



**ORDERED in the Southern District of Florida on May 14, 2010.**

**A. Jay Cristol, Judge  
United States Bankruptcy Court**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 09-31935-BKC-AJC

CHAPTER 13

IN RE:

JUNIUS D. MORRISON,  
Debtor.

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**ORDER DENYING MOTION FOR DISMISSAL WITH PREJUDICE**

THIS CAUSE came before the Court for hearing on April 20, 2010 upon the *Motion for Dismissal With Prejudice* filed by Kenneth Jones and Mary Ellen Jones on March 22, 2010 (the "Motion") (CP 43). Having heard the proffers, representations and argument of counsel, the parties having agreed the relevant facts are undisputed, and based upon the record, the Court denies the Motion.

The Movants, Kenneth Jones and Mary Ellen Jones, allege in the Motion that the Debtor, Junius Morrison, has filed this case in bad faith and it should therefore be dismissed. In support of their Motion, the Movants state the Debtor is a "millionaire" with an annual income of at least

\$140,000.00 a year, and he can pay his debts as they become due. Movants assert the Debtor's case was filed in bad faith because it was filed for the sole purpose of staying a pending state court eviction action.

There is no dispute that the Movants filed an eviction action against the Debtor after he defaulted on a 99-year commercial lease by failing to make a single monthly payment in the amount of \$166.67. Movants are the owners of a commercial property used as a strip mall located at 9517-9523 Harding Avenue, Surfside Florida (the "Property"). Debtor is the current owner of a 99-year lease for the Property. On March 1, 2009, the debtor defaulted on his rental payments, and the Movants thereafter declared Debtor to be in default. In July 2009, Movants commenced a state court eviction action; and, on the eve of a hearing on Movants' motion for judgment on the pleadings filed therein, the Debtor filed a voluntary Chapter 13 petition, effectively staying the state court eviction action.

The Debtor asserts he attempted to cure the default by making the payment belatedly, but claims the Movants refused to accept same and instead chose to file the eviction action. During the course of the proceedings in the eviction action, the Debtor has been making payments into the State Court Registry. The Debtor proffers that this was the only default under the lease and the Movants have not disputed this proffer.

The Debtor has filed a First Amended Chapter 13 Plan in this case. The proposed plan provides for an immediate cure of the default and for all ongoing monthly payments under the 99-year lease, until the plan is confirmed, paid off or the disputes are resolved.

#### **Issue**

The issue before the Court is whether the Debtor, who admittedly has assets valued in the millions of dollars and undisputedly meets the technical requirements of a Chapter 13 debtor, can

proceed in a Chapter 13 case if his sole purpose of filing is to cure a default in a commercial lease, which default is currently the subject of a state court eviction action. The Court believes he can.

### **Analysis**

There is no prohibition in the Bankruptcy Code limiting a debtor's ability to file a Chapter 13 petition based upon his/her assets or income. The jurisdictional requirements for a debtor under the various chapters of title 11, found in 11 U.S.C. §109, indicate who is eligible to file a Chapter 13 petition. This section places no restrictions on a debtor's eligibility based upon a debtor's assets or income.

Once determined to be eligible, a debtor may *inter alia* assume an unexpired lease under 11 U.S.C. §365(b)(1)(A), provided that, at the time of the assumption, the Debtor cures or provides adequate assurance that there will be a prompt cure relating to any default. The Debtor's First Amended Chapter 13 plan proposes to cure the default under the 99-year lease immediately.

The Motion alleges that the filing of the Chapter 13 petition lacked the requisite good faith, notwithstanding the fact the Bankruptcy Code allows the Debtor to assume an unexpired lease. The Movants state, "'good faith' requires 'honesty of purpose' on the part of the debtor and contemplates broad judicial inquiry into the debtor's conduct and state of mind in proposing a plan. *In re Bandini* 165 BR 317, 319 (Bankr. S.D.Fla. 1994). Upon consideration of the proffers and representations of the parties and based on the record, it appears Debtor does indeed possess the required "honesty of purpose" demonstrating his good faith in filing this case. Prior to filing this case and prior to the commencement of the eviction action, the Debtor attempted to cure the default. When the Movants didn't accept payment, the Debtor deposited the required funds in the State Court Registry. When the Movants proceeded with litigation to obtain the Property, the Debtor filed for bankruptcy relief. The Debtor then filed a First Amended Chapter 13 Plan which provides a 100% payment to all

unsecured creditors and the immediate cure of the alleged default of the 99-year lease.

The Movants appear to have chosen eviction in an effort to gain a windfall by obtaining possession of the Property with all its improvements and attendant rents. The lease has approximately 40 years remaining. The Debtor has secured tenants for the Property, who together provide the Debtor with rental income, and the Debtor has made various costly expenses, undoubtedly relying on the extended length of the lease. The Debtor's purpose of filing, to assume the 99-year lease on the Property, is not an improper purpose, particularly considering the fact that such assumption will preserve value, rather than to provide the Movants with a windfall.

The Movants rely on *In re Waldron* 785 F. 2d 936 (11<sup>th</sup> Cir. 1986) to support their position. Such reliance is misplaced. In *Waldron*, the Debtors were attempting to use the bankruptcy laws to avoid obligations under a contract. In this case, the Debtor is seeking only the benefit of the bargain he made with the Movants. The Movants remind the Court that the aim of a Chapter 13 case is to balance giving an equitable distribution to the creditors while also giving a fresh start to the debtor by releasing him from the liabilities of old debts. But where is the equity in the Movants' position - trying to obtain the Property, with its costly improvements and substantial rents, for one missed payment (of \$166) under a 99-year lease?

Based upon the foregoing, it is

**ORDERED AND ADJUDGED** that the Movants, Kenneth and Mary Ellen Jones, Motion to Dismiss Case and Objection to Confirmation, is DENIED.

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Copies to:

Michael A. Frank, Esquire  
Nancy Herkert, Trustee  
Meredith L. Mishan, Esquire

Attorney Michael A. Frank is directed to mail a conformed copy of this Order to all interested parties immediately upon receipt.