE,)	
)	
Plaintiff,)	
)	
v.)	ADVERSARY NO.
)	86-0312
ARK LAND COMPANY,)	
)	
Defendant.)	

O R D E R

This matter is before the Court on Petition for Contempt and for Sanctions for Violation of Automatic Stay filed by debtor Roger William Selle ("debtor") against Ark Land Company ("Ark Land"). At hearing, the parties agreed that the liability issue could be decided on the briefs and that a bifurcated hearing on the question of damages would be held if the Court found in favor of plaintiff. The relevant facts, based on the stipulation filed by the parties, are as follows:

On October 7, 1985, Ark Land filed a forcible entry and detainer action against debtor in the Circuit Court of Perry County, Illinois concerning agricultural property which Ark Land leased to debtor. Subsequently, the parties reached a "settlement situation" under which, inter alia, debtor delivered a mortgage conveying his interest in certain mineral interests in unrelated property in Perry County to Ark Land as additional security for the amount owed by debtor under the lease. The stipulation further

stated that if debtor did not pay the amount owed by December 31, 1985, Ark Land would have the right to foreclose on the mortgage. Finally, the stipulation provided that if debtor paid the amount owed, Ark Land would release the mortgage and dismiss the forcible entry and detainer action.

On February 6, 1986, after default of the settlement agreement by debtor, Ark Land filed a complaint for foreclosure of mortgage. On February 8, 1986, debtor was served by certified mail with a "Landlord's Five Day Notice" which stated that the failure of debtor to pay Ark Land the amount of past rent then due (\$30,651.88) within five days would result in the termination of debtor's tenancy of the premises.

On March 17, 1986, after debtor failed to pay the past due rent demanded, Ark Land filed a new forcible entry and detainer complaint (Case No. 86-LM-8). On March 20, 1986, debtor filed his bankruptcy petition with this Court. No further proceedings have been held in Case No. 86-LM-8. Debtor voluntarily dismissed his bankruptcy petition on November 5, 1986.

Debtor was served with a "Notice of Criminal Trespass" by the Perry County Sheriff on June 27, 1986. The service of this notice forms the basis of debtor's petition for contempt and sanctions for violation of the automatic stay which the debtor filed on October 30, 1986.

Debtor claims that the service of the criminal trespass notice after the filing of the bankruptcy petition was a violation of the

automatic stay.¹ Debtor argues that because Ark Land had knowledge of the bankruptcy petition it should be held in contempt for its failure to withdraw its forcible entry and detainer action and for having the criminal trespass notice served on him.

In response, Ark Land argues, inter alia, that the automatic stay only applies to property of the estate and that after the expiration of the February 8, 1986 five day notice the lease automatically terminated and was no longer property of the estate. Therefore, any actions taken by Ark Land in connection with repossessing the property would not violate the stay.

Generally, an action taken against property of the estate after the filing of a bankruptcy petition violates the automatic stay. §362(a). One exception to this general rule can be found at §362(b)(10)² which states:

(b) The filing of a petition under section 301, 302, or 303 of this title, ...does not operate as a stay -

¹In is complaint and supporting brief debtor claims that Ark Land sent him a letter on June 27, 1986 stating that he was considered a trespasser and demanding possession of the leased property. However, the parties' stipulation of fact makes no mention of a letter. Instead, it states that service of the criminal trespass notice was made by the Perry County Sheriff on June 27, 1986. A copy of that notice is attached as an exhibit to the stipulation. For purposes of this Order, the Court will assume that the facts as related in the parties' stipulation are correct.

²Section 362(b)(10) was added to the Bankruptcy Code by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, §363(b), 98 Stat. 363-64 (1984). At that time, it was added to the Code as §362(b)(9), which resulted in the existence of two provisions being so numbered. However, §283(d)(3) of the Bankruptcy Judges, Trustees, and Family Farmer Bankruptcy Act of 1986 corrected this error by redesignating this subsection as §362(b)(10).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property.

This section codifies the well-settled law that a lease that was terminated prior to the filing of a bankruptcy petition is not property of the estate within the meaning of §541 and is not affected by the automatic stay. *In re Cohoes Industrial Terminal, Inc.*, 62 B.R. 369, 377 (Bankr. S.D. N.Y. 1986).

In order to decide whether Ark Land's post-petition actions violated the automatic stay, it is necessary to determine whether the lease was terminated prior to the filing of the bankruptcy. That determination is made by reference to state law. *In re Sudler*, 71 B.R. 780, 785 (Bankr. E.D. Pa. 1987).

In Illinois, leases are terminated five days after the tenant's receipt of the statutory five-day notice, provided the tenant does not cure the default. *Ill.Rev.Stat.*, ch. 110, ¶9-209; *In re Maxwell*, 40 B.R. 231, 236 (N.D. Ill. 1984); *Elizondo v. Medina*, 100 Ill. App. 3d 718, 427 N.E. 2d 381, 383, 56 Ill. Dec. 301, 303 (1st Dist. 1981); *Elizondo v. Perez*, 42 Ill. App. 3d 313, 356 N.E. 2d 112, 113, 1 Ill. dec. 112, 113 (1st Dist. 1976); *Westerman v. Gilmore*, 17 Ill. App. 2d 455, 150 N.E. 2d 660, 662-63 (3rd Dist. 1958). The statutory procedure for terminating a lease and a forcible entry and detainer action are two separate things. The former process ends the contractual relationship between the parties while the forcible entry and detainer action determines rights to possession of the property. *In re Maxwell*,

supra at 237.

In the present case, the lease was terminated by operation of law after debtor was served with the five day notice on February 8, 1986 and failed to pay the back rent he owed Ark Land within five days. Since the lease was terminated, there was no violation of the stay by Ark Land when it had the criminal trespass notice served on debtor after the filing of the bankruptcy petition. §362(b)(10).

The lease was terminated in spite of the fact that Ark Land's forcible entry and detainer action was not completed before the bankruptcy petition was filed. As other courts have noted:

[T]he termination before bankruptcy of a lease pursuant to its terms and applicable state law results in its expiration, even if, as is the case here, the tenant remains in possession as a tenant at sufferance and the landlord has instituted but not yet concluded an eviction proceeding.

Id., quoting In re Foxfire Inn of Stuart Florida, Inc., 30 B.R. 30, 31 (Bankr. S.D. Fla. 1983).

IT IS ORDERED that debtor's Petition for Contempt and for Sanctions for Violation of the Automatic Stay is DENIED.

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

ENTERED: November 2, 1987