

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION**

In re

EVEREST CROSSING, LLC,

Debtor

**Chapter 11
Case No. 09-16664-FJB**

**MEMORANDUM OF DECISION ON
DEBTOR'S MOTION TO ASSUME LEASE**

By the motion before the Court, the chapter 11 debtor, Everest Crossing, LLC (“the Debtor”), seeks to assume its lease (“the Lease”) of the nonresidential real property at 57 John F. Kennedy Street, Cambridge, Massachusetts, out of which it operates its business, a restaurant known as OM Restaurant and located in the Harvard Square section of Cambridge. The landlord and counter-party to the lease, Crimson Galeria Limited Partnership (“the Landlord”), opposes the motion, citing alleged defaults under the Lease. This dispute boils down to three issues: (1) whether the amount of that monetary default, which the Landlord contends is \$157,258 for common area and maintenance (“CAM”) charges, includes the 2005 portion of these charges, which total \$39,000 and which the Debtor contends the Landlord either waived or is barred from enforcing because it did not bill the Debtor for them within the time required by the Lease; (2) whether the Debtor has provided adequate assurance that it will promptly cure the alleged monetary default under the Lease; and (3) whether the Debtor has provided adequate assurance of future performance under the Lease. After an evidentiary hearing on the motion, the Court hereby enters the following findings and rulings, on the basis of which the Court concludes that the Lease may be assumed.¹

¹ Under recent amendments to the Bankruptcy Code, and absent the consent of the lessor, a debtor must assume a lease of nonresidential real property on or before (at most) 210 days after the commencement of the case. Given that most debtors who need to assume a lease are not ready to do so in the first months of a case, these motions tend to be filed at the last minute and consequently to necessitate an evidentiary hearing and then a decision in an unreasonably short time. In this instance, circumstances conspired to require that the Court decide the matter within twenty-four hours after the close of the evidentiary hearing.

The Debtor filed a voluntary petition for relief under Chapter 11 on July 15, 2009. It first entered into the Lease with the Landlord in December 2004, completed the build-out of its space during the following year, and opened for business on December 31, 2005. The restaurant facility is itself is a work of art, and the restaurant as a whole has been highly acclaimed, having received numerous awards and reviews of the very highest level, a truly world-class restaurant. It enjoys strong patronage and a high degree of good will and support in its community. This is due in no small part to the efforts and investment of its principal, Mr. Solomon Chowdhury, whose resourcefulness and continuing commitment to the success of this venture are clear. Mr. Chowdhury invested his savings of \$1.5 million in the build-out and establishment of OM.

Unfortunately, the Debtor's relationship with the Landlord has been strained; this has been the principal source of its financial troubles and the cause of its bankruptcy filing. The causes of these strained relations are three. First, the Debtor owes the landlord for CAM charges dating back to 2007. (The debtor was first billed for CAM charges in 2007, but the billed charges extend back as far as 2005.) Second, the Debtor, while not disputing that some amount is due, honestly disputes the amounts of these charges and has had difficulty obtaining from the landlord a suitable accounting. Third, though the Landlord, acting through its general partner Mr. Raj Dhanda, was willing to work amicably with the debtor in the first years of their relationship, Mr. Dhanda later indicated to Mr. Chowdhury that the Landlord would like to acquire an ownership interest in the Debtor. Later, in May of 2009, Dhanda indicated to Chowdhury that he would like for the Debtor to sell the restaurant to a third party who was willing to pay the Landlord \$1 million for this deal, of which the Landlord offered the Debtor a small percentage, \$75,000, plus forgiveness of the lease, for the debtor's acquiescence in this plan. Mr. Chowdhury, who sees the investment of his ideas, efforts, and life's savings being appropriated by the Landlord in this effort, has understandably resisted these efforts. So the Debtor's woes are in part financial but not wholly so. It was shortly after the Debtor rebuffed this

latter effort that the Landlord served notices of default on the Debtor, precipitating the bankruptcy filing.

At the time of the bankruptcy filing, the Landlord was attempting to terminate the Lease on account of defaults, consisting mostly of alleged arrearages in CAM charges. By a previous ruling in this case, this Court determined that the Lease had not been terminated as of the bankruptcy filing date. The debtor disputes the amount of the CAM charges for all years, but for purposes of the present motion, it disputes only the CAM charges for 2005, \$39,000 of the \$157,258 arrearage that the Landlord contends must be cured as a condition of assumption of the lease.

I do not have before me an objection to the Landlord's claim, so on this motion to assume lease, the Court's task is not to adjudicate the cure component of the Landlord's claim but simply to estimate the cure amount for present purposes.² On the evidence adduced at the evidentiary hearing, the Court concludes that the debtor is likely to prevail on its objection to the 2005 CAM charges. Under the Article VI, section 2 of the Lease, the Landlord was obligated to give the Debtor a statement of a particular year's CAM charges within 180 days of the end of that calendar year or as soon as reasonably practicable thereafter. It is undisputed that the Landlord did not bill the debtor for 2005 CAM charges until May of 2007. The Landlord made no showing—did not even attempt to show—that it was not reasonably practicable to bill for the CAM charges within the 180-day period or sooner than eleven months thereafter. It follows that no claim for the 2005 CAM charges is enforceable under the lease. Also, in the alternative, the long delay in sending notice of the 2005 CAM charges lends credence to Mr. Chowdhury's testimony that, through Mr. Dhanda, the Landlord had agreed to waive the 2005 CAM charge.

² The parties nonetheless urge the court to make a final determination on that arrearage at this juncture. The Court declines to do so, not only because no objection to claim is presently before me, but also because the debtor has made clear that it's objection to the Landlord's claim is broader than that which has been presented as part of the present controversy, and therefore a final decision at this juncture would result in piecemeal adjudication of the claim.

Accordingly, for purposes of this motion, the cure amount is hereby fixed at \$118,258.

Section 365(a) and (b)(1) of the Bankruptcy Code provide, in relevant part, that a debtor in possession, exercising the powers of a trustee, may assume an unexpired lease if the debtor, at the time of such assumption, “provides adequate assurance that [it] will promptly cure” any monetary default (with exceptions not applicable here) and “provides adequate assurance of future performance under such . . . lease.” 11 U.S.C. § 365(a) and (b)(1)(A) and (C). The Debtor bears the burden of proof as to both adequate assurance issues.

The Debtor proposes to cure the arrearage over eighteen months out of operating revenues and has submitted a budget under which it could reasonably accomplish that cure. In addition, to further assure such performance, Mr. Chowdhury’s sister has given the Debtor \$30,000 to secure the Debtor’s performance on this obligation, and a Mr. Ozgur Ylimac has further promised to lend the Debtor \$15,000 should this further sum be necessary to effectuate the cure. These amounts are over and above a \$36,000 security deposit that the Landlord is holding to secure performance under the Lease. Especially in view of the fact that the Debtor’s budget is based on a cure amount of \$157,000, which is a full one-third more than the actual cure amount, the Court finds that the Debtor is likely to complete the cure on the proposed schedule. The Debtor’s projections, as adjusted for the lesser cure amount, are realistic.³ In combination with the \$45,000 that has been pledged as security and the \$36,000 security deposit, the plan to repay over eighteen months constitutes adequate assurance of cure.

The Landlord contends that a cure within eighteen months is not the “prompt” cure that the statute expressly mandates. The Court disagrees. There is no bright-line test as to what constitutes “prompt” for all cases. On the facts of this case, eighteen months is sufficient. The debtor is in the fifth year of the initial ten-year term of the Lease, and the lease is extendable for two five year terms. The Lease itself requires the payment of CAM charges not all at once but

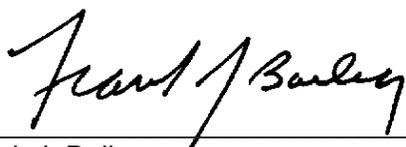
³ The contrary testimony of the Landlord’s expert was not informed with information about the Debtor’s operation, which he conceded was critical; I give his testimony little weight.

in monthly installments over a year. In addition, the precise amount of the default remains in dispute, with large numbers in the balance, and may not be adjudicated or otherwise resolved for some time. On these facts, the proposed cure is prompt within the meaning of subsection 365(b)(1)(A).

The only remaining issue is whether the Debtor has provided adequate assurance of future performance under the Lease. The Debtor has provided adequate assurance. The Debtor has made substantial changes to its business in the seven months since its bankruptcy filing, including by effectuating substantial savings and efficiencies in several areas, hiring a new cook and booking manager, adjusting its pricing structure, and expanding its capacity. Mr. Chowdhury testified that although his business suffered in the fall of 2008, primarily through cancelations occasioned by the economic collapse in that period, these bookings have begun to pick up again. Also, the Debtor has a plausible plan to acquire a new liquor license and sell its present license at a substantial profit, a move that would, among other things, relieve the Debtor of substantial monthly debt service on the present license. It is true, as the Landlord notes, that the Debtor has not yet filed a plan of reorganization; however, it is also true that the assumption of the Lease and cure of the CAM charge arrearage are the biggest issues the debtor has to face in this case. And having surmounted these hurdles, debtor is now reasonably likely to confirm a plan and continue performing under the Lease. It has demonstrated the wherewithal do so.

For these reasons, the Court will issue a separate order granting the motion to assume.

Date: February 24, 2010



Frank J. Bailey
United States Bankruptcy Judge