

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

SPICE MODERN STEAKHOUSE, INC.,

Case No. 6:11-bk-15109-ABB

Chapter 11

Debtor.

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ORDER

This matter came before the Court on the Motion for Relief from Automatic Stay (Doc. No. 13) filed by PA Partners, LLLP (“Movant”) seeking relief from the automatic stay pursuant to 11 U.S.C. Section 362(d). The preliminary hearing was held on October 17, 2011 at which counsel for the Debtor and counsel for Movant appeared. The Motion is due to be set for a final evidentiary hearing for the reasons set forth herein.

The Debtor owns and operates a restaurant located at 326 South Park Avenue, Winter Park, Florida and leases the business premises pursuant to a Lease Agreement dated October 19, 2005.¹ The Debtor defaulted on its rent payments and Movant instituted a civil action against the Debtor in the Florida State Courts. The Florida State Court, on October 3, 2011, issued a Default Final Judgment for Possession and Writ of Possession in favor of Movant. The Debtor filed this Chapter 11 bankruptcy case on October 4, 2011 (“Petition Date”).

Movant asserts the Lease was terminated prepetition pursuant to the issuance of the Default Final Judgment and Writ of Possession. The Debtor asserts the Lease was not terminated prepetition based upon the plain language of the Lease. Florida State law

¹ The Lease Agreement was executed by The Estate of Roger W. Holler, Jr. as Lessor and Atlas Diversified, LLC as Lessee. The Lease was assumed by the Debtor on August 30, 2006 pursuant to the Assignment and Assumption of Lease Agreement and Consent to Transfer of Liquor License. PA Partners, LLLP became the lessor pursuant to the Assignment of Leases dated September 13, 2007 (Doc. No. 13).

controls the determination as to whether the Lease was terminated prepetition. In re Florida Lifestyle Apparel, Inc., 221 B.R. 897, 898 (Bankr. M.D. Fla. 1997). The termination of a commercial lease requires the finding of an intent to surrender the leased premises by the lessee and the lessor's acceptance of the surrender. Id.

A landlord in Florida, pursuant to Florida State common law, has three options when a tenant defaults on its lease obligations: (i) the landlord may treat the lease as terminated and retake possession for its own purposes; (ii) it may retake possession on account of the tenant and hold the tenant responsible for damages measured by the difference between the stipulated rent and the amount the landlord receives from reletting the premises; and (iii) it may do nothing and sue the tenant as each installment matures or for the full amount of the rental due when the lease terminates. Hudson Pest Control, Inc. v. Westford Asset Management, Inc., 622 So.2d 546, 548-49 (Fla. 5th DCA 1993)

The terms of a written commercial lease are controlling in determining whether a termination has occurred and those terms may not be rewritten by the Courts. Rodeway Inns of America v. Alpaugh, 390 So. 2d 370, 372 (Fla. 2d DCA 1980). The provisions of the parties' Lease are conclusive and govern the determination as to whether the Lease was terminated prepetition. In re Hickory Point Indus., Inc., 83 B.R. 805, 807 (M.D. Fla. 1988).

The Lease contains plain and unambiguous termination provisions in Articles III and XXII. The Lease in Article III provides for a ten-year term "commencing no later than November 1, 2005 and terminating in ten years at 11:59 p.m., unless sooner

terminated pursuant to the provisions of this Lease”² The Lease in Article XXII provides the landlord may, in the event of a default, do any one or more of the following:

- (a) Terminate this Lease and re-enter and take possession of the Premises;
- (b) Recover possession of the Premises (with or without terminated the Lease, at Lessor’s option) in a manner prescribed by any statute relating to summary process, and any demand for rent, re-entry for condition broken, and any and all notices to quit, including, without limitation, the notice requires by the provisions of Section 83.20, Florida Statutes, or any similar statutes, or other formalities of any nature, to which Lessee may be entitle, are hereby specifically waived;
- (c) Bring suit for the breach which has occurred without affecting the obligations of the parties to perform the balance of the Lease;
- (d) Declare the entire rent for the balance of the Term of the Lease due and payable; and
- (e) Relet the Premises or any part thereof without thereby avoiding or terminating the Lease to any person, firm or corporation other than the Lessee for such rent”³

Section 22.03 of Article XXII specifies: “No re-entry or taking possession of the Premises by Lessor shall be construed as an election on Lessor’s part to terminate this Lease unless a written notice of such intention be given by Lessor to Lessee or unless the termination thereof be decree by a court of competent jurisdiction.”⁴

The Lease, pursuant to its plain and unambiguous language, was not terminated prepetition. The Lease did not terminate by virtue of the expiration of its term. Its ten-year term expires in 2015. The Lease was not terminated pursuant to the termination requirements of Article XXII, Section 22.03:

² Doc. No. 13 Lease Agreement at Article III, ¶ 3.01.

³ Id. at Article XXII, ¶ 22.202.

⁴ Id. at ¶ 22.03.

- (i) The Landlord did not issue a written notice to the Debtor of its intention to terminate the lease.
- (ii) No Court issued a decree finding the Lease has been terminated. Neither the Default Final Judgment nor the Writ of Possession contains a finding of termination. The Stipulation for Judgment executed by the Movant and the Debtor and presented to the Florida State Court does not make any reference to the termination of the Lease.

The Debtor has taken no action that could constitute a termination of the Lease. It has not surrendered or abandoned the premises.

No action occurred resulting in the prepetition termination of the Lease pursuant to Florida State law or the specific terms of the Lease. In re Florida Lifestyle Apparel, Inc., 221 B.R. at 901. The Movant nor the Debtor manifested any intent to terminate the lease. The Lease was not terminated prior to the Petition Date. A lease that is not validly terminated prepetition is assumable pursuant to 11 U.S.C. Section 365(a). In re Hickory Point Indus., Inc., 83 B.R. at 807. The automatic stay of 11 U.S.C. Section 362(a) arose on the Petition Date protecting the Debtor's rights in and to the Lease and the Debtor may assume or reject the Lease pursuant to 11 U.S.C. Section 365.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that a final evidentiary hearing on Movant's Motion (Doc. No. 3) shall be held on November 10, 2011 at 1:30 p.m.

Dated this 20th day of October, 2011.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge