UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In Re: **ORAMA HOSPITALITY GROUP, LTD.,** Debtors.	Case No.: 17-21720 (JKS) Chapter 11 Judge: Hon. John K. Sherwood

DECISION AND ORDER RE: LANDLORD'S MOTION FOR AN ORDER CONFIRMING THAT THE AUTOMATIC STAY DOES NOT PRECLUDE CONTINUATION OF AN EVICTION ACTION, AWARDING POST-PETITION RENT AND AWARDING ATTORNEYS' FEES AND COSTS

The relief set forth on the following pages, numbered three (3) through twelve (12), is hereby **ORDERED**.

HONORABLE JOHN K. SHERWOOD
UNITED STATES BANKRUPTCY JUDGE

DATED: 9-15-17

APPEARANCES

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PRELIMINARY STATEMENT

Orama Hospitality Group, Ltd. ("Debtor") operates a restaurant in Edgewater, New Jersey from leased premises overlooking the New York City skyline. Mitsuwa Corporation ("Mitsuwa"), the Debtor's landlord, has moved for an order confirming that the automatic stay does not preclude continuation of a state court eviction action that was in process when this bankruptcy case was filed.[1] Mitsuwa claims its sublease agreement with the Debtor was terminated pre-petition. The Debtor claims the sublease was not formally terminated by the state court, that the automatic stay is in effect, and that it retains the option to assume the lease. For the reasons set forth below, the Court holds that the automatic stay is in effect as to Mitsuwa and that the Debtor must pay all post-petition rent. The Court reserves decision on the issue of attorneys' fees and costs.

JURISDICTION

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), and the Standing Order of Reference from the United States District Court for the District of New Jersey dated July 23, 1984, as amended September 18, 2012. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (G), (M) and (O). Venue is proper under 28 U.S.C. §§ 1408 and 1409(a).

[1] Mitsuwa's Notice of Mot. [ECF No. 16].

FACTS AND PROCEDURAL HISTORY

The Debtor owns and operates a restaurant located at 595 River Road Edgewater, New Jersey under a sublease with Mitsuwa dated May 23, 2012 and amendments thereto dated August 31, 2012, January 2, 2013 and July 16, 2014 (collectively, the "Sublease").[2] Section 18.1 of the Sublease provides that a default by the Debtor under any agreement with Mitsuwa also constitutes a default under the Sublease.[3]

On May 24, 2012, the Debtor purchased a liquor license from Mitsuwa for use in the restaurant for $700,000.00.[4] The liquor license purchase was financed by a promissory note ("Note") for $650,000.00 with annual interest rate of 3.58%.[5] The Note contains an acceleration clause that causes the outstanding principal plus all late fees and accrued and unpaid interest thereon to be immediately due and payable in the event the Debtor defaults on the Sublease.[6]

The Debtor's monthly financial obligations to Mitsuwa in the amount of $33,234.79 included rent, operating expenses and tax payments totaling $26,545.29 for the restaurant, an additional $4,750.00 to operate a separate retail space, and $1,939.50 of interest only payments under the Note.[7]

[2] David B. Gordon Decl., Ex. "A" [ECF No. 16].
[3] *Id*.
[4] Facts concerning the purchase of the liquor license and the history of the relationship between the parties are taken from the state court summary judgment decision (the "Decision"), attached to the David B. Gordon Decl., Ex. "E" [ECF No. 16]. Decision 5.
[5] David B. Gordon Decl., Ex. "D", ¶ 32 [ECF No. 16].
[6] Decision 5.
[7] Decision 2 and 5.

Shortly after signing the Sublease and Note, the Debtor claims to have discovered that the property was not structurally sound and, before the restaurant could open, required investment of millions of dollars to repair the ceiling, floor and walls, to install electric, plumbing and HVAC systems, and to replace skylights. Mitsuwa disputed Debtor's structural assessment of the property.[8]

On or about October 29, 2012, Superstorm Sandy caused extensive water damage and a prolonged loss of electricity. The catastrophic storm forced the Debtor to begin the repairs from scratch and further delayed the opening of the restaurant.[9] It appears that the parties executed various amendments to the Sublease deferring rent as a result of the structural issues and storm damage.[10] The Debtor contends that Bruce Bailey, former President of Mitsuwa, made an oral promise that the Debtor would receive rent credits until reconstruction was complete and the restaurant was open for business.[11] The Debtor also claims Mitsuwa received substantial insurance and flood damage payments for storm damage to the property but failed to credit the Debtor for the restoration work.[12]

In December of 2014, more than two and a half years after signing the Sublease and Note and after investing more than $4 million in repairs and remodeling, the Debtor opened the restaurant.[13]

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[8] Decision 3.
[9] *Id.*
[10] See Third Amendment which deferred rent from August 1, 2013 to June 1, 2014. David B. Gordon Decl., Ex. "A" [ECF No. 16"].
[11] Decision 3.
[12] *Id.*
[13] Stavroula Christakos Certification ¶ 4 [ECF No. 24].

On or about July 8, 2015, Mitsuwa commenced an eviction action against the Debtor in the Superior Court of New Jersey.[14] By order dated September 21, 2015, the Debtor was ordered to make monthly payments to Mitsuwa in the amount of $31,295.29 and the matter was transferred to the state court's law division.[15]

During the pendency of the state court action, on or about August 31, 2015, Mitsuwa served the Debtor with a Notice of Termination of Tenancy. The notice referenced a previous Notice of Breach dated May 29, 2015 and demanded that the Debtor remove itself from the premises within three (3) days from the date of service of the notice.[16]

On November 20, 2015, Mitsuwa filed an amended complaint in state court.[17] On January 6, 2016, the Debtor filed counterclaims consisting of common-law fraud, equitable fraud, fraudulent inducement and misrepresentation, breach of implied covenant of good faith and fair dealing, and unjust enrichment.[18]

Mitsuwa filed a motion for summary judgment and the state court issued the Decision on April 21, 2017 partially granting summary judgment as to an undisputed breach of the Note.[19] However, based on the state court's finding that there were material issues of fact as to the renovation of the premises, the payment of rent and the delayed opening of the restaurant, the

[14] David B. Gordon Decl., Ex. "B" [ECF No. 16].
[15] David B. Gordon Decl., Ex. "C" [ECF No. 16].
[16] Stavroula Christakos Supp. Certification [ECF No. 37].
[17] David B. Gordon Decl., Ex. "D" [ECF No. 16].
[18] Decision 6.
[19] Decision 1.

Decision denied Mitsuwa's requests for summary judgment for eviction and to strike the Debtor's counterclaims.[20]

On or about May 19, 2017, Mitsuwa sent another Notice of Lease Termination to the Debtor reiterating its position that the Debtor must vacate the premises.[21]

The state court action was tried over a three-day period beginning June 1, 2017.[22] Prior to the state court issuing a decision, the Debtor filed this chapter 11 bankruptcy case on June 6, 2017.[23] Currently, the restaurant is operating and the Debtor is paying its post-petition rent.

On June 21, 2017, Mitsuwa filed the instant motion seeking confirmation that the automatic stay does not preclude continuation of the state court eviction action. The major issues before this Court are whether the Sublease was irrevocably terminated pre-petition under New Jersey law and whether the Debtor may still assume the Sublease.

[20] Decision 16.
[21] David B. Gordon Decl., Ex. "F" [ECF No. 16].
[22] Mitsuwa's Mem. of Law, ¶ 8 [ECF No. 16].
[23] Stavroula Christakos Certification, ¶ 5 and ¶ 8 [ECF No. 24].

DISCUSSION

In determining whether a lease can be assumed under bankruptcy law, a two-prong analysis was set forth by the court in *In re Shelco, Inc.*, 107 B.R. 483 (Bankr. Del. 1989). The "court must first determine whether the lease terminated under applicable state law prior to the filing of the bankruptcy petition." Second, "if the lease in fact terminated pre-petition, the next question is whether the termination could have been reversed under a state anti-forfeiture provision or other applicable state law."[24]

Mitsuwa contends the Sublease was terminated pre-petition pursuant to N.J.S.A. 2A:18-53(c)(4), which states in relevant part that:

> "Except for residential lessees or tenants … any lessee or tenant at will or at sufferance … may be removed from such premises by the Superior Court, Law Division, Special Civil Part in an action in the following cases: … (c) Where such person … (4) shall commit any breach or violation of any of the covenants or agreements in the nature thereof contained in the lease for the premises where a right of re-entry is reserved in the lease for a violation of such covenants or agreements, and shall hold over and continue in possession of the demised premises or any part thereof, after the landlord or his agent for that purpose has caused a written notice of the termination of said tenancy to be served upon said tenant, and a demand that said tenant remove from said premises within three days from the service of such notice."

Section 18.1 of the Sublease permits Mitsuwa to "immediately terminate this Sublease and Sublessee's right to possession of the leased Premises by giving Sublessee written notice that this Sublease is terminated."[25] The Debtor acknowledges receiving Notice of Termination of Tenancy

[24] *Shelco*, 107 B.R..at 485.
[25] David B. Gordon Decl., Ex. "A" [ECF No. 16].

on or about August 31, 2015 satisfying the statutory provision N.J.S.A. 2A:18-53(c)(4).[26] Mitsuwa's notice claimed, in part, that the Debtor's default on the Note resulted in a breach of a covenant of the Sublease.[27] But the Debtor contested the termination of the Sublease in the state court action that was pending when the termination notices were sent. The Debtor had the right to do so under New Jersey Law.

In *Ivy Hill Park Apartments v. GNB Parking Corporation*, 236 N.J. Super. 565, 568 (Law Div. 1989), the court stated:

> "Obviously, the purpose of the specificity requirement in *N.J.S.A.* 2A:18-53(c) ... is to permit the tenant to adequately prepare a defense, since the tenant may contest an alleged breach of a covenant or may raise equitable defenses. Because an action to evict the tenant is normally a summary proceeding devoid of discovery, specification of the cause of termination is a means of adequately advising the tenant of the allegations against which it must defend."

The Debtor had the right to challenge and reverse the termination of the Sublease under New Jersey law. Because the Debtor exercised this right, the Sublease is not irrevocably terminated until judgment for eviction is granted by the state court.

Indeed, the state court recognized this in the Decision on Mitsuwa's motion for summary judgment. Though the court held that that there was an undisputed default on the Note, this was not sufficient to grant summary judgment for eviction.[28] The Decision took no position on whether the Sublease was terminated at the time Mitsuwa's notice was sent nor whether the default under the Note gave Mitsuwa the legal authority to terminate the Sublease. Instead, the Decision denied

[26] Stavroula Christakos Supp. Certification [ECF No. 37].
[27] *Id*.
[28] Decision 16.

summary judgment for eviction, refused to strike the Debtor's counterclaims and specifically cited to material issues of fact that had to be determined at trial. The Decision made it clear that this was not a cut and dry eviction as suggested by Mitsuwa. If it was, the state court could easily have granted summary judgment for eviction.

Prior to the state court rendering a trial decision, the Debtor filed for bankruptcy.[29] Since a judgment for eviction was never entered, termination of the Sublease may still be reversed by the state court under N.J.S.A. 2A:18-53(c)(4). Applying the second prong of the *Shelco* analysis, because the Debtor can still get relief from termination of the Sublease under New Jersey state law, the Debtor may still assume the lease under bankruptcy law.[30]

Alternatively, to the extent the payments under the Note are considered additional rent, the Debtor had the right to cure under New Jersey law. N.J.S.A. 2A:18-55 states, in relevant part, "if … the tenant or person in possession of the demised premises shall at any time on or before entry of final judgment, pay to the clerk of the court the rent claimed to be in default, together with the accrued costs of the proceedings, all proceedings shall be stopped."

The New Jersey Supreme Court analyzed monetary defaults under a lease in *Vineland Shopping Center, Inc. v. De Marco*, 35 N.J. 459 (N.J. 1961).[31] In reference to N.J.S.A. 2A:18-55, the court stated: "The statute thus adopts an approach somewhat akin to the equitable doctrine

[29] Stavroula Christakos Certification, ¶ 8 [ECF No. 24].
[30] *In re Seven Hills, Inc.*, 403 B.R. 327, 331 (Bankr. N.J. 2009) states, albeit in the context of a non-payment of rent case, that "the bright-line rule for bankruptcy courts applying New Jersey law is that the judgment for possession terminates nonresidential lease."
[31] *In re Great Feeling Spas, Inc.*, 275 B.R. 476, 477 (Bankr. N.J. 2002) states *Vineland* "must serve as the starting point for any discussion of the termination of leases under New Jersey law."

relieving from forfeiture for non-payment of a monetary obligation. Expressed another way, the summary proceeding is designed to secure performance of the rental obligation, and hence, it having been performed, the summary remedy may not be further pursued."[32]

Mitsuwa contends the Debtor's default on the Note was a breach of a non-financial covenant independent of the non-payment of rent. Yet, Section 5.4 of the Sublease states, in part, that "rent shall be defined in this Sublease as minimum annual rental, Taxes, Operating Expenses payment, and any other sums designed and/or treated in this Sublease as amounts to be paid by Sublessee to Sublessor. Sublessee's failure to pay any such amounts or charges set forth in this Sublease and the Exhibits hereto when due shall carry with it the same consequences as Sublessee's failure to pay any other form of rent."[33] Under this portion of the Sublease, the parties considered the payments due under the Note to be treated like rent. But it is also clear that the parties intended payments under the Note to be a separate covenant under Section 18.1 of the Sublease.[34]

Treating a monetary covenant like rent is supported by *Vineland*. The court found that "it would be incongruous to preserve the tenant's right to possession upon payment of 'rent' and to evict him despite payment of some other and perhaps minor sum of money."[35] In *Vineland*, the court determined a sewerage charge was considered rent despite it being listed as a covenant in the commercial lease.[36]

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[32] *Vineland*, 35 N.J. at 469.
[33] David B. Gordon Decl., Ex. "A" [ECF No. 16].
[34] *Id*.
[35] *Vineland*, 35 N.J. at 470.
[36] *Vineland*, 35 N.J. at 471.

This Court echoes the rationale in *Vineland* and considers the Note to be additional rent. As such, the Court finds that pursuant to N.J.S.A. 2A:18-55, the Debtor can cure the amounts due under the Note if it can obtain the funds to do so and assume the Sublease under bankruptcy law.

CONCLUSION

For the foregoing reasons, the motion for an order confirming that the automatic stay does not preclude continuation of an eviction action is denied.

Debtor shall continue to pay all post-petition rent through termination of the Sublease in accordance with 11 U.S.C. § 365(d)(4), which states:

> "An unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of-- (i) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming a plan. (B)(i) The court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day period, for 90 days on the motion of the trustee or lessor for cause. (ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance."

This case was filed on June 6, 2017. Thus, the 120-day deadline would expire on October 4, 2017. Furthermore, while 11 U.S.C. § 365(d)(4) does allow for a 90-day extension without Mitsuwa's consent, the Debtor must file any such motion prior to October 4, 2017 and must establish real cause. A 90-day extension would carry the deadline to January 2, 2018. Thereafter, the Debtor can only obtain further extensions upon written consent of Mitsuwa.

The Court reserves decision as to attorneys' fees and costs.