

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re	)	Case No. 05-16685
	)	
Esq. Communications, Inc.	)	Chapter 11
	)	
	)	
Debtor	)	Judge Burton Perlman

**ORDER GRANTING MOTION FOR RELIEF FROM STAY**

The debtor named in the caption, Esq. Communications, Inc., is one of several debtors which have filed Chapter 11 bankruptcy cases, whose cases are being jointly administered. The present motion, however, is directed only at the captioned debtor because it relates to premises occupied by Esq. Communications, Inc., premises for which the debtor had originally taken occupancy pursuant to a lease. The lessor in the lease

agreement was the City of Youngstown, Ohio. The premises in question are located at 34 Federal Plaza West, Suite 1200, in Youngstown, Ohio ("premises"). The record owner of the building in which the premises are located, Youngstown Wick Building Real Estate Partners, (hereafter, "Wick") here moves for relief from the automatic stay of 11 U.S.C. §362(a) so that it may proceed with a forcible entry and detainer action in state court.

The following facts are uncontroverted. The City of Youngstown at the time that the lease was entered into was the owner of the building in which the premises are located. Percy Squire, a principal of the debtor, believed that he had an understanding with the City of Youngstown to purchase the building. When the City refused to honor the understanding, and refused to sell the building to Squire he brought suit against the City for alleged breach of contract. The Plaintiff in the suit was Percy Squire Co. LLC. Squire is an attorney and conducts his law practice in that name. Percy Squire Co. LLC is not a debtor in this court. The purpose of the litigation which was filed in the Mahoning County Court of Common Pleas, was to seek relief for alleged breach of the agreement between Squire and the City of Youngstown. The Common Pleas court dismissed the action on February 14, 2005. Squire then filed a notice of

appeal on March 2, 2005, and the appeal is pending. No stay pending appeal was obtained. The City of Youngstown then on May 15, 2005 conveyed title to movant. Debtor has made no payments of rent for the premises since the time the movant took title.

Debtor opposes the motion on the ground of lis pendens. Movant contends that the doctrine is inapplicable here, and argues further that it is entitled to relief because the lease had terminated by its own terms.

Essentially, under the application of lis pendens, the Debtor argues that Wick was unable to obtain good title to the property on May 20, 2005 due to Percy Squire Co. LLC's appeal of its state court action against the City of Youngstown. Because of the appeal Debtor contends that the state court litigation was still in progress when movant took title, and thus movant's title is defective under the doctrine of lis pendens.

The doctrine of lis pendens is governed by O.R.C. §2703.26 which states:

When summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency. While pending, no interest can be acquired by third persons in the subject of the action, as against the plaintiff's title. (2005).

The purpose of lis pendens is to protect a plaintiff's

interest in property that is the subject of litigation against a third party who attempts to take an interest in the property while the litigation is still pending. Martin, Rochford & Durr v. Lawyer's Title Ins. Co., 619 N.E. 2d 1130, 1131 (Ohio App. 1993). Thus, if a third party takes an interest in property while a lawsuit is pending, the third party takes the property subject to the outcome of the litigation. Id. In addition, the doctrine of lis pendens does not in and of itself grant a plaintiff greater rights in property than a third party who obtained their rights during the pendency of the suit. Katz v. Banning, 617 N.E. 2d 729, 733 (Ohio App. 1992).

The doctrine of lis pendens, even if it was a valid defense to a motion for relief from stay, simply does not apply to the Debtor. This is because the Debtor is not a party to the state court litigation. The doctrine only operates to protect a plaintiff's interest in property that is the subject of a lawsuit. Percy Squire Co., LLC, a non-debtor entity, was the sole plaintiff in the state court litigation with the city of Youngstown regarding the property.<sup>1</sup> As a result, the Debtor may not assert the doctrine of lis pendens as a defense to movant's motion for relief.

Movant asserts that it is entitled to succeed in its motion

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<sup>1</sup>See Percy Squire Co., LLC v. City of Youngstown, 04 CV 4284, (Mahoning County Common Pleas Court, Feb. 14, 2005)(finding that no implied contract for the sale of the building existed between the parties).

because by the terms of the written lease between the Debtor and the City of Youngstown expired on March 31, 2001. The Debtor remained in the building as a holdover tenant, and in accordance with the provisions of the lease, the Debtor was treated as having a month to month lease thereafter. The Debtor has failed to make any lease payments since sometime prior to May 15, 2005.

Bankruptcy courts do not have the authority to reinstate a lease that was terminated in accordance with state law prior to the bankruptcy filing. In re Nasir, 217 B.R. 995, 997 (Bankr. E.D. Va. 1997), citing In re Lady Liberty Tavern Corp, 94 B.R. 812 (S.D.N.Y. 1988); In re Caldwell, 174 B.R. 650 (Bankr. N.D. Ga. 1994); In re Smith, 105 B.R. 50 (Bankr. C.D. Cal. 1989). The automatic stay under 11 U.S.C. §362 does not apply where a lease has terminated. Id., citing In re A. Bus. and Community Dev. Corp., 901 F. 2d 325 (3d. Cir. 1990); In re Fairview Estates, 94 B.R. 938 (Bankr. W.D. Mich. 1989); In re 163<sup>rd</sup> St. Med. Corp., 67 B.R. 799 (S.D. Fla. 1986); In re Tranq, 58 B.R. 183 (Bankr. S.D. Tex. 1985).

The automatic stay does not afford a debtor the opportunity to revive a lease that was properly terminated by the lessor prior to the filing. Caldwell, supra at 652. Thus, a lessor's desire to evict a debtor based upon a lease that was terminated pre-petition provides sufficient cause under 11 U.S.C. §362(d)(1) to grant relief from stay. Id.

In the instant case, the lease provided that the landlord

may terminate the lease for non-payment of rent after a ten day period expired. Due to the fact that the Debtor has failed to make rent payments to the lessor since sometime prior to May 15, 2005, it is clear that the lease terminated prior to the filing of bankruptcy. After the termination of the lease, the Debtor was left with no further contractual right to occupy the building at the time of filing. In accordance with the holding in Caldwell, this Court also, finding that the lease had terminated, holds that this provides sufficient ground to grant relief from the automatic stay under 11 U.S.C. §362(d)(1). As a result, Wick's motion for relief from the automatic stay is granted.

**IT IS SO ORDERED.**

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