U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

United States Bankruptcy Judge

Signed June 15, 2010

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

In re	§	
	§	Chapter 11
Joseph Domino, III and	§	
Debra Williams Domino,	§	Case No. 10-41270 (DML)
	§	
Debtors.	§	

Memorandum Order

Before the court is the *Motion to Assume Leases with Subway Restaurants, Inc. and Franchise Agreements with Debtor's Associates, Inc. and* [sic] *Cure Any Outstanding Defaults* (the "Motion"). The Motion was opposed by Subway Restaurants, Inc. ("SRI") and Doctor's Associates, Inc. ("DAI"), each of which filed a response to the Motion. The court conducted a hearing on the Motion on April 21, 2010, at which time Debtor Joseph Domino, III ("Domino", and, with Debra Domino, "Debtors") testified, and the parties entered exhibits, referred to as necessary below, into evidence. Following the hearing, at the court's suggestion, the parties submitted additional briefs in support of

their respective positions.

By the Motion, Debtors seek to assume four agreements pursuant to section 365(a) of the Bankruptcy Code (the "Code").[1] Two of the agreements are leases between SRI and Debtors. At each of the leased premises, Debtors operate a Subway Restaurant under a franchise agreement with DAI. The Motion proposes assumption of the two franchise agreements as well. In this memorandum order, however, the court will address only one of the agreements, that lease pertaining to 6401 N. Beach St. in Fort Worth, Texas (the "Beach Location" and the "Beach Lease"). As to the other three agreements, the court will deny the Motion without prejudice. Should Debtors determine they can reorganize successfully notwithstanding the court's decision respecting the Beach Lease, they may reurge assumption of one or more of the other agreements.[2]

This matter is subject to the court's core jurisdiction. 28 U.S.C. §§ 1334 and 157(b)(2). This memorandum order embodies the court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052 and 9014.

Discussion

In March of 1988, SRI leased the Beach Location from Beach and Western Joint Venture pursuant to that lease admitted as SRI Exhibit A. On October 6, 1989, by the Beach Lease (SRI Exhibit B, Debtors Exhibit 3), SRI subleased the Beach Location to Debtors.[3] Debtors have occupied the Beach Location and, pursuant to a franchise

[1] 11 U.S.C. §§ 101 *et seq.*

[2] The court is doubtful that the franchise agreement related to the Beach Location can survive if the Beach Lease is lost, but is not prepared to so conclude in this memorandum order.

[3] The Beach Lease (and SRI's underlying lease) apparently were subject to various amendments not relevant to the court's decision.

agreement with DAI, have operated a Subway Restaurant there ever since. Pursuant to the Beach Lease, Debtors were obligated to pay to SRI's landlord the monthly rent due it from SRI. Beach Lease, ¶ 4.

On May 5, 2009, SRI sent Debtors "a warning notice concerning termination" of the Beach Lease by reason of an outstanding default. Debtors Exhibit 19. On May 21, 2009, SRI, per Thomas Dautel ("Dautel"), as SRI's "collection representative," sent a letter to Debtors actually terminating the Beach Lease. *Id.* However, SRI took no action to reclaim the Beach Location, and Debtors remained in possession of the premises, continued to operate the Subway restaurant there, and (sporadically) paid rent under the Beach Lease. Debtors Exhibits 5 and 21; Domino's testimony.

On November 17, 2009, SRI's landlord[4] commenced suit against SRI because Debtors had fallen behind $8,285.79 in payments, representing several months' rental. SRI Exhibit E. Prior to commencement of that suit, on November 3, 2009, SRI once again advised Debtors they were in default under the Beach Lease. *See* SRI Exhibit C, Debtors Exhibit 20. In that November 3 letter, Dautel, again acting as a collection representative for SRI, advised Debtors that, if the defaults were not cured, the Beach Lease would be terminated. *See, id.*

In the meantime, Debtors twice commenced cases under chapter 13 of the Code. They filed a first case, *pro se*, on October 21, 2009; that case was dismissed on October

---

[4] The landlord, according to the suit (SRI Exhibit E), is Sandstone Fossil Creek Associates ("Sandstone") rather than the landlord shown on the lease to SRI. To add to the confusion, the Beach Lease recites that SRI is the tenant of the Beach Location under a lease "between it and Woodmont Reliance Limited Partnership." As the parties seem to agree it is the case, the court assumes Sandstone is, in fact, the present lessor to SRI and that the plethora of landlord names does not affect the dispute between Debtors and SRI.

28, 2009. On November 6, 2009, they filed a second chapter 13 case, which was dismissed on February 24, 2010, due to ineligibility under Code § 109(e) (Debtors' debts exceeded the statutory limit). As SRI's November 3 letter came between Debtors' first and second cases, it was not sent in violation of Code § 362(a).

After dismissal of their second case, but before commencement of the instant chapter 11 case, SRI, on February 24, 2010, confirmed that the Beach Lease was terminated by letter dated February 24, 2010, and denominated as a "notice of eviction." SRI Exhibit D. This letter, however, referenced the May 5 letter warning of termination rather than the November 3 letter. *See id.*

Following commencement of their chapter 11 case, Debtors have engaged in several disputes with SRI. SRI has consistently insisted before this court that it no longer wishes to work with Debtors but rather wants to terminate its business relationships with them.

On the other hand, though opposing in this court assumption by Debtors of their franchise agreements, DAI has continued to maintain an ordinary franchisor – franchisee relationship with Debtors. *See, e.g.*, Debtors Exhibits 9 – 13. Indeed, Dautel himself, on these occasions purportedly acting for DAI, has encouraged Debtors to believe that DAI anticipates a continuing relationship between it and Debtors. Debtors Exhibit 14; Domino's testimony. On the basis of this conduct, Debtors argue that SRI has waived the effect of its purported termination of the Beach Lease.

Waiver is an equitable doctrine by which the courts may relieve a party to a contract of certain of the burdens of that contract based on conduct of the counterparty to

the contract that is inconsistent with enforcement of those burdens. *See* 28 Am. Jur. 2d Estoppel and Waiver § 197 (2010) (and cases cited therein); 73 Tex. Jur. Waiver § 1 (2010). Courts in Texas,[5] however, are reluctant to find waiver (*see, e.g., Harris County Hosp. Dist. v. Textac Partners I*, 257 S.W.3d 303, 310 (Tex. App.—Houston [14th Dist.] 2008); *Producers Assistance Corp. v. Employers Ins.*, 934 S.W.2d 796, 798 (Tex. App.—Houston [1st Dist.] 1996)), and will do so only when it is clear that waiver was intended. *See ASI Techs., Inc. v. Johnson Equip. Co.*, 75 S.W.3d 545 (Tex. App.—San Antonio 2002); *Sedona Contracting, Inc. v. Ford, Powell & Carson, Inc.*, 995 S.W.2d 192, 196 (Tex. App.—San Antonio 1999) ("In order to establish waiver, the act must be clear and decisive."); *Cal-Tex Lumber Co., Inc. v. Owens Handle Co., Inc.*, 989 S.W.2d 802, 812 (Tex. App.—Tyler 1999).

Clearly, the court cannot find that SRI intended to waive its right to enforce termination of the Beach Lease. The conduct inconsistent with enforcement of the February 24 termination was conduct undertaken by DAI, not SRI. As argued by SRI, even though the two companies are closely affiliated and despite the overlap of the Beach Lease and the franchise agreement, the court cannot attribute to SRI an intent implied from the conduct of DAI.

While the court is troubled by Dautel's dual role – on the one hand causing termination of the Beach Lease for SRI while on the other hand on behalf of DAI encouraging Debtors to believe their franchise was secure – it is not prepared to extend the doctrine of waiver to the instant situation solely on that basis. In the first place, the

---

[5] SRI's lease of the Beach Location, and, consequently, the Beach Lease are governed by Texas law. SRI Exhibit A, § 28.10.

court has found no case in Texas – or, for that matter, any other jurisdiction – in which the actions of an individual representing one entity were attributed to another related entity that he also represented. In the absence of any precedential support, the court, given the disfavor in which waiver is held, would be most reluctant on its own to develop an extension of the doctrine. In the second place, SRI and DAI have consistently acted in this court in a fashion consistent with an intent to enforce termination of the Beach Lease and end their relationship with Debtors. While, therefore, the actions of DAI may create ambiguity about its and SRI's intent, the court cannot find the sort of clear manifestation of intent necessary for proof of waiver.

While the court cannot find waiver of the actual February 24 termination, the court does conclude that the termination effected through SRI's letters of May 5 and 21, 2009, was obviated by waiver. SRI's belief that the November 3 letter was necessary demonstrates that SRI believed termination pursuant to the letters sent the preceding May would be ineffective.

That leads, in turn, to the question of whether the February 24 letter actually terminating the Beach Lease was fatally defective in that it referred to the May 5 notice from SRI rather than that of November 3. The court has again found a paucity of guidance on this question, and despite scouring the sources the court has found no case in which a notice of termination of a lease – or other contract – referred back to the wrong notice of default.

However, what authority the court has found suggests that the incorrect reference to the May 5 letter should not be fatal to SRI's termination of the Beach Lease. To begin

with, section 24.005 of the Texas Property Code, which requires a notice to vacate rental premises and which governs the required content of the November 3 letter contains no requirement that such a notice reference a default or notice of default. Second, at least one Texas court has held that a demand for possession – i.e., with notice to vacate – "need not include [any] magic phrase." *Blackman v. Elliot* 1997 WL 57693 *2 (Tex. App. – Austin). Indeed, in *Blackman* the court noted that "[t]he purpose of the statute is to ensure that the lessee receive notice that the landlord intends to terminate the lease . . . ." *Id.* Clearly, the February 24 letter satisfies the requirement. *See, similarly,* 41 Tex Jur. Forcible Entry and Detainer § 7 (2010), and 18-282 Dorsaneo, Texas Litigation Guide § 282.120[1][b] (2010) ("There are no special requirements . . . for the content of a notice to vacate, but it must clearly state the landlord's demand for possession").

In the case at bar, despite the incorrect reference to the May 5 letter, the February 24 letter clearly demands possession of the Beach Location and shows that SRI intended termination of the Beach Lease. Debtors can have had no doubt that, as of February 24, SRI viewed the relationship between it and Debtors represented by the Beach Lease as being over. Nor can Debtors have been confused about the reason the Beach Lease had been terminated. Not only were they put on notice of their defaults by the November 3 letter; those defaults, though then renoticed, dated back in large part to the May 5 and 21 letters. It is obvious that the issue respecting termination is one of notice and that the February 24 letter was sufficient for that purpose. Therefore defective reference in the February 24 letter to the May 5 letter does not invalidate the effect of the former.

For all the reasons stated above, the court concludes that the Beach Lease was

terminated prior to Debtors' commencement of their chapter 11 case. Because a terminated contract is not subject to assumption (*see, e.g., Erickson v. Polk*, 921 F.2d 200 (8th Cir. 1990)), the Motion must be denied with prejudice as to the Beach Lease. As noted above, it will be denied without prejudice as to the remaining three contracts it addresses.

It is so ORDERED.

END OF MEMORANDUM OPINION # #