



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
October 28, 2022

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re: ) Case No.: 22-13430-MKN  
) Chapter 11  
BROTHERS PIZZA 5 LLC )  
dba BROTHERS PIZZA, )  
) Date: October 26, 2022  
Debtor. ) Time: 9:30 a.m.  
)

**ORDER ON MOTION TO LIFT STAY TO COMPLETE PRE-PETITION  
ORDERED EVICTION<sup>1</sup>**

On October 26, 2022, the court heard the Motion to Lift Stay to Complete Pre-Petition Ordered Eviction (“RAS Motion”) brought by TCL II, LLC (“TCL”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND<sup>2</sup>**

On September 25, 2022, a “skeleton” voluntary Chapter 11 petition was filed by Brothers Pizza 5 LLC (“Debtor”). (ECF No. 1). The petition was filed under Subchapter V of the

<sup>1</sup> In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “Section” are to provisions of the Bankruptcy Code, 11 U.S.C. §101, *et seq.* All references to “FRE” are to the Federal Rules of Evidence.

<sup>2</sup> Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned bankruptcy case. See *U.S. v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980). See also *Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.)*, 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) (“The Court may consider the records in this case, the underlying bankruptcy case and public records.”).

Chapter 11 provisions of the Bankruptcy Code. Lisa Holder was appointed as the Subchapter V trustee. On the same date, a Notice of Chapter 11 Bankruptcy Case was entered informing parties in interest of the Brothers Pizza 5 LLC Chapter 11 bankruptcy proceedings; the deadline of December 5, 2022, for creditors to file a proof of claim and March 24, 2023, for any governmental unit to file a proof of claim; and set a meeting of creditors required by Section 341 (“341 Meeting”) for October 27, 2022.

On October 11, 2022, TCL filed the instant RAS Motion along with declaration of Nicholas V. Montana, Sr. (“First Montana Declaration”) in support thereof and noticed it to be heard on shortened time on October 26, 2022 (“RAS Hearing”). (ECF Nos. 18, 19, and 24). Attached to the RAS Motion (as well as the First Montana Declaration) are copies of numerous documents marked as Exhibits “A” through “J.”<sup>3</sup>

On October 24, 2022, TCL filed a “Notice of No Timely Opposition to the RAS Motion. (ECF No. 26).

On October 24, 2022, Debtor filed its schedules of assets and liabilities (“Schedules”), along with its statement of financial affairs (“SOFA”) and other information. (ECF No. 27).

On October 25, 2022, Debtor filed an opposition (“Opposition”) to the RAS Motion as well as declarations of Jacob Tchamanian (“Tchamanian Declaration”) and Gregory A. Miles, Esq. (“Miles Declaration”) in support thereof. (ECF Nos. 28, 29, and 31). Attached to the Tchamanian Declaration are a variety of documents marked as Exhibits “A” through “E.”<sup>4</sup> Attached to the Miles Declaration is a copy of a document marked as Exhibit “A.”

On October 25, 2022, TLC filed a supplemental declaration of Nicholas V. Montana, Sr. (“Second Montana Declaration”) in support of reply to Debtor’s Opposition to the RAS Motion. (ECF No. 30).

## DISCUSSION

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<sup>3</sup> If necessary, these documents will be referred to as “TCL Ex. \_\_\_\_”.

<sup>4</sup> If necessary, these documents will be referred to a “Tchamanian Ex. \_\_\_\_” or “Miles Ex. \_\_\_\_”.

1 TCL seeks relief from stay under Sections 362(d)(1) and 362(d)(2). The former  
2 provision requires the moving party to demonstrate “cause” for relief. The latter provision  
3 requires the moving party to demonstrate that the debtor lacks equity in the subject property, and  
4 if so, the burden shifts to the debtor to demonstrate that the subject property is necessary to an  
5 effective reorganization. The Bankruptcy Code allocates the burdens of proof. See 11 U.S.C. §  
6 362(g). TCL seeks relief under either or both provisions so that it can complete a pre-bankruptcy  
7 state court action to evict the Debtor from its business premises.<sup>5</sup> In this instance, the RAS  
8 Motion was heard on 14-days notice rather than a minimum of 28-days notice required by the  
9 Local Rule 9014.

10 There is no dispute that the Debtor operates the kitchen and restaurant area of a tavern  
11 known as Town Center Lounge II. TCL is the owner of the tavern and therefore is the Debtor’s  
12 landlord. There is no dispute that TCL entered into a “Kitchen Lease” with the Debtor on  
13 December 20, 2020. (TCL Ex. “A”) The lease expires on January 9, 2023. The lease requires  
14 monthly payments totaling \$3,000 consisting of rent, utilities costs, and cleaning expenses. In  
15 addition to these monetary requirements, the lease has non-monetary aspects that require the  
16 Debtor to meet certain conditions.

17 There is no dispute that TCL commenced separate unlawful detainer proceedings in the  
18 North Las Vegas Justice Court (“Justice Court”) alleging that the Debtor was in violation of both  
19 the monetary requirements and the non-monetary requirements of the Kitchen Lease. The  
20 former proceeding denominated Case No. 22EN003723 styled as TCL II, LLC v. Avetisyan, etc.  
21 (“Monetary Eviction Action”), was commenced on August 4, 2022, and a hearing is scheduled  
22 before the Justice Court on November 1, 2022. (TCL Ex. “C”) Commencement of the Monetary  
23 Eviction Action was preceded by TCL’s service of a Five-Day Notice to Pay Rent or Quit on  
24 July 29, 2022. (TCL Ex. “E”)

25 The latter proceeding denominated Case No. 22EN004552 styled as TCL II, LLC v.  
26 Avetisyan, etc. (“Nonmonetary Eviction Action”), was commenced on Tuesday, September 13,

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27 <sup>5</sup> An exception to the automatic stay exists for eviction proceedings involving residential  
28 leases of real property, see 11 U.S.C. § 362(b)(22), but apparently does not apply to the Kitchen  
Lease.

2022. (TCL Ex. “F”) Commencement of the Nonmonetary Eviction Action was preceded by TCL’s service of a Five-Day Notice to Perform Lease Condition or Quit on July 29, 2022. (TCL Ex.”E”) The Nonmonetary Eviction Action resulted in an Order for Summary Eviction signed on Thursday, September 15, 2022 (“Nonmonetary Eviction Order”). (TCL Ex. “G). On or about Thursday, September 22, 2022, the Debtor apparently was served with a 24-hour lockout notice. On Sunday, September 25, 2022, Debtor electronically filed its voluntary Chapter 11 petition staying further proceedings.

Debtor commenced this Chapter 11 proceeding under Subchapter V in the hopes of confirming a plan of reorganization to continue operations under the Kitchen Lease. As previously noted, the Kitchen Lease expires under its stated term on January 9, 2023. Section 541(b)(2) provides that property of the bankruptcy estate “ceases to include any interest of the debtor as lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.” 11 U.S.C. § 541(b)(2). After the Kitchen Lease expires, the Debtor’s interest in the premises is no longer property of the bankruptcy estate. Debtor apparently maintains that the Kitchen Lease has not been terminated and can be assumed under Section 365(a), subject to any of the requirements under Sections 365(b)<sup>6</sup> and 365(d). Presumably, Debtor also suggests that the Kitchen Lease term can be extended beyond January 9, 2023, through confirming a Chapter 11 plan. Debtor acknowledges that it is under a 90-day deadline under Subchapter V to file a proposed plan of reorganization. See 11 U.S.C. §

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<sup>6</sup> Before the assumption of an unexpired lease of nonresidential real property can be approved, various requirements must be met by the Chapter 11 debtor, including a cure or adequate assurance of a cure of nonmonetary defaults, compensation or adequate assurance of compensation for any damages, and adequate assurance of future performance. See 11 U.S.C. § 365(b)(1). Section 365(a) expressly allows for unexpired leases to be assumed as long as existing defaults are cured. Whatever monetary and nonmonetary defaults may have existed at the time this Chapter 11 proceeding was commenced, the Debtor apparently seeks to use the tools available under bankruptcy law. Subchapter V requires the Debtor to move quickly. Nothing in Subchapter V excuses the instant Debtor from satisfying the conditions of Section 365(b)(1).

1 1189(b).<sup>7</sup> Thereafter, Debtor would be required to satisfy most of the elements of Section 1129  
2 to confirm its proposed Subchapter V plan. See 11 U.S.C. § 1191. .

3 By its current motion, TCL seeks relief under Section 362(d), which permits the court to  
4 enter an order “terminating, annulling, modifying, or conditioning” the automatic stay. 11  
5 U.S.C. § 362(a). In particular, TCL seeks relief so that it can proceed with its eviction  
6 proceedings in Justice Court. It appears that the Monetary Eviction Action set to be heard on  
7 November 1, 2022, might address whether the Debtor was and/or currently is in default on the  
8 rent obligations under the Kitchen Lease. It also appears that the Nonmonetary Eviction Order  
9 was based on TCL’s allegations that the Debtor had defaulted on various other terms of the  
10 Kitchen Lease. It does not appear, however, that such nonmonetary defaults were ever actually  
11 litigated before the Justice Court. The evidence presented to the bankruptcy court on an order  
12 shortening time represents numerous factual disputes.

13 There appears to be no dispute that Debtor defaulted on prepetition rent under the  
14 Kitchen Lease when it bounced at least one check for such payments. (TCL Ex. “B”). That  
15 check appears to have been tendered after the Monetary Eviction Action was commenced, but  
16 may or may not be the ongoing basis for the Monetary Eviction Action. Instead, it appears that  
17 the Monetary Eviction Action is predicated on a \$450.00 late fee under the Kitchen Lease. See  
18 Miles Ex. “A.” TCL suggest that the Debtor may have defaulted at one time on its business  
19 license and health permit fees (TCL Exs. “I” and “J”), but the Debtor maintains that is it current.  
20 (Tchamanian Exs. “D” and “E”). There is no dispute that TCL provided notice to the Debtor in  
21 July 2022 of a variety of alleged nonmonetary defaults (TCL Ex. “D”), but the existence of such  
22 defaults also is disputed (Miles Ex. “A”). Representatives of both TCL and the Debtor make  
23 various factual allegations concerning the Debtor’s compliance with the nonmonetary  
24 requirements of the Kitchen Lease. Compare Tchamanian Declaration at ¶¶ 3, 4, 5, 6, 7, 8, 9, 10,  
25 11 and 12, with First Montana Declaration at ¶¶ 11, 13, 20, 26 and 28, and Second Montana  
26 Declaration at ¶¶ 3, 4, and 5.

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28 <sup>7</sup> As the Chapter 11 petition was filed on September 25, 2022, the deadline expires on or  
about December 23, 2022.

1 Having considered the record and the arguments presented by counsel, the court  
 2 concludes that cause for relief from stay has not been established by a preponderance of the  
 3 evidence. As discussed above, too many factual disputes exist to conclude that cause has been  
 4 demonstrated. Section 362(d)(1) therefore does not apply.

5 There is no dispute that the Debtor does not have equity in the real property that is the  
 6 subject of the Kitchen Lease. The burden therefore shifts to the Debtor under Section 362(d)(2)  
 7 to demonstrate that the property is necessary to an effective reorganization. As a practical  
 8 matter, the Debtor cannot operate its existing business without the current location. As a legal  
 9 matter, Section 362(d)(2) requires the Debtor to show that it has a reasonable possibility of a  
 10 successful reorganization within a reasonable time. See generally United Savings Ass'n of  
 11 Texas v. Timbers of Inwood Assoc., 484 U.S. 365, 375-76 (1988). Debtor's manager attests that  
 12 significant additional revenues may be generated as its business operations recover from the  
 13 effects of the COVID-19 pandemic. See Tchamanian Declaration at ¶ 10. According to Part 1  
 14 of its SOFA, the Debtor had gross revenues in 2021 exceeding \$592,000, and gross revenues in  
 15 2022 to date in excess of \$460,000. Given that the Kitchen Lease commenced on December 20,  
 16 2020, i.e., after the COVID-19 pandemic started, the impact of the pandemic on the Debtor's  
 17 business is unclear. Only one month into this expedited Chapter 11 proceeding and on this  
 18 limited record, the court is satisfied that the Debtor has met its burden of establishing a  
 19 reasonable possibility of reorganizing within the time period permitted in a Subchapter V  
 20 proceeding. Thus, the court concludes that Section 362(d)(2) also does not apply at this time.

21 In short, the limited record before the court presents too many factual disputes to warrant  
 22 the relief requested by the moving party.

23 **IT IS THEREFORE ORDERED** that the Motion to Lift Stay to Complete Pre-Petition  
 24 Ordered Eviction brought by TCL II, LLC, Docket No. 18, be, and the same hereby is, **DENIED**  
 25 **WITHOUT PREJUDICE.**

26 Copies sent via CM/ECF ELECTRONIC FILING

27  
 28 Copies sent via BNC to:

1 BROTHERS PIZZA 5 LLC  
2 ATTN: OFFICER OR MANAGING AGENT  
3 3815 FAIRMEADE RD  
4 PASADENA, CA 91107

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