

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

IN RE:	)	Chapter 11
	)	
UNIDIGITAL INC., et al.,	)	Case No. 00-3806 (MFW)
	)	
Debtors.	)	(Jointly Administered)

**MEMORANDUM OPINION**<sup>1</sup>

This matter is before the Court on the Motion of WXIII/FAR Yale Real Estate Limited Partnership ("the Landlord") for Relief from the Stay to permit it to obtain a writ of execution for possession of premises it leases to one of the Debtors, Unison (MA) Inc. ("Unison"). Unison opposes that relief. After a hearing held on December 1, 2000, and consideration of the parties' positions, we grant the Motion.

I. FACTUAL BACKGROUND

Prior to filing its chapter 11 case, Unison was a party to a lease dated October 14, 1998, by which it leased premises at 451 D Street, Boston, Massachusetts ("the Premises"). Prepetition, there had been litigation between Unison and the Landlord regarding the parties' respective rights under the lease. That litigation was settled, prepetition, by a Settlement Agreement dated June 14, 2000. Pursuant to the Settlement Agreement, the

---

<sup>1</sup> This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

lease terminates on December 31, 2000. To assure that the Landlord would receive the Premises, a Judgment in Possession was entered in favor of the Landlord and a writ of execution for possession was issued. The Landlord was to hold the writ of execution in escrow until January 1, 2001, whereupon it could levy on it. As part of the Settlement Agreement, the Landlord gave Unison rent abatement for 6 months so long as Unison used its best efforts to find other premises by September 1, 2000.

Unison apparently used its best efforts to find other premises and was given the rent abatement. However, it was unsuccessful and when these bankruptcy cases were filed on September 19, 2000, Unison was still in possession of the Premises. The Landlord filed the instant Motion on November 9, 2000. Unison opposed the Motion and a hearing was held on December 1, 2000. We gave Unison until December 6, 2000, to file a memorandum of law in opposition to the Motion.<sup>2</sup>

---

<sup>2</sup> Instead of filing a brief, Unison filed a Certification of Counsel with an unsigned brief attached. The Certification asserted that the cases cited by the Landlord are inapposite, for the reasons noted in the attached memorandum, but conceded that in the Settlement Agreement Unison had waived its right to retain possession of the Premises after December 31, 2000.

## II. JURISDICTION

This Court has jurisdiction over this matter, which is a core proceeding pursuant to 28 U.S.C. § 157(b) (2) (G).

## III. DISCUSSION

Section 362(b) (1) permits the Court to grant relief from the stay "for cause." The term "cause" as used in section 362(d) has no obvious definition and is determined on a case-by-case basis. A three-factor test has been adopted for determining whether "cause" exists, applying the following criteria:

- (a) [Whether] any great prejudice to either the bankrupt estate or the debtor will result from the continuation of the civil suit;
- (b) [Whether] the hardship to the [non-bankrupt party] by maintenance of the stay considerably outweighs the hardship of the debtor; and
- (c) [Whether] the creditor has a probability of prevailing on the merits.

See, e.g., In re Rexene Products Co., 141 B.R. 574, 576 (Bankr. D. Del. 1992) (citations omitted).

### A. Prejudice to the Debtor

The Landlord asserts that Unison will suffer no prejudice if stay relief is granted because Unison has no interest in the Premises after December 31, 2000, by virtue of the Settlement Agreement. It argues that Unison waived any right it had to

remain in possession by virtue of its agreement to a Judgment in Possession and writ of execution in the Settlement Agreement. It asserts that after December 31, 2000, the Debtor will have no property or other interest in the Premises. The Landlord cites several cases for the proposition that the Court cannot extend a lease of a debtor beyond its stated terms, revive a leasehold interest once it has expired, or permit a debtor to assume an expired lease.<sup>3</sup> Therefore, the Landlord argues that because the Court cannot give Unison any right to possession of the Premises beyond December 31, 2000, cause exists for relief from the stay to permit the Landlord to obtain possession after that date.

While Unison concedes that it has waived any right to possession of the Premises after December 31, 2000, it asserts that relief from the stay should not be granted because it will be severely prejudiced if it is not permitted to remain on the Premises. Unison notes that its business is run from those Premises and it has been unable to find any other suitable location. It also asserts that the cost to move its business is excessive and a burden on the estate. It posits that it may have to close its business if it is forced to vacate the Premises by year-end.

---

<sup>3</sup> See, e.g., Bell v. Alden Owners, Inc., 199 B.R. 451, 462 (Bankr. S.D.N.Y. 1996) (where lease had expired prepetition, debtor had no right to assume it); In re P.I.N.E., Inc., 52 B.R. 463, 465 (Bankr. W.D. Mich. 1985) (debtor had no right to assume lease which expired by its own terms post-petition).

While we are sympathetic to Unison's plight, we advised Unison that equity was insufficient and that it needed a legal right to remain on the Premises to defeat the Motion. As one court has stated: "the intervening filing of a petition for relief [did not] give the lessee a right to extend a contract beyond its original terms. . . . The Bankruptcy Code neither enlarges the rights of a debtor under a contract, nor prevents the termination of a contract by its own terms. . . . The Bankruptcy Court cannot recreate an interest for the Debtor where none exists." In re Crabb, 48 B.R. 165, 167 (Bankr. D. Mass. 1985) (citations omitted).

Unison asserts that the cases cited by the Landlord for the proposition that once a lease expires the Court cannot extend it are inapposite to the case at bench. Those cases involve efforts of the debtor to extend a lease which has already expired;<sup>4</sup> they do not deal with what rights a debtor may have in a lease which has expired. While it concedes that the lease will expire on December 31, 2000, Unison asserts that post-termination it will have a possessory interest in the Premises pursuant to state law. See, e.g., Spodek v. U.S. Postal Service, 35 F. Supp.2d 160 (D. Mass. 1999); Moskow v. Robinson, 176 N.E. 603 (Mass. 1931); Boudreau v. Johnson et al., 134 N.E. 359 (Mass. 1922).

---

<sup>4</sup> See, e.g., Crabb, 48 B.R. 165; Chart House, Inc. v. Maxwell (In re Maxwell), 40 B.R. 231 (N.D. Ill. 1984).

Without deciding whether, under Massachusetts law, Unison would have a right of possession in the Premises upon expiration of the lease, however, we conclude that Unison has waived this right. The Settlement Agreement provided that upon expiration of the lease on December 31, 2000, the Landlord had the right to possession of the Premises. In fact, Unison concedes it has consented to that possession and has waived all defenses it might have to that possession by agreeing to the entry of the Judgment in Possession and the issuance of a writ of execution thereon. Thus, we conclude that Unison will have no right in the Premises after December 31, 2000.

Consequently, we conclude that there is no prejudice to any legally cognizable right of Unison by granting relief from the stay to permit the Landlord to enforce its right to possession after December 31, 2000. Similarly, there is no prejudice to Unison by granting relief from the stay now to permit the Landlord to have the writ of possession issued, so long as the Landlord does not levy until January 1, 2001.<sup>5</sup>

B. Prejudice to the Landlord

The Landlord asserts that it will be severely prejudiced if it is not permitted to obtain possession of the Premises on January 1, 2001. The Landlord asserts that the current market

---

<sup>5</sup> Apparently, a writ of possession was issued previously pursuant to the Settlement Agreement but has expired.

rates are significantly higher than the lease rate, which Unison does not dispute. Further, the Landlord asserts that denying it relief from the stay will eliminate the benefit of the bargain it struck in the Settlement Agreement. The Landlord has already given Unison all that it bargained for in the Settlement Agreement (6 months of free rent and the right to remain in the Premises despite the Landlord's assertion of prior defaults).

Unison does not contest any of these facts. Therefore, we conclude that the Landlord has established that it will be harmed if relief from the stay is not granted.

C. Probability of success on the merits

Since the Landlord already has a Judgment in Possession, it is clear that it will succeed on the merits of the underlying action. Therefore, this factor is met.

V. CONCLUSION

For the reasons set forth above, we grant the Motion for relief from the stay filed by the Landlord. An appropriate order is attached.

BY THE COURT:

Dated: December 8, 2000

\_\_\_\_\_  
Mary F. Walrath  
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

IN RE: ) Chapter 11  
 )  
UNIDIGITAL INC., et al., ) Case No. 00-3806 (MFW)  
 )  
Debtors. ) (Jointly Administered)

**O R D E R**

**AND NOW**, this **8th** day of **DECEMBER, 2000**, upon consideration of the Motion of WXIII/FAR Yale Real Estate Limited Partnership for Relief from the Stay and the Debtors' Response thereto, and after hearing held on December 1, 2000, it is hereby

**ORDERED** that the Motion is hereby **GRANTED** and the automatic stay of 11 U.S.C. 362 is hereby modified to permit WXIII/FAR Yale Real Estate Limited Partnership to obtain (and the state court to issue) a writ of execution with respect to the Agreement for Judgment of Possession entered in the Massachusetts Superior Court (Suffolk County), Civil Action No. 00-0379B, provided, however, that no levy on the writ of execution may commence prior to January 1, 2001; and it is further

**ORDERED** that the automatic stay is lifted in all other respects effective January 1, 2001, to permit WXIII/FAR Yale Real Estate Limited Partnership to enforce its rights to possession of the Premises.

BY THE COURT:

\_\_\_\_\_  
Mary F. Walrath  
United States Bankruptcy Judge

cc: See attached



**SERVICE LIST**

Charlene D. Davis, Esquire  
Douglas M. Hershman, Esquire  
The Bayard Firm  
222 Delaware Avenue  
Suite 900  
Wilmington, DE 19801  
Counsel for Debtors

Jeffrey C. Wisler, Esquire  
Connolly, Bove, Lodge & Hutz  
1220 Market Street  
P.O. Box 2207  
Wilmington, DE 19899  
Counsel for WXIII/FAR Yale  
Real Estate Limited Partnership

Daniel K. Astin, Esquire  
Office of the United States Trustee  
601 Walnut Street  
Curtis Center, Suite 950 West  
Philadelphia, PA 19106