


ORDERED.

Dated: July 12, 2018


Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
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In re:

Jerusalem Restaurant, Inc.,
d/b/a The Flame Kabob

Case No. 6:18-bk-01065-CCJ
Chapter 11

Debtor.

ORDER DENYING MOTION
BY WRI-TC MARKETPLACE AT DR. PHILLIPS, LLC FOR ENTRY
OF AN ORDER DETERMINING THAT PROPERTY IS NO LONGER
PROPERTY OF THE ESTATE OR, ALTERNATIVELY, GRANTING STAY RELIEF

This case came before the Court after a hearing to consider the Motion by WRI-TC Marketplace at Dr. Phillips, LLC, for Entry of an Order Determining that Property is No Longer Property of the Estate or, Alternatively, Granting Stay Relief (Doc. No. 14; the “Motion”) and the Objection by the Debtor to the Motion (Doc. No. 20; the “Objection”). At the hearing, WRI-TC Marketplace at Dr. Phillips, LLC (the “Landlord”) argued that the Court could rule on the Motion without a trial or the presentation of evidence. With the Debtor raising no objection, the Court took the Motion under advisement. Having considered the Motion with attachments and arguments made by counsel, the Motion is denied for the following reasons.

The Debtor operates a restaurant known as The Flame Kabob at 7536 Dr. Phillips Blvd. # 360, Orlando, Florida 32819 (the “Property”). The Landlord owns the Property. The Debtor and Landlord are parties to a Lease Assignment, Assumption and First Amendment to Lease of the Property (the “Lease Assignment”). A copy of the “Original Lease” referenced in the Lease Assignment is not attached to the Motion.

Approximately eight months ago, the Landlord filed an action in the County Court for Orange County, Florida seeking to evict the Debtor for failing to pay rent (the “Eviction Action”). During the Eviction Action, the parties agreed to the County Court’s entry of an Order on Stipulation of Settlement (the “Settlement Order”). The Settlement Order stated that the Landlord would be entitled to *possession* of the Property if the Debtor failed to make a timely payment as required by the order. A couple months after entry of the Settlement Order, the Landlord asserted that the Debtor failed to make a timely payment and obtained an Order for Final Judgment of Possession from the County Court (the “Final Judgment”). The Final Judgment stated that the Landlord is entitled to *possession* of the Property and directed the clerk to issue a writ of possession. The clerk issued the writ of possession (the “Writ of Possession”). Before the sheriff could serve the Writ of Possession however, the Debtor filed this bankruptcy case.

By the Motion, the Landlord argues that the Settlement Order, Final Judgment and Writ of Possession (collectively the “Eviction Documents”) terminated the lease and the Debtor’s possessory interest in the Property. And, because the Debtor may not assume a terminated lease under Section 365 of the Bankruptcy Code and the Debtor lacks a possessory interest in the Property, the Landlord asserts that the automatic stay of Section 362 of the Bankruptcy Code is not in effect. The Landlord contends that for these reasons “cause” exists to lift the automatic stay to complete execution of the Writ of Possession.

The Debtor responds that the mere entry of the Eviction Documents do not terminate the lease or the Debtor's possessory interest in the Property. The Debtor argues that the Landlord must demonstrate a valid prepetition lease termination to preclude assumption under Section 365 of the Bankruptcy Code. Because the Eviction Documents do not terminate the lease or the Debtor's possessory interest in the Property, the Debtor asserts that it is not precluded from assuming the lease pursuant to Section 365 of the Bankruptcy Code and the automatic stay should remain in effect.

The only issue before this Court is whether the lease is protected by the automatic stay and capable of assumption by the Debtor pursuant to Section 365 of the Bankruptcy Code. Having reviewed the applicable bankruptcy and Florida case law, the Court concludes that the prepetition entry of the Eviction Documents do not preclude the Debtor from attempting to assume the lease with the Landlord. As a result, cause does not exist to lift the automatic stay.

In Florida, a landlord ordinarily has three options when a tenant defaults.¹ First, the landlord may take possession of the property and terminate the lease.² Second, the landlord may take possession of the property and hold the tenant liable for damages measured by the rent due under the lease less any amounts received by a replacement tenant.³ Third, the landlord may do nothing and hold the tenant liable for the rent as it becomes due or for the full amount due at the end of the lease term.⁴ Because one of the options allows a landlord to take possession of the property without terminating the lease, the entry of a final judgment of possession or writ of possession alone does not terminate a lease.⁵ Instead, the landlord must demonstrate some type of affirmative act that terminated the lease.⁶ And, if a written lease exists between the landlord and tenant, the lease terms will govern whether the lease terminated before a bankruptcy filing.⁷

Here, the Eviction Documents merely address the Landlord's entitlement to possession of the Property and are void of any language that could be construed as terminating the parties' lease. Although the Landlord provided the Court with a copy of the Lease Assignment, the Lease Assignment does not address the termination of the lease by the Landlord. Nor do the other documents attached to the Motion demonstrate an affirmative action by the Landlord to terminate the lease. This Court acknowledges that some bankruptcy courts have found that the entry of a final judgment of possession alone terminates a lease and therefore precludes the Debtor from assuming the lease under Section 365 of the Bankruptcy Code.⁸ But, having reviewed the case law on the matter, this Court elects to follow those cases that hold to the contrary⁹ and finds that the mere entry of the Eviction Documents did not terminate the lease.

Finally, the entry of the Final Judgment and issuance of the Writ of Possession did not extinguish the Debtor's possessory interest to the Property. The eviction process, under Florida law, is not complete until the tenant is physically dispossessed from the property.¹⁰ The execution of a writ of possession is a process that is only complete when the tenant is physically dispossessed of the property and possession is given to the landlord.¹¹ Here, the Debtor filed this bankruptcy case before the sheriff executed the Writ of Possession. The Debtor has not been dispossessed from the Property and the Landlord does not have possession. For these reasons, the Court finds that Debtor has a possessory interest in the Property.

In conclusion, the Eviction Documents and other documents attached to the Motion do not demonstrate a valid lease termination and the Debtor retains a possessory interest in the Property. The Debtor is therefore not precluded from attempting to assume the lease pursuant to Section 365 of the Bankruptcy Code and, as such the automatic stay should remain in effect. Accordingly, it is ORDERED that the Motion (Doc. No. 14) is denied without prejudice.

Attorney Steven J. Solomon is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

¹ See *Williams v. Aeroland Oil Co.*, 20 So.2d 346, 347 (Fla. 1944); See also *In re Kennedy, LLC*, 512 B.R. 708, 712 (Bankr. M.D. Fla. 2014); *In re Florida Lifestyle Apparel, Inc.*, 221 B.R. 897, 899 (Bankr. M.D. Fla. 1997); *In re GISC, Inc.*, 130 B.R. 346, 348 (Bankr. M.D. Fla. 1991).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ See *In re 2408 W. Kennedy, LLC*, 512 B.R. at 712

⁶ *Id.*

⁷ See *In re Spice Modern Steakhouse, Inc.*, 2011 WL 5563545 at *1 (Bankr. M.D. Fla. Oct. 20, 2011); *In re GISC, Inc.*, 130 B.R. at 348.

⁸ See *In re Key Largo Watersports, Inc.*, 377 B.R. 738 (Bankr. S.D. Fla. 2007)(Marks, J.) (pre-petition eviction judgment terminates a debtor's right of possession, and as a result, the lease is no longer an unexpired lease that the debtor may assume pursuant to Section 365); *In re Williams*, 139 B.R. 759 (Bankr. M.D. Fla. 1992)(Proctor, J.) (pre-petition eviction judgment terminates a residential lease and precludes the debtor from assuming a lease pursuant to Section 365); *In re Cowboys*, 24 B.R. 15 (Bankr. S.D. Fla. 1982)(Gassen, J.)(pre-petition eviction judgment terminates a lease and the debtor's possession of the property alone is insufficient to allow some type of equitable relief in bankruptcy)

⁹ See *In re 2408 W. Kennedy, LLC*, 512 B.R. 708 (Bankr. M.D. Fla. 2014)(Williamson, J.)(pre-petition entry of a judgment for possession or issuance of a writ of possession without more does not terminate a lease or preclude the debtor from assuming a lease under Section 365); *In re Spice Modern Steakhouse, Inc.*, 2011 WL 5563545 (Bankr. M.D. Fla. 2011)(Briskman, J.) (pre-petition entry of final judgment and issuance of writ of possession did not preclude debtor from assuming a lease because the parties did not manifest an intent to terminate the lease); *In re Florida Lifestyle Apparel, Inc.*, 221 B.R. 897 (Bankr. M.D. Fla. 1997)(landlord did not terminate the lease by taking possession of the property); *In re GISC, Inc.*, 130 B.R. 346 (Bankr. M.D. Fla. 1991)(Paskay, J.)(debtor not precluded from assuming a lease pursuant to Section 365 despite pre-petition entry of a judgment and issuance of a writ of possession).

¹⁰ See *In re PetitUSA, LLC*, 2016 WL 8504995 (Bankr. S.D. Fla. April 5, 2016); *In re 2408 W. Kennedy, LLC*, 512 B.R. 708, 713 (Bankr. M.D. Fla. 2014); *In re Hobbs*, 221 B.R. 892, 894 (Bankr. M.D. Fla. 1997).

¹¹ See *In re PetitUSA, LLC* 2016 WL 8504995 at *3.