

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: January 21, 2004 at 9:30 a.m.
)	Objection Deadline: January 14, 2004 by 4:00 p.m.

RESPONSE OF BARRY ROAD FOODS, INC TO DEBTORS'
MOTION FOR ORDER PURSUANT TO § 365(a) OF THE BANKRUPTCY
CODE AUTHORIZING THE DEBTORS TO REJECT AN EQUIPMENT LEASE
WITH BARRY ROAD FOODS, INC.

Barry Road Foods, Inc. ("Barry Foods") by and through its undersigned counsel, hereby files this Response ("Response") to Debtors, Fleming Companies, Inc., et al. (the "Debtors") Motion for Order Pursuant to § 365(a) of the Bankruptcy Code Authorizing the Debtors to Reject an Equipment Lease with Barry Road Foods, Inc. ("Motion to Reject"). In support of its Response, Barry Foods respectfully represents as follows:

JURISDICTION

1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (G) and (O). Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for relief relevant herein are §§105(a) and 365 of Title 11 of the United States Bankruptcy Code (the "Bankruptcy Code").

BACKGROUND

3. On April 1, 2003, (the "Petition Date"), the Debtor, along with other affiliated entities (collectively, "Debtors"), filed their voluntary petitions for relief under

Chapter 11 of the Bankruptcy Code. The Debtors operate and manage their businesses as debtors in possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

4. On or about December 27, 1996, Barry Foods and Debtor, Fleming Companies, Inc. entered into an equipment lease for various types of refrigeration equipment for use in Debtors stores (the "Lease"). A copy of the Lease, as well as an itemization of the equipment provided therein, is attached hereto as Exhibit "A".

5. Paragraph 2(a) and (d) of the Lease provides as follows:

- (a.) During the Term, the Equipment shall remain the property of [Barry Foods]. [Debtors] shall have a leasehold interest in the Equipment and shall have the right to use the Equipment in the Normal operation of the [Debtors'] business consistent with the Terms of this Lease.
- (d.) Neither [Barry Foods] nor [Debtors] shall pledge, lend, create a security interest in, sublet, sell or part with possession of the Equipment or any part thereof or attempt in any other manner to dispose thereof, without the other party's prior written permission.

6. In September of 1998, Steve A. Malecki, the Marketing Director and employee for Debtors, contacted Dan Birk and Nick Holaves, principle employees of Barry Foods, wherein he advised Barry Foods that Debtors established a relationship with a retailer that was interested in operating the "Barry Road Food-4-Less" (the "Store"), and changing the Store to a new concept, commonly referred to as a "Festival Foods".

7. Mr. Malecki asked Mr. Holaves to provide Debtors' with written permission to move the equipment in the store, and otherwise upgrade the Store to a Festival Foods. A copy of the letter signed by Mr. Holaves is attached hereto as Exhibit "B".

8. In order to implement the changes required to convert the Store to a Festival Foods, Debtors represented to Barry Foods that the changes would require Debtors to move some of Barry Foods' equipment within the Store, as well as upgrade other equipment. Debtors also represented to Barry Foods that Debtors' needed approval from Barry Foods in order to allow Debtors to move and/or upgrade the equipment in the Store. Mr. Malecki further represented to Debtors that if the deal to convert the Store to a Festival Foods did not materialize, the Letter signed by Barry Foods would not be relied upon by the Debtors.

9. Barry Foods never received additional information from Debtors that the Festival Foods conversion would take place. Based on Debtors' prior representations, Barry Foods reasonably assumed that the Store conversion would not occur, and that the Letter was a nullity. Barry Foods signed the Letter for the sole purpose of allowing Debtors to remodel the Store as part of the Festival Foods conversion. Under no circumstances did Barry Foods intend to convey to Debtors the right to dispose of the Equipment.

10. Upon information and belief, prior to the Petition Date, the Debtors sold to a non-debtor third party some or all of the equipment subject to the Lease. The Debtors held no ownership interest in the equipment prior to the Petition Date and therefore had not right to sell the equipment. The equipment sold by the Debtors had a market value as of the Petition Date of approximately \$1,200,000.00.

11. At the time Debtors sold the equipment, and at all times since, Debtors have made no attempt to inform or otherwise notify Barry Foods that it intended to sell

the equipment under the Lease. Furthermore, at no time have the Debtors received permission or consent from Barry Foods to sell the equipment provided under the Lease.

12. Pursuant to paragraph 2(d) of the Lease, Debtors are prohibited from selling any of the equipment under the Lease without receiving prior consent from Barry Foods. Absent Barry Foods' consent, Debtors' actions were impermissible.

BASIS FOR RESPONSE

13. Debtors inappropriately seek to retain the benefits of the Lease (namely, the proceeds from the sale of the equipment) yet discard the burdens of the Lease (the lease payments due up and until December 26, 2007).

14. The parties agree that §365(a) of the Bankruptcy Code permits the Debtors to assume or reject an executory contract. However, it is well established that an executory contract must be either assumed or rejected in its entirety; the debtor-in-possession can not assume part of a contract, yet reject others. Stewart Title Guaranty Co. v. Old Republic Nat'l Title Ins., 83 F.3d 735, 741 (5th Cir. 1996); City of Covington v. Covington Landing Ltd. Partnership, 71 F.3d 1221 (6th Cir. 1995); U.S. v. Carolina Parachute Corp., 907 F.2d 1469, 1472 (4th Cir. 1990); Sharon Steel Corp. v. National Fuel Gas Distribution Corp., 872 F.2d 36 (3rd Cir. 1989); In re Klein, 218 B.R. 787, 790 (Bankr. W.D.Pa. 1998); In re Village Rathskeller, Inc., 147 B.R. 665, 671 (Bankr. S.D.N.Y. 1992); In re Independent American Real Estate, 146 B.R. 546, 553 (Bankr. N.D. Tex. 1992); In re El International, 123 B.R. 64, 68 (Bankr. D.Idaho 1991); In re Cutters, 104, B.R. 886, 888 (Bankr. M.D. Tenn. 1989); In re TransAmerican Natural Gas Corp., 79 B.R. 663, 667 (Bankr. S.D.Tex. 1987); In re Texstone Venture, Ltd., 54 (Bankr. S.D.Tex. 1985); In re Silver, 26 B.R. 526 (Bankr. E.D.Pa. 1983). In other words, a

debtor-in-possession may not assume favorable aspects of an executory contract, and reject its burdens. An executory contract may be assumed only subject to its existing burdens and obligations. See e.g., Collier on Bankruptcy, §365.03 (15th ed.).

15. Debtors contend that the Letter permitted Debtors to dispose of the equipment at will. However, testimony of Dan Birk and/or Nick Holaves, employees of Barry Foods, will show Debtors fraudulently misrepresented the purpose of the Letter. Mr. Holaves would never have signed the letter were it not for Debtors' representations that Debtors intended merely to convert the Store to a Festival Foods.

16. Furthermore, the Letter lacked any consideration in that Debtors were still obligated to make lease payments regardless of whether Barry Foods consented to the Letter. Had Nick Holaves not signed the Letter, Barry Foods would not suffer any detriment.

17. Debtors should not be permitted to reject the lease as Debtors inappropriately disposed of the equipment. Due to the inequities of Debtors' misrepresentations to Barry Foods, Debtors should be required to fully perform their obligations arising under the lease.

WHEREFORE, for the reasons stated above, Barry Foods respectfully requests that this Court deny Debtors' Motion to Reject and grant such other relief as this Court deems just and appropriate.

FOX ROTHSCHILD LLP

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Dated: January 13, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy of the attached Response of Barry Road Foods, Inc. To Debtors' Motion For Order Pursuant To § 365(a) of the Bankruptcy Code Authorizing the Debtors to Reject an Equipment Lease with Barry Road Foods, Inc. was served upon the following individuals this 14th day of January 2004, in the manner indicated below:

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