

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL**

GENERAL ELECTRIC CAPITAL BUSINESS	:	September Term 2008
ASSET FUNDING CORPORATION OF	:	
CONNECTICUT,	:	No. 1661
	:	
Plaintiff,	:	
	:	
v.	:	Commerce Program
	:	
R3 FOODS SERVICES, LLC,	:	
	:	
Defendant.	:	Control Number 09123762

ORDER

AND NOW, this 20th day of April 2010, upon consideration of the Receiver’s Motion to Approve a First and Final Distribution to Creditors, all responses in opposition and after a hearing, it hereby is **ORDERED** that the Motion is **Granted**.

The Receiver is authorized to pay all necessary and reasonable expenses of the Receivership Estate, including professional fees. After payment of all necessary and reasonable expenses, the Receiver is authorized to distribute all remaining assets to the Receivership Estate to the holders of Non Subordinated Allowed Claims, in the “Allowed” amounts (as defined in the Motion) on a pro rata basis as listed on Exhibits A-C attached hereto. To the extent that all Non-Subordinated Allowed Claims are paid in full, the Receiver shall distribute all remaining assets of the Receivership Estate to the holders of Subordinated Allowed Claims (as defined in the Motion) on a pro rata basis as listed on Exhibit D as attached hereto.

BY THE COURT,

MARK I. BERNSTEIN, J.

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OPINION

On September 11, 2008, General Electric Capital Business Asset Funding Corporation of Connecticut (hereinafter “Plaintiff”) filed a complaint against the defendant seeking injunctive and other equitable relief including the appointment of a receiver. On September 12, 2008, the plaintiff filed an emergency petition seeking the appointment of a Receiver for the defendant. The petition was granted on September 15, 2008 and Kevin T. O’ Hallaran (hereinafter “the Receiver”) was appointed Receiver for the defendant R3 Foods Services, LLC (hereinafter “Defendant”). Pursuant to this court’s order, the Receiver took control and custody of 22 Taco Bell fast food restaurants located in Tennessee, Ohio and Pennsylvania.

On March 16, 2009, this court entered an order approving the sale of five Tennessee area stores for a sale price of \$500,000.00. The sale was completed on March 25, 2009. On July 1, 2009, this court entered an order approving the sale of fifteen (15) Ohio and Pennsylvania area stores for a sale price of \$6,450,000. The sale closed on July 8, 2009. After the sales, the Receivership Estate includes the sale proceeds from the stores as well as surplus funds from operating the stores prior to their sales.

On June 2, 2009, the court entered an order establishing a claims process for all claims against defendant to be asserted and set a bar date of September 30, 2009 for creditors to file

claims. After reviewing and analyzing the claims received, the Receiver categorized the claims as allowed claims, allowed in part claims, denied in full claims, subordinated allowed claims and non subordinated allowed claims. The remaining creditors were placed in the category of general unsecured creditors.

On December 30, 2009, the Receiver filed a motion for an order approving a first and final distribution to creditors. On January 29, 2010, the court issued a rule upon all parties and creditors of defendant to show cause why the Receiver's motion should not be granted. The parties and creditors were directed to file a written objection to the motion within twenty days of the order. The court scheduled a hearing for March 5, 2010.¹

After the rule to show cause was served upon all the parties and creditors, the court received an objection from Earl N. Stevenson, a landlord for one of the Taco Bell stores located in Jackson, Tennessee. Mr. Stevenson (hereinafter "Stevenson") filed a claim in the amount of \$1,161,177.40 representing lost rent due to modification of the lease for the property. Stevenson's objection was the only objection received to the Receiver's motion. A hearing was held on March 5, 2010. Stevenson was permitted to participate telephonically at his request to present his objection. After considering all matters of record and Stevenson's colloquy, Stevenson's objection is overruled and the Receiver's Motion is granted.

DISCUSSION

Lease agreements are governed by contract law.² The fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties. When

¹ Additionally, the court also issued a rule upon the City of Philadelphia to show cause on March 5, 2010 why the Receiver's request to disallow and dismiss its claim should not be granted. The City of Philadelphia appeared at the scheduled hearing and the parties subsequently agreed upon a sum to resolve the claim.

² Trizechahn Gateway, LLC v. Titus, 930 A.2d 524, 533 (Pa. Super. 2007).

there is a written agreement, the intent of the parties is to be regarded as being embodied in the writing itself. The whole written agreement must be taken together in ascertaining the contractual intent. Courts do not assume that a contract's language was chosen carelessly, nor do they assume that the parties were ignorant of the meaning of the language they employed.³ As such, when the language of a lease is clear and unequivocal, its meaning will be determined by its contents alone in ascertaining the intent of the parties.⁴

Here, the language of the Modification Agreement is clear, the landlord waived any claim for rent default and agreed to the modified rent amount. On December 24, 2008, Stevenson, the landlord, executed an Assignment, Assumption and First Modification of Lease with the Landlord's Consent (hereinafter "Modification"). The Modification was reviewed by Stevenson's counsel as well as an attorney for the property lien holder, La Jolla Bank and pursuant to their review changes were made.

The Modification was between the Receiver, BBG North LLC⁵ and Mr. Stevenson. The Modification assigned the original lease between Stevenson and Ohio Valley Taco Corporation to the Receiver, permitted the Receiver to assign the lease to BBG North LLC upon consummation of the sale, allowed BBG North LLC to assume and be bound by the lease as if it were the original party and modified the rent. Stevenson consented to the assignments as well as the rent modification. Specifically, paragraph 3 (b)(1) provides:

3. Modification of Lease Terms: Subject to approval of the APA [Asset Purchase Agreement] by the Receivership Court and consummation of the sale to Assignee [BBG North LLC] under the APA [Asset Purchase Agreement]. Landlord [Stevenson], Assignor [the Receiver], and Assignee

³ Murphy v. Duquesne Univ. of the Holy Ghost, 565 Pa. 571, 777 A.2d 418, 429 (Pa. 2001).

⁴ Trizechahn Gateway, LLC v. Titus, 930 A.2d 524, 533 (Pa. Super. 2007).

⁵ BBG North LLC was the purchaser of the Taco Bell store leased from Stevenson.

[BBG North LLC] agree that the terms of the Lease are modified as follows:

....

b. The Rent provisions set forth in paragraph 7 are deleted in their entireties and replaced with the following:

i. Beginning January 1, 2009 and continuing through September 30, 2013 Lessee shall pay the base yearly rent of Sixty-four Thousand Eight Hundred Dollars (\$64,800) payable in equal monthly installments (12 per year) of Five Thousand Four Hundred Dollars (\$5,400) each and every month on the first day of the month, in advance, all such rent being payable at the address of the Lessor set forth in paragraph 28 or at such other place as the Lessor may direct. Thereafter, Lessee shall pay rent to Lessor based on the terms and conditions set forth on Exhibit B attached hereto and incorporated herein by reference.

Since Stevenson agreed to modify the rent, the prior rent provision was deleted and no longer exists. As such, Stevenson is precluded from seeking damages based on the prior rent amount.

Additionally, Stevenson waived his right to assert a claim for rent default. Paragraph 5 (d) provides:

5. Representations of Landlord. To the best of Landlord's actual knowledge:

....

d. Landlord acknowledges that one or more rent payments due under the Lease have not been made and Landlord waives any obligation and liability of Assignor [Receiver representing R3 Foods] or Assignee [BBG North LLC] for any rent obligations that accrued or became due prior to the date of the consummation of the sale to Assignee [BBG North LLC] under the APA[Asset Purchase Agreement]. Landlord further agrees that any and all defaults under the Lease for failing to timely make any rent payment existing as of the date of the consummation of the sale to Assignee [BBG North LLC] under the APA [Asset Prurchase Agreement] are waived;⁶

⁶ Modification ¶ 5(d).

Based on the clear and unambiguous language in the Modification, Stevenson's objection is overruled and the Receiver's motion is granted.

BY THE COURT,

MARK I. BERNSTEIN, J.

