

**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)
)	
)	
)	

**RENEWED OBJECTION OF DAVID MINKIN TO ASSUMPTION AND ASSIGNMENT
OF THE MIAMI FOODCO SUBLEASE**

COME NOW, David Minkin Realty Trust, Patricia B. Lester, Paul H. Briger, Peter L. Briger, and the Hall Family Partnership (collectively “David Minkin”)¹, as owners and lessors of property leased by the Debtors at N.W. 35th Terrace and N.W. 77th avenue, Dade County, FL, (the “Miami Perishables Warehouse”), by and through the undersigned counsel and for its Objection to *Debtors’ Motion for an Order Pursuant to Sections 365(A) of the Bankruptcy Code Authorizing Debtors to Assume and Assign the Miami Foodco Sublease and to Reject Prim lease Pursuant to an Asset Purchase Agreement between the debtors and C&S Wholesale Grocers, Inc., and C& S Acquisition LLC*, (the “Motion”), states to the Court as follows:

Background

1. David Minkin is the Lessor for the premises identified in the Motion as the Miami Foodco Warehouse, located at 355 N.W. 77th Avenue, Miami, Florida, which property is subject to a

¹ David Minkin passed away on September 19, 2003. As of the filing of this Objection, it is not clear what authority exists with respect to undersigned counsel’s right to represent Mr. Minkin’s interests in this matter. Nevertheless, this Objection is filed to preserve those rights.

sublease that the Debtors seek to assume and assign to Associated Grocers. The original lease (the “Master Lease”) was executed on July 19, 1973, and both David Minkin and Fleming acquired their respective interests as Landlord and Tenant under the Master Lease subsequent to that date. On June 28, 2002, the Debtors purported to assign its rights and duties as Tenant to Miami Foodco Investors, LLC (“Miami Foodco”) and then sublet the premises back from Miami Foodco pursuant to the Sublease. As noted in the Motion, the Sublease at issue was subject to a previous Notice of Assumption and Assignment², to which David Minkin objected. David Minkin hereby incorporates by reference the prior Objection (D.I. 3417), and renews its objection to the assumption and assignment, for the reasons stated therein and as set forth below.

2. In addition to the grounds set forth in the prior objection, Minkin objects to the assumption and assignment of the Sublease for the Miami Perishables Warehouse because the Sublease may not be a valid sublease, and because the parties to the Sublease are in breach of the obligations with respect to insurance contained in the Master Lease.

3. To the extent that the Debtors intend to assume and assign the Lease the Debtors must satisfy the applicable provisions of 11 U.S.C. § 365.

4. 11 U.S.C. Section 365(b), which addresses the assumption of executory contracts and unexpired leases, states:

1. ² The Debtors original Notice to assume and assign the lease identified as Contract No. 7301 (the “Original Notice”) was issued August 21, 2003. The Original Notice identified Miami Foodco Investors, LLC (“Miami Foodco”) as the counter party. [D.I. 3295]. On August 22, 2003, the Debtors filed a supplemental Notice (the “Supplemental Notice”), which again identified Miami Foodco as the counter party. [D.I. 3313]. The Debtors issued an additional supplemental Notice (the “Additional Supplemental Notice”) which was docketed on August 26, 2003 and apparently sent by Debtors via Federal Express on Friday, August 22, 2003. [D.I. 3360]. The Additional Supplemental Notice does identify Minkin as the counter party. All three notices refer to the same contract number, 7301, and describe the contract as the Miami Perishables Warehouse.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

U.S.C. § 365(b)(1).

5. As such, before approval of the assumption and assignment of the Lease, the Debtors are required to cure all prepetition and post-petition monetary and non-monetary defaults with Minkin under 11 U.S.C. §§ 365(b)(1)(A) and (B).

6. To be valid, an assignment under the Master Lease must assign all of the Tenant's obligations under the lease, but does not relieve the Tenant of its obligations. *See Lease, para. 4; relevant portions of the Master Lease attached as Exhibit 1.* The Master Lease also requires that documents evidencing the assignment be delivered to the Landlord. *Id.* Minkin has no record of ever receiving the Sublease at issue, and any associated documents, and has no way of determining whether the Sublease at issue is valid. To the extent that the Sublease is not valid, the assigning party is in breach of the Master Lease, and the lease cannot be further assumed and assigned.

7. In addition, the Master Lease contains several provisions relating to insurance for the leased premises:

Para. 26(b): The Tenant shall obtain and keep in force during the term hereof (I) general liability insurance insuring the Landlord and the Tenant against any and all liability or claims of liability arising out of, occasioned by or resulting from any accident or otherwise in or about the demised premises... [Ex. 1]

Para. 26(c): All policies of insurance carried pursuant to the provisions of this lease, shall name as insureds Landlord and Tenant, and if required, any mortgagee, as their respective interests may appear, but the policies shall provide that the proceeds thereof shall be paid to the originally named Tenant herein, or to Landlord if this lease has theretofore been assigned by the originally named tenant... [Ex. 1]

Para. 26(d): The original of all policies referred to in this lease shall be delivered to the originally named Tenant herein, or to Landlord if this lease has theretofore been assigned by the originally named Tenant (not less than 30 days prior to the expiration of any existing policies, in the case of renewals) except when such originals are required to be held by any first mortgagee, and certificated of insurance shall be so delivered to the Landlord. Each policy of insurance required under or referred to in this lease shall have attached thereto and endorsement that such policy shall not be cancelled or modified without at least 10 days prior written notice to Landlord and, if required, to any first mortgagee. Each such policy shall contain a provision that no act or omission of Tenant shall effect or limit the obligation of the insurance company to pay the amount of any loss sustained. [Ex. 1]

8. In addition, Paragraph 8 of the Lease, which deals with the requirement of the Tenant to maintain fire insurance with extended coverage endorsements on the leased premises, requires that any of such insurance policies of the Tenant shall expressly waive any right of subrogation on the part of the insurer against either the Landlord or Tenant. [Ex. 1].

9. David Minkin has been provided with copies of the insurance certificates by March USA, Inc., who appears to be the Debtors broker. [Ex. 2]. These appear to indicate only that the Minkin entities are certificate holders, but do not demonstrate that they are additional insureds. The policies have not been provided, as required under the lease, and accordingly, there is no evidence that the other requirements of the lease have been met; namely, that the proceeds are properly payable to the Minkin entities, that there are no subrogation rights against the Minkin entities or the Tenant, and that

no acts or omissions of the Tenant affect the insurer's obligation to pay. Until those provisions are demonstrated to exist, the parties to the Sublease remain in breach of the Master Lease.

10. Finally, the insurance certificate provided on September 17, 2003, indicates that the insurance policies expire on October 1, 2003, prior to the hearing. Minkin has received no evidence that the policies have been renewed or that replacement insurance has been obtained. Any gap in coverage constitutes a severe breach of the lease which must be cured immediately.

WHEREFORE, for the above-stated reasons and as set forth in their prior objection to the assumption and assignment notice, Minkin requests this Court make and enter its Order denying Fleming's request that the lease for the Miami Perishables Warehouse be assigned to Associated Grocers of Florida, and for such other and further as the Court deems just and proper, including an award of attorneys fees with respect to the enforcement of the parties' obligations under the Lease, as provided in Section 23 (g) to the Lease.

Dated: September 25, 2003

ELZUFON AUSTIN REARDON
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served by facsimile this 28th day of August, 2003, to:

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