

UNITES STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

WILLIAM R. FUCCI,
Debtor

Case # 02-10758
Chapter 13

Appearances: *Michael P. Palmer, Esq.*
 Middlebury, VT
 Counsel for Debtor

Stuart M. Bennett, Esq.
Shelburne, VT
Counsel for Nancy Flinn

MEMORANDUM OF DECISION
GRANTING CREDITOR NANCY FLINN’S MOTION FOR RELIEF FROM STAY

At a hearing held on July 23, 2002, this Court granted the Motion for Relief from Stay filed by creditor Nancy Flinn. This written decision is issued to elucidate the rationale for the Court’s ruling.

BACKGROUND

William R. Fucci (hereafter “the Debtor”) had a one-year lease with creditor Nancy Flinn. By its terms, the lease expired on December 31, 2001. However, the Debtor did not vacate the premises after the lease’s expiration. Thereafter, Ms. Flinn (hereafter “the Creditor”) began eviction proceedings. On May 6, 2002, the Debtor stipulated to a Judgment Order which provided, in relevant part, that a writ of possession was to be issued and executed to place Ms. Flinn in possession of the premises on June 1, 2002. The writ was issued and served the next day, May 7, 2002. The Debtor filed for chapter 13 bankruptcy protection on June 4, 2002.

The Creditor filed a Motion for Relief from Stay in order to regain possession of her rental property that the Debtor continues to occupy. Moreover, Ms. Flinn alleges that she has not received any rental payments from the Debtor since December 31, 2002. The Debtor has proposed a chapter 13 plan that provides for him to reinstate the lease, cure the rental arrearages over the life of the plan, and remain in possession of the rental residence.

Finding that the Debtor’s lease had expired prior to the filing of the bankruptcy case, the Court ruled that the Debtor could not reinstate the lease, cure the rental arrearages, or remain in possession of the premises through the plan. Accordingly, the Court granted Creditor Flinn’s Motion for Relief from Stay.

DISCUSSION

In the Second Circuit Court of Appeal’s recent decision, Canney v. Merchants Bank, 284 F.3d 362 (2d Cir. 2002), the Court instructs: “In an ejectment proceeding, a debtor may redeem and thereby avoid ejectment *if the clerk of the court has not issued the writ of possession*; issuance of the writ in an ejectment proceeding extinguishes the debtor’s right to redeem.” 284 F.3d at 374-75 (emphasis added). This clear instruction was followed by a lengthy footnote citing various cases applying Vermont state law, to wit:

- 1) Tucker v. Bushway, 689 A.2d 426, 427 (Vt. 1996) (the court discontinued an eviction action where the tenants tendered their rent after judgment *but before the clerk issued the writ of possession*);
- 2) Town of Corinth v. Locke, 20 A. 809 (Vt. 1890) (writ of possession put legal possession of premises in the orator);
- 3) In re Stolz, 197 F.3d 625, 631 (2d Cir. 1999) (holding that under Vermont law, a tenant could assume lease after the court entered the judgment of possession *because the writ of possession had not been entered*); and
- 4) Couture v. Burlington Hous. Auth. (In re Couture), 225 B.R. 58, 62 (D. Vt. 1998) (concluding that the Vermont Supreme Court would find that the Chapter 7 debtors retained possessory interest in their apartment *until execution of the writ of possession*).

Id.

Likewise, in In re Stolz, the Second Circuit recognized that under Vermont law, a tenant has a right to cure a rental default – and remain in possession of the residential premises – provided an eviction judgment is not final. See 197 F.3d at 630. According to Vermont statutory law, an ejectment judgment is not final until the earlier of either: (a) the time to appeal the judgment has expired; or (b) the issuance of the writ of possession. See id.; see also Vt. Stat. Ann. Tit. XII, § 4773. In other words, “under Vermont law, a debtor who retains a possessory interest in a residential tenancy has an ‘unexpired’ lease *at least until the writ of possession is issued*.” In re Stolz, 197 F.3d at 631 (emphasis added).

The present case is clearly distinguishable from In re Stolz. The debtor in In re Stolz filed for chapter 13 bankruptcy relief before the issuance of the writ of possession. Thus, she still had the right to cure her rental arrearages, and in turn, had the right to retain possessory interest in the residential premises. Here, however, the writ of possession had already been issued and served *before* the Debtor filed for his chapter 13 bankruptcy petition. Therefore, any right to reinstate the lease, cure his arrearages and retain possession were extinguished before Debtor came to bankruptcy court seeking its protection. The Debtor's filing for bankruptcy protection cannot resurrect these leasehold rights. Cf., Tucker, 689 A.2d at 427; Locke, 20 A. 809; Couture, 225 B.R. 58.

CONCLUSION

Since a writ of possession had already been issued against Debtor by the state court before he filed his chapter 13 case, any right he had to cure his arrearages and to redeem his residential rental lease with Ms. Flinn were, likewise, extinguished under Vermont law before his filing. The Debtor has no right to cure and redeem his expired residential lease in bankruptcy. Therefore, creditor Nancy Flinn's Motion for Relief from Stay is GRANTED.

Dated: July 25, 2002
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge