

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

In re:)	Chapter 11
)	
FLEMING COMPANIES, INC., <u>et. al.</u> ,)	Case No. 03-10945 (MFW)
)	(Jointly Administered)
Debtors.)	
)	Hearing Date: August 13, 2003 @ 1:00 PM
)	Objections Due: August 6, 2003

**MOTION OF RMS PROPERTIES II LLC TO COMPEL PAYMENT OF
POST-PETITION OBLIGATIONS PURSUANT TO 11 U.S.C. § 365(d)(3)**

PLEASE TAKE NOTICE that RMS Properties II LLC has filed the attached Motion To Compel Payment Of Post-Petition Obligations Pursuant To 11 U.S.C. § 365(D)(3).

HEARING ON THE MOTION will be on AUGUST 13, 2003 at 1:00 P.M.

OBJECTIONS to the relief requested herein must be filed by AUGUST 6, 2003.

At the time of filing any objection, you must also serve a copy of the response upon movant's attorneys:

William D. Sullivan, Esquire
Charles J. Brown, III, Esquire
ELZUFON AUSTIN REARDON
TARLOV & MONDELL, P.A.
300 Delaware Avenue, 17th Floor
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(302) 428-3181

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Tel: (617) 261-0100
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IF YOU FAIL TO RESPOND TO THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED WITHOUT A HEARING.

DATED: July 21, 2003

ELZUFON, AUSTIN, REARDON,
TARLOV & MONDELL, P.A.

/s/ Charles J. Brown, III
William D. Sullivan (No. 2820)
Charles J. Brown (No. 3368)
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RMS Properties II LLC (“RMS”) hereby moves the Court to enter an Order compelling Fleming Companies, Inc. (the “Debtor”) to pay its obligations to RMS arising from and after the order for relief (April 1, 2003) in these cases pursuant to an unexpired lease of non-residential real property dated June 28, 2002 for the rental of premises located at 6300 West Brown Deer Road, Milwaukee, Wisconsin (the “Milwaukee Lease”). As grounds for this Motion, RMS states that the Debtor is required under § 365(d)(3) of the Bankruptcy Code to timely perform all obligations under the Milwaukee Lease arising from and after April 1, 2003.

FACTS

1. On April 1, 2003, the above-captioned Debtors filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code.

2. RMS (and another), as Landlord, and the Debtor as Tenant, are parties to several leases. One such lease is the Milwaukee Lease. RMS (and another) and the Debtor are also parties to another unrelated lease for premises located in Waukesha, Wisconsin (the “Waukesha Lease”).

3. On May 31, 2003, the Debtor sent a letter to RMS in which the Debtor stated that it was paying only \$2,606.27 for June 2003 rent due on June 1, 2003 under the Milwaukee

Premises and not the \$47,869.55 the Debtor acknowledged in its letter is the amount due pursuant to the terms of the Milwaukee Lease. A copy of the Debtor's May 31, 2003 letter is attached hereto as Exhibit A. The Debtor claimed in its May 31, 2003 letter to RMS that the Debtor was due a "refund" from RMS in the amount of "\$45,263.28 representing Real Estate Taxes on the Rainbow-Waukesha store location (87470040)."

4. On June 10, 2003, and in accordance with the provisions set forth in the Milwaukee Lease, RMS sent the Debtor an invoice for \$2,263.16 in late fees for failure to pay the June, 2003 rent. A copy of the June 10, 2003 invoice is attached hereto as Exhibit B.

5. On June 20, 2003, counsel for RMS sent a letter to Debtor's counsel demanding the full and immediate payment of the June, 2003 rent. A copy of the June 20, 2003 letter is attached hereto as Exhibit C.

6. As of the filing date of this Motion, the Debtor has still not paid its June 2003 rent obligations under the Milwaukee Lease.

7. RMS estimates that it will incur as much as \$8,000.00 in legal fees and expenses to enforce the terms of the Milwaukee Lease post-petition and collect the \$47,526.44 now owed RMS. The Milwaukee Lease requires the Debtor to pay RMS' reasonable legal fees.

ARGUMENT

8. Pursuant to 11 U.S.C. § 365(d)(3), a debtor in possession must timely perform all obligations arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected. 11 U.S.C. § 365(d)(3).

9. It is well established that a debtor cannot off set post-petition rent obligations against any pre-petition deposits or credits. See In re Jarvis Kitchenware of D.C., Inc., 13 B.R. 230, 232 (Bankr. D. D.C. 1981). Here, the Debtor's claimed "credit" is not even on the same

premises or under the same lease. In light of 11 U.S.C. § 365(d)(3) and the applicable case law, RMS is entitled to immediate payment of \$47,526.44 for the Debtor's June, 2003 rent obligations for the Milwaukee Premises plus its reasonable legal fees in collection of that amount.

10. The Milwaukee Lease states, in pertinent part, "Upon the occurrence of an Event of Default, Landlord at any time thereafter without further notice or demand, may exercise any one or more of the following remedies concurrently or in succession: Recover all costs, expenses and reasonable attorneys' fees incurred by Landlord in connection with enforcing this Lease... or collecting amounts owed...." Milwaukee Lease Section 17.3(d). A copy of the Milwaukee Lease is attached hereto as Exhibit D.

Wherefore, RMS prays that the Court enter an Order pursuant to §365(d)(3) compelling the Debtor to immediately pay RMS the amount of \$47,526.44 for post-petition rent obligations under the Milwaukee Lease, plus reasonable attorneys' fees and its costs associated with enforcing the provisions of the Milwaukee Lease, and grant such other and further relief as this Court deems just.

Dated: July 21, 2003

ELZUFON AUSTIN REARDON
TARLOV & MONDELL, P.A.

/s/ Charles J. Brown, III

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CERTIFICATE OF SERVICE

I, Charles J. Brown, III, hereby certify that I caused a copy of the foregoing *Motion of RMS Properties II LLC to Compel Payment of Post-Petition Obligations Pursuant to 11 U.S.C. § 365(D)(3)* to be served upon the following parties via hand delivery or United States Mail postage prepaid.

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Under penalty of perjury, I declare that the foregoing is true and correct.

Dated: July 21, 2003

/s/ Charles J. Brown, III
CHARLES J. BROWN, III