IT IS ORDERED as set forth below:

Date: May 12, 2016

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
STRICK CHEX NEWNAN ONE, LLC,	:	15-11275-WHD
Debtor.	:	
GEORGIA CAPITAL GROUP, LLC,	:	CONTESTED MATTER
Movant,	:	
v.	:	
STRICK CHEX NEWNAN ONE, LLC,	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
Respondent.	:	

ORDER

Before the Court is the Renewed Motion of Georgia Capital Group, LLC (hereinafter "GCG") for Relief from the Automatic Stay and Order of Rejection of

Non-Residential Real Property Lease. This matter came on for hearing on April 20, 2016, and the parties have submitted briefs in support of their positions. Having considered the relevant law, the arguments made at the hearing, and the briefs submitted by the parties, the Court concludes as set forth below.

Background

On November 30, 2009, Strick Chex Newnan One, LLC (hereinafter the "Debtor") entered into a ground lease agreement with RCG-Newnan, LLC concerning property in a shopping center in Newnan, Georgia. The Debtor leased the property for the purpose of operating a Checkers fast-food restaurant franchise. In 2013, RCG-Newnan, LLC sold the property to GCG. The lease remained intact, and the Debtor continued making payments.

On June 16, 2015, the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code.[1] On January 4, 2016, GCG filed a motion for relief from the automatic stay, contending that the lease agreement was rejected as a matter of law pursuant to § 365(d) and that it was entitled to possession of the property. On January 8, 2016, the Debtor filed a motion to dismiss its case.

A hearing was held on the Debtor's motion to dismiss on February 3, 2016.

[1] 11 U.S.C. § 101 *et seq.*

In response to the motion to dismiss, an objection was filed asserting that conversion to Chapter 7 pursuant to § 1112(b) was more appropriate than dismissal. The Court agreed, and that same day entered an order converting the case to Chapter 7 for cause. Griffin E. Howell, III (hereinafter the "Trustee") was appointed to administer the Debtor's bankruptcy estate.

On February 25, 2016, GCG filed the instant motion, once more asserting that its lease with the Debtor is rejected as a matter of law and that it is entitled to possession of the property.

Though the Debtor has not filed a response to GCG's motion, one of its creditors has. United Bank (hereinafter the "Bank") holds a blanket lien on the Debtor's property, which includes the physical Checkers restaurant building[2] located on the real property leased from GCG, as well as the Debtor's equipment and fixtures. The Bank also holds a leasehold mortgage on the lease between the Debtor and GCG. The Bank claims rights under an agreement entered into between itself, the Debtor, and RCG-Newnan, LLC (hereinafter the "Attornment Agreement"). Pursuant to the Attornment Agreement, the Bank is entitled to notice and an

[2] The Bank describes the building as a "box." The Court understands this to mean that the physical restaurant is a prefabricated structure that has been placed on the real property that is the subject of the ground lease.

opportunity to assume the lease should the Debtor default or reject the lease.[3] The Bank contends that these rights mean that relief from the automatic stay is not appropriate.

Adding two more wrinkles to this case, the Trustee has filed two motions: one is a motion to assume the lease; the other is a motion to sell the Debtor's property. The Trustee hopes to sell the Checkers restaurant to a new franchisee and continue the business on the real property that is the subject of the ground lease. In order to accomplish that goal, it is necessary to assign the lease to the ultimate purchaser of the physical restaurant. Those motions are set for hearing on May 11, 2016. The Bank supports the Trustee's efforts, and if the Bank is allowed to assume the lease, it intends to assign the lease to the Trustee.

Discussion

Section 365(d)(4) provides that

> an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease 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.

[3] At the April 20th hearing on GCG's motion, GCG acknowledged that the Bank has these rights under the Attornment Agreement.

11 U.S.C. § 365(d)(4). The "order for relief" is the commencement of the case. 11 U.S.C § 301(b). In an ordinary Chapter 11 case where no trustee has been appointed, as was the situation in this case before it was converted, the debtor is empowered to exercise the authority of the trustee. *See* 11 U.S.C. § 1107(a); FED. R. BANKR. P. 9001(11) ("'Trustee' includes a debtor in possession in a chapter 11 case."). Therefore, in a normal Chapter 11 case, the debtor must assume or reject a nonresidential lease within 120 days of filing the case, or the lease will be deemed rejected as a matter of law.

Here, the parties do not contest that the lease was rejected as a matter of law on October 15, 2015, (120 days after the case was filed) while the case was in Chapter 11. However, because of the Trustee's motions, the parties do refer briefly to the Trustee's ability to assume or reject the lease now that the case has been converted to Chapter 7. Because whether the Trustee may assume the lease necessarily affects whether the lease is deemed rejected at all, the Court will address the Trustee's power before turning to the Bank's arguments.

A. Effect of Conversion on Rejection of Lease

Section 348(c) provides that in a case converted from one chapter to another, the conversion order constitutes the "order for relief" for the purposes of calculating the time periods under § 365(d). 11 U.S.C. § 348(c). This means that in a case converted from Chapter 11 to Chapter 7, the newly appointed Chapter 7 trustee would have an additional 120 days from the conversion date to assume or reject an unexpired nonresidential lease pursuant to § 365(d)(4). *See id.*; 11 U.S.C. § 365(d)(4).

While bankruptcy courts appear to agree that a trustee in a converted case receives an extra 120 days from the conversion date to assume or reject nonresidential leases when the time to assume those leases has not expired, *see In re Poseidon Pool & Spa Recreational, Inc.*, 377 B.R. 52, 60 (E.D.N.Y. 2007) (holding that because a motion to extend the time to assume the lease was pending when the case was converted, "the lease remained in effect and § 348(c) controlled."); *see also In re Young*, 214 B.R. 905, (Bankr. D. Idaho 1997) (extending time to assume the executory contract where the 60 days allowed by § 365(d)(1) had not expired prior to conversion), this case raises a more novel issue. This case requires the Court to consider not only whether the time to assume or reject a lease is extended by §

348(c), but also whether § 348(c)'s post-dating provision causes the *revival* of a lease that was deemed rejected by operation of § 365(d)(4) nearly four months prior to the conversion of the case.

The post-dating provision of § 348(c) has led at least one court, interpreting the similar time limits of § 365(d)(1), to conclude that it can "revive" an executory contract that has been deemed rejected. *See In re Helm*, 335 B.R. 528, 538 (Bankr. S.D.N.Y. 2006) ("[P]ursuant to § 348(c) a conversion operates to revive the Debtor's right to assume or reject an executory contract…." (footnote omitted)). Other courts, considering the application of § 348(c) specifically as to § 365(d)(4), have concluded the opposite: "A commercial lease rejection during Chapter 11 proceedings whether by stipulation, court order, or operation of law remains rejected and cannot be assumed by the Chapter 7 trustee after conversion.". *In re Maralak, Ltd.*, 104 B.R. 446, 449 (Bankr. M.D. Fla. 1989); *see also In re Tandem Group, Inc.*, 61 B.R. at 740 (citing Congressional intent as a factor "warranting a departure from the plain meaning of section 348(c)"). For the reasons set forth below, this Court concludes that § 348(c) does not revive a lease rejected pursuant to § 365(d)(4).

Section 365(d)(4) provides that, once the time limit has run, the lease "shall be deemed rejected, *and the trustee shall immediately surrender that nonresidential*

real property to the lessor." 11 U.S.C. § 365(d)(4) (emphasis added). Though the effect of the "surrender" clause on the relief available to lessors whose leases have been rejected is a debated question, the courts are unanimous that they are entitled to some form of relief, be it lifting the automatic stay or an order directing the surrender of the property. *See In re Elm Inn, Inc.*, 942 F.2d 630, 633-34 (9th Cir. 1991) ("By operation of law, the debtor's possessory interest in the lease terminated on that date, and the lessor's right to immediate surrender of the property simultaneously accrued."); *In re Williams*, 171 B.R. 420, 424 (Bankr. S.D. Ga. 1994) (granting landlord relief from the stay "to enforce its rights under the rejected lease to dispossess the Debtor from the occupancy of the premises"); *In re Damianopoulos*, 93 B.R. 3, 6 (Bankr. N.D.N.Y. 1988) (ordering the surrender of the leased premises).[4] These cases also agree that the rejection causes the leases no longer to be considered "property of the estate" within the meaning of § 541. *See In re Williams*, 171 B.R. at 423 ("The lease itself is no longer property of the bankruptcy estate."); *In re Damianopoulos*, 93 B.R. 3, 6 ("At this point in time, the…lease is not property of the estate nor does the Debtor have any interest in it since it has been

[4] As GCG is seeking relief from the automatic stay, the Court has no need to address whether ordering surrender of the property is appropriate.

rejected by operation of law under Code § 365(d)(4).").

These holdings make even more sense when one considers the way in which the term "surrender" is used elsewhere in the code. For instance, in the Chapter 13 context, one way for a debtor to account for a secured claim in his plan of reorganization is to surrender the collateral securing the claim. *See* 11 U.S.C. § 1325(a)(5)(C). Though "surrender" is not defined in the Bankruptcy Code, its meaning "is nonetheless settled and well understood." *In re Tosi*, 546 B.R. 487, 492 (Bankr. D. Mass. 2016). "'[S]urrender' means only that the debtor will make the collateral available so the secured creditor can, if it chooses to do so, exercise its state law rights in the collateral." *Id.* (quoting *In re Williams*, 542 B.R. 514, 518 (Bankr. D. Kan. 2015)); *see also In re Ware*, 533 B.R. 701, 712 (Bankr. N.D. Ill. 2015) ("At the very least, the debtor must not stand in the way of the secured creditor taking possession of the property, must not retain any rights to the property, and must at all times act in good faith." (citations omitted)); *Surrender*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("The act of yielding to another's power or control."). Applying that definition to the § 365(d)(4) context, a trustee must make the real property subject to the rejected lease immediately available to the lessor once the lease is rejected. This suggests, as the cases cited above have held, that once the

lease is rejected, the bankruptcy estate's interest in the real property that is the subject of the lease terminates, and the property merely awaits disposition by the lessor through action in the Bankruptcy Court or through vindication of its state law rights.

Faced with this clear authority holding that a landlord is entitled to relief when the lease is rejected, the Court cannot conclude that § 348(c) would entitle a trustee to assume a lease rejected pursuant to § 365(d)(4) nearly four months prior to conversion.[5] Allowing the "revival" of such leases would undermine the lessor's rights under the statute by permitting the trustee in a converted case to claw back the property after conversion, a result that is contrary to the statutory intent as expressed through the plain meaning of the words "immediately surrender."

Furthermore, allowing leases to "revive" on conversion would lead to absurd results. One can easily imagine that cases would arise in which a lease was rejected, the lessor repossessed the property, and the case subsequently converted. Is the trustee allowed to assume that lease and undo everything the lessor has done?

[5] The Court makes no decision on whether § 348(c) would revive an executory contract, residential real property lease, or personal property lease through extending the time limits in § 365(d)(1).

Such outcomes cannot be accommodated. Indeed, this Court has a duty to avoid constructions of statutes that lead to such results, as do all courts. *See Shaw v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 605 F.3d 1250, 1254 (11th Cir. 2010) (reading a statute to avoid absurdity).

Therefore, considering the fact that a lessor is entitled to immediate surrender of the property on rejection under § 365(d)(4), once a lease is deemed rejected pursuant to that statute, conversion of the case and the post-dating of the order for relief pursuant to § 348(c) do not cause that lease to "revive," and thus the trustee may not assume it. Once the lease is rejected, it is rejected, and the lessor may, as GCG has done here, seek relief from the automatic stay so that it may pursue its state law remedies.

B. The Attornment Agreement

The Bank asserts that even though the lease is rejected, the rejection of the lease did not alter the Bank's rights under the Attornment Agreement. The Bank contends that it can assume the lease pursuant to the Attornment Agreement, so granting relief from the automatic stay is not appropriate. The Bank further asserts that because the real property that is subject to the lease is the ground upon which its collateral—which is property of the estate—sits, whether the Bank can assume the

lease is still "related to" the bankruptcy case, meaning this Court has jurisdiction to adjudicate those rights. The Bank urges the Court to exercise that jurisdiction.

Pretermitting whether the Court would have such jurisdiction, the Court finds that there is no need to address the provisions of the Attornment agreement and that relief from the automatic stay is warranted in this case. To begin with, the only consequence of granting GCG relief from the stay will be to allow it to pursue whatever rights it has against the Debtor as the lessee on a rejected lease. While the Court agrees with the Bank that those rights will be restricted by the provisions of the Attornment Agreement, *see In re Austin Dev. Co.*, 19 F.3d 1077, 1083 (5th Cir. 1994) (holding that rejection of a lease pursuant to § 365(d) does not serve to terminate it nor affect the rights of third parties to the lease), there does not appear to be any need to adjudicate those provisions in resolving GCG's instant motion.

With that addressed, the facts compel the conclusion that GCG's motion ought to be granted. The Debtor was the lessee on a lease from GCG. That lease was not assumed or rejected, so it was deemed rejected as a matter of law 120 days after the petition was filed. This is sufficient cause to grant relief from the stay. *See In re Communications Co. of Am.*, 65 B.R. 580, 580 (Bankr. M.D. Fla. 1986) (granting relief from the stay despite the debtor's assertions that the lease is necessary to

reorganize the estate and that the landlord is not harmed).

Conclusion

Therefore, in accordance with the foregoing, GCG's motion is **GRANTED**. The Clerk is **DIRECTED** to serve this Order on the Debtor, GCG, the Bank, the Chapter 7 Trustee, and the United States Trustee.

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