NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-10-1059-TaPaKi
BROCKMAN BUILDING LOFTS, LLC,	Bk. No. SV-09-13713-KT
Debtor.	
THERMO GRAND AVENUE, LLC,	
Appellant,	
v.	**M E M O R A N D U M**[1]
AMY L. GOLDMAN, Chapter 7 Trustee; BANK OF AMERICA, N.A.; BHFC OPERATING, LLC; BROCKMAN BUILDING LOFTS, LLC,	
Appellees.	

Argued and Submitted on July 23, 2010
at Pasadena, California

Filed - August 16, 2010

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

Honorable Kathleen H. Thompson, Bankruptcy Judge, Presiding.

Before: TAYLOR,[2] PAPPAS, KIRSCHER, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Laura S. Taylor, Judge of the U.S. Bankruptcy Court for the Southern District of California, sitting by designation.

Thermo Grand Avenue, LLC ("Thermo Grand"), the lessor under a lease agreement entered into with the debtor as of December 4, 2003 (the "Lease"), appeals the bankruptcy court's order authorizing the chapter 7 trustee ("Trustee") to assume and assign the Lease pursuant to 11 U.S.C. § 365(b) (the "Assignment Order").

Thermo Grand contends on appeal that the bankruptcy court should not have allowed assumption and assignment of the Lease because the Trustee failed to show how the bankruptcy estate would benefit and also failed to adequately assure future performance by the proposed assignee. At the hearing and as confirmed in the Assignment Order, Thermo Grand waived its right to appeal from the Assignment Order "solely on the ground of the failure of the Court to make a finding regarding termination of the Subject Lease," but reserved all other grounds for appeal. Thus, it appears that the bankruptcy court bifurcated the decision making process, ruling first on other assumption and assignment issues and deferring to a later date (for a "court of competent jurisdiction") the threshold issue as to whether the Lease terminated pre-petition. Nowhere in the record did the bankruptcy court suggest or authorize an appeal prior to determination of the termination issue.

Thermo Grand stated in its Opening Brief, with virtually no discussion or analysis, that the Assignment Order is a final and appealable order. Appellee Bank of America, N.A. ("BofA") simply stated its agreement with Thermo Grand's statement of jurisdiction.

In advance of oral argument on this appeal, the Panel advised the parties to be prepared at oral argument to address the issue of finality of the Assignment Order and to discuss whether this Panel should grant leave to appeal if the Panel were to decide the Assignment Order is interlocutory.

After careful consideration of the parties' briefs and oral argument, review of the record provided, and independent analysis and application of the law, we conclude that the Assignment Order is interlocutory. We further decide that leave to appeal from this interlocutory order is not appropriate. Having so determined, this Panel lacks jurisdiction to hear the appeal, and, accordingly, we hereby dismiss this appeal.

FACTS

In light of our decision to dismiss the appeal for lack of jurisdiction, we need provide only the minimal factual background where the parties appear to agree. Chapter 7 debtor Brockman Building Lofts, LLC ("Debtor"), a real estate development entity, owns an historic building in downtown Los Angeles intended to be converted to mixed use residential and commercial space, including 88 residential units (the "Project"). When Debtor purchased the building from Thermo Grand's predecessor in interest approximately six years ago, Debtor concurrently entered into a Lease that provides necessary additional surface parking for future residents of the Project. The Lease's term commences only after issuance of a final certificate of occupancy. The Lease further provides that Debtor ultimately will assign it to

the owners' association formed for the Project and incorporate it into the Project's common area.

BofA is the successor in interest to Countrywide Savings Bank, FSB on approximately $35 million of pre-petition construction financing it provided to the Debtor for the Project. Pursuant to an order entered by the bankruptcy court on a motion filed by the Trustee in the voluntary chapter 7 case, the Trustee was authorized to temporarily operate the Debtor's business and to pay necessary and ordinary operating and administrative expenses funded by BofA with authorized post-petition credit (the "Operating Order").

At the request of BofA, and as provided for in the Operating Order, the Trustee subsequently moved the bankruptcy court for its authorization to assume the Lease and assign it to BofA or its nominee. Thermo Grand opposed the Motion on the grounds that the Trustee failed to show a benefit to the estate and failed to provide adequate assurance of future performance by BofA's unidentified nominee. Thermo Grand also argued, in the alternative, that the Lease had automatically terminated pre-petition due to Debtor's violations of express use limitations.

BofA joined in the Motion and supplemented the Trustee's papers with multiple declarations regarding BofA's process and status of approval of funding arrangements, including a disclosure filed a few days in advance of the hearing on the Motion (the "Hearing") that identified a solely owned subsidiary formed by BofA, Wickliffe A Corp., a Virginia corporation ("Wickliffe"), as BofA's nominee to assume the Lease.

BHFC Operating, LLC ("BHFC"), a creditor of the Debtor and the operator of the Bottega Louie restaurant on the ground floor of the Project, also supported the Motion. BHFC employed approximately 200 people at that time.

The bankruptcy court held the Hearing on October 13, 2009, and entered the Assignment Order on November 17, 2009. Thermo Grand filed a timely notice of appeal.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(O). We have an independent duty to ensure that we have jurisdiction over this appeal. Travers v. Dragul (In re Travers), 202 B.R. 624, 625 (9th Cir. BAP 1996). Whether this Panel has jurisdiction to hear the appeal pursuant to Rule 8001 of the Federal Rules of Bankruptcy Procedure and 28 U.S.C. §§ 158(a) and (b)(1) depends on whether the Assignment Order is a final order. Elliott v. Four Season Props. (In re Frontier Props., Inc.), 979 F.2d 1358, 1362 (9th Cir. 1992) ("only 'final' rulings of the bankruptcy court may be appealed as of right"). The Ninth Circuit has adopted a "pragmatic approach" to finality in bankruptcy cases and has held that "a bankruptcy order is appealable where it: 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." Id. at 1363.

Here, as clearly stated in the Assignment Order, the bankruptcy court, with the consent of the parties, made no determination on the threshold issue of whether the Lease had

terminated pre-petition[3]. Further, the bankruptcy court ruled only after assurance from Thermo Grand that Thermo Grand would not appeal from the Court's order based upon that particular issue.

Specifically, the Assignment Order provides that:

> With binding effect only as between Thermo Grand on the one hand, and the Primary Parties[4] on the other hand, this Court hereby finds as follows: (A) under Section 365(b)(1)(A), any default under the Subject Lease which has heretofore occurred is waived with respect only to, and therefore need not be cured by any of, the Primary Parties; (B) under Section 365(b)(1)(B), the Lessor is not and shall not in the future be entitled to compensation from any of the Primary Parties for any losses which the Lessor may have sustained as a result of any prior default under the Subject Lease and (C) under section 365(b)(1)(C), there is adequate assurance of future performance of the Subject Lease. Notwithstanding the foregoing, the Court makes no finding whether the Subject Lease terminated prior to the Petition Date. As noted on the record of the hearing, Thermo Grand has waived its right to appeal from this order solely on the ground of the failure of the Court to make a finding

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[3] There is nothing for the trustee to assume "if a lease of nonresidential real property has been terminated under state law before the filing of a bankruptcy petition . . . " Vanderpark Props., Inc. v. Buchbinder (In re Windmill Farms, Inc.), 841 F.2d 1467, 1469 (9th Cir. 1988). Here, the parties consistently refer to the Lease as a lease of nonresidential real property. The bankruptcy court ruled that "[t]his is an asset of the estate"; however the basis for this finding is not clear from the record. The Panel considered, but need not further analyze, whether the bankruptcy court may have viewed the written agreement as more in the nature of an executory contract, as opposed to a lease. The Panel reviewed the Lease itself. Although possession under the Lease has not yet commenced, the Lease conforms to the definition of a lease under California state law: "an instrument granting one the right, upon stated terms and conditions, to occupy property to the exclusion of the grantor" (see City of San Francisco Market Corp. v. Walsh (In re Moreggia & Sons, Inc.), 852 F.2d 1179, 1182 (9th Cir. 1988)); and under applicable federal law: "leases of real property shall include any rental agreement to use real property" (see 11 U.S.C. § 365(m)). Further, at oral argument before this Panel, counsel for both parties conceded that the agreement is a lease of real property.

[4] The term "Primary Parties" is defined in the Assignment Order as: "(a) the Trustee, (b) the estate in this case, (c) BofA, (d)[Wickliffe] or their respective successors and assigns."

regarding termination of the Subject Lease, but reserves all other grounds for appeal.

Any existing breaches under the Lease were not required to be cured by the Primary Parties; however, "Thermo Grand's rights against Third Parties, if any, to such compensation are preserved."

Paragraph 4 then provides that:

> If a court of competent jurisdiction in an appropriate proceeding ("Proceeding") in which Wickliffe and Thermo Grand are parties hereafter determines that, prior to the date of this chapter 7 case was commenced, the Subject Lease was terminated and that the Trustee is not entitled to relief from such termination under the doctrine of equitable relief from forfeiture, the effect of those determinations, notwithstanding any contrary provision of this Order, shall be as follows:
>
> (a) Subject to the provisions of subsection (b) of this Section 4, Thermo Grand, on the one hand, and the Primary Parties, on the other hand, shall have no rights or claims against one another under the Subject Lease and shall have no duties or obligations to one another under the Subject Lease; and
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> (b) The questions whether, notwithstanding that determination, Thermo Grand has any right to the payment of rent or other compensation from Wickliffe for the period of possession by Wickliffe of the parking spaces that were the subject of the Subject Lease prior to the date of such determination and, if not, whether Wickliffe has a right to recover rent it may have paid to Thermo Grand under the Subject Lease for such period, or other compensation, shall be determined in the same Proceeding; and the parties' contentions, claims and defenses with respect to those questions, are fully preserved.

Based on the specific language of the Assignment Order, the bankruptcy court granted assumption and assignment of the Lease, but allowed Thermo Grand to reserve the right to obtain a later determination that the Lease terminated pre-petition. Further, the bankruptcy court made clear that a later determination that the lease terminated would render the Assignment Order wholly

ineffective as to the rights among the parties with respect to the Lease (and the real property to which it pertains). And, if the Assignment Order is thus rendered ineffective, determination of any compensation of the respective parties for rent paid or not paid during the interim would be required, albeit not under the Assignment Order.

At oral argument before this Panel, counsel for Thermo Grand argued that this Panel's reversal of the Assignment Order would make resolution of the termination issue unnecessary, and therefore that even if the Assignment Order is interlocutory, this Panel should grant appellate review. BofA's counsel, when pressed to answer as to whether the Assignment Order is a final order, stated that it is not final and further disclosed that BofA has now filed a declaratory relief action in the bankruptcy case to resolve the termination issue. BofA, however, also stated its preference for appellate review of the merits before BofA expended further time and effort in connection with the declaratory relief action. Thus, the parties clearly prefer immediate appellate review on grounds of convenience and economy; such factors, however, cannot create appellate jurisdiction where no jurisdiction otherwise lies, and such factors do not support our review of this interlocutory order.

Like the Assignment Order itself, this Panel's decision as to the merits of the current appeal could be a nullity if it is later determined that the Lease terminated pre-petition. Thus, no certainty exists that a decision by this Panel will definitely and finally determine the discrete issues on appeal – assumption

and assignment of the Lease – as required under the finality rules.

Further, while a decision at this time may conserve the economic resources of the parties and save them time and effort, it may also result in a significant waste of judicial resources. Thus, the potential for benefit to the parties if this appeal proceeds to final decision is more than offset by the potential squandering of the time and effort of the appellate courts.

Finally, the Assignment Order's waiver and reservation of the right to later determine whether the Lease terminated pre-petition create the impression that the parties have, at least in part, purposely manufactured appellate jurisdiction. See Am. States Ins. Co v. Dastar Corp., 318 F.3d 881, 885 (9th Cir. 2003) ("A party may not engage in manipulation either to create appellate jurisdiction or prevent it"). Under such circumstances and given the need to preserve the integrity of the appellate process, it is particularly clear that finality does not exist here.

As the Assignment Order is not final, we lack jurisdiction pursuant to 28 U.S.C. § 158, unless we grant leave to appeal. "Granting leave is appropriate if the order involves a controlling question of law where there is substantial ground for difference of opinion and when the appeal is in the interest of judicial economy because an immediate appeal may materially advance the ultimate termination of the litigation." Kashani v. Fulton (In re Kashani), 190 B.R. 875, 882 (9th Cir. BAP 1995). We may treat a notice of appeal as a motion for leave to appeal. Fed. R. Bankr. P. 8003(c).

Under the circumstances here, we decline to grant leave to appeal. Until the threshold issue of termination is decided, it is not clear that a resolution of this appeal is necessary. Thus, review by this Panel of the bankruptcy court's determination that the Trustee met her burden of proof regarding the basis for assumption and assurance of future performance could be an empty exercise. That is not the purpose of appellate review and this Panel declines to participate in such an exercise.

CONCLUSION

For the reasons stated above, we hereby DISMISS this appeal based on lack of appellate jurisdiction.