

IN THE UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF ALABAMA

IN RE: VICKI CRAWFORD,

Chapter 13

Debtor

Case no: 11-02550-WSS

**EMERGENCY MOTION TO RETROACTIVELY ANNULL AUTOMATIC STAY AND FOR
INSTRUCTIONS TO CREDITOR**

COMES NOW the creditor, Randall Investments, LLC, d/b/a Manchester Park Apartments (“Creditor”), through counsel, and respectfully moves the Court, under 11 U.S.C. Section 362(d), to annul the automatic stay that may otherwise apply to Creditor in this case, or issue an Order that the automatic stay ceased to apply to Creditor when debtor voluntarily moved out the apartment complex that is the subject of this controversy, or, in the alternative, Creditor respectfully moves the Court for an Order issuing instructions to Creditor in how to comply with any rights that debtor may have under the facts presented below, and as grounds states as follows:

1. Debtor entered into a lease with Creditor on July 1, 2011 (the “Lease”) for an apartment with Creditor with an address of 1621 Springhill Ave, Apt 305, Mobile, AL 36604 (the “Apartment”).
2. Creditor did not know that, at the time the Lease was signed, debtor had filed for bankruptcy and Creditor would not have allowed debtor to resign the Lease if creditor had known of the bankruptcy and, in fact, would have immediately sought the advice of counsel.
3. The Lease was a renewal of a lease that expired on June 30, 2011. While debtor was late for the month of June, 2011, she brought herself current for June’s rent which induced Creditor to execute the renewal Lease with an effective date of July 1, 2011. The renewal lease was signed by debtor on June 29 but was effective July 1, and a copy of the renewal Lease is attached hereto as Exhibit A.
4. Debtor failed to pay July rent under the Lease of \$653 and failed to pay the late fee of \$100 for July.
5. Creditor became concerned, but debtor told creditor that she has suffered an injury at work and she would no longer have to miss lease payments and agreed to sign a promissory note for July rent. The Note provided that debtor would pay July rent plus a \$100 late fee (for a total of \$743) on or before July 28, 2011. A copy of the promissory note is attached hereto as Exhibit B.

6. Debtor failed to pay the \$743 under the promissory note and also failed to pay August rent.
7. At no time did debtor inform creditor that debtor had filed a chapter 13 bankruptcy, and creditor never received notice from the bankruptcy court that debtor had filed bankruptcy.
8. While the creditor's Lease may have been listed on schedule G, creditor was not added to the matrix and never received formal notice of the bankruptcy, and never received verbal notice from debtor or anyone else.
9. Debtor claims that she told representatives of creditor that she was in bankruptcy, but creditor vehemently denies this allegation and, moreover, no notice of the bankruptcy was given to creditor under 11 U.S.C. 342(g).
10. The first time creditor learned of the bankruptcy was on August 23 when its attorney, Joseph Shaw, communicated to creditor a letter Shaw had received from counsel to debtor stating that debtor was in bankruptcy. A copy of this letter from counsel to debtor is attached hereto as Exhibit C.
11. In the meantime, and before becoming aware of the bankruptcy, creditor filed on August 1, 2011 a complaint for eviction/unlawful detainer and past due rent against the debtor in the District Court of Baldwin County, Alabama, Case no: DV-2011-902201 (the "State Case"). The debtor was served with this eviction/unlawful detainer on August 3, 2011, and under Alabama law, debtor had 7 days to respond to the complaint.
12. Neither debtor nor debtor's attorney notified creditor that debtor was in bankruptcy not did they answer or otherwise respond to the State Case.
13. In fact, without notifying creditor that debtor was in bankruptcy and without responding to the State Case, the debtor voluntarily surrendered the premises on August 8, 2011. The debtor began moving out on August 6, 2011 and voluntarily turned in the keys to the Apartment to the manager of the Apartment on August 8, 2011, all without notifying creditor of the bankruptcy or filing any responsive pleading in the State Case.
14. On August 18, 2011 creditor, through counsel, moved for a default judgment in the State Case, which was done in order to insure that creditor had rightful possession of the Apartment and to insure that Creditor would have a judgment for past due rent.
15. On the same day that counsel for debtor wrote a letter to counsel for creditor, i.e. August 22, 2011, the Court in the State Case issued a default judgment in the State Case awarding possession of the Apartment to creditor and awarding creditor

monetary damages for past due rent of \$1,286, late fees for July and August of \$200 and an attorney's fee of \$400. See State Case Judgment attached hereto as Exhibit D.

16. It is abundantly clear that debtor voluntarily abandoned the Apartment by moving out voluntarily and not informing counsel for the creditor or the State Court of her bankruptcy. This constitutes abandonment of property of the estate and the automatic stay only applies to property of the estate.
17. Debtor's failure to provide notice of the bankruptcy after having several opportunities to do justifies a retroactive annulment of the automatic stay if the automatic stay even applies under these circumstances.
18. Courts have retroactively annulled the automatic stay in extraordinary circumstances and the facts in this case present extraordinary circumstances. See In re: Soares, 107 F.3d 969 (1st Cir 1997). In Soares, the Court acknowledged that it would have allowed a state court default judgment allowing a judicial foreclosure on a debtor's residence, which judgment was taken after the automatic stay was effective, if the creditor had not known of the bankruptcy. After noting that cases retroactively annulling the stay would be rare, the Court stated such cases would not be limited to the matters set forth in Section 342(d), but could include situations where a creditor "inadvertently violates the automatic stay in ignorance of a pending bankruptcy..." 107 F.3d at 977, citing Mutual Benefit Life Ins Co. v Pinetree, Ltd, 876 F.2d 34, 37 (5th Cir 1989). The Soares Court likewise held that "[b]y like token, debtors who act in bad faith may create situations that are ripe for retroactive relief." 107 F.3d at 977. It is very clear that the Creditor in this case was unaware of the stay both when it filed the State Case and when it moved for a default judgment in the State Case. The creditor was likewise unaware of the bankruptcy when it allowed the debtor to renew the lease and execute a promissory note to catch up on the late July rent.
19. It is also clear that the debtor is "in pari delicto" by waiting almost two months before informing creditor that she was in bankruptcy and then only after she had voluntarily moved from the Apartment. The debtor signed a new lease, executed a promissory note, received and never responded to the State Case and voluntarily surrendered the Apartment, all without informing creditor that she had filed bankruptcy. These actions meet the "bad faith" test set by the Court in Soares, so that both prongs of Soares are met, i.e. the creditor had no notice of the bankruptcy and the debtor acted in bad faith, but meeting just one of these tests would have been sufficient under Soares.
20. To be sure, courts have held that acts in violation of the stay are void and not just voidable. However, the court in Soares recognized and adopted this principle and

would have applied its retroactive annulment doctrine to override even an act that was void had the creditor in Soares not had notice of the bankruptcy. Also, the Soares case has been cited with approval by the 11th Circuit, albeit not for the proposition under consideration in this case. See Roberts v C.I.R., 175 F.3d 889, 897 (11th Cir 1999).

21. The debtor moved out of the Apartment from August 6 to August 8 and turned the keys over to creditor on August 8 before ever being subject to a judgment in the eviction action. In fact, the debtor could have filed an answer in the eviction action up to August 8 by filing a "suggestion of bankruptcy." The subsequent default judgment in the State Case brings into play Section 362(l). And this default judgment was applied for and obtained prior the creditor or creditor's counsel learning of the bankruptcy.
22. Therefore, even if this Court should refuse to retroactively annul any actions of the creditor deemed to be a violation of the automatic stay, and because the debtor comes into this court with unclean hands, the debtor should be required to comply with Section 362(l) or the Court should use its equitable powers to require debtor to pay the past due rent (even if it did arise post petition) because to do otherwise would reward debtor for her bad faith conduct.
23. The creditor is need of instructions in how to handle this case if the Court denies creditors motion for Annulment of the automatic stay.
24. The creditor has already leased the Apartment to a third party and even if creditor has an apartment available at the time of this Court's order, creditor is unsure what size apartment debtor should be entitled to, i.e. a one or two bedroom apartment, given her inability to pay for a two bedroom apartment after filing her petition.
25. The creditor respectfully requests this Court to set this matter for hearing at the earliest possible date to determine the rights and obligations of the parties.
26. The creditor asserts that it should not be held liable for any violation of the automatic stay since it was unaware of the bankruptcy filing until August 22 and then immediately hired the undersigned counsel to attempt to clear up the respective rights of the parties.
27. Alternatively, if this Court does not approve of a retroactive annulment, this Court could find that the Apartment is no longer property of the bankruptcy estate since debtor voluntarily moved out of the Apartment on August 8, 2011 without ever informing the Creditor, counsel for the Creditor or the State Court of her bankruptcy. The debtor should not be allowed to take these kinds of actions and then apply to this Court to force a different result that could have easily been avoided by simply notifying the creditor of the bankruptcy in a timely manner.

WHEREFORE, the creditor respectfully requests this Court to render an Order:

- a. Annulling the automatic stay as to creditor retroactively to the date of the filing of the petition and entering an Order that creditor is not required to place debtor in an apartment at the creditor's complex, or alternatively, finding that the Apartment is no longer property of the estate (and therefore not subject to the automatic stay) because debtor abandoned possession of the Apartment without informing the State Court, Creditor, or counsel for the Creditor of her bankruptcy;
- b. That creditor is not liable to debtor for any damages for any violation of the stay;
- c. That debtor owes creditor the sum of \$1,886 pursuant to the State Case which should be treated as an unsecured debt;
- d. That if the Court does not agree with the arguments set out by creditor in this pleading, that the Court instruct the creditor and debtor how to place debtor in an apartment, and in that Order instructing the debtor to comply with Section 362(l) or otherwise pay creditor for July and August rent plus late fees of \$100 per month;
- e. That if the Court requires Creditor to place debtor in an apartment, inform the creditor what size apartment and enter an order providing that if debtor misses a single monthly payment of rent by more than 10 days after it's due date, that the automatic stay of Section 362 shall automatically be lifted and that creditor may proceed to evict debtor without further application to this Court for relief from stay; and
- f. That this Court will award such other relief and issue such other instructions to which creditor may be entitled.

August 30, 2011.

/s/ Ronald F Suber

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of August, 2011, I have caused a copy of the foregoing to be served upon the trustee, JC McAleer, III, and counsel for the debtor, James E Loris, by filing this pleading with the ECF system which will cause an email copy to be served upon them by email at the address they maintain with the ECF system.

/s/ Ronald F Suber

Ronald F Suber