

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

2003 APR 14 AM 9:51

In the Matter of)
)
FLEMING COMPANIES, et al.) Chapter 11
) Case No. 03 B 10945 (MFW)
)
)

**LIMITED OBJECTION BY RAMCO-GERSHENSON, INC. TO THE DEBTORS'
REJECTION OF DEBTORS' STORE LOCATED IN CRESTVIEW, FLORIDA**

Ramco-Gershenson, Inc., ("Ramco-Gershenson"), by its undersigned counsel, submits this limited objection, ("Objection"), to Debtors' Rejection of Debtor's Store located in Crestview, Florida, for the reasons set forth herein.

I. Introduction.

1. As of the petition date, Ramco-Gershenson was the managing agent for one of Debtors' stores, (hereinafter the "Crestview Store"), in which the Debtors had subleased their location to another retailer—Big Lots. The Crestview Store contains approximately 28,000 square feet, subject to a Lease Agreement dated December 19, 1985 ("Lease") between Ramco-Gershenson Properties, L.P., as successor and Fleming Companies, as assignee. Big Lots, as sublessee, is operating from Debtors' Crestview Store and continues to operate as of the date of this limited objection.

2. On April 8, 2003, Ramco Gershenson received Debtors' Motion seeking to reject the Lease ("Motion").

3. The Motion states that the rejection of the Crestview Store shall become effective on

April 1, 2003. However, the Debtors are not surrendering the Crestview Store to Ramco-Gershenson on April 1, 2003, since the premises is subject to a sublease between Big Lots and Debtors. The term of the sublease runs until September 17, 2006. Debtors do not seek in their Motion to reject the sublease.

4. Ramco-Gershenson objects to the Motion and requests that this Court modify those portions of the Order which make rejection of the Crestview Store effective on April 1, 2003. In this instance, Big Lots may continue to pay rent to the debtor-entity, and retain possession of the Crestview Store, under section 365(h)(1)(A)(ii) of the Bankruptcy Code. The terms of the Debtors' sublease with Big Lots differ from those of the Lease and are not acceptable to Ramco-Gershenson. The Motion does not address the Catch 22 in which Ramco-Gershenson is placed by the Debtors' rejection of a lease for premises subject to a sublease between a debtor-entity and a third party. Ramco-Gershenson requests that the Court modify its Order to address the following issues:

- a. the Debtors' inability to surrender possession of the Crestview Store to Ramco-Gershenson;
- b. whether the debtor-entity intends to forward the rent and other lease charges, it receives from Big Lots or Big Lots has pre-paid over to Ramco-Gershenson;
- c. the appropriate forum for resolving disputes between Big Lots and Ramco-Gershenson.

Until these issues are resolved, Debtors should not be permitted to cut off Ramco-Gershenson's rights to either administrative rent under the Lease or immediate possession of the Crestview Store.

II. Until the Debtors Actually Surrender the Crestview Store To Ramco-Gershenson, the Primary Lessor Should Retain Its Right To Pursue Claims for Post-Petition Rent.

5. Based on the Motion it appears that the Debtors propose not to pay any rent to Ramco-Gershenson for the Crestview Store after April 1, 2003, although this location will not be surrendered to Ramco-Gershenson. When the Debtors filed their Motion, the Debtors did not address their post-petition obligation to pay rent to primary lessors, pending surrender of the locations like the Crestview Store, which are subject to subleases. Consequently, the proposed order may permit the Debtors to collect rent from Big Lots under section 365(h)(1)(A)(ii) of the Bankruptcy Code, without paying anything to Ramco-Gershenson. At a minimum, Ramco-Gershenson seeks a modification of the proposed order to condition rejection of the Crestview Store on immediate payment to Ramco-Gershenson of all funds Debtors receive from Big Lots.

6. Merely turning over the sublease payments does not resolve the issue, however. The plain language of the Bankruptcy Code forecloses the scenario proposed by Debtors. The relevant language of section 365(d)(3) requires:

The trustee shall timely perform all the obligations of the debtor, . . . , 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.

Even when a lessor's claims for rent exceed the reasonable value of the actual use of the property, section 365(d)(3) entitles these claims to administrative priority. *See, In re Cukierman*, 265 F.3d 846 (9th Cir. 2001); *Handy Andy Home Improvement Centers Inc., v. National Terminals Corporation*, 144 F. 3d 1125 (7th Cir. 1998).

7. In this case, the Debtors exercised their business judgment, pursuant to section 365(a) of the Bankruptcy Code, and selected the Crestview Store for rejection. However, there is no

provision in the Bankruptcy Code which allows a debtor to cut off its obligations under section 365(d)(3) by a volitional exercise of its business judgment. Rejection of a lease occurs by operation of law pursuant to section 365(d)(4) of the Bankruptcy Code, when a debtor does not assume a lease within the requisite time period. In pertinent part section 365(d)(4) states: "the trustee shall immediately surrender such nonresidential real property to the lessor". The term "surrender" is not defined in the Bankruptcy Code. However, under classic real estate principles "surrender" "is an agreement by the landlord and tenant to terminate the lease or tenancy, followed by delivery of possession of the premises to the landlord." *Real Estate Law, 11th Ed, Raymond J. Werner §41.22, p. 496.* The requirement that a debtor immediately deliver a rejected location to the lessor is supported by the legislative history and purpose of section 365(d)(4). "[T]his immediate surrender of the premises upon rejection of the lease was to enable the lessors to once again rent the premises and to earn income from the demised premises." *In re Bernard, 69 B.R. 13, at 14 (Bankr. D. Haw. 1986).*

8. Since immediate delivery of the premises is required when rejection occurs by operation of law under section 365(d)(4), the same rationale requires immediate delivery of the premises when a debtor exercises its business judgment and rejects a lease under section 365(a). Without delivery, the lessor is unable to rent the premises and earn income. There is no rationale basis for requiring delivery when rejection occurs by operation of law, but excusing delivery when objection occurs as a result of a debtor's volitional act.

9. Ramco-Gershenson anticipates the Debtors may cite *Chatlos Systems, Inc. v. Kaplan, 147 B.R. 96 (D. Del., 1992)*, to support an argument that the rejection of the Crestview Store should be effective on April 1, 2003, despite the presence of Big Lots as a subtenant. However, the *Chatlos*

Systems decision also included an order requiring the debtor to pay the primary lessor “any funds paid to [the Debtor] by [the Subtenant] as rental payments. . .”. *Id.* 147 B. R. at 101. The Motion does not condition rejection of the Crestview Store on a requirement that the Debtors to turn over to Ramco-Gershenson any funds it receives from Big Lots.

10. The decision in *Chatlos Systems, Inc. v. Kaplan*, 147 B.R. 96 (D. Del., 1992), also holds that a primary lessor may be forced to pursue possession of the rejected premises under applicable state law. However the *Chatlos Systems* decision leaves open the question of whether the appropriate forum is federal bankruptcy court or state court. (“Whether [the Primary Landlord] should have looked to the courts of New Jersey or to a federal bankruptcy court to regain possession of the Property from [the Subtenant] is a question which must await resolution until another day. . . .”) (*Chatlos Systems, Inc. v. Kaplan*, 147 B.R. at 100).

11. In this case, Ramco-Gershenson is requesting that any rejection of a location subject to a sublease with one of the debtor-entities not occur until the later of (a) the date Debtors tender possession of the premises in broom-clean condition, with keys and without subtenants, or (b) sixty (60) days after effective date of the order permitting the rejection of the Lease. Sixty days is the minimum period of time necessary to allow a lessor, like Ramco-Gershenson, to communicate with the subtenant, and institute an adversary proceeding against the subtenant, if surrender or other acceptable arrangements cannot be made.

Wherefore, Ramco-Gershenson respectfully requests that this Court enter an Order:

a. Conditioning any effective rejection date for the Crestview Store to the later of (a) the date Debtors tender possession of the premises in broom-clean condition, with keys and without subtenants, or (b) sixty (60) days after effective date of the order permitting the rejection of the

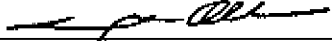
Lease;

b. Authorizing that any personal property remaining at the premises after the "Rejection Date" shall be deemed abandoned;

c. Conditioning rejection at Ramco-Gershenson Centers on immediate payment to Ramco-Gershenson of all funds received by the Debtors under a sublease with Debtor entities including any pre-paid funds applicable to any period after the effective date of rejection.

Respectfully submitted,

Ramco-Gershenson, Inc.

By: 

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Southfield, Michigan 48034
248-728-1630

Date: April 11, 2003

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In the Matter of)	
)	Chapter 11
FLEMING COMPANIES, et al.)	Case No. 03 B 10945 (MFW)
)	
)	

**ORDER CONDITIONING EFFECTIVE REJECTION OF UNEXPIRED REAL
PROPERTY LEASES ON SURRENDER**

This matter having come before the Court on the Limited Objection By Ramco-Gershenson, Inc., to the Debtors' Motion to rejection of Debtors' store located in Crestview, Florida, due notice having been given and the Court being fully informed in the premises, it is hereby ordered as follows:

1. The effective rejection date for Debtors' store located in Crestview, Florida and subject to a sublease between a debtor entity and a third party shall be the later of (a) the date Debtors tender possession of the premises in broom-clean condition, with keys and without subtenants, or (b) sixty (60) days after effective date of the order permitting the rejection of the Lease;
2. Any personal property remaining at the premises of a rejected location after the effective rejection date shall be deemed abandoned;
3. Any effective rejection is conditioned upon immediate payment to Ramco-Gershenson of all funds received by the Debtors by the sublessee for lease charges including any pre-paid charges applicable to the period following the effective date of rejection;

April __, 2003

Bankruptcy Judge Mary F. Walrath

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

7/23/03 14:00:51

In re:

FLEMING COMPANIES, INC., et. al.

Debtors.

Chapter 11

Case No: 03-10945 (MFW)
(Jointly Administered)
Related Docket No. 13

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

STEPHANIE HALL, being first duly sworn, deposes and says that on the 11TH day of April 2003, she served a copy of Entry of Appearance, Request for Notice and Request to Be Added to Mailing Matrix and this Proof of Service upon:

Clerk of the Court
United States Bankruptcy Court
824 Market Street, 5th Floor
Wilmington, Delaware 19801
VIA OVERNIGHT MAIL; Tracking Number: 17598905553

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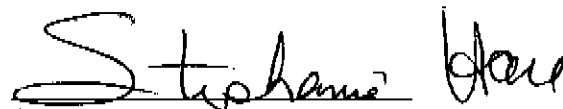
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by placing same in envelopes properly addressed and depositing said envelopes in the U.S. mail in Southfield, Michigan, with first class postage fully prepaid thereon.


STEPHANIE HALL