

**IN THE 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.	:	Objection Deadline: November 18, 2003
	:	Hearing Date: November 25, 2003, at 9:30
	:	a.m.

OBJECTION OF BRIGANTINE TOWN CENTER ASSOCIATES, LP TO THE DEBTORS' MOTION PURSUANT TO 11 U.S.C. § 105(A) AND FED. R. BANKR. P. 9019 FOR COURT APPROVAL OF SETTLEMENT AGREEMENT WITH DIGIORGIO CORPORATION, C&S ACQUISITION LLC, W.R. SERVICE V CORP. AND VARIOUS STORE OWNERS, WHICH SETTLEMENT INCLUDES THE SALE OF CERTAIN ASSETS UNDER 11 U.S.C. § 363(B) AND (F)

Brigantine Town Center Associates, LP (“BTCA”), by and through its undersigned counsel, hereby objects to the Debtors’ Motion Pursuant to 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 9019 for Court Approval of Settlement Agreement with DiGiorgio Corporation (“DiGiorgio”), C&S Acquisition LLC, W.R. Service V. Corp. and Various Store Owners (the “Settlement Agreement”), Which Settlement Includes the Sale of Certain Assets Under 11 U.S.C. § 363(b) and (f) (the “Motion”), and, in support thereof, respectfully represents as follows:

INTRODUCTION

1. The Motion is fraught with procedural and substantive defects as it fails to provide landlords with due process and ignores the unique rights accorded to them in Section 365 of the Bankruptcy Code. For the reasons set forth below, the Motion should be denied; alternatively, the Motion should be adjourned until the Debtors file a motion to assume and assign the leases affected by the Settlement Agreement so that the interrelated issues can be addressed in a comprehensive and simultaneous, not piecemeal, fashion.

BACKGROUND

2. BTCA, as successor-in-interest to Brigantine Harbour Limited Partnership, owns the Brigantine Town Center in Brigantine, New Jersey (the “Shopping Center”). BTCA leases a supermarket located in the Shopping Center (the “Premises”) to the Debtors pursuant to a Build and Lease Agreement dated March 7, 1989 (the “Lease”). In turn, the Debtors sublease the Premises to Brigantine Supermarket, Inc. (the “Subtenant”) pursuant to a Sublease Agreement dated March 7, 1989.

3. On August 15, 2003, this Court entered an Order authorizing the Debtors to sell substantially all of the Wholesale Distribution Business assets to C&S Wholesale Grocers, Inc. and C&S Acquisition LLC or their designees (collectively, “Purchaser”) pursuant to an Asset Purchase Agreement (“APA”) and granting related relief. The APA provides, *inter alia*, that during the six (6) month period following the closing date of August 23, 2003 (the “Option Period”), the Purchaser may provide written notice to the Debtors requiring them either to assume and assign to the Purchaser, or exclude the assignment of, any executory contract or unexpired lease. *See* APA at §2.6(a).¹ In turn, the Debtors are required to file and serve a motion for Court approval of the proposed assignment. *Id.* at §2.6(b).

4. Understandably, this is the procedure that BTCA expected the Debtors would follow in seeking to assume and assign the Lease. BTCA was shocked to learn - and only because it was contacted by the Subtenant’s counsel - that the Lease was included in the Settlement Agreement and would be disposed of through a completely different procedure.

¹The Option Period expires on or about February 23, 2004.

RELIEF REQUESTED AND BASIS THEREFOR

5. The Motion is misleadingly styled as a request to approve a settlement agreement when, in fact, it seeks to dispose of the Lease or is a prelude to the disposition of the Lease. Notwithstanding its impact on BTCA's substantive rights, the Motion does not mention the Lease or the Subtenant.² The Motion does not afford BTCA the opportunity to verify the terms of the Settlement Agreement, instead merely providing a confusing summary thereof.³ The Motion ignores the lease assignment standards prescribed in Section 365 of the Bankruptcy Code, relying only on the less rigorous standards contained in Section 363 and Fed. R. Bankr. P. 9019.

6. Thus, BTCA objects to the Motion to the extent it seeks to conceal the terms of the Settlement Agreement. The Settlement Agreement presumably refers to the Lease and, therefore, necessarily affects BTCA's property. BTCA is entitled to review the Settlement Agreement so that it can more clearly comprehend the transaction contemplated thereby and respond more thoroughly to the objectionable provisions, including the proposed disposition of the Lease.⁴

²In fact, as set forth above, but for the Subtenant's counsel contacting BTCA, BTCA would not have known that the Lease is apparently implicated in the Settlement Agreement.

³For example, in paragraph 20(b) of the Motion, the Debtors state that they have agreed to sell to DiGiorgio or its designee pursuant to Section 363(b) of the Bankruptcy Code, inter alia, the leases relating to the Store Owners' use and occupancy of their respective premises. Thereafter, the Debtors state that DiGiorgio will instruct the Debtors regarding how to dispose of the Lease presumably pursuant to Section 365 of the Bankruptcy Code. See Motion at ¶ 20(b). The two statements are completely inconsistent.

⁴BTCA reserves all of its rights to set forth additional objections to the Settlement Agreement upon its review thereof.

7. BTCA also objects to the Motion to the extent it includes a request to sell the Lease pursuant to Section 363 of the Bankruptcy Code. Assumption and assignment of unexpired leases is governed by Section 365 of the Bankruptcy Code, not Section 363. Section 365 of the Bankruptcy Code imposes heightened restrictions on the assignment of shopping centers leases (such as the Lease) and provides as follows:

(3) For the purposes of paragraph (1) of this section, adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance --

(A) of the source of rent and other consideration due under such lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease will not breach substantially any provision, such as a radius, location, use or exclusivity provision, in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt substantially any tenant mix or balance in such shopping center.

11 U.S.C. § 365(b)(3).

8. The United States Court of Appeals for the Third Circuit observed that these additional restrictions on assignments of shopping center leases were enacted to protect the rights of lessors and the center's other tenants, and are intended to correct three problems caused by the insolvency of shopping center tenants. In re Joshua Slocum Ltd., 922 F.2d 1081, 1086-1088 (3rd Cir. 1990); see also In re 905 Intern'l Stores, Inc., 57 B.R. 786, 787 (E.D. Mo. 1985).

Specifically, this provision was designed to: (i) alleviate the hardship caused on landlords and tenants from the vacancy or partial operation of the debtor's space in a shopping center; (ii) ensure that the landlord will continue to receive lease payments; and (iii) prevent the tenant mix from being substantially disrupted. Joshua Slocum, 922 F.2d at 1088.

9. Absent strict compliance with the rigorous requirements of Section 365(b)(3), and even if the Debtors have satisfied the elements of Section 363(b) or Fed. R. Bankr. P. 9019, they cannot dispose of the Lease pursuant to the Settlement Agreement or otherwise.

10. In sum, the Debtors should not be permitted to trample the rights of shopping center landlords by disguising their efforts to dispose of unexpired leases under a request to approve a settlement agreement. Rather, the Court should compel the Debtors to properly file and notice their request to assume and assign the Lease and to demonstrate how they satisfy the strict requirements of Section 365(b)(3) of the Bankruptcy Code.

CONCLUSION

11. For all of these reasons, BTCA respectfully requests that the Court deny the Motion or, alternatively, adjourn it until the return date of the motion to assume and assign the Lease, and grant such other relief as the Court deems just and appropriate under the circumstances.

DATED: November 18, 2003

Respectfully submitted,

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.

By: /s/ Ilana Volkov
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CERTIFICATION OF SERVICE

I, Ilana Volkov, Esq., hereby certify that on November 18, 2003, I caused to be served a true and correct copy of the foregoing Objection via facsimile, upon all counsel on the attached service list.

Dated: November 18, 2003

/s/ Ilana Volkov

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