IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	
	)	Chapter 11
FLEMING COMPANIES, INC. et al.,	)	
	)	Case No. 03-10945 (MFW)
Debtors.	)	
	)	Jointly Administered
	)	
	)	**Hearing Date: 10/02/03 @ 2:00 p.m.** **Objections Due: 9/25/03 @ 4:00 p.m.**

OBJECTION OF MIAMI FOODCO INVESTORS, LLC TO MOTION FOR ORDER AUTHORIZING DEBTORS TO ASSUME AND ASSIGN THE MIAMI FOODCO SUBLEASE AND TO REJECT PRIM LEASE (D.I. No. 3711)

Miami Foodco Investors, LLC ("Foodco") hereby objects to the Debtors' motion for assumption and assignment of a real property ground sublease with Foodco and rejection of a contiguous real property lease (the "Motion"), as follows:

Background

1. On April 1, 2003 (the "Petition Date"), the Debtors commenced these voluntary chapter 11 cases under the Bankruptcy Code.

2. Fleming Companies, Inc. ("Fleming"), one of the Debtors, and PRIM Warehouse, LLC ("PRIM"), as successor to Foodco, are parties to a lease agreement, dated June 28, 2002 (the "Net Lease"), governing nonresidential real property located at 2400 NW 74th Avenue, Miami, Florida (the "PRIM Parcel"). A copy of the Net Lease is annexed as Exhibit A hereto.

3. Foodco and Fleming, are parties to a ground sublease agreement, dated June 28, 2002 (the "Sublease"), governing nonresidential real property located at 3555 NW 77th Avenue, Miami, Florida (the "Foodco Parcel"). A copy of the Sublease is annexed as Exhibit B hereto.

4. The four-page Sublease contains five provisions in total. The Sublease requires Fleming to pay rent of $1.00 to Foodco for the term of the Sublease and to comply with all the terms of the ground lease, including payment of rent due to the ground lessor. The Sublease incorporates all the terms of the Net Lease into the Sublease (the "Incorporation Provision"). Finally, the Sublease provides: "The term of this Sublease shall automatically expire upon the expiration or sooner termination of the Net Lease" (the "Expiration Provision").

5. The Net Lease and the Sublease are freely assignable without the consent of the landlord. *See* Net Lease ¶ 17(a) (also incorporated into the Sublease).

6. Fleming operates an ambient warehouse on the PRIM Parcel and a refrigerated warehouse on the Foodco Parcel. The Foodco Parcel and the PRIM Parcel are contiguous and share parking and other facilities. To date, Fleming has operated the Foodco Parcel and the PRIM Parcel as one parcel (the "Miami Property"), utilizing common signage, employees, and offices.

7. The Net Lease and the Sublease arise from a sale/leaseback transaction on or about June 28, 2002 (the "Sale/Leaseback"), under which Foodco purchased Fleming's interest in the Miami Property. Specifically, Foodco purchased Fleming's fee interest in the PRIM Parcel and its ground leasehold interest in the Foodco Parcel. Fleming and Foodco also executed the Net Lease and the Sublease under which Fleming leased the Miami Property back from Foodco.

8. The Sublease's Incorporation Provision and Expiration Provision were material to Foodco in agreeing to close the Sale/Leaseback transaction. Foodco would not have agreed to

purchase fee property that was contiguous with property leased to Fleming unless Foodco had some control over Fleming's obligations on the leased property.

9. Foodco subsequently sold the PRIM Parcel and assigned the Net Lease to PRIM. However, the PRIM Parcel lacked sufficient parking on its own. Accordingly, in connection with the sale, Foodco covenanted to PRIM or any subsequent owner of the PRIM Parcel that, in the event of a termination of the Sublease, they would have use of the parking areas located on the Foodco Parcel until Fleming constructed additional parking spaces on the PRIM Parcel.

10. On August 15, 2003, the Court approved the Debtors' sale (the "Sale") of substantially all their assets relating to their wholesale distribution business to C&S Wholesale Grocers, Inc. ("C&S") pursuant to an asset purchase agreement (the "APA") and a First Amendment to the APA (the "Sale Order").

11. On August 4, 2003, the Debtors served a notice seeking to assume and assign the Net Lease to Associated Grocers of Florida, Inc. ("Associated") (D.I. No. 2719). On or about August 20, 2003, the Debtors served a notice seeking to assume and assign the Sublease to Associated (D.I. No. 3295).

12. On September 17, 2003, the Debtors filed the Motion, which seeks to assume and assign the Sublease to Associated, but now seeks to reject the Net Lease with September 30, 2003, as the effective date of rejection.

13. The Motion also seeks a finding that the Incorporation Provision and the Expiration Provision are unenforceable. The Motion gives no reason why the Incorporation Provision should be held unenforceable. The Motion argues that the Expiration Provision is a

cross-default provision and, as such, is a de facto anti-assignment provision that is not enforceable under the Bankruptcy Code's policy against anti-assignment provisions.

14. The Motion cites to a "Second Amendment" to the APA and contends that, under the Second Amendment (¶ 6), the purchase price for the Sale will be reduced by $5 million if the Sublease is not assumed and assigned by Fleming. No reason is given why the reduction is for $5 million. The Second Amendment is dated August 23, 2003, eight days after the Sale Order was entered. The Second Amendment does not show up on the Court's docket and has neither been served on creditors nor been approved by the Court. A copy of the Second Amendment (as provided to Foodco through counsel) is annexed as Exhibit C hereto.

Objection

I. Fleming Will Lack the Ability To Assume and Assign the Sublease at the Hearing.

15. Foodco objects to the Motion on the basis that, at the time of the hearing, Fleming will lack the ability to assume and assign the Sublease at the scheduled hearing on October 2, 2003, because of the Sublease's prior expiration under its own terms. The Motion seeks to reject and abandon the Net Lease retroactive to September 30, 2003, two days before the scheduled hearing on the Motion. Under applicable Florida law,[1] Fleming's abandonment of the Net Lease on or before September 30 terminates it at that time. *See T.V. Nurseries, Inc. v. Vinik*, 371 So. 2d 1110 (Fla. Dist. Ct. App. 1979); *Orange State Oil Co. v. Jacksonville Expressway Authority,* 143 So. 2d 892, 893-94 (Fla. Dist. Ct. App. 1962).

[1] The Net Lease and the Sublease are governed by Florida law. (Net Lease ¶ 42, 1.z) (also incorporated into the Sublease).

16. Under the terms of the Sublease, the termination of the Net Lease on September 30 causes the Sublease's term to expire at the same time. At the hearing on October 2, therefore, the Sublease cannot be assumed and assigned to Associated because the Sublease will have expired by its own terms. *Counties Contracting and Constr. Co. v. Construction Life Ins. Co.,* 855 F.2d 1054, 1061 (3d Cir. 1988) ("A contract may not be assumed under §365 if it has already expired according to its terms"); *In re Triangle Labs., Inc.,* 663 F.2d 463, 467 (3d Cir. 1981). Accordingly, the Motion should be denied to the extent that it seeks to assume and assign the Sublease.

II. Fleming Provides No Justification To Strike the Incorporation Provision.

17. The Debtors seek to assume the Sublease absent the Incorporation Provision without any argument why the Incorporation Provision is unenforceable. It is axiomatic, however, that an executory contract must be assumed in its entirety, including both its benefits and burdens. *See Sharon Steel Corp. v. National Fuel Gas Distribution Corp.*, 872 F.2d 36, 40 (3d Cir. 1989); *see also In re Kopel*, 232 B.R. 57, 63-64 (Bankr. E.D.N.Y. 1999) ("A debtor cannot simply retain the favorable and exercise the burdensome provisions of an agreement.").

18. Only in the limited circumstances when a court is presented with contractual provisions expressly rendered unenforceable by the Bankruptcy Code or those designed to thwart the provisions of the Bankruptcy Code should it exercise its equitable powers to alter the contractual relationship between the parties. *Kopel*, 232 B.R. at 64. Absent any such justification, the Court cannot allow the Debtors to pick and choose selected portions of the Sublease.

19. In the Motion, the Debtors have offered no basis for excising the Incorporation Provision, and none exists. The Incorporation Provision does not contravene any provision of the Bankruptcy Code. Nor does the the Incorporation Provision thwart the policies of the Bankruptcy Code. Rather, the Incorporation Provision merely provided the parties with consistent terms and conditions for the entire Miami Property. Accordingly, the Incorporation Provision should not be excised from the Sublease.

III. The Expiration Provision Is Not a De Facto Anti-Assignment Provision.

20. Foodco also objects for the following reasons to the proposed relief seeking to hold the Expiration Provision unenforceable. First, the Expiration Provision is not a cross-default provision and, unlike cross-default provisions, does not restrict the Debtor's ability to assign the Sublease in any way. Second, unlike cross-default provisions, the Expiration Provision does not implicate the language of Bankruptcy Code's policy against anti-assignment provisions set forth in Section 365(f)(1) and (f)(3). Third, to the extent that Paragraph 6 of the Second Amendment is binding on Fleming – Foodco contends that Paragraph 6 has no effect on the Debtors – it is the Second Amendment, not the Expiration Provision, which is preventing the Debtors from obtaining the full value of their assets. Finally, the Expiration Provision should not be struck down because it is a material provision of the Sublease and was material to Foodco's decision to purchase the Miami Property from Fleming in the Sale/Leaseback.

A. The Expiration Provision does not restrict or condition assignment.

21. Without any analysis or quotation of the Expiration Provision, the Debtors characterize it as a cross-default provision. They are mistaken. A cross-default provision causes a default under one lease in the event of a default under another lease. *See Kopel*, 232 B.R. at 62.

22. Cross-default provisions are sometimes viewed as de facto anti-assignment provisions because they condition the assignment of a lease on the cure of defaults under other leases. Since the cure of defaults is a condition to assumption and assignment, *see* 11 U.S.C. § 365(b)(1)(A), a cross-default provision requires the cure not only of the defaults under the lease to be assigned but also the cure of defaults under other leases, *see Kopel*, 232 B.R. at 63.

23. In contrast, the Expiration Provision does not restrict assignment in any way. Unlike a cross-default provision, the Expiration Provision does not require cure of additional defaults as a condition to assignment. Indeed, the Expiration Provision has nothing to do with defaults; it merely causes the Sublease's term to expire in the event of a termination of the Net Lease.[2]

B. The Expiration Provision is not implicated by Section 365(f).

24. The Expiration Provision is not inconsistent with the Bankruptcy Code's policy against anti-assignment provisions. Section 365(f)(1) does not apply because the Expiration Provision neither "prohibits, restricts or conditions the assignment" of the Sublease. Nor does

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[2] Even if the Court viewed the Expiration Provision as a cross-default provision, it is not *per se* invalid and must be examined under the particular facts and circumstances of the transaction to see if enforcement of the provision would contravene an overriding federal bankruptcy policy. *See Kopel,* 232 B.R. at 64.

Section 365(f)(3) – not mentioned by the Debtors – apply because the Expiration Provision does not terminate the Sublease "on account of an assignment of such [lease]."[3]

25. In *In re E-Z Serve Convenience Stores, Inc.*, 289 B.R. 45, 52 (Bankr. M.D.N.C. 2003), a case relied on by the Debtors, the court held that the landlord's right of first refusal did not "fall within the framework of § 365(f)" because the right of first refusal, quite simply, had no effect on the assignment of the lease. Likewise, the Expiration Provision is not inconsistent with Section 365(f) because the Expiration Provision does not restrict or burden assignment of the Sublease in any way.

26. This Court should not read the language of Section 365(f) more broadly than it is written, especially since the Expiration Provision does not restrict or condition assignment in any way. *See In re Professional Ins. Mgmt.*, 130 F.3d 1122, 1127 (3d Cir. 1997) ("[W]e are not free to ignore the plain and unambiguous language of the statute.").

C. The Second Amendment, not the Expiration Provision, prevents the Debtors from obtaining full value from Assignment of the Sublease.

27. The Debtors also argue that the Expiration Provision prevents the Debtors from realizing the full value of their assets. In support, the Debtors cite to the Second Amendment to the APA because, under its Paragraph 6, the Sale's purchase price would be reduced by $5 million in the event that the Debtors cannot assume and assign the Sublease.

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[3] Neither is the Expiration Provision similar to the other types of de facto anti-assignment provisions that have been struck down by courts. *See In re E-Z Serve Convenience Stores, Inc.*, 289 B.R. 45, 50 (Bankr. M.D.N.C. 2003) (viewing use restrictions required payment of all or part of profit realized on assignment and cross-default provisions as typical de facto anti-assignment provisions).

28. As stated above, however, the Sublease is freely assignable. It is not clear why the Debtors would lose $5 million if the Sublease were assigned to Associated with the Expiration Provision intact.

29. Moreover, the Debtors had previously noticed their intention to assign both the Net Lease and the Sublease to Associated – presumably on instructions from C&S – and the Court most likely would have approved the assignments, subject to the payment of cure. Associated remains ready to accept an assignment of the Sublease. So it is unclear why the Debtors would agree to allow the purchase price to be reduced by $5 million.

30. In any event, the Second Amendment has no binding effect on the Debtors because it was never noticed to creditors or approved by this Court under 11 U.S.C. § 363(b). The Sale Order did not give the Debtors authority to enter into the Second Amendment under which the Debtors stand to forfeit $5 million, a material amount to creditors in these cases.

31. In addition, the relatively large and arbitrary amount of the reduction for the assignment of a single lease smacks of an unenforceable penalty. Five million dollars is a very high reduction given the thousands of leases and contracts connected with the Sale.

32. Finally, it is not the Expiration Provision that prevents assignment of the Sublease. Rather, it is the terms of the Second Amendment – negotiated by C&S, Fleming and Associated with full knowledge of the Expiration Provision – that are restricting assignment and affecting the Debtors' realization of full value for their assets.

D. The Expiration Provision Is Material to the Sublease.

33. The Expiration Provision was material to Foodco's decision to enter into the Sale/Leaseback with Fleming. Foodco would not have closed the Sale/Leaseback and purchased

the Miami Property if the Debtors could subsequently terminate the Net Lease without causing the Sublease to expire.

34. Other courts have upheld lease provisions when they are material and part of the bargaining process. *See E-Z Serve Convenience Stores*, 289 B.R. at 51-52 (finding that right of first refusal was economically significant to the landlord); *Kopel*, 232 B.R. at 67 (finding that cross-default provision was necessary term that would have halted sale of veterinary practice and related formation of lease).

35. Further, the Expiration Provision must be deemed material to the Sublease since the Expiration Provision governs the Sublease's term and occupancy. *See In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1091 (3d Cir. 1990). In that case, cited by the Debtors, the Third Circuit refused to strike a lease provision that gave the landlord the ability to terminate the lease if the tenant's average annual sales did not reach a particular dollar amount. The court viewed the provision, standing alone, as "an essential bargained element of this lease agreement because it governs occupancy." *Id.* Likewise, the Expiration Provision is an essential bargained element of the Sublease because it too governs term and occupancy.

36. Any modification of Foodco's rights should not be taken lightly, and this Court must be sensitive to Foodco's rights and the policy requiring the non-debtor contracting party to receive the full benefit of its bargain. *See id.* Accordingly, the Court should not rewrite the Sublease to delete a material bargained term.

IV. The Net Lease and Sublease Are One Integrated Agreement.

37. The Debtors cannot assume the Sublease and reject the Net Lease as they have proposed because the two documents should be construed as part of a single agreement under

relevant law. *See Pieco v. Atlantic Computer Sys., Inc. (In re Atlantic Computer Sys., Inc.),* 173 B.R. 844, 848 (S.D.N.Y. 1994) ("it is elemental that if the various instruments at issue are deemed a single contract, then [the debtor] may not assume only the benefits (i.e., payment) while rejecting the obligations of the bargain).

38. Under Florida law, "where two or more documents are executed by the same parties, at or near the same time, in the course of the same transaction, and concern the same subject mater, they will be read together." *Clayton v. Howard Johnson Franchise Sys., Inc.,* 954 F.2d 645, 648 (11th Cir. 1992).

39. In *Howard Johnson,* the Claytons entered into a license agreement (the "Motel License") with Howard Johnson for the use of the Howard Johnson name in a motel the Claytons operated. Howard Johnson's franchise policy required a restaurant to be operated adjacent to any Howard Johnson motel. The Claytons owned the property adjacent to the motel, so they executed a lease agreement (the "Restaurant Lease") with Howard Johnson for the operation of a restaurant on that property. Later, Marriott purchased the stock of Howard Johnson and conveyed only its interest in the Motel License to a third entity. In deciding whether the Restaurant Lease and the Motel License (the "Agreements") were integrated, the Eleventh Circuit, applying Florida law, found the Agreements to be "functionally intertwined" because, *inter alia*: a) the Agreements were executed by the same parties on the same date; b) the two properties were contiguous and the businesses were related; c) each of the Agreements contained statements that contemplated the achievement of interrelated objectives (*i.e.,* the operation of a restaurant adjacent to the motel); and d) the Motel License stated that it would automatically terminate upon the termination of the Restaurant Lease. *Id.* at 648-50.

40. Here, the Sublease and the Net Lease contain the identical similarities as the Restaurant Lease and the Motel License the Eleventh Circuit addressed in *Howard Johnson*:

a. The agreements were executed between the same parties on the same date. The Sublease and the Net Lease are both between Foodco and Fleming and were both executed on June 28, 2002.

b. The agreements relate to contiguous property. The Foodco Parcel, the subject of the Sublease, and the PRIM Parcel, the subject of the Net Lease, are directly adjacent to one another.

c. The agreements relate to a common business. The PRIM Parcel and the Foodco Parcel are both used as warehouses for the Debtors' distribution business and they are operated as one parcel. The only difference is that one is refrigerated warehouse space while the other is ambient warehouse space.

i) The two parcels, which are located immediately adjacent to one another and together occupy a city block, are surrounded by a single chain link security fence.

ii) Trucks entering the facility to deliver or pick up goods enter through a common entry way and must pass through a single guard house.

iii) Visitors and employees entering the facility must enter through another common entry way where they park in either a common employee parking area or a common visitors parking area. There is a common reception area.

iv) Both entry ways are marked by common signage that does not distinguish between the two parcels.

v) Trucks are served by a common maintenance area and a common fuel pumping system.

vi) There is a common cafeteria area for employees and a common office area.

d. The Expiration Provision provides that the Sublease "shall automatically expire upon the expiration or sooner termination of the Net Lease."

e. The Incorporation Provision provides that all of the terms and conditions of the Net Lease are incorporated into the Sublease.

41. The parties intended that there be one agreement for the Miami Property, but there were two reasons for having two different documents. First, Foodco's lender objected to the pledging of the lease interest in the PRIM Parcel because the underlying ground lease did not contain standard language that lenders require to protect their lien interest. Second, it was more efficient to draft two documents rather than one integrated lease because of the existing ground lease.

42. Finally, although rental payments under the Net Lease are presently over $2,000,000 yearly (Net Lease, Ex. B), the total rent due under the Sublease is $1 plus the rental payments, taxes and other charges due under the ground lease. It defies logic that Foodco would have leased a 154,000 square foot refrigerated warehouse in a major metropolitan city for a net benefit of $1 *unless* that lease was a part of another lease. As the bankruptcy court warned in *In re Atlantic Computer Sys., Inc.,* the debtor can not reject the obligation (i.e., the Net Lease) while assuming the benefits of the bargain (i.e., the Sublease).

43. Even though two separate documents, the Net Lease and the Sublease are construed as one agreement under Florida law because the two documents were executed at the same time and because the business in the underlying parcels is the same business. There were legitimate reasons for having two documents, and the economics demonstrate that the two documents are really one agreement. Accordingly, the Debtors may not reject the Net Lease while assuming the Sublease.

V. Fleming Must Satisfy Cure Claims To Assume the Sublease.

44. Fleming has not paid the $54.37 increase per month in sales tax during 2003 owing under the Sublease.

45. Fleming apparently has not paid an outstanding sewer and water bill in the amount of $998.16.

46. Fleming has provided proof of insurance only through October 1, 2003. Pursuant to the Sublease, Fleming is obligated to provide an insurance certificate with evidence that insurance policies required to be maintained under Sections 8 and 26 of the ground lease are in effect. Fleming is presently in default under the Sublease because Fleming has not provided evidence of the renewal of insurance to the ground lessor at least thirty days prior to the expiration of the existing coverage.

47. Foodco has incurred reasonable legal fees and expenses relating to Foodco's enforcement of the Sublease and the attempted cure of defaults thereunder relating to the Insurance Certificate and payment of sales tax. The Sublease allows for recovery of attorney's fees. *See* Net Lease ¶ 20(e) (incorporated into Sublease).

VI. Fleming Has Not Provided Proof of Adequate Assurance of Future Performance.

48. Although Foodco has been provided financial information about Associated, Foodco has received such information only today. Accordingly, Foodco presently maintains its objection to the assignment of the Sublease on the basis of no proof of adequate assurance of future performance.

WHEREFORE, Foodco requests that the Court deny the Motion and grant to Foodco such other and further relief as is just.

Dated: Wilmington, Delaware
September 25, 2003

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