

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: December 8, 2003, 9:30 a.m.
) Objection Date: December 1, 2003, 12:00 p.m.

BASED ON THE ACTIVE CONCEALMENT OF MATERIAL FACTS BY FLEMING COMPANIES, INC., THE UNDERSIGNED FILE THIS MOTION FOR

- (1) LEAVE TO FILE THIS MOTION IN CONVENTIONAL PAPER FORMAT PURSUANT TO RULE 26.E OF THE CLERK'S OFFICE INSTRUCTIONS AND GUIDELINES;
- (2) LEAVE TO FILE A LATE OBJECTION TO THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES PURSUANT TO INSTRUCTION FROM SUPERVALU INC. (HEARING DATE DECEMBER 8, 2003);
- (3) LEAVE TO FILE A LATE CLAIM AGAINST FLEMING TO BE SATISFIED PRIOR TO THE ASSUMPTION OF WI-197 (NUMBER 6975);
- (4) SHORTENING THE TIME UPON WHICH THIS MOTION MAY BE HEARD TO DECEMBER 8, 2003; AND
- (5) PERMISSION FOR THE UNDERSIGNED TO APPEAR BY TELEPHONE (415.776.3643) AT THE DECEMBER 8, 2003 HEARING AT 9:30 A.M. E.S.T.

Objections to the assumption and assignment were due to be filed on December 1, 2003.

The undersigned, however, first received the notice of the December 8, 2003 hearing and the December 1, 2003 deadline for filing objections on December 1, 2003 in an envelope sent by first class mail, postmarked in Wilmington, Delaware on November 20, 2003. As a result, the undersigned, who is employed was not able to prepare this motion and declaration during the day needed additional time to complete it.

The undersigned is appearing *pro se* on behalf of herself, Patricia J. Kenney of San Francisco, California, and her sister, Roberta Kearns of Henderson, Nevada, to object to the assumption of WI-197 which is number 6975 (the "Lease") for premises located at 810 North Wisconsin Street, Elkhorn, Wisconsin ("Leased Premises") without Fleming or Supervalu first curing the approximately \$140,000 which Fleming Companies, Inc. ("the Tenant" or "Fleming") owes to Patricia J. Kenney and Roberta J. Kearns ("the Landlord") under the Lease for (1) a sublease which Fleming entered into in January of 1997 without disclosing it to the Landlord or fulfilling Fleming's obligations to pay additional rent under that sublease to the Landlord, and (2) for Fleming's unauthorized use as a parking lot and drive of a strip of land (304 feet long by 33 feet wide) along the Leased premises since 1992. This strip of land was expressly excluded from the Lease (as it was reserved to provide access to a larger parcel which the Landlords owned behind the Leased parcel).

As is explained in the attached declaration, from April 2, 2003 to October 29, 2003, Fleming refused many reasonable requests of the Landlord for a copy of the sublease which, once provided on October 29, 2003, made clear that Fleming owed the Landlord \$117,664 on the sublease for the period from January 11, 1997 to the date of Fleming's filing its bankruptcy petition on April 1, 2003. Fleming subleased the Landlord's premises to another party to operate a grocery store as of January 11, 1997, but never gave the Landlord notice of the sublease. More importantly, the sublease clearly provides that, if Fleming received rent from a sublessee that exceeded the rent owed the Landlord, then Fleming and the Landlord would split the excess amount, 50/50. Although Fleming was receiving \$2683 more a month than it was paying the Landlord, Fleming never gave notice of the sublease to the Landlord and never paid half of the

excess amount as additional rent. The Landlord learned of the sublease from individuals in Elkhorn, Wisconsin. On April 2, 2003, the Landlord demanded that Fleming produce a copy of the sublease so it could determine whether it needed to file a claim. Fleming refused. Fleming continued to pay to the Landlord, in the post-petition period, the same amount of rent as in the pre-petition period, rather than the increased amount rightfully owed the Landlord under the sublease. As a result, the Landlord had no way of knowing that it needed to file a claim for amounts Fleming owed under the sublease for the pre-petition. On November 11, 2003, however, Fleming finally admitted that it owed additional rent and cut a check to the Landlord to compensate for the additional amount owed post-petition to the Landlord under the sublease. In sum, because Fleming ignored the Landlord's reasonable requests for a copy of the sublease and failed to pay the proper rent post-petition, Fleming actively concealed that it also owed the Landlord a substantial sum of money for the pre-petition period from the inception of the sublease on January 11, 1997 to April 1, 2003.¹

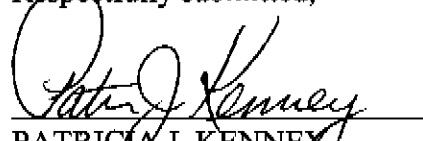
Also, as is explained in the attached declaration, Fleming actively concealed that it occupied a strip of land, 304 feet long by 33 feet wide, which the Landlord had excluded from the Leased premises as access to another parcel. The Landlord learned of the unauthorized use after the Landlord sold the strip of land to another party who surveyed the land in the fall of 2003 and informed the Landlords on October 27, 2003, that Fleming had paved over that strip of land to create a parking lot for access to the Leased building. For reasons explained in the attached declaration, the Landlord estimates that the reasonable rental value of the strip of land, 304 feet

¹ Although Ms. Kenney is employed, Ms. Kearns is retired and her only income is from the Fleming lease which, as it turns out, Fleming failed to pay.

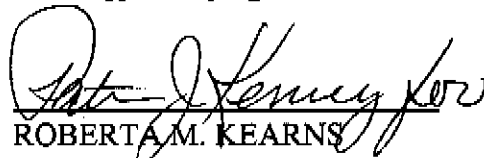
long by 33 feet wide, since 1992 is approximately \$1800 per year and amounts to \$20,400 for the period from 1992 through March 31, 2003.

For the foregoing reasons as explained in the attached declaration, we respectfully request the Court exercise its equitable powers under the circumstances and grant (1) for leave to file this motion in conventional format because the undersigned do not have the ability to file it electronically; (2) for leave to file a late objection to the assumption and assignment of certain executory contracts and unexpired leases pursuant to instruction from supervalu inc. (Hearing datee december 8, 2003); (3) for leave to file a late claim against Fleming to be satisfied prior to the assumption of WI-197 (Number 6975); (4) for shortening the time for hearing this motion to December 8, 2003 when the other motion is scheduled; (5) for leave of the undersigned to appear by telephone at 415.776.3643 at the December 8, 2003 hearing scheduled for 9:30 A.M. E.S.T.

Respectfully submitted,



PATRICIA J. KENNEY
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DECLARATION OF PATRICIA J. KENNEY

I, Patricia J. Kenney, declare as follows:

1. I received on December 1, 2003 in the mail a notice of the December 8, 2003 hearing on the sale order re: assumption and assignment of certain executory contracts and unexpired leases. It was sent by regular mail from Wilmington, Delaware and postmarked November 20, 2003. As a consequence and due to the fact that I am employed, I was unable to complete the motion and the declaration during the day and it took two evenings to complete.

2. Our family has long leased a grocery store building and land at 810 N. Wisconsin Street in Elkhorn Wisconsin. The original lease and amendment to that lease were signed in 1977 with the Godfrey Company. Exhibit A (October 27, 1977 Amendment and October 21, 1977 Lease). The 1977 lease reserved land to the north of the leased premises. Exhibit A, ¶ 20.

3. In 1992, having inherited the property and building, my sister, Roberta Kearns, and myself entered into an Amended and Restated Lease with the Godfrey Company. Exhibit B (May 21, 1992 Amended and Restated Lease). The Fleming Companies, Inc., guaranteed the 1992 lease agreement. Exhibit C (May 26, 1992 Guaranty). The rental amount was \$60,212 per year due in monthly installments of \$5,017. The original term was 10 years with two five year options which Fleming could exercise. The 1992 lease provided in pertinent part:

... [I]n the event Tenant shall assign or sublease the Leased Premises to a third party for any rent or other consideration in excess of the guaranteed fixed annual rent . . . , the Landlord shall receive fifty percent (50%) and the Tenant shall receive fifty percent (50%) of any such excess rental. Tenant agrees to provide written notice of any such assignment or sublease to Landlord within ten (10) days of the date of such assignment or sublease.

Exhibit B, ¶ 4 at 10.

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The lease also provided in pertinent part in the legal description that a strip of land 33 feet wide along the north property line was reserved as an easement to the City of Elkhorn and was not leased. Exhibit B, Legal Description at 18.

4. On August 2, 1999 and July 29, 1999, Fleming Companies, Inc. and my sister, Roberta Kearns and I entered into a third amended lease. Exhibit D (August 2, 1999 and July 29, 1999 Third Amendment of Lease). After the Wisconsin Department of Transportation threatened to condemn a strip of land along the west side of the leased premises to expand the highway, Ms. Kearns and I conveyed that strip of land to them in return for \$25,500. Fleming Companies, Inc., claimed entitlement to the entire amount. Ms. Kearns and I disputed that. The Third Amendment of Lease provided that Ms. Kearns and I would reduce the amount of the lease by \$600 per year for the remainder of the lease and option periods. At the time, Ms. Kearns and I were unaware that Fleming Companies, Inc., was receiving \$2683 excess rent per month under the sublease over what Fleming was paying us in rent. We were also unaware that Fleming had without authorization paved over the strip of land, 304 feet by 33 feet, for a parking lot.

5. On June 27, 2002, Ms. Kearns and I executed a letter agreement with Fleming Companies, Inc., in which it exercised its first five year option. Exhibit E (June 27, 2002 exercise of first five year option).

6. On April 1, 2003, I heard on CNN that Fleming Companies, Inc., had filed for bankruptcy. I reviewed the lease agreements and wrote my contact at Fleming, Adrienne Cooper Real Estate Administrator, on April 2, 2003:

... in reviewing the lease as amended, I note that we are entitled to 50% of any amount received from the sublessee, if the sublessee is paying more than the rent paid to Roberta Kearns and myself under the amended lease. Please provide us with a copy of

the sublease which shows the amount that the sublessee is paying. For your information and in order to help you search for the sublease, the Sentry Store is operated by Terry Daniels. If the sublessee is paying in excess of the rental amount, then Roberta Kearns and I are owed additional sums and may need to file a claim with the bankruptcy court.

Exhibit F (April 2, 2003 letter to Adrienne Cooper). Ms. Cooper did not respond.

7. Although I know extremely little about bankruptcy law, I was advised by a friend that Fleming had an obligation to continue to pay rent to Ms. Kearns and I during the post-petition period. Because Fleming did not increase the amount of the post-petition rent, I assumed that Fleming had determined that there was no excess rent and therefore had not increased the rent to us to reflect a 50/50 split of any excess. I believed that I could not in good faith file a claim.

8. By letter dated October 8, 2003, I again requested that Ms. Cooper provide me with a copy of the sublease and threatened to bring the matter to the Bankruptcy Court's attention and ask for an order directing that Fleming provide the sublease. Exhibit G (October 8, 2003 letter to Ms. Cooper). By email on October 10, 2003, Ms. Cooper responded that she could not find the provision that required a 50/50 split. By emails dated October 10 and 12, 2003, I directed Ms. Cooper to the provision that required a 50/50 split. Exhibit H (October 10 and 12, 2003 emails).

9. On October 13, 2003, Ms. Cooper advised me by email that she was reviewing the issue of the 50/50 split and awaiting instructions from "Fleming directly." On October 27, 2003, I complained by email that, because Fleming had refused to provide a copy of the sublease since April, it appeared that Fleming was trying to conceal the fact it owed us money and again

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threatened to take the matter to the Bankruptcy Court.. Exhibit I October 13 and 27, 2003 emails).

10. On October 29, 2003, for the first time and after seven months, Ms. Cooper provided me with a copy of the sublease which Fleming had entered with Terry Daniels to operate the grocery store in the Leased premises and a calculation of the post-petition rent which Fleming owed Ms. Kearns and I. Exhibit J (October 29, 2003 email). The post-petition rent was paid by check for \$2007.12 on November 11, 2003 which I received on November 17, 2003.

10. What was surprising was the amount of excess rent that Fleming had been concealing. Fleming's sublease provided that during the first five years and eleven months, from January 11, 1997 until December 31, 2002, Fleming would receive \$8,250 in monthly rent or \$99,000 on an annual basis and subsequently the annual rent went to \$66,233. Exhibit J (January 11, 1997 Fleming sublease). At no time prior to October 29, 2003 did Fleming inform us of the excess rent or fulfill its obligation to split the excess rent 50/50. Because of Fleming concealed the sublease, we did not believe in good faith that we had any basis for filing a pre-petition claim. I now calculate that Fleming owes us \$117,940 in back rent during the period from January 11, 1997 through March 31, 2003:

Year		Sublease Total Rent	Lease Total Rent
1997	\$5322 Jan rent + 11 x \$8250	\$ 96,072	\$ 58,398 (prorate 11 days)
1998	12 x \$8250	\$ 99,000	\$ 60,212
1999	12 x \$8250	\$ 99,000	\$ 59,954 (annual rent decrease by \$600)
2000	12 x \$8250	\$ 99,000	\$ 59,612
2001	12 x \$8250	\$ 99,000	\$ 59,612
2002	12 x \$8250	\$ 99,000	\$ 59,612
2003	3 (Jan thru Mar\$) x \$5519	<u>\$ 16,557</u>	<u>\$ 14,901</u> (Jan thru Mar)
		\$607,629	\$372,301

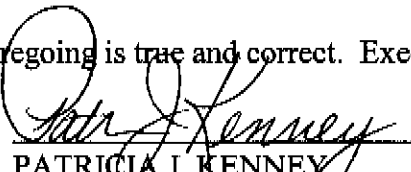
Accordingly, the excess rent is equal to \$607,629 - \$372,301 which is \$235,328. Thus, a 50/50 split of the excess rent is \$117,664. Fleming owes Ms. Kearns and I \$117,664 for the period from January 11, 1997 through March 31, 2003.

9. In April of 2003, Ms. Kearns and I sold the a parcel of land to a developer which is to the east of the Leased premises. The access to that parcel from the highway is a strip of land, 304 feet by 33 feet, which we also sold to the developer. This land, as previously noted, was excluded from the Fleming lease. On October 27, 2003, the attorney for the developer complained that Fleming had paved over strip of land to use as a parking lot and drive and provided me with a copy of the survey which showed Fleming's encroachment which likely occurred when Fleming expanded the building in 1992. Exhibit K. Based on the settlement with Fleming in the August 2, 1999 and July 29, 1999 Third Amendment of Lease in which Fleming concluded that the fair market rent for a strip about 1/3 of the size of the strip which is 304 feet by 33 feet, I believe that the reasonable annual rent for the strip as a parking lot and drive is \$1800. For the period from 1992 through March 31, 2003, the rent for that strip is \$20,400.

10. But for Fleming's concealment of the sublease and the unauthorized use of the strip of land, Ms. Kearns and myself would have filed a timely claim for claim for the \$117,664 and the \$20,400.

* * * * *

I declare under penalty of perjury that the foregoing is true and correct. Executed in San Francisco, California on this December 3, 2003.


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CERTIFICATE OF SERVICE

I certify that I served a copy of the following motion which is captioned,

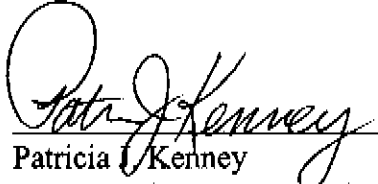
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along with the Declaration of Patricia J. Kenney and attached exhibits on the following at their last known address by an overnight mail service on December 3, 2003:

Laura Davis Jones, Esq.
Christopher J. Lhulier, Esq.
Pachulski, Stang, Ziehl, et al.
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- Exhibit A October 27,1977 Amendment and October 21, 1977 Lease
- Exhibit B May 21, 1992 Amended and Restated Lease
- Exhibit C May 27, 1992 Guaranty of Fleming Companies, Inc.
- Exhibit D August 2, 1999 and July 29, 1999 Third Amendment of Lease
- Exhibit E June 27, 2002 Fleming exercise of first five year option
- Exhibit F April 2, 2003 letter to Adrienne Cooper
- Exhibit G October 8, 2003 letter to Adrienne Cooper
- Exhibit H October 10 and 12, 2003 emails
- Exhibit I October 13 and 27, 2003 emails
- Exhibit J January 11, 1999 Fleming sublease
- Exhibit K October 27, 2003 Letter from Developer's Attorney