

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

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In re	*	
	*	
FARMLAND INDUSTRIES, INC.,	*	In Proceedings Under
	*	Chapter 11
Debtor	*	Case No. 02-50557-JWV
	*	
	*	
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**MOTION OF BERKSHIRE KANSAS CITY, LLC FOR ORDER PURSUANT TO
11 U.S.C. § 365(d)(3) COMPELLING DEBTOR TO PERFORM POST-PETITION
OBLIGATIONS UNDER LEASE OF NON-RESIDENTIAL REAL PROPERTY**

Berkshire Kansas City, LLC (“Berkshire”), hereby moves for an order compelling Farmland Industries, Inc., debtor in the above-captioned cases (the “Debtor”), to perform timely its obligations under that certain Lease Agreement dated August 11, 1999 (the “Lease”) and immediately pay all post-petition rents and other expenses that are nearly two weeks overdue. Section 365(d)(3) of the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, unambiguously commands the Debtor to pay pro-rated rent from the commencement of its bankruptcy case forward. Consistent with the statute, the Debtor should be compelled to pay this rent immediately.

In support of this Motion, Berkshire states as follows:

1. On May 31, 2002, the Debtor commenced the above-captioned case (the “Petition Date”).
2. The Debtor entered into the Lease on August 11, 1999. Slightly over two years remain in the Lease’s initial term, which runs through August 2004. The demised premises under the Lease (the “Premises”) includes an office building of approximately 235,000 square feet.

3. The Lease requires the Debtor to pay Berkshire annual “Basic Rent” of \$2,338,250 in monthly installments of \$194,854.17, due in advance on the first day of each month.

4. The Lease also requires the Debtor to pay all real estate taxes, special and general assessments, insurance premiums, utility charges, water and sewer charges, maintenance expenses, repair and replacement expenses, and any other cost, fee or expense incurred in the use, occupancy, ownership, operation, leasing or possession of the Premises. Included in these expenses is a monthly management fee of \$2,937.50 payable to Berkshire as additional rent for property management services provided by a third party (the “Management Fee”). The Management Fee is due on the first day of each month.

5. To date, Debtor has neither paid the installment Basic Rent nor the Management Fee due on June 1, 2002. The Landlord has contacted the Debtor to inquire about the status of the late payments; despite the Debtor’s initial assurances, the Debtor has indicated that the payments will not be forthcoming.

6. The late payments are not the Debtor’s only post-petition default under the Lease. In addition to the Basic Rent and Management Fee, the Debtor has an ongoing obligation to keep the Premises in good repair. However, portions of the Premises have fallen into serious disrepair. Specifically, the Landlord has notified the Debtor of two major slab failures in the multi-level parking garage, which present an ongoing structural and safety concern. As with the late payments, the Debtor has failed to perform its obligation to repair the Premises, thus endangering the structural integrity of the Premises and the safety of its occupants.

7. Section 365(d)(3) of the Bankruptcy Code provides, inter alia, as follows:

The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

11 U.S.C. § 365(d)(3).

8. In enacting section 365(d)(3), Congress intended to address the plight of landlords, who are compelled to extend credit to a debtor during its case:

In this situation, the landlord is forced to provide current services -- the use of its property, utilities, security, and other services -- without current payment. No other creditor is put in this position. . . . The bill would . . . requir[e] the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease. This timely performance requirement will insure that debtor-tenants pay their rent, common area, and other charges on time pending the trustee's assumption or rejection of the lease.

130 Cong. Rec. § 8894-95 (daily ed. June 29, 1984) (remarks of Sen. Hatch).

9. Indeed, this Court has held that the provisions of section 365(d)(3) contain “an unambiguous statement of Congressional intent that the lessors of nonresidential realty receive the rent provided for in the lease until the lease is rejected.” In re Tel-Central Communications, Inc., 212 B.R. 342, 344 (Bankr. W.D.Mo. 1997) (quoting In re Worths Stores Corp., 135 B.R. 112, 114-15 (Bankr. E.D.Mo. 1991)). See also Towers v. Chickering, (In re Pacific-Atlantic Trading Co.), 27 F.3d 401, 404 (9th Cir. 1994) (“The plain and unconditional language of the [Bankruptcy Code] demands that a trustee promptly pay the full amount of rent due under a nonresidential real property lease during the 60-day period pending assumption or rejection”).

10. A debtor can delay payment of rent during the first 60 days of a case only for “cause” shown. 11 U.S.C. § 365(d)(3). See also In re Dieckhaus Stationers of King of Prussia, Inc., 73 B.R. 969, 972 (Bankr. E.D. Pa. 1987) (“nonresidential lessor’s administrative expense claim arising under

section 365(d)(3) should be paid immediately unless the trustee establishes good cause for withholding payment.”). Cause may, for example, be shown where the landlord happens to be an insider of the debtor. In re Numedco, Inc., 1990 WL 256321, at *2 (Bankr. E.D. Pa. 1990).

11. Here, the Debtor has shown no cause for its failure to pay rent and other expenses immediately. It has not claimed, and cannot claim, that there is any basis for paying less than the rate of rent and other expenses provided under the Lease. The Debtor continues to occupy and possess the Premises.

12. In fact, the Debtor has good reason to pay its obligations timely, since default interest accrues under the Lease if rent has not been paid within five days after notice of default, and attorneys’ fees must be paid if Berkshire prevails on this Motion.

13. Moreover, the Debtor’s failures to pay the Basic Rent and the Management Fee, and to maintain the Premises, raise serious questions respecting the performance of its other obligations under the Lease, including but not limited to its obligation to pay electricity, gas, water, sewer and other utility bills, interior and exterior cleaning services, general building maintenance costs, real estate taxes, security service fees and insurance premiums. In light of these concerns, the Debtor should also be compelled immediately to perform all of its other obligations under the Lease, including, without limitation: (i) its obligations to pay the Management Fee; (ii) its obligation to keep the Premises in good repair; (iii) its obligation to pay electricity, gas, water , sewer and other utility bills; (iv) its obligation to pay for interior and exterior cleaning services; (v) its obligation to pay for general building maintenance; (vi) its obligation to pay all real estate taxes; (vii) its obligation to pay for security services; and (viii) its obligation to pay all insurance premiums. The Debtor should also be required to furnish, at Landlord’s

request, evidence reasonably satisfactory to Landlord that it has, in fact, performed these additional Lease obligations.

14. The Bankruptcy Code commands a debtor to timely perform under its leases; a debtor refuses to do so at its peril. Here, the Debtor has refused to pay rent and perform other obligations under the Lease, leaving Berkshire with a delinquency of \$194,854.17 for post-petition Basic Rent alone, exclusive of other expenses. As required by 11 U.S.C. § 365(d)(3), the Debtor should be ordered to pay the June 1, 2002 rent in full, in cash, with default interest and attorneys fees to Berkshire, plus the June 1, 2002 management fee to Facility Source, Inc., plus all other fees, bills, insurance premiums, real estate taxes and other expenses associated with the Premises.

WHEREFORE Berkshire Kansas City, LLC, respectfully requests that this Court enter an order:

1. Compelling Debtor immediately to pay the amount of \$194,854.17 as Basic Rent due under the terms of the Lease, together with default interest and attorneys' fees;
2. Compelling Debtor immediately to pay the amount of \$2,937.50 as additional rent due to Berkshire for the Management Fee;
3. Compelling Debtor to pay all other fees, bills, insurance premiums, real estate taxes and other expenses associated with the Premises and due as of the Petition Date;
4. Compelling Debtor to continue to pay all rent due under the Lease, the management fee and all other fees, bills, insurance premiums, real estate taxes and other expenses associated with the Premises, and to perform all other obligations under the Lease through the date of the final order of this Court approving the assumption or rejection of the Lease; and
5. Granting such additional relief as the Court deems necessary and appropriate.

Respectfully submitted,

BERKSHIRE KANSAS CITY, LLC

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