



IT IS ORDERED as set forth below:

Date: February 13, 2008

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 07-81755

Marshall Silvester Wallace,

CHAPTER 13

Debtor.

JUDGE MASSEY

Steve F. Bechtel, d/b/a B&B Properties,

Movant,

v.

CONTESTED MATTER

Marshall Silvester Wallace, Evelyn Wallace and
Nancy J. Whaley, Trustee,

Respondents.

ORDER ON MOTION FOR RELIEF FROM STAY

On January 11, 2008, Steve Bechtel moved for an order modifying the automatic stay to permit Movant to regain possession of real property leased by Movant to Debtor and Evelyn Wallace pursuant to a written lease agreement, a copy of which is attached to the motion.

Paragraph 3 of the motion alleges that “[t]he default, including late charges and dispossession costs, and excluding attorney’s fees and costs, is approximately \$9,050.00.” There is no other mention of the attorney’s fees in the motion, except that the demand on page 4 asks for an award of “attorney’s fees and costs incurred in this matter.” Movant does not contend that Debtor occupies the leased premises, and the petition does not list the leased premises as his residence.

The lease does not mention attorney’s fees. Paragraph 18 of the lease states that “[a]ll remedies under this agreement or by law or equity shall be in cumulative. If a suit for any breach of this agreement establishes a breach by said Resident, (sic) shall pay to Management all expenses incurred in connection therewith.” The motion is not accompanied by a brief and makes no legal argument that Debtor is liable for attorney’s fees. Debtor proposes to reject the lease in his plan.

The Court scheduled a hearing on the motion for February 6, 2008. None of the Respondents appeared in opposition to the motion. Thereafter, Movant’s counsel submitted a proposed order that provides in part, “Movant is awarded its reasonable attorney’s fees and costs incurred in this matter in the amount of \$850.00.”

The specific question that the motion and the proposed order raise is whether Movant is entitled to an award of attorney’s fees. For the following reasons, the Court concludes that Movant is not entitled to an award of attorney’s fees.

First, the motion does not allege facts that if true would entitle Movant to the relief requested. A default on a motion is no different than a default on a complaint. The failure to respond to a complaint or to a motion does not entitle the plaintiff or movant to relief demanded in such a document and certainly not to relief as to which the document is silent merely because

of the default. A plaintiff or movant is only entitled to the relief that is supported by facts admitted by the defendant or respondent. “The defendant, by his default, admits the plaintiff’s well-pleaded allegations of fact, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established.” *Nishimatsu Const. Co., Ltd. v. Houston Nat. Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). Facts that are not well-pleaded in the complaint or motion are not admitted as a result of a default, and a default is not an admission of the validity of a conclusion of law.

In this case, the proposed order had the Court awarding Movant attorney’s fees and costs of \$850. Yet, the motion did not allege that Movant incurred such expenses and did not allege the amount of any fees; hence, from a purely factual standpoint, the motion failed to state a claim upon which relief can be granted. As a consequence, Respondents have not admitted that Movant incurred an expense of \$850 for attorney’s fees or that a fee of \$850 is reasonable. Therefore, submitting a proposed order awarding Movant \$850 for attorney’s fees was highly improper.

Second, the motion fails to show that Debtor is liable to Movant for attorney’s fees. Paragraph 18 of the lease, the only one referring to expenses incurred by “Management,” is at best limited to expenses incurred in connection with a “suit for any breach of the agreement.” But a motion for stay relief is not a suit for a breach of the lease. Movant is not seeking damages for the breach or possession of the property. When and if he seeks to evict whoever is in possession of the premises or to assert a claim for damages against the co-debtor, Movant will have instituted a “suit” for breach of the lease. That he included the Trustee as representative of

the bankruptcy estate, which is not a party to the lease, further illustrates the point that the motion is not a suit for the breach of the lease.

Further, the second sentence of paragraph 18 is not a complete sentence; the subject of the sentence is missing. It might be argued that the intent of the parties was that both lessees “shall pay,” but there is no evidence or factual allegation to support the assumption that Debtor, who apparently does not occupy the premises, agreed to pay Movant’s expenses. In short, the portion of the motion seeking to make Debtor liable for paying Movant’s attorney’s fees is without merit as a matter of law, and the submission of the proposed order awarding attorney’s fees on the basis of the asserted liability was highly improper.

“Stay litigation is limited to issues of the lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization.” *See In re Johnson*, 756 F.2d 738, 740 (9th Cir. 1985). It is not a process by which a creditor should normally seek to adjudicate the validity of or amount of a claim for attorney’s fees incurred in bringing the motion for stay relief, at least where the debtor does not propose to retain possession of property in which the movant has an interest.

Accordingly, because Respondents did not oppose the motion for stay relief, the motion is GRANTED to this extent only: the automatic stay and the co-debtor stay are modified to permit Movant to pursue whatever remedies he may be entitled to pursue under state law with respect to possession of the leased premises and as to the Respondent Evelyn Wallace. Otherwise, the motion is DENIED.

END OF ORDER