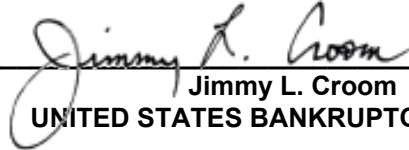




Dated: February 13, 2015
The following is SO ORDERED:



Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

In re: WISPER , LLC)	Case No. 13-10770
)	
Debtor.)	Chapter 11
)	

MEMORANDUM OPINION RE: MOTION OF MATT ABERNATHY AND ADRIA ABERNATHY TO COMPEL PAYMENT UNDER CONFIRMED PLAN AND TO COMPEL SURRENDER OF LEASED PREMISES

This matter is before the Court on a “Motion to Compel Payment Under Confirmed Plan and to Compel Surrender of Leased Premises” (“Motion to Compel”) filed by Matt Abernathy and Adria Abernathy (jointly referred to as “Movants”). At issue in this case is whether the reorganized debtor Wisper II, LLC (“Wisper II”), should be compelled to pay rent to the Movants for the post-confirmation use of office space in Alamo, Tennessee, and to surrender and vacate the same property. The office space at issue in this dispute was the subject of a pre-petition lease between one or more of the Movants and the original debtor in this case Wisper, LLC (“Wisper I”). Upon confirmation of the Chapter 11 plan, Wisper I merged with and into Wisper II. Neither Wisper I nor Wisper II ever assumed the lease. The Court conducted a hearing on the Motion to Compel on January 8, 2015. Fed. R. Bankr. P. 9014.

For the reasons that follow, the Court concludes that it does not have subject matter jurisdiction to resolve the post-confirmation rent and occupancy issues in this matter because the lease at issue in this case was deemed rejected by operation of 11 U.S.C. § 365(d)(4) in July 2013.

STATUTORY AUTHORITY AND JURISDICTION

This proceeding arises in a case referred to this Court by the Standing Order of Reference, Misc. Order No. 84-30, previously entered by the United States District Court for the Western District of Tennessee, Western and Eastern Divisions. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (B). This Court has statutory authority and jurisdiction over core proceedings pursuant to 28 U.S.C. §§ 157(b)(1) and 1334 to hear and enter a final order in this matter subject to the traditional right of appeal. This memorandum opinion shall serve as the Court's findings of facts and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FACTS

On May 2, 2010, Matt Abernathy leased office space at 1378 North Cavalier Drive in Alamo, Tennessee ("Alamo Property"), to Wisper I for a period of nine years ("Lease").¹ Matt Abernathy was the sole owner and managing member of Wisper I at the time the Lease was executed. Wisper I consistently made complete and timely rental payments under the Lease.

Wisper I filed a voluntary Chapter 11 petition for bankruptcy relief on March 27, 2013. On August 21, 2013, Wisper I filed its Chapter 11 plan of reorganization. Within Article VI of its plan, Wisper proposed assuming the Lease for the Alamo Property. (Wisper I Plan, ECF No. 104 at 3-4 and Exhibit B). At no time during the case did Wisper I file a motion to assume the Lease.

¹It is unclear from the Lease itself whether Matt Abernathy leased the property as an individual or as a representative of a partnership; however, resolution of the lessor's true identity is irrelevant to the issue currently before the Court.

Several of Wisper I's creditors filed a competing plan of reorganization on October 15, 2013 ("Investor Plan"). Article IV(C) of the Investor Plan provides that

On the Effective Date, except for an Executory Contract or Unexpired Lease that was previously assumed, assumed and assigned, or rejected by an order of the Bankruptcy Court or that is assumed pursuant to Article VI.A, each Executory Contract and Unexpired Lease entered into by [Wisper I] prior to the Petition Date that has not previously expired or terminated pursuant to its own terms will be rejected pursuant to section 365 of the Bankruptcy Code. The Executory Contracts and Unexpired Leases to be rejected will include the Executory Contracts and Unexpired Leases listed on Exhibit C. . . . Any Executory Contract and Unexpired Lease not listed on Exhibit C and not previously assumed, assumed and assigned or rejected by an order of the Bankruptcy Court will be rejected irrespective of whether such contract is listed on Exhibit C. The Confirmation Order will constitute an order of the Bankruptcy Court approving such rejections pursuant to section 365 of the Bankruptcy Code as of the Effective Date.

(Investor Plan, ECF No. 142 at 11.) The Investor's disclosure statement also provided that "[a]ll executory contracts and unexpired leases that are not listed in the Plan will be rejected under the Plan." (Investor Disclosure Statement, ECF No. 141 at 15.) The Investor Plan did not list the Lease for the Alamo Property on Exhibit C. At no time during the case did Wisper II file a motion to assume or reject the Lease. Nothing in the Investor Plan provides for payment of the monthly rent for the Alamo Property or specifies that Wisper II will continue to occupy the Alamo Property.

During the balloting process, a majority of Wisper I's creditors voted to accept the Investor Plan. At the January 23, 2014 confirmation hearing, the Court confirmed the Investor Plan ("Confirmed Plan"). The Court entered an order confirming the plan on January 29, 2014 ("Confirmation Order"). The Confirmed Plan provided for the merger of Wisper I into the reorganized debtor Wisper II. (Ch. 11 Plan, ECF No. 142 at 12.) Neither Matt Abernathy nor Adria Abernathy were retained as members of Wisper II. The Confirmed Plan also provided that all property of Wisper I would vest in Wisper II on the plan's effective date. (*Id.* at 11.) The Confirmed Plan's effective date was "the first business day following the date that is fourteen days after the entry of the Confirmation Order." (Investor Plan, ECF No. 142 at 3.) By the Court's calculations, the plan's effective date was February 12, 2014 ("Effective Date").

Wisper I made all post-petition, pre-confirmation rental payments for the Alamo Property, but stopped making rental payments following the plan's Effective Date.

Since entry of the Confirmation Order, Wisper II has remained in the Alamo Property and used the offices to conduct its business operations. Wisper II has not, however, made any rental payments to the Movants for this use. Pursuant to the terms of the Motion to Compel, the Movants asked the Court to compel Wisper II to remit the unpaid rent and to surrender and vacate the Alamo Property pursuant to the terms of the Lease and the Confirmed Plan. The Movants sought payment of rent from the Effective Date through May 30, 2014, when the Motion to Compel was filed. By the Movants' calculations, the total amount of rental payments due was \$12,000. The Movants asserted that the rent they were seeking represents an administrative claim that was incurred in the ordinary course of business. The Movants sought their requested relief pursuant to 11 U.S.C. §§ 105, 365(d)(4) and 1142. As of the hearing on the Motion to Compel, Wisper II still had not paid any post-confirmation rent to the Movants for use of the Alamo Property.

Wisper II does not dispute the fact that it is liable for the monthly rental payments. Rather, it argues that

Any Funds owed to either Matt Abernathy or Adria Abernathy by virtue of the reorganized debtor being a hold over, post-confirmation tenant are subject to being offset against the funds/damages owed by said Defendants as set out in Plaintiff's Complaint, Adv. Pro. No. 14-05043 . . . filed April 4, 2014.

(Response to Motion to Compel Payment, ECF No. 325 at 1.) The adversary proceeding referred to in Wisper II's response is a "Complaint to Recover Money and Property of the Estate, to Compel Turnover, to Recover Preferences, and to Recover Fraudulent Transfers" ("Adversary Proceeding") filed by Wisper II against Matt and Adria Abernathy. (See Adv. Pro. No. 14-5043). Included within the adversary complaint was Wisper II's claim that the Movants overpaid \$9,000 in rent for the Alamo Property from April 2013 through December 2013. Wisper II filed the original complaint on April 4, 2014, and an

amended complaint on November 12, 2014. The Movants filed a motion to dismiss the amended complaint on November 17, 2014.²

The Court conducted a hearing on the motion to dismiss the Adversary Proceeding concurrently with the hearing on the Motion to Compel. At the conclusion of the hearings, the Court took both motions under advisement. On February 3, 2015, the Court issued a memorandum opinion and an order denying the Movants' motion to dismiss the Adversary Proceeding. (See Adv. Proc. No. 14-5043, ECF Nos. 53 and 54.) In so doing, the Court determined that it has jurisdiction over all of Wisper II's claims, including the alleged overpayment of the rent on the Alamo Property, pursuant to 28 U.S.C. § 157(b)(2)(A), (E), (L), and (O). As it relates to the rent overpayment issue, the Court based its jurisdictional conclusion on the fact that the alleged overpayment occurred during the time between the bankruptcy filing and confirmation of the Chapter 11 plan.

ANALYSIS

This is one of those unfortunate cases wherein the parties made certain assumptions about the status of the controversy and, in so doing, failed to thoroughly address all of the issues relevant to the Court's determination. The parties agree that Wisper II rejected the Lease and that Wisper II is obligated to pay for its post-confirmation use of the Alamo Property. Wisper I's failure to act within 11 U.S.C. § 365(d)(4)'s time constraints, however, undermines the parties' collective positions.

The first issue the Court must address in this case is when the Lease of the Alamo Property was rejected. Section 365(d)(4) of the Bankruptcy Code provides that:

(4)(A) Subject to subparagraph (B), 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—

²The Movants originally moved for dismissal of the adversary proceeding on May 15, 2014 (Adv. Proc. No. 14-5043, ECF No. 13). They subsequently filed amended motions to dismiss on August 21, 2014, and November 17, 2014. (Adv. Proc. No. 14-5043, ECF Nos. 27 and 38.)

(i) the date that is 120 days after the date of the order for relief;³ or

(ii) the date of the entry of an order confirming a plan.

(B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause.

11 U.S.C. § 365(d)(4). If a debtor-in-possession⁴ fails to assume or reject a lease of nonresidential real property within § 365(d)(4)(A)'s time period or fails to seek an extension of that time period pursuant to § 365(d)(4)(B), the lease is deemed rejected. Such rejection occurs by operation of law because § 365(d)(4)'s provisions are "self-executing." *In re Brown*, 367 B.R. 599, 603 (Bankr. S.D. Ohio 2006) (citation omitted). As the bankruptcy court in *In re National Record Mart, Inc.*, 272 B.R. 131 (Bankr. W.D. Pa. 2002) explained:

Because the clear implication of § 365(d)(4) is that a deemed rejection occurs under § 365(d)(4) without further action of a court, a court order, to the extent that it approves rejection of a lease subsequent to a deemed rejection of the same, is without effect and, therefore, unnecessary.

Id. at 134 (citation omitted). "[T]he effective date of a debtor's rejection of an unexpired lease is the date upon which the same is deemed rejected under § 364(d)(4)" *Id.*

Wisper I filed its Chapter 11 petition on March 27, 2013. The Court entered the Confirmation Order on January 29, 2014. Clearly, more than 120 days elapsed between the filing of the case and entry of the Confirmation Order. It was therefore incumbent upon Wisper I to take some action with respect to the Lease within § 365(d)(4)(A)(i)'s 120-day time limit. Wisper I failed to do this. It neither filed a motion to assume the Lease pursuant to Federal Rules of Bankruptcy Procedure 6006 and 9014, nor sought an extension of the time in which to do so. See *In re Cybernetic Servs., Inc.*, 94 B.R. 951, 953 (Bankr. W.D. Mich. 1989). The only action Wisper I took with respect to the Alamo Property was its

³11 U.S.C. § 301(b) provides that "[t]he commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter." As such, the petition date is the relevant date for purposes of 11 U.S.C. § 365(d)(4)(A)(i).

⁴See 11 U.S.C. § 1107(a).

proposed assumption of the Lease in its Chapter 11 plan. Although 11 U.S.C. § 1123(b)(2) allows parties to assume or reject a lease in this manner, Wisper I did not file its plan until August 21, 2013—some 147 days after the case was commenced. Clearly, Wisper I failed to act within § 365(d)(4)'s time constraints and the Lease of the Alamo Property was deemed rejected as of July 25, 2013.

The fact that the Movants continued receiving rent payments from Wisper I after the deemed rejection date does not result in a waiver of the Movants' rights under 11 U.S.C. § 365(d)(4). As the *Brown* court held,

the acceptance of payments for rent by the Claimant in and of itself does not constitute a waiver. "The Landlord has no affirmative duty to seek lease rejection upon the expiration of the 60 day period⁵ following the filing of the petition in bankruptcy as § 365(d)(4) of the Code states that the Lease is deemed rejected if the Debtor (or the Trustee) fails to move to assume the Lease within the 60 day period, and such rejection is self-executing." Moreover, the Claimant is entitled to receive compensation for the use of the premises during the time of possession by the Debtors, and . . . "acceptance of any such performance does not constitute a waiver or relinquishment of the lessor's rights under such lease."

In re Brown, 367 B.R. 599, 603 (Bankr. S.D. Ohio 2006) (quoting *In re Damianopoulos*, 93 B.R. 3, 7 (Bankr. N.D.N.Y. 1988)); *In re Ok Kwi Lynn Candles, Inc.*, 75 B.R. 97, 100 (Bankr. N.D. Ohio 1987); *In re Food Barn Stores, Inc.*, 174 B.R. 1010, 1015 (Bankr. W.D. Mo. 1994) (recognizing that "[t]he decisions are many which hold that even after the lease is deemed rejected, the landlord may freely accept use and occupation payments from a holdover debtor without waiving the deemed rejection.").

Clearly, the Movants in this case did not waive their rights under 11 U.S.C. § 365(d)(4) by accepting rental payments after the lease was deemed rejected on July 25, 2013. Had they wanted to, the Movants would have been well within their rights to ask the Court to compel Wisper I to surrender the Alamo Property once the lease was deemed

⁵Prior to 2005, 11 U.S.C. § 365(d)(4)'s applicable time limits were 60 days. When Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), § 365(d)(4)'s time limit was extended to 120 days.

rejected.⁶ Given the fact that the Movants were, in essence, both lessor and lessee, however, it is unsurprising that they chose not to take action against Wisper I with respect to the rejected lease.

Although the Movants have not waived their rights under § 365(d)(4), the timing of the default in rental payments under the Lease forecloses their ability to seek relief from the Court at this juncture in the case. As stated *supra*, Wisper I made all of the rental payments under the Lease through the Effective Date of the Confirmed Plan. Thus, Wisper II's failure to make the rent payments is purely a post-confirmation default of a lease that was rejected in July 2013. For the reasons that follow, the Court concludes that it does not have subject matter jurisdiction to resolve the rent and occupancy issues between Wisper II and the Movants at this stage in the proceedings.⁷

Once a court confirms a Chapter 11 plan, there is a shift in the nature of the bankruptcy estate. Section 1141(b) provides that “[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of the plan vests all of the property of the estate in the debtor.” 11 U.S.C. § 1141(b). Assuming that neither the plan nor the confirmation order provide otherwise, the bankruptcy estate ceases to exist post-confirmation. *In re Te-Kon Travel Court, Inc.*, 424 B.R. 775, 784 (Bankr. W.D. Mich. 2010). In the case at bar, the Confirmed Plan specifically provides that “as of the Effective Date, all property of the Debtor, and any property acquired by a Debtor or reorganized Debtor

⁶Courts are divided as to what procedure a lessor must employ in order to remove a tenant from nonresidential real property after a lease is deemed rejected under 11 U.S.C. § 365(d)(4). The majority of courts have held that a bankruptcy court may order the lessee to immediately vacate the property. *In re U.S. Fax, Inc.*, 114 B.R. 70, 73 (E.D. Pa. 1990) (collecting cases); *In re Chris-Kay Foods East, Inc.*, 118 B.R. 70, 72 (Bankr. E.D. Mich. 1990). The minority view requires the lessor to first seek relief from the Bankruptcy Code's automatic stay provisions and then pursue state-law remedies in state court. *In re Boston Bus. Machs.*, 87 B.R. 867, 870 (Bankr. E.D. Pa. 1988); *In re Cybernetic Servs., Inc.*, 94 B.R. 951, 954 (Bankr. W.D. Mich. 1989). Given the Court's conclusion regarding a lack of jurisdiction, the Court need not decide which approach is appropriate.

⁷There is also authority which suggests that confirmation of a reorganization plan cuts off a party's rights to seek relief under 11 U.S.C. § 365. *Hyman v. Univ. Cafeteria, Inc.*, (*In re Univ. Cafeteria, Inc.*), 47 B.R. 404, 405 (W.D. Va. 1985).

under the Plan, will vest in the applicable Reorganized Debtor” (Confirmed Plan, ECF No. 142 at 11.) Nothing in the plan or the Confirmation Order excepted any property from this vesting provision. Consequently, Wisper II’s bankruptcy estate ceased to exist as of February 12, 2014—the Effective Date of the Confirmed Plan.

Post-confirmation, a bankruptcy court’s jurisdiction is significantly curtailed. As the bankruptcy court in *In re Eastland Partners, Ltd., Partnership*, 199 B.R. 917 (Bankr. E.D. Mich. 1996), recognized,

the status of the bankruptcy case figures prominently in determining bankruptcy court jurisdiction. Following confirmation of a chapter 11 debtor’s plan, a bankruptcy court has a fairly narrow jurisdiction. Post-confirmation, the Court’s role is “limited to matters involving the execution, implementation, or interpretation of the plan’s provisions, and to disputes requiring the application of bankruptcy law.”

Post-confirmation state law claims, . . . are generally not within the bankruptcy court’s jurisdiction, even when, . . . , the conduct giving rise to the state law claims or causes of action has interfered or could potentially interfere with the reorganized debtor’s ability to carry out its obligations under the plan.

The reasoning behind these cases is that Congress did not intend, when it allowed bankruptcy courts to have jurisdiction over post-confirmation disputes that could conceivably affect implementation of the plan, that bankruptcy courts would retain jurisdiction over any dispute involving a reorganized debtor performing under a confirmed plan. “Indeed, such an interpretation seems directly at odds with the goal of weaning the debtor from dependence on the bankruptcy court in order to stand on its own feet with respect to post-confirmation matters.”

Id. at 919-20 (internal citations omitted).

Given the pared down nature of post-confirmation jurisdiction, there are essentially two broad categories of proceedings a bankruptcy court may hear and determine once a Chapter 11 plan is confirmed. First, a court has post-confirmation jurisdiction over “matters traceable to the bankruptcy estate, as it exists at confirmation.” *Id.* at 920. If “the outcome of [a] proceeding could conceivably have any effect on the estate being administered in bankruptcy,” then the bankruptcy court retains jurisdiction to resolve the matter. *Mich. Employment Security Comm’n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930

F.2d 1132, 1141 (6th Cir. 1991); see also Fed. R. Bankr. P. 3020(d) (“Notwithstanding the entry of the order of confirmation, the court may issue any other order necessary to administer the estate.”). This facet of jurisdiction necessarily extends to actions related to pre-petition and/or pre-confirmation dissipation of the bankruptcy estate like the actions alleged in the Adversary Proceeding. Second, a bankruptcy court retains post-confirmation jurisdiction “to ensure compliance with the provisions of title 11 and to ensure the proper execution and consummation of the debtor’s plan.” *Pioneer Investment Servs. Co. v. The Cain P’ship, Ltd. (In re Pioneer Investment Servs. Co.)*, 141 B.R. 635, 641 (Bankr. E.D. Tenn. 1992); see also 11 U.S.C. § 1112 (ability to convert or dismiss a case post-confirmation), § 1142 (ability to ensure implementation of a confirmed Chapter 11 plan), and § 1144 (power to revoke an order of confirmation).

In the case at bar, the Lease of the Alamo Property was deemed rejected by operation of statute in July 2013. There is nothing in the Investors’ disclosure statement, the Confirmed Plan, or the Confirmation Order that provides for continuing occupation of the Alamo Property by Wisper II nor are there any provisions for payment of the rent due under the Lease. Although Wisper II might have anticipated staying in the Alamo Property post-confirmation, it did nothing to ensure it would be entitled to do so. At the time the Investor Plan was filed with the Court in October 2013, Wisper I’s inaction had resulted in the deemed rejection of the Lease. Accordingly, there is no plan provision for this Court to enforce or interpret.

As for the other basis of post-confirmation jurisdiction, the Court concludes that resolution of Wisper II’s holdover tenancy will not have any conceivable effect on administration of the bankruptcy estate. The default in rent payments did not occur until post-confirmation when the bankruptcy estate no longer existed. Wisper II made no provisions for this Lease in the Confirmed Plan. Clearly, Wisper II did not think consummation of the Confirmed Plan was in any way dependent upon continued occupation and use of the Alamo Property. Although Wisper II uses the property as its main office, the great majority of its income is generated outside of that property through the cellular towers located throughout West Tennessee. The Court found it had jurisdiction over the claims made in the Adversary Proceeding because Wisper II alleged that the

Movants are liable to the bankruptcy estate for their *pre-confirmation* actions. If Wisper II is successful in the adversary proceeding, the bankruptcy estate could realize a financial recovery that would then be dispersed to Wisper II's creditors. That is not the case with the post-confirmation default under the Lease.

As the court stated in *In re Eastland Partners, Ltd., Partnership*, 199 B.R. 917 (Bankr. E.D. Mich. 1996)

Post-confirmation state law claims, . . . are generally not within the bankruptcy court's jurisdiction, even when, . . . , the conduct giving rise to the state law claims or causes of action has interfered or could potentially interfere with the reorganized debtor's ability to carry out its obligations under the plan.

199 B.R. at 920. The issue in the case at bar is based entirely on state law. It has nothing to do with the bankruptcy case or the Confirmed Plan. There is simply no basis for this Court's exercise of subject matter jurisdiction over the claim.

For the reasons stated herein, the Court concludes that it does not have jurisdiction to determine the issues related to Wisper II's failure to remit post-confirmation rent under the Lease of the Alamo Property. The Court notes that in reaching this conclusion, it is not making any judgment about Wisper II's liability for the rent and its entitlement to remain in the property. The Court simply concludes that those issues are ones that need to be decided in a state court arena rather than in bankruptcy court.

CONCLUSION

The Court concludes that the it does not have subject matter jurisdiction over the Movants' claims for payment of post-confirmation rent and surrender of the Alamo Property. The Movants' Motion to Compel is therefore denied. The Court will enter a separate order in accordance herewith.

Mailing list

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