**The following constitutes the order of the Court.**

**Signed February 7, 2005.**

**United States Bankruptcy Judge**

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

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| **IN RE:** | § | |
| | § | |
| **AHMAD M. BARODI,** | § | **CASE NO. 04-91415** |
| | § | |
| **Debtor.** | § | |

**MEMORANDUM OPINION AND ORDER**

This Court now considers the motion of Afamia, Inc. ("Afamia"), Abdulalim Ilaiwi ("Ilaiwi") and Olfat Kalalib for relief from the automatic stay to permit them to terminate the lease of Debtor Ahmed M. Barodi ("Barodi") in and to lease spaces 801-803 (the "Lease Space") in Park Row Shopping Center, Arlington, Texas (the "Shopping Center"). For the reasons set forth in this Memorandum Opinion and Order, the Court grants the Motion. The following constitutes the Court's findings of fact and conclusions of law.

## A. Factual and Procedural Background

In or about January 2002, Barodi entered into a lease (the "Lease") with Chisom Investment & Management Group, Inc. ("Chisom") for the Lease Space in the Shopping Center. The Lease was for a period of five years and required Barodi to pay rent in the amount of $8,000 per month, commencing on January 15, 2002. Barodi intended to open a European market and restaurant in the Lease Space.

In or around September 2002, Afamia purchased the Shopping Center from Chisom. Afamia is owned by Ilaiwi, Barodi's nephew. (The Court will refer to Ilaiwi and Afamia as "Ilaiwi.") Ilaiwi purchased the Shopping Center at the instigation of Barodi. Barodi himself desired to purchase the Shopping Center, but did not have the credit to procure a loan for the purchase. Barodi and Ilaiwi agreed that Ilaiwi would purchase the Shopping Center for $1.5 million and then resell it to Barodi for $1.6 million. Due to disputes between Ilaiwi and Barodi, the Shopping Center has never been sold to Barodi.

Ilaiwi procured a loan in the amount of $1.5 million from First International Bank in order to purchase the Shopping Center. The note was secured by a deed of trust on the Shopping Center. The day after closing his loan with First International Bank, Ilaiwi executed a $300,000 note (the "$300,000 Note") payable to the order of Zaraf Enterprises, Inc., an affiliate of Chisom. Barodi and Ilaiwi disputed, among other things, whether the $300,000 Note was intended to be secured by the Shopping Center or by certain property known as the "Nizza Pizza Property." In a separate adversary proceeding (the "Adversary Proceeding"), this Court held that the $300,000 Note was secured by a second lien on the Shopping Center.

Disputes between Ilaiwi and Barodi arose shortly after Ilaiwi purchased the Shopping Center. One of the disputes concerned Barodi's non-payment of rent under the Lease. Barodi concedes that he has never made any payment under the Lease; Barodi contends that none is yet due. Barodi testified that when he entered into the Lease with Chisom, Chisom orally agreed that Barodi would not be required to pay rent until he opened his restaurant. According to Barodi, this agreement was necessary because the Lease Space required extensive renovations due to a fire. Notwithstanding the criticality of this provision, the free rent provision is not reflected in the Lease.

Barodi testified that Ilaiwi was aware of the oral agreement. Indeed, according to Barodi, neither Chisom nor Ilaiwi ever demanded rent from Barodi. Barodi spent considerable money renovating the Lease Space before Ilaiwi purchased the Shopping Center. After Ilaiwi bought the Shopping Center, Barodi purchased or caused to be purchased restaurant equipment for the Lease Space. Nevertheless, in May 2003 Ilaiwi locked Barodi out of the Lease Space. Ilaiwi's lockout presaged extensive litigation between Barodi and Ilaiwi over a variety of topics. In October 2004, Ilaiwi procured an interlocutory summary judgment against Barodi in state court due to Barodi's default under what the parties refer to as the "Arabic Contract."

On November 30, 2004, Barodi and his wife, Habbiba Noman Barodi ("Ms. Barodi"), filed separate chapter 13 bankruptcy cases in this district and division. Ms. Barodi has alleged that approximately two weeks before filing her bankruptcy petition, she purchased the $300,000 Note from Chisom. After her petition in bankruptcy, Ms. Barodi purported to post the Shopping Center for foreclosure. In the Adversary Proceeding, this Court ruled that the foreclosure sale could not go forward because (1)

conducting foreclosure sales and operating a shopping center were not in the ordinary course of business for Ms. Barodi, (2) Ms. Barodi has de minimis assets and income, (3) if Ms. Barodi were the successful bidder at foreclosure, she would be subject to a $1.5 million loan in favor of First International Bank, and (4) Ms. Barodi's ownership of the $300,000 Note has been disputed by Ilaiwi.

On December 2, 2004, Ilaiwi filed his motion for relief from stay in Barodi's case, asking the Court to lift the stay to (1) permit Ilaiwi to return to state court and finalize his summary judgment against Barodi, and (2) authorize Ilaiwi to terminate the Lease so that he could re-let the Lease Space to a new tenant. Barodi timely filed his opposition to this request. At the preliminary hearing on the stay motion, the Court denied Ilaiwi's motion to lift stay to permit him to finalize his judgment against Barodi. On January 12, 2005, the Court held a final hearing on that portion of Ilaiwi's motion to lift stay pertaining to termination of the Lease.

At the final hearing, Ilaiwi called as a witness Abu Ayyash, who presented himself as an agent for a partnership that was interested in renting the Lease Space from Ilaiwi. Barodi objected to Abu Ayyash's testimony as hearsay. Abu Ayyash testified as to his own agency and the terms under which the partnership was willing to rent the Lease Space. Abu Ayyash does not work for the partnership but, from time to time, acts as its agent for specific tasks. In this case, Abu Ayyash was deputized by the partnership to appear and testify in court in the absence of the partners. The Court finds that Abu Ayyash's testimony is hearsay and therefore does not consider it in rendering its opinion.

Ilaiwi testified that he desired to rent the Lease Space to a party other than Barodi for a period of five years at a rate of $8,000 per month, and that he had a prospective

tenant under those terms. Ilaiwi testified that he was willing to grant the third party free rent for the first seven months in order to finish out the Lease Space.

Barodi called Bassam Zahra ("Zahra"), who testified that he has agreed to invest an unspecified sum of money in Barodi's restaurant in return for 40% of the restaurant's profits for the first three years. Barodi testified as to his plans for a European market and restaurant and his confidence in the success of the venture. Barodi also testified that he was willing to enter into a lease with Ilaiwi on the same terms that Ilaiwi was willing to rent the Lease Space to Abu Ayyash's principals.

**B. Barodi's Request to Require Ilaiwi to Enter Into a New Lease With Barodi**

Barodi first argues that the Court should order Ilaiwi to enter into a lease with Barodi on the same terms that Ilaiwi is willing to rent the Lease Space to a third party, that is a five-year lease at $8,000 per month with free rent for the first seven months. Notwithstanding the proffered practicality of this position, this request must be denied. The Court has no authority to require a non-debtor to enter into a contract with the Debtor, much less dictate the terms pursuant to which the non-debtor must be bound by the involuntary arrangement. Practical or not, this solution simply is not sustainable.

**C. Barodi's Request to Assume the Lease**

Next, Barodi argues that he should be permitted to assume the Lease. However, when Barodi asks for authority to assume the Lease, he does not mean the Lease as it is written, but the Lease as modified by the oral agreement between Barodi and Chisom. Thus, the Lease that Barodi asks the Court to permit him to assume is the version that permits Barodi to pay no rent until the restaurant is opened. Ilaiwi argues, however, that

any oral agreement between Barodi and Chisom is not admissible, much less enforceable, because it is hearsay and is barred by the parol evidence rule and the statute of frauds.

"The parol evidence rule provides that if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements with regard to the same subject matter are excluded from consideration whether they were oral or written." *Smith v. Smith*, 794 S.W.2d 823, 827 (Tex.App. – Dallas 1990, no writ). The rule has particular application where "the written contract contains a recital that it contains the entire agreement between the parties." *Id*. (citing *Weinacht v. Phillips Coal Co.*, 673 S.W.2d 677, 679 (Tex.App. – Dallas 1984, no writ)).

The Lease is unambiguous. It specifically provides for rent in the amount of $8,000 per month in months one through thirty-six, with a commencement date of January 15, 2002. The Lease contains no free rent provision. Moreover, paragraph 25.8 states that the Lease "contains the entire agreement between the parties." As a general rule, an unambiguous contract will be enforced as written. *Heritage Resources, Inc. v. Nationsbank*, 939 S.W.2d 118, 121 (Tex. 1996).

Notwithstanding the explicit provisions of the Lease, Barodi contends that evidence of his oral agreement is admissible to establish his claims and defenses of promissory estoppel and quasi estoppel. Barodi has submitted authorities which he contends support this argument. In particular, Barodi relies upon *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934 (Tex. 1972) and *Cimarron Country Property Owners Ass'n v. King*, 117 S.W.3d 509 (Tex. App. – Beaumont 2003, no pet.).

*Moore* stands for the proposition that promissory estoppel may preclude a defense based on the statute of frauds. 492 S.W.2d at 937. However, *Moore* does not stand for

the proposition that promissory estoppel can preclude the application of the parol evidence rule.

*Cimarron* involves quasi estoppel. In *Cimarron*, the plaintiff property owners' association had, in a letter to the defendant, interpreted a deed restriction so as to permit the defendant to operate a business out of his home. When the plaintiff sued to preclude the defendant from operating a childcare business out of his home, the court held that the doctrine of quasi estoppel precluded plaintiff from asserting a position that was inconsistent with that which it had previously taken and upon which the defendant had relied. In *Cimarron* the court did not address the question of parol evidence. The plaintiff's letter was admitted into evidence, but the plaintiff argued that the letter did not constitute legally and factually sufficient evidence to support a finding of quasi estoppel. It did not argue that the letter was not admissible. Consequently, *Cimarron* does not stand for the proposition that the mere assertion of a quasi estoppel defense can vitiate the parol evidence rule.

Barodi next cites *Wagner v. Morris*, 658 S.W.2d 230 (Tex.App. – Houston [1st Dist.] 1983, no writ) for the proposition that the parol evidence rule can be overcome when a party has been fraudulently induced to enter into a contract. The Court agrees with this general statement of law. However, Barodi did not plead fraud in the inducement in response to Ilaiwi's motion to lift stay, nor does the evidence show that Chisom fraudulently induced him to enter into the Lease. Barodi's testimony that Chisom did not attempt to collect rent from him is inconsistent with any assertion that Chisom lured Barodi into the Lease with the promise of free rent, but that Chisom did not intend to abide by that representation. Ilaiwi cannot be said to have fraudulently induced

Barodi to enter into the Lease because Ilaiwi did not succeed to the lessor's rights under the Lease until nine months after it was executed.

Based upon the foregoing, the Court finds that parol evidence is not admissible to vary or contradict the express terms of the Lease. Additionally, Barodi's testimony as to his oral agreement with Chisom cannot be considered because it is hearsay.

Consequently, the Lease before the Court is the written Lease executed by Barodi and Chisom. To the extent that Barodi desires to assume the Lease, he must assume it as it is written, not as it is modified by the oral agreement.

### D. Barodi Did Not Meet the Requirements for Assumption Pursuant to 11 U.S.C. § 365(b)(1)

Barodi filed his petition in bankruptcy on November 30, 2004. Pursuant to 11 U.S.C. § 365(d)(4), in order to assume the Lease, Barodi was required to assume the Lease no later than January 31, 2005. Barodi did not file a motion to assume the Lease on or before that date. Nevertheless, construing Barodi's pleadings, testimony, and argument as a timely motion to assume, the Court cannot authorize Barodi to assume the Lease. Barodi is a chapter 13 debtor. As of the date of his petition in bankruptcy, he had $315 in cash. He and his wife make $3,102 per month. Their total monthly expenses are $2,434. Barodi has no personal ability to cure defaults under the Lease, offer adequate assurance that he will cure defaults under the Lease, or offer adequate assurance of future performance under the Lease.

Barodi's prospective investor, Zahra, testified that he was willing to invest money to assist Barodi with the necessary finish-out, but Zahra did not state that he was willing to pay rent during the finish-out process, much less to dedicate substantial sums to curing

the arrearages under the Lease. In short, Barodi cannot satisfy the requirements for assumption of the Lease pursuant to section 365(b)(1).

### E. Alternatively, the Court Would Not Exercise Its Equitable Powers To Enforce the Indefinite No-Rent Agreement Between Chisom and Ilaiwi and Permit Barodi to Assume that Agreement

Although the Court has ruled that the parol evidence rule precludes Barodi from purporting to modify the Lease in accordance with the oral agreement, the Court would not authorize Barodi to assume the Lease subject to an open-ended free rent agreement in any event. The doctrines relied upon by Barodi to force this result are equitable in nature. Promissory estoppel is to be employed "if injustice can be avoided only by enforcement of the promise." *Moore*, 492 S.W.2d at 937 (citing *Wheeler v. White*, 398 S.W.2d 93, 96 (Tex. 1965)). Quasi estoppel applies when it would "be unconscionable to allow a party to maintain a position inconsistent with one to which the party acquiesced or from which it accepted a benefit." *Cimarron*, 117 S.W.3d at 511. Because these remedies are equitable, the Court has discretion to determine the "expediency, necessity or propriety of [such] relief." *Id.* at 512.

The Court does not find that it would be unjust or unconscionable to deny Barodi the opportunity to assume the Lease subject to a provision that permits him to pay no rent until he opens his restaurant. Barodi had from January 2002 to May 2003 to complete the finish-out on his restaurant, but was unable to do so. Although Barodi testified that Ilaiwi impeded his efforts to complete his finish-out after Ilaiwi became the owner of the Shopping Center, there is no evidence that Ilaiwi impeded the finish-out in the nine months prior to Ilaiwi's purchase of the Shopping Center. Moreover, notwithstanding the

obstacles encountered by Barodi, it is undisputed that from January 2002 to May 2003, Barodi paid no rent.

Additionally, the free rent provision endorsed by Barodi is vague and unlimited. The provision is open-ended as to time. It does not require Barodi to take reasonable steps to move towards completing and opening the restaurant. Indeed, it has no objective criteria at all to measure his progress.

The enforcement of an open-ended, free rent provision is not in the best interests of either Ilaiwi or Barodi. Each of these parties has an interest in the Shopping Center, Ilaiwi via his deed, and Barodi via his wife's second lien on the property.[1] Due to the dispute over the Lease, 8,000 square feet of space has gone without rent for the last three years. Clearly, this has negatively impacted cash flow, and concomitantly, the value of the Shopping Center. To the extent that Ilaiwi and Barodi have an interest in the Shopping Center, each has suffered from the fact that the Lease Space has produced no rent.

Based upon the hearings conducted thus far, it is clear that permitting Barodi to assume the Lease will not solve his disputes with Ilaiwi. The notion that Ilaiwi and Barodi can be brought together by a court order is purely illusory. The disputes between the parties would only be exacerbated by binding them to each other pursuant to a contract that only required Barodi to start paying rent when and if he opened the restaurant.

Barodi argues that it would be unfair to deny him the opportunity to open his restaurant given the amount he already has invested in it. He also complains that Ilaiwi

[1] The Court has determined that Ms. Barodi has colorable title to the $300,000 Note secured by the second lien on the Shopping Center. However, her ownership of the $300,000 Note has not been finally determined and the Court makes no such final determination here.

prevented him from performing under the Lease by locking him out. If Barodi has other claims or defenses involving his relationship with Ilaiwi, to the extent such claims and defenses are not otherwise foreclosed by this opinion, they are reserved for another day. Today the Court focuses on the issue of whether Barodi may assume the Lease, and concludes that Barodi cannot assume the Lease. In so ruling, the Court does not purport to resolve all of the rights and liabilities of the parties under the Lease or in their other dealings with each other.[2]

**F. Barodi's Section 365 Argument**

Barodi contends that the motion to lift stay must also be denied because it is procedurally defective. Citing *In re Sweetwater,* 40 B.R. 733 (Bankr. D. Utah 1984), Barodi contends that Ilaiwi's motion to lift stay should have been filed as a motion to compel Barodi to assume or reject the Lease. The Court notes that *Sweetwater's* view of the exclusivity of section 365 as remedy is not universally held. *See In re Borbridge*, 66 B.R. 998, 1000 (Bankr. E.D. Pa. 1986) ("The majority of bankruptcy courts to consider the issue has concluded, using various rationales, that lessors are entitled to relief from stay under section 362(d)(1)").

Even assuming that *Sweetwater* represents the correct view, it would be inequitable to strictly construe section 365 against Ilaiwi and not Barodi. After all, Barodi did not timely file a motion to assume the Lease as required by 11 U.S.C. §

[2] For example, Barodi has argued that Ilaiwi modified the Lease in accordance with the Chisom oral agreement after Ilaiwi purchased the Shopping Center. Barodi cites *Smith v. Bidwell*, 619 S.W.2d 445 (Tex.Civ.App. – Corpus Christi 1981, writ ref'd n.r.e.) for the proposition that parol evidence is not applicable to agreements made subsequent to the written agreement or to prevent a party from showing that the written agreement was waived or changed. The Court does not find that Ilaiwi modified the Lease to permit an unlimited free rent provision. Ilaiwi's eviction of Barodi for non-payment of rent is fundamentally inconsistent with this position. Moreover, Barodi never offered any evidence of the consideration that supported such a modification. However, the Court expresses no opinion as to whether Ilaiwi waived his entitlement to some portion of the rent under the Lease.

365(d)(4), but the Court has construed Barodi's pleadings as a timely request under that section. Having done so, the Court must construe Ilaiwi's pleadings as a proper response to Barodi's motion to assume the Lease.

## CONCLUSION

The motion to lift stay to terminate the Lease is granted. The Lease is rejected. Ilaiwi may terminate the Lease, but may not take action to collect amounts due under the Lease, except by filing his proof of claim in this case and Ms. Barodi's case. This order is without prejudice to Barodi's right to contest Ilaiwi's claim on any grounds, except on those grounds that are foreclosed by this opinion and order.

**SO ORDERED.**

*** * * END OF ORDER * * ***