

Tagged Opinion



**ORDERED in the Southern District of Florida on April 5, 2016.**

A handwritten signature in blue ink, reading "Laurel M. Isicoff".

Laurel M. Isicoff, Judge  
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division  
[www.flsb.uscourts.gov](http://www.flsb.uscourts.gov)

In re:

PETITUSA, LLC

Chapter 11

Debtor.

Case No. 16-10305-BKC-LMI

**ORDER ON DEBTOR'S EMERGENCY MOTION TO ENFORCE AUTOMATIC STAY**

This cause came before me on February 9, 2016 at 8:30 a.m. on the Emergency Motion to Enforce Automatic Stay and Motion for Violation of the Automatic Stay (the "Motion") filed by PetitUSA, LLC (the "Debtor") (ECF #3). The Debtor alleged in the Motion that its landlord, Purdy Partners 1929, LLC (the "Landlord") violated the automatic stay by failing to instruct the Miami Dade County Sheriff (the "Sheriff") to cease execution of a writ of possession after the Debtor filed its bankruptcy petition (the "Petition") at 2:59 p.m. on January 8, 2016. After a preliminary hearing on January 11, 2016, the Debtor's possession was restored temporarily<sup>1</sup> and I set for evidentiary hearing, briefing and legal argument the issue of whether the writ of

<sup>1</sup> Agreed Order on Debtor's Emergency Motion to Enforce Automatic Stay (ECF #8) dated January 13, 2016.

possession was executed before the Petition was filed, whether the Debtor was legally removed from possession of the Premises pursuant to Florida law when the execution process began, and whether the Lease between the Debtor and Landlord more fully described below was terminated when the state court judge signed the writ of possession.<sup>2</sup> After examining the pleadings, hearing testimony of witnesses, reviewing the evidence, and applicable Florida and bankruptcy law and for the reasons stated on the record,<sup>3</sup> as more fully detailed below, I found that, although the execution process began one or two minutes before the Debtor filed the Petition, the Landlord's refusal to terminate the execution process, which was not completed until approximately 3:40 p.m., was a violation of the automatic stay. Moreover, I ruled that, because the Lease had not been terminated, and the Debtor still had a possessory interest at the time the Petition was filed, the Debtor's right to assume or reject the Lease was not lost.<sup>4</sup>

### **Findings of Fact**

In accordance with the Stipulation as to Undisputed Facts submitted by the parties<sup>5</sup> as well as the testimony and evidence submitted at the evidentiary hearing held on February 9, 2016, I make the following findings of fact. The Landlord is the owner of that certain real property located at 1929 Purdy Avenue, Miami Beach, Miami-Dade County, Florida 33139 (the "Premises"). On or about August 1, 2012, the Landlord and the Debtor entered into a Commercial Lease Agreement, whereby the Landlord leased the Premises to the Debtor for the term therein stated (the "Lease"). On November 17, 2015, in the state court, the Landlord filed a

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<sup>2</sup> Prior to the evidentiary hearing the Landlord acknowledged the Lease was not terminated, but argued that the Debtor's loss of possession terminated the Debtor's right to assume the Lease under 11 U.S.C. §365(a).

<sup>3</sup> I read a detailed oral ruling into the record on February 9, 2016, but asked the parties to submit a detailed written order based on that ruling rather than a simple order referring to "the reasons stated on the record". The form of the written order was agreed to by the parties and provided a starting point for this written order.

<sup>4</sup> Ironically, the Debtor has now filed a Motion to Reject the Lease (ECF #62) and has voluntarily turned over the Premises to the landlord.

<sup>5</sup> See Stipulation As To Undisputed Facts, Disputed Facts, And Issues of Law for Upcoming Evidentiary Hearing (ECF #36).

Complaint for Eviction and Damages (the “Eviction Action”). On January 8, 2016 at 12:04 pm, the state court entered a Final Judgment for Possession, which stated Landlord “shall recover from [Debtor] possession of [the Premises].” Also on January 8, 2016, after the Final Judgment for Possession was entered, the Deputy Clerk of the state court issued a Writ of Possession commanding the Sheriff of Miami-Dade County to “remove all persons from [the Premises] and to put [Landlord] in possession of it.”

At approximately 2:30 p.m. on January 8, 2016, Miami-Dade Police Officer Javier Soto (“Officer Soto”) arrived at the Premises to execute the Writ of Possession. Shortly thereafter, Sergeant Tony Johns and Officer Frank Gonzalez arrived. At 2:55 p.m., Officer Soto received a call from his office, but he missed the call. At 2:57 p.m. while standing outside the Premises, Officer Soto placed a call to his office, and he was advised to proceed with execution of the Writ of Possession.

Having considered the testimony of Officer Soto and the Debtor’s representative, Giuseppe Bottiglieri, together with the documents admitted as evidence (including Officer Soto’s cell phone logs for the date and times in question), I found that the Sheriff’s deputies entered the Premises before 2:59 p.m.

At 2:59 p.m. on January 8, 2016, the Debtor filed the Petition. Sometime after 3:30 p.m. on January 8, 2016, the keys were turned over to the Landlord, the Debtor’s representatives left the Premises, and the locks to the Premises were changed.

Between 2:59 p.m. and when the locks were changed, the Debtor’s counsel, in phone calls to the Landlord’s counsel and Officer Soto, repeatedly advised them that the Debtor had filed bankruptcy, and that the continuation of the eviction was a violation of the automatic stay. The Landlord refused to stop the eviction and refused to ask Officer Soto to stop the eviction.

### **Conclusions of Law**

The first issue is whether the Landlord violated the automatic stay. The second issue is whether loss of possession cut off the Debtor's right to assume the Lease under 11 U.S.C. §365(a).

The Landlord argues that it did not violate the automatic stay because as soon as the Sheriff entered the Premises, the writ of execution had been served and the Debtor's possessory rights terminated. Everything that followed (which was everything other than the Sheriff entering the premises) occurred post-petition. However, the Landlord argues this continued action was not a violation of the stay because, the Landlord submits, when the Petition was filed, the Premises were no longer property of the Debtor or the Debtor's estate.

There is no Florida law that sets forth when execution of a writ of possession is complete – that is, does the first appearance by the sheriff at the door with the writ constitute the official loss of the right of possession, or is possession officially lost only when dispossession is complete? Whatever the answer to that question (which I will address next) the Landlord violated the automatic stay by continuing the act of dispossession after the Petition was filed.

11 U.S.C. §362(a) describes as a violation of the automatic stay “(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title ...”. Consequently, everything that took place after 2:59 p.m. violated the automatic stay. When the Petition was filed, the Debtor was still in physical possession of the Premises, and the Sheriff and the Landlord should have stopped immediately and come to this Court seeking relief from the automatic stay to finish the process. I recognize the Landlord's argument that if the execution and the loss of the legal right of

possession occurred before 2:59 p.m., the Landlord did not want to concede possession by stopping the eviction process. However, most violations of the automatic stay occur where a creditor, with or without knowledge of a bankruptcy, wants to protect its position vis-a-vis the debtor and other creditors. Thus, the Landlord's motives are not only irrelevant, but underscore why the actions constituted a stay violation.

The second issue, whether the Debtor still had, at the time of the Petition, the right to assume or reject the Lease pursuant to section 365(a) does require me to answer the question I posed above – at what point during execution of the writ of possession is the right of possession legally terminated, and what relevance, if any does that have to the Debtor's rights under 11 U.S.C. §365.<sup>6</sup>

If the loss of the right of possession does not terminate a debtor's right to assume a lease, then the timing does not have legal significance. In *In re 2408 W. Kennedy, LLC*, 512 B.R. 708, 713 (Bankr. M.D. Fla. 2014), Judge Williamson held that with respect to commercial leases, "[e]ntry of a judgment for possession or issuance of a writ of possession—without more—does not terminate a lease or otherwise preclude a debtor from assuming the lease under § 365." However Judge Williamson never defined what "more" means.

The Landlord argues that "more" under *In re 2408 W. Kennedy, LLC* is the moment the Sheriff arrived at the Premises with the writ of execution, because once the legal right to possession was lost, the Lease was effectively terminated and with it, the Debtor's right to assume or reject the Lease. However, I disagree; first, I find that the legal right of possession is not lost when the sheriff first shows up with a writ of execution and second, that loss of physical

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<sup>6</sup> Because the Lease was not terminated at the time the Petition was filed I need not address whether and to what extent termination of a lease terminates a Debtor's right to assume or reject under 11 U.S.C. §365.

possession is not the same as termination of the lease.<sup>7</sup> Because possession and termination do not mean the same thing, I find, having reviewed both applicable bankruptcy and Florida case law, that what "more" requires is that the landlord has terminated the lease, and it is only after termination occurs, subject only to Florida's anti-forfeiture provisions discussed below, that a debtor's right of possession has been completely foreclosed.

A debtor's loss of possession is not complete until the debtor has been physically dispossessed. Execution of a writ of possession in Florida is a process, and the process is not complete until the tenant is physically dispossessed of the property and possession is turned over to the landlord. Indeed, the Writ of Possession confirms that the execution of the writ is a process. The Writ of Possession commands the Sheriff to "remove all persons from the real property . . . and to put [Landlord] in possession of it." Thus, even if the execution did begin at 2:57 p.m. and 59 seconds or 2:58 p.m. and three seconds, the execution was not complete until well after 2:59 p.m. when the Debtor's representatives left the building, as stipulated by both parties. I do not need to find whether the actual physical changing of the locks was necessary in order for execution of the writ to be complete, but at least the tenants and their personal property leaving the building had to have occurred for the execution to have been complete, and possession turned over to the Landlord. That did not occur before the Petition was filed.

This is consistent with Florida law. In Florida, the equitable remedy of anti-forfeiture is available if the circumstances otherwise warrant, irrespective of whether the tenant has lost physical possession. *Nevins Drug Co. v. Bunch*, 63 So. 2d 329 (Fla. 1953); *Rader v. Prather*, 130 So. 15 (Fla.1930).

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<sup>7</sup> In a residential case, once the landlord has possession, the lease is usually terminated. However, this is not an issue I need to address for purposes of resolving the Motion.

A court of equity has inherent power to relieve a tenant from forfeiture of his estate because of a failure to pay rent at the time required by the terms of his lease.

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‘Where a lease contains a condition that the lessor may re-enter and put an end to the lessee’s estate, or even that the lease shall be void, upon the lessee’s failure to pay the rent at the time specified, it is well settled that a court of equity will relieve the lessee and set aside a forfeiture incurred by his breach of the condition, whether the lessor has or has not entered and disposed the tenant.’

*Rader v. Prather*, 130 So. at 16-17 (citations omitted). Thus, under Florida law, loss of possession does not necessarily terminate a tenant’s leasehold interest and even termination, if due solely to the non-payment of rent, can be reversed.

Consequently, to the extent that my findings are in any way legally incorrect, I nonetheless exercise my equitable powers pursuant to 11 U.S.C. §105, and as authorized under the common law of the State of Florida, to void any potential forfeiture of the Debtor’s leasehold interest by virtue of the Debtor’s loss of its possessory interest. I find that to forfeit this Debtor’s rights in the Premises because of a monetary default which has now been cured<sup>8</sup> is not equitable, even if the Debtor was truly dispossessed prior to the filing of the Petition. Although the Landlord has alleged that there are non-monetary breaches of the Lease, there is also no dispute that the judgment of possession was entered solely on the basis of non-payment of rent, thus, it is clear that the forfeiture of the Debtor’s leasehold is based solely upon the Debtor’s monetary default, not the alleged non-monetary defaults. Consequently, based upon the applicable case law, and the fact that the Debtor has now cured all monetary defaults and the Landlord has been made whole with respect to the Debtor’s monetary defaults, I find that equity does not warrant the forfeiture of the Debtor’s leasehold interest in the Premises.

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<sup>8</sup> According to the Landlord’s eviction complaint there was only approximately \$15,000.00 in past due rent owing at the time the complaint was filed.

The Landlord confuses the concept of possession by trying to conflate the legal loss of the right to possession with the physical loss of the right of possession, and they are not the same thing. The Landlord has already conceded that the Lease was not terminated pre-petition, and because physical dispossession did not take place prior to the filing of the Petition the Lease is an unexpired Lease that is subject to assumption or rejection. However, this Court emphasizes the word “subject”. This does not mean that this Court will ultimately find, should the Debtor seek to assume the Lease, that, in fact, the Debtor may assume the Lease. The Landlord has alleged in its complaint and has argued before this Court, at least generally, that there are non-monetary breaches of the Lease. When and under what circumstances a debtor can cure a non-monetary breach of a lease for purposes of assumption is an issue of law that has not yet been presented to me by either party and thus must be decided if and when the Debtor elects to assume the Lease.<sup>9</sup>

### **The Request for Sanctions**

In the Motion the Debtor requested I find the Landlord in civil contempt for its willful violation of the automatic stay and sought the award of “sanctions in the form of actual damages incurred by the Debtor due to Landlord’s will [*sic*] stay violation, including but not limited to those damages arising from loss in revenues, inventory, and all other monetary bases stemming from the forced closure of the Debtor’s business” as well as punitive damages. By virtue of the Agreed Order<sup>10</sup>, the parties stipulated that, should I find willful violation of the automatic stay “[t]he Landlord shall not be liable for any damages to the Debtor as a result of any such violation of the automatic stay, other than lost profits from the petition date through January 12, 2016.”

There is no question that the Landlord willfully violated the stay. Willful violation is defined as (a) knowledge that “the automatic stay was invoked” and (b) an intentional act that

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<sup>9</sup> As I already noted, the Debtor has now filed a motion to reject the Lease.

<sup>10</sup> See n. 1 *supra*.

violated the automatic stay, *Jove Engineering, Inc. v. I.R.S.*, 92 F.3d 1539, 1555 (11th Cir. 1996), and there is no question that the Landlord proceeded notwithstanding its express knowledge of the filing of the Petition. The Landlord argues it is not liable for damages because 11 U.S.C. §362(k) specifies that only an individual debtor may seek damages for a willful violation of the automatic stay. However, I may nonetheless impose sanctions upon the Landlord for its stay violation through 11 U.S.C. §105. *Jove Engineering, Inc.*, 92 F.3d at 1539. Thus, should I decide to award damages to the Debtor, subject to the agreed upon limitations, I will do so pursuant to section 105.

**THEREFORE, IT IS ORDERED AND ADJUDGED:**

1. The Debtor's Emergency Motion to Enforce Automatic Stay and Motion for Violation of the Automatic Stay is **GRANTED**.

2. The Lease between the Debtor and the Landlord did not expire pre-petition, and thus the parties retain all rights thereunder in accordance with applicable law, subject to the Debtor's motion to reject and its voluntary surrender of the Premises.

3. The amount of sanctions to be imposed upon the Landlord, for Landlord's violation of the automatic stay, shall be determined by this Court at a subsequent evidentiary hearing to be coordinated and scheduled by the parties.

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Copies furnished to:  
Joe M. Grant, Esq.

Attorney Grant is directed to serve a conformed copy of this order upon on all parties in interest.