

11-1773-bk
In re: Association of Graphic Communications, Inc.
Super Nova 330 LLC v. Ian J. Gazes

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term, 2011

Docket No. 11-1773-bk

SUPER NOVA 330 LLC,

Plaintiff-Appellant,

— V. —

IAN J. GAZES.

Defendant-Appellee.

Defendant-Appellee.

Defendant-Appellee.

Before: CALABRESI, RAGGI, and CHIN, *Circuit Judges*.

Super Nova 330 LLC appeals from a judgment of the District Court (*Sweet, J.*), affirming a judgment of the Bankruptcy Court (*Lifland, J.*), denying a claim, pursuant to Section 365(d)(3) of the Bankruptcy Code, for recovery of post-petition rent, attorneys' fees, and interest. We VACATE the judgment of the District Court and REMAND the case to the District Court with instructions to remand to the Bankruptcy Court for further proceedings consistent with this opinion.

JAY B. ITKOWITZ, Itkowitz & Harwood (Simon W. Reiff, *on the brief*), New York, N.Y., for Plaintiff-Appellant.

IAN J. GAZES, Gazes LLC, New York, N.Y., for
Defendant-Appellee.

1 CALABRESI, *Circuit Judge*:

2 Super Nova 330 LLC (“Super Nova”) rented commercial property to Association of
3 Graphic Communications, Inc. (“AGC”) pursuant to a lease agreement set to expire on
4 February 28, 2007. In 2006, AGC stopped making rent payments and Super Nova obtained
5 a warrant of eviction in New York City Civil Court. On February 2, 2007, before Super
6 Nova could execute the warrant, AGC filed for Chapter 7 bankruptcy protection and the
7 resulting automatic stay halted Super Nova’s eviction efforts. Super Nova successfully
8 moved to lift the automatic stay and eventually executed the warrant on April 24, 2007.
9 Almost two years later, Super Nova moved, pursuant to Section 365(d)(3) of the Bankruptcy
10 Code, to recover post-petition rent, attorneys’ fees, and interest for the period between the
11 Chapter 7 filing date and the date the warrant of eviction was executed. The Bankruptcy
12 Court denied the motion, concluding that the pre-petition issuance of the warrant of
13 eviction terminated the landlord-tenant relationship such that there was no “unexpired”
14 lease, the presence of which is necessary to obtain administrative expenses under Section
15 365(d)(3). The District Court affirmed for substantially the same reasons. We now
16 VACATE the judgment of the District Court and REMAND the case to the District Court
17 with instructions to remand to the Bankruptcy Court for further proceedings consistent with
18 this opinion.

19 **I. BACKGROUND**

20 Super Nova is the landlord of a commercial building located at 770 Seventh Avenue,
21 New York, New York. Prior to the dispute giving rise to this lawsuit, AGC was Super
22 Nova’s tenant, occupying a portion of the ninth floor of the Seventh Avenue building. The
23 parties’ landlord-tenant relationship was governed by a non-residential lease agreement,

1 dated February 10, 1992, between Four Star Holding Company % David Yagoda (Super
2 Nova's predecessor-in-interest) and Association of the Graphic Arts, Inc. (AGC's
3 predecessor-in-interest), which subsequently was extended on February 11, 2002 and set to
4 expire on February 28, 2007. Sometime in the summer or fall of 2006, AGC ceased business
5 operations and stopped making rent payments. Super Nova first made informal requests for
6 payment, followed by a formal rent demand on October 13, 2006. When those requests
7 went unanswered, Super Nova began a nonpayment proceeding in New York City Civil
8 Court on November 27, 2006. AGC failed to appear to defend the action. The court
9 therefore granted Super Nova a default judgment of possession and issued a warrant of
10 eviction on February 1, 2007. The following day, February 2, 2007, AGC filed a voluntary
11 Chapter 7 petition for bankruptcy protection that automatically stayed all actions against the
12 company, *see* 11 U.S.C. § 362(a), thereby preventing Super Nova from executing the
13 warrant.

14 On March 28, 2007, Super Nova filed an unopposed motion before the Bankruptcy
15 Court to lift the automatic stay in order to execute the warrant of eviction. The Bankruptcy
16 Court granted the motion on April 11, 2007. With the stay lifted, Super Nova executed the
17 warrant on April 24, 2007, and Super Nova obtained both legal and actual possession of the
18 property. According to Super Nova, AGC abandoned certain personal property and debris
19 on the premises that cost Super Nova \$10,000 to remove.

20 On January 30, 2009, Super Nova moved, pursuant to Section 365(d)(3) of the
21 Bankruptcy Code, *see* 11 U.S.C. § 365(d)(3), for unpaid rent, attorneys' fees, and
22 prejudgment interest. Super Nova sought payment for the period between the Chapter 7
23 petition date, February 2, 2007, and the eviction date, April 24, 2007. The Trustee promptly

1 opposed the motion and the Bankruptcy Court ordered discovery pursuant to Federal Rule
 2 of Bankruptcy Procedure 9014(c). Following discovery, the Trustee moved for summary
 3 judgment, arguing that—since the lease had been “terminated” pre-petition when the
 4 warrant of eviction was issued—the lease was not “unexpired” and hence that a prerequisite
 5 for relief under Section 365(d)(3) was not met.

6 On July 13, 2010, the Bankruptcy Court granted the Trustee’s motion for summary
 7 judgment and denied Super Nova’s motion for administrative expenses. Accepting the
 8 Trustee’s argument, the court held that the lease was not “unexpired” because it was
 9 “terminated” pre-petition by the issuance of the warrant of eviction, and, as such, Super
 10 Nova was not entitled to post-petition rent, attorneys’ fees, or interest. On appeal, the
 11 District Court, agreeing that the lease was not “unexpired” as required by the Bankruptcy
 12 Code, affirmed the Bankruptcy Court’s decision. This timely appeal followed.¹

13 II. DISCUSSION

14 “We exercise plenary review over a district court’s rulings in its capacity as an
 15 appellate court in bankruptcy.” *Cnty. Bank, N.A., v. Riffle*, 617 F.3d 171, 174 (2d Cir. 2010)
 16 (per curiam). We “independently examine the bankruptcy court’s factual determinations
 17 and legal conclusions, accepting the former unless clearly erroneous and reviewing the latter
 18 *de novo.*” *Id.* (quoting *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 371 (2d Cir.
 19 2005)).

20 The threshold question in this case is a purely legal one: Where a landlord seeks and
 21 obtains a warrant of eviction in New York, but does not execute that warrant prior to the

¹ The Bankruptcy Court also denied Super Nova’s motion for leave to amend its expense motion to include an alternative basis for relief under Section 503(b)(1)(A) of the Bankruptcy Code. The District Court affirmed. On appeal, Super Nova does not challenge this ruling and we treat the claim as abandoned.

1 tenant's filing of a bankruptcy petition, is the lease "unexpired" for purposes of Section
 2 365(d)(3) of the Bankruptcy Code? We hold that it is and vacate the District Court's ruling
 3 to the contrary. Our holding to that effect does not, however, fully resolve this case. *See infra*
 4 pp. 7-11.

5 Section 365(d)(3) of the Bankruptcy Code obligates a trustee "timely [to] perform all
 6 the obligations of the debtor . . . arising from and after the order for relief under any
 7 unexpired lease of nonresidential real property." 11 U.S.C. § 365(d)(3). "The term
 8 'unexpired' is not defined in the Bankruptcy Code itself or in its legislative history."
 9 *Brattleboro Hous. Auth. v. Stoltz (In re Stoltz)*, 197 F.3d 625, 629 (2d Cir. 1999). Given this, we
 10 have held that "because property interests are created and defined by state law," we should
 11 "look[] to state law to determine a debtor's interests, including leasehold interests, in the
 12 bankruptcy estate." *Id.*

13 Section 749(3) of the New York Real Property Actions & Proceedings Law provides
 14 in relevant part:

15 The issuing of a warrant for the removal of a tenant cancels the agreement
 16 under which the person removed held the premises, and annuls the relation of
 17 landlord and tenant, but nothing contained herein shall deprive the court of
 18 the power to vacate such warrant for good cause shown prior to the execution
 19 thereof.

20 N.Y. Real Prop. Acts. Law § 749(3) (McKinney 2011). Under New York law, therefore,
 21 while the issuance of a warrant of eviction cancels any existing lease and seemingly
 22 terminates the landlord-tenant relationship, the tenant, in fact, retains a residual interest in
 23 the lease until the execution of the warrant. Prior to such execution, the state court may
 24 vacate the warrant of eviction for good cause and thereby reinstate the lease. *See, e.g., In re*

1 Sweet N Sour 7th Ave. Corp., 431 B.R. 63, 70 (Bankr. S.D.N.Y. 2010) (lifting automatic stay
 2 to permit debtor to move in New York state court to vacate warrant of eviction).

3 In *Stoltz*, a Vermont case, we suggested that a lease that has been “terminated” pre-
 4 petition can nonetheless be “unexpired” for purposes of Section 365(d)(3) if state law
 5 permits reinstatement of the lease. 197 F.3d at 630-31. Under Vermont law, until a landlord
 6 obtains a writ of possession—the equivalent of New York’s warrant of eviction—the debtor
 7 “ha[s] the right to vacate the judgment of possession by curing the default on rent and
 8 paying interest and costs.” *Id.* at 630. The tenant in *Stoltz* had filed for bankruptcy prior to
 9 the issuance of the writ of possession and before the time to appeal the judgment of
 10 possession had expired. *Id.* On these facts, we held that “a debtor who retains a possessory
 11 interest in a residential tenancy has an ‘unexpired’ lease at least until the writ of possession
 12 is issued.” *Id.* at 631. We expressly left open whether the lease would be deemed
 13 “unexpired” if the writ of possession had been issued but not executed pre-petition. *See id.*
 14 (“On the facts of this case, it is unnecessary to decide whether a lease remains unexpired
 15 until the execution of the writ of possession.”). In *Canney v. Merchants Bank (In re Canney)*,
 16 284 F.3d 362 (2d Cir. 2002), we returned to the issue left open in *Stoltz* and held that under
 17 Vermont law, “[i]n an ejectment proceeding, a debtor may redeem and thereby avoid
 18 ejectment if the clerk of court has not issued the writ of possession; issuance of the writ in an
 19 ejectment proceeding extinguishes the debtor’s right to redeem.” *Id.* at 374-75.

20 Applying *Stoltz* and *Canney* to the New York statutory scheme compels reversal of
 21 the District Court’s decision in this case that the lease was not “unexpired.” In Vermont, the
 22 issuance of the writ of possession terminates a tenant’s right to redeem. But in New York,
 23 until the execution of the warrant of eviction, a tenant who demonstrates good cause may

1 obtain vacatur of the warrant, and in that way avoid eviction and reinstate the lease even
2 though it was previously terminated when the eviction warrant was issued. The automatic
3 stay, moreover, effectively prevents a landlord from executing a warrant of eviction once a
4 bankruptcy petition is filed, and thereby preserves the tenant's right to pursue this state court
5 post-petition statutory remedy.

6 Following our prior holdings, we conclude that a lease is "unexpired" for purposes of
7 Section 365(d)(3) of the Bankruptcy Code when the tenant has the power to revive the lease
8 under applicable state law. *Cf. Stoltz*, 197 F.3d at 630-31 (stating that "a tenant-debtor with a
9 possessory interest in leased residential property has an 'unexpired' lease" if state law
10 permits the debtor to "cur[e] the default"); *see also id.* at 630 (stating that "a lease is not
11 considered to be expired for purposes of the Code by a judgment of possession where [the]
12 tenant has power to revive [the] lease under applicable state law" (citing *Robinson v. Chi.
13 Hous. Auth.*, 54 F.3d 316, 321 (7th Cir. 1995))). Because in New York it is the execution and
14 not the issuance of the warrant of eviction that extinguishes the tenant's interest in the lease,
15 the lease is "unexpired," as that term is used in Section 365(d)(3), until the warrant is
16 executed. That the warrant itself nominally terminates the lease is irrelevant: the existence
17 of a statutory right to reinstate the lease upon a showing of good cause means that the lease
18 remains "unexpired." And only when the warrant is executed and the tenant's residual right
19 to reinstate the lease is extinguished does the lease cease being "unexpired."

20 It does not, however, follow from this conclusion that Super Nova is entitled to
21 rental payments and other costs. Section 365(d)(3) states that "[t]he trustee shall timely
22 perform all the obligations of the debtor . . . arising from and after the order for relief under
23 any unexpired lease of nonresidential real property, *until such lease is assumed or rejected.*" 11

1 U.S.C. § 365(d)(3) (emphasis added). This same section also states that a nonresidential
2 lease cannot be assumed or assigned by the trustee if it is “terminated” under state law. *See*
3 *id.* § 365(c)(3) (“The trustee may not assume or assign any executory contract or unexpired
4 lease of the debtor . . . if . . . such lease is of nonresidential real property and *has been*
5 *terminated under applicable nonbankruptcy law* prior to the order for relief.” (emphasis added)).
6 In other words, if a nonresidential lease has been terminated under state law, then the
7 Trustee may not assume or assign the lease; rather, he can only reject it.

8 This raises the question whether a “terminated” yet “unexpired” lease should be
9 treated as presumptively rejected by the Trustee or whether we should require the Trustee
10 affirmatively to reject it in order to avoid liability for rent and other costs. We can think of
11 practical reasons to treat the lease as rejected, the most compelling one being that unless the
12 Trustee acts in moderately complex ways—*i.e.*, by moving to lift the automatic stay in
13 bankruptcy court and then seeking vacatur in state court—he is not permitted to assume
14 such a terminated lease. By contrast, the landlord need only move to lift the automatic stay
15 to execute its eviction warrant, without seeking any further state court remedy.

16 But there are also compelling concerns on the other side. Even though the leasehold
17 cannot be immediately assumed by the Trustee, the Trustee—as indicated above—can move
18 in state court to reinstate the lease. Once the lease is reinstated, the Trustee can, under the
19 Bankruptcy Code, readily assume it. Pending any such action, moreover, the Trustee
20 remains in legal possession of the property and the landlord cannot execute the warrant
21 because of the automatic stay. This means that the Trustee is capable during such a time to
22 move to obtain the benefits of the lease, should he wish to do so. Conversely, the
23 Bankruptcy Code does provide a mechanism for the Trustee to reject a lease during the

1 same time, if that is what he wishes. *See* 11 U.S.C. § 365(d)(4) (requiring a trustee to file a
2 motion to reject a lease or wait 120 days, after which the unexpired lease is deemed
3 rejected). As a result, to avoid allowing the trustee to “have it either way” depending on
4 how the value of the lease moves, there may be a good reason to place the burden on the
5 Trustee to disclaim any future interest in the lease and affirmatively to reject it if he intends
6 to surrender the property.

7 This question—whether the Trustee should be obliged to reject a “terminated” but
8 “unexpired” lease—was not briefed or argued below. The issue is one of law, and hence we
9 could decide it now. But because of the Bankruptcy Court’s specialized knowledge, we
10 deem it wise to permit the parties to brief and argue the issue before that court in the first
11 instance. In remanding this issue, we also vacate and remand the Bankruptcy Court’s earlier
12 finding on the question of possession. The Bankruptcy Court concluded that the tenant in
13 this case was not in possession of the property. This finding was based entirely on
14 representations made by the tenant and the Trustee. The Trustee declared to the Bankruptcy
15 Court that he could not enter the premises because he did not have possession of the keys
16 and could access the building only with the permission of the building supervisor. Further,
17 the Trustee submitted that in November 2006, Super Nova “locked the [p]remises and
18 thereafter, denied [AGC] access to the [p]remises and to its property,” thereby regaining
19 possession and effectuating constructive eviction. At the same time, AGC claimed that it
20 communicated to Super Nova that it “had no intention or desire to maintain operations or
21 otherwise occupy the [p]remises” and offered to enter into a surrender agreement.

22 Super Nova presents a substantially different account. It asserts that after AGC
23 began bankruptcy proceedings, AGC retained possession of the premises and failed to

1 surrender the keys. According to Super Nova, AGC did not vacate the property until ousted
 2 by eviction. Super Nova also claims that prior to formal eviction, the Trustee's agent, along
 3 with Vicky Kuhn, a representative of AGC who had keys to the premises, visited the
 4 building and removed several boxes. Finally, Super Nova alleges that when the lease
 5 expired on February 28, 2007, it sent the Trustee a request to enter into a surrender
 6 agreement, but received no response.

7 The Bankruptcy Court appeared to acknowledge that there was a conflict, but,
 8 nonetheless, held that the debtor was not in possession of the property. Given that the
 9 parties' accounts diverge dramatically, the issue of possession could not be decided at
 10 summary judgment. *See Jasco Tools, Inc. v. Dana Corp. (In re Dana Corp.)*, 574 F.3d 129, 151
 11 (2d Cir. 2009) ("A motion for summary judgment may properly be granted—and the grant
 12 of summary judgment may properly be affirmed—only where there is no genuine issue of
 13 material fact to be tried, and the facts as to which there is no such issue warrant judgment
 14 for the moving party as a matter of law." (citing Fed. R. Civ. P. 56(c))). On remand,
 15 therefore, if the Bankruptcy Court concludes that this question of fact—whether AGC or the
 16 Trustee remained in possession of the property—is necessary to decide whether Super Nova
 17 is entitled to its administrative claim of rental payments under Section 365(d)(3), it must
 18 make this determination, but it must do so only after the requisite examination of the issues
 19 of fact in dispute.

20 ***

21 To summarize: We hold that a lease is "unexpired" for purposes of the Bankruptcy
 22 Code where the tenant has the power to revive the lease under applicable state law. Because
 23 in New York it is the execution, and not the issuance, of the warrant of eviction that

1 extinguishes the tenant's interest in a lease, until the warrant is executed, the lease is
2 "unexpired" for purposes of Section 365(d)(3). We therefore vacate the District Court's
3 judgment that the lease in this case was not "unexpired" under Section 365(d)(3). Even so,
4 the question of whether a Trustee is required affirmatively to reject a "terminated" yet
5 "unexpired" lease or whether such a lease should be treated as presumptively rejected was
6 not briefed or argued before either the Bankruptcy Court or the District Court. Accordingly,
7 we remand the case to the Bankruptcy Court so that it can decide that issue in the first
8 instance. If its determination of that issue leaves the question of whether AGC or the
9 Trustee remained in possession of the property as determinative of whether Super Nova is
10 entitled to rental payments and other costs under Section 365(d)(3), the Bankruptcy Court
11 must decide that issue, but only after resolving the factual dispute that we have noted.

III. CONCLUSION

13 For the foregoing reasons, we VACATE the judgment of the District Court and
14 REMAND the case to the District Court with instructions to remand to the Bankruptcy
15 Court for further proceedings consistent with this opinion.