

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
TBR USA, INC.,) CASE NO. 06-60429 JPK
) Chapter 11
) Debtor.)

TBR USA, INC.,)
) Plaintiff,)
) v.) ADVERSARY NO. 06-6091
JOHN A. WORSTELL and THE)
WORSTELL BUSINESS TRUST,)
) Defendants.)

MEMORANDUM OF DECISION AND ORDER

This adversary proceeding was initiated by a complaint filed by the plaintiff TBR USA, Inc. (the debtor-in-possession in Chapter 11 case number 06-60429 in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division) on March 24, 2006. Also on March 24, 2006, TBR filed an Application for a Preliminary Injunction, which requested the Court's issuance of a preliminary injunction enjoining the defendants John A. Worstell ("Worstell") and The Worstell Business Trust ("Worstell Trust") from denying TBR access to its business premises at 360 South Campbell Street, Valparaiso, Indiana and access to a particular machine used by TBR in its business (the "Router") located at those premises. On March 27, 2006, TBR filed an amended complaint. Worstell and the Worstell Trust filed a Response in Opposition to Debtor's Motion for a Preliminary Injunction, and their answer to the amended complaint, on March 30, 2006.

The amended complaint is comprised of nine counts. By agreement of the parties, Counts I, II, VII and VIII were presented to the Court for trial on April 25, 2006, pursuant to the parties' Agreed Pre-Trial Order Regarding Trial of Counts I and II of TBR's Complaint filed on April 21, 2006. At the trial, the plaintiff TBR appeared by counsel Mark Werling and Carl Greci; TBR's president John Richard Negrey was also in attendance. The defendants Worstell and

Worstell Trust were represented by attorneys Gordon E. Gouveia and Catherine Molnar-Boncela; John Worstell was also in attendance.

As stated by paragraph 9 of the pre-trial order, the legal issues before the Court at the trial on April 25, 2006 were the following:

1. Whether a real estate lease entered into between TBR and the Worstell Trust was terminated prior to March 15, 2006 (the date of TBR's filing of its Chapter 11 case); and
2. Whether the equipment lease for the Router entered into between TBR and John Worstell was terminated prior to March 15, 2006.

These issues have significance in TBR's bankruptcy case in relation to whether or not its interests in its business premises and in the Router survived purported lease terminations by the respective lessors, so that those property interests became property of TBR's bankruptcy estate. Count I of the complaint seeks a declaratory judgment against the Worstell Trust to determine that the lease between that entity and TBR was not terminated prior to the debtor's filing of its bankruptcy case; Count VII of the complaint seeks a preliminary injunction against the Worstell Trust with respect to the debtor's access to its business premises on the assertion that the lease was not terminated prior to TBR's bankruptcy filing, and thus that the automatic stay of 11 U.S.C. § 362(a) precludes the Worstell Trust's exercise of control over the business premises. Count II of the complaint seeks a declaratory judgment against Worstell to the effect that the Router lease was not terminated prior to TBR's bankruptcy filing. Count VIII seeks a preliminary injunction against Worstell with respect to his exercise of control over the Router, again on the contention that the Router lease was not terminated prior to the bankruptcy filing, and that therefore 11 U.S.C. § 362(a) precludes Worstell's exercise of control over that machine.

The Court has jurisdiction over this adversary proceeding, including the issues addressed at the April 25, 2006 trial, pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. § 157(a) and

N.D.Ind.L.R. 200.1. This adversary proceeding is a "core proceeding" as defined by 28 U.S.C. § 157(b)(2)(A), (E), and (K); matters relating specifically to the issues before the Court on April 25, 2006 also constitute "core proceedings" under 28 U.S.C. § 157(b)(2)(M)¹ and (O).

I. CONTENTIONS OF THE PARTIES

TBR contends that the Worstell Trust and Worstell failed to take procedural actions necessary under the terms of the real property lease and of the Router lease, respectively, to effect termination of those leases prior to the filing of TBR's bankruptcy case. As one might surmise, both the Worstell Trust and Worstell contend that the leases were effectively terminated prior to the initiation of the debtor's Chapter 11 case. The specific contentions of the parties will be addressed in more detail in the Decision section of this Memorandum.

II. FINDINGS OF FACT

Most of the basic facts necessary for the Court's determination of the issues presented are not in dispute, and are provided by the Joint Stipulations of Fact stated in paragraph 6 of the pre-trial order, and the List of Stipulated Exhibits to be Offered, stated in paragraph 10 of that document. As pertinent to the issues, those facts are the following:

1. TBR USA, Inc. ("Debtor" or "TBR"), is a Delaware Corporation with its principal place of business located at 360 Campbell Street, Valparaiso, Indiana. [Stipulation, ¶ A]
2. On March 15, 2006, TBR filed a petition for relief under Chapter 11 of the United States Code and the Debtor has qualified to act as a "debtor in possession" pursuant to 11 U.S.C. §§ 1101 and 1108. [Stipulation, ¶ 1]
3. Worstell is the owner of a Maka CNC router machine ("Router") that he leased to the Debtor. [Stipulation, ¶ 3]

¹ If the leases were not terminated, they presumably will be the subject of a motion pursuant to 11 U.S.C. § 365 for their assumption or proceedings by the lessors in relation to compelled rejection of those leases, and the issues addressed at the trial serve as a foundation for those actions.

4. The Worstell Business Trust is a business trust organized under the Indiana Code and fee simple owner of certain real estate located at 360 Campbell Street, Valparaiso, Indiana ("Real Estate"). [Stipulation, ¶ 4]

5. John and Diane Worstell are the Trustees of the Trust. [Stipulation, ¶ 5]

6. The Debtor leased the Real Estate from the Trust pursuant to a lease dated September 17, 2001 and executed by the Debtor and the Trust ("Real Estate Lease"). [Stipulation, ¶ 6]

7. On November 1, 2004, the Debtor leased a certain Maka CNC router machine ("Router") from Worstell pursuant to an Equipment Lease ("Router Lease"). [Stipulation, ¶ 7]

8. The Router Lease commenced November 1, 2004 and terminated December 31, 2004. The Lease Term of the Router Lease provided for the renewal of the Router Lease on a month-to-month basis, unless terminated by either party, unless there was a default in the payment of any monetary obligation, in which case the Lessor had the right to terminate the Lease upon 10 days notice to Lessee. [Stipulation, ¶ 8]

9. The Debtor's Board of Directors met in Las Vegas, Nevada on November 2, 2005 ("Meeting"). At the Meeting, Worstell provided a written statement of amounts owed by the Debtor to the Trust relative to the Real Estate and Router Leases. On or about December 23, 2005, the Trust delivered another ledger to TBR, a copy of which is attached hereto as Exhibit "C-2" and incorporated herein by reference. [Stipulation, ¶ 9]

10. On December 23, 2005, the Defendants filed an action in the Porter County Superior Court, Cause No. 64D05-0512-PL-10992 ("State Court Complaint") against the Debtor seeking a judgment for rent owed for the Real Estate, Router Lease, Promissory Note and the termination of the Real Estate Lease and the Router Lease. [Stipulation, ¶ 10]

11. On January 20, 2006, Steve Handlon, Defendant's Attorney in the State Court Complaint, sent a letter to Mr. Carl S. Greci, Esq., attorney for the Debtor in the State Court

Litigation. [Stipulation, ¶ 11]

12. On December 23, 2005, the Defendants obtained a prejudgment attachment ("December 23, 2005 Order") by, among other things, filing their Complaint for Judgment, posting a bond, supplying an affidavit. [Stipulation, ¶ 12]

13. The Debtor challenged the December 23, 2005 Order in the Porter County Superior Court by filing an Emergency Motion to Vacate the Defendants' Pre-Judgment Order of Attachment. [Stipulation, ¶ 13]

14. On February 1, 2006, after a hearing on the merits in which evidence was presented by both parties, the Porter Superior Court in the State Court Litigation entered an Order Denying TBR USA Inc.'s Motion to Vacate Pre-Judgment Order of Attachment ("February 1, 2006 Order"). [Stipulation, ¶ 14]

15. TBR owed sums to the Defendants under the Router Lease and the Premises Lease as of December 23, 2005. The Defendants claim the amounts were \$564,454.28 on the Premises Lease and \$192,100.00 on the Router Lease. These amounts are consistent with the Defendants' contemporaneous payment ledgers. TBR has not objected to the Defendants' claims filed herein. [Stipulation, ¶ 16]

The Commercial Lease entered into between the Worstell Trust and TBR – stipulated into evidence at the trial – describes the leased premises as 360 Campbell Street, in Center township, Porter County, Valparaiso, State of Indiana. This location constitutes the business premises of TBR. The lease describes certain areas within that property subject to the leasehold. The lease was entered into on September 17, 2001, and the parties agree that it continued in effect continuously thereafter, subject to their respective contentions as to its termination. The specific provisions of the lease pertinent to the issues before the Court are paragraphs 21 and 23, each of which respectively states the following:

21. Acts of Default by Lessee: The occurrence of any one of

the following shall constitute a default by Lessee under this Lease:

- a) Lessee fails to pay any installment of monthly base rental or any other monetary obligation hereunder within ten (10) days after receipt of written notice that such payment is due.
- b) Lessee fails to comply with any other term, provision, condition or covenant of this Lease and such failure continues for a period of thirty (30) days after written notice from the Lessor.
- c) Lessee hinders or prevents occupants from entering the Premises and/or carrying out their lawful business and fails to cease same within thirty (30) days after written notice from Lessor.

Remedies: Upon the occurrence of a default under this Lease, Lessor shall have the option, upon thirty (30) days notice, and in addition to an not in limitation of any other remedies permitted by law, equity, or this Lease, to terminate this Lease, or without terminating the Lease or Lessee's obligations hereunder, to terminate the Lessee's rights to possession, In the event, Lessor may deny the use of the Premises to Lessee.

Any payment not received in a timely fashion (as laid out in this contract) shall bear a late charge, equal to five-percent (5%) of such payment.

23. Notices. Any notice which either party may, or is required to give, shall be given by mailing the same, postage prepaid, to Lessee at the Premises, or Lessor at the address shown below, or at such other places as may be designed by the parties from time to time.

Lessors Address for Notice: 310 E. Lincolnway,
Valparaiso, IN 46383

The Equipment Lease between Worstell and TBR was entered into on November 1, 2004, and has been stipulated into evidence by the parties. The pertinent provisions of that lease are the following:

LEASE TERM. The term of this Lease shall commence effective November 1, 2004, and terminate December 31, 2004. In the event Lessee continues to be in possession of the Equipment

after December 31, 2004, this Lease shall renew itself on a month-to-month basis, unless terminated by either party in writing upon thirty (30) days written notice to the other party, unless there is a default in the payment of any monetary obligations herein set out, in which case Lessor shall have the right to terminate this Lease upon ten (10) days notice to Lessee.

...
RENEWAL TERM. Any renewal term shall be for thirty (30) calendar days and subject to the termination provisions set out in PAYMENT TERMS.

...
DEFAULT. The occurrence of any of the following shall constitute a default under this Lease:

- A. The failure to make a required payment under this Lease when due.
- B. The violation of any other provision or requirement that is not corrected within five (5) days after written notice of the violation is given.
- C. The insolvency or bankruptcy of the Lessee.
- D. The subjecting of any of Lessee's property to any levy, seizure, assignment, application or sale for or by any creditor or government agency.

RIGHTS ON DEFAULT. In addition to any other rights afforded the Lessor by law, if the Lessee is in default under this Lease, without notice to or demand on the Lessee, the Lessor may take possession of the Equipment as provided by law, deduct the costs of recovery (including attorney fees and legal costs), repair, and related costs, and hold the Lessee responsible for any deficiency. The rights and remedies of the Lessor provided by law and this Agreement shall be cumulative in nature. The Lessor shall be obligated to re-lease the Equipment, or otherwise mitigate the damages from the default, only as required by law.

Certain additional facts were provided by testimony at the trial.

First, although the Court does not deem either of the leases to be ambiguous with respect to the issues presented, the evidence failed to establish the party by whom the documents were drafted. On direct examination, John Richard Negrey stated that both

documents were drafted by the respective Lessors. However, on cross-examination, Mr. Negrey testified that he didn't know whether information in the leases was drafted by an attorney in Texas who represented TBR. John Worstell testified that he thought the drafting of the real estate lease was a collaboration between TBR's Texas attorney and Mr. Worstell's attorney, and that his attorney drafted the Router lease "and probably some changes in that, too". There is thus no clear evidence as to the party by whom each of the leases was drafted.

Exhibit C-1, stipulated into evidence, is a document entitled "Statement". This document states the calculations of Worstell and the Worstell Trust as to amounts owed by TBR under the Router lease and under the real estate lease. The first sentence on this document states: "\$ due from TBR USA as of: 11/2/2005". On the first page of the document is the designation "Rent due (see attached) 546,845.22", and attached to the document is a running compilation of the amount of the rental accruing on the lease, and credits for payments made by TBR. The Statement also contains a designation "Total due on Router", followed by the figure "189,650.00". At the end of the second column on the first page of Exhibit C-1, the following is stated:

Creditors of corporations, ie banks, may go after any one guarantor on a note for the total amount due. Since John Worstell has signed for these funds he will be the first they will go to for funds, then John will have to collect from the other guarantors. However, what needs to be paid immediately is the Router, Line of Credit and then the Rent as noted in this statement.

Exhibit C-2 – stipulated by the parties to have been delivered to TBR on or about December 2, 2005 – is a one-page document designating "\$ due from TBR USA as of: 12/23/2005". The "Rent due (see attached)" designation is followed by the number 564,654.28, and the entry "Total due on Router" is followed by the number 192,100.00.

Mr. Negrey testified that Exhibit C-1 "represents the lease payments due for the Router and the building and the note – personal note from John Worstell". As noted above, paragraph

9 of the parties' stipulation states that a copy of this document was provided by John Worstell to representatives of TBR at a meeting held in Las Vega, Nevada on November 2, 2005. While Mr. Negrey testified that he received Exhibit C-1 for the first time in December of 2005, that testimony will not be allowed to overturn the stipulations of fact by the parties. Mr. Negrey testified that Mr. Worstell had been delivering statements of the nature of Exhibits C-1 and C-2 to TBR for a period of two to three years, and that these statements were usually delivered to TBR's business premises at 360 South Campbell Street, Valparaiso, Indiana. John Worstell testified that copies of statements were provided in writing to TBR at every board meeting, that monthly statements were mailed by his secretary to the premises at 360 South Campbell, and that if they were not so mailed, he would deliver them personally when he visited the business premises. Mr. Worstell testified that he considered the statements to be demands for payment of past due rent, and not merely recitations of accruing delinquent amounts. Based on the foregoing, the Court finds that Statements of the nature of Exhibits C-1 and C-2 were regularly provided by Worstell to TBR; that some of those statements were mailed to TBR at its business address at 360 South Campbell Street, Valparaiso, Indiana; and that others were personally delivered by Worstell to TBR at that location. Exhibit C-1 was personally delivered by Worstell to TBR at a meeting in Las Vegas, Nevada on November 2, 2005; however, that Statement was neither mailed nor delivered to TBR at its business address. Exhibit C-2 was delivered to TBR on or about December 23, 2005. TBR never received a document designated as "Notice of Default" or "Notice of Termination". Mr. Negrey testified that prior to December 23, 2005, John Worstell never made a demand for payment under either the premises lease or the Router lease, and never told TBR that he was going to take steps to collect on delinquent amounts owed under the leases.

On December 23, 2005, John A. Worstell and the Worstell Business Trust, as plaintiffs, filed a complaint in the Porter County, Indiana Superior Court under cause number 64D05-

0512-PL-10992, designating TBR USA, Inc. as the principal defendant. Paragraph 10 of the complaint states: "The Trust has elected to terminate the Commercial Lease and to collect the sums owed thereunder by TBR". Paragraph 14 of the complaint states: "Worstell has elected to terminate the Equipment Lease and to collect the sums owed thereunder by TBR". Count I of the complaint requested a judgment for delinquent rent under the premises lease; Count II requested a judgment for delinquent rent under the Router lease.

TBR did not receive a copy of the complaint in mail sent to its business premises. However, a copy of the complaint was personally delivered by Mr. Worstell to TBR at its business premises; the Court finds, based upon the testimony of John Negrey, that a copy of the complaint was delivered by John Worstell to Mr. Negrey shortly after Christmas of 2005.

No document or other notice of termination of either of the leases was ever provided by either Worstell or the Worstell Trust to TBR.²

John Worstell testified that in his view the premises lease terminated when the Porter County Superior Court entered its Order of Attachment on December 23, 2005, or that the lease terminated "when we sent an attachment order notice to them that the lease was terminated". Thus, based upon Mr. Worstell's testimony, the Court finds that the Worstell Trust deemed the attachment order to constitute termination of the lease.³

By letter dated January 20, 2006, addressed to Carl A. Greci as attorney for TBR USA, Inc., Attorney Steven W. Handlon, as attorney for the Worstell Business Trust, stated the following:

RE: *John A. Worstell and the Worstell Business Trust v. TBR*

² Worstell and the Worstell Trust contend that the complaint filed on December 23, 2005 constituted notice of termination to TBR with respect to both leases.

³ The defendants contend in their legal argument that the delivery of a copy of the complaint on December 23, 2005 to TBR constituted sufficient notice of termination under both leases.

USA, Inc., et al.
Cause No. 64D05-0512-PL-10992
Our File No. 003488-001

Dear Mr. Greci:

The pleadings filed in this case by Defendant TBR USA, Inc. allege that the Worstell Business Trust was required to, and did not, give a notice of default to TBR under the Lease. The Worstell Business Trust disagrees with this interpretation of the parties' Lease and the law. To avoid unnecessary technical disputes, and nevertheless maintaining that no notice is required to be given under these circumstances, the Worstell Business Trust hereby serves notice on TBR that TBR has defaulted in the payment of rent for the premises located at 360 South Campbell Street, Valparaiso, Indiana, by failing to pay rent owed through December, 2005, resulting in a cumulative arrearage in excess of \$564,000, including late charges assessed according to the Lease.

The Order of Attachment entered by the Porter Superior Court on December 23, 2005, included the following provision:

IT IS THEREFORE ORDERED that all of the tangible and intangible property of Defendant TBR USA, INC., a foreign corporation, described in Exhibit "D" appended hereto and incorporated herein by reference shall, upon delivery of the Plaintiff's undertaking to the Clerk, be attached, and that Defendant TBR USA, INC. shall have no right to possession or use of any of the property attached until further order of court; and the Clerk of this Court is directed to sign this Order of Attachment where provided below, in compliance with Ind.Code § 34-25-2-6.

III. LEGAL DISCUSSION

Because of the differences in the provisions of the Commercial Lease (with respect to the real estate) and the Equipment Lease (with respect to the Router), issues regarding whether or not TBR's interests in the property subject to those respective leases were terminated prior to the filing of its bankruptcy case will be dealt with separately.

A. Commercial Lease

TBR contends primarily that the provisions of the lease require a two-step notice process in order to terminate the lease: first, 10 days written notice of default under paragraph

21(a), and then a second thirty-day notice of termination under the "Remedies" section of paragraph 21 of the lease. TBR contends that these steps were not followed, and that therefore the interests of TBR in the leasehold were not effectively terminated prior to its bankruptcy filing.

The Worstell Trust contends first that the provision in paragraph 21 of the lease which provides for 30 days' notice of termination is "in addition to an (sic) not in limitation of any other remedies permitted by law", and that termination of the lease without advance notice was effective pursuant to I.C. 32-31-1-8, which states:

Sec. 8. Notice is not required to terminate a lease in the following situations:

- (1) The landlord agrees to rent the premises to the tenant for a specified period of time.
- (2) The time for the determination of the tenancy is specified in the contract.
- (3) A tenant at will commits waste.
- (4) The tenant is a tenant at sufferance.
- (5) The express terms of the contract require the tenant to pay the rent in advance, and the tenant refuses or neglects to pay the rent in advance.
- (6) The landlord-tenant relationship does not exist.

Alternatively, the Worstell Trust argues that either the filing of the Porter County Superior Court complaint, which included the above-recited paragraph 10 therein – or the delivery of the complaint to TBR – constituted the required notice of termination under the lease.

The Court first notes that it does not find the provisions of the lease to be ambiguous. Thus, there is no need to determine whether or not one party essentially drafted the instrument in order to invoke the principle that an ambiguous document will be construed strictly against its drafter; *see, Fresh Cut, Inc. v. Fazli, Ind.*, 650 N.E.2d 1126, 1132 (1995).⁴

The principal rule of construction of contracts, including leases, is that the Court must

⁴ It is unquestioned that Indiana law applies to the substantive legal issues in this case.

give effect to the intent of the parties as expressed in the document as a whole. This principle was nicely stated in *Walb Construction Co. v. Chipman*, Ind., 175 N.E. 132, 134-135 (1931):

The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties, as expressed in the language used, and to give effect to that intention, if it can be done consistently with legal principles. *Durland v. Pitcairn* (1875) 51 Ind. 426; *Beard v. Lofton* (1885) 102 Ind. 408, 2 N. E. 129; *Warrum et al. v. White, Adm'r, et al.* (1909) 171 Ind. 574, 86 N. E. 959. In construing a contract, the whole contract should be taken into consideration, and each part construed, in the light of its relation with the whole context of the agreement. 6 R. C. 837, 838.

No part of a contract will be treated as redundant or as surplusage if a meaning reasonable and consistent with other parts of the contract can be given it. *Heywood v. Heywood*, 42 Me. 229, 66 Am. Dec. 277; *German Fire Insurance Co. v. Roost*, 55 Ohio St. 581, 45 N. E. 1097, 36 L. R. A. 236, 60 Am. St. Rep. 711; *Blanding v. Corporation of Columbia*, 10 Rich Eq. (S. C.) 573, 73 Am. Dec. 102.

To the foregoing principles must be added the concept that existing statutes and substantive law in existence at the time of the entry into a contract do not become part of that contract if the parties express a clear intention to the contrary. As stated in *Phrommer, et al. v. Albers*, Ind.App., 21 N.E.2d 72, 74 (1939):

The law is well stated in 12 American Jurisprudence 769, § 240, as follows: "It is commonly said that the existing statutes and the settled law of the land at the time a contract is made become a part of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention. This rule is elaborated to the effect that the laws which exist at the time and place of making a contract and at the place where it is to be performed, affecting its validity, construction, discharge, and enforcement, enter into, and form a part of, it as if they were expressly referred to or incorporated in its terms." (emphasis supplied)

See also, *Ethyl Corporation v. Forcum-Lannon Associates, Inc.*, Ind.App. 433 N.E.2d 1214, 1220 (1982); *Miller v. Geels*, Ind.App. 643 N.E.2d 922, 928 (1994); *Essex Group, Inc. v. Nill*, Ind.App. 594 N.E.2d 503, 508 (1992).

The Worstell Business Trust essentially contends that I.C. 32-31-1-8 was incorporated

into the parties' lease, and that as a result no notice to terminate was required because the contract provided for payment of rent in advance and the tenant (TBR) neglected to pay the rent in advance. However, the parties clearly and expressly provided for a 30-day notice of termination which, under the principles of construction stated above, substituted that expressly stated procedure for the procedure provided by the statute. Moreover, the provision of paragraph 21 of the lease which provided the lessor with the option, "upon thirty (30) days notice . . . to terminate this Lease" is a procedural provision, not impaired by the language in the sentence in which it appears by the phrase "and in addition to an (sic) not in limitation of any other remedies" (emphasis supplied). This latter provision refers to a remedy, apart from termination, which the lessor at its option may elect. I.C. 32-31-1-8 is not a statute which provides a "remedy" of termination, but rather is a statute which specifies the procedure to be employed to terminate a lease – when that remedy is otherwise available – when the lease is silent as to an alternative procedural mechanism to be used to provide notice of termination. Thus, a notice of 30 days prior to termination of the lease was required by the lease before termination could be declared. The fact that the notice must have been in writing is more than amply provided for by paragraph 23 of the lease, which provides that notices "shall be given by mailing the same": obviously, it is impossible to mail or otherwise deliver an oral notice. The parties were free to contract for a specific notice provision more stringent than that provided by I.C. 32-31-1-8, and in this case they did; *See, Kimmel v. Cockrell*, Ind.App., 317 N.E.2d 449, 450-451 (1974); *Edward Rose of Indiana v. Fountain*, 431 N.E.2d 543, 546 (fn 5) (1982).

The issue now becomes whether or not the procedures required by the lease were followed by the Worstell Trust in such a manner that TBR's interests under the lease were terminated prior to its bankruptcy filing.

The lease clearly provides that an "occurrence of a default under this Lease" must precede the giving of the 30 days' notice of termination. It is clear under the lease that the

"occurrence of default" is defined in paragraph 21 under the three sub-categories of "Acts of Default by Lessee". The critical provision states:

The occurrence of any one of the following shall constitute a default by Lessee under the Lease:

- a) Lessee fails to pay any installment of monthly base rental or any other monetary obligation hereunder within ten (10) days after receipt of written notice that such payment is due. (emphasis supplied)

TBR contends that this provision requires a formal "notice of default" in order to trigger an "occurrence" of default. However, that is not what this lease requires. The "occurrence/act" of default is the lessee's failure to pay a monetary obligation under the lease within ten days after receipt of a written notice that the payment is in fact due – not a notice of demand for payment, or a formal declaration of default under the lease. The Statements provided by John Worstell on behalf of the Worstell Trust to TBR, including Exhibit C-1, clearly constituted notices that payments under the lease were due, and in fact past due. There was therefore an "act of default" as defined by the lease.⁵ The Court thus determines that an "Act of Default"/ "Occurrence of a default under this Lease" occurred well in advance of the filing of the complaint in the Porter Superior Court on December 23, 2005.

The issue now crystalizes into the nature of the notice of termination given by the Worstell Trust to TBR. If the provision of a copy of the complaint to TBR constituted the 30-day notice of termination required by the lease, TBR's interests in the leased premises, and under the lease, terminated prior to its bankruptcy filing. If that act did not constitute sufficient notice

⁵ The evidence is unquestioned that Exhibit C-1 was not technically provided to TBR in the manner designated in paragraph 23 of the lease. However, it would be a foolish Court indeed which determines that personal delivery of a notice to the president of a corporation is not sufficient notice under a document which provides for mailing of notice – with the uncertainties that the United States Postal Service mailing process entails. Moreover, the evidence is uncontroverted that prior documents of the nature of Exhibit C-1 were routinely provided by John Worstell to TBR, and that some of those Statements were in fact mailed to TBR's business premises.

of termination, TBR retained its interests in the premises and in the lease when it filed its bankruptcy case.

Simply put, the issue is whether the filing and/or delivery of a complaint can constitute notice under a default or termination provision in a contract.

Paragraph 10 of the complaint states: "The Trust has elected to terminate the Commercial Lease and to collect the sums owed thereunder by TBR". The Court determines that this statement in the complaint is a sufficient declaration/notice of termination under the "Remedies" provisions of paragraph 21 of the lease. However, the Court determines that the filing of a complaint does not constitute notice required by a contract as a condition precedent to the pursuit of a remedy through litigation.

The Court has searched in vain for a definitive decision by an Indiana court on the issue of whether the filing of a complaint can constitute the giving of notice required by a contract. At first blush, the case of *Gigax v. Boone Village Limited Partnership*, Ind.App., 656 N.E.2d 854 (1995) may appear to be relevant to this issue, particularly with respect to the statement that "[i]n the present case, Boone Village terminated the lease when it gave notice of its intent to do so in the complaint filed on May 27, 1993"; 656 N.E.2d 854, 858. However, the factual circumstances of the case disclose that the document in question had no contractual provision relating in any manner to notice of termination. Properly understood, *Gigax* is the determination by the Indiana Court of Appeals that a landlord who files a complaint premised upon termination of a lease cannot thereafter proceed to litigate the case as if it had not terminated the lease, and thereby seek to recover damages through the end of the lease term, as opposed to capping damages as of the date of termination. Far more instructive is the hoary pronouncement of the Supreme Court of Indiana in *Mather v. Scoles*, 35 Ind. 1 (1870), in a case in which the issue was whether a suit could be initiated to enforce an agreement to convey real estate prior to a pre-litigation demand for a conveyance having been made on the

defendant. The Court stated:

In the last named case the court say, in speaking of the necessity for a demand in such a case, "It is best calculated to secure the specific execution of contracts, and to prevent a multiplicity of law suits. Besides, it may be often a convenience to the purchaser, for a variety of reasons, not to receive the title as soon as he is entitled to it; and he may therefore prefer its continuance for some time in the vendor. If he can obtain the title to which he has a right, whenever he may choose to demand it, he ought not to complain. There is, indeed, respectable authority for the opinion that it would have been better had the law required a demand previously to a suit, even in case where money only has been contracted for. The law, it is true, as to that has long been settled to be otherwise. But the fact that its policy has been thus questioned, when money alone is to be paid, is a strong ground to show that the rule dispensing with any demand upon the obligor for performance, before a suit against him for non-performance, should not be applied but with great caution to any other contracts than those for the payment of money. We are now well satisfied that it should not be extended to covenants like the one under consideration, for the conveyance of land. An eminent English writer upon this subject says: 'A vendor cannot bring an action for the purchase-money without having executed the conveyance or offered to do so, unless the purchaser has discharged him from so doing. And, on the other hand, a purchaser cannot maintain an action for a breach of contract without having tendered a conveyance' (for execution) 'and the purchase-money.' Sugden on Vend., pp. 162 and 163. We are not now called upon for an opinion as to whether the purchaser should pursue the English practice by not only demanding the conveyance, but also by tendering it for execution. It is sufficient, for the present purpose, to say that this suit could not be maintained, unless previously to its commencement the deed had been demanded."

The law referred to in the above citation concerning a lawsuit for payment of money without a prior demand refers to actions which solely seek a monetary judgment in a circumstance in which the governing document does not itself have a notice provision. Apart from this circumstance, the foregoing illustrates the sense of the Indiana Supreme Court that a notice or demand concerning performance or default prior to the filing of a lawsuit is required in other circumstances, even when there is no contracted provision for such notice or demand. Not entirely on point, but of some applicability, is the case of *Prudential Insurance Company of*

America v. Myers, Ind.App., 44 N.E. 55 (1896), in which the Court held that a contract provision which stated that no lawsuit relating to the plaintiff's employment could be maintained until ten days had expired after service upon the president of the company of the plaintiff's claim – meant what it said, and that the failure of the plaintiff to prove the required notice precluded his maintaining the lawsuit. Although not as expressly stated as the contract provision in *Myers*, the paragraph 23 termination notice requirement is in the Court's view tantamount to the parties' agreement that notice of termination is exclusive of the filing of a lawsuit which declares that termination has occurred.

Without citing them, the overwhelming authority of cases in other jurisdictions is that the filing of a complaint, or the initiation of a lawsuit, does not satisfy a contractual provision requiring the provision of notice of default or termination. There are sound policy reasons for this principle, including the mundane fact that if the defendant cures within the required period following the filing of the lawsuit, all of the time invested in the lawsuit – including that of the courts – has been wasted. Courts enforce parties' matured rights – they do not provide a mechanism for parties to notify adverse parties of a default which can be cured upon the provision of notice prior to the initiation of litigation. As stated in *Shadeland Hills Development Company v. Westel Indianapolis Company*, 2002 WL 31431571 (S.D.Ind. 2002):

Shadeland Hills argues that it provided Cellular One with all the information necessary for it to meet its property tax obligations independently, and that the Lease contains no requirement that Shadeland Hills present Cellular One with a tax bill-as it did in 1997-before triggering Cellular One's duty to pay. (Pl.'s Cross-Mot. Summ. J. at 12.) This may be true, but disregards the express provision in the Lease calling for written notice of default and thirty days opportunity to cure. Plaintiff concedes it has not provided notice of default outside of this litigation.

That difficulty leads Shadeland Hills to propose its novel "lawsuit" theory of notice: Shadeland Hills notified Cellular One of its delinquency in the payment of taxes by filing the complaint in this case alleging the same. And despite knowledge of the complaint, Cellular One has still not remedied the situation. FN5 See *Id.* The

notion that a notice-of-default clause in a contract may be satisfied by a lawsuit subverts the entire purpose of these clauses of avoiding unnecessary litigation; nor has opportunity to cure been given where notice of default and the lawsuit arrive in one fell swoop. Moreover, the idea is contrary to an analogous line of Indiana cases holding that where notice and an opportunity to remedy defects in sold goods form part of a warranty agreement, they operate as conditions precedent to instituting suit. See *Aamco Transmission v. Air Sys., Inc.*, 459 N.E.2d 1215, 1217 (Ind.Ct.App.1984) (collecting cases). Because Shadeland Hills failed to give Cellular One proper written notice as to its default in tax payments, as well as a chance to cure, there has been no actionable breach of the Lease provision relating to this obligation.

The Court agrees with the reasoning of the United States District Court for the Southern District of Indiana. Under Indiana law, the filing of a complaint cannot constitute a notice of default or termination required by the terms of a lease.

The January 20, 2006 letter from Attorney Steven Handlon to Attorney Carl Greci is of no moment. It is obvious that this correspondence sought to meet the argument that notice of default was required under the terms of the lease as a precondition to termination, a requirement of the lease which the Court has determined was met by the Worstell Trust prior to its filing of the Porter County Superior Court lawsuit. Moreover, there is nothing in the letter which declares a notice of termination. Finally, an after-the-fact attempt to correct deficiencies in notice which should have preceded the filing of a lawsuit has no efficacy.

Based upon the foregoing, the Court determines that the Commercial Lease between the Worstell Trust and TBR was not effectively terminated prior to TBR's filing of its bankruptcy case, and that TBR's interests in the leasehold under the terms of that lease constituted property of its bankruptcy estate. As a result, TBR's request for a preliminary injunction enjoining the Worstell Trust from interfering with its possession of the subject real estate must be granted. The granting of this remedy is nothing more than an assertion that the automatic stay of 11 U.S.C. § 362(a) is in place and effective with respect to those premises.

B. Equipment Lease

The determination of issues relating to the Equipment Lease does not follow the same course as that with respect to the Commercial Lease. It is notable to the Court that the parties have focused most of their arguments on issues relating to the Commercial Lease and have somewhat short-shrifted issues relating to the Equipment Lease.

It is without question that the Equipment Lease does not provide a two-tiered notice procedure which requires any form of notice of default in order for a default to have taken place. As stated in the "DEFAULT" provision, the simple occurrence of the failure to make a required payment when due constitutes a default under the lease. The evidence is conclusive that TBR failed to make a number of payments under the Equipment Lease when those payments were due and thus was in default under the terms of that agreement.

The critical concept with respect to the Equipment Lease is whether or not that lease remained in effect under the circumstances of this case.

In the "RIGHTS ON DEFAULT" provision, the parties agreed that if TBR was in default under the lease, Worstell could take possession of the Router without any notice or demand on the lessee. Worstell chose the mechanism of a pre-judgment attachment (preliminary replevin) to take possession, which was effected by an order entered in the Porter Superior Court on December 23, 2005. There is nothing in the lease which precludes Worstell's taking of possession of the Router in this manner, without any advance notice to TBR.

The "RENEWAL TERM" provision of the lease provides that a "renewal term shall be for thirty (30) calendar days and subject to the termination provision set out in PAYMENT TERMS". Interestingly, there is no termination provision set out in the "PAYMENT TERMS" section; rather, the termination provision is stated in the "LEASE TERM" section. The Court does not deem this inconsistency to be material. The term of the lease is clearly defined by the "LEASE TERM" section. The lease is essentially a month-to-month arrangement, which renews itself for

another month automatically if the lessee continues in possession of the Router, unless either party terminates the lease upon thirty day's written notice to the other. Under the express terms of the lease, TBR's continuing in possession of the Router is critical to the automatic monthly renewal of the lease. The "RIGHTS ON DEFAULT" provision provides that if TBR is in default under the lease (which it unquestionably was), Worstell may take possession of the Router as provided by law, without notice to or demand on TBR. This is precisely what Worstell did by obtaining the Order of Attachment entered by the Porter Superior Court on December 23, 2005. As noted in the Findings of Fact, the Porter Superior Court specifically stated in its decree that "Defendant TBR USA, INC. shall have no right to possession or use of any the property attached until further order of court". The property subject to this provision, as identified in Exhibit D attached to the order, included the Router and the Router lease, as designated in paragraph 1 of that document. Therefore, as a result of actions totally in accordance with the provisions of the Equipment Lease, Worstell divested TBR of possession of the Router as of December 23, 2005. Because the renewal of the Equipment Lease depended upon TBR's continuation in possession of the Router at the expiration of the then-present monthly lease term, the lease expired by its own terms on December 31, 2005. The 30-day notice of termination provision was simply not in play under the circumstances.

Because the Equipment Lease expired by its own terms as of December 31, 2005, TBR had no property interest in either the lease or the Router on the date that it filed its bankruptcy petition.

Based upon the foregoing, the Court finds that neither the Equipment Lease nor the Router subject to that lease constituted property of TBR's bankruptcy estate. TBR's request for a preliminary injunction essentially enforcing 11 U.S.C. § 362(a) with respect to the lease and the Router must therefore be denied.

The results determined by the Court lead to a somewhat anomalous situation. Nothing

has been actively brought before the Court with respect to other counts of the complaint in this adversary proceeding, apart from those which deal specifically with the business premises and the Router. The Court's determination means that TBR is entitled to possession of its business premises, and that any further act by the Worstell Trust to preclude TBR's access to those premises will constitute a violation of 11 U.S.C. § 362(a). However, John Worstell is entitled to possession of the Router, a huge machine located inside the business premises, to the preclusion of TBR's use of that machine in its business. Additionally, it is the Court's understanding that all of the other equipment in the business premises remains subject to the attachment imposed by the Sheriff of Porter County, commensurate with an order of the Porter County Superior Court. It appears that apart from the Router, all of the other debtor's equipment and its bank account – to the extent any funds remain in it – are possibly subject to 11 U.S.C. § 543; however, any request for remedies under that section have not been immediately place before the Court.

IV. DETERMINATION

IT IS ORDERED, ADJUDGED AND DECREED that the Commercial Lease between The Worstell Business Trust and TBR USA, Inc. was not terminated prior to the filing of the Chapter 11 bankruptcy petition by TBR USA, Inc. on March 15, 2006, and that the interests of TBR USA, Inc. under the lease, including its interest in real property located at 360 South Campbell Street, Valparaiso, Indiana, constitute property of the bankruptcy estate of TBR USA, Inc.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that TBR USA, Inc.'s request for a preliminary injunction with respect to the property subject to the Commercial Lease is granted, and that The Worstell Business Trust shall immediately turn over possession of the property at 360 South Campbell Street, Valparaiso, Indiana subject to the Commercial Lease to TBR USA, Inc. and shall immediately cease any actions to exercise control or possession with

respect to said property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the interests of TBR USA, Inc. in the Equipment Lease entered into between it and John A. Worstell were terminated prior to the filing of the Chapter 11 case of TBR USA, Inc. on March 15, 2006, and that neither that lease nor the Router subject to that lease constitute property of the debtor's bankruptcy estate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that TBR USA, Inc.'s request for a preliminary injunction with respect to the Equipment Lease and the Router subject to that lease, is denied.

The determination made by this Memorandum and Decision determines fewer than all of the claims in this adversary proceeding, and thus does not constitute a final judgment under the provisions of Fed.R.Bankr.P. 7054(a)/Fed.R.Civ.P. 54(b). No separate document apart from this Memorandum and Decision will be entered by the Court with respect to the determination hereby made, as provided for by Fed.R.Bankr.P. 9021/Fed.R.Civ.P. 58(a)(2).

Dated at Hammond, Indiana on May 5, 2006.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

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