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**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	
7	ANY MOUNTAIN, LTD.,)	BAP No. NC-06-1006-JBS
8	Debtor.)	BK. No. 04-12989
9	_____)	
10	VASILIOS GLIMIDAKIS,)	
11	Appellant,)	M E M O R A N D U M¹
12	v.)	
13	ANY MOUNTAIN, LTD,)	
14	Appellee.)	
15	_____)	

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

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

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.

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

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

13
14 I. FACTS

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

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

22 Financial Investment Management
23 c/o George Aree

24 ³ Absent contrary indication, all "Code," chapter and
25 section references are to the Bankruptcy Code, 11 U.S.C.
26 §§ 101-1330 prior to its amendment by the Bankruptcy Abuse
27 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
28 119 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.

1 P.O. Box 31716
2 San Francisco, CA 94101

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

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

18 On April 29, 2005, Debtor filed its second motion to extend
19 time to assume or reject leases. Notice of the hearing was
20 served on parties including the Notice Party and Glimidakis. The
21 motion was granted on May 13, 2005, extending the deadline to May
22 27, 2005.

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

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

18 The Assumption Motion was then inadvertently dropped from
19 the bankruptcy court's calendar of August 5, 2005. On August 11,
20 2005, Debtor filed an ex-parte motion to restore the Assumption
21 Motion to the court's calendar and it was restored on August 12,
22 2005. The hearing was then continued to September 2, 2005,
23 October 21, 2005 and November 18, 2005. On November 16, 2005,
24 Debtor filed an Amended Motion for Order Authorizing Assumption
25 and Assignment of the Lease (the "Amended Motion") to the highest
26 bidder in a court auction, with the hearing set for November 18,
27 2005. Contrary to the Assumption Motion filed in July, the
28 Amended Motion identified Financial Investments Manager (party

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

7 The bidding for the Lease took place in the bankruptcy court
8 on November 18, 2005. The winner of the auction to assume the
9 Lease was Cherry Foods, Inc. ("Cherry Foods"). After the
10 auction, Debtor sent Glimidakis a "Notice of Opportunity for
11 Hearing on Amended Motion for Order Authorizing Assumption and
12 Assignment of Lease" (the "Assignment Motion"), giving Glimidakis
13 10 days to request a hearing. Only Glimidakis c/o ERA Hometown
14 Real Estate Co. and a Marc Libarle were given notice of the
15 Assignment Motion. Financial Investments Manager and George Aree
16 were not noticed.

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

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

1 bond has been posted. The bankruptcy court denied Glimidakis'
2 motion for reconsideration by memorandum decision on January 11,
3 2006.

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

8
9 II. JURISDICTION

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

13
14 III. ISSUES

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

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

22 (3) Whether the bankruptcy court's factual findings
23 regarding Cherry Foods's financial condition to satisfy
24 §§ 365(b) (3) and (f) (2) (B) based on the evidence submitted at the
25 evidentiary hearing were sufficient.⁴

26
27 ⁴ We will not address whether the Debtor was obligated to give
28 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...)

1 IV. STANDARD OF REVIEW

2 We review the factual findings of the bankruptcy court for
3 clear error. First Card v. Carolan (In re Carolan), 204 B.R.
4 980, 984 (9th Cir. BAP 1996) (citation omitted). If two views of
5 the evidence are possible, the bankruptcy court's choice between
6 them cannot be clearly erroneous. Id.

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

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

18 Whether adequate due process notice was given in any
19 particular instance is a mixed question of law and fact that we
20 review de novo. In re Repp, 307 B.R. 144, 148 (9th Cir. BAP
21 2004) (citations omitted).

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23
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26
27 (...continued)
28 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.

1 V. DISCUSSION

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

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

9 Executory contracts and unexpired leases.

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

20 11 U.S.C. § 365.

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

27 In In re Southwest Aircraft Services, Inc., 831 F.2d 848
28 (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

1 after that period had ended. Id. at 849. In interpreting
2 § 365(d)(4), the Ninth Circuit noted that the meaning of the
3 words in the section is not entirely clear. Id. Courts have
4 interpreted "within 60 days after the date of the order for
5 relief, or within such additional time as the court, for cause,
6 within such 60-day period, fixes . . ." as either meaning: 1) a
7 bankruptcy court must grant a motion to extend within the initial
8 60-day period; or 2) a bankruptcy court may grant the extension
9 even outside of the 60-day period so long as the motion to extend
10 is timely filed within that period. Id. at 850. The Ninth
11 Circuit adopted the latter approach, reasoning that:

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

20 Id. at 851-52.

21 In In re Victoria Station Inc., 875 F.2d 1380 (9th Cir.
22 1989), the Ninth Circuit followed Southwest Aircraft in holding
23 that a bankruptcy judge could grant multiple extensions of time
24 to assume or reject a lease outside of the 60-day period under
25 § 365(d)(4). The Ninth Circuit noted that "Congress also clearly
26 permitted the bankruptcy judge to grant a motion for an extension
27 filed within the first 60 days *without limitation* if the debtor
28 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.

1 Here, Debtor's last motion for an extension of the time to
2 assume the Lease, was filed on May 20, 2005. The bankruptcy
3 court granted an extension to July 15, 2005. On July 6, 2005,
4 Debtor filed its Assumption Motion. The hearing was held on July
5 15, 2005, but the matter concerning the Lease was continued to
6 August 5, 2005. The hearing was never held on August 5, 2005
7 because the court inadvertently dropped the hearing from its
8 calendar (not by parties or active decision of the court). The
9 Motion was restored to the court's calendar on August 12, 2005,
10 continued several times, and decided by the court on December 23
11 2005. Therefore, because the Assumption Motion was filed within
12 the extended period of time, and because court error resulted in
13 it being "dropped" from the court's calendar, the Lease was not
14 deemed rejected by operation of law.

15 Adopting Glimidakis' argument that the calendar error
16 terminated the Assumption Motion would lead to "arbitrary and
17 fortuitous results." This does not comport with the flexible
18 approach the Ninth Circuit has adopted with regard to
19 § 365(d)(4)'s time limitations as noted in Southwest Aircraft and
20 Victoria Station.

21
22 B. Glimidakis' Due Process Rights were Violated when Debtor
Failed to Give Proper Notice of the Amended Motion

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

25 Assumption, Rejection or Assignment of an Executory
26 Contract or Unexpired Lease.

- 27 (a) Proceeding to assume, reject, or assign. A
28 proceeding to assume, reject or assign an
executory contract or unexpired lease, other than
as part of a plan, is governed by Rule 9014.

1 . . .
2 (c) Notice. Notice of a motion made pursuant to
3 subdivision (a) or (b) of this rule shall be given
4 **to the other party to the contract or lease**, to
5 other parties in interest as the court may direct,
6 and, except in a chapter 9 municipality case, to
7 the United States trustee.

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

9 Indeed,

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

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

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

29 Furthermore, a motion to sell an executory contract or lease
30 is governed by Rule 6006(a) and 9014, as opposed to Rule 6004
31 which normally applies to sale motions. Indeed, a debtor must
32 "file a formal motion to assume, providing reasonable notice and
33 an opportunity for a hearing." In re Tleel, 876 F.2d 769, 771
34 (9th Cir. 1989); 10-6006 Alan N. Resnick & Henry J. Sommer,
35 Collier on Bankruptcy § 6006.01[3][c] (15th ed. rev. 2006).

1 Where notice is "reasonably calculated, under all the
2 circumstances, to apprise interested parties of the pendency of
3 the action and to afford them an opportunity to present their
4 objections," then the due process clause of the Fifth Amendment
5 of the United States Constitution is satisfied. Loloe, 241 B.R.
6 655, 660-61 (9th Cir. BAP 1999), citing to Mullane v. Cent.
7 Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

8 Rule 6006 clearly requires that notice of a motion for
9 assumption of a lease shall be given to the other party to the
10 lease. FRBP 6006. Ninth Circuit case law supports strict
11 compliance with the motion and notice requirements. Moreover, if
12 notice reasonably calculated to apprise all interested parties of
13 the pending action is not given, then the due process clause of
14 the Fifth Amendment is not satisfied. See Loloe, 241 B.R. at
15 660-61.

16 Here, Debtor admits in various motions that Glimidakis is
17 the landlord to the Lease in question. However, it did not give
18 him notice of the Amended Motion as required by § 365 and Rules
19 6006 and 9014. In addition, Glimidakis was not allowed to
20 participate in the initial auction. Notice of the Amended Motion
21 was not property served on Glimidakis. Further, the Amended
22 Motion was served on November 15, 2005 for the hearing on
23 November 18, 2005, only three days notice.

24 Under the circumstances, this was not reasonable notice to
25 apprise Glimidakis of the auction or to provide him a reasonable
26 opportunity to present an objection. Therefore, because
27 Glimidakis was denied due process with respect to the auction
28

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

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

6 Although § 365(f) governs assumption and assignment of
7 executory contracts or leases, "[w]hen it comes to assuming and
8 assigning unexpired leases, 'adequate assurance of future
9 performance' has a specialized meaning in the case of shopping
10 center leases regardless of whether it is the landlord or the
11 tenant who is in bankruptcy." In re Arden and Howe Associates,
12 Ltd., 152 B.R. 971, 976 n.9 (Bankr. E.D. Cal. 1993), citing to
13 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.

14 Section 365(f) states:

15 (1) Except as provided in subsection (c) of this
16 section, notwithstanding a provision in an executory
17 contract or unexpired lease of the debtor, or in
18 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 . . .

19 (2) The trustee may assign an executory contract or
20 unexpired lease of the debtor only if -
21 (A) the trustee assumes such contract or lease in
accordance with the provisions of this section;
and
22 (B) adequate assurance of future performance by
the assignee of such contract or lease is
23 provided, whether or not there has been a default
in such contract or lease.

24 11 U.S.C. § 365(f).

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

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

1 (A) of the source of rent and other consideration due
2 under such lease, and in the case of an assignment,
3 that the financial condition and operating performance
4 of the proposed assignee and its guarantors, if any,
5 shall be similar to the financial condition and
6 operating performance of the debtor and its guarantors,
7 if any, as of the time the debtor became the lessee
8 under the lease;

9 (B) that any percentage rent due under such lease will
10 not decline substantially;

11 (C) that assumption or assignment of such lease is
12 subject to all the provisions thereof, including (but
13 not limited to) provisions such as a radius, location,
14 use, or exclusivity provision, and will not breach any
15 such provision contained in any other lease, financing
16 agreement, or master agreement relating to such
17 shopping center; and

18 (D) that assumption or assignment of such lease will
19 not disrupt any tenant mix or balance in such shopping
20 center.

21 11 U.S.C. § 365(b).

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

28 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

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

5 Section 365(b)(3)(A) requires that, in the case of
6 assignment, the financial condition and operating performance of
7 the proposed assignee be similar to that of the debtor's at the
8 time debtor became the lessee to the lease. § 365(b)(3)(A).
9 Here, the bankruptcy court made no such finding. In fact,
10 Glimidakis' counsel raised the concern that the proposed
11 assignee, Cherry Foods, was only in operation for two years, is a
12 "newly-minted California S Corp." and only had one tax return
13 (2004) at the time of the hearing. Transcript, December 8,
14 2005, pp 244. In response, the bankruptcy court noted that in
15 the case that Cherry Foods or the subtenant could not make
16 payments to Glimidakis, Glimidakis could then take over the Lease
17 as he had wanted to bid on the Lease himself. This does not
18 satisfy the adequate assurance requirements of § 365(b)(3)(A).
19

20 VI. CONCLUSION

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

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

3 The bankruptcy court also failed to establish the adequate
4 assurances of Cherry Foods as the assignee, as required by
5 § 365(b)(3)(A). Therefore, for the reasons noted above, we

6

7 REVERSE AND REMAND.

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