

Exhibit A

In re Friendly's Ice Cream Corp., Inc., et al.
Case No. 11-13167 (KG)
Memorandum Order dated February 24, 2012

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

In re:) Chapter 11
)
AMICUS WIND DOWN CORPORATION,) Case No. 11-13167 (KG)
) (Jointly Administered)
Debtors.)
_____) **Re Dkt. Nos. 594, 630, 741**

MEMORANDUM ORDER

The Court has before it the Debtors' Notice of Rejection of Executory Contract and Unexpired Leases (the "Rejection Notice") (D.I. 594) and the Objection of Park Tysen Associates to Proposed Rejection of Lease (the "Objection") (D.I. 630). Upon review of the pleadings and following a hearing on February 21, 2012, the Court ORDERS that the Objection is sustained and the Debtors' lease rejection is denied without prejudice.

JURISDICTION

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

BACKGROUND

On March 17, 2008, Friendly Ice Cream Corporation ("Friendly" or "Debtors") and Park Tysen Associates LLC (the "Over-Landlord" or "Park Tysen") entered into a lease for property (the "Over-Lease") located at 2720 Hylan Boulevard, Staten Island, New York (the "Premises"). Subsequently, on March 28, 2008, Friendly entered into a sublease with Rappan Restaurants, Inc. (the "Subtenant" or Rappan") for the Premises (the "Sublease"). Rappan has been in sole possession of the Premises from the date the Sublease was executed until the present.

As part of the Debtors' first day pleadings, the Debtors filed the *Debtors' Motion for Entry of an Order Authorizing and Approving Expedited Procedures for (A) Rejection of Executory Contracts and Unexpired Leases and (B) Abandonment of Personal Property*, (the "Rejection Procedures Motion") (D.I. 5). On October 25, 2011, the Court entered an order approving the proposed rejection procedures (the "Rejection Procedures") for the rejection of executory contracts and unexpired leases (the "Lease Rejection Order") (D.I. 224). The Lease Rejection Order, (§2.a(iii)) provides that "the proposed effective date of the rejection of each such contract(s), which date may not be before the date of service of the Rejection Notice nor before the date the Debtors relinquish (or already have relinquished) control of the applicable premises by delivering keys and/or security codes to the affected landlord"

On December 30, 2011, the Debtors filed and serve the Rejection Notice on the Over-Landlord and Subtenant. The Rejection Notice proposed December 31, 2011, as the effective date of rejection of the Over-Lease between Friendly and Park Tysen and the Sublease between Friendly and Rappan. That same day, Friendly's general counsel sent a letter to both Rappan and Park Tysen (the "Rejection Letters") informing both parties that Rappan's continued possession of the property as a sublessee was a matter between Rappan and Park Tysen. On January 3, 2012, Rappan filed a petition for relief under chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of New York.¹

Finally, on January 9, 2012, the Over-Landlord filed its Objection to prevent rejection of the Over-Lease. The Over-Landlord interprets this Court's Lease Rejection Order as requiring the

¹ At the February 21, 2012, hearing, Rappan's counsel informed the Court that the Rappan Debtor is under the control of a Chapter 7 trustee.

Debtors to deliver the keys and/or security codes for the Premises to the Over-Landlord before the rejection is effective. Although Rappan ceased operating as of January 9, 2012, certain kitchen equipment and restaurant furniture remain on the Premises. As of February 21, 2012, the Debtors had not delivered the keys/and or security codes for the Premises to the Over-Landlord, but only surrendered the property through the Rejection Notice and Rejection Letters.

DISCUSSION

The Debtors argue that their service of the Rejection Notice and Rejection Letters is a valid rejection of the Over-Lease and that under section 365(h) of the Bankruptcy Code the Debtors are not required to deliver possession of the property to the Over-Landlord. The Debtors argue that for the rejection to be valid, all that is required is that the Debtors surrendered their interests in the Premises, even though the Subtenant had not relinquished its interest in the Premises.² The Court disagrees with the Debtors' arguments. The Bankruptcy Code and the Lease Rejection Order contemplate and require that the Debtors deliver, at least, constructive possession of the premises.

New York law provides that there is no privity between an owner/over-lessor and a sublessee. *Federated Retail Holding, Inc. v. Weatherly 39th Street, LLC, et al.*, 77 A.D.3d 573, 911 N.Y.S.2d 5 (1st Dep't 2010); *Clarkton Estates, Inc. v. Chiaro*, 122 Misc.2d 721, 471 N.Y.S.2d 942 (N.Y. City

² The Debtors rely on *In re CHI-CHI'S INC.*, 305 B.R. 396 (Bankr. D. Del. 2004) (J. Case) to support their argument. The Debtors cite *In re CHI-CHI's Inc.*, for the proposition that the effective date for a lease rejection is the "day the Debtors surrendered the premises to the Landlords, and the Landlords were able to enter into agreements with the current tenants." *Id.* at 399. This Court disagrees with the proposition of law because it disregards Section 365(h)(1)(A)(ii) of the Bankruptcy Code which explicitly provides that the subtenant retains its rights under the lease. Further, allowing a debtor-lessor to merely surrender the property to the over-landlord without delivering possession ignores the fact that there is no legal privity between the over-landlord and the subtenant, and the over-landlord will face significant legal obstacles if it wants to evict the subtenant. This is especially true if the over-landlord prefers to evict the current subtenant, rather than "enter into new agreements with the current tenants [the subtenant]."

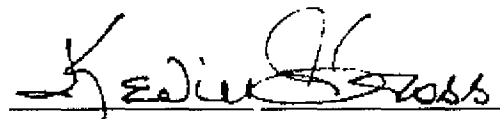
Civ. Ct. 1983). Additionally, the Bankruptcy Code further constrains an owner/over-landlord's right to compel an eviction of a non-debtor sublessee. Section 365(h)(1)(A)(ii) of the Bankruptcy Code provides that the rejection of a sub-lease allows the Subtenant to "retain its rights under the lease". The subtenant retains its rights under the lease even if it is not in physical possession of the premises. *Lee Road Partners, Ltd. v. Woolworth (In re Lee Road Partners, Ltd.)*, 169 B.R. 507 (E.D.N.Y. 1994). Rejection of the lease "frees the bankruptcy estate from its obligation to perform" but "it does not make the contract disappear." *Med. Malpractice Ins. Assoc. v. Hirsch (In re Lavigne)*, 114 F.3d 379, 387 (2d Cir. 1997) (quoting *In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 687, 703 (Bankr. S.D.N.Y. 1992)). Although it is now in a chapter 7 bankruptcy, the Subtenant is still in physical possession of the property. At the February 21, 2012, hearing, counsel indicated that there is still kitchen equipment and restaurant furniture on the Premises. Even if it attempts to evict the Subtenant, the Over-Landlord could face significant cost and legal challenges because the Over-Landlord is not in privity of contract with the Subtenant, and the Subtenant has retained all of its possessory rights under its sub-lease with the Debtors.

Because the Subtenant retains its possessory rights under the Sublease by application of the Bankruptcy Code and interpreting case law, the question is which party should bear the burden of obtaining legal possession of the property through state law actions in New York? The Debtors enjoyed the right, and the benefit, of the Sublease, and now they must also bear any burdens that result from the Sublease, including the present situation. The Debtors, not Park Tysen, are in privity of contract with the Subtenant, and the Debtors are best legally situated to resolve this situation in the New York courts. Moreover, this Court's Lease Rejection Order provided that the rejection would be effective once the Debtors (1) served the Rejection Notice, and (2) the "Debtors relinquish

(or already have relinquished) control of the applicable premises by delivering keys and/or security codes to the affected landlord." The Lease Rejection Order required delivery of possession of the property to the Over-Landlord, not merely surrender of the Debtors' interest in the Premises as the Debtors argue. The Debtors did not deliver possession of the property to Park Tysen because absent eviction proceedings in the New York courts, the Debtors can not unilaterally surrender the Subtenant's possessory rights in the Premises. Therefore, as is required under the Lease Rejection Order, the rejection shall be effective on the date that the Debtors deliver keys or security codes to Park Tysen for the Premises. Additionally, the Court suggests that the Debtors should (1) file a motion in the Subtenant's chapter 7 proceedings which are pending in the Eastern District of New York, for an order authorizing the chapter 7 trustee to abandon the Premises or relinquish its possessory interest in the Premises, or (2) bring a motion in the Subtenant's chapter 7 proceeding to lift the automatic stay to allow the Debtors to commence an eviction proceeding under New York law.

For the foregoing reasons IT IS ORDERED THAT the Park Tysen's Objection is sustained, and the Rejection of the Over-Lease will not be effective until the Debtors relinquish control of the Premises by possession to Park Tysen by wresting possession from Rappan.

Dated: February 24, 2012



KEVIN GROSS, U.S.B.J.