

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:)
)
CRESCENT OIL COMPANY, INC.,) In Proceedings Under Chapter 11
) Case No. 09-20258
Debtor.)

**MOTION AND MEMORANDUM OF STATION
ACQUISITION, LLC FOR ORDER DECLARING LEASES OF NON-RESIDENTIAL
REAL PROPERTY TO BE TERMINATED, COMMANDING DEBTOR TO
SURRENDER POSSESSION OF SUCH REAL PROPERTY FORTHWITH AND FOR
RELIEF FROM THE AUTOMATIC STAY UNDER 11 U.S.C. § 362(d) AS
NECESSARY OR APPROPRIATE TO SUCH RELIEF**

The Emergency Motion and Memorandum of Station Acquisition, LLC, as provided under 11 U.S.C. § 365(d)(3), respectfully represents:

PARTIES AND JURISDICTION

1. On February 9, 2009, debtor Crescent Oil Company, Inc. (“Debtor” or “Crescent”) filed its Voluntary Petition for Relief under 11 U.S.C. § 1101, *et seq.*, and as provided under 11 U.S.C. §§ 1107 and 1108, has continued in the management and operation of its business and assets as debtor-in-possession.

2. Movant Station Acquisition, LLC (“Station”) is the holder of a claim against the Debtor within the meaning of 11 U.S.C. § 101(5)(B) and, accordingly, is a creditor entitled to appear and be heard upon any issue arising herein, as provided under 11 U.S.C. § 1109(b).

3. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334, and venue is proper herein pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested by movant are 11 U.S.C. §§ 105 and 365 and Fed. R. Bankr. P. 6006. Accordingly, this matter is a core proceeding, pursuant to 28 U.S.C. § 157(b)(2).

FACTUAL BACKGROUND

4. Crescent is engaged in the business of selling motor vehicle fuels and related products at wholesale.

5. In order to secure a reliable market for its products, Crescent owns or leases a substantial number of “filling station”, “filling station and convenience store” and “truck stop” facilities which it leases or subleases to retail “operators” who then purchase Crescent’s fuel and related products for resale to the public.

6. On or about June 22, 2007, Station and Crescent made and entered into fourteen (14) commercial lease agreements, wherein Crescent, as lessee, agreed to lease the following nonresidential real estate from Station, as lessor, for an initial term of fifteen (15) years, from and after June 22, 2007:

- a. 1000 NW State Route 7, Blue Springs, Missouri
- b. 12419 West 95th Street, Lenexa, Kansas
- c. 1901 Russell Road, Kansas City, Missouri
- d. 2602 NE Vivion Road, Kansas City, Missouri
- e. 3901 Tomahawk Road, Prairie Village, Kansas
- f. 5401 NW 64th Street, Kansas City, Missouri
- g. 7427 Metcalf, Overland Park, Kansas
- h. 7701 West 123rd Street, Overland Park, Kansas
- i. 7905 East 171st Street, Belton, Missouri
- j. 8120 Mission Road, Prairie Village, Kansas
- k. 8700 Long, Lenexa, Kansas
- l. 8820 West 63rd Street, Merriam, Kansas
- m. 9640 Nall, Overland Park, Kansas

n. 10695 Roe Boulevard, Overland Park, Kansas

7. A copy of the lease agreement by and between Station and Crescent, with respect to the premises at 5401 NW 64th Street, Kansas City, Missouri, and with the exception, only, of the description of the premises demised, identical in terms to each of the other thirteen (13) leases, is attached to this Motion as **EXHIBIT 1**.

8. On or about August 30, 2007, Station and Crescent made and entered into addenda to each of the fourteen (14) commercial leases wherein Crescent exercised its option, irrevocably, to extend the primary term of each such lease for an additional term of five (5) years commencing July 1, 2022, and ending on June 30, 2027.

9. A copy of the Addendum to Lease Agreement entered into by Station and Crescent with respect to the premises at 5401 NW 64th Street, Kansas City, Missouri, and with the exception of the description of the premises demised, identical in terms to the thirteen (13) other addenda, is attached to this Motion as **EXHIBIT 2**.

10. As provided under each of the fourteen (14) Lease Agreements, Crescent is required to pay annual Base Rent to Station which, depending upon the nature and extent of the premises identified in said lease, ranges from \$55,949.00 to \$147,074.00 per year, which Base Rent is to be paid to Station in equal monthly installments ranging from \$4,662.41 to \$12,256.00.

11. As provided under each of the fourteen (14) Lease Agreements, Crescent is required to pay each monthly installment of Base Rent not later than the fifth (5th) day of the month to which it pertains, and any installment of Base Rent that is not paid in thirty (30) days thereafter shall bear interest at the “default rate” specified in such Lease Agreement.

12. In addition, Crescent is responsible, under each of the fourteen (14) Lease Agreements:

- a. For the payment of all real and personal property taxes assessed against the property and premises identified in each such Lease Agreement;
- b. Crescent is required, at its sole cost and expense, to perform all repairs and maintenance necessary to keep the demised premises in a clean, neat and sanitary condition, and otherwise in at least as good a condition as existed at the inception of each such Lease Agreement; and
- c. Crescent is required, at its sole cost and expense, to maintain, *inter alia*, policies of casualty insurance having an indemnity sufficient to replace all of the improvements, property, plant and equipment located on the demised premises, should they be damaged or destroyed.

13. Paragraph 20 of each of the fourteen (14) Lease Agreements provides that in the event Crescent “fails to pay any installment of monthly Base Rent when due, and such failure continues beyond the fifth (5th) day of the month for which such installment is due”:

- a. Station “may declare” each of those Lease Agreements to be “terminated;
- b. Crescent shall thereupon “surrender and deliver the” Properties to Station;
- c. “All rights and claims of Crescent in and to the use and enjoyment of the” Properties “shall cease and”;
- d. Crescent shall be liable for and pay to” Station “all rent accrued to the date of such repossession plus the present value of all rent” which under the now-terminated Lease Agreements would become due and payable thereafter.

14. Further, ¶ 26 of each of the Lease Agreements provides that each of the Security Deposits which Crescent remitted to Station at or shortly after the execution thereof shall be and constitute security for “all of” Crescent’s “obligations” under those Lease Agreements and that Station may apply those Security Deposits to or toward any “event of default by Crescent”.

15. Prior to the Petition Date, Crescent failed and refused to pay the monthly installment of Base Rent which, under each of the fourteen (14) Lease Agreements, became due for the month of February, 2009.

16. On February 6, 2009, Station gave written notice to Crescent that Station had terminated each of the fourteen (14) Lease Agreements, *instanter*, as provided under ¶ 20 thereof.

17. A copy of said Notice of Termination of Lease Agreements is attached to this Motion as **EXHIBIT 3** and by reference incorporated herein.

18. In material part, Station informed Crescent of the following:

- a. Crescent had failed to pay any of the fourteen (14) monthly installments of Base Rent due and payable for February, 2009 and that default had continued beyond February 5, 2009;
- b. As provided under ¶ 20 of each of the fourteen (14) Lease Agreements, Station was authorized and empowered to declare and did declare that each of the Lease Agreements was terminated, without further notice or opportunity for tour;
- c. As provided under ¶ 20 of each of the fourteen (14) Lease Agreements, Crescent was required to surrender and deliver each and all of the fourteen (14) leaseholds to Station immediately; and
- d. As provided under ¶ 26 of each of the fourteen (14) Lease Agreements, Station was authorized to retain and did retain each of the fourteen (14) Security Deposits of which it had custody in satisfaction, *per tanto*, of Crescent's obligation for the payment of the present value of the rent reserved under each of the Lease Agreements for the remaining term thereof.

19. Notwithstanding Station's termination of each and all of the fourteen (14) Lease Agreements, Crescent continues to use and occupy each of the demised premises and all of the improvements, plant and equipment located on the demised premises.

20. As a consequence of the Crescent's continuing use and occupation thereof, each of the premises and improvements identified in the fourteen (14) Lease Agreements remains subject to loss, casualty or destruction, and there is the continuing potential that liabilities may

arise as a result of injury to Crescent's agents, employees, customers and invitees which, as the lessor of such premises, could affect Station adversely.

21. Each of the fourteen (14) premises leased from Station by Crescent has, in turn, been subleased by Crescent to retail operators who themselves pay rent each month to Crescent.

22. Station is informed and believes that each of the subtenants to whom Crescent has subleased the premises described in the fourteen (14) Lease Agreements has paid the subrent due and owing to Crescent for February, 2009, and that it is the intention of such subtenants to continue paying such subrents to Crescent in March, 2009 and thereafter.

23. Crescent continues to use and dissipate the subrents paid to it by its subtenants for the month of February, 2009 and absent will continue to collect such subrents hereafter notwithstanding that its own leases have been terminated, that it has no leasehold estate to transfer or transmit to any subtenants and that it is, as a practical matter, diverting such rents unlawfully.

24. For all of these reasons, it is essential for Station's protection, the protection of its interests in and to the premises identified in each of the fourteen (14) Lease Agreements and as a means of identifying and resolving the interests, if any, of Crescent's subtenants in and to the properties demised under these Lease Agreements, that the Court declare such leases to have been terminated pre-petition, declare that neither the leases nor the property demised under the leases is or represents property of the estate under 11 U.S.C. § 541, declare that the assumption of such leases is expressly prohibited under 11 U.S.C. § 365(c)(3); and order Crescent to surrender each of the demised premises to Station in the exercise of the Court's power under, *inter alia*, 11 U.S.C. § 105(a).

GROUNDS FOR RELIEF REQUESTED

I. EACH OF THE FOURTEEN LEASES WAS TERMINATED ON FEBRUARY 6, 2009 WITHOUT OPPORTUNITY FOR CURE, SUCH TERMINATION WAS FULLY AND IMMEDIATELY EFFECTIVE UNDER APPLICABLE NON-BANKRUPTCY LAW AND SINCE, AS PROVIDED UNDER 11 U.S.C. § 365(C)(3), THOSE LEASES CANNOT NOW BE ASSUMED, NEITHER THEY NOR THE LEASEHOLDS TO WHICH THEY RELATE CONSTITUTE PROPERTY OF THE ESTATE

25. A “debtor’s bankruptcy estate consists of all legal and equitable interests of the debtor existing at the commencement of the bankruptcy case”, In re Foote, 277 B.R. 393, 396 (Bankr. E. D. Ark. 2002), *citing*, 11 U.S.C. § 541(a). Although “[a] leasehold interest may constitute property of a debtor’s estate, and the debtor may” then “assume or reject” that interest under 11 U.S.C. § 365(a)”, a “lease of non-residential real property that has terminated prior to the bankruptcy’s filing is excluded from the debtor’s estate under 11 U.S.C. § 541(b)(2)”, *Id.*

26. By its terms, “11 U.S.C. § 365(c)(3) prohibits assumption of a lease of non-residential real property that has been terminated prior to the filing of the petition”, In re Haines, 178 B.R. 471, 474 (Bankr. W. D. Mo. 1995) by providing that a debtor-in-possession “may not assume or assign any ... unexpired lease of the debtor” if “such lease is of non-residential real property and has been terminated under applicable non-bankruptcy law prior to the order for relief”, *Id.*, *quoting from* 11 U.S.C. § 365(c)(3).

27. In short, “the Bankruptcy Code generally upholds the pre-bankruptcy termination of ... leases without threat of later attack”, *Id.* at 477 (internal quotation omitted). For that reason, the “bankruptcy courts” themselves “generally disclaim the power to override the pre-petition termination of an executory contract or lease”, and will not “and cannot revive” an “agreement terminated before bankruptcy” if that “termination” was “otherwise effective”, *Id.*,

citing, Moody v. Amoco Oil Co., 734 F.2d 1200 (7th Cir. 1984), *cert. denied*, 469 U.S. 982, 105 S. Ct. 386, 83 L.Ed.2d 321 (1984).

28. State law traditionally governs when “resolving a question of whether a lease has been properly terminated”, In re Mako, Inc., 102 B.R. 814, 817 (Bankr. E. D. Ok. 1988), *accord*, In re Foote, 277 B.R. at 396. In this case, that means the law of Missouri, the state where four (4) of the fourteen (14) leaseholds are located and of Kansas, the situs of the remaining ten (10).

29. Under Missouri law, lease provisions to the effect that if a tenant fails or refuses to pay the rent reserved, “**the lease shall then terminate and the [tenant] will surrender ... peaceable possession**” of the premises are “**not a mere covenant, but ... a valid and enforceable condition subsequent imposed upon**” the tenant’s “leasehold interest”, Wilson v. Watt, 327 S.W.2d 841, 850 (Mo. Sup. 1959) (emphasis added). When “**a lease contains a provision authorizing the lessor to terminate the tenancy on the failure to pay rent, the lessor is authorized to end the lease on the breach of such a condition**”, Superior Outdoor Advertising Co. v. Snadon, 965 S.W.2d 421, 424 (Mo. App. 1998).

30. It is clear, moreover, that when the lessor enforces this “condition subsequent ... upon” the lessee’s “leasehold interest” through “an unequivocal” expression of “intention to claim a forfeiture and demand possession”, the lessor’s demand is “**equivalent to a reentry**” by the lessor to the former leasehold and “**as a matter of law**” will “**preclude [any] holding**” that the lessor has somehow “**waived the forfeiture of the lease**”, Ball v. Kemp, 419 S.W.2d 55, 59 (Mo. Sup. 1967) (emphasis added).

31. In sum, “provisions authorizing the termination of a lease for failure to pay rent” have been upheld repeatedly in Missouri and any “number of cases” can be “cited to support that statement”, Edith Investment Co., Inc. v. Fair Drug, Inc., 617 S.W.2d 567, 569 (Mo. App. 1981).

That being the case, where a Missouri lease is terminated before a bankruptcy petition is filed, the lease and the leasehold to which it relates are not property of the bankruptcy estate and may not be utilized as such through the mechanism of assumption, In re Huffman, 171 B.R. 649 (Bankr. W. D. Mo. 1994).

32. Kansas law is to same effect. In Kansas, as in Missouri, a **“lessor ordinarily may terminate a lease, pursuant to a forfeiture clause contained therein, for lessee’s breach of [a] covenant as to payment of rent”**, Groendycke v. Ellis, 205 Kan. 545, 549, 470 P.2d 832, 835 (1970).

33. Although the right to forfeiture for non-payment of rent is subject to judicial control, “relief” from forfeiture “may be granted” only “for special circumstances”, *Id.*, 470 P.2d at 835. In order to establish such “special circumstances”, “facts must be shown which would render it inequitable to permit the lessor to enforce his legal rights”, *Id.* at 470 P.2d at 835-36, *quoting from Kanakry v. Sayles Finishing Plants, Inc.*, 53 R.I. 455, 457, 167 A. 121, 122. As a matter of law, a “provision in a lease ... for forfeiture for non-payment of rent is valid and enforceable ... and equity will not forgive a plain violation of” that “contract” absent proof of “circumstances of justification or excuse”, *Id.* at 470 P.2d at 836, *quoting from Kanakry*, 53 R.I. at 457, 167 A. at 122.

34. Among the many conceivable “circumstances of justification or excuse”, it appears that to date the “Kansas Supreme Court has acknowledged authority” only “for the view that forfeiture for non-payment of rent should be denied where a good faith controversy exists as to the amount of rent due”, In re Valley View Shopping Center, L.P., 233 B.R. 120, 123-24 (Bankr. D. Kan. 1999). Even then, it is the lessee’s burden to establish grounds for relief and if “the entire record relating to” the “particular lease” and a consideration of “the equities inherent

therein so far as lessees are concerned” fail to establish such “special circumstances”, there will be “nothing warranting a denial of forfeiture”, Groendyke, 205 Kan. at 550, 470 P.2d at 836.

35. Here, there are no “special circumstances” sufficient to excuse Crescent’s fourteen (14) defaults. Quite the contrary, Crescent not only failed to pay fully agreed rents that were indisputably due, but it did so despite having received all of the February rents from its own fourteen (14) subtenants rents which, in aggregate amount, exceeded the total of the February, 2009 installments due to Station.

36. In short, Crescent has profited from default and unless it is dispossessed, will continue to profit from the sublease of premises to which it has no color of title, under leases which have already terminated and can never become property of the estate.

II. GIVEN THE FACT THAT THE FOURTEEN (14) LEASES HAVE BEEN TERMINATED, THAT NEITHER THEY NOR ANY LEASEHOLD FORMERLY ASSOCIATED WITH THEM CONSTITUTE PROPERTY OF THE ESTATE, AND THAT MERE “NAKED POSSESSION” OF THOSE LEASEHOLDS IS INSUFFICIENT TO WARRANT PROTECTION UNDER TITLE 11, THE AUTOMATIC STAY SHOULD BE DISSOLVED AND CRESCENT ORDERED TO SURRENDER POSSESSION OF EACH OF THESE PREMISES TO STATION FORTHWITH

37. To emphasize again, it “is well settled that bankruptcy court does not have the authority to resurrect a lease which has been terminated prior to the filing of bankruptcy”, In re Gromyko, Inc., 142 B.R. 20, 21 (D. R.I. 1992), *citing*, Matter of Shelco, Inc., 107 B.R. 483 (Bankr. D. Del. 1989); In re Trang, 58 B.R. 183 (Bankr. S. D. Tex. 1985); In re Maxwell, 40 B.R. 231 (N. D. Ill. 1984). No such authority exists “not even pursuant to Section 105 of the Code”, In re Premier Automotive Services, Inc., 2006 WL 4711334 *5, Bankr. D. Md., Case No. 05-20168-JS (June 14, 2006).

38. On the contrary, 11 U.S.C. § 105(a) “does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a

roving commission to do equity”, Wilner Woods Products Co. v. State of Maine, 128 B.R. 1, 3 (D. Me. 1991). Even “as a court of equity ... the bankruptcy Court’s equitable discretion is limited and cannot be used in a manner inconsistent with the commands of the Bankruptcy Code”, In re Plaza De Diego Shopping Center, Inc., 911 F.2d 820, 830 (1st Cir. 1990).

39. Therefore, the “[t]he fact that the automatic stay gives limited and temporary protection to a holdover tenant-debtor” like Crescent “based solely on naked possession does not mean that there is a viable executory contract which a debtor may assume ...”, In re Gromyko, 142 B.R. at 21. It does not matter that the debtor professes to have the “ability to provide [the] lessor[] with adequate protection during its holdover tenancy” or that it is essential that the Debtor “stay in possession of the premises” or that if the debtor is not “allowed to operate the business ...”, it will have “no viable plan of reorganization”, *Id.* at 22, or that “in good conscience”, the Crescent should be given an opportunity to resurrect the lease, In re P & J Marketing, Inc., 142 B.R. 608, 610 (Bankr. D. R.I. 1992). As demonstrated above, if a “lease has expired by its own terms or has been terminated prior to the commencement of the bankruptcy case ... there is nothing left for the [debtor] to assume ...”, *Id.*

40. For these reasons and given the provisions of 11 U.S.C. § 362(b)(10), other courts have held that “[b]ecause the debtor has no interest in a validly terminated lease, the automatic stay does not preclude a lessor from taking possession of property leased to a debtor under a terminated non-residential real property lease”, In re Foote, 277 B.R. at 398. According to those courts, it is not even “necessary for the lessor to move for relief from stay in order to regain possession of non-residential real property held by a debtor under a terminated lease”, *Id.*, *citing*, In re Neville, 118 B.R. 14, 18 (Bankr. E. D. N.Y. 1990).

41. Station has not chosen that course. Instead, Station has sought authority from this Court before acting against Crescent. For all of the reasons identified above, it asks that the Court dissolve the automatic stay as it would in any other case with respect to property in which the Debtor has no interest and necessarily no equity, and which will play no part in any reorganization whether reasonably in prospect, or not.

42. Further, and just as the Court could and would order Crescent to surrender that property under the mandate of 11 U.S.C. § 365(d)(4), Station requests that the Court order Crescent to “surrender and abandon” each of the fourteen (14) former leaseholds and that Station be allowed to “take immediate possession” thereof without the necessity of further proceedings whether in this or any other court, *see, In re Mako, Inc.*, 102 B.R. 818, 822 (Bankr. E. D. Ok. 1988).

RELIEF REQUESTED

For each and all of the reasons identified above, movant Station Acquisition Corp. requests the following relief:

A. That the Court make and enter its order declaring that each of the fourteen (14) pre-petition leases of non-residential real property by and between Station as lessor, and Debtor Crescent Oil Company as lessee, was terminated prior to the order for relief in this case, and that neither the leases nor the leaseholds to which they relate can be assumed under 11 U.S.C. § 365;

B. That the Court make and enter its order commanding and directing Crescent immediately to vacate and surrender each of the demised premises identified in the fourteen (14) pre-petition leases to Station or its designee in the same plight and condition as they existed at the inception of such leases with all of the property, plant, fixtures, equipment and inventory that now exist thereon; and

C. That the Court grant Station such other and further relief as may be justified in the premises.

Respectfully submitted,

McDOWELL, RICE, SMITH & BUCHANAN

/s/ James F.B. Daniels
James F.B. Daniels, MO Bar #30003
R. Pete Smith, KS Bar #07200
A. Jeffrey Mislner, KS Bar #16383
605 W. 47th Street, Suite 350
Kansas City, MO 64112-1905
Telephone: (816) 753-5400
Facsimile: (816) 753-9996

ATTORNEYS FOR STATION ACQUISITION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was served this 12th day of February, 2009 to the persons requesting electronic notice.

/s/ James F.B. Daniels