UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

In Re:	
SPOKANE SPORTS BAR, INC.,	No. 02-01608-W11
Debtor(s).	MEMORANDUM DECISION RE: LEIPHAMS' MOTION FOR RELIEF FROM STAY

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on March 29, 2002 upon creditors Dean and Cheryl Leipham's Motion for Relief From Stay. Debtor was represented by John Bury and creditors Dean and Cheryl Leipham were represented by David Eash. The court reviewed the files and records herein, heard argument of counsel, and was fully advised in the premises. The court now enters its Memorandum Decision.

FACTS

Spokane Sports Bar, Inc., the debtor, currently occupies the premises located at 126 N. Division, Spokane, Washington. Originally, the debtor occupied the premises pursuant to a ten year lease with the owners, Dean and Cheryl Leipham (hereinafter "the Leiphams"). That lease expired by its terms in May of 2000. Since that date, the debtor has been occupying the premises under a month-to-month tenancy. In November, 2001, Dean Leipham executed a Real Estate Purchase and Sale Agreement and Amendment No. 1 with prospective purchaser Gavin Swenson. That agreement was subject to

six contingencies, one of which was the purchaser's review and acceptance of the title report. Due to defects in the title unacceptable to the purchaser, the closing date was at first postponed and then never consummated. The debtor alleges an oral lease with the Swensons which extends through July of 2002.

On January 15, 2002, the Leiphams caused a Notice to Terminate Tenancy to be posted at 126 N. Division and to be mailed to the debtor and all related entities appearing on the preliminary title report. The Notice to Terminate Tenancy stated that the debtor's tenancy of the premises would be terminated on the 28th day of February, 2002. On February 27, 2002, the debtor filed this Chapter 11 proceeding.

On March 1, 2002, the Leiphams moved for relief from the automatic stay to complete foreclosure of certain personal property of the debtor under the terms of a Security Agreement. Leiphams and Swenson sought to lift the stay to evict the debtor in an unlawful detainer action. The court has reserved the request to lift the stay to allow foreclosure of the personal property to a later date. This memo opinion will address the debtor's purported lease of the real property with Swenson and the effect of the automatic stay on the debtor's interest in the real property.

Issue No. 1 - The Effect of the Automatic Stay On the Original 10 Year Lease Between the Debtor and the Leiphams.

The filing of a petition commences a case which creates an estate. 11 U.S.C. § 541(b)(2) provides that property of the estate does not include any interest of the debtor as a lessee under a lease of non-residential real property that has terminated at the expiration of the stated term of such lease before the commencement

of a case under this Title. 11 U.S.C. § 541(b)(2). The Lease Agreement entered into on the 1st day of June, 1990 between Leiphman and Culinary Purveyors, Inc. (apparently a predecessor entity of the debtor) signed by Terry and Thomas Finnerty (principals of the debtor) provides at paragraph 2 that the lease shall be for a term of 10 years commencing on the 1st day of June, 1990 and ending on the last day of May, 2000. Further, paragraph 17, "Holding Over", provides that if the lessors elect to accept rent, only a month-to-month tenancy shall be created and not a tenancy for any longer period. Consequently, the 10-year lease terminated by its terms on the last day of May, 2000. The lease no longer existed when this proceeding was commenced and cannot constitute property of the estate, and any termination of that lease would not be subject to the automatic stay.

Issue No. 2 - Is There A Valid Lease Between the Debtor and Swenson?

The debtor alleges that pre-petition it entered into an oral lease with Swenson through July of 2002. However, Swenson, as a prospective purchaser, never had the authority to enter into a binding lease, oral or otherwise, with the debtor prior to consummation of the sale. Therefore, it is irrelevant whether oral leases for terms of less than one year are enforceable in Washington.

Despite the fact that Swenson neither owns nor possesses the building which houses the debtor's business, the debtor argues that Swenson is a vendee-in-possession who is authorized to enter into a binding oral lease with the debtor. The debtor points to the fact that Swenson has posted signs that read "For Lease By Owner"

in front of the premises listing only Swenson's phone number, and that Swenson has performed construction and remodeling work on the premises. While this type of behavior is troubling in light of Swenson's representations to this court that he is not the owner of this building, the only evidence on the issue indicates that the sale of the property to Swenson has never closed. The purchase was contingent on Swenson's acceptance of the title report and other matters. It is certainly plausible that as a prospective purchaser, Swenson would be unwilling to close the sale after receiving a title report such as the one on this property. In any event, entering into an agreement to purchase with closing contingent upon certain conditions does not make him a vendee in possession.

The debtor cites several Washington decisions recognizing various rights of vendees in possession. See *Nethery v. Olson*, 41 Wn.2d 173, 247 P.2d 1011 (1952) (recognizing the general rule that a vendee who possesses land under an executory contract is estopped to deny his vendor's title); *Swanson v. Anderson*, 180 Wn.2d 284, 38 P.2d 1064 (1934) (recognizing that a vendee in possession of real property under an executory contract may claim a homestead); *Lawson v. Helmich*, 20 Wn.2d 167, 146 P.2d 537 (1944) (holding that a purchaser of land under a forfeitable executory contract has an interest in land which, coupled with possession, is a sufficient basis for him to institute an action for trespass); *Pierce County v. King*, 47 Wn.2d 328, 287 P.2d 316 (1955) (holding that a vendee in possession under an executory contract is a necessary and proper party to a condemnation proceeding, and that vendees in possession under an executory contract must bear the

risk of property being taken in eminent domain proceedings); *Northwest Television Club, Inc. v. Gross Seattle, Inc.*, 96 Wn.2d 973, 634 P.2d 837 (1981) (discussing a lessee-in-possession's rights of first refusal).

These cases are inapposite to the case at hand. They discuss whether vendees in possession are entitled to maintain various types of actions on their own behalf, not whether a vendee in possession is entitled to enter into a lease with a tenant of the vendor. More importantly, they all involve vendees who possessed property under closed contracts of sale under which the vendees had been performing for long periods of time. This is vastly different from the current situation, where no closing has occurred on the agreement to purchase the building at 126 S. Division. Swenson clearly is not a vendee-in-possession. In fact, Swenson is not even a *vendee* as he has not yet purchased anything. Swenson has never been anything more than a prospective purchaser.

Issue No. 3 - Does 11 U.S.C. § 362(b)(10) Exclude Month-to-Month Tenancies From the Automatic Stay Provisions of 11 U.S.C. § 362(a)(3)?

The debtor argues that 11 U.S.C. § 362(b)(10) is inapplicable to month-to-month tenancies, and that the automatic stay protects its possessory interest in the property. 11 U.S.C. § 362(b)(10) reads:

> (b) The filing of a petition under section 301, 302, or 303 of this title...does not operate as a stay -
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> (10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this tile to obtain possession of such property.

The debtor points out that 11 U.S.C. § 362(b)(10) only excepts

from the automatic stay acts taken by lessors under a lease with a stated term. The debtor's rationale is that a month-to-month tenancy is not a lease for a stated term, and does not fit into the exception provided by 11 U.S.C. § 362(b)(10) and thus the automatic stay protects the debtor.

Conversely, the Leiphams attempt to expand 11 U.S.C. § 362(b)(10) to include month-to-month tenancies that arise following the expiration of a lease for a stated term, regardless of the date that lease expired. Debtor argues that since leases for a sated term are not effected by the automatic stay, after expiration of a lease, the continued tenancy is also not effected by the automatic stay. Leiphams' argument is illogical. It would result in different treatment of debtors in the same position. For example, a tenant who occupied premises for two years as a month-to-month tenant following the expiration of a one year lease would not be protected by the automatic stay while a tenant who had occupied premises for three years as a month-to-month tenant (never having been a party to a lease) would be protected by the automatic stay. Both debtors would be month-to-month tenants at the time of filing bankruptcy with the only distinguishing factor the fact that one debtor was once a party to a long-ago expired lease. To hold that one debtor would have a possessory interest protected by the automatic stay and the other debtor's possessory interest would not be subject to the automatic stay would be unreasonable and unfair. See, *Erickson v. Polk*, 921 F.2d 200 (8th Cir. 1990).

It is clear that 11 U.S.C. § 362(b)(10) applies only to nonresidential leases that terminate by their own stated terms prior to or during bankruptcy. What we are faced with is a month-

to-month tenancy that has continued for almost two years after the expiration of a 10-year lease. The fact that a lease for a stated term once existed is irrelevant. Neither the lessor nor the lessee has any rights under the expired lease, and this court cannot reinstate a lease that terminated almost two years ago. This reasoning is consistent with the holding in *In re Windmill Farms, Inc.*, 841 F.2d 1467 (9th Cir. 1988). We are dealing only with a month-to-month tenancy, and a month-to-month tenancy. A month-to-month tenancy under Washington law has no stated term. R.C.W. 59.04. It is merely the right to occupy the premises with that right terminable upon 30 days notice by either party. A month-to-month tenancy does not fall within the scope of 11 U.S.C. § 362(b)(10) as it is subject to termination at any time, subject only to 30 days notice.

The debtor's possessory right to occupy the premises under a month-to-month tenancy is protected by the automatic stay. *In re Nasir*, 217 B.R. 995, 997 (Bankr. E.D.Va. 1997); *In re Atlantic Business and Community Corp.*, 901 F.2d 325, 328 (2rd Cir. 1990) (holding that Chapter 11 debtor's tenancy at sufferance was property of bankruptcy estate and that mere possessory interest in real property, without any accompanying legal interest, was sufficient to trigger protection of automatic stay); *In re Turbowind, Inc.*, 42 B.R. 579, 585 (Bankr. S.D. Cal. 1984) (stating that "the language of § 362 is clear that mere possession of property is sufficient to invoke the protections of the automatic stay"); *In re Zartun*, 30 B.R. 543, 545-546 (9th Cir. B.A.P. 1983) (holding that the automatic stay does not depend on the nature of any legal or equitable interest or leasehold interest, but applies

to any act to obtain possession of property of estate). Therefore, prior to the Leiphams taking any action to gain possession of the premises, the stay must be modified.

Issue No. 4 - Is There Sufficient Cause To Lift the Automatic Stay?

Under Washington law a month-to-month tenancy can be terminated by either party upon 30 days notice. R.C.W. 59.04.020. These state law rights are not lost upon the filing of a bankruptcy proceeding by a tenant, and bankruptcy courts do not create new rights for debtors that did not exist prior to filing for bankruptcy. Therefore, when a lessor in the Leipham's position seeks to terminate a month-to-month tenancy under applicable state law, "cause" exists to annul the stay to permit the lessor to exercise its rights. *In re Schewe*, 94 B.R. 938, 950 (Bankr. W.D. Mich. 1989); *In re Nasir*, at 997 (a landlord's desire to evict a debtor tenant whose lease has been terminated prepetition is sufficient cause for the bankruptcy court to grant relief from stay under § 362(d)(1)); *In re Delex Management*, 155 B.R. 161, 168 (Bankr. W.D. Mich. 1993) (holding that when a debtor-vendee is holding over in possession by sufferance, "cause" exists to modify the stay). "In other words, a debtor cannot rely on the automatic stay to prevent termination of a short term tenancy." *In re Nasir*, at 997. The debtor is a hold over month-to-month tenant. A Notice to Terminate was served on January 15, 2002, terminating debtor's interest in the real property as of February 28, 2002. 11 U.S.C. § 362(a)(1) states that the automatic stay does not toll the running of time under a contract nor prevent a contract from terminating automatically nor the running of statutory time

periods. Therefore, on February 27, 2002, the date of the bankruptcy filing, the debtor under state law only had the right of occupancy for one day. Cause exists to lift the stay to allow Leiphams to exercise their state law rights.

CONCLUSION

This court holds that sufficient cause exists to lift the automatic stay for the purpose of allowing the Leiphams to pursue their state law rights, i.e., elect to notify the debtor that the property must be vacated.

DATED this 2nd day of May, 2002.

PATRICIA C. WILLIAMS, Bankruptcy Judge