



SO ORDERED.

SIGNED this 12 day of April, 2005.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)
)
EXCEL LAMINATES, INC.,)
)
) **Case No. 01-20190**
Debtor.) **Chapter 7**
)
_____)

**ORDER DENYING TDF ASSOCIATES' MOTION FOR SUMMARY JUDGMENT
IN OPPOSITION TO TRUSTEE'S OBJECTION TO CLAIM NO. 50 FOR RENT**

The matter before the Court is the motion of TDF Associates for summary judgment in opposition to the Trustee's objection to TDF Associate's Proof of Claim for rent and occupancy charges (claim number 50). TDF Associates (TDF) appears by Michael P. Swisher, of Michael P. Swisher, P.C. The Trustee, Carl R. Clark, appears by Michele L. Whetstone, Lentz & Clark, P.A. There are no other appearances. This is a core proceeding.¹ The Court has subject matter jurisdiction.²

¹ 28 U.S.C.A. § 157 (b)(2)(B).

² 28 U.S.C.A. § 1334.

There is no objection to personal jurisdiction or venue.

BACKGROUND.

This Debtor, Excel Laminates, Inc. (Excel), is one of five related bankruptcy debtors. The others are: Illig Industries, Inc. (Case No. 01-20189); World Class Molding, Inc. (Case No. 01-20188); USA Products, Inc. (Case No. 01-20187); and KHI, Inc. (Case No. 01-20186). Claimant, TDF, is the landlord of the premises located at 9730-50 Alden Street, Lenexa, Kansas (the Premises) and claims that all five of these debtors conducted business at the Premises. Accordingly, on December 29, 2003, Proofs of Claim for rent of the Premises in the amount of \$576,408.18 were filed by TDF in all five bankruptcies. The Trustee objected to TDF's claim in this case. TDF timely responded to the objection. A briefing schedule was established. TDF filed a motion for summary judgment, and the Trustee responded.

An objection to a claim is a contested matter governed by Fed. R. Bankr. P. 9014, which incorporates Fed. R. Bankr. P. 7056, which in turn provides that Fed. R. Civ. P. 56 is applicable. Under Rule 56 when a motion for summary judgment is filed, the "judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." The substantive law identifies which facts are material.³ When deciding a summary judgment motion, the court does not weigh the evidence or resolve factual disputes, but merely determines whether the evidence favorable to the non-moving party about a material fact is sufficient to require a trial.⁴ Summary judgment is inappropriate if an inference can be drawn from the

³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

⁴ *Id.* at 249-52.

uncontroverted facts that would allow the non-moving party to prevail at trial.⁵

UNCONTROVERTED FACTS.

TDF's motion for summary judgment was accompanied by a memorandum, which included a statement of material facts in 23 numbered paragraphs. The Trustee's response controverted 12 of these statements and set forth additional material facts in 22 numbered paragraphs, supported by an affidavit of Keith Illig and various exhibits. TDF did not file a responsive brief. These additional statements of fact are therefore deemed admitted.⁶ The Court therefore bases its analysis upon the following statements of material facts from the memorandum of TDF which the Trustee agreed are uncontroverted and the 22 additional statements of fact from the response of the Trustee.

1. On December 29, 2003, TDF submitted its Proof of Claim.

2. Itemized with TDF's Proof of Claim is the amount of \$576,408.18 for rent and occupancy charges relating to the use and occupancy of the Premises.⁷

3. Attached to the Proof of Claim is the Lease Agreement for the Premises dated October 1, 2000, with TDF as Landlord and with Illig Industries, Inc. and World Class Molding, as the named

⁵ *Id.* at 248.

⁶ D. Kan. Rule 56.1(b)(2).

⁷ It is controverted whether the \$576,408.18 claimed by TDF in its Proof of Claim is the correct amount owed to TDF pursuant to the Lease for rent and other occupancy charges. The Trustee argues: That TDF failed to mitigate damages; that TDF failed to provide a copy of its notice for repairs or removal costs; that the Proof of Claim includes extra costs that the Trustee believes have been paid; and that TDF has not credited the tenant security deposit against other charges. It is the Trustee's contention that the amount rent charges owed (exclusive of other occupancy charges) is \$214,707.90. This controversy over the total amount owed to TDF, by whomever might be liable, involves material issues of controverted fact and can not be resolved when the ruling on TDF's motion for summary judgment.

Tenant.

4. Paragraph 50 of the Lease Agreement states the following:

50. Assignment, Pledging. If this Lease be assigned, or if the Leased Premises be subleased (whether in whole or in part) or in the event of the mortgage, pledge or hypothecation of the leasehold interest or grant of any concession or license within the Leased Premises or if the Leased Premises be occupied in whole or in part by anyone other than the Tenant, then (i) Landlord may nevertheless collect rent from the assignee, sublease, mortgagee, pledge, party to whom the leasehold interest was hypothecated, concessionee or licensee or other occupant and apply the net amount collected to the rent payable hereunder,...

5. Paragraph 52 of the Leased Agreement states the following:

52. Related Entities. Notwithstanding anything herein to the contrary, Tenant, without Landlord's prior written consent but otherwise subject to the conditions set forth in the preceding sentence, (i) may assign this Lease or sublease the whole of the Leased Premises to a legal entity which is either (x) the successor, by merger or otherwise, to all or substantially all of Tenant's assets and liabilities, or (y) controls or is controlled by or is under common control with Tenant. Any such assignment or subletting shall be otherwise subject and upon all the terms, provisions and covenants of this Lease. However the assignment under (x) or (y) above shall not relieve Tenant of liability as to any term or condition of this Lease without the express written approval of Landlord. . .

6. Illig Industries, Inc., USA Products, Inc., Excel Laminates and World Class Molding, Inc., were insured under the same insurance policies for worker's compensation, general liability and automobile insurance for their business operations at the Premises.

7. Keith H. Illig is the officer, sole director and sole shareholder of Excel Laminates, Inc., Illig Industries, Inc., World Class Molding, Inc., USA Products, Inc., and KHI, Inc., (hereafter the Illig Companies) with identical addresses and telephone numbers with registrations to do business in Kansas

and all operating from these Premises.

8. Keith H. Illig also registered Excel Laminates, Inc. to do business in the Commonwealth of Kentucky with its corporate principle office address at these Premises.

9. Chuck Herling is one of the Accountants/Bookkeepers who kept or supervised the keeping of the books of accounts and records of Keith Illig's Excel Laminates, Inc.

10. On behalf of the Illig Companies, Chuck Herling and Keith Illig negotiated with TDF for a lease extension and the new Lease Agreement for the Premises.

11. Keith Illig's Excel Laminates controlled numerous other funds transfers to the Illig Companies.

12. On December 29, 2003, TDF submitted its Proof of Claim in the amount of \$576,408.18.⁸

13. The itemizations attached to the Proof of Claim show a number of bids and proposed charges, but provide little proof of which items had actually been paid by TDF. Additionally, none of the bids were addressed to Excel.

14. The Lease Agreement attached to TDF's Proof of Claim shows TDF as landlord, with Illig Industries, Inc. and World Class Moldings, as the Tenant. Excel Laminates, Inc. is not a party to the Lease Agreement.

15. Keith Illig, personally, was the Guarantor for the Tenant under the Lease Agreement.

16. Keith Illig served as president of several entities, and based his operations out of the subject premises over a period of at least twelve years.

⁸ See footnote 7.

17. Excel Laminates, Inc. is Kansas corporation, and has used the premises address of 9750 Alden Street, Lenexa, Kansas as its legal address with the Kansas Secretary of State.

18. Keith Illig also registered Excel Laminates, Inc., to do business in the Commonwealth of Kentucky.

19. Excel Laminates, Inc.'s manufacturing operations were based out of Mount Sterling, Kentucky.

20. At no time did Excel Laminates, Inc. ever have a manufacturing operation working out of the facilities in Lenexa, Kansas.

21. During negotiations for the Lease Agreement dated October 1, 2000, TDF was aware that Keith Illig was operating several business was out of the subject premises, yet failed to require each entity to be named as Tenants.

22. Illig Industries, Inc. was the first and only company on the initial lease for space at 9730-50 Alden, Lenexa, Kansas.

23. USA Products, Inc., to the best of Keith Illig's recollection, became a legal entity in the middle 1980s, and began using 9730 Alden as its legal address for operation as a sales and marketing company only. Later on they used the premises on Alden to do some of their own manufacturing.

24. In late 1988 or early 1989, Engineered Laminates leased 35,000 square feet of the subject premises.

25. Engineered Laminates was owned by two Sub-S corporations – Joan Laminates, Inc. , out of Massachusetts, and KHI, Inc., a Kansas corporation owned by Keith Illig.

26. Engineered Laminates ceased to do business in the Lenexa facility as of July 1996, and

ceased to be an operating entity.

27. World Class Molding, Inc. (hereafter World Class) and USA Products, Inc. (hereafter USA) took over the space that Engineered Laminates, Inc. had been using.

28. Excel Laminates, Inc. was formed in 1995, and was in no way a successor company of Engineered Laminates.

29. Division of space between World Class and USA was billed to each of those two companies based on the amount of space that either one was using, including Common Area Maintenance (hereafter CAM).

30. There was no co-mingling between Illig Industries and World Class/USA space.

31. Illig Industries' personnel did the accounting and HR work for Excel, World Class Molding, USA Products, KHI, and previously for Engineered Laminates. Later, some of those employees were transferred onto Excel's payroll and any services they provided to the other companies were then billed back to those companies.

32. The portion of the subject premises used by employees of Excel was less than 200 square feet of the total 70,000 square feet of that facility.

33. Employees of Excel did additional work for some of the other companies in the subject premises. At no time, was rent ever paid by Excel.

ANALYSIS AND CONCLUSIONS OF LAW.

TDF seeks to recover the full amount of all rent and other occupancy charges (hereinafter collectively referred to as rent) allegedly due for use of the Premises from Excel, even though Excel is not a party to the October 1, 2000 Lease Agreement (hereinafter Lease). The Tenant under the Lease

is Illig Industries, Inc. and the World Class Molding, Inc., which companies are debtors in other bankruptcy cases. TDF's theories for recovery of the rent from Excel are paragraphs 50 and 52 of the Lease Agreement and two Kansas statutes, K.S.A. 58-2501 and K.S.A. 58-2520. The Trustee argues that because Excel is not a named tenant, TDF can not collect rent from this Debtor pursuant to the Lease and that the Kansas statutes are not applicable. The Court will address each of these theories.

Paragraph 50 of the Lease does not establish Excel's liability. Paragraph 50 provides:

50. Assignment, Pledging. If this Lease be assigned, or if the Leased Premises be subleased (whether in whole or in part) or in the event of the mortgage, pledge or hypothecation of the leasehold interest or grant of any concession or license within the Leased Premises or if the Leased Premises be occupied in whole or in part by anyone other than the Tenant, then (i) Landlord may nevertheless collect rent from the assignee, sublease, mortgagee, pledge, party to whom the leasehold interest was hypothecated, concessionee or licensee or other occupant and apply the net amount collected to the rent payable hereunder, or (ii) Landlord shall have the right to re-enter the Leased Premises, assume and take possession of the whole or any part thereof, and remove all persons or personal property therefrom, by direct or summary action, or in a different type of suit or proceeding, by force, or otherwise, without being deemed guilty of trespass or other actionable wrong by reason thereof, and without being liable for damages therefor, or in connection therewith, and after demand made therefor, Tenant or anyone in possession claiming under Tenant shall be deemed guilty of unlawful detainer as subject to such summary or other action as may be provided by law.

It imposes liability when the Lease is assigned, the Leased Premises are subleased, there is a pledge or hypothecation, there is grant of any concession or license, or if the Premises are occupied in whole or in part by anyone other than the Tenant. However, paragraph 48 of the Lease limits the applicability of paragraph 50. It provides:

48. Consent of Landlord. Tenant shall not assign this Lease or sublease the Leased Premises or any part thereof or mortgage, pledge or hypothecate its leasehold interest or grant any concession or license within the Leased Premises, or sublease any operating department therein without the express written consent of Landlord which may be arbitrarily held. Any attempt to do any of the foregoing without Landlord's consent, shall be void and of no effect. This prohibition against assigning or subletting shall be construed to include or prohibition against any assignment or subletting by operation of law.

Paragraph 48 makes assignment, subleasing, and other actions of the Tenant addressed in paragraph 50 subject to the Landlord's express written consent, and acts done without such express written consent are declared void. Paragraphs 48 and 50 address the same subject matter and must be construed together.⁹ Paragraph 48 applies to assignments, subleases, mortgages, pledges, hypothecations, concessions, and licenses. Likewise, paragraph 50 applies to assignments, subleases, mortgages, pledges, hypothecations, concessions and licenses. Paragraph 50, unlike paragraph 48, in addition, refers to occupancy "by anyone other than Tenant." In Kansas the rule of ejusdem generis is applied to the construction of written contracts, including leases.¹⁰ This rule states,

where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind with respect to a classification which immediately precedes it - that is to say, where general words follow particular words in an enumeration describing the subject matter, general words are construed to embrace only objects similar in nature

⁹ *Garvey Center, Inc. v. Food Specialties, Inc.*, 214 Kan. 224, 519 P.2d 646 (1974).

¹⁰ *Wulf v. Shultz*, 211 Kan. 724, 508 P.2d 896 (1973); *Texaco, Inc. v. Holsinger*, 336 F.2d 230 (10th Cir. 1964).

to those enumerated by antecedent specific words.¹¹

Pursuant to this rule of construction, the Court finds the word “occupant” in paragraph 50 has reference to those succeeding to occupancy by virtue of assignment, sublease, mortgage, pledge, hypothecation, concession, or license and does not create a separate classifications of persons subject to the rent obligation of paragraph 50. Every event which could give rise to non-Tenant liability for rent pursuant to paragraph 50 is subject to the consent requirement of paragraph 48. Stated differently, the reference to “other occupant” in paragraph 50 is not intended to impose liability for rent on occupants other than those in possession pursuant to an assignment, sublease, mortgage, pledge, hypothecation, concession or license; the Landlord’s remedy with respect to such occupants is re-entry of the Leased Premises.

The uncontroverted facts do not include any evidence of express written consent by TDF pursuant to paragraph 48 to the occupancy of any portion of the premises by Excel. Therefore, even if the Tenant did attempt to sublease a portion of the property to Excel in accord with paragraph 50, paragraph 48 would render such a sublease void and therefore unenforceable by TDF for purposes of collection of rent from the sublessee. Paragraph 50 does not provide a vehicle for TDF to collect rent from Excel.¹²

Next, TDF relies upon paragraph 52 of the Lease. Paragraph 52 provides:

¹¹*Wulf v. Shultz*, 211 Kan. at 730 quoting *Keller v. Ely*, 192 Kan. 698, 391 P.2d 132 (1964).

¹² Moreover, in even if the term “occupant” in paragraph 50 were construed to be a separate category of persons liable for rent because in possession without the Landlord’s consent pursuant to paragraph 48, and Excel were found to be of such an occupant, given the uncontroverted facts, Excel would be liable for rent only for that portion of the Premises occupied by it, which is less than 200 square feet.

52. Related Entities. Notwithstanding anything herein to the contrary, Tenant, without Landlord's prior written consent but otherwise subject to the conditions set forth in the preceding sentence, (i) may assign this Lease or sublet the whole of the Leased Premises to a legal entity which is either (x) the successor, by merger or otherwise, to all or substantially all of Tenant's assets and liabilities, or (y) controls or is controlled by or is under common control with Tenant. Any such assignment or subletting shall be otherwise subject and upon all the terms, provisions and covenants of this Lease. However the assignment under (x) or (y) above shall not relieve Tenant of liability as to any term or condition of this Lease without the express written approval of Landlord..

Under this paragraph someone other than the Tenant, such as Excel, is liable for rent when that person is an assignee or sublessee and is a related entity under subsection (y) of paragraph 52. The Trustee argues that Excel is not liable because the Tenant did not assign or sublet its right of occupancy to Excel and Keith Illig, not the Tenant, controlled Excel.

Paragraph 52, in contrast to paragraph 50, does permit the assignment or sublease of the Premises without the Landlord's written consent, but only in the circumstance where the legal entity to whom the Lease is assigned "controls or is controlled by or is under common control with Tenant." The absence of the Landlord's consent to an assignment of the Lease to Excel is therefore not a barrier to application of paragraph 52. However, the clear language of paragraph 52 provides that it is applicable only to an assignment of the Lease or a sublease of the "whole of the Leased Premises." Paragraph 52, a contrast to paragraph 50, does not apply to a transfer of only a portion of the Premises.

The uncontroverted facts do not include any evidence that the Lease was assigned or the Premises sublet in whole to Excel. Rather, the uncontroverted facts establish that Excel used the Premises address in its filings with the Kansas Secretary of State and in its voluntary petition in this

case, that some employees of Excel used a portion of the Premises for an unspecified period of time, and that the portion of the Premises used by employees of Excel was less than 200 square feet of the total 70,000 square feet in the facility. The Court therefore sustains the Trustee’s contention that Excel is not liable for rent due by virtue of paragraph 52 because of an assignment or sublease to a related entity.¹³

Next, Excel relies upon K.S.A. 58–2501, which provides in relevant part as follows: “A person in the possession of real property with the assent of the owner is presumed to be a tenant at will, unless the contrary is shown” The definitions of tenancy at will are various. Black’s Law dictionary defines a tenancy at will as one “in which the tenant holds possession with the landlord’s consent but without fixed terms (as for duration or rent).”¹⁴ A legal encyclopedia adopts the following definition:

A “tenancy at will” is a leasehold interest which may be created by a tenant remaining on the property, with the consent of the landlord, after the original lease terminates, for an uncertain time which may be terminated by either party.¹⁵

The same encyclopedia goes on to say that a “tenancy at will may arise by implication as well as out of an express contract” and that a “tenancy at will cannot be created without the consent of both

¹³ However, the Court does note, that paragraph 52 might have been applicable to shift liability for rent to Excel if there had been such an assignment or sublease of the entire Premises, because the paragraph’s definition of related entities includes entities under the under common control with the Tenant. The uncontroverted facts establish that Keith Illig is the officer, sole director, and sole shareholder of Excel, as well as the Tenant, Illig Industries, Inc. and World Class Molding. Unless proven otherwise, this may constitute common control. See K.S.A. 17-12,100(d) (defining “under common control with” for purposes of the Business Combinations with Interested Shareholders Act).

¹⁴ Black’s Law Dictionary 1477 (7th ed. 1999).

¹⁵ 49 Am. Jur. 2d *Landlord and Tenant* §133 (2nd ed. 2004).

parties.’’¹⁶

The Trustee contends that the foregoing statute does not apply because the Lease before the Court is a commercial lease, whereas the foregoing statute is part of the Kansas Residential Landlord and Tenant Act. The Court rejects this defense. The Kansas Residential Landlord and Tenant Act is found in K.S.A. 58-2540 to 58-2573. K.S.A. 58 –2501, relied upon by TDF, is a portion of the general provisions of article 25 addressing landlords and tenants. It is not restricted to residential leases; in fact the final portion of K.S.A 58-2501, omitted from the above quotation, addresses the application of the statute to the lease of farm land.

Nevertheless, the Court denies TDF’s motion for summary judgment based upon K.S.A. 58–2501. Because none of the facts evidence the possibility of a tenancy at will of the entire Premises, the Trustee is entitled to judgment as a matter of law on this contention. However, with respect to a tenancy at will for the portion used by Excel, there are disputed issues of material fact which preclude summary judgment but provide a basis for TDF to pursue a trial if it so desires. The statute provides that a tenancy at will arises from occupancy with “assent of the owner..., unless the contrary is shown.” The evidence favorable to the Trustee about whether Excel was a tenant at will precludes summary judgment on this contention. The uncontroverted facts demonstrate an issue of fact of whether TDF “assented” to Excel’s occupancy, as required by the express language of K.S.A. 58-2501. TDF rented the Premises to the Tenants, Illig Industries, Inc. and World Class Molding. A landlord, after granting a valid lease to commercial tenants, would be in breach of the lease if it allowed a third party tenant at

¹⁶ *Id.*

will to occupy the premises. On the other hand, the facts also establish that TDF when negotiating the Lease was aware that Keith Illig was operating several businesses out of the Premises and failed to require each entity to be named as a tenant. Whether TDF “assented” to Excel being be a tenant of a portion of the Premises is a disputed issue of material fact which cannot be resolved upon summary judgment.

Finally, TDF relies upon K.S.A. 58-2520 which states, “the occupant without special contract, of any lands, shall be liable for the rent to any person entitled thereto.” This statute, first enacted in 1868, has been construed to hold a tenant by sufferance liable for rent,¹⁷ and this appears to be its primary function. *Story v. McCormick* holds that the statutory obligation to pay rent “rests upon quasi contract, or a contract implied in law, as distinguished from a contract implied in fact.”¹⁸ Under this theory, the court found that the testimony of the person seeking the rent regarding intent to make a charge was material to the inquiry. “If [the owner] never had any intention of exacting or expectation of receiving rent, she could not have recovered.”¹⁹

TDF argues that because Excel occupied the Premises, was not named specifically in the Lease, and was not a signatory to the Lease, Excel has liability under K.S.A. 58–2520. The Trustee responds that the statute does not apply because it is a portion of the Kansas Residential Landlord and Tenant Act and, with respect to commercial leases, courts are required to determine the rights of the

¹⁷ *Benston v. Beakey*, 71 Kan. 872, 81 Pac. 196 (1905).

¹⁸ 70 Kan. 323, 78 Pac. 819, 820 (1904).

¹⁹ *Id.*, 78 Pac. at 821.

parties as expressed in the legal documents. Contrary to the Trustee's position, K.S.A 58–2520, like K.S.A. 58–2501 also relied upon by TDF, is not a portion of the Kansas Residential Landlord and Tenant Act. Therefore its applicability to the present circumstances is not precluded as a matter of law pursuant to this argument. Further, the Trustee provides no authority to support his second argument that the presence of a written commercial lease bars consideration of statutory liability.

However, for the following reasons the Court denies summary judgment on TDF's claim under K.S.A. 58–2520. First, there is no evidence that Excel was an occupant of the entire Premises for which TDF seeks rent. Occupancy is a prerequisite to recovery under the statute. As a matter of law, K.S.A. 58-2520 cannot be a basis for TDF to collect all unpaid rent from Excel. As to the portion of the Premises occupied by Excel, under the rule of *Story*,²⁰ TDF is not entitled to collect rent from Excel pursuant to K.S.A. 58-2520 if TDF had no expectation that Excel would be obligated for rent because of its occupancy. On the question of expectation, the uncontroverted facts allow an inference favorable to the position of the Trustee that Excel had no such expectation. It is uncontroverted that there is a commercial lease of the Premises which obligated the Tenant, Illig Industries, Inc. and World Class Moldings, to pay rent to TDF. The intention of TDF to collect rent from the Tenant, as opposed to Excel, is clearly expressed in the Lease. On the other hand, the unconroverted facts do establish that Excel occupied a portion of the Premises and the TGF knew that more of the Illig Companies than the two companies signing the Lease occupied the space. The Court therefore denies TDF's motion for summary judgment to enforce its Proof of Claim against Excel pursuant to K.S.A. 58–2520.

²⁰ *Id.*

CONCLUSION.

For the foregoing reasons, the Court denies TDF's motion for summary judgment in support of allowance of its Proof of Claim for all rent and related charges under the Lease for use of the Premises. As a matter of law under the facts of this case, neither paragraph 50 nor paragraph 52 of the Lease provides a basis for TDF to collect any rent from Excel. Further, as a matter of law, Excel is not liable for rent and related charges for the entire Premises pursuant to either K.S.A. 58-2501 or K.S.A. 58-2520. As to rent for the approximately 200 square feet used by Excel, the evidence in favor of the Trustee is sufficient to require trial on whether Excel was a tenant at will with liability for rent pursuant to K.S.A. 58-2501 or was an occupant with liability under K.S.A. 58-2520.

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