

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re: FLEMING COMPANIES, INC., et al. Debtors.)
)

) **Chapter 11 Case No. 03 - 10945 (MFW)**
)

) **Jointly Administered**
)

) **Hearing Date: April 21, 2003 @ 12:30 p.m.**
) **Objection Deadline: April 16, 2003**
)

**MOTION OF BRADLEY OPERATING LIMITED PARTNERSHIP FOR
ORDER ALLOWING AND DIRECTING IMMEDIATE PAYMENT OF ALL
POST-PETITION, PRE-REJECTION RENT AND LEASE OBLIGATIONS,
COMMENCING WITH THE APRIL 2003 RENT AND LEASE OBLIGATIONS,
AS ADMINISTRATIVE EXPENSES
PURSUANT TO 11 U.S.C. §§ 365(d)(3) AND 503(a), (b).**

Bradley Operating Limited Partnership (“Bradley”) by and through its undersigned counsel, hereby moves this Court for entry of an order, pursuant to 11 U.S.C. §§ 365(d)(3), 503(a) and (b), and 507(a)(1), for entry of an order allowing and directing the immediate payment, on a priority basis, of all unpaid post-petition, pre-rejection rent and other lease obligations, commencing with those due to be paid on April 1, 2003, owing by the Debtors to Bradley pursuant to certain Leases (defined below) of non-residential real property. In support of its Motion, Bradley states as follows:

JURISDICTION

1. On April 1, 2003 (the “Petition Date”), Fleming Companies, Inc. (“Fleming, Inc.”) and its affiliates, including Food 4 Less Beverage Company, Inc. (“Food 4 Less”) and Rainbow Food Group, Inc. (“Rainbow”) (collectively, “Debtors”), filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy

Code. Pursuant to 11 U.S.C. §301, commencement of that case constitutes an order for relief.

2. On April 3, 2003, the Court entered an order directing the procedural consolidation and joint administration of Debtors' Chapter 11 cases. On information and belief, Debtors have continued to operate their businesses as debtors-in-possession under 11 U.S.C. §§ 1107(a) and 1108.

3. This Court has jurisdiction over Bradley's Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (M) and (O).

BACKGROUND

4. At the time of the petition, there were in existence certain unexpired real estate leases (the "Leases") with respect to thirteen separate nonresidential real properties owned by Bradley and leased to Debtors. Bradley is the successor in interest to the lessor with respect to each of the Leases. The Leases are for retail spaces located in shopping centers and consist of the following.

The Austin Town Center Lease

5. On October 16, 1998, Bradley's predecessor in interest entered into that certain Shopping Center Lease (the "Austin Town Center Lease") whereby it leased to Fleming, Inc. certain retail space, consisting of premises located in a shopping center in Mower County, Minnesota, commonly known as the "Austin Town Center."

6. Fleming, Inc. continues to occupy those premises.

7. Pursuant to the Austin Town Center Lease, Debtor Fleming, Inc. was obligated to pay minimum rent in monthly increments of \$39,718.00, payable on the first day of the month.

8. In addition to the rent, Debtor was also obligated to pay its proportionate share of the common area maintenance (“CAM”) in monthly increments of \$6,668.37 each, payable on the first day of the month.

9. In addition, Debtor was obligated to pay its allocable portion of real estate taxes for the premises, on a monthly basis in the amount of \$8,364.00. Fleming, Inc. thus was required to pay \$8,364.00 to Bradley in taxes on April 1, 2003.

10. Additional payment obligations arise, and a statement of amounts due and owing to Bradley pursuant to the Austin Town Center Lease is attached hereto as Exhibit A.

The Bishop Heights Lease

11. On January 7, 1971 Bradley’s predecessor in interest entered into that certain Build and Lease Agreement (the “Bishop Heights Lease”) whereby they leased to Fleming, Inc. certain retail space, consisting of premises in Topeka, Kansas, commonly known as “Bishop Heights.”

12. Fleming, Inc. continues to occupy those premises.

13. Pursuant to the Bishop Heights Lease, Debtor Fleming, Inc. was obligated to pay minimum rent in monthly increments of \$3,186.00, with payments due on the first day of each month.

14. Additional payment obligations arise, and a statement of amounts due and owing under the Bishop Heights Lease is attached hereto as Exhibit B.

The Burlington Plaza West Lease

15. On June 15, 1988, Bradley's predecessor in interest entered into that certain Shopping Center Lease (the "Burlington Plaza West Lease") whereby it leased to Scrivner, Inc. certain retail space in a shopping center in Burlington, Iowa, commonly known as "Burlington Plaza West." Fleming, Inc. acquired and/or merged with Scrivner, Inc. in 1994 and is Scrivner, Inc.'s successor in interest to the Burlington Plaza West Lease.

16. Fleming, Inc. continues to occupy the premises.

17. Pursuant to the Burlington Plaza West Lease, Debtor Fleming, Inc. was obligated to pay minimum rent in monthly increments of \$26,015.00, with payments due on the first day of each month.

18. Pursuant to the Burlington Plaza West Lease, Debtor Fleming, Inc. also was obligated to pay its allocable portion of the CAM which was payable in monthly increments of \$3,046.87, due on the first day of the month.

19. Additional payment obligations arise under the Lease, and a statement of the amounts due and owing under the Burlington Plaza West Lease is attached hereto as Exhibit C.

The Central Valu Center Lease

20. In or about September, 1983, Bradley's predecessor in interest entered into that certain Shopping Center Lease Agreement (the "Central Valu Center Lease")

whereby it leased to Applebaum Food Markets, Inc. certain retail space, consisting of premises in a shopping center located in Columbia Heights, Minnesota, commonly known as “Central Valu Center.” Through a series of name changes, mergers and assignment and assumption agreements, the Central Valu Center Lease was assigned to Fleming, Inc., as tenant. Fleming, Inc. continues to occupy those premises.

21. Pursuant to the Central Valu Center Lease, Debtor Fleming, Inc. was obligated to pay minimum rent in monthly increments of \$44,209.00, with payments due on the first day of each month.

22. Debtor was also obligated under the Central Valu Center Premises Lease to make monthly payments in the amount of \$2,195, payable on the first day of the month for a roof replacement.

23. In addition to the rent, Debtor was also obligated to pay its allocable portion of the CAM on the Central Valu Center Premises which, for the year 2003 was payable in monthly increments of \$8,167.62 each, on the first day of each month.

24. Additional payment obligations arise under the Lease, and a statement of the amounts due and owing on the Central Valu Center Lease is attached hereto as Exhibit D.

The Edgewood Shopping Center Lease

25. On July 30, 1990, Bradley’s predecessor in interest entered into that certain Build and Lease agreement (the “Edgewood Shopping Center Lease”) whereby it leased to Fleming, Inc. certain retail space, consisting of premises in Lancaster County, Nebraska, commonly known as the “Edgewood Shopping Center.”

26. Fleming, Inc. continues to occupy those premises.

27. Pursuant to the Edgewood Shopping Center Lease, Debtor Fleming, Inc. was obligated to pay minimum rent in monthly increments of \$38,567.57, with payments due on the twentieth day of the following month. Fleming, Inc. thus is required to pay \$38,567.57 in rent to Bradley on April 20, 2003.

28. Pursuant to the Edgewood Shopping Center Lease, Debtor Fleming, Inc. also was obligated to pay an allocable portion of the CAM in monthly increments of \$2,855.00 each.

29. Additional payment obligations arise under the Edgewood Shopping Center Lease, and a statement of amounts due and owing under that Lease is attached hereto as Exhibit E.

The Hub West Lease

30. On July 2, 1991, Bradley's predecessor in interest entered into that certain Shopping Center Lease (the "Hub West Lease") whereby it leased to Gateway Foods, Inc. certain retail space, consisting of premises located in a shopping center in Richfield, Minnesota, commonly known as "Hub West." In February, 1996, Gateway Foods, Inc. merged into Fleming, Inc. and, on information and belief, Fleming, Inc. assumed all of Gateway Foods, Inc.'s obligations under the Hub West Lease. Fleming, Inc. continues to occupy those premises.

31. Pursuant to the Hub West Lease, Debtor Fleming, Inc. was obligated to pay minimum rent in monthly increments of \$44,583.23, with payments due on the first day of each month.

32. Pursuant to the Hub West Lease, Debtor Fleming, Inc. also was obligated to pay its allocable portion of the CAM which was payable in monthly increments of \$\$7,174.62 each, due on the first day of the month.

33. Additional payment obligations arise under the Hub West Lease, and a statement of amounts due and owing under that Lease is attached hereto as Exhibit F.

The Madison Plaza Lease

34. On October 18, 1988, Bradley's predecessor entered into that certain Lease (the "Madison Plaza Lease") whereby it leased to Godfrey Company certain retail space, consisting of premises in a shopping center in Madison, Wisconsin, commonly known as "Madison Plaza." Through a series of mergers and acquisitions, Fleming, Inc. acquired the Madison Plaza Lease and, on information and belief, Fleming, Inc. assumed all of the obligations originally held by Godfrey Company under that Lease.

35. Fleming, Inc. continues to occupy those premises.

36. Pursuant to the Madison Plaza Lease, Debtor Fleming, Inc. was obligated to pay minimum rent in monthly increments of \$37,916.67, with payments due on the first day of each month.

37. Additional payment obligations arise under the Madison Plaza Lease, and a statement of amounts due and owing under that Lease is attached hereto as Exhibit G.

The Marketplace at 42 Lease

38. On April 20, 1998, Bradley's predecessor in interest entered into that certain Shopping Center Lease (the "Marketplace at 42 Lease") whereby it leased to

Fleming, Inc. certain retail space, consisting of premises in Scott County, Minnesota, commonly known as the “Marketplace at 42.”

39. Fleming, Inc. continues to occupy those premises.

40. Pursuant to the Marketplace at 42 Lease, Debtor Fleming, Inc. was obligated to pay minimum rent in monthly increments of \$43,752.50, with payments due on the first day of each month.

41. Pursuant to the Marketplace at 42 Lease, Debtor Fleming, Inc. also was obligated to pay an allocable portion of the real estate taxes on the Marketplace at 42 Premises, including the currently due amount of \$16,927.00.

42. In addition to the rent and taxes, Debtor was also obligated to pay its allocable portion of CAM which was payable in monthly increments of \$7,292.45 each, payable on the first day of the month.

43. Additional payment obligations arise under the Marketplace at 42 Lease, and a statement of amounts due and owing under that Lease is attached hereto as Exhibit H.

The Meadows Lease

44. On or about March 18, 1987, Bradley’s predecessor in interest entered into that certain Shopping Center Lease (the “Meadows Lease”) whereby it leased to Scrivner, Inc. certain retail space, consisting of retail space located in Lincoln, Nebraska, commonly known as the “Meadows.” On information and belief, Debtor Food-4-Less assumed Scrivner, Inc.’s obligations under the “Meadows Lease” in 1987.

45. Food-4-Less continues to occupy those premises.

46. Pursuant to the Meadows Lease, Debtor Food-4-Less was obligated to pay minimum rent in monthly increments of \$22,916.67, with payments due on the first day of each month.

47. Pursuant to the Meadows Lease, Debtor Food-4-Less also was obligated to pay its allocable portion of the CAM which was payable in monthly increments of \$5,237.54 each, payable on the first day of the month.

48. Debtor Food-4-Less was also obligated under the Meadows Lease to make monthly escrow payments for insurance and water, in the amounts of \$359.00 and \$863.21, respectively, payable on the first day of the month.

49. Additional payment obligations arise under the Meadows Lease, and a statement of amounts due and owing under that Lease is attached hereto as Exhibit I.

The Oak Creek Center Lease

50. On March 4, 1988, Bradley's predecessor entered into that certain Lease (the "Oak Creek Center Lease") whereby it leased to Godfrey Company certain retail space, consisting of retail premises in Oak Creek, Wisconsin, commonly known as "Oak Creek Center." Through a series of mergers and acquisitions, Fleming, Inc. acquired the Oak Creek Center Lease and, on information and belief, Fleming, Inc. assumed all of the obligations originally held by Godfrey Company under that Lease.

51. Fleming, Inc. continues to occupy those premises.

52. Pursuant to the Oak Creek Center Lease, Debtor Fleming, Inc. was obligated to pay minimum rent in monthly increments of \$22,416.66, with payments due on the first day of each month.

53. Additional payment obligations arise under the Oak Creek Center Lease, and a statement of amounts due and owing under that Lease is attached hereto as Exhibit J.

The Park Plaza Lease

54. Bradley's predecessor entered into that certain lease agreement (the "Park Plaza Lease") whereby it leased to Godfrey Company certain retail space, commonly known as "Park Plaza." Through a series of mergers and acquisitions, Fleming, Inc. acquired the Park Plaza Lease and, on information and belief, Fleming, Inc. assumed all of the obligations originally held by Godfrey Company under that Lease.

55. Fleming, Inc. continues to occupy those premises.

56. Pursuant to the Park Plaza Lease, Debtor Fleming, Inc. was obligated to pay minimum rent in monthly increments, with payments due on the first day of each month.

57. Additional payment obligations arise under the Park Plaza Lease, and a statement of amounts due and owing under that Lease is attached hereto as Exhibit K.

The Terrace Mall Lease

58. On July 31, 1978, Bradley's predecessor in interest entered into that certain Shopping Center lease agreement (the "Terrace Mall Lease") whereby it leased to National Super Markets certain retail space, consisting of retail premises located in Robinsdale, Minnesota, commonly known as the "Terrace Mall." Through a series of assignment and assumption agreements and mergers and acquisitions, Debtor Rainbow

assumed all of the obligations originally held by National Super Markets under that Lease.

59. Rainbow continues to occupy those premises.

60. Pursuant to the Terrace Mall Lease, Debtor Rainbow was obligated to pay minimum rent in monthly increments of \$38,254.00, with payments due on the first day of each month.

61. Pursuant to the Terrace Mall Lease, Debtor Rainbow also was obligated to pay an allocable portion of the CAM in monthly increments of \$8,727.52 each, payable on the first day of each month.

62. Debtor Rainbow was also obligated to make monthly payments of \$100 for merchant's association dues.

63. Additional payment obligations arise under the Terrace Mall Lease, and a statement of amounts due and owing under that Lease is attached hereto as Exhibit L.

The White Bear Hills Lease

64. On November 30, 1989, Bradley's predecessor in interest entered into that certain lease agreement (the "White Bear Hills Lease") whereby it leased to Gateway Foods, Inc. certain retail space, consisting of premises in White Bear Lake, Minnesota, commonly known as "White Bear Hills." Through a series of mergers and assignment agreements, Fleming, Inc. acquired the White Bear Hills Lease and, on information and belief, Fleming, Inc. assumed all of the obligations originally held by Gateway Foods, Inc. under that Lease.

65. Fleming, Inc. continues to occupy those premises.

66. Pursuant to the White Bear Hills Lease, Debtor Fleming, Inc. was obligated to pay minimum rent in monthly increments of \$21,887.85, with payments due on the first day of each month.

67. Pursuant to the White Bear Hills Lease, Debtor Fleming, Inc. also was obligated to pay its allocable portion of the CAM, in monthly increments of \$3,315.66 each, payable on the first day of each month.

68. Pursuant to the White Bear Hills Lease, Debtor Fleming, Inc. was also obligated to make monthly insurance payments of \$555.14, payable on the first day of the month.

69. Additional payment obligations arise under the White Bear Hills Lease, and a statement of amounts due and owing under that Lease is attached hereto as Exhibit M.

DEBTORS' FAILURE TO MEET THEIR APRIL 2003 LEASE OBLIGATIONS

70. Debtor Fleming, Inc. failed to pay the rent, taxes, CAM and/or other amounts payable on April 1, 2003 under the Austin Town Center Lease, the Bishop Heights Lease, the Burlington Plaza West Lease, the Central Valu Center Lease, the Hub West Lease, the Madison Plaza Lease, the Marketplace at 42 Lease, the Oak Creek Center Lease, the Park Plaza Lease and the White Bear Hills Lease. Debtor Fleming, Inc. is due to make payments under the Edgewood Shopping Center Lease on April 20, 2003.

71. Debtor Food-4-Less failed to pay the rent, taxes or CAM payable on April 1, 2003 under the Meadows Lease.

72. Debtor Rainbow failed to pay the rent, taxes or CAM payable on April 1, 2003 under the Terrace Mall Lease.

DISCUSSION

73. Pursuant to 11 U.S.C. §365(d)(3), Debtors are required (with certain exceptions not relevant here) to “timely perform” all of their obligations “arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected... .” It is well-established that the legislative purpose of §363(d)(3) was to alleviate the “heavy economic burden” previously imposed on landlords, whose rental payments could be deferred by bankruptcy courts until the confirmation of a plan of reorganization. In re Montgomery Ward Holding Corp., 268 F.3d 205, 210 (3d Cir. 2001).

74. All of the rental and other monthly payments Bradley seeks in this Motion, were not payable under the Leases until April 1, 2003, the same day as the order for relief in this case. It is well-settled that “where rent is payable on a certain day, the tenant has the whole of that day in which to make payment. So, proceedings by the landlord commenced on the day the rent is payable to enforce payment of rent are premature.” 49 Am Jur 2d, Landlord and Tenant §713 (1995).

75. Consequently, the rents and other obligations payable on April 1, 2003 under the Leases did not actually come due until, at the earliest, midnight on April 1, 2003, and Bradley could not have commenced proceedings to enforce Debtors’ payment obligations until after that time. The Third Circuit Court of Appeals has held expressly that “an obligation arises under a lease for the purposes of §365(d)(3) when the legally

enforceable duty to perform arises under that lease.” In re Montgomery Ward Holding Corp., 268 F.3d at 211. Thus, all of the April 1, 2003 rental and other Lease obligations Bradley seeks in this Motion came due, and therefore arose “from and after the order for relief,” and Debtors are required to make those payments under §365(d)(3).

76. Similarly, in In re UAL Corp., 2003 WL 1701974 at *4 (Bankr. N.D. Ill 2003), the bankruptcy judge first noted that if an obligation becomes “payable” during the period when the debtor has the option to assume or reject the lease, they are payable under §365(d)(3). Conversely, obligations already past due at the time of the order for relief are not payable under that provision because “it is not possible for a trustee to make a timely payment of a lease obligation that was past due at the time the bankruptcy case was filed”. Id., 2003 WL 1701974 at *4. In this case, the April 1, 2003 Lease obligations fall into the former category. They were not past due when the order for relief was entered by virtue of Debtors’ bankruptcy filing. Rather, Debtors could timely have paid all of their obligations under the Leases after its entry, and they thus were required to do so. Indeed, because the Debtors could have satisfied their April 1 2003 Lease obligations in a timely fashion under the Leases after the commencement of the case, those payment obligations fall well within the plain language of §365(d)(3).

77. Debtors have failed to comply with their obligations under 11 U.S.C. §365(d)(3) by failing to pay the rent, taxes, CAM and other obligations payable under the Leases on April 1, 2003. Bradley thus is entitled to recover those sums immediately pursuant to 11 U.S.C. §365(d)(3) and 11 U.S.C. §503(b) and is entitled to treatment of its claims for those amounts on an administrative priority basis. See, In re Valley Media.

Inc., 290 B.R. 73, 76 (Bankr. D. Del. 2003) (holding that §365(d)(3) affords administrative status to unpaid rent and taxes for pre-rejection period); and see, In re Telesphere Communications, Inc., 148 B.R. 525, 531-32 (Bankr. N.D. Ill 1992) (holding that “operational payments ... enjoy a de facto priority over other administrative expenses”); Cf., In re Microvideo Learning Systems, Inc., 232 B.R. 602, 604-05 (Bankr. S.D.N.Y. 1999) (holding that, “absent cause shown by the debtor, the court should direct the debtor to immediately pay the claim” of a landlord seeking pre-rejection rent payments under §365(d)(3)), aff’d, 254 B.R. 90 (S.D.N.Y. 1999), aff’d, 227 F.3d 474 (2d Cir. 2000).

78. In any case, even if the Debtors’ obligations to make Lease payments payable on April 1, 2003 are somehow deemed to have arisen prior to the order for relief and thus are not payable under §365(d)(3), Debtors’ use and occupancy of the leased premises under the Leases nevertheless entitles Bradley to recover rent and other amounts immediately pursuant to §503(b) as administrative expenses. E.g., In re HQ Global Holdings, Inc., 282 B.R. 169, 174 (Bankr. D. Del. 2002) (finding §503(b) applicable to administrative claims for “stub period” rents, but deferring liquidation of the claims); In re UAL Corp., 2003 WL 1701974 at *5 (holding that §365(d)(3) does not require any change in the accepted practice of allowing “an administrative claim under §503 for rent relating to any period in which rental property was occupied by the debtor regardless of when the rent was payable.”).

79. Section 503(b) authorizes recovery of the “actual, necessary costs and expenses of preserving the estate ...” 11 U.S.C. §503(b)(1)(A). Moreover, there exists a

presumption that the rent fixed in a rental agreement is the reasonable rent. E.g. In re HQ Global Holdings, Inc., 282 B.R. at 174; In re PYXSYS Corp., 2003 WL 103208 at *7 (Bankr. D. Mass. 2003) (holding that “the terms of the lease should be used to value the benefit conferred by the use of the premises in the absence of evidence that said terms were unreasonable”).

80. Consequently, Bradley seeks, in the alternative, an order directing Debtors to make immediate payment of the rents and other obligations due April 1, 2003 under the Leases, at the rates specified in the Leases, as administrative expenses under 11 U.S.C. §503(b)(1).

WHEREFORE, Bradley respectfully requests that this Court enter an order:

A. Compelling the Debtor Fleming, Inc. to make immediate payment to Bradley of all of the Lease obligations payable April 1, 2003 under the Austin Town Center Lease, the Bishop Heights Lease, the Burlington Plaza West Lease, the Central Valu Center Lease, the Hub/Hub West Lease, the Madison Plaza Lease, the Marketplace at 42 Lease, the Oak Creek Center Lease, the Park Plaza Lease and the White Bear Hills Lease pursuant to 11 U.S.C. §365(d)(3) and under 11 U.S.C. §503(b)(1) and compelling it to make timely payments thereafter of all Lease obligations for these leases, including the rental and other payments due on April 20, 2003 under the Edgewood Shopping Center Lease;

B. Compelling the Debtor Food-4-Less to make immediate payment to Bradley of the rent and all other obligations that were payable April 1, 2003 under the Meadows Lease pursuant to 11 U.S.C. §365(d)(3) and under 11 U.S.C. §503(b)(1) and compelling it to make timely payments thereafter of all Lease obligations for that lease;

C. Compelling the Debtor Rainbow to make immediate payment to Bradley of the rent that was payable on April 1, 2003 under the Terrace Mall Lease pursuant to 11 U.S.C. §365(d)(3) and under 11 U.S.C. §503(b)(1) and compelling it to make timely payments thereafter of all Lease obligations for that lease; and

D. Granting Bradley such other and further relief, including the payment of reasonable attorneys' fees and costs, as this Court deems just and proper.

ROSS & HARDIES

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