NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	
ANY MOUNTAIN, LTD.,	BAP No. NC-06-1006-JBS
Debtor.	BK. No. 04-12989
VASILIOS GLIMIDAKIS,	
Appellant,	**M E M O R A N D U M**[1]
v.	
ANY MOUNTAIN, LTD,	
Appellee.	

Argued and Submitted on September 13, 2006
at Sacramento, California

Filed – November 3, 2006

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

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Before: JURY,[2] BRANDT and SMITH, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Meredith A. Jury, Bankruptcy Judge for the Central District of California, sitting by designation.

Any Mountain, Ltd. ("Debtor") obtained court approval to assume a commercial lease without providing proper notice to the affected lessor. Thereafter, debtor moved to assign the lease (this time with appropriate notice to the lessor) to a third party. The bankruptcy court approved the assignment over the objection of the lessor. Lessor filed a timely appeal and obtained a stay of the assignment pending the disposition of this panel.

Based on notice requirements of Federal Rules of Bankruptcy Procedure 6006 and 9014, as well as the adequate assurance requirements of §§ 365(f) and 365(b)(3)(A)[3], we REVERSE the bankruptcy court's decision.

I. FACTS

Debtor filed a voluntary petition under Chapter 11 on December 23, 2004. Included as assets of the estate were a number of commercial leases, including a lease with Glimidakis of property located in a shopping center situated at 2350 Junipero Serra Boulevard, Daly City, California (the "Lease").

The Lease was listed in Debtor's Schedule G. The Lease provides that notices are to be sent to:

> Financial Investment Management
> c/o George Aree

[3] Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from which this appeal arose was filed before its effective date (generally 17 October 2005). All "Rule" references are to the Federal Rules of Bankruptcy Procedure, all "FRCP" references are to the Federal Rules of Civil Procedure.

P.O. Box 31716
San Francisco, CA 94101

(the "Notice Party"). Paragraph 29.1 of the Lease provides that the Notice Party may be changed by notice. On October 11, 1999, Debtor received notice from Glimidakis that (1) the building had been sold; (2) the new Management company is Wayne Tu, ERA Hometown Real Estate Company; and (3) rents should be paid out to Vasilios Glimidakis ("Glimidakis") at the designated management company.

Debtor filed its first motion to extend time to assume or reject the Lease (and other leases) on February 19, 2005. Notice was given to Glimidakis, the Notice Party and other parties. Debtor correctly served Glimidakis at: c/o ERA Hometown Real Estate Co., 300 Washington St., Daly City, CA 94015. ("Correct Address"). The bankruptcy court granted the motion and extended the deadline to assume the Lease to April 22, 2005. The order was entered on March 11, 2005.

On April 29, 2005, Debtor filed its second motion to extend time to assume or reject leases. Notice of the hearing was served on parties including the Notice Party and Glimidakis. The motion was granted on May 13, 2005, extending the deadline to May 27, 2005.

On May 20, 2005, Debtor filed its third motion to extend time to assume or reject leases. Notice of the hearing was properly served to parties including the Notice Party and Glimidakis. The hearing was heard on May 27, 2005 and the court granted the extension to July 15, 2005. The order was entered on June 13, 2005.

On July 6, 2005, Debtor filed its motion to assume leases (including the Lease) on shortened time (the "Assumption Motion"). Notice of the hearing was served on the Notice Party. However, instead of serving the Assumption Motion to the Correct Address, the notice was sent to "**390** Washington Street." At the hearing on July 15, 2005, the assignee of the other leases did not want to acquire the Lease, although other leases were assumed and assigned. Therefore, the Assumption Motion as to the Lease was continued to August 5, 2005 – twenty-one days after expiration of the last extension order granted by the bankruptcy court on June 13, 2005. At the time of the continued hearing, the Debtor had no proposed assignee for the Lease. Notice of the further continuance as to the Lease was ordered by the bankruptcy court as part of its order authorizing the assumption and assignment of the other leases. However, this notice was mailed to the incorrect "390 Washington Street" address previously used by Debtor in the Assumption Motion.

The Assumption Motion was then inadvertently dropped from the bankruptcy court's calendar of August 5, 2005. On August 11, 2005, Debtor filed an ex-parte motion to restore the Assumption Motion to the court's calendar and it was restored on August 12, 2005. The hearing was then continued to September 2, 2005, October 21, 2005 and November 18, 2005. On November 16, 2005, Debtor filed an Amended Motion for Order Authorizing Assumption and Assignment of the Lease (the "Amended Motion") to the highest bidder in a court auction, with the hearing set for November 18, 2005. Contrary to the Assumption Motion filed in July, the Amended Motion identified Financial Investments Manager (party

noted in the Lease and associated with George Aree) as the landlord. Debtor's Assumption Motion identified Vasilios Glimidakis c/o ERA Hometown Real Estate Co. as the Landlord, not Financial Investments Manager or George Aree. Debtor did not give notice of the Amended Motion to Glimidakis or ERA Hometown Real Estate Co.

The bidding for the Lease took place in the bankruptcy court on November 18, 2005. The winner of the auction to assume the Lease was Cherry Foods, Inc. ("Cherry Foods"). After the auction, Debtor sent Glimidakis a "Notice of Opportunity for Hearing on Amended Motion for Order Authorizing Assumption and Assignment of Lease" (the "Assignment Motion"), giving Glimidakis 10 days to request a hearing. Only Glimidakis c/o ERA Hometown Real Estate Co. and a Marc Libarle were given notice of the Assignment Motion. Financial Investments Manager and George Aree were not noticed.

After Glimidakis filed an objection and request for hearing on the Assignment Motion, a hearing was initially set for December 2, 2005. The hearing was continued to December 8, 2005, at which time the court found that Cherry Foods, the proposed assignee, had provided adequate assurances of future performance. Therefore, the court ordered that Debtor could assume and assign the Lease to Cherry Foods as the winner of the previous auction. The order was entered on December 23, 2005 (the "Order").

Glimidakis filed his notice of appeal and then his motion for a stay of the assumption and assignment of the Lease, as well as a motion for reconsideration of the Order. The bankruptcy court granted Glimidakis' stay pending appeal and the

bond has been posted. The bankruptcy court denied Glimidakis' motion for reconsideration by memorandum decision on January 11, 2006.

Glimidakis appeals both the Order authorizing the assumption and assignment of the Lease and the bankruptcy court's order denying reconsideration of the Order, as set forth in his amended notice of appeal filed on August 30, 2006.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 1334 and § 157(b)(1) and (b)(2). This panel has jurisdiction under 28 U.S.C. § 158(b)(1).

III. ISSUES

(1) Whether the Lease was deemed rejected by operation of law on or about July 15, 2005 due to the expiration of the extension and the inadvertent exclusion of the Assumption Motion from the bankruptcy court's calendar.

(2) Whether the Debtor's failure to give adequate notice of the Amended Motion to Glimidakis resulted in a denial of due process rendering the Order void.

(3) Whether the bankruptcy court's factual findings regarding Cherry Foods's financial condition to satisfy §§ 365(b)(3) and (f)(2)(B) based on the evidence submitted at the evidentiary hearing were sufficient.[4]

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[4] We will not address whether the Debtor was obligated to give Glimidakis notices of its motions to extend time to assume or reject, despite a conflict between the Northern District of California's Local Bankruptcy Rule 6006-1(a) and the Ninth

(continued...)

IV. STANDARD OF REVIEW

We review the factual findings of the bankruptcy court for clear error. First Card v. Carolan (In re Carolan), 204 B.R. 980, 984 (9th Cir. BAP 1996) (citation omitted). If two views of the evidence are possible, the bankruptcy court's choice between them cannot be clearly erroneous. Id.

We review conclusions of law de novo. In re Tredinnick, 264 B.R. 573, 575 (9th Cir. BAP 2001) (citation omitted). Statutory interpretation is a question of law reviewed de novo. In re Bldg. Block Child Care Ctrs., Inc., 234 B.R. 762, 765 (9th Cir. BAP 1999) (citation omitted).

A trial court's denial of a FRCP 60(b) motion, applicable via Rule 9027, is reviewed for abuse of discretion. In re Loloee, 241 B.R. 655, 659 (9th Cir. BAP 1999). A court necessarily abuses its discretion when it refuses to set aside a void judgment. Id. Whether a judgment is void is a question of jurisdictional law to be reviewed de novo. Id.

Whether adequate due process notice was given in any particular instance is a mixed question of law and fact that we review de novo. In re Repp, 307 B.R. 144, 148 (9th Cir. BAP 2004) (citations omitted).

(...continued)
Circuit's holding in In re Victoria Station Inc., 875 F.2d 1380 (9th Cir. 1989), as Debtor had given notice of the Motions to Glimidakis. See App. 8-19.

V. DISCUSSION

A. The Lease Was Not Deemed Rejected by Operation of Law on July 15, 2005 Due to the Bankruptcy Court's Inadvertent "Dropping" of the Motion From Calendar

Section 365(d)(4) provides specific rules governing nonresidential real property under which a debtor is the lessee in the context of executory contracts and unexpired leases. 11 U.S.C. § 365(d)(4). It reads:

> Executory contracts and unexpired leases.
> . . .
> (4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60 day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor . . . .

11 U.S.C. § 365.

Glimidakis argues that because the Assumption Motion was heard and decided after the last extension date to assume and assign expired on July 15, 2005 since it was "inadvertently dropped" from the court's calendar, the Lease is deemed rejected. Although the Ninth Circuit has not ruled on this issue, two cases are instructive.

In In re Southwest Aircraft Services, Inc., 831 F.2d 848 (9th Cir. 1987), the Ninth Circuit addressed the question of whether a lower court retained authority to consider a debtor's motion to extend the 60 day period for assumption or rejection of a commercial lease when the 60 day period had expired. Debtor filed a motion to extend the 60 day deadline within that time frame, but the bankruptcy court did not hear the motion until

after that period had ended. Id. at 849. In interpreting § 365(d)(4), the Ninth Circuit noted that the meaning of the words in the section is not entirely clear. Id. Courts have interpreted "within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes . . . " as either meaning: 1) a bankruptcy court must grant a motion to extend within the initial 60-day period; or 2) a bankruptcy court may grant the extension even outside of the 60-day period so long as the motion to extend is timely filed within that period. Id. at 850. The Ninth Circuit adopted the latter approach, reasoning that:

> [A] rule that forfeits a parties rights, benefits, privileges or opportunities simply because a court fails to act within a particular time period would be quite extraordinary. We think that Congress would not adopt any such rule without clearly indicating in the legislative history its intention to do so and explaining its reasons . . . [Such an] interpretation would produce arbitrary and fortuitous results.

Id. at 851-52.

In In re Victoria Station Inc., 875 F.2d 1380 (9th Cir. 1989), the Ninth Circuit followed Southwest Aircraft in holding that a bankruptcy judge could grant multiple extensions of time to assume or reject a lease outside of the 60-day period under § 365(d)(4). The Ninth Circuit noted that "Congress also clearly permitted the bankruptcy judge to grant a motion for an extension filed within the first 60 days *without limitation* if the debtor demonstrates cause for doing so." Id. at 1384. Therefore, the Court held that multiple extensions of time to assume or reject a lease are allowed if cause exists for the extensions. Id. at 1384-85.

Here, Debtor's last motion for an extension of the time to assume the Lease, was filed on May 20, 2005. The bankruptcy court granted an extension to July 15, 2005. On July 6, 2005, Debtor filed its Assumption Motion. The hearing was held on July 15, 2005, but the matter concerning the Lease was continued to August 5, 2005. The hearing was never held on August 5, 2005 because the court inadvertently dropped the hearing from its calendar (not by parties or active decision of the court). The Motion was restored to the court's calendar on August 12, 2005, continued several times, and decided by the court on December 23 2005. Therefore, because the Assumption Motion was filed within the extended period of time, and because court error resulted in it being "dropped" from the court's calendar, the Lease was not deemed rejected by operation of law.

Adopting Glimidakis' argument that the calendar error terminated the Assumption Motion would lead to "arbitrary and fortuitous results." This does not comport with the flexible approach the Ninth Circuit has adopted with regard to § 365(d)(4)'s time limitations as noted in Southwest Aircraft and Victoria Station.

B. Glimidakis' Due Process Rights were Violated when Debtor Failed to Give Proper Notice of the Amended Motion

Motions to assume and assign are procedurally governed by Rule 6006. Rule 6006 states in part:

> Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease.
>
> (a) Proceeding to assume, reject, or assign. A proceeding to assume, reject or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014.

> . . .
> (c) Notice. Notice of a motion made pursuant to subdivision (a) or (b) of this rule shall be given **to the other party to the contract or lease**, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.

Fed. R. Bankr. P. 6006, emphasis added.

Indeed,

> Rule 9014 states that relief shall be requested by motion, with reasonable notice and opportunity for a hearing afforded to the opposing party. A motion must "state with particularity the grounds therefor, and . . . set forth the relief or order sought." Bankruptcy Rule 9013 . . . Thus, these rules plainly specify that a debtor in possession must file a formal motion and provide reasonable notice and an opportunity for a hearing to the opposing party.

Sea Harvest Corp. v. Riviera Land Co., 868 F.2d 1077, 1079(9th Cir. 1989).

The Ninth Circuit in Sea Harvest Corp., in deciding that the debtors had not properly filed or served motions to assume leases to lessors, held that "[w]e share the view of the district court, expressed in these proceedings, that '[s]trict compliance with these requirements avoids ad hoc inquiries into the meaning of the debtors' words and actions. Anything short of this standard risks uncertainty, which is exactly what Section 365(d)(4) was designed to remedy.'" Id.

Furthermore, a motion to sell an executory contract or lease is governed by Rule 6006(a) and 9014, as opposed to Rule 6004 which normally applies to sale motions. Indeed, a debtor must "file a formal motion to assume, providing reasonable notice and an opportunity for a hearing." In re Tleel, 876 F.2d 769, 771 (9th Cir. 1989); 10-6006 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy § 6006.01[3][c] (15th ed. rev. 2006).

Where notice is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections," then the due process clause of the Fifth Amendment of the United States Constitution is satisfied. Loloee, 241 B.R. 655, 660-61 (9th Cir. BAP 1999), citing to Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Rule 6006 clearly requires that notice of a motion for assumption of a lease shall be given to the other party to the lease. FRBP 6006. Ninth Circuit case law supports strict compliance with the motion and notice requirements. Moreover, if notice reasonably calculated to apprise all interested parties of the pending action is not given, then the due process clause of the Fifth Amendment is not satisfied. See Loloee, 241 B.R. at 660-61.

Here, Debtor admits in various motions that Glimidakis is the landlord to the Lease in question. However, it did not give him notice of the Amended Motion as required by § 365 and Rules 6006 and 9014. In addition, Glimidakis was not allowed to participate in the initial auction. Notice of the Amended Motion was not property served on Glimidakis. Further, the Amended Motion was served on November 15, 2005 for the hearing on November 18, 2005, only three days notice.

Under the circumstances, this was not reasonable notice to apprise Glimidakis of the auction or to provide him a reasonable opportunity to present an objection. Therefore, because Glimidakis was denied due process with respect to the auction

held on November 18, 2005, the order approving the assignment to Cherry Foods was entered in error. See Loloee, 241 B.R. at 661.

C. There Was Insufficient Evidence of Adequate Assurances as Required by §§ 365(f) and 365(b)(3)(A).

Although § 365(f) governs assumption and assignment of executory contracts or leases, "[w]hen it comes to assuming and assigning unexpired leases, 'adequate assurance of future performance' has a specialized meaning in the case of shopping center leases regardless of whether it is the landlord or the tenant who is in bankruptcy." In re Arden and Howe Associates, Ltd., 152 B.R. 971, 976 n.9 (Bankr. E.D. Cal. 1993), citing to Section 365(b)(3); see also In re House of Emeralds, 57 B.R. 31, 33-34 (Bankr. D. Haw. 1985), overruled on other grounds.

Section 365(f) states:

> (1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection . . .
>
> (2) The trustee may assign an executory contract or unexpired lease of the debtor only if –
>
> (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and
>
> (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f).

Section 365(b)(3) provides as follows:

> (3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance-

> (A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;
>
> (B) that any percentage rent due under such lease will not decline substantially;
>
> (C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and
>
> (D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

11 U.S.C. § 365(b).

Contrary to Debtor's allegation that Glimidakis did not provide a transcript of the December 8, 2005 proceeding and evidentiary hearing on the assignment of the Lease, Glimidakis has done so. Additionally, Glimidakis' attorney did raise the sufficiency of the evidence of Cherry Food's financial condition at the hearing, so the issue is not waived.

However, the transcript of the hearing shows the bankruptcy court did not make all findings of adequate assurance as required by § 365(b)(3), specifically with regard to § 365(b)(3)(A). Per the transcript and copy of the Lease, it appears that Debtor is currently the lessee to approximately 94% of either a portion of or the total of Broadmoor Shopping Center, Daly City, California. Debtor is then the sublessor to the sublease of the Lease; this sublease garners a profit spread to the sublessor (Debtor). Sublessee is a grocery store. There is a sub sublease on the

sublease and the sub sublessee is Cherry Foods, the winner at the bankruptcy court auction of the assumption of the Lease. As the winner of the auction, Cherry Foods would then take the place of the sublessor, Debtor.

Section 365(b)(3)(A) requires that, in the case of assignment, the financial condition and operating performance of the proposed assignee be similar to that of the debtor's at the time debtor became the lessee to the lease. § 365(b)(3)(A). Here, the bankruptcy court made no such finding. In fact, Glimidakis' counsel raised the concern that the proposed assignee, Cherry Foods, was only in operation for two years, is a "newly-minted California S Corp." and only had one tax return (2004) at the time of the hearing. Transcript, December 8, 2005, pp 244. In response, the bankruptcy court noted that in the case that Cherry Foods or the subtenant could not make payments to Glimidakis, Glimidakis could then take over the Lease as he had wanted to bid on the Lease himself. This does not satisfy the adequate assurance requirements of § 365(b)(3)(A).

VI. CONCLUSION

Section 365 and Rules 6006 and 9014 require that a formal motion to assume or reject an executory contract or lease be filed with the court and served on the party to the lease, with an opportunity for the opposing party to respond. Here, although Debtor admits and acknowledges that Glimidakis is the landlord and, therefore, the other party to the Lease, Debtor failed to serve him with notice of its Amended Motion. As a result, the assumption hearing and sale of the Lease occurred without his

participation or opposition and denied him of due process rights under the Fifth Amendment.

The bankruptcy court also failed to establish the adequate assurances of Cherry Foods as the assignee, as required by § 365(b)(3)(A). Therefore, for the reasons noted above, we

REVERSE AND REMAND.