

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
	:	
SHULL ENTERPRISES, d/b/a	:	Case No. 93-1933-C H
Fonzy's Family Fun Pizza,	:	Chapter 11
	:	
Debtor.	:	
	:	

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ORDER--MOTION FOR RELIEF FROM STAY BY RBT, INC.

On November 1, 1993, a hearing was held on the Motion for Relief From Stay by RBT, Inc. The following attorneys appeared on behalf of their respective clients: Kathryn S. Barnhill for the Debtor-in-Possession, Shull Enterprises, Inc., d/b/a Fonzy's Family Fun Pizza, and Lynn Wallin-Hines and James D. Beatty for the movant, RBT, Inc. At the conclusion of said hearing, the Court took the matter under advisement under a briefing schedule and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). The Court, upon review of the pleadings, evidence, and briefs and arguments of the parties, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. RBT, Inc. (hereinafter RBT) is a corporation organized and existing under the laws of the state of Nebraska

and is authorized to do business in the state of Iowa.

2. The Debtor-in-Possession, Shull Enterprises, d/b/a Fonnzy's Family Fun Pizza, is a corporation organized and existing under the laws of the state of Iowa. Darrell Shull is the sole officer and director of Shull Enterprises which is a retail business selling pizza, primarily, and other concession items.

3. RBT is a lessee of non-residential property consisting of approximately 24,016 square feet in the River Plaza Shopping Center at 2300 Euclid Avenue, Des Moines, Iowa.

4. On April 4, 1991, RBT sublet approximately 3,500 square feet of the space to Fox-Holz Enterprises for the purpose of operating a Breadeau Pizza.

5. On March 16, 1992, Fox-Holz Enterprises assigned the sub-lease to Shull Enterprises, Inc. The sub-lessor, RBT, released Fox-Holz from any further obligation on the sub-lease and looked only to Shull Enterprises to perform. Shull Enterprises terminated the Breadeau Pizza franchise and commenced doing business as Fonnzy's Pizza.

6. Prior to February 15, 1993, Darrell Shull approached RBT regarding the sale of Fonnzy's Pizza to RBT. Shull Enterprises had management problems and did not have a manager at the time.

7. On February 15, 1993, Shull Enterprises and RBT entered into an agreement whereby RBT ran the day-to-day operations of Fonnzy's Pizza and Shull Enterprises would manage the finances. RBT was to be paid \$250.00 a week as a

management fee. Shull Enterprises has never paid this amount.

8. Darrell Shull agreed not to enter the premises during business hours, but retained a key to the offices of both Fonnzy's Pizza and RBT.

9. Brenda Madison was employed by both Shull Enterprises and RBT as a bookkeeper. Darrell Shull directed her as to which bills should be paid by Shull Enterprises.

10. Shull Enterprises also employed Rose Voll. Rose Voll was the pizza maker for Fonnzy's Pizza and worked the counter when needed. She accepted shipments to Fonnzy's Pizza and received the mail. Upon receipt of the mail, she turned it over to Brenda Madison who retained it for Darrell Shull.

11. Darrell Shull was in contact with both Brenda Madison and Rose Voll at least once a week. He received his and Shull Enterprise's mail at least once a week.

12. Shull Enterprises did not pay the monthly base rent for March, April, May, and June, 1993. It did not pay the monthly electrical utility bill for March, April, May, and June, 1993. In addition, it did not pay the monthly percentage rental for April, May, and June, 1993.

13. On June 24, 1993, RBT sent certified letters to Fox-Holz Enterprises, Shull Enterprises, and Darrell Shull, noticing said entities that Shull Enterprises and Fox-Holz Enterprises were in default under the sublease agreement dated April 4, 1991, for failure to pay rent, utility bills, and transfer of the premises to Shull Enterprises without RBT's consent. The notice referenced said sublease agreement which

provided that a default must be cured within 10 days.

14. The notices to Shull Enterprises and Darrell Shull were sent to the River Plaza Shopping Center, 2300 Euclid Avenue, Des Moines, Iowa 50310.

15. Fox-Holz Enterprises received the notice, as John Holz took the notice to Fox-Holz Enterprises's attorney, Kathryn S. Barnhill on or before June 30, 1993. Ms. Barnhill was also representing Shull Enterprises at the same time. However, she never advised Darrell Shull that she had received this notice.

16. Darrell Shull testified during the hearing and denied ever receiving the June 24, 1993 notice. However, he testified at a 2004 Examination on October 5, 1993 that he could not recall receiving the certified letter giving notice of the default.

17. Rose Voll signed a receipt for the notice of June 24, 1993 to Darrell Shull and Shull Enterprises, but did not date the receipt. She testified that she did not remember when she received the notice and could not remember whether it was before or after the time the business was closed because of the flood. However, she does remember giving the certified letters to Brenda Madison for delivery to Darrell Shull. Rose Voll is currently still employed by Shull Enterprises.

18. Sue Knight of the United States Postal Office testified that the certified letter was either picked up or redelivered within five days of the initial notice on June 30, 1993 as no second notice of the certified letter was issued.

19. The 1993 flood struck Des Moines on July 8, 1993, and the 2300 Block of Euclid Avenue was closed on July 10, 1993. The River Plaza Shopping Center, including Fonnzy's, closed for business on July 10, 1993. Fonnzy's remained closed until on or about July 22, 1993. Rose Voll did not go to Fonnzy's during this period of time.

20. Brenda Madison testified that Darrell Shull picked up the certified letter before the flood. She also admits telling Rose Voll that she did not remember the certified letter. Additionally, Brenda Madison admits that she stole money from Shull Enterprises.

21. On July 10, 1993 and July 13, 1993, Notice of Termination of Sublease Agreement was sent to Fox-Holz Enterprises, Shull Enterprises, Inc. and Darrell Shull. Darrell Shull admits receipt of this notice on July 23, 1993.

22. On July 19, 1993 Darrell Shull met with officers of RBT. At that time Darrell Shull was advised that he should clean up the pizza parlor pursuant to the sublease and let the attorneys take care of the legal matters.

23. Darrell Shull ran Fonnzy's Pizza after July 23, 1993.

24. On July 27, 1993 Darrell Shull was served with a Notice to Quit and he filed a Chapter 11 petition on July 29, 1993.

DISCUSSION

RBT brings this Motion For Relief From Automatic Stay requesting authorization to obtain possession of the sublet property at the River Plaza Shopping Center. RBT argues that it is entitled to such relief on the grounds that the sublease terminated prior to the filing of the bankruptcy petition and is, therefore, not subject to assumption under § 365. Debtor objects to RBT's motion arguing that the sublease was not properly terminated as Darrell Shull never received the notice of default providing for a ten day period in which to cure as required by the provisions of the sublease. Debtor also objects on equitable grounds and argues that the property is necessary to a successful reorganization and that RBT has not shown that cause exists for the granting of relief from stay.

Termination of the Sublease

Darrell Shull testified to this Court that he did not receive the June 24, 1993 notice of default. The certified letter was either picked up or redelivered by the Post Office within five days from the date of the initial notice on June 30, 1993. Ruth Voll, who received mail and turned it over to Brenda Madison, signed for the notice. Ruth Voll testified that she does not remember when she signed for the notice, but does remember passing it on to Brenda Madison, as was her common practice. Brenda Madison testified that she remembers giving the notice to Darrell Shull before the flood and there is evidence that Darrell Shull received his mail at least once a week. The restaurant was closed on July 10, 1993 due to

flooding. Based on the testimony and credibility of the witnesses and all of the evidence presented, the Court finds that Darrell Shull received the notice of default, at the latest, on July 10, 1993.

Under Iowa law, an intent to terminate a lease must be manifested by a clear and unequivocal act. Jack Moritz Co. Management v. Walker, 429 N.W.2d 127, 130 (Iowa 1988). This action must be in strict compliance with the forfeiture provisions relied upon in the lease. Id. Darrell Shull admits receiving a Notice of Termination of the Sublease Agreement on July 23, 1993. The Court finds that this notice manifests a clear intent by RBT to terminate the lease.

The Court must then look to the terms of the Sublease Agreement to determine whether the commercial lease was properly terminated. Paragraph 19 of the sublease provides as follows:

19. Remedies. Then and in any event covered by subsections 18.a., b., c., d., and e., Sublessor shall have the right in addition to any other right in this Sublease Agreement, at its election, provided Sublessor has given prior written notice, as hereinabove set forth, to Sublessee, then or at any time thereafter, either to:

- a. Re-enter and take possession of the Premises . .

Paragraph 18 provides in relevant part:

18. Events of Default. If any one or more of the following events (each of which is herein sometimes called "Event or Default") shall happen:

- a. If default shall be made in the due and punctual payment of any rent, taxes or any other sums required to be paid by Sublessee under this Sublease Agreement when and as the same shall

become due and payable, and such default has not been cured within ten (10) days of the date Sublessor shall have given Sublessee written notice specifying the default.

- c. If default shall be made by Sublessee in the performance of or compliance with any of the covenants, agreements, terms or conditions contained in this Sublease Agreement and Sublessee shall fail to remedy the same within ten (10) days after Sublessor shall have given Sublessee written notice specifying such default.

Darrell Shull admits that neither the base rent nor the monthly estimated percentage rent had been paid for March, April May, June, and July. He also admits that the electric bills had not been paid for this same time period. It is undisputed that no effort to cure such default was made within ten days of the notice of default.

Therefore, as the Debtor was in default, given written notice with opportunity to cure and given notice of RBT's intent to terminate the lease, the Court finds that the sublease agreement was properly terminated by RBT prior to the filing of the bankruptcy petition on July 29, 1993.

Debtor argues that despite the Notice of Default and Notice of Termination, this Court should find as a matter of equity that the sublease was not terminated prior to the bankruptcy filing. The Debtor cites the following cases in support of this argument: Matter of Joseph Cordaro, 20 B.R. 814 (Bankr. M.D. Fla. 1982) (breach giving rise to forfeiture was of minor importance and enforcement thereof would frustrate reorganization); In re Land Management, Inc., 14 B.R. 607 (Bankr. D. Puerto Rico 1981) (although lease was

technically terminated, the lease contract was held to be assumable under state law where debtor remained in possession of land and held an undetermined property right in crops); In re Belize Airways Limited, 5 B.R. 152 (Bankr. S.D. Fla. 1980) (forfeiture clause in lease agreement would not be enforced where default was minor and no opportunity was given to cure the default); Matter of Furniture Warehouse, Inc., 2 B.R. 293 (Bankr. N.D. Ga. 1980) (court refused to uphold lease termination clause where lessor failed to make one rental payment and property was essential to a successful reorganization); In re Great Scott Food Market, Inc., 1 B.R. 223 (Bankr. D. R.I. 1979) (minor default of lease agreement was not sufficient grounds to uphold forfeiture clause where otherwise promising reorganization would be rendered impossible).

However, other courts have refused to resurrect a lease where it is properly terminated under nonbankruptcy law, instead holding that the debtor is barred from assuming the terminated lease. See In re Seven Stars Restaurant, Inc., 122 B.R. 213 (Bankr. S.D.N.Y. 1990); In re Memphis-Friday's Assoc., 878 B.R. 830 (Bankr. W.D. Tenn. 1988); In re Hospitality Assoc., Inc., 6 B.R. 778 (Bankr. D. Or. 1980); Matter of Mimi's of Atlanta, Inc., 5 B.R. 623 (Bankr. N.D. Ga. 1980).

The Court concludes that the circumstances of this case do not warrant the extraordinary equitable remedy of resurrecting a terminated lease. In this case, the default was

not merely technical, but of a substantial nature. There has been no unconscionable forfeiture of the Debtor's rights, nor is this a case where termination was caused solely by the operation of a bankruptcy clause in the lease. The parties agreed prior to bankruptcy that the sublease could be terminated upon the occurrence of certain events. At least one of those events, nonpayment of rent, has occurred and RBT acted pursuant to the sublease to effect a termination. Since that termination, the Debtor's interest is one of a holdover tenant. This sublease was properly terminated under the both the terms of the agreement and Iowa law. Accordingly, the Court distinguishes the facts of this case from the line of cases cited by Debtor and declines to resurrect the properly terminated lease.

Relief From Automatic Stay

Mere possessory interests in real property have been held to be sufficient to trigger the automatic stay. In re Atlantic Business and Community Corp., 901 F.2d 325, 327 (3d Cir.1990). Therefore, the automatic stay applies in this case. However, relief from stay may be granted under § 362(d)(1) when "cause" exists. Where the trustee has no ability to assume the commercial lease pursuant to § 365(c)(3), such "cause" under § 362(d)(1) may be found. In re Acorn Investments, 8 B.R. 506, 510 (Bankr. S.D. Cal. 1981). Consequently, the Court finds that RBT is entitled to and is granted relief from the stay.

ORDER

IT IS THEREFORE ORDERED that the Motion For Relief From Automatic Stay brought by RBT, Inc. is granted and the automatic stay is terminated.

Dated this 6th day of December, 1993.

RUSSELL J. HILL
U.S. Bankruptcy Judge