



The following constitutes
the order of the court. Signed April 25, 2014

M. Elaine Hammond

M. Elaine Hammond
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
Lee Andrew Cain and
Annette Jackson Cain,

Case No. 13-45030 MEH
Chapter 13

Hearing Held

Date: April 11, 2014
Time: 1:30 p.m.
Place: 1300 Clay Street
Courtroom 215
Oakland, CA

Debtors./

MEMORANDUM DECISION

A hearing was held on April 11, 2014 in the above-captioned case to resolve issues in the case revolving around two Commercial Lease Agreements for adjacent properties used as Debtors' place of business (together, the "Lease Agreements") entered into by Lee Cain and Annette Cain (the "Debtors") and Haoson, LLC (the "Landlord"). Duong Tran appeared on behalf of Landlord and Robert Chang appeared on behalf of Debtors. The court heard the parties' arguments and took the matter under submission.

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1 The court, having considered all relevant pleadings, admitted
2 exhibits, witness testimony and the parties' arguments on the record,
3 issues the following Memorandum Decision.

4 **I. FACTS**

5 The parties entered into the Lease Agreements on March 15, 2011
6 for a lease term from March 15, 2011 to March 31, 2016. Under the
7 agreements, the base rent for the premises was \$2,740 per month from
8 August 1, 2011 until December 30, 2011, and then was to increase to
9 \$4,110 per month from January 1, 2012 until March 31, 2016.

10 Debtors filed a Seventh Amended Chapter 13 Plan (the "Plan") on
11 February 6, 2014, which provided for \$2,740 regular monthly payments
12 and \$767.07 monthly cure payments on the leases. Landlord filed an
13 Objection to Confirmation on February 25 and an Amended Motion for
14 Relief from Stay, seeking relief to pursue an unlawful detainer action
15 with respect to the property, on February 26.

16 The parties do not dispute that Landlord allowed Debtors to pay
17 \$2,740 per month rather than the agreed-upon \$4,110 per month from
18 August 2012 until December 2012. Landlord's July 8, 2013 Three-Day
19 Notice to Pay Rent or Quit¹ indicates that the monthly rent owed from
20 January 2013 until July 2013 was \$2,740. Landlord's additional filings
21 in the case indicate that the monthly rent owed from August, 2013 until
22 December 2013 was also at the lower rate.²

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24 ¹ Debtors' Exhibit 1.

25 ² See Creditor Haoson, LLC's Objection to Confirmation of Chapter
26 13 Plan, docket no. 93 at 4; Declaration of Nguyet Vu, docket no.
(continued...)

1 Debtors assert that the parties entered into an oral agreement to
2 modify the Lease Agreements such that monthly payments would remain at
3 \$2,740 for the duration of the lease term (through March of 2016), as
4 evidenced by Landlord's failure to bring a claim against Debtors.
5 *Debtors' Opposition to Creditor Haoson, LLC's Objection to Confirmation*
6 (*"Debtors' Opposition"*), docket no. 99 at 2. Debtors further argue
7 that Landlord waived any right to the higher rent amount under the
8 Lease Agreements by choosing not to enforce its rights. *Id.*

9 **II. DISCUSSION**

10 **A. Amount Owed Under the Leases**

11 **(1) Oral Modification**

12 Under California law, a written contract may be modified by an
13 oral agreement to the extent that it is executed by the parties, or,
14 unless the contract expressly provides otherwise, by an oral agreement
15 between the parties supported by new consideration. Cal. Civ. Code
16 § 1698(b), (c). In addition, any contract modification that falls
17 within the statute of frauds must satisfy its requirements. *Id.*

18 Debtors have not alleged new consideration nor produced evidence
19 establishing that the parties reached an oral agreement to modify the
20 Lease Agreements for the duration of the term of the leases. Debtors
21 argue that "the contract was modified sometime in 2011 to allow for the
22 lower payment to remain in effect for the remainder of the

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25 ²(...continued)
26 94 at 8.

1 lease term³," however Debtors' only evidence regarding a modification
2 was Ms. Cain's testimony at the hearing that Landlord represented to
3 her orally and through emails that the parties would enter into a new
4 lease agreement in 2012 to reflect an ongoing monthly payment of
5 \$2,740. The court finds that this evidence alone is insufficient to
6 establish that the parties orally modified the Lease Agreements.

7 In addition, the purported modification does not meet the
8 requirements of the California statute of frauds. Under Cal. Civ. Code
9 § 1624(a)(3)⁴, an agreement to lease real property for a period longer
10 than one year must be made in writing and signed by the party to be
11 charged.

12 Here, the parties do not dispute that the lease terms extend out
13 through March of 2016. Instead, Debtors argue that the statute of
14 frauds does not apply because the Debtors could potentially satisfy the
15 leases within one year by paying off the leases in full.

16 The focus of § 1624(a)(3), however, is not the overall agreement
17 to lease, but rather on the duration or term of the lease. *Bed, Bath*
18 *& Beyond of La Jolla, Inc. v. La Jolla Vill. Square Venture Partners,*
19 *52 Cal. App. 4th 867, 877 (Ct. App. 1997).* If the term of the lease
20 exceeds one year, as the terms of the leases do in this case, the lease
21 agreement will be subject to the statute of frauds. *Id.*

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25 ³ *Debtors' Opposition*, docket no. 99 at 2.

26 ⁴ Hereinafter "§ 1624(a)."

1 Because the statute of frauds applies to the parties' purported
2 modification and it is not in a writing signed by the party to be
3 charged, it is an invalid modification to the Lease Agreements.

4 **(2) Waiver**

5 Debtors argue that Landlord's conduct constitutes a waiver of its
6 right to enforce the \$4,110 rent term of the Lease Agreements.

7 A party may, by its conduct, waive the right to recover for a
8 breach of contract. However, in "continuing obligation cases, a waiver
9 of a breach up to a certain time does not necessarily preclude the
10 promisee from asserting a subsequent breach." *Bowman v. Santa Clara*
11 *Cnty.*, 153 Cal. App. 2d 707, 713 (1957).

12 Landlord's conduct and its filings in the case indicate its assent
13 to continue to accept the lower monthly payments of \$2,740 from January
14 2013 until December 2013. Landlord's Three Day Notice to Pay Rent or
15 Quit indicates that the monthly "rent owed" from August 2012 until
16 July 2013 is \$2,740. Landlord's proof of claim⁵ also indicates that
17 the monthly rent owed during that period is \$2,740. With respect to
18 post-petition payments up until January 2014, Landlord's additional
19 filings indicate Landlord's assent to post-petition payments of the
20 lower rent amount from September 2013 until December 2013.

21 Both Landlord's objection to plan confirmation and its amended
22 motion for relief from stay indicate that post-petition rent owed for
23 October 2013 through December 2013 is \$2,740 per month. See fn 2.

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26 ⁵ Proof of Claim no. 14-1.

1 Based on Landlord's proof of claim and the rent roll provided at
2 the hearing as Landlord's Exhibit B (the "Rent Roll"), pre-petition
3 rent owed from June 2012 through September 3, 2013 is \$40,774⁶ and the
4 amount paid during this period was \$11,023. Those documents are
5 consistent with the court's finding that the monthly rent owed from
6 July 2012 through December 2014 is \$2,740. Applying the rent paid to
7 the rent owed, Debtors' pre-petition default is \$29,751.

8 Based on the court's finding that the monthly rent owed for
9 October, November and December 2013 is \$2,740 and the monthly rent owed
10 going forward is \$4,110, the total amount owed from September 4, 2013
11 through April 2014 is \$27,126. Based on the Rent Roll, the amount paid
12 during this period was \$16,240. Applying the rent paid to the rent
13 owed, Debtors' post-petition default is \$10,886.

14 As for the monthly obligation from January 2014 and going forward,
15 the language of the Lease Agreements is clear: Section 24 ("Waiver")
16 states that "[n]o waiver by the parties hereto of any default as breach
17 of any term, condition or covenant of this Lease shall be deemed a
18 waiver of any subsequent default or breach of the same or any other
19 term, condition, or covenant contained herein." While Landlord waived
20 its right to the \$4,110 monthly rent obligation up until January 2014,
21 its waiver of prior amounts owed does not amount to a waiver of amounts
22 owed in the future. Because Debtors provide no substantial evidence
23

24 ⁶ The case was filed on September 4, 2013 and the \$2,740
25 pre-petition portion of the September 2013 rent is prorated
26 accordingly. The remaining \$2,466 is allocated to the post-petition
arrears.

1 to support a contrary finding, the court finds that Debtors' monthly
2 rent obligation under the Lease Agreements is \$4,110 per month as of
3 January 1, 2014.

4 Based on the foregoing, the court finds that Debtors' pre-petition
5 default is \$29,751; that Debtors' post-petition default is \$10,886; and
6 that the current monthly rent as of January 1, 2014 is \$4,110.

7 **B. Assumption of the Leases**

8 In order to assume the leases, Debtors must: 1) cure any existing
9 default or provide adequate assurance of prompt cure of the default;
10 2) provide adequate assurance of prompt compensation for any monetary
11 loss; and 3) provide adequate assurance of future performance of the
12 contract. 11 U.S.C. § 365(b)(1)⁷.

13 **(1) Cure or Adequate Assurance of Prompt Cure**

14 As of the April 11 hearing, Debtors have not cured the outstanding
15 \$40,637 default on the leases. Debtors argue that the Plan provides
16 for prompt cure, however the Plan calls for cure payments over a 42
17 month period, well beyond the remaining term of the leases.

18 Courts have consistently held that a cure period of over two years
19 is not "prompt" for purposes of § 365(b)(1). *See Matter of DiCamillo*,
20 206 B.R. 64, 72 (Bankr. D. N.J. 1997) (collecting cases). Likewise, the
21 court finds under the facts presented that a cure period that is beyond
22 two years and beyond the remaining term of the loan does not satisfy
23 this requirement.

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26 ⁷ Hereinafter "§ 365(b)(1)."

1 **(2) Adequate Assurance of Prompt Compensation for Loss**

2 For the reasons stated above, Debtors have failed to provide
3 adequate assurance that Landlord will be promptly compensated for any
4 pecuniary loss resulting from their default.

5 **(3) Adequate Assurance of Future Performance**

6 Debtors' Plan is based on the assumption that Debtors will
7 continue to make payments of \$2,740 for the duration of the leases,
8 which is \$1,370 shy of the current monthly payment owed under the Lease
9 Agreements. As such, and taking into consideration Debtors' sporadic
10 payment history, the court finds that Debtors have not provided
11 adequate assurance of future performance.

12 **C. Relief from the Automatic Stay**

13 A final hearing on relief from stay will be held on April 30, 2014
14 at 11:30 a.m. to determine whether Debtors have provided Landlord
15 adequate protection in light of the findings set forth in this
16 Memorandum Decision.

17 **III. CONCLUSION**

18 For the above reasons, the court finds that the parties did not
19 modify the Lease Agreements and that Debtors have not met the
20 requirements of § 365(b)(1) to assume the lease. The court will enter
21 an order contemporaneously herewith.

22 **END OF MEMORANDUM DECISION**

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ECF Recipients