THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 98-13588
	)	
JOHN W. SCHULTZ,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

There are two related motions before the Court:

1. Debtor's Motion to Assume Lease and Franchise Agreement (Docket 13); and

2. Motion of Creditors Dunkin' Donuts Incorporated and Third Dunkin' Donuts Realty, Inc. for Relief from Stay. (Docket 4). Both of these motions are opposed. (Docket 12, 19, 20, 22). The resolution of both motions turns on the same issue: Did the franchise agreement and lease between Mr. Schultz and the creditors terminate before this bankruptcy proceeding was filed?

JURISDICTION

Jurisdiction exists to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (G), and (M).

FACTS

The material facts are not disputed and neither party requested an evidentiary hearing. In 1996, John Schultz entered into a franchise agreement with Dunkin' Donuts, Incorporated and a

lease with Third Dunkin' Donuts Realty (the creditors are collectively referred to as "Dunkin' Donuts"). Mr. Schultz used the leased premises to operate a Dunkin' Donuts franchise. By letter dated November 14, 1997, Dunkin' Donuts terminated both the franchise agreement and the lease due to a failure to make payments. (The lease and franchise agreement are sometimes collectively referred to as "the agreements").

Dunkin' Donuts then filed a forcible entry and detainer action against Mr. Schultz in the Mentor Municipal Court to recover the premises. The parties resolved that action when they entered into a Stipulated Judgment Entry (the "Judgment"). The Judgment entered judgment in favor of Dunkin' Donuts and against Mr. Schultz, finding that Mr. Schultz was wrongfully in possession of the premises. The parties agreed, however, that a writ of restitution would not issue so long as Mr. Schultz made specified payments and maintained certain obligations. In the event of a failure to do so, the Judgment stated that "[a] writ of restitution shall issue upon notice filed with the Court that any of the foregoing conditions have not been satisfied by [Mr. Schultz]."

Mr. Schultz acknowledged that he was in default under the Judgment by affidavit dated May 1, 1998. Dunkin' Donuts then filed its "Notice that Defendant has Failed to Satisfy Conditions of Stipulated Judgment Entry." On May 6, 1998, the Mentor Municipal Court issued a "Writ of Restitution Execution under Ohio Revised Code § 1923.13" to the court bailiff. The writ directed the bailiff to remove Mr. Schultz from the premises and set an eviction date of May 13, 1998. After Mr. Schultz received the writ, he filed for protection under Chapter 11 of the Bankruptcy Code. The filing took place on May 11, 1998.

DISCUSSION

I.

The Arguments of the Parties

Motion to Assume Lease and Franchise Agreement: Debtor argues that he had until the date of eviction to cure his default under the Judgment, which right comes from reading Ohio Revised Code § 1923.13 together with Ohio Rule of Civil Procedure 60. The filing of the petition protected that right. Consequently, he has rights under the agreements that have not been terminated and can be assumed. Dunkin' Donuts' position is that both agreements terminated pre-petition and, once terminated, they cannot be revived. Alternatively, it argues that Debtor has not met the requirements of 11 U.S.C. § 365 for assuming these agreements because he has not shown that he can promptly cure the default or give assurance of future performance.

Motion for Relief from Stay: Dunkin' Donuts contends that all of the Debtor's rights under the agreements terminated, at the latest, when Mr. Schultz defaulted under the Judgment. As that default took place pre-petition, Dunkin' Donuts states that Debtor no longer has an interest under the agreements. In the absence of such an interest, Dunkin' Donuts argues that it is entitled to have the automatic stay under 11 U.S.C. § 362 lifted so that it can pursue its state court remedies. In opposition, Debtor argues that the operative document is the Judgment and state law gave him until May 13, 1998 in which to cure the default under the Judgment. As he filed his bankruptcy petition before that date, his position is that the automatic stay under 11 U.S.C. § 362 prevented the default period from expiring.

II.

Motion to Assume Lease and Franchise Agreement

The Bankruptcy Code provides that, with certain exceptions, a debtor may assume an executory contract or an unexpired lease. 11 U.S.C. § 365(a). A debtor may not, however, assume a nonresidential lease if it has been terminated under state law prior to the order for relief in the bankruptcy case. 11 U.S.C. § 365(c)(3). If a lease has not been terminated under state law, then a debtor may assume the lease even if he was in default at the time of the filing of the bankruptcy petition. To do so, however, a debtor must (a) cure the default, or provide adequate assurance that the default will be cured promptly; (b) compensate, or provide adequate assurance of compensation to, any third party for actual pecuniary loss caused by the default; and (c) provide adequate assurance of future performance under the lease. 11 U.S.C. § 365(b)(1). Similarly, if a debtor is in default under an executory contract, the contract may only be assumed if the same assurances are provided.

A. Did Debtor have an interest under the agreements at the time of the bankruptcy filing?

Debtor's argument under state law relies on Ohio Revised Code § 1923.13. That statute provides :

> Except as otherwise provided in this section, within ten days after receiving the writ of execution described in section 1923.13 of the Revised Code, the . . . bailiff shall execute it by restoring the plaintiff to the possession of the premises, and shall levy and collect the costs and make return, as upon other executions.

The statute goes on to state that:

> If an appeal from the judgment of restitution is filed and if, following the filing of the appeal, a stay of execution is obtained and any required bond is filed with the court of common pleas, municipal court, or county court, the judge of that court

> immediately shall issue his order to the . . . bailiff commanding him to delay all further proceedings upon the execution. If the premises have been restored to the plaintiff, the . . . bailiff shall forthwith place the defendant in possession of them, and return the writ with his proceedings and the costs taxed thereon.

As noted above, Debtor argues that this statute creates a right to cure up to May 13, 1998, the date on which the bailiff was to carry out the eviction. He then contends that the filing of his bankruptcy case stayed the running of the cure period under 11 U.S.C. § 362. With the running of the cure period stayed, Debtor' position is that he still has an interest in the agreements that he can assume.

Debtor's argument melds two concepts that are actually distinct: a right to cure and a right to appeal. The Judgment created a right to cure. In it, Mr. Schultz admitted he was in wrongful possession of the premises and Dunkin' Donuts was entitled to possession. Despite that, the parties crafted a compromise that gave Mr. Schultz a right to cure the default and avoid eviction by making payments. He did not do so. When Mr. Schultz failed to make the payments, he lost his opportunity to cure the default.

Once the cure period ended and Dunkin' Donuts was entitled to execute on the writ of restitution, Mr. Schultz's remaining rights arose under Ohio Revised Code § 1923.14. That statute does not create a new right to cure; it instead creates rights relating to an appeal. Specifically, it provides that if an appeal is filed and if a stay of execution is obtained and if any required bond is posted, then the trial judge shall permit the tenant to remain in the premises or return to the premises. In this case, Debtor did not state that he intended to appeal, nor does it appear that he would have had any grounds to do so. In any event, a right to appeal is not the same as a right to cure a default under the agreements or under the Judgment.

Debtor argues that the Ohio Rules of Civil Procedure support his position. He contends that if he had mustered the funds called for by the Judgment before the May 13, 1998 eviction date, the trial court would have vacated the Judgment under Rule 60(b)(4) or (5) of the Ohio Rules of Civil Procedure. He views this as the equivalent of a right to cure.

Under Rule 60(b)(4), a state court judge may relieve a party from a final judgment if:

> the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application[.]

Rule 60(b)(5) addresses "any other reason justifying relief from the judgment." There is no right under this rule to any form of relief, much less to a right to cure the default under the Judgment. The rule is one of procedure that gives a trial court discretion to vacate a judgment if certain matters are proven. If Mr. Schultz had some grounds for seeking relief under this rule and if the state court had granted relief, then it is possible that Mr. Schultz might have been left with some legal or equitable interest either under the agreements or under the Judgment. That is not, however, what happened. And the theoretical possibility does not create an interest that is capable of being assumed under the Bankruptcy Code.

Finally, the authority cited by Debtor does not support his position. He relies principally on *In re Emilio Cavallini, Ltd.*, 112 B.R. 73 (Bankr. S.D.N.Y. 1990). That case involved an agreed judgment between a landlord and a tenant similar to the one at issue here. The tenant filed for bankruptcy before the cure period expired under the agreed judgment. The court found that under New York law, a tenant has equitable rights in a lease between the date on which a writ of execution issued and the date of the eviction which are subject to the § 362 stay. Under

those circumstances, the court held that the cure provision gave debtor an assumable interest in the lease. The facts and the state law applicable in *Cavallini* are quite different from this case. Here, the cure period under the Judgment expired before the filing of the Chapter 11 and there is no provision under the Ohio statute comparable to the one applied in *Cavallini.*

At oral argument, Debtor also cited to the case of *Crossings Development, Ltd. v. H.O.T., Inc.*, 96 Ohio App. 3d 475, 645 N.E.2d 159 (1994). He did so for the proposition that any stay put into effect after a writ of execution issues will give a tenant a right to possession under Ohio Revised Code § 1923.14. The support is claimed to be found in a footnote in that case. In addition to being dicta, the substance of the footnote does not help Debtor's case. The point it makes is that a bailiff is to put a tenant back into possession "in the limited circumstances when that defendant obtains a stay pending appeal after execution of a writ of execution." Id. at fn. 3. By using the phrase "limited circumstances," this footnote actually highlights that the statute gives a right of possession only under a narrow set of facts; i.e., when a tenant pursues an appeal, obtains a stay, and posts a bond. The quoted language cannot reasonably be read to say that the automatic stay under 11 U.S.C. § 362 creates a right of possession under this Ohio statute.

Debtor's rights under the lease, the franchise agreement, and the Judgment terminated, at the latest, when the writ of restitution execution issued. Under Ohio law, Debtor did not have a right to cure his default under the Judgment in the days between the issuance of the writ and the execution of the writ. The filing of a bankruptcy petition during that time period did not, therefore, create or preserve any interest Debtor had in the agreements or the Judgment. Since Debtor did not have any interest in the lease or the franchise agreement at the time of the filing, he does not have a right to assume either one.

B. Alternatively, did Debtor show that he can promptly cure the default and provide adequate assurance of future performance?

Debtor was in default under the agreements pre-petition.[1] Because of this, even if Debtor has an interest under the agreements, he cannot assume them unless he :

> (A) cures, or provides adequate assurance that [he] will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that . . . [he] will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1). Debtor, as the party requesting assumption, has the burden of proving that these requirements have been met. *In re Rachels Indus., Inc.*, 109 B.R. 797 (Bankr. W.D. Tenn. 1990). Adequate assurance of a prompt cure requires a firm commitment to make the payments, combined with a demonstrated ability to do so. *In re DWE Screw Products, Inc.*, 157 B.R. 326 (Bankr. N.D. Ohio 1993); *In re World Skating Center, Inc.*, 100 B.R. 147 (Bankr. D. Conn. 1989).

Debtor proposes to cure his defaults under the agreements by applying funds he expects to receive in a state court action. There was no evidence as to the exact amount of the default, although both parties assumed in argument that it was in the range of $35,000. Again in argument, Debtor acknowledged that there is a dispute over the state court funds that might reduce them below the amount needed to cure the default. In the absence of evidence of the

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[1] The parties did not identify the specific default under the agreements.

amount owed, a predictable schedule for paying the amounts in default, and a demonstrated ability to make the payments, Debtor has not shown adequate assurance of a prompt cure.

Neither has Debtor provided adequate assurance of future performance under the agreements as required by § 365(b)(1)(C). The phrase "adequate assurance of future performance" is not defined in the Bankruptcy Code. Most courts "consider whether the debtor's financial data indicated its ability to generate a stream sufficient to meet its obligations, the general economic outlook in the debtor's industry, and the presence of a guarantee." *Richmond Leasing Co. v. Capitol Bank, N.A.*, 762 F.2d 1303, 1310 (5th Cir. 1985). There was no evidence presented on any of these issues. Debtor has not, therefore, met his burden of showing that he will perform under the agreements in the future.

Motion for Relief from Stay

The filing of the bankruptcy petition put into place an automatic stay against enforcing the writ of restitution execution. 11 U.S.C. § 362. The Bankruptcy Code provides that the stay can be lifted for "cause." 11 U.S.C. § 362(d)(1). Debtor has the burden of proof on this issue. 11 U.S.C. § 362(g)(2). A finding of cause is appropriate based on a landlord's desire to evict a debtor whose lease has been terminated. *In re Nasir*, 217 B.R. 995 (Bankr. E.D. Va. 1997). As discussed above, Debtor does not have any interest in the lease. In the absence of a leasehold interest, Debtor does not have any right to remain in the premises. Cause, therefore, exists to lift the stay.

CONCLUSION

For the reasons stated, Debtor's Motion to Assume the Lease and Franchise Agreement is denied. The Motion of Dunkin' Donuts Incorporated and Third Dunkin' Donuts Realty, Inc. for Relief from Stay is granted. A separate Order reflecting this decision will be entered.

Date: 8 July 1998

Pat E Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Andrew Vara, Esq.
Daniel Wilt, Esq.
C. Douglas Lovett, Esq.
Nancy Sponseller, Esq.

By: Joyce L. Gordon, Secretary

Date: 7/8/98

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In re:	)	Case No. 98-13588
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JOHN W. SCHULTZ,	)	Chapter 11
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the Memorandum of Opinion filed this date,

IT IS ORDERED that Debtor's Motion to Assume Lease and Franchise Agreement is denied. IT IS FURTHER ORDERED that the Motion of Dunkin' Donuts Incorporated and Third Dunkin' Donuts Realty, Inc. for relief from stay is granted.

Date: 8 July 1998

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Daniel Wilt, Esq.
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Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

This Court issued a Memorandum of Opinion and Order on July 9, 1998 which denied Debtor's Motion to Assume Lease and Franchise Agreement and granted the related Motion of Dunkin' Donuts Incorporated and Third Dunkin' Donuts Realty, Inc. ("Dunkin' Donuts") for relief from stay. (Docket 23, 24). Debtor has filed a Motion for reconsideration of that Order and for emergency reinstatement of the stay until the request for reconsideration has been decided. (Docket 25).[1] Reconsideration is requested to: (1) allow Debtor to respond to Dunkin' Donuts' post-hearing memorandum; and (2) move that the Order be vacated.

I.

This Motion is linked to the hearing held on Debtor's Motion to Assume Lease and Franchise Agreement and Dunkin' Donuts' Motion for Relief from Stay. There, Debtor's counsel cited for the first time to the case of *Crossings Dev. Ltd. Partnership v. H.O.T., Inc.*, 96 Ohio App. 3d 475, 645 N.E.2d 159 (1994). The docket indicates that after the hearing, Dunkin'

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[1] The Motion incorrectly states a hearing date. Motions for Reconsideration are decided on the briefs, absent a court order setting a hearing.

Donuts filed and served a brief limited to addressing that case. Debtor's counsel apparently did not receive his service copy. He, therefore, moves to reconsider, stating that "he cannot help but wonder that if Debtor had been given the opportunity to file a Post Hearing Memoranda or at least respond to Creditors' Memoranda that the result may have been different." (Brief in Support of Motion). The Court notes that Debtor did not request the opportunity to file anything further at the conclusion of the hearing, nor did Debtor independently file a post-hearing brief.

II.

The Court denied Debtor's Motion to Assume Lease and Franchise Agreement on the ground that Debtor no longer had an interest in his lease and franchise agreement with Dunkin' Donuts at the time this Chapter 11 case was filed; and alternatively, Debtor failed to show that he could assume those agreements under the terms of 11 U.S.C. § 365(b)(1). Dunkin' Donuts' Motion for relief from stay was granted based on a finding of cause. In support of the Motion to Reconsider, Debtor argues that (1) he has an interest in the premises which is protected by the 11 U.S.C. § 362 stay; and (2) the state court had the power to relieve him from the terms of its Stipulated Judgment Entry under Ohio Rule of Civil Procedure 60(B). He again requests that he be granted authority to assume the lease and franchise agreement.

Federal Rule of Civil Procedure 59 applies in bankruptcy cases under Federal Rule of Bankruptcy Procedure 9023. "A motion under Rule 59(e) is not an opportunity to re-argue a case . . . 'Motions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence'. " *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, ___F.3d _ , 1998 WL 288685 at *5 (6th Cir. June 5, 1998) quoting *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992). Debtor does neither in his Motion. He does not present any new

evidence and his brief merely restates arguments that were previously made to the Court in support of the Motion to assume and in opposition to Dunkin' Donuts' request for relief from stay. To the extent that a new or different argument is being made, that should have been done before the judgment was issued. *Id.* Therefore, while the Court has considered the arguments set forth in the Motion, they do not provide an appropriate basis for reconsideration of the Order. As reconsideration is not appropriate, Debtor's request for emergency reinstatement of the stay is moot.

IT IS, THEREFORE, ORDERED that Debtor's Motion for reconsideration is denied.

Date: 16 July 1998

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Daniel Wilt, Esq.
C. Douglas Lovett, Esq.
Nancy Sponseller, Esq.
Andrew Vara, Esq.

By: Joyce L. Gordon, Secretary

Date: 7/16/98