

UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF PUERTO RICO

In re: :
: :
GMD AIRLINE SERVICES, INC., : Case No. 95-02998 (GAC)
: :
Debtor : Chapter 11
: :
_____ :

DECISION AND ORDER

BACKGROUND

This case was filed as a voluntary petition under Chapter 11 on May 16, 1995. On July 17, 1996, the debtor filed a notice of assumption of executory contracts and non-residential real estate leases (Dkt. #23). This notice included non-residential real estate leases with the Puerto Rico Ports Authority ("Ports Authority"). The Ports Authority filed a reply and objection to the debtor's request for assumption (Dkt. #38). The debtor responded to this motion (Dkt. #46) and the Ports Authority responded to the debtor's response (Dkt. #51).

At a hearing held on March 26, 1996, the debtor filed an amended notice of assumption of executory contracts and non-residential real estate leases (Dkt. #61). The debtor indicates that the only two leases with the Ports Authority that the debtor wants to assume are Contracts No. AP-86-87-(4)-116 and AP-86-87-(4)-120. The Court granted the Ports Authority twenty days to respond to the amended notice. The Ports Authority filed a reply to the debtor's amended notice and a request for summary judgment

(Dkt. #69). The debtor filed an answer to the motion for summary judgment (Dkt. #97).

From the numerous pleadings and exhibits submitted by the parties, the Court concludes that the non-residential real estate leases between the debtor and the Ports Authority have expired. Thus, the debtor's request to assume the leases will be denied and the debtor will be ordered to vacate and surrender possession of the premises to the Ports Authority.

DISCUSSION

Subject to the court's approval, Section 365(a) of the Bankruptcy Code permits a trustee or debtor in possession to assume "any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). It is well settled law that a lease that has expired cannot be assumed in bankruptcy or revived. In re Boricua Motors Corp., 77 B.R. 358, 362 (Bankr. D.P.R. 1987) (*citing* Gloria Mfg. Corp. v. International Ladies Garment Workers' Union, 734 F.2d 1020 (4th Cir. 1984)); see also Moody v. Amoco Oil Co., 734 F.2d 1200 (7th Cir. 1984), *cert. denied* 469 U.S. 982 (1984).

In the present case, the debtor admits that the black letter language of the lease contracts indicates that they expired prepetition. (p.7 of debtor's amended notice of assumption, Dkt. #61). This should be the end of the analysis. The debtor argues, however, without legal support, that based on the Ports

Authority's standard operating procedure, the Court should estop the Ports Authority, based on equitable principles, from treating the leases as expired. The debtor indicates that the Ports Authority would execute lease agreements long after the lessee took possession of the premises and started operations and when the lease was about to expire. The leases would be retroactive. After the expiration, the Ports Authority would continue to bill the lessee and the invoices would include the phrase "enmienda en proceso" (amendment in process), which the debtor indicates referred to amendment of the lease agreement to extend the term. The Ports Authority has denied that this is the meaning. This factual disagreement is not material, because whatever the meaning of the term "enmienda en proceso", an amendment to extend the term of the leases was not executed between the parties.

The Bankruptcy Code does not create or enhance the property rights of a debtor. In re Gull Air, Inc., 890 F.2d 1255, 1261 (1st Cir. 1989) (citations omitted). Moreover, "[i]t is well established that equitable considerations do not play a part where a lease has been validly terminated. 'Courts will not revive a terminated lease simply because of the lease's importance to the reorganization efforts.'" In re Crabb, 48 B.R. 165, 168 (Bankr. D.Mass. 1985) (quoting In re Maxwell, 40 B.R. 231, 238 (N.D.Ill. 1984)). "The courts have been uniform in concluding that once a lease is terminated, other than by an *ipso*

facto forfeiture clause, it cannot be given new life and the court is certainly not in a position to rewrite the terms of a new lease." Matter of R. R. S., INC., 7 B.R. 870, 872 (Bankr. M.D.Fla. 1980) (citations omitted).

It is undisputed that the leases in this case have expired, thus they may not be revived by the Court. This Court may not rewrite the terms of a new agreement for the parties, nor extend the agreements for some unspecified duration irrespective of the importance of the leases to the debtor.

When a lease is made for a specified time, it expires on the day fixed without the necessity of any notice. Article 1455 of the Puerto Rico Civil Code; 31 L.P.R.A. § 4062. If the lessee continues occupying the premises and paying rent, there is an implied renewal. Article 1456 of the Puerto Rico Civil Code; 31 L.P.R.A. § 4063. The term of the renewed lease is determined by the frequency of the payment obligation under the expired lease agreements. Article 1471 of the Puerto Rico Civil Code; 31 L.P.R.A. 4092; Dalmau v. Hernández Saldaña, 103 P.R.R. 679, 681-82, 103 D.P.R. 487, 489-90 (1975). The term of the lease is monthly when the rent is payable monthly. 31 L.P.R.A. 4092. To terminate a month-to-month lease, the lessor must only signify nonacquiescence to continuation of the lease. Cesani Vargas v. Tribunal Superior, 92 P.R.R. 230, 234, 92 D.P.R. 239, 242 (1965).

In the present case, as the debtor's rent to the Ports

Authority was payable on a monthly basis, after the expiration of the written lease agreements, the debtor had a month-to-month tenancy. The Ports Authority was free to withdraw its consent to the debtors continued occupancy of the premises at any time. The Ports Authority has made it clear since August 28, 1995, when it filed its reply and objection to the debtor's request for assumption (Dkt. #38), that it was not consenting to an extension of the lease agreements and that it was demanding possession of the premises. Accordingly, if the leases continued in force after the expiration of their written terms, they continued as month-to-month tenancies, which have since expired by the Ports Authority's withdrawal of consent to the tenancy and the passage of time. Accordingly, the debtor will be ordered to vacate and surrender possession of the property to the Ports Authority.

Although the Ports Authority alleged a number of legal bases for its request for summary judgment, as the Court concludes that the leases have expired, the Court will not address the other arguments raised.

ORDER

WHEREFORE IT IS ORDERED that, as to the nonresidential real property leases between the debtor and the Puerto Rico Ports Authority, the debtor's amended notice of assumption of the lease agreements (Dkt. #61) shall be, and hereby is, DENIED.

IT IS FURTHER ORDERED that the debtor shall vacate and

surrender the premises to the Puerto Rico Ports Authority within
thirty (30) days.

Judgment shall enter accordingly.

SO ORDERED.

San Juan, Puerto Rico this ____ day of June, 1996.

Gerardo A. Carlo
U.S. Bankruptcy Judge