

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

HITZ RESTURANT GROUP, LLC,) Case No. 20-05012
)
 Debtor) Chapter 11
)
) Honorable Donald R Cassling

**CREDITORS’ REPLY TO DEBTOR’S RESPONSE TO
CREDITOR’S MOTION TO COMPEL PAYMENT OF RENT AND SECOND MOTION
FOR RELIEF FROM THE AUTOMATIC STAY**

NOW COME, Creditors, KASS MANAGEMENT SERVICES, INC. AND THE SOUTH LOOP SHOPS, LLC (collectively “Landlord”), by and through their attorneys, Mario A. Sullivan, Johnson & Sullivan, Ltd., and in reply to the responses filed by Debtor, HITZ RESTURANT GROUP, LLC, to Landlord’s Motion to Compel Payment of Rent and Second Motion for relief from the Automatic Stay, states as follows:

Debtor has failed to show that the current Stay At Home Orders (“SAHO”) or the pandemic have prohibited it from being able to transfer money or issue payments to Landlord to comply with its obligation to pay rent under the terms of the Lease, and the lack of money does not excuse such obligation. Debtor has also failed to provide any facts to establish a reasonable rental value for its use and occupancy of the Property. “In the absence of evidence of reasonable value for the use and occupancy of the premises it is presumed that the proper compensation for use and occupancy is the amount of rent fixed in the lease.” *Wiemeyer v. Koch*, 152 F.2d 230, 234 (8th Cir. 1945); *In re Schnabel*, 612 F.2d 315, 318 (7th Cir. 1980).

Landlord should not be penalized because Debtor made poor decisions and elected not to operate its business, despite being able to do so, or to seek financial assists with a Paycheck Protection Program loan through the Small Business Association (“SBA loan”) which would have provided funds for the payment of rental and employee expenses. See the attached SBA application attached hereto as Exhibit “A”. Whether the lessee operates the premises fully or profitably is not relevant. *Kneeland v. American Loan & trust Co.* 136 U.S. 89 (1980); *In re Millard's, Inc.*, 41 F.2d 498, 499 (7th Cir. 1930); *In re Mastercraft Record Plating Co., Inc.*, 32 Bankr. 112 (Bankr. S.D.N.Y. 1983); *In re UNR Industries*, 1984 U.S. Dist. Lexis 16233, at *83 (N.D. Ill. May 31, 1984). Moreover, Debtor was operating its business in February and March, and despite having received revenue, has failed and continues to fail to pay post-petition rent for several days of February and the month of March, 2020.

I. Creditor’s Motion for Relief from the Stay should be granted as Debtor has failed to pay post-petition rent in violation of §365(d)(3).

Despite Debtors belief, its obligation to pay rent has not been prohibited by any SAHO or the pandemic and the Property is not necessary to reorganization as Debtor cannot cure the default and assume the Lease. Debtor’s failure to meet its rental payment obligations is a violation of §365(d)(3) of the Code entitling Landlord to relief from the stay.

Section 365(d)(3) of the Code requires that a debtor in possession shall timely perform all obligations under any unexpired lease, until such time as it is assumed or rejected.

Under Section 365(d)(3) of the Code, a debtor “has the duty, prior to the assumption or rejection of a lease of nonresidential real property, to make timely payment of the full rent due...” *In re Telesphere Communications*, 148 B.R. 525, 531 (U.S. Bankr., Northern Dist. IL, 1992).

A court can grant relief from the stay for cause pursuant to Section 362(d)(1) of the Code for a debtor's failure to tender post-petition rent. *In re Consolidated Indus. Corp.*, 234 B.R. 84, 87 (U.S. Bankr., Northern Dist IL., 1999).

Sections 2.1 and 2.4(A) of the Lease, provides that Debtor has an obligation to tender payment of Minimum Rent, Additional Rent, and the payment of any other sums due under the Lease ("Monthly Rent") to Landlord in lawful U.S. currency. Further, that obligation is independent of any obligation of Landlord thereunder and shall be paid without abatement, reduction, demand, or set-off.

A. Neither the SAHO nor the pandemic have hindered or halted the Debtor's ability to transfer funds to Landlord for the payment of Monthly Rent.

Debtor attempts to justify its violation of Section 365(d)(3) of the Code by incorrectly claiming that under the terms of the Lease, its obligation to pay Monthly Rent is excused by Section 29.5 Force Majeure Clause ("FMC"). Pursuant to Sections 2.1 and 2.4(A) of the Lease, Debtor obligation is to tender payment to Landlord of the Monthly Rent in lawful money of the United States. To comply with such obligation, Debtor only needs to be able to transfer funds to Landlord. Neither the SAHO nor the pandemic have halted, prohibited, or otherwise hindered a person's ability to transfer of money to another, issue and deposit checks or negotiable instruments, or otherwise tender payment in U.S. currency. Moreover, nowhere, whatsoever, does the Lease state, provide, or require that Debtor's obligation to tender Monthly Rent is condition or subject to its ability to operate or to have a successful business. In fact, under Section 29.5 of the Lease, the lack of money is not grounds for the FMC.

Furthermore, the SAHO did not prohibit all of Debtor's operations of its business. As many restaurants have, Debtor could have continued its operation for to-go or delivery items,

which would have provided some revenue to pay post-petition Monthly Rent. In addition, Debtor could have applied for and received an SBA loan to assist in its operations, including the payment of rent. It was Debtor's decision not to operate its business or seek assistance with an SBA loan. Debtor cannot seek to be excused under the FMC as it could have and can operate its business.

Finally, Debtor has failed to show why it failed to pay post-petition Monthly Rent for several days in February and the month of March, 2020, despite being in operation and no SAHO being in effect.

B. The Property is not necessary for an effective reorganization as Debtor cannot assume the Lease as it is unable to cure the Default.

Debtor claims that the Property is necessary for an effective reorganization, but has failed to show that it can cure the Default and assume the Lease. To date, Debtor has failed to tender payment of Monthly Rent in the amount of \$110,451.88. Debtor has also failed to set forth any realistic assurance or facts that would allow such a substantial default to be cured. Debtor is not even able to and has not tender payment for post-petition Monthly Rent. The fact that Debtor has not tender any rental payments since September of 2019, has not tendered any post-petition Monthly Rent, and the current state of its operations, it is impossible for Debtor to cure the default and assume the Lease. The Debtor "has the duty, prior to the assumption or rejection of a lease of nonresidential real property, to make timely payment of the full rent due..." *In re Telesphere Communications* at 531. Thus, the Lease is not essential to reorganization as it cannot be assumed by Debtor.

Therefore, Landlord should not be penalized for Debtor's poor business decisions and should be allowed to proceed against Debtor when the eviction case is next scheduled to be heard on July 7, 2020. This Honorable Court should grant Landlord's Motion and terminate the stay for cause pursuant to Section 362(d)(1) of the Code for Debtor's failure to pay any post-petition Monthly Rent. *In re Consolidated Indus. Corp.* at 87.

II. Creditor's Motion to Compel Payment of Monthly Rent should be granted as it was Debtor decision not to operate its business and Debtor's rental obligations have not been excused.

This Honorable Court should grant Creditor's Motion to Compel and require Debtor to tender payment of post-petition Monthly Rent in the amount of \$15,736.93, per month.

Debtor has failed to provide any convincing evidence to show why it should not be obligated to tender post-petition Monthly Rent in the amounts contracted for under the Lease. Nowhere, whatsoever, has Debtor set forth any evidenced to determine the fair rental value for its use and occupancy of the Property. "In the absence of evidence of reasonable value for the use and occupancy of the premises it is presumed that the proper compensation for use and occupancy is the amount of rent fixed in the lease." *In re Schnabel* at 318.

Moreover, the fact the Debtor is not operating the business is not relevant to a determination of post-petition rental payments. "Neither the particular use to which the property is put nor whether the lessee operates the premises fully or profitably is particularly relevant." *In re UNR Industries* at *83. Debtor should be required to tender payment of post-petition Monthly Rent in the amounts set forth in the Lease. Landlord should not hold the risk and loss of Debtor's failures. "[T]he presumption in favor of contractual rent is a risk assignment device, placing the risk of loss on the debtor/tenant and not the creditor/landlord." *Id.* at *86.

Furthermore, as set forth aforesaid, Debtor cannot avail its self to the FMC since neither the SAHO nor the pandemic has prohibited or hindered its ability to send funds to Landlord to comply with its obligation to pay Monthly Rent. Debtor's lack of funds is not grounds under the FMC to excuse its obligation to pay Monthly Rent to Landlord. Debtor made the decision not to operate its business or seek assistance with an SBA loan that would have paid for all or some of the post-petition Monthly Rent. It is clear that Debtor's failure to tender Monthly Rent since September, 2019 demonstrates that its inability to pay Monthly Rent has nothing to do with the current circumstances or any SAHO. Even though Debtor could have already been open for to-go or delivery, the new regulations issued by the Governor will allow additional operation of Debtor's business. See Exhibit "B" attached hereto: <https://chicago.eater.com/2020/5/20/21265428/illinois-restaurants-reopen-may-29-outdoor-dining>.

Finally, Debtor's claim that the rental value should be reduced as a result of alleged repairs is without merit. Debtor took possession of the Property on or about March, 2019. Debtor had an opportunity to inspect the Property prior to taking possession thereof for any conditions not in compliance with the terms of the Lease. See Exhibit "C" attached hereto and incorporated herein. Pursuant to Section 1.4 of the Lease, upon taking possession of the Property, Debtor accepts it in an AS-IS, WHERE-IS condition. Moreover, Section 2.4(A) of the Lease provides that Debtor's duty to pay Monthly Rent is independent of any obligation of Landlord thereunder and shall be paid without abatement, reduction, demand, or set-off. Even if repairs were need or Landlord was in default of the Lease, Debtor's obligation to pay Monthly Rent remains in full force and effect. In addition, pursuant to Section 5.1 of the Lease, it is Debtor's obligation to

maintain and repair the Property, including, but not limited to all equipment, including heating, ventilating, and air conditioning facilities.

WHEREFORE, Creditors, KASS MANAGEMENT SERVICES, INC. AND THE SOUTH LOOP SHOPS, LLC, respectfully requests that this Court grant its Motion for Relief From the Automatic, in the alternative, this Honorable Court grant it Motion to Compel Payment of Rent, and as set forth herein, and awarding any other relief this Court deems just and equitable.

Respectfully submitted,
KASS MANAGEMENT SERVICES, INC. AND
THE SOUTH LOOP SHOPS, LLC
Creditor

By: /s/Mario A. Sullivan
One of Their Attorneys

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