

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 04-14228-MWV  
Chapter 11

Latitudes Cafe, LLC,  
Debtor

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**MEMORANDUM OPINION**

The Court has before it a motion filed by Latitudes Cafe, LLC (the “Debtor”), seeking to assume its unexpired lease of nonresidential real estate entered into with Waterville Development Corporation (“Waterville”) or to extend the time to assume the lease until approval of the Debtor’s plan of reorganization (“Debtor’s motion”). Waterville objected to the Debtor’s motion on July 11, 2005. On May 10, 2005, the United States Trustee filed a motion to convert this case to Chapter 7 or alternatively to dismiss the case pursuant to § 1112(b)<sup>1</sup> (“UST’s motion”), in which Waterville joined. The Debtor opposed the UST’s motion, and on June 14, 2005, a hearing was held on the UST’s motion. On July 13, 2005, the Court held an evidentiary hearing on the Debtor’s motion and a continued hearing on the UST’s motion. For the reasons set out below, the Court denies the Debtor’s motion to assume the lease, and the

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<sup>1</sup>Unless otherwise noted, all statutory section references herein are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, *et seq.*

lease is deemed rejected. With respect to the UST's motion, a further hearing will be held on August 17, 2005, at 10:00 a.m.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.).

### **BACKGROUND**

The Debtor, in the business of operating a restaurant, filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code with this Court on November 30, 2004. The Debtor currently leases space in a shopping center located in Waterville Valley, New Hampshire, owned by Waterville pursuant to a lease agreement entered into with Waterville on June 18, 2001 (the "Lease"). The initial term of the Lease commenced on July 1, 2001, and will end on June 30, 2011. Since the beginning of the Lease, the Debtor has been late with its rent and is in default for two prepetition rent payments. Pursuant to § 365(d)(4),<sup>2</sup> the deadline by which the Debtor was required to assume or reject the Lease was January 29, 2005. That deadline was later extended to June 30, 2005 (Ct. Doc. 43), and the Debtor filed this motion on June 30, 2005.

Prior to filing bankruptcy, on May 16, 2004, the Debtor's business premises was struck by lightning and the Debtor sustained severe damage to its computer system. As result of the loss of the computer system, the Debtor suffered from inefficiencies and slowdowns of its operations which, in turn, placed the Debtor in a difficult financial situation. The computer system was insured under an insurance

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<sup>2</sup>Section 365(d)(4) reads in relevant part:

[I]n a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor. 11 U.S.C. § 365(d)(4).

policy issued by Acadia Insurance Company (“Acadia”). Acadia made payment on the computer coverage in September 2004, but it refused to compensate the Debtor for its business losses. Subsequently, the Debtor and Acadia designated appraisers to evaluate the amount of the business losses, and it is expected that the appraisal panel will issue its decision shortly.

The Debtor proposes to cure the prepetition arrearage due Waterville with the proceeds of the settlement with Acadia in twelve months. Waterville objects to the Debtor’s proposal arguing that twelve months is too long a period to cure the arrearage, far from prompt. Waterville further argues that the Debtor has provided no evidence to adequately assure that the Debtor will be able to perform its obligations in the future.

### **DISCUSSION**

Section 365(b) provides that if there has been a default in an executory contract or unexpired lease of the debtor, the trustee<sup>3</sup> may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1)(A), (B) and (C). The language of § 365(b)(1)(A) clearly requires that the trustee cure all defaults or provide adequate assurance of prompt cure before a lease may be assumed. The Debtor here does not propose to cure all defaults before it assumes the Lease. Instead, the Debtor promises to pay the arrearage amount over a period of twelve months. Whether a cure is “prompt” for purposes of § 365(b)(1)(A) depends on the facts and circumstances of each case. In re Embers 86th

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<sup>3</sup> Section 1107 confers upon a debtor in possession the power to assume or reject an unexpired lease under § 365. See § 1107(a).

Street, Inc., 184 B.R. 892, 900 (Bankr. S.D.N.Y. 1995). After considering the facts and circumstances of this case, including the Debtor's past performance, the Court believes that the proposed time period of twelve months is not prompt. Waterville alleges that of the forty-nine payments due so far, thirty-three payments were late, which the Debtor does not dispute. While the Court notes that the Debtor has been struggling since the lightning strike in May 2004, the Debtor has not paid the rent on a timely basis, long before the strike occurred. Although a time period of up to one year is not necessarily in violation of the standard that the cure be prompt, 2 NORTON BANKR. L. & PRAC. 2d §§ 39:29 (2004) (citations omitted), under the facts of this case, the proposed twelve month cure period is not prompt within the meaning of § 365(b)(1)(A).

The Court is also not satisfied that the Debtor will compensate Waterville for any pecuniary loss resulting from the default. Paragraph 23 of the Lease provides for interest on late payments at the rate of 18% per annum. But the Debtor's proposal does not include interest. Moreover, from the testimony of the Debtor's principal, Mr. Mike Lambrecht, it is evident that the Debtor has not envisioned compensating Waterville for any pecuniary loss.

Finally, there is nothing in the evidence to ensure the Court that the Debtor will provide adequate assurance of future performance. As stated by the Embers court, in assessing adequate assurance of future performance under § 365(b)(1)(C), the "test is not one of guaranty, but simply whether it appears that the rent will be paid and other obligations met." Id. at 902 (citations omitted). The unrefuted testimony leads the Court to question whether the rent will be paid in the future. Mr. Lambrecht testified that he borrowed money from his family members to pay the rent and that the Debtor only has ability to pay August rent. The Debtor hired a broker to sell the restaurant, which is the Debtor's sole source of income. Further, a review of the Debtor's monthly operating reports reveals that the Debtor has not made any profit for the last several months. Nonetheless, the Debtor argues that it can pay the rent with the expected damages to be awarded from the appraisal panel. However, the Debtor failed to offer any evidence that it will be able to make the rent payments even if the panel renders its decision for Acadia.

Conversely, if the Debtor is not successful to obtain a decision in its favor, it has no ability to pay the rents. Based on the foregoing, the Debtor's motion to assume the Lease is denied, and the Lease is deemed rejected.

With respect to the UST's motion, a further hearing will held on this matter. As grounds for its motion, the United States Trustee states that the Debtor has failed to file its monthly operating reports, despite repeated requests that it do so. On June 14, 2005, upon the UST's motion, the Court ordered that the Debtor shall file the reports by June 24, 2005, and the Debtor complied with the Court's order by filing all of the reports due through May 31, 2005. Since the Debtor complied with the Court's order, and the United States Trustee does not allege any other grounds for its request, the Court will have a further hearing in order to be informed of developments in the case.

#### **CONCLUSION**

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgement consistent with this opinion.

DONE AND ORDERED this 21st day of July, 2005, at Manchester, New Hampshire.

/s/ Mark W. Vaughn

Mark W. Vaughn  
Chief Judge