IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
Fleming Companies, Inc., et al.,[1]	)	Case No. 03-10945 (MFW)
	)	(Jointly Administered)
Debtors.	)	Related Docket No.:3277

DEBTORS' OBJECTION TO MOTION OF PARK PLACE, MHP LTD. TO VACATE AN ORDER AUTHORIZING THE DEBTORS TO REJECT A CERTAIN LEASE AND SUBLEASE OF NONRESIDENTIAL REAL PROPERTY [DOCKET NO. 3277]

The above-captioned debtors and debtors in possession (the "Debtors") file this objection (the "Objection") to the Motion of Park Place, MHP Ltd. To Vacate An Order Authorizing The Debtors To Reject A Certain Lease And Sublease Of Nonresidential Real Property (the "Motion to Vacate"). By the Motion to Vacate, Park Place, MHP Ltd. ("Park Place") seeks to vacate the Court's order dated September 16, 2003 (the "Rejection Order") [Docket No. 3706] granting the Motion Authorizing the Debtors to Reject Certain Unexpired Leases of Nonresidential Real Property [Docket No. 3277] (the "Rejection Motion") as it relates to the Lease and the Sublease[2]. In support of their Objection, the Debtors state as follows:

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[1] The Debtors are the following entities: Core-Mark International, Inc.; Fleming Companies, Inc.; ABCO Food Group, Inc.; ABCO Markets, Inc.; ABCO Realty Corp.; ASI Office Automation, Inc.; C/M Products, Inc.; Core-Mark Interrelated Companies, Inc.; Core-Mark Mid-Continent, Inc.; Dunigan Fuels, Inc.; Favar Concepts, Ltd.; Fleming Foods Management Co., L.L.C., Fleming Foods of Texas, L.P.; Fleming International, Ltd.; Fleming Supermarkets of Florida, Inc.; Fleming Transportation Service, Inc.; Food 4 Less Beverage Company, Inc.; Fuelserv, Inc.; General Acceptance Corporation; Head Distributing Company; Marquise Ventures Company, Inc.; Minter-Weisman Co.; Piggly Wiggly Company; Progressive Realty, Inc.; Rainbow Food Group, Inc.; Retail Investments, Inc.; Retail Supermarkets, Inc.; RFS Marketing Services, Inc.; and Richmar Foods, Inc.

[2] All capitalized terms not defined herein are used as defined in the Motion to Vacate.

A. The Debtors Properly Served the Motion to Reject On Park Place

1. The Motion should be denied because the Debtors properly served the Motion to Reject on Park Place. Fed R. Bankr P. 9006(e) provides that "notice by mail is complete on mailing." A correctly mailed notice creates a presumption that proper notice was given. In re The Grand Union Company, 204 B.R. 864, 870 (Bankr. D. Del. 1997); In re Schepps Food Stores, Inc.,152 B.R. 136, 139 (Bankr. S.D. Tex. 1993). The presumption is not rebutted even if the creditor submits an affidavit declaring notice was not received. Moody v. Bucknum (*In re Bucknum*), 951 F.2d 204, 207 (9th Cir. 1991); Grand Union, 204 B.R. at 870; Schepps, 152 B.R. at 139. Such a denial does raise a question of fact. Schepps, 152 B.R. at 139. But when a creditor offers evidence of nonreceipt, "the question of fact which arises is not whether notice was received, but rather whether notice was properly sent." Id. at 140 (stating that the presumption may only be overcome by evidence that mailing was not, in fact, accomplished). In making such a determination, the court considers factors such as whether the notice was correctly addressed, whether proper postage was affixed, whether it was properly mailed and whether a proper certificate of service was filed. Id. at 140.

2. Park Place has not proven, or even alleged, that the Motion to Reject was not properly served.[3] Further, a consideration of the factors articulated by the Court in Schepps weighs heavily in favor of a finding that Park Place cannot overcome the presumption that notice of the Motion to Reject was properly sent by the Debtors. The Debtors served the Motion to

[3] The Administrator of Park Place has only alleged that to his knowledge he has not received the Rejection Motion.

Reject on Park Place by Express Mail on August 20, 2003 (See Affidavit of Service, attached hereto as Exhibit A, p. 43) at the following address: P.O. Box 359, Stuart, FL, 34995-0359 (the "Park Place Address"). The Debtors have served at least 12 notices and other pleadings on Park Place at the Park Place Address in these cases, including the notice of commencement of case (the "Notice of Commencement"), notice of sale of certain of the Debtors' assets, the notice of deadline for filing prepetition claims (the "Notice of Bar Date"), the notice of administrative expense claim bar date, the notice of filing of disclosure statement and plan of reorganization, the notice of potential assumption and assignment of certain executory contracts (the "Notice of Potential Assumption and Assignment"), supplemental notice of potential assumption and assignment of certain executory contracts and the notice of sale hearing regarding the sale of assets to C&S Acquistion, LLC (the "Notice of Sale Hearing") (See Affidavit of Myrtle H. John, ¶5). To the Debtors' knowledge, only the Notice of Commencement was returned as undeliverable[4] (John Aff. ¶6).

3. In fact, Park Place acknowledges in the Affidavit of Char O'Donnell that it has received several documents in these cases (See O'Donnell Aff., ¶5 and ¶7), including the certification of counsel that seeks entry of an order on the Motion to Reject, (See O'Donnell Aff., ¶5), the Notice of Bar Date, the Notice of Potential Assumption and Assignment and the Notice of Sale Hearing (See O'Donnell Aff., Exhibits 4-6). Therefore, the Park Place Address used by the Debtors to serve the Rejection Motion is presumably valid. The Affidavit of Service

[4] The Notice of Commencement was returned because the label contained an incomplete address for Park Place. The address was corrected for future mailings.

regarding the Motion to Reject was filed with the Court on August 27, 2003 [Docket No. 3401]. There is significant evidence that the Debtors properly served the Motion to Reject on Park Place. Additionally, there is no evidence that the Motion to Reject was not properly served on Park Place. Therefore, Park Place has not and cannot overcome the presumption that service of the Motion to Reject was properly given. Accordingly, the Motion to Vacate should be denied.

B. Even If Proper Notice Was Not Given To Park Place, Relief Under Fed. R. Civ. P. 60(B)(6) As Incorporated By Fed. R. Bankr. P. 9024 Is Not Warranted In This Case

4. Even if the Court finds that proper notice of the Motion to Reject was not given to Park Place, the Court should deny the Motion to Vacate because Park Place's request for relief under Fed. R. Civ. P. 60(b)(6) as incorporated by Fed. R. Bankr. P. 9024 is not warranted in this case. Rule 60(b)(6) is a "catch-all" provision that provides that a court may relieve a party from the effects of an order for "any other reason justifying relief from the operation of the judgment." The United States Court of Appeals for the Third Circuit has consistently held that this ground for relief provides for extraordinary relief and may only be invoked upon a showing of exceptional circumstances Coltec Industries, Inc. v. Hobgood, 280 F.3d 262, 273 (3d Cir. 2002) (*quoting*, In re Fine Paper Antitrust Litig., 840 f.2d 188 (3d Cir. 1988) ("a change in law subsequent to [a] challenged order rarely justifies Rule 60(b)(6) relief"). This ground is used "sparingly as an equitable remedy to prevent manifest injustice." United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir.1993). Additionally, the movant generally must also show that it has actually suffered injury. See Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998), cert. denied, 526 U.S. 1040, 119 S. Ct. 1336, 143 L. Ed. 2d 500 (1999).

5. In the instant case, a consideration of the equities makes it clear that the Motion to Vacate should be denied. Several parties have relied in good faith on the Rejection Order. All leases contained in the Rejection Motion, including the Lease and Sublease, were rejected by the Debtors at the direction of Associated Wholesale Grocers, Inc. and AWG Acquisitions, LLC (collectively, "AWG") as a third party purchaser pursuant to the terms of the sale of certain of the Debtors' assets to C&S Acquisition, LLC (the "C&S Sale"). Pursuant to the terms of the C&S Sale, AWG assumed certain of the payment obligations associated with the Lease from a certain date after the C&S Sale to the date the Rejection Order was entered. If the Rejection Order is vacated, it is not clear what party would be liable for any administrative expense due in connection with the Lease and Sublease as a result thereof. It is clear that AWG, the Debtors, or both parties, would likely be harmed in the form of additional payment obligations, through no fault of their own, if the Rejection Order is vacated.

6. Additionally, the counterparty to the Sublease, Sewell's Big Star No. 187, Inc. n/k/a Sewell Allen, Inc. ("Sewell"), has relied on entry of the Rejection Order. On information and belief, Sewell vacated the premises of the Sublease several months ago. Vacating the Rejection Order as to the Sublease would severely prejudice Sewell because it has relied in good faith on the order in its decision to vacate the premises and in making decisions about where to locate its business in the future. If the Rejection Order was vacated as to the Sublease, Sewell, would presumably be liable for all obligations under the Sublease from the date of the Rejection Order until the Court entered a new order rejecting the Sublease even though Sewell has not occupied the space during the time and despite Sewell's reasonable belief

that its obligations under the Sublease terminated upon entry of the Rejection Order. Accordingly, vacating the Rejection Order would be inequitable to Sewell.

7. Additionally, if the Motion to Vacate is denied, Park Place will not be prejudiced. Even if Park Place had timely objected to the Rejection Motion, its objection would have failed. The standard applied to determine whether the rejection of an executory contract or unexpired lease should be authorized is the "business judgment" standard. See NLRB v. Bildisco & Bildisco, 465 U.S. 513, 524 (1984); see In re Taylor, 913 F.2d 102 (3d Cir. 1990); Sharon Steel Corp. v. Nat'l Fuel Gas Distrib. Corp. (In re Sharon Steel Corp.), 872 F.2d 36 (3d. Cir. 1989). Rejection of any executory contract is appropriate where rejection of the contract would benefit the estate. Id. at 40. The standard for rejection is satisfied when a debtor has made a business determination that rejection will benefit the estate. See Commercial Fin. Ltd. v. Hawaii Dimensions, Inc. (In re Hawaii Dimensions, Inc.), 47 B.R. 425, 427 (Bankr. D. Haw. 1985) ("under the business judgment test, a court should approve a debtor's proposed rejection if such rejection will benefit the estate."). In applying the business judgment standard, courts show great deference to the debtor's decision to reject. See, e.g., Summit Land Co. v. Allen (In re Summit Land Co.), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of a debtor's decision to assume or reject an executory contract "should be granted as a matter of course.").

8. As discussed above, the Debtors had a contractual obligation to reject the Lease and Sublease, once directed by AWG to do so, pursuant to Sections 2.5 and 2.6 of the Asset Purchase Agreement with C&S Wholesale Grocers, Inc. and C&S Acquisition LLC (the "APA") as amended by paragraphs 13 and 14 of the August 4, 2003 Letter Agreement Amending

the APA (the "Letter Amendment"). The APA and Letter Amendment were approved by the Court. In other words, any timely made objection by Park Place questioning the Debtors' business judgment to reject the Lease and Sublease necessarily would have failed, because the decision to reject was rightfully made by AWG. If the Motion to Vacate is denied, Park Place will be in no worse position than if it had timely objected to the Motion to Reject. After considering the equities of the instant case, it is clear that the circumstances do not warrant the extraordinary relief contemplated by Fed. R. Civ. P. 60(b)(6) as incorporated by Fed. R. Bankr. P. 9024.

9. WHEREFORE, for the foregoing reasons, the Debtors respectfully request that the Motion to Vacate be denied in its entirety.

Dated: January 16, 2004

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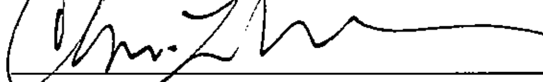

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