



IT IS ORDERED as set forth below:

Date: April 2, 2012

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In Re:	:	Chapter 11
	:	
CITRUS TOWER BOULEVARD	:	
IMAGING CENTER, LLC,	:	Case No. 11-70284-MGD
	:	
Debtor.	:	Judge Mary Grace Diehl
	:	

**ORDER GRANTING DEBTOR’S MOTION TO ASSUME UNEXPIRED LEASE
WITH SKY TOP ENTERPRISES, LLC**

Several motions came on for hearing on March 13, 2012.¹ Pivotal to the future of this Chapter 11 case is whether Debtor can assume its unexpired lease with Sky Top Enterprises, LLC pursuant to 11 U.S.C. § 365 (“Motion”). (Docket No. 114). Gus Small and Anna Humnicky appeared as Debtor’s counsel. James Rollins, Phillip Smith, and Paul Vranicar, attorneys for Sky Top Enterprises, LLC (“Landlord” or “SkyTop”), also appeared at the hearing opposing the Motion to Assume. John Isbell, representing Key Bank Financial Inc., Debtor’s largest creditor – asserting

¹ Docket Nos. 114, 115, 118, 123, 124 & 129

a claim of just under \$5 million, appeared at the hearing in support of Debtor's Motion.

After hearing opening arguments on the Motion, Debtor orally presented an amended Motion. The Court heard testimony from Debtor's managing member and eighty percent owner, George D. Overend, and closing arguments from the parties. At the close of the hearing, the matter was taken under advisement and this Order represents findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

This Court has jurisdiction over this core proceeding under 28 U.S.C. §§ 1334(b) and 157, and venue is proper. For the reasons set forth below, Debtor's motion to assume the unexpired lease with SkyTop is granted.

I. Factual Background and Procedural Posture

The parties entered into a September 2008 lease agreement for two floors of a Clermont, Florida medical office building ("Lease"), which serves as Debtor's sole location and operation ("Facility"). Debtor built out the shell of a building and the Facility began operating in November 2010. The Facility operates as an imaging center and provides treatment and services to patients. Debtor operates the Facility and rents the equipment and office space to doctor tenants. SkyTop owns the building.

The Lease has a ten-year term with two renewable 3-year periods and a purchase option. (Docket No. 46, Exhibit A). The monthly rent owed to SkyTop is \$40,299.16. Debtor did not make all the pre-petition rent payments owing under the Lease and does not contest that it was in default pre-petition. SkyTop issued a notice of default to Debtor in February 2011, and on March 21, 2011, SkyTop filed a complaint for eviction and damages in the Fifth Judicial Circuit in and for Lake County, Florida ("Florida Court"). The same day the Florida Court issued an order directing Debtor

to pay a total amount of \$512,948.24 into the court registry, Debtor filed its voluntary petition to commence this Chapter 11 case.

In September 2011, this Court granted SkyTop's motion for relief from the automatic stay to allow the parties to return to the Florida Court to conclude the pending litigation and make a final determination as to the amount of pre-petition rent the Debtor owed under the Lease.² On February 10, 2012, the Florida Court issued an Order finding that the amount of pre-petition rent owed from Debtor to SkyTop was \$941,878.08, exclusive of attorneys' fees that SkyTop may be entitled to recover pursuant to the Lease terms.³ At the hearing, Debtor represented that it had filed a notice of appeal of the Florida Court order. (Docket No. 136, Exhibit D).

Debtor is performing its post-petition Lease obligations and seeks authority to assume the Lease. Debtor's original Motion provided for a cure of the pre-petition default upon the closing of a sale or through a Chapter 11 plan. Neither proposed option had any definite timeline. The proposed cure period was minimally 24 months. Debtor had neither filed a Chapter 11 plan nor a Motion to Sell, and Debtor had not negotiated or executed a contract for sale. At the conclusion of opening arguments, the Court noted that the written proposal to assume the Lease was likely insufficient to meet the § 365(b)(1) requirements for assumption of an unexpired lease.

After a short recess, Debtor orally amended its Motion with the following terms. Debtor proposed to cure the pre-petition monetary default— \$941,878.07 plus any attorneys' fees, in equal

² The March 2011 Florida Court order specifically excluded the 2009 rents, late charges, and interest because the 2009 amounts required further determination and consideration with respect to a tenant improvement allowance under the Lease.

³ SkyTop sought stay relief to pursue its full pre-petition rent claim in the Florida Court, and that motion was granted at the March 13, 2012 hearing. (Docket No. 129).

payments over a twelve-month period, beginning within 30 days. (The Court clarified that the first installment payment would be 30 days from the hearing date or another date agreed to by the parties.) Debtor also plans to sell certain equipment and deliver title to SkyTop within 30 days. Debtor represented that the value of the equipment would be approximately \$300,000. Debtor proposes to reduce the pre-petition arrears by the value of the equipment; therefore, reducing the monthly cure obligation. However, if Debtor is unable to sell the equipment and provide title, the monthly cure payments would continue according to the amount determined by the Florida Court. Debtor's amended Motion also leaves open Debtor's ability to cure the pre-petition default through a sale or to amend treatment of the pre-petition default through confirmation of a plan if performed within the twelve-month period.

Debtor proposes that the source of the cure payments under Debtor's amended motion to assume would come from Mr. Overend's personal funds. Mr. Overend testified that he would and could make the monthly installment payments over the course of twelve months to SkyTop. He testified that his net worth exceeded \$20 million. The testimony revealed that Mr. Overend provided personal financial statements to Key Bank at the time it entered into the existing equipment lease, and that Key Bank (holding approximately a \$5 million unsecured claim) has a personal guaranty on its loan from Mr. Overend. The operating reports filed by Debtor show that Mr. Overend has contributed more than \$1.5 million in personal funds to finance the Debtor's operations.⁴

Debtor is also hopeful that it can generate rent from new tenants in the near future. Debtor's current tenant, Dr. James Ray with the National Training Centers Sports Medicine Institute, P.A.

⁴ In the context of providing adequate protection to Key Bank, the Court approved Mr. Overend's payments as an operating loan to Debtor – subordinate to all other claims asserted against the estate. (Docket No. 106).

(“NTC”), recently vacated the Facility. Debtor believes the relationship with Dr. Ray is relevant to this Motion because the Court’s assessment of the § 365(b)(1) cure requirements is a fact specific analysis. Debtor is engaged in state court litigation with Dr. Ray and NTC. Dr. Ray served as the managing member of SkyTop at the time Debtor entered into the Lease agreement. Debtor, as lessor, and NTC, as lessee, entered into a lease agreement for equipment and services in December of 2008. Debtor alleges that Dr. Ray used the equipment and Facility, yet never made any payment to Debtor. Mr. Overend testified that Dr. Ray performed 2,474 MRI scans at the Facility, beginning in mid-November of 2010. At the hearing, Debtor represented that Dr. Ray had vacated the Facility on February 29, 2012, which now allows Debtor to market the Facility and engage new tenants.

II. Legal Analysis

This issue before the Court is whether Debtor’s oral amended motion to assume meets the standard for assumption under § 365(b). Under § 365(b), a debtor in possession may not assume an unexpired lease (as to which there has been a default) unless, at the time of assumption, it – “(A) cures, or provides adequate assurance that the trustee will promptly cure, such default; (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and (C) provides adequate assurance of future performance under such contract or lease.” § 365(b). Debtor has the burden of proof on the Motion, including the burden to show the proposed twelve month cure “promptly cures” the default and that its has offered “adequate assurance of future performance” under the lease. *In re Everest Crossing, LLC*, 2010 WL 696750 (Bankr. D. Mass. Feb. 24, 2010); *In re Gant*, 201 B.R. 216, 220 (Bankr. N.D. Ill. 1996). The only two requirements at issue are subsections (b)(1)(A) and (C).

As a preliminary matter, Debtor has sufficiently preserved its right to timely seek assumption of the unexpired lease with SkyTop. Section 365(d)(4) governs assumption of an unexpired nonresidential real property lease where a debtor is the lessee. If certain statutory timelines are not complied with, then the lease is deemed rejected. § 365(d)(4)(A). The lease must be assumed “by the earlier of – (i) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming a plan.” § 365(d)(4)(A)(i-ii). Debtor was granted an extension to assume or reject to and including February 7, 2012. (Docket No. 84). This Motion was filed on February 7, 2012, and is, therefore, timely. *Cousin Props. v. Treasure Isles HC, Inc. (In re Treasure Isles HC, Inc.)*, 462 B.R. 645, 650 (B.A.P. 6th Cir. 2011)).

Debtor asserts that the proposed twelve-month cure period is sufficient to satisfy the requirement of establishing adequate assurance of a prompt cure required under § 365(b)(1)(A). Debtor submits that the term of the lease and Mr. Overend’s promise and personal financial ability to provide the cure payments demonstrate adequate assurance of a prompt cure. Debtor also argues that the facts and circumstances of this case, specifically including Dr. Ray’s failure to make any payments to Debtor, should impact whether the proposal to cure is sufficiently prompt. Debtor similarly argues that Debtor’s post-petition performance under the Lease and Mr. Overend’s promise and personal ability to make ongoing Lease payments provide SkyTop adequate assurance of future performance under the Lease.

SkyTop opposes the Motion and asserts that Debtor’s proposal for adequate assurance of a prompt cure and of future performance is far too speculative. SkyTop asserts Mr. Overend’s testimony regarding his personal ability to meet the proposed monthly cure payment and ongoing monthly Lease payment, without financial statements, is too theoretical to satisfy Debtor’s burden

of proving the statutory requirements under § 365(b). SkyTop also emphasizes the inadequacy of Debtor's proposed adequate assurance of a prompt cure and future performance based on Debtor's total absence of revenue, in addition to the absence of evidence demonstrating that Debtor has a viable business model to substantiate the proposed payment stream.

A. Debtor has provided adequate assurance that it will promptly cure the pre-petition default.

Debtor proposes to cure the prepetition arrearage claim to SkyTop over a twelve-month period. Debtor has suggested that it will reduce the \$941,878.07 pre-petition arrearage claim, as determined by the Florida Court, in a larger lump sum transfer if it can sell the equipment. Yet, Debtor's inability to sell the equipment will not affect ongoing cure payments over a twelve-month period, including any increase due to inclusion of attorneys' fees. Debtor's proposal to pay nearly \$80,000.00 per month in cure payments is supported by Mr. Overend's promise to fund these payments from his personal finances. To determine whether Debtor satisfies the first requirement under § 365(b)(1), the Court must find, first, that Debtor's proposal provides adequate assurance and, second, that the twelve-month cure period is sufficiently prompt.

To determine whether the proposed cure of pre-petition defaults meet the statutory requirement of a prompt cure, courts consider the facts and circumstances on a case by case basis. *In re Embers 86th Street, Inc.*, 184 B.R. 892, 900 (Bankr.S.D.N.Y.1995). "There is no bright-line test as to what constitutes prompt for all cases." *In re Everest Crossing, LLC*, 2010 WL 696750 (Bankr. D. Mass Feb. 24, 2010). Here, the long-term nature of the Lease, the substantial amount of each monthly cure payment, the net worth of Mr. Overend, and the circumstances impacting Debtor's pre-petition default support a finding that the twelve monthly installments to cure the pre-

petition default claim, as promised by Mr. Overend, constitutes adequate assurance of a prompt cure.

Some courts have found it useful to contrast the proposed “curing” period with the remaining life of the unexpired lease, and have found a proposed cure to be “prompt” so long as the proposed period for curing the default does not extend to the end of the lease period. *In re PRK Enters., Inc.*, 235 B.R. 597, 601 (Bankr. E.D. Tex. 1999) (citing *In re Gold Standard at Penn, Inc.*, 75 B.R. 669, 673 (Bankr. E.D. Pa.1987)). Here, the remaining term of the Lease far exceeds the 1-year cure period. The Lease terminates January 31, 2019 and has two 3-year renewable terms with a purchase option.

Generally, a time period of one year or less has been construed as satisfying the requirement of prompt payment of the cure amount with a lease that has significant time remaining on its term. *In re LRP Mushrooms, Inc.*, 2010 Bankr. LEXIS 2241 (Bankr. E.D. Pa. July 13, 2010)(holding that given the remaining 5-year term on the Lease, which was essential to the debtor’s reorganization, the debtor's cure proposal to become current in a period not to exceed 12 months met the statutory requirement under section 365(b)); *In re Everest Crossing, LLC*, 2010 WL 696750 (finding 18-month cure period prompt when debtor was in year 5 of a 10-year extended lease); *In re MP Invs., LLC*, 2010 Bankr. LEXIS 6294, 9-10 (Bankr. S.D. Iowa Nov. 18, 2010) (citing NORTON BANKRUPTCY LAW & PRAC. 3d § 46:29 (2010)); *In re Brown*, 2006 Bankr. LEXIS 2180, 2006 WL 2546824, at *3-*4 (Bankr. S.D. Miss. Sept. 1, 2006) (13-month cure is sufficiently prompt under the circumstances where the lease was the debtor’s major asset, five years remained on the primary term of the lease, and debtor made other offerings to satisfy the adequate assurance of payment).

Secondly, “[a]dequate assurance of a prompt cure requires that there be a firm commitment to make all payments and at least a reasonably demonstrable capability to do so.” *In re Embers 86th*

Street, Inc., 184 B.R. at 900–01 (quoting *In re R.H. Neil, Inc.*, 58 B.R. 969, 971 (Bankr. S.D.N.Y. 1986)). Here, Mr. Overend pledges to make the cure payments. Mr. Overend’s testimony was that he would be able to make the cure payments over the 1-year period. His testimony regarding his ability to pay relied on his net worth. Although there was some variance in his estimation, his testimony established that his net worth, minimally, exceeds \$10 million. He also testified that he has sufficient liquid or semi-liquid assets to make the nearly \$80,000 monthly cure payments, in addition to his other obligations.

SkyTop argues that Mr. Overend’s testimony on its own without supporting financial statements is too speculative to constitute adequate assurance of a prompt cure. Although Debtor could have presented additional evidence regarding Mr. Overend’s ability to pay, his testimony was credible and uncontradicted. Mr. Overend’s promise to pay is supported by his performance in this case, as Debtor is current on its post-petition Lease payments.

Further, as SkyTop points out, Mr. Overend has paid a significant amount into Debtor’s business in advance of the bankruptcy and during the pendency of the case. At the time of the hearing, Mr. Overend had contributed at least \$1,571,000.00 since the commencement of this case. Given Mr. Overend's past performance in this case and his overall investment in Debtor and this Facility, his testimony alone regarding his financial ability to pay the cure amount is sufficient evidence for the Court to find that he is capable and likely to perform, which constitutes adequate assurance. Debtor has reasonably demonstrated its capability to satisfy § 365(b)(1)(A)’s requirement to provide adequate assurance of a prompt cure.

B. Debtor has provided adequate assurance of future performance under the Lease.

Debtor can only assume the Lease if it is able to demonstrate “adequate assurance of future performance.” § 365(b)(1)(C). Assurance of future performance is adequate ‘if performance is likely (i.e. more probable than not)’ and the degree of assurance necessary to be deemed adequate ‘falls considerably short of an absolute guaranty.’ *In re M. Fine Lumber Co.*, 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008) . The burden is on the movant. *In re Tex. Health Enters., Inc.*, 246 B.R. 832, 835 (Bankr. E.D. Tex. 2000). A debtor need not prove that it will “thrive and make a profit.” *In re M. Fine Lumber Co.*, 383 B.R. at 573. It must simply appear that the rent will be paid and other lease obligations met. *Id.*

Courts that look to the legislative history of the statute have found that the phrase was to be given a practical, pragmatic construction. *Cinicola v. Scharffenberger*, 248 F.3d 110, 120 (3d Cir. 2001) (citing *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309-10 (5th Cir. 1985)). In determining whether “adequate assurance of future performance” has been shown, courts have considered some of the following factors: (1) the debtor's payment history; (2) presence of a guarantee; (3) presence of a security deposit; (4) evidence of profitability; (5) a plan which would earmark money exclusively for the landlord; (6) the general outlook in the debtor's industry; and (7) whether the unexpired lease is at, or below, the prevailing rate. *In re M. Fine Lumber Co.*, 383 B.R. at 573 (citing *In re Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1310 (5th Cir. 1985)).

Debtor has demonstrated adequate assurance of future performance. Again, Mr. Overend’s promise to continue paying the post-petition rent provides adequate assurance of his financial ability

and commitment to make the ongoing \$40,229.16 post-petition rent payments. Although SkyTop argues that Mr. Overend's promise alone is insufficient to provide adequate assurance, as noted above, Mr. Overend's testimony was credible and his net worth and commitment to the project make it likely - more probable than not - that he would and could continue to make the post-petition Lease payments.

Debtor's overall investment and commitment to the Facility are influential in determining that adequate assurance of future performance has been shown. Mr. Overend's personal financial contribution to maintain the facility exceeds \$1.5 million, solely post-petition. The undisputed evidence shows that Debtor built out the building from a shell to a specialized treatment facility. Mr. Overend's testimony also evidences the efforts he and other members of Debtor, including several orthopedic surgeons, are taking to relet the space since the end of February when Dr. Ray vacated the premises. Mr. Overend's testimony regarding his personal commitment to the Facility was credible and persuasive. On more than one occasion he stated with conviction that based on the amount of money he has invested thus far, he "would not let the project go for nothing." Debtor's investment in the Facility is so substantial that Debtor and Mr. Overend and its other principals have every incentive to maintain the Lease. Mr. Overend's credible testimony and investment in the Facility coupled with Debtor's performance on the post-petition Lease obligations contribute to the finding that Debtor has established adequate assurance of future performance.

Another main factor influencing the Court's determination of adequate assurance of future performance under the Lease, is the evidence in support of this Lease being valuable and under market. *In re Serv. Merch. Co.*, 297 B.R. 675, 683 (Bankr. M.D. Tenn. 2002) (considering value of below market lease in the context of adequate assurance under 11 U.S.C. § 365(b)(3)); *In re Rickel*

Home Ctrs., Inc., 240 B.R. 826, 835 (D. Del. 1998) (considering the value of below market lease in the context of adequate assurance under 11 U.S.C. § 365(b)(3)). Although the testimony is somewhat vague, SkyTop agrees that the Lease is valuable. Mr. Overend testified as to the number of scans Dr. Ray performed in the period of November 2010 through February 2012. There is testimony regarding the proximity to the hospital and the initial interest from other doctors in the short period since Dr. Ray vacated the premises and made it available to other tenants.

The court in *In re M. Fine Lumber Co., Inc.*, allowed Debtor to assume an unexpired lease even when the debtor's business was failing and Debtor's payment history, both pre- and post-petition, was admittedly "less than stellar." *In re M. Fine Lumber Co., Inc.*, 383 B.R. at 572. Debtor offered adequate assurance of future performance through a lender earmarking funds for the landlord for four months of rent and making available to the debtor funds equal to six months of rent. *Id.* at 571. Additionally, a guaranty was offered by a separate company that was owned by the debtor's principal's son. *Id.* The evidence of the lease being below market rent also factored into the court's decision to find that the debtor had sufficiently provided adequate assurance of future performance under the lease, and the debtor was permitted to assume the lease. *Id.* at 574-75.

SkyTop argues that Debtor is essentially incapable of demonstrating adequate assurance of future performance because it is not generating revenue from the operation of its business. The strength of this argument is significantly mitigated by the circumstances under which the parties entered into the original Lease. When the Lease was executed, Debtor was not generating revenue and was not an operating business. SkyTop assumed the risk of a non-operating entity at the outset of its Lease agreement with Debtor and cannot improve its position in bankruptcy. "The Bankruptcy Code requires only that the lessor be given the performance for which he has contracted." *In re*

Lafayette Radio Elecs. Corp., 9 B.R. 993, 998 (Bankr. E.D.N.Y. 1981); *see In re Natco Indus., Inc.*, 54 B.R. 436, 440 (Bankr. S.D.N.Y. 1985). SkyTop's emphasis on Debtor's lack of revenue seems to conflate the overall financial success of the business with the specific requirement under § 365(b)(1)(C) of adequate assurance of future performance *under the Lease*.

Because § 365(b)(1)(C)'s standard of "adequate assurance of future performance" is case specific and invites the Court to look at the offering pragmatically, the circumstances regarding the Debtor's relationship with Dr. Ray is somewhat relevant. With Dr. Ray's exit from the Facility, Debtor's have an opportunity to generate revenue by securing new paying tenants. Without inferring any culpability to either party, Debtor's failure to generate revenue was unquestionably impacted by Dr. Ray's failure to pay Debtor.

Debtor has demonstrated adequate assurance of future performance under the Lease based on the following unique facts and circumstances presented: Debtor's post-petition performance under the Lease, Mr. Overend's promise and financial ability to pay, Debtor's overall commitment to the project, and the under market value of the Lease. These facts taken together sufficiently demonstrate that Debtor's continued performance under the Lease is likely, and, therefore, it has met its burden as to § 365(b)(1)(C). Because Debtor has satisfied the assumption requirements in § 365(b)(1), Debtor may assume the Lease. Accordingly, it is

ORDERED that Debtor's oral amended motion to assume its unexpired lease with SkyTop is hereby **GRANTED**.

It is **FURTHER ORDERED** that Debtor shall make the first cure installment payment on or before April 13, 2012 or on another date agreed to by SkyTop.

If Debtor fails to timely remit any cure funds to SkyTop, SkyTop may file an affidavit stating

Debtor's failure and request a hearing on its pending relief from stay motion (Docket No. 118).

The Clerk's Office is directed to serve a copy of this Order upon the parties listed on the attached distribution list.

END OF DOCUMENT

Distribution List

James H. Rollins
Holland & Knight LLP
Suite 2000
1201 West Peachtree Street, N.E.
Atlanta, GA 30309

Phillip Smith
McLin Burnsed
1000 West Main Street
Leesburg, FL 34749

Anna Mari Humnicky
Cohen Pollock Merlin & Small
Suite 1600
3350 Riverwood Parkway
Atlanta, GA 30339

Gus H. Small
Cohen Pollock Merlin & Small
Suite 1600
3350 Riverwood Parkway
Atlanta, GA 30339-6401

John Isbell
Thompson Hine LLP
Two Alliance Center
3560 Lenox Road, Suite 1600
Atlanta, Georgia 30326

Vivieon Kelley
Office of the U. S. Trustee
362 Richard Russell Federal Bldg.
75 Spring Street, SW
Atlanta, GA 30303