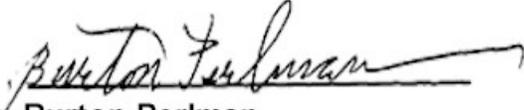


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IT IS SO ORDERED.

Dated: June 08, 2007

  
Burton Perlman  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In re: :  
: :  
Johnny Rockets of Ohio, Inc., : Case No. 07-10533  
: Chapter 11  
Debtor. : Judge Burton Perlman

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**DECISION DENYING MOTION TO DISMISS AND MOTION FOR RELIEF**

I. Introduction

Creditor RPP Sycamore, LLC (“RPP”) has filed a motion to dismiss debtor’s Chapter 11 bankruptcy case and a separate motion seeking relief from the automatic stay. Debtor is Johnny Rockets of Ohio, Inc. (“Johnny Rockets”). RPP’s motion to dismiss alleges lack of good faith and gross mismanagement of the case. Its motion for relief from stay seeks leave to proceed with its state court remedies, namely eviction, against the Debtor. Briefs were filed and Judge Aug presided over a hearing on behalf of Judge Perlman April 25, 2007. At that hearing, Richard Thompson, the principal shareholder of Johnny Rockets, testified.

## II. Facts

The Debtor is the owner and operator of a restaurant which has leased premises from RPP since May 1994. During that time, the lease has been amended twice. It is scheduled to expire December 31, 2009, though Johnny Rockets has an option to extend that term through 2014. Thompson, the principal shareholder of the Debtor, testified that the Debtor had experienced decreased business during the recent past because of construction at the shopping center where the Debtor is located. He testified that this had resulted in the Debtor's failure timely to pay rent when due on several occasions, including January, February and March, 2007.

After the missed January payment, RPP provided written notification to the Debtor that it was in default of the terms of the lease agreement. Thompson sent a check to RPP to cover January's rent, but it was returned for insufficient funds. Following this, on January 22, 2007, RPP served a three-day notice to vacate the premises on the Debtor in accordance with the Ohio Revised Code. On January 26, RPP filed a Complaint for Eviction and Rent against the Debtor and a hearing was scheduled in state court for February 14, 2007. The day before the hearing, the Debtor filed its Chapter 11 bankruptcy case, and the state court eviction proceedings were consequently stayed. Thereafter, there were additional problems with rent being sent to an incorrect address and a check returned for insufficient funds. Debtor did, however, send a certified check to RPP to cover the first post-petition rent payment.

In addition to problems with RPP, the Debtor's briefs and Thompson's testimony indicate that the decreased cash flow also resulted in Johnny Rockets falling behind on other obligations. The Internal Revenue Service had attached a lien to the Debtor's

property at the time the petition was filed and a number of additional creditors are reflected in Debtor's Schedules E and F.

### III. Discussion

In its motion to dismiss, RPP alleges a lack of good faith and gross mismanagement of the estate. Citing In re Winshall Settlor's Trust, 758 F.2d 1136 (6th Cir. 1985) for the proposition that there is an implicit prerequisite of good faith to the right to file a Chapter 11 case, RPP then turns to In re Integrated Telecom Express, 43 B.C.D. 175 (3d Cir. 2004), for the standard that whether the good faith requirement has been satisfied is a "fact intensive inquiry" in which the court must examine the "totality of the facts and circumstances."

The Court disagrees that the missed payments constitutes bad faith on the part of the Debtor in filing this case or gross mismanagement of the estate. Instead, after duly considering the evidence, the Court concludes that circumstances, temporary in nature, have led to the Debtor's problems. The Sixth Circuit has discussed the importance of a debtor's ability to reorganize its business in determining whether a filing was made in good faith. In re Ocean Beach Properties, 148 B.R. 494, 495 (Bankr. E.D. Mich. 1992). In particular, In re Dalton Lodge Trust No. 35188 emphasizes that the purpose of Chapter 11 reorganization is to assist financially distressed businesses by providing them with breathing space in order to return to a viable state. 22 B.R. 918, 922 (Bankr. N.D. Ill. 1982). In this case, the business has been profitable for several years but has been beset by temporary setbacks which it can overcome. The payment history was adequately explained during the hearing as mistakes made in a time of change and upheaval. In

addition, Thompson has made an on-time payment and testified that the Debtor can hereafter stay current.

RPP also cites In re Carbon, 200 F.3d 154 (1999), which notes that filing a Chapter 11 case merely to obtain a tactical litigation advantage is inappropriate. RPP argues that this is merely a two-party dispute. However, as Johnny Rockets established, this is more than a single creditor bankruptcy. As discussed above, there is a community of creditors, as listed in Schedules E and F, including the IRS and a number of others. The Court finds that Johnny Rockets acted in good faith in filing this Chapter 11 case and did not do so to inappropriately obtain a tactical litigation advantage. Therefore, the motion to dismiss will be denied.

In its motion for relief from stay, RPP argues that debtor's lease had been terminated prior to the bankruptcy filing and therefore the automatic stay under 11 U.S.C. § 362 does not apply. It is true that bankruptcy courts do not have the authority to reinstate a lease which has been terminated in accordance with state law prior to filing, In re Nasir, 217 B.R. 995, 997 (Bankr. E.D. Va. 1997), citing In re Lady Liberty Tavern Corp, 94 B.R. 812 (S.D.N.Y. 1988); In re Caldwell, 174 B.R. 650 (Bankr. N.D. Ga. 1994); In re Smith, 105 B.R. 50 (Bankr. C.D. Cal. 1989). The Court, however, holds that that authority is inapplicable here. Debtor argues that the lease was not terminated prior to the filing of the petition. The Court agrees.

Section 19.02 of the original lease agreement between the parties governs termination. That agreement states, in pertinent part,

. . . Landlord may serve upon Tenant a written notice that this lease will terminate on a date specified therein . . . . Upon the date specified in the aforesaid notice of termination, this Lease shall terminate and come to an end as fully and completely

as if such date were the day herein definitely fixed for the end and expiration of this Lease . . . .

RPP argues that it provided this written notice in the demand letter, the three-day eviction notice, or both. However, the demand letter does not refer to a termination of the lease or provide a date for termination as required by the terms of the lease. In addition, the three-day eviction notice also does not meet the lease agreement's requirements for termination. It did not use the word "termination" and did not have a specific date for termination. Instead, the three-day notice was a state law device that would lead to eviction proceedings, wherein the debtor could have raised state law defenses to eviction.

While there is some case law regarding whether a three-day-notice constitutes notice of termination, much of it concerns residential leases and does not discuss whether there was an agreement between the parties in regard to specific processes to terminate the lease. For instance, Cubbon v. Locker, 5 Ohio App. 3d 200 (Ohio App. 6th Dist. March 5, 1982), found that the landlord's election of re-entry was notice to the tenant of the termination of the tenancy, but that case differs factually from that at hand, particularly because it was a residential lease, the renter had already vacated the property and the court was considering whether the tenant was obligated to pay future rents. Similarly, the Court finds Dennis v. Morgan, 89 Ohio St. 3d 417 (2000), inapplicable because the issue in that case was whether the landlord waived his right to sue for unpaid future rent due under the lease by pursuing an eviction. However, even in that case, the Ohio Supreme Court adopted the holding and reasoning of Briggs v. MacSwain, 31 Ohio App.3d 85 (Ohio App. 10th Dist. Dec. 9, 1986), which held that a landlord's issuance to tenant of a three-day notice to vacate premises for nonpayment of rent does not terminate the obligations under the lease, at least as concerned with payment of rent, as opposed to

Cubbon's holding that such notice constitutes termination. Because the lease was not yet terminated at the time of filing, the motion of RPP for relief from stay fails.

There are also insufficient grounds to grant relief from the automatic stay on grounds of cause as provided in 11 U.S.C. § 362(d)(1). The Court is convinced that the Debtor filed this Chapter 11 in good faith and has proceeded in a reasonable manner since the filing. Moreover, the location of this business is important to the Debtor's reorganization process, and the Debtor intends to assume the lease. As a result, RPP's motion for relief from the automatic stay will be denied.

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