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BANKRUPTCY LAW

Split Remains on Landlord-Tenant Stay Relief

New Bankruptcy Code fails to shed light on residential lease conflict

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Under the former Bankruptcy Code, the filing of a bankruptcy petition by a tenant functioned as a stay of a pending eviction, which permitted a residential tenant to remain in possession of their leased property until the landlord brought a motion for stay relief for cause pursuant to § 362(d) of the Bankruptcy Code. With passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), residential landlords seemingly are provided with more powers, and residential tenants with fewer protections. Specifically, BAPCPA provides that, subject to certain qualifications, the § 362 automatic stay does not apply in cases where (1) a lessor obtained a prepetition judgment for possession or (2) where a lessor commenced a prepetition eviction action based upon a tenant's endangerment of the property or illegal use of controlled substances on the premises. However, although BAPCPA

provides more avenues for residential property landlords seeking relief from the automatic stay, it fails to shed light on the pre-BAPCPA bankruptcy court split as to whether residential leases terminated prepetition may be assumed by debtors post-petition.

BAPCPA

New Bankruptcy Code § 362(b)(22) provides that a debtor's bankruptcy filing does not operate as a stay of the continuation of a residential eviction or unlawful detainer action where the landlord obtained a judgment for possession for monetary default prior to the debtor's filing. 11 U.S.C. § 362(b)(22). A debtor's stay will be lifted 30 days after the debtor's filing unless the debtor: (1) serves the landlord with a certification providing that he has state law grounds to cure the entire monetary default that gave rise to the entry of the judgment for possession; and (2) deposits with the clerk of the court any rent that became due during the 30-day period following his or her bankruptcy filing. *Id.* at § 362(l)(1) and (2).

However, in two instances, § 362(b)(22) applies immediately and works to automatically lift a debtor's § 362 automatic stay without court

approval. First, if the landlord objects to the debtor's § 362(l) certification, the bankruptcy court must hold a hearing on the veracity of debtor's certification within 10 days of filing and service of the objection. *Id.* at § 362(l)(3)(A). If the bankruptcy court upholds the landlord's objection, § 362(b)(22) applies immediately and automatically. *Id.* at § 362(l)(3)(B). In other words, if the bankruptcy court upholds the landlord objection to the debtor's certification, the landlord need not obtain stay relief from the bankruptcy court to recover possession of the leased premises. Second, if the debtor lists the landlord's judgment for possession on his bankruptcy petition, but fails to file a § 362(l) certification, § 362(b)(22) likewise applies immediately, thereby eliminating the landlord's need to obtain formal stay relief from the bankruptcy court. *Id.* at § 362(l)(4). In the event either of these circumstances occurs, the court clerk must immediately serve a certified copy of the court's order or docket (whichever is applicable) upon the landlord and the debtor. *Id.* at § 362(l)(3)(B) & (l)(4). Finally, although a landlord need not obtain formal stay relief under these limited circumstances, the landlord may apply for a "comfort order" under new § 362(j) confirming that the automatic stay has been terminated. *Id.* at § 362(j).

Additionally, BAPCPA provides that a debtor's bankruptcy petition will

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not operate as a stay against an action for possession due to endangerment of the premises or the illegal use of controlled substances on the premises. 11 U.S.C. § 362(b)(23). To obtain this relief, a landlord must file a supporting certification, which must provide that within the 30-day period preceding the debtor's bankruptcy filing, the landlord filed an eviction action based on the debtor's endangerment of the leased premises, or the illegal use of controlled substances thereon. *Id.* at § 362(m)(1). The debtor's stay will be lifted automatically 15 days after the landlord files a § 362(b)(23) certification. *Id.* However, if the debtor files an objection to the truth or legal sufficiency of the landlord's § 362(b)(23) certification, the debtor's stay will not be lifted unless the bankruptcy court so orders. *Id.* at § 362(m)(2). Moreover, if the debtor can demonstrate to the court's satisfaction that the situation that precipitated the landlord's certification either did not exist or has been remedied, debtor's stay will remain in effect until the landlord moves for stay relief under § 362(d). *Id.* at § 362(m)(2) & (3). If, however, the debtor fails to file an objection within 15 days, or cannot satisfactorily refute the landlord's certification, the debtor's stay is lifted automatically pursuant to § 362(b)(23). *Id.* Under these circumstances, the court clerk must immediately serve a copy of the court's order or docket (whichever is applicable) upon the landlord and debtor. *Id.* Again, although unnecessary to resume its state court action for possession, a landlord may request a § 362(j) comfort order from the bankruptcy court. *Id.* at § 362(j).

New Jersey Law

In the event of a default by a tenant under the terms of residential lease, New Jersey law enables a landlord to gain possession of a leased premises through a summary dispossess action. N.J.S.A. 2A:18-53; 2A:18-61.1. The purpose of the summary action is "to secure performance of the rental obligation...." *Vineland Shopping Center v. Marco*, 35 N.J. 459, 469 (1961). A ten-

ant may terminate, and thus, avoid the entry of a judgment for possession by paying the rent claimed to be in default to the court clerk "at any time on or before entry of final judgment" for possession. N.J.S.A. 2A:18-55; 2A:42-9. Additionally, after the entry of a judgment for possession, the court, in its discretion and pursuant to the Tenant Hardship Act, may stay the issuance of a warrant of removal or possession for a period not to exceed six months. N.J.S.A. 2A:42-10.6. Further, a court may also grant relief from a judgment for possession on equitable grounds pursuant to New Jersey Rule of Court 4:50-1. See *Housing Authority of Town of Morristown*, 135 N.J. 274, 290-91 (1994).

If a tenant fails to avail himself of these remedies, the court shall issue a warrant of removal/possession, but not before three days pass following the entry of the judgment for possession. N.J.S.A. 2A:18-57. The warrant may be executed an additional three days thereafter. N.J.S.A. 2A:42-10.16. Finally, the Superior Court, Law Division, Special Civil Part retains jurisdiction for 10 days after the execution of the warrant for possession in order "to hear applications by the tenant for lawful relief." N.J.S.A. 2A:42-10.16(c).

As noted above, a summary dispossess action will be terminated if the tenant cures his default prior to entry of the "final judgment." The term "final judgment" is not defined in the statute, and New Jersey courts have been divided on the issue of what constitutes "final judgment" within the meaning of § 2A:18-55, and, hence, at what point a tenant could avoid a judgment for possession. Compare *Azar v. Jabra*, 167 N.J. Super. 543, 553 (1979) (holding that a tenant could cure default at any time before issuance of a warrant for removal/possession), with *Stanger v. Ridgeway*, 171 N.J. Super. 466, 473 (App. Div. 1979) (holding that defaulting tenant must deposit rent "on or before the day that judgment is entered"). In interpreting New Jersey law, our bankruptcy courts have determined that entry of a judgment of pos-

session, not the entry of a warrant of removal or possession, constitutes a "final judgment" within the meaning of the statute and, thus, terminates the tenant's entitlement to possession. *In re DiCamillo*, 206 B.R. 64, 67 (Bankr. D. N.J. 1997) (Wizmur, J.); see also *In re Great Feeling Spas, Inc.*, 275 B.R. 476, 481 (Bankr. D. N.J. 2002) (Lyons, J.).

New Code, New Problems

Although New Jersey's bankruptcy courts have fixed the point at which leases — both commercial and residential — are terminated under state law, under the old code, bankruptcy courts in general were split as to whether a Chapter 13 debtor could assume a "terminated" residential lease pursuant to § 365(b) and 1322(b)(7). See *DiCamillo*, 206 B.R. at 67-68. In New Jersey, at least one bankruptcy court has held that Chapter 13 debtors may assume leases terminated prepetition under applicable state law. *Id.* at 71. In so holding, the *DiCamillo* court focused in part on the fact that § 365(c) specifically precludes only nonresidential lessees from assuming leases terminated prepetition; § 365(a) precludes only expired (not "terminated") leases from being assumed by trustees (and debtors-in-possession), and that § 1322(b)(7) contains provisions for the assumption of leases. *Id.* at 69.

Although Congress surely had knowledge of this inconsistency in the old code, its passage of BAPCPA did nothing to illuminate or resolve the split among bankruptcy courts as to whether it intended to permit debtors to assume residential leases post-petition that were terminated under state law prepetition. Thus, while BAPCPA provides greater protections to residential landlords, it left some questions unanswered and raised new ones in the process.

For instance, under the old bankruptcy code in New Jersey, a residential lease terminated upon entry of a judgment for possession. Under BAPCPA, if a debtor can demonstrate that he has state court grounds to cure his default (and deposits one month's rent with the court), the landlord in the

case will not benefit from the new stay relief provisions. As noted above, a residential tenant has two remedies under state law after the entry of a judgment for possession — the tenant may petition the court for a stay under the Tenant Hardship Act, or the court

may relieve the tenant from the judgment of possession in its entirety if equity so dictates (e.g., if the tenant has an equitable defense, such as breach of implied warranty of habitability by the landlord). Thus, while it seems as if Congress intended to provide landlords

with more remedies under bankruptcy law, it appears as if it clarified a debtor's rights as well. In the end, as it is unclear how our bankruptcy courts will interpret these new rules in light of existing conflicts, we will have to wait and see what happens. ■