

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

IN RE:
THERESA TYLER
Debtor

CASE NO. 04-50505-BKC-RBR
CHAPTER 13

**ORDER DENYING MOTION BY CREDITOR MIAMI PROPERTY GROUP, LTD. FOR
RELIEF FROM STAY**

On October 5, 2004, the Court heard Creditor's, Miami Property Group Ltd. d/b/a 187th Street Apartments, Motion for Relief from Stay (C.P. 10). The Motion seeks relief from stay to continue eviction proceedings against Debtor. For the reasons discussed below, the Motion will be denied.

BACKGROUND

Ms. Tyler, the chapter 13 Debtor, is a tenant in an apartment owned by Miami Property Group, Ltd., d/b/a 187th Street Apartments (hereinafter, "Property Group"). The lease contract provides for a month to month term unless terminated. The landlord may terminate the contract for non-payment of rent.

The Debtor is disabled, with her entire income consisting of Social Security and TANF benefits totaling \$774.00 a month. Debtor receives a governmental subsidy in the form of rental assistance through the Section 8 Project Based Program. Debtor pays \$443.00 a month directly to Property Group as rent and the Section 8 Project Based Program pays the remaining amount of the contract

rent to Property Group. The rental assistance continues as long as the Debtor remains in the current apartment.

Debtor fell behind on the rent payments for the months of June and July 2004. In a Fifteen Day Notice dated July 7, 2004, Property Group, demanded payment of \$868.66 or possession of the premises by July 22, 2004. On August 5, 2004, Property Group, filed a Complaint for Eviction pursuant to its Fifteen Day Notice.

On August 16, 2004, Debtor filed a chapter 13 bankruptcy case, in order to repay the money owed to Property Group. In the Chapter 13 Plan, Debtor assumed the residential lease and provided for full payment to Property Group, within thirty-five (35) months as an administrative priority creditor. Debtor continues to make the regular rent payments of \$443.00 per month through the plan as the rent becomes due. In addition, Section 8 continues to pay, on Debtor's behalf, the remaining portion of rent for the apartment.

ISSUE

The main issue is whether a chapter 13 debtor, pursuant to 11 U.S.C. §365, may assume her defaulted subsidized housing residential lease.

DISCUSSION

Pursuant to 11 U.S.C. §365(b)(1), the trustee may assume the debtor's defaulted lease as long as it remains unexpired. A defaulted residential lease has not expired for purposes of §365,

if the lease termination process is not completed prior to the filing of the bankruptcy. *In the Matter of Ross v. Metropolitan Dade County*, 142 B.R. 1013 (S.D. Fla. 1992) *aff'd* 987 F. 2d 774 (11th Cir. 1993). *In re Hobbs*, 221 B.R. 892 (M.D. Fla. 1997) ([t]he lease was not terminated because the writ of possession was not served before the bankruptcy petition was filed); *In re Atkins*, 237 B.R. 816 (M.D. Fla. 1998); *Executive Square Office Building v. O'Connor and Asso., Inc.*, 19 B.R. 143 (N.D. Fla. 1981); *In re Wimberly*, 1996 Bankr. LEXIS 1923, Case No. 95-14612-BKC-RAM (Bankr. S.D. Fla. 1996).

One must look to state law in order to determine whether the lease termination process is completed. Florida law holds that the termination process is completed once the tenant no longer has a right to retain possession of the leasehold. *In the Matter of Ross*; *In re Hobbs*; *In re Atkins*; *Executive Square Office Building*; *In re Wimberly*.

Florida case law is clear that the earliest a tenant loses the right to retain possession is at the entry of a judgment of possession. *In the Matter of Ross*, 142 B.R. at 1016 ("a Chapter 13 debtor should be able to cure a default on a lease after a judgment of possession, but prior to a writ of execution has been entered"); *In re Atkins*, 237 B.R. at 819 ("[i]t is unclear whether a judgment of possession is merely a stage in the termination process or whether the process may be considered complete without execution of

a writ of possession"); *In re Hobbs*, 221 B.R. at 894 ("[u]ntil the writ of possession is executed and the tenant is removed from the premises, a tenant whether involved in a bankruptcy case or not has a right to retain possession of her leased housing"); *In re Wimberly*, 1996 Bankr. LEXIS 1923, at *3-4 (holding that debtor retains the right to assume and cure a residential lease until the writ of possession is executed).

In *Wimberly*, the debtor defaulted on her subsidized housing residential lease by failing to make a rent payment. 1996 Bankr. LEXIS 1923, at *1-2. The landlord filed a complaint for eviction in Florida state court and obtained a default final judgment. *Id.* Before the debtor filed her bankruptcy, a writ of possession was issued. *Id.* The court in *Wimberly* held that the debtor retained the right to assume and cure the residential lease. *Id.* According to the court, a debtor retains this right until a writ of possession is executed and the debtor loses physical possession of the property. *Id.*

At the time Debtor, Ms. Tyler, filed for bankruptcy, Property Group had only filed a complaint for eviction. Debtor had not yet filed an answer, affirmative defenses, or any legal defenses. A final judgment had not been entered nor had a writ of possession been issued. Therefore, Debtor's lease remained unexpired as the lease termination process had merely commenced.

Since, the lease termination process had not been completed,

Debtor's lease remained unexpired for purposes of 11 U.S.C. §365. Consequently, the trustee retained the right to assume and cure Debtor's residential lease.

CONCLUSION

A chapter 13 debtor, pursuant to 11 U.S.C. §365, may assume her defaulted subsidized housing residential lease. A defaulted residential lease has not expired for purposes of §365, if the lease termination process is not completed prior to the filing of the bankruptcy. In this case, Debtor's lease remained unexpired as the lease termination process had merely commenced. Therefore, Debtor had the right to cure the default and assume her subsidized housing residential lease.

Therefore, it is

ORDERED AND ADJUDGED that Creditor's, Miami Property Group Ltd. d/b/a 187th Street Apartments, Motion for Relief from Stay (C.P. 10) is **DENIED**.

DONE AND ORDERED in the Southern District of Florida on October 26, 2004.

RAYMOND B. RAY
United States Bankruptcy Judge