

**UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION**

**IN RE:** )  
 )  
**STUDIO FRAMES LTD.,** ) **Case No. 10-80827**  
**d/b/a Somerhill Gallery,** ) **Chapter 11**  
 )  
 )  
**Debtor.** )  
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**LANDLORD'S MOTION FOR ORDER (1) REQUIRING THE DEBTOR TO  
PAY POST-PETITION RENT AND FEES AND/OR (2) APPROVING THE  
REJECTION OF LEASE AGREEMENT AND REQUIRING THE DEBTOR TO  
VACATE PREMISES**

COMES NOW Venable Tenant (the "Landlord"), by and through its undersigned counsel, and respectfully submits this motion (the "Motion") for an order, pursuant to section 365(d)(3) and (4) of Title 11 of the United States Code (the "Bankruptcy Code"), (i) compelling payment by the Debtor of post-petition rent due and directing the timely performance of all other obligations under a Lease Agreement (as discussed herein), (ii) award attorneys fees to Landlord for the cost of filing this Motion, and/or (ii) in the event that rent cannot be paid, the Landlord seeks an order finding that the Lease Agreement is rejected and granting the Landlord possession of the Premises (as defined herein). In support of the Motion, Landlord respectfully represents:

**JURISDICTION AND VENUE**

1. The Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334. This Motion is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

## BACKGROUND

2. On May 10, 2010 (the "Petition Date") the Debtor filed a voluntary petition under the Bankruptcy Code, and has been permitted to continue its business as a debtor-in-possession pursuant to 11 U.S. C. §§ 1107 and 1108.

3. Landlord and the Debtor are parties to a Lease Agreement dated March 25, 2008 pursuant to which Landlord constructed and leased certain premises located on 302 East Pettigrew Street, Durham, North Carolina (the "Premises") to the Debtor for its use and operation of an art gallery and gift business consisting of 9,663 square feet. The Landlord upfitted the premises for the Debtor in an amount equal to \$80 per square foot, with \$60 psq amortized over the term of the Lease and included in the Base Rent and \$20 psq amortized over the term and included in the Additional Rent. The Base Rent is currently \$15,299.75 with Additional Rent of \$2,462.32 for total monthly rent of \$17,762.07. The Lease Agreement, with amendments, is annexed hereto as Exhibit "A" and made a part hereof.

4. The Debtor's obligations under the Lease Agreement are guaranteed by the Debtor's principal, Joe Rowand.

5. At the Petition Date, the Debtor owed the Landlord \$137,404.48 representing over 8 months of unpaid rent following application of a \$66,117.09 security deposit. The Landlord filed suit in Durham County Superior Court, seeking to collect the rent and eject the Debtor before the chapter 11 case was filed.

6. Under the Lease Agreement, the Base Rent and Additional Rent (collectively, the "Rent") are due in advance on the first day of each calendar month. The Debtor has failed to pay the full amount of post-petition rent due under the Lease from and after May 10, 2010. The Rent due for the period of May 11 – May 31, 2010 (the "Stub Rent") totals \$12,605.34.

The Rent for June and July, 2010 totals \$35,524.14, and on August 1, Rent became due in the amount of \$17,762.07. Late fees total \$2,447.96. The Debtor has paid a total of \$16,000 in post-petition Rent, leaving a current balance due of \$60,339.51.

7. Pursuant to this Motion, Landlord seeks payment of all post-petition Rent and late fees due under the Lease Agreement from May 10, 2009 through and including August, 2010, or alternatively, the Landlord seeks an order finding that the Lease Agreement is rejected and requiring the Debtor to relinquish the premises to the Landlord without the need for further state court legal action.

8. During the past month, the Landlord has been discussing with the Debtor, through counsel, an arrangement by which the Debtor would remain in the premises through August 31, 2010 in consideration of acceptance by the Landlord of reduced Rent and an administrative claim for the balance of the Rent due post-petition through August 31. Even though the Landlord was agreeable to this arrangement and withheld filing this Motion several weeks ago, the Debtor informed the Landlord on August 4, 2010 that it is unable to pay the Rent as required by section 365(d)(3) of the Bankruptcy Code but will not agree to vacate the premises by August 31, 2010.

9. The Landlord, in anticipation of getting the premises back on or about August 31 with the approval of this Court and consent of the Debtor, has been trying to find a replacement tenant. It is critical to the Landlord, which is actually a subtenant itself, to find a paying tenant. It is an extreme financial burden for the Landlord to have the Debtor in the premises without paying the Rent due under the Lease Agreement.

10. The Monthly Report filed by the Debtor for May, 2010 showed revenue for May 11 – 31, 2010 of \$44,520.48 and expenses of \$40,000, not counting payment of any rent.

Mr. Rowand received payment of \$15,583 in salary and health insurance costing \$3,384 during the same period. The Monthly Report reflects that the Debtor sold consigned property for \$10,252.50 and had not paid the persons that consigned the art. Furthermore, a total of \$17,194.18 in payables is shown, but the Landlord is unsure whether this amount includes the rent due to the Landlord.

11. The Monthly Report for June, 2010 was filed on August 4, 2010. It reflects revenue of 24,731.07 and expenses of \$48,433.23. In June, no payments were made to the Landlord for rent. The amount due to parties for consigned property has increased to \$12,132 and trade payables other than rent total \$3,055.65. Again, Mr. Rowand took a salary of \$15,565.16 and received the benefit of health insurance costing \$3,338.

12. The Debtor is losing money while in chapter 11 and Mr. Rowand is the primary beneficiary of the revenue being generated to the detriment of the Landlord and other parties, including consignors who are not paid when their property is sold.

13. The Landlord is informed that the Debtor is proceeding with a liquidation sale of its assets which consist according to the Schedules of \$264,000 of inventory (at cost) owned by the Debtor. The Debtor intends to reject the Lease because the Debtor clearly cannot afford the Premises. However, the Debtor wishes to remain in the Premises until new premises are ready for occupancy, and the Landlord must not bear the burden of the Debtor's failure to plan adequately for a transition to new premises.

#### **RELIEF REQUESTED**

14. The Landlord seeks an order requiring the Debtor to timely perform all obligations under the Lease Agreement and allow fees to Landlord's counsel for this Motion,

or, alternatively if the Debtor cannot pay the full Rent, compel the Debtor to reject the Lease Agreement and immediately vacate the Premises

### **BASIS FOR THE RELIEF REQUESTED**

15. Section 365(d)(3) of the Bankruptcy Code requires that a debtor “timely perform all obligations ... arising from and after the order of relief under any unexpired lease of non-residential real property, until such lease is assumed or rejected, notwithstanding Section 503(b)(1).” 11 U.S.C. § 365(d)(3). The obligation to timely perform a debtor’s post-petition obligations under its executory lease is mandatory, not permissive. In re CSVA, Inc., 140 B.R.116, 119 (Bankr. W.D.N.C. 1992; In re Almacs, Inc., 196 B.R. 244 (Bankr. N.D.N.Y. 1996). This obligation runs for the period from the bankruptcy petition date through and until such lease is rejected. CSVA, 140 B.R. at 119; In re Calder, Inc., 217 B.R. 116 (Bankr. S.D.N.Y. 1998).

16. By explicitly calling for timely payment of all non-residential lease obligations, Section 365(d)(3) protects lessors from the danger of ever-increasing losses during the post-petition, pre-rejection period. See CSVA, 140 B.R. at 120-21 (citing legislative history to make the point that “Congress specifically recognized that a lessor of non-residential real property occupies a very unique, and almost vulnerable, position when a lessee files bankruptcy.”); In re Handy Andy Home Improvement Centers, Inc., 196 B.R. 87, 95 (Bankr. N.D. Ill. 1996) (similar). In In re Pudgies Dev. Of NY, Inc., 202 B.R. 832 (Bankr., S.D.N.Y. 1996), the Bankruptcy Court strictly construed Section 365(d)(3) to hold that non-residential lessors were entitled to immediate payment of post-petition, pre-rejection rent at the full rate expressed in the lease. Courts have held repeatedly that Section 365(d)(3), [the landlord] is entitled to a post-petition administrative rent claim for the full amount of the

payments required under its lease through the date that the Court authorized the [debtor's] rejection of each lease.”); In re Child World, Inc., 161 B.R. 571, 575 (S.D.N.Y. 1993) (stating that section 365(d)(3) “fix[es] the amount to be paid by debtor-tenants pending assumption or rejection of the lease at the amount provided in the lease ... and [requires] these payments to be paid ‘at the time required in the lease’”).

17. Even where debtors have filed their chapter 11 cases after the first day of the month, most courts have held that compelling a debtor to pay prorated rent during the first month of a proceeding is appropriate, finding that landlords are entitled to immediate payment of such rent while the debtor uses the property. See, In re Stone Barn Manhattan LLC, 398 B.R. 359 (Bankr. S.D.N.Y. 2008). A number of other courts have reached the same conclusion. See In re Furr’s Supermarkets, Inc., 283 B.R. 60 (Cir. B.A.P. 10th 2002); In re McCrory Corp., 210 B.R. 934, 940 (S.D.N.Y. 1998); In re Child World, Inc., supra; In re Ames Dept. Stores, Inc., 306 B.R. 43 (Bankr. S.D.N.Y. 2004); In re NETtel Corp., Inc., 289 B.R. 486 (Bankr. D.D.C. 2002); In re Rhodes, Inc., 321 B.R. 80 (Bankr. N.D.Ga. 2005). But see, In re R.H. Macy & Co., 152 B.R. 869 (Bankr. S.D.N.Y. 1993); aff’d, 1994 WL 482948 13 (S.D.N.Y. Feb. 23, 1994).

18. The Debtor should be directed to pay all post-petition Rent which comes due between the Petition Date and the date the Lease Agreement is assumed or rejected. The Debtor should also be required to provide evidence that it has adequate and appropriate insurance in place with respect to the Premises.

19. In addition to payment of the Rent due under the Lease Agreement, the Debtor should also reimburse Landlord for the costs associated with bringing this Motion.

20. The Lease Agreement provides that the Debtor must indemnify Landlord from, inter alia, costs, claims and expenses, including reasonable attorneys' fees and court costs, incurred to the extent such costs arise from the Debtor's breach of any of its obligations under the Lease (see section 16 of the Lease Agreement). Accordingly, Landlord should be reimbursed for its fees and expenses that have been incurred in connection with this Motion. (Lease governed by North Carolina law); also Three Sisters Partners, LLC v. Harden (In re Shangra-La, Inc.), 167 F.3d 843 (4th Cir. 1999) (recognizing that entitlement to attorneys' fees is dependent upon the terms of the lease and state law and that pursuant to Section 6-21.2 of the North Carolina General Statutes, statutory authority exists for recovery of attorneys' fees when permitted in the lease) (citations omitted).

21. Under Section 365(d)(4) of the Bankruptcy Code, the Lease Agreement shall be deemed rejected and the Debtor is required to immediately surrender the real property to the Landlord, if the Debtor does not assume or reject the Lease Agreement by the earlier of 120 days after the entry of the order for relief or the date of entry of an order confirming a plan. The Debtor can seek to extend the 120 day period, which expires in the Debtor's case on or about September 10, 2010, but considering the Debtor's inability to pay the Rent due, an extension should not be granted.

22. The upcoming end of the 120 day period under Section 365(d)(4) further justifies entry of an order finding that the Lease Agreement is rejected immediately and allowing the Landlord to take possession of the Premises. This will end the accrual of administrative rent which will negatively impact the estate and the Landlord. The assets of this estate may not be sufficient to pay all expected administrative expenses, much less unsecured creditors, of which the Landlord will be a significant component.

WHEREFORE, the Landlord respectfully requests the Court to require the Debtor to pay all administrative rent in full, plus attorneys fees related to this Motion, and/or alternatively find that the Lease Agreement is immediately rejected and require the Debtor to vacate the Premises immediately.

Dated: August 5, 2010

**NELSON MULLINS RILEY & SCARBROUGH LLP**

By: /s/ Terri L. Gardner  
Terri L. Gardner  
State Bar No. 9809  
GlenLake One, Suite 200  
4140 Parklake Avenue  
Raleigh, North Carolina 27612  
Telephone: (919) 329-3882  
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*Attorneys for Venable Tenant, LLC*

**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that the foregoing LANDLORD'S MOTION FOR ORDER (1) REQUIRING THE DEBTOR TO PAY POST-PETITION RENT AND FEES AND/OR (2) APPROVING THE REJECTION OF LEASE AGREEMENT AND REQUIRING THE DEBTOR TO VACATE PREMISES has been filed electronically in accordance with the Local Rules and was therefore served electronically on those entities that have properly registered for such electronic service, including:

*Debtor's Counsel:*

Richard M. Hutson, II, Esquire  
302 East Pettigrew Street  
Suite B-260  
P.O. Drawer 2252-A  
Durham, NC 27702

*Bankruptcy Administrator:*

Michael D. West, Esquire  
Bankruptcy Administrator  
P.O. Box 1828  
Greensboro, NC 27402

This 5<sup>th</sup> day of August, 2010.

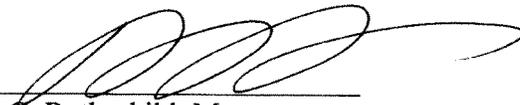
/s/ Terri L. Gardner

Terri L. Gardner

IN WITNESS WHEREOF, the parties hereto have executed this Lease under seal as of the day and year first set forth above.

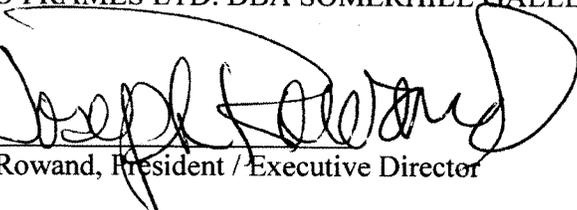
LANDLORD:

VENABLE TENANT, LLC

By:   
Andrew C. Rothschild, Manager

TENANT:

STUDIO FRAMES LTD. DBA SOMERHILL GALLERY

By:   
Joseph Rowand, President / Executive Director

THIS LEASE IS EXECUTED BY PETTIGREW STREET PARTNERS, LLC AND VENABLE REALTY, LLC FOR THE SOLE PURPOSE OF CONFIRMING THE PROVISIONS OF SECTION 25 (B) HEREOF.

PETTIGREW STREET PARTNERS, LLC

BY: VENABLE REALTY, LLC

By:   
Andrew C. Rothschild, Managing Member

VENABLE INVESTOR, LLC

BY: VENABLE MANAGER, LLC

By:   
Andrew C. Rothschild, Managing Member