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)**
	)	
	)	
	)	

REPLY OF LANDLORD, DAVID MINKIN *et al*, TO DEBTORS MOTION FOR ASSUMPTION AND ASSIGNMENT OF GROUND SUBLEASE TO ASSOCIATED GROCERS OF FLORIDA, INC. (D.I. 3711)

COME NOW, David Minkin Realty Trust, Patricia B. Lester, Paul H. Briger, Peter L. Briger, and the Hall Family Partnership (collectively "Minkin"), as owners and lessors of property leased by the Debtors at N.W. 35th Terrace and N.W. 77th avenue, Dade County, FL, (the "Refrigerated Warehouse"), by and through the undersigned counsel and for its Reply 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:

Preliminary Statement

1. On August 23, 2003, Minkin, filed an Objection to the Assumption and Assignment of Executory Contract (Contract No.7301) [D.I. 3417] (the "Objection"), wherein they noted that the Debtors had filed three notices to assume and assign the Debtors' leasehold interest in the Refrigerated Warehouse which Minkin owned. Minkin objected to the confusing nature of the three notices, two of which identified Miami Foodco Investors, LLC ("Miami

Foodco") as the counter-party to the Debtors' lease that it sought to assume and assign, the other identifying Minkin as the counter-party. In their Objection, Minkin observed that The Grand Union Company ("Grand Union"), the original tenant under the ground lease for the property, remained obligated to perform under the lease; that Grand Union had rejected the ground lease in its bankruptcy; and that the rights of any assignee of the Debtors would be taken subject to the rights of Minkin concerning Grand Union's rejection of the lease.

2. On September 17, 2003, the Debtors filed a Motion for an Order Pursuant to Section 365(a) of the Bankruptcy Code Authorizing Debtors or 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") [D.I. 3711]. Minkin then filed a Renewed Objection to Assumption and Assignment of the Miami Foodco Sublease (the "Renewed Objection") [D.I. 3812], in which they incorporated their previous Objection asserting that they were unable to determine if there was a valid sublease between Miami Foodco and the Debtors, and asserting that the insurance requirements of the lease were in default.[1] The Debtors' Motion itself only addressed issues that Miami Foodco had raised concerning what the Debtors have characterized as a cross-default provision. The Motion sought a determination that the rejection of the lease to an adjacent warehouse owned by Prim would not operate as a rejection of the Refrigerated Warehouse owned by Minkin, but did not address any of the issues that Minkin raised in their Objection.

3. The proposed Order that the Debtors attached to their Motion, however, provided:

[1] The Debtors have produced insurance certificates for the year starting October 1, 2003. Minkin has requested that the actual policies be produced to ensure that all of the requirements in the Ground Lease concerning insurance have been satisfied.

> "The Ground Lease, the assignment of the Ground Lease to Miami Foodco by Fleming and the sublease from Miami Foodco to Fleming are valid, in good standing, in full force and effect and without any existing defaults."

Minkin takes no position on the cross-default issue and has no objection to the Court ruling on that issue. Minkin strongly objects, however, to any finding that the purported assignments are valid, in good standing, and without any existing defaults. Furthermore, this Court does not have jurisdiction to determine the rights and obligations between Minkin and Miami Foodco, two non-debtor entities. Therefore, this Court has no jurisdiction to enter the proposed form of Order that the Debtors attached to the Motion. By way of illustration only, and without waiving its rights to contest the jurisdiction of this Court, Minkin notes that the rights of Miami Foodco are subject to Minkin's continuing right to terminate the Ground Lease, based on Grand Union's rejection of and incurable default with respect to its obligations under the Ground Lease.

Statement of Facts

4. On July 19, 1973, G.R. Warehouse Company, Ltd., as the owner and Landlord of a refrigerated warehouse entered into a lease (the "Ground Lease") with The Grand Union Company ("Grand Union" or "Tenant"). The Ground Lease was freely assignable. Specifically, page 3, paragraph 4 of the Ground Lease provides:

> "The Tenant may assign this lease or sublet the demised premises, or any part thereof, for the purpose herein permitted, or for any other lawful business **without relieving the Tenant, however, from its obligations hereunder.**
>
> The Tenant agrees to notify the Landlord of any assignment of this lease and to provide the Landlord with an executed copy of said assignment and an assumption agreement by which the assignee assumes all the Tenant's obligations both in recordable form. Same are to be delivered to the Landlord within ten (10) days after execution of the assignment. No assignment shall be valid unless the foregoing provisions are complied with."

There is no provision in Ground Lease that requires consent of the Landlord to an assignment by Grand Union or otherwise gives the Landlord any rights to contest a Grand Union assignment.

5. By deed dated November 20, 1974, G.R. Warehouse Company, Ltd., sold its interest in the refrigerated warehouse to David Minkin, Sigmund S. Briger and Elias Thall (collectively and including their successors "Minkin"). On or about November 20, 1978, Grand Union assigned its interest under the Ground Lease to Malone & Hyde, Inc. and a copy of the Assignment and Assumption of Lease between Grand Union and Malone & Hyde is attached hereto as Exhibit A. Pursuant to page 3, paragraph 4 of the Ground Lease, however, Grand Union was not relieved from any of its obligations thereunder. Indeed, the written Assignment and Assumption of Lease[2] between Grand Union and Malone & Hyde recognizes this and specifically provides:

> "3. So long as Assignor remains in any way liable to any third party for the performance of the obligation of Tenant under the lease hereby assigned , Assignee shall not modify any provisions of said lease without the prior written consent of Assignor which shall not be unreasonably withheld.
>
> 4. In the event of any default by Assignee under the lease hereby assigned, Assignor shall have the right, but not the obligation to require reassignment of this lease which right shall be exercised by written notice to Assignee. Said reassignment shall be automatic upon notice from Assignor …."

6. In or about December of 1994, Malone & Hyde, Inc., purportedly merged with or was acquired by Fleming Companies, Inc., (the "Debtors" or "Fleming"). Minkin has no records, however, reflecting that Malone & Hyde transferred any interest in the Ground Lease to

[2] The only copy of this document that Minkin possesses was not notarized and therefore did not satisfy the terms of the Ground Lease in that the Assignment and Assumption of Lease is not in recordable form. Section 695.03 of the Florida Statutes requires that the signatures to a document conveying an interest in land be authenticated by a notary public. The Assignment and Assumption of Lease between Grand Union and Malone & Hyde also appears to violate the Florida Statute of Frauds, § 689.01 of the Florida Statutes, which provides: "No estate or interest of freehold, or for a term of more than 1 years … shall be created, made, granted, transferred or released in any other manner than by an instrument in writing signed in the presence of two subscribing witnesses by the party creating,

Fleming and certainly nothing in any kind of recordable form. On or about June 28, 2002, Fleming assigned its interest in the Ground Lease to Miami Foodco.

7. Meanwhile, Grand Union, who had remained obligated to perform the obligations of the Ground Lease, filed bankruptcy in the District of New Jersey on October 3, 2000. On October 8, 2002, Grand Union's bankruptcy plan was confirmed with a provision that all executory contracts that had not specifically been assumed were deemed rejected. [See ¶ 7 of the Order confirming the Grand Union Plan attached hereto as Exhibit B] Minkin received no notices from Grand Union concerning its bankruptcy, including no notice that Grand Union had assumed its obligations under the Ground Lease. [See Affidavit of Barbara Dunne attached hereto as Exhibit C]. Additionally, Fleming has not alleged that it took any action in the Grand Union bankruptcy to protect its interest in the Ground Lease. Accordingly, Grand Union rejected the Ground Lease effective October 8, 2002.

8. In addition, the Ground Lease provides Minkin with an unequivocal right to terminate the Lease in the event that Grand Union files a bankruptcy petition. Pages 18 through 19, paragraph 23(c) of the Ground Lease provides:

> "If any of the following events shall occur, the Landlord may, at any time thereafter, at its option, give written notice to Tenant stating that this lease and the term hereof shall expire and terminate on the date specified in such notice (which shall be no earlier than 3 days after the mailing of said notice), and upon the date specified in said notice this lease, the term hereof and rights of Tenant hereunder shall expire and terminate and Tenant shall quit and surrender the demised premises and Landlord may exercise its rights under subparagraph (a) of this paragraph 23 and as elsewhere provided in this lease and pursuant to law:
>
> the filing or execution or occurrence of
>
> (i) a petition in bankruptcy by or against Tenant
>
> …

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making, granting, conveying, transferring or releasing such estate, interest or term for more than 1 year." The document does not contain the signatures of the requisite witnesses.

> provided, however, that in the case of a petition filed against Tenant … an event of default shall be deemed to have occurred only if the petition shall not have been dismissed within 90 days after the filing thereof."

While this provision was inoperative during the Grand Union bankruptcy pursuant to 11 U.S.C. § 365 (e)(1), upon the rejection and closing of the Grand Union case, the provision is fully effective. *Id.*

Legal Analysis

1. This Court's Jurisdiction to determine rights under the ground lease.

9. At the time of filing their initial Objection and their subsequent Renewed Objection to the Debtors' Motion and the assumption and assignment notices, Minkin did not possess a number of documents between the Debtors and Miami Foodco. Minkin indicated that it was necessary to review those documents to determine if the assignment of the lease from the Debtors to Miami Foodco was valid. To the extent that the Debtors ask this Court to determine that the assignment between the Debtors and Miami Foodco is valid, Minkin does not contest this Court's jurisdiction to make that determination.

10. Minkin does, however, object to the notion that this Court has jurisdiction to determine the rights and obligations that exist between Miami Foodco and Minkin, two non-debtor entities. Indeed, neither Miami Foodco nor Minkin have requested this Court to make any determination concerning their respective rights under the Ground Lease. Even if this Court did have jurisdiction to make any findings concerning the rights between Minkin and Miami Foodco, this could only be done by bringing a declaratory judgment action in an adversary proceeding. The Debtors citations to In re III Enterprises, Inc. V, 163 B.R. 453 (Bankr. E.D. Pa. 1994) and Billing v. Ravin, Greenbery & Zackin, P.A., 22 F.3d 1242 (C.A. 3rd 1994) in no way suggest that the Bankruptcy Court has any jurisdiction to determine the contractual rights between two non-

debtor parties. Rather, in both cases the Bankruptcy Court was called upon to make a determination as to the contractual rights between the debtor and the party with which it was in privity.

11. An issue of great significance with respect to Ground Lease and the rights as between Minkin and Miami Foodco is whether Miami Foodco has any interest at all. As more fully set forth below, Miami Foodco currently has only a tenancy at will, as the Ground Lease was rejected by Grand Union, the named Tenant under the Ground Lease, on or about October 28, 2002. With the ground lease rejected, Grand Union remains in breach of its obligations, and any assignment is terminable at will by Minkin. Moreover, by bringing this issue to light at this time, Minkin does not consent to having this Court make any findings with respect to this issue, nor does Minkin waive their rights to raise any other issues that impact upon the Ground Lease and the rights and obligations as between Minkin and Miami Foodco. The sole purpose in raising this issue is to advise the Debtors, Associated Grocers and Miami Foodco of Minkin's position with respect to the status of the Ground Lease, and what Minkin believes are the procedural requirements to resolving any uncertainties with respect to the proposed assignment.

2. Grand Union rejected the Lease during its bankruptcy case, which renders the Lease non-assignable and subject to Minkin's termination rights.

12. Grand Union, the tenant to the Ground Lease, filed for bankruptcy in 2000 and had its plan confirmed on October 8, 2002. [Ex. B] As previously stated, the Grand Union Plan contained a provision that all executory contracts not previously assumed were deemed rejected. Minkin never received any notice that the Ground Lease was assumed in the Grand Union Bankruptcy, and Debtors have not provided any order from the New Jersey Bankruptcy Court showing that it was assumed.

13. Moreover, at the time of Grand Union's bankruptcy, Grand Union had already assigned its rights under the Ground Lease to Malone & Hyde, such that Grand Union was deriving no benefit from the Ground Lease.[3] Indeed, without Fleming agreeing to provide some incentive to Grand Union to assume the Ground Lease, there would be no logical reason for Grand Union to seek assumption of the Ground Lease, since it remained obligated to perform all of the obligations of the Ground Lease but no longer possessed the leased property. Cf Commercial Trading Company, Inc. v. Lansburgh, 577 F.2d 901, 906 (5th Cir. 1978) ("In a bankruptcy context the justification for the continued existence of the leasehold mortgage is stronger if the [lessor's] mortgagee [or sublessee] is willing to 'put something in the pot' for the rest of the creditors.")[4] The Debtors have not suggest that they put anything "in the pot" of the Grand Union estate to preserve their rights under the Ground Lease.

14. To date, all that the Debtors have asserted on this issue is that "Minkin's information and belief that the Ground Lease was not assumed in the Grand Union bankruptcy is insufficient." The Grand Union confirmed plan, however, specifically rejected all executory contracts not specifically assumed. Furthermore, attached hereto as Exhibit C is the Affidavit of Barbara Dunne, custodian of records for Minkin, establishing that Minkin received no notice of the Grand Union bankruptcy let alone notice that Grand Union sought to assume the Ground Lease. The Debtors would certainly have knowledge if they took any steps to protect their interest in the Ground Lease during the Grand Union bankruptcy, but without the Debtors providing some incentive to Grand Union to assume the Ground Lease, there is simply no reason to believe that Grand Union took any action other than to reject it pursuant to its Plan.

[3] As set forth in Footnote 2, this purported assignment fails to satisfy either the terms of the Ground Lease or Florida law.

[4] Landsburgh was decided prior to certain amendments to the Bankruptcy Code including the restrictions on *ipso facto* clauses under 11 U.S.C. § 365(e). The Landsburgh court, however, observed that bankruptcy courts would, in

15. The terms of Ground Lease allowed Grand Union to assign it without the need for obtaining any consent from the Landlord-- perhaps even over the objection of the Landlord. Grand Union's only obligation to effectuate an assignment was to notify the Landlord that the assignment had taken place and provide a copy of that assignment in recordable form. In exchange for Grand Union's right to freely assign the Ground Lease, Grand Union agreed to remain liable for all obligations under the lease. Since the landlord had no say over who Grand Union might choose as an assignee for the Ground Lease, the fact that Grand Union remained liable for the tenant's obligations was a material provision of the Ground Lease.

16. Grand Union's rejection of the Ground Lease operates as a termination thereof, leaving Miami Foodco with a tenancy at will. Chief Judge Robinson's opinion in Chatlos Systems, Inc. v. Kaplan, 147 B.R. 96, 98 (D.Del. 1992) quotes from In re 6177 Realty Associates, Inc., 142 B.R. 1017, 1019 (Bankr.S.D.Fla. 1992) and provided: "Rejection of a non-residential lease results in termination of the lease. Once the underlying lease is terminated, leasehold mortgages or sublessees retain no interest that can be pursued in bankruptcy court or state court." Miami Foodco currently stands in the position of a sublessor of a terminated lease with its only interest being that of a tenant at will.

17. Even if the Grand Union rejection did not automatically give rise to a termination of the Ground Lease, the rejection amounts to a continuing breach of the Ground Lease, pursuant to § 365 (g). This breach is incurable, since, even if Associated Grocers provides adequate assurance of future performance to justify an assignment governed by §365(b)(1)(C) of the Code, Associated Grocers retains the right to freely assign its interests in the Ground Lease to another party, who may not have the same qualifications. The only protection afforded to Minkin under

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the exercise of equitable powers ignore *ipso facto* clauses and remanded to case essentially to determine if the mortgagee would provide any benefit to estate so as to make it equitable to ignore the clause.

these circumstances is the fully negotiated provision requiring Grand Union to remain liable for the obligations of any assignee. That lease provision remains in breach, and prevents assignment of the Ground Lease pursuant to § 365 (b)(1)(A).

3. Minkin's termination rights cannot be eliminated by the Debtors.

18. Minkin retains a specific right to terminate the Ground Lease even if Fleming's interests in the Ground Lease are assignable to Associated Grocers. Specifically, page 19 of the Ground Lease provides that the Landlord may exercise its termination rights upon the filing of a petition in bankruptcy by or against Grand Union, if such petition is not withdrawn within 90 days of the filing thereof. The provisions of 11 U.S.C 365 (e) relating to *ipso facto* clauses provides no help to the Debtors, Associated Grocers or Miami Foodco. Section 365(e)(1) provides:

> "Notwithstanding a provision in an executory contract or unexpired lease … of the debtor may not be terminated or modified … at any time after the commencement of the solely because of a provision in such contract or lease that is conditioned on – (A) the insolvency or financial condition of the debtor **at any time before the closing of the case.**"

The Ground Lease having been rejected by Grand Union and the Grand Union bankruptcy having long since been confirmed, the provision on pages 18 through19 of the Ground Lease may be given full force and effect and Minkin may exercise their right to terminate the Ground Lease.

19. This is entirely consistent with the purpose of 365(e), which was to preserve the Ground Lease until Grand Union could determine what, if any, value it could provide to the estate. Indeed, Collier on Bankruptcy ¶ 365.07 (15th ed. Rev. 2002) makes clear that the purpose of §365(e) is to delay the effect of an *ipso facto* clause to allow a debtor to assume a contract.

> "The treatment of bankruptcy termination clauses is clarified under the Code. Section 365(e) expressly invalidates *ipso facto* and other bankruptcy termination clauses that might otherwise prevent the estate [in the instant case the Grand Union estate and not the Fleming estate, which has no privity with the Landlord] from receiving the benefit of an executory contract or lease…. Consequently, the [Grand Union] trustee or debtor in possession may **assume** such a contract or lease notwithstanding the a clause triggered by bankruptcy." Id.

Here, where Grand Union's bankruptcy petition has not been withdrawn, and Grand Union has rejected its interests in the Ground Lease, such that Minkin is unable to seek from Grand Union the guarantee of performance of the assignee's obligations, Minkin has the right to terminate the Ground Lease pursuant to paragraph 19 of the Ground Lease. Debtors had the opportunity to fully preserve its rights with respect to this lease by providing Grand Union with some incentive to assume and assign the Ground Lease to it. Having failed to do so, Minkin has been armed with the authority under both the terms of the Ground Lease and section 365 to exercise its right to terminate the Ground Lease.

Conclusion

WHEREFORE, for the foregoing reasons, David Minkin respectfully requests that this Court refrain from entering an order with respect to disputed rights between non-debtor parties, that the Court deny the proposed assignment of the Debtors' interests in the Ground Lease to Associated Grocers, and that the Court grant such other relief as is just and proper.

Dated: October 16, 2003
Wilmington, Delaware

ELZUFON AUSTIN REARDON
TARLOV & MONDELL, P.A.

/s/ William D. Sullivan
William D. Sullivan (No. 2820)
Charles J. Brown, III (No. 3368)
300 Delaware Avenue, Suite 1700
P.O. Box 1630
Wilmington, DE 19899-1630
(302) 428-3181

ATTORNEYS FOR David Minkin Realty Trust, Patricia B. Lester, Paul H. Briger, Peter L. Briger, and the Hall Family Partnership

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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 16th day of October, 2003, to:

Fleming Companies, Inc.
Attention: Contracts Department
1945 Lakepointe Drive
Lewisville, TX 75057

Marjon Ghasemi, Esq.
Kirkland & Ellis, LLP
777 South Figueroa St.
Los Angeles, CA 90017

Shirley S. Cho, Esq.
Kirkland & Ellis, LLP
777South Figueroa Street
Los Angeles, CA 90017

James I. Stang
Pachulski, Stang, Ziehl,
Young, Jones & Weintraub, P.C.
10100 Santa Monica Blvd., Suite 1100
Los Angeles, CA 90067

Steven Kotarba, Esq.
Kirkland & Ellis, LLP
200 East Randolph Drive
Chicago, IL 60601

Thomas G. Macauley
Zuckerman Spaeder LLP
919 Market Street, Suite 1705
Wilmington, DE 19899

Laura Davis Jones, Esq.
Pachulski, Stang, Ziehl, Young, Jones & Weintraub, P.C.
919 North Market Street, 16th Floor
Wilmington, DE 19801

The Lenders:
c/o Andrew DeNatale, Esq.
White & Case, LLP
1155 Avenue of the Americas
New York, NY 10036

The Committee:
c/o Dennis Dunne, Esq.
Milbank, Tweed, Hadley & McCloy, LLP
One Chase Manhattan Plaza
New York, NY 10005

Robert S. Hertzberg, Esq.
Pepper Hamilton, LLP
100 Renaissance Center, 36th Floor
Detroit, MI 48243-1157

/s/ William D. Sullivan
William D. Sullivan