

Good News for Landlords

By *JUSTIN H. DION, Esq.*

It can be tough being a landlord in Massachusetts.

In addition to the everyday hassles, such as dealing with ornery tenants and rent collections, there are also long-term considerations, such as contemplating lease modifications and default problems, as well as working to maintain high occupancy rates. In addition, landlords often feel that eviction and bankruptcy laws are stacked against them and impede their ability to quickly evict in case of default.

The good news for landlords is that as of October 2005, things seem to have gotten a little easier.

The passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) has had a profound effect on the bankrupt tenant/landlord relationship in both the residential and commercial realms.

As every residential landlord knows, obtaining a judgment for eviction can be an extremely trying and expensive proposition. Under the old bankruptcy law, nothing would frustrate a landlord more than finally obtaining an eviction following months of litigation, only to have the tenant file bankruptcy, thus invoking the automatic stay and halting the eviction process. Despite sometimes months of legal wrangling (and likely non-payment), tenants could immediately stop and delay a hard-fought eviction.

Now, under BAPCPA, if a residential landlord has a judgment

for possession by the time the tenant files for bankruptcy, the stay does not prevent the landlord from continuing to evict the tenant 30 days after the petition was filed. An exception applies only if the debtor has a right to cure a deficiency in rent, and actually has cured the deficiency by depositing all of the rent with the clerk of the Bankruptcy Court within 30 days of the bankruptcy filing. In a majority of cases, it is likely that a debtor's financial distress will prevent any cure, thus permitting the landlord to move forward with eviction in a relatively short period of time.

In addition, the automatic stay no longer prevents a landlord from evicting a tenant based on endangerment of the property or illegal use of controlled substances. In order to proceed as such, the landlord must first file a certification with the court, after which the debtor has 15 days in which to rebut the allegations or to remedy the situation.

Even larger than the BAPCPA's effect on residential landlords are the new law's effect on commercial landlords. In fact, if commercial leases are important components of a debtor's business, it is likely that the new code provisions will significantly reduce the length of time a debtor is in bankruptcy. Although prior bankruptcy law allowed the debtor 60 days to either assume or reject a lease only upon request of the debtor and after demonstrating 'cause,' the Bankruptcy Court

routinely extended the 60-day time period indefinitely at the request of the debtor.

This provision was generally viewed as a huge advantage to the debtor, who could essentially keep the landlord waiting for years while the debtor decided whether or not it made economic sense to retain its leases. In turn, this put tremendous strain on the landlord, who was forced to live with uncertainty, while on the other hand, the debtor could make a lengthy business decision about whether to keep the lease or not.

Pursuant to BAPCPA, this balance of power has now been shifted away from the debtor and into the hands of the landlord. Specifically, the new code provision extends the assumption/rejection deadline to 120 days; however it limits the extension to one 90-day period. Additional extensions are only permitted with the express permission of the landlord.

Thus, the debtor now has only 210 days to make a decision that will have potentially eternal consequences. In addition, if the debtor is not able to make a reasonable business decision regarding the viability of its leases, it may be forced to negotiate with and offer its landlord new consideration in exchange for the landlord's agreement to grant a further assumption extension.

In turn, although other creditors may find it detrimental to have the debtor extend consideration to another entity, the pay-

ment of additional consideration is obviously beneficial from the landlord's position. The shift of power has an especially adverse affect on debtors who own multiple commercial properties, as debtors are now obligated to make a relatively fast decision regarding lease assumptions, despite the fact that the lease may eventually prove economically detrimental.

Landlords are now in a position to engage in a more timely and meaningful negotiation regarding assumption that hopefully will allow the debtor to avoid a hasty decision, while also helping the landlord to avoid a store going dark.

If your commercial tenant does file for bankruptcy, the new law change allows you to become more actively involved in the case, as well as forcing the debtor to negotiate a resolution with you on a much more timely basis. It is important to remain on top of the case transpirings, and make sure the debtor is complying with the new time requirements. Now more than ever, it is vital that landlords strategize their options and plan to exercise their rights when the time is strategically best. ♦

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