

**FILED**

MAY 11 2007

U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

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4 **IN THE UNITED STATES BANKRUPTCY COURT**  
5 **FOR THE DISTRICT OF ARIZONA**  
6

7 In re: ) Chapter 13  
8 )  
9 JOSEPH S. CUNNINGHAM and ) Case No. 4-06-01385-EWH  
CANDICE A. CUNNINGHAM, )  
10 ) **MEMORANDUM DECISION**  
Debtors. )

11  
12 **I. INTRODUCTION**

13 The Debtors failed to file a motion to assume their non-residential restaurant  
14 lease by the deadline imposed by 11 U.S.C. § 365(d)(4). The lease was, therefore,  
15 deemed rejected as of March 4, 2007. The landlord is now entitled to possession of the  
16 leased premises. The reasons for this holding are set forth in detail in the balance of  
17 this Memorandum Decision.  
18

19  
20 **II. FACTS AND PROCEDURAL HISTORY**

21 Debtors, who operate a coffee shop in a strip mall in Vail, Arizona, filed for  
22 Chapter 13 relief on November 2, 2006. Their lease ("Lease") with Old Vail Station,  
23 L.L.C. ("Landlord") was listed on Schedule G. The Lease was for a five-year term  
24 commencing on April 30, 2005. Rent payments were due on the 15<sup>th</sup> of every month.  
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1 Prior to the filing of their petition, the Debtors were frequently delinquent on  
2 paying rent. The Landlord sent a number of rent demand letters and commenced  
3 forcible entry and detainer proceedings on two separate occasions in 2006.  
4

5 On December 1, 2006, approximately one month after the filing of the Chapter  
6 13 petition, the Debtors and the Landlord entered into an amendment of the Lease  
7 ("Second Amendment") which increased the monthly rent by \$300 and permitted Debtor  
8 to sell beer and wine. Paragraph 3 of the Second Amendment provides that "[a]ll other  
9 terms of the Lease as amended shall remain the same."  
10

11 The Debtors did not make a rent payment on March 15, 2007. On March 22, the  
12 Landlord filed a "Motion to Declare Rejection of Lease and Order Surrender of  
13 Possession to Landlord" ("Rejection Motion") on the grounds that the Debtors had failed  
14 to timely move for assumption of the Lease.

15 After the Rejection Motion was filed, the Debtors tendered a check for the March  
16 rent, which the Landlord asserts was written on insufficient funds and was, therefore,  
17 returned to Debtors' counsel. The filing of the Rejection Motion was also followed by a  
18 flurry of pleadings including: Debtors' Response and Amended Response to the  
19 Rejection Motion, Debtors' "Motion to Approve Post-Petition Lease and Alternatively to  
20 Declare That Lease Was Timely Assumed" ("Assumption Motion"); Debtors', Brief in  
21 support of the Assumption Motion; Landlord's Reply to Debtors' Amended Response to  
22 the Rejection Motion.  
23

24 At the April 24, 2007 hearing on the Assumption and Rejection Motions, the  
25 Debtors were ordered to make the March and April rent payments within five business  
26  
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1 days and to timely make the May payment. Both the Assumption and Rejection  
2 Motions were taken under advisement. The matter is now ready for decision.  
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### 5 **III. JURISDICTIONAL STATEMENT**

6 The court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2).  
7

### 8 **IV. ISSUES TO BE DECIDED**

9 1. Does the deadline of 11 U.S.C. § 365(d)(4), which requires that a motion to  
10 assume an executory contract be filed within 120 days of the petition date, apply to the  
11 Lease?  
12

13 2. Even if the deadline of 11 U.S.C. § 365 (d)(4) applies to the Lease, did the  
14 execution of the Second Amendment satisfy the deadline?  
15

### 16 **V. DISCUSSION**

#### 17 **A. § 365(d)(4) – Deadline Applies to the Lease**

18 The Debtors argue that the Second Amendment constituted a new postpetition  
19 lease, which is not subject to the deadline imposed by § 365(d)(4). There is nothing in  
20 the record to support the Debtors' claim. The language of the Second Amendment is  
21 clear and unambiguous. It provided that the Lease was being amended, not that new  
22 agreement was being entered into by the parties.  
23

24  
25 In re Dant and Russell, Inc., 853 F.2d 700 (9th Cir. 1988) cited by the Debtors to  
26 support their assertion that executing the Second Amendment was an "ordinary course  
27

1 of business” transaction not subject to § 365 and not requiring court approval under  
2 § 363(b) is distinguishable. In that case, the leases in question had expired postpetition  
3 and the debtor, without notice to creditors, entered into new leases which the court  
4 found to be within the ordinary course of the debtors’ business. The facts in this case  
5 are different. The Lease had not expired postpetition and the Second Amendment is  
6 not a new agreement, but an amendment to the prepetition Lease. Accordingly, the  
7 Debtors were required by § 365(d)(4) to file a motion to assume the Lease within  
8 120 days of the petition date, which was March 4, 2007. Failure to comply with the  
9 § 365(d)(4) deadlines is generally fatal to a debtor’s effort to assume an executory  
10 contract because court approval of an assumption is required.  
11

12  
13 Because a non-debtor party to an assumed lease obtains an  
14 administrative claim and, therefore, priority in payment over other  
15 unsecured creditors, by virtue of assumption of a lease, the Bankruptcy  
16 Code does not permit a debtor to assume an unexpired lease without  
17 court approval and prior notice to creditors. In re JAS Enterprises,  
18 180 B.R. 210, 215 (D. Neb. 1995).

19  
20 B. Executing the Second Amendment Did Not Satisfy § 365(d)(4)

21 Debtors argue that even if the § 365(d)(4) deadline applies to the Lease, it  
22 should not be imposed in this case. First, they argue that they put the Chapter 13  
23 Trustee and the court on notice that they were assuming the Lease by referring to it in a  
24 fee application made by Debtors’ counsel. Rule 6006 governs the procedure which  
25 must be followed to assume an unexpired lease. It requires that notice be given to the  
26 other party to the contract. See Rule 6006(c). The Landlord was not served with the  
27 Debtors’ lawyer’s fee application.  
28



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2 **VI. CONCLUSION**

3 The Second Amendment was not a new lease, but an amendment to a  
4 prepetition lease which the Debtors had to move to assume by March 4, 2007. They  
5 did not do so. Accordingly, the Lease was deemed rejected as of March 4, 2007. The  
6 Debtors must surrender the leased premises to the Landlord no later than 10 calendar  
7 days from the date of this Memorandum Decision. An order consistent with this  
8 Memorandum Decision will be entered this date.  
9

10 DATED: May 11, 2007  
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13   
14 HONORABLE EILEEN W. HOLLOWELL  
15 UNITED STATES BANKRUPTCY JUDGE

16 COPIES mailed this 11th day of  
17 May, 2007, to:

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4 By /s/ Jannis Medina  
5 Judicial Assistant

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