

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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U.S. BANKRUPTCY COURT
ALBUQUERQUE, N.M.

In re:

FURR'S SUPERMARKETS, INC.

No. 11-01-10779-SA

Debtor.

**MEMORANDUM OF LAW IN SUPPORT OF HELLER LEASING, INC.'S
OBJECTION TO SEPARATING THE DEBTOR'S EQUIPMENT LEASE**

Heller Leasing, Inc. ("Heller") respectfully submits this Memorandum in Support of its Objection to Separating the Debtor's Equipment Lease.

I. INTRODUCTION

Furr's Supermarkets, Inc. (the "Debtor") seeks to end run around the basic principal of bankruptcy law that a debtor must assume all the benefits and burdens of a lease and can not cherry-pick which portions of a lease it wishes to honor. The Debtor asks this Court to find that the two Closing Schedules, together with the Master Lease and Equipment Lease No. One (each as defined below) constitute separate equipment leases. The Debtor's attempts to cherry-pick the portions of its lease with Heller (the "Equipment Lease") must fail because (1) the documents are clear on their face that they constitute a single agreement; (2) the documents are part of a single transaction between the same parties; and (3) under the three prong test set forth in Gardinier, the documents must be treated as a single agreement.

II. BACKGROUND

On September 30, 1999, General Electric Capital Business Asset Funding Corporation ("GE Capital Corp.") and the Debtor entered into the Equipment Lease by executing a Master Equipment Lease Agreement (the "Master Lease"), Equipment Lease

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No. One and two corresponding Lease Closing Schedules (collectively, the "Heller Leasing Documents"). Pursuant to the Heller Leasing Documents, GE Capital Corp. agreed to lease equipment to the Debtor for use at various of the Debtor's locations. On September 30, 1999, GE Capital Corp. assigned the Debtor's Lease to Heller, and Heller, as assignee, has continued to lease equipment to the Debtor. On February 8, 2001, the Debtor filed for relief under chapter 11 of the Bankruptcy Code. The Debtor now seeks to separate the Equipment Lease, claiming the Heller Leasing Documents do not constitute one agreement, so as to allow the Debtor to select those portions of the Equipment Lease it wishes to assume.

III. ARGUMENT

A. **The Heller Leasing Documents Are Clear On Their Face That They Constitute A Single Agreement**

Heller agrees with the Debtor on one point, which is that "[w]hether certain documents constitute one or more agreements depends upon the parties intention." See Debtor's Memorandum of Law at p. 3. Indeed, the "touchstone for interpreting a written agreement is to ascertain and apply the intent of the parties." Levinson v. Hayes, 934 P.2d 300, 305 (N.M. Ct. App. 1997); see also In re Villa West Associates, 146 F.3d 798, 803 (10th Cir. 1995). The parties' intention is gathered from the four corners of the instruments in question. See e.g., In re Angel Fire Ski Corp., 176 B.R. 570 (Bankr. N.M. 1995). On their face, the Heller Leasing Documents clearly evidence the parties' intent that each instrument is interrelated and constitutes part of a single transaction. Section 26 of the Master Lease states:

This Agreement, applicable Leases, Certificates of Acceptance and Closing Schedules shall constitute the entire agreement between the parties and shall not be altered or amended except by an agreement in writing

signed by the parties hereto or their successors or assigns.
Master Lease § 26. (emphasis added)

The parties' intent that the Heller Leasing Documents constitute one agreement could hardly be more evident. As further evidence of their interrelatedness, the Heller Leasing Documents expressly incorporate each other and continually cross reference each other. For example, the Master Lease requires that "[f]ollowing the date ("Closing Date") . . . Lessor¹ shall send Lessee a Closing Schedule, setting forth any adjustments to payment schedules, stipulated loss values or other matters." Master Lease § 1. The Master Lease further instructs Heller to "insert in the Lease or the Closing Schedule, dates, models, serial numbers and other pertinent data relative to the proper identification of Equipment and/or the Lessee." *Id.*

Additionally, in Lease No. One, the parties expressly incorporate the Master Lease, stating that they each "affirm the Agreement [the Master Lease] and incorporate its terms in this Lease by this reference." Lease No. One § 1. Even more compelling evidence that the parties intended the Heller Leasing Documents to constitute one lease is the fact that Lease No. One lists every piece of equipment being leased to the Debtor. See Lease No. One at § 2 (emphasis added). There is not one lease for the fixtures and equipment that the Debtor intends to utilize in its El Paso stores and warehouse and a separate lease for the floor cleaning equipment the Debtor intends to distribute throughout its various stores—all the equipment to be leased to the Debtor is listed under a single lease, Lease No. One. Tellingly, Lease No. One requires that Heller send the Debtor "one or more Closing Schedules with respect to this Lease setting forth any adjustment to Equipment description, payment schedules, stipulated loss values and

other matters." Lease No. One § 8. The Closing Schedules merely set forth information regarding the leased equipment as required by the Master Lease and Lease No. One. See Master Lease at § 1 and Lease No. One at § 5. In fact, the language of Lease No. One contradicts the Debtor's argument that because the Closing Schedules set forth the rent due, equipment cost and stipulated loss values they create separate agreement. See Lease No. One at § 5 (rental rates for the equipment being leased will be "determined at closing; please see appropriate Lease Closing Schedule"). As expressed in the Heller Leasing Documents, the Closing Schedules do nothing more than finalize the rental rate and payment schedules for the leased equipment.

Further, the Heller Leasing Documents expressly incorporate each other and cross reference each other on multiple occasions evidencing that they are properly construed as one agreement. As the Court noted in Board of Education v. James Hamilton School Construction Co., 891 P.2d 556, 559 (N.M. Ct. App. 1994), an agreement for sale and letter of escrow instructions were to be construed as one contract because the sale agreement "expressly incorporate[d] the [escrow] Instructions, [and] when two such documents refer to each other, they are properly construed together." Id. (citation omitted). The Closing Schedules do not constitute separate agreements, and any attempt to separate the Heller Leasing Documents into separate contracts flies in the face of the parties' stated intentions as born out by the documents themselves.

B. The Heller Leasing Documents Were Executed By The Same Parties At The Same Time As Part Of A Single Transaction And Therefore Must Be Treated As One Lease

¹ Heller as assignee is the Lessor and the Debtor is the Lessee.

Although federal bankruptcy law governs assumption and rejection of leases, the Court will look to governing non-bankruptcy law (*i.e.* state law) where bankruptcy law is not available *i.e.* to determine issues of contract law. In this case, the governing law, as set forth in the Master Lease, is Washington state law. The Supreme Court of Washington has definitively held that under Washington law "where several instruments are made as part of one transaction they will be read together, and each will be construed with reference to the other." Levinson v. Linderman et al., 322 P.2d 863 (Wash. 1958); Boyd v. Davis, 897 P.2d 1239, 1241 (Wash. 1995). The Heller Leasing Documents were executed contemporaneously (on September 30, 1999), by the same parties (GE Capital Corp. and the Debtor), for the same purpose (leasing equipment) and as part of a single transaction (whereby equipment would be leased to the Debtor for its use at various of its locations). Accordingly, pursuant to applicable law, the Heller Leasing Documents must be treated as a single Lease.

New Mexico courts examining the issue of whether multiple instruments should be treated as one contract have echoed the rule set forth by Washington courts. See In re Angel Fire Ski Corp., 176 B.R. at 576-77 ("separate documents executed at the same time for the same purpose, and in the course of the same transaction are to be construed together"). In Levinson v. Hayes, 934 B.R. at 305, the Court found that the parties intended a guaranty and lease to be interlinked because "absent evidence indicating a contrary intention, instruments executed at the same time by the same parties, for the same purpose, and in [the] course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together . . ." Id. (citation omitted).

Using this basic rule, courts have consistently found that when, as in this case, instruments are executed by the same parties at the same time in order to accomplish one overarching goal, such documents are to be treated as one agreement. In Amoco Oil Company v. Gomez, 125 F. Supp.2d 492 (11th Cir. 2000), the Court rejected Amoco's argument that a lease whereby Gomez leased gas station premises and an agreement pursuant to which Gomez was allowed to sell Amoco Gasoline were separable. Id. at 501. The Court found that the lease and agreement were executed at the same time and had the common overall purpose of allowing Gomez to dispense Amoco gas through Amoco owned pumps; thus they constituted a single contract. Id. at 501. Similar to the instant case, In Clayton v. Howard Johnson Franchise Systems, 954 F.2d 645 (11th Cir. 1992) the court found that a motel license and restaurant lease constituted a single contract because they were executed on the same day, by the same parties for the operation of related businesses, and the documents themselves indicated their interrelatedness. See also Jones v. Kelley, 614 S.W.2d 95, 98 (Tex. 1981) (four instruments were held to be one agreement because they were executed at the same time, for the same purpose and in the course of the same transaction); In re TAK Broadcasting Corp., 137 B.R. 728 (W.D. Wis. 1992), (rejecting an attempt by a chapter 11 debtor to reject leases for space on a radio tower because such leases could not be separated from the sale of the land and tower); Carvel Corp. v. Diversified Management Group, Inc., 930 F.2d 228, 233 (2nd Cir. 1991) (separate promissory notes executed for the purpose of making payments under a distributorship agreement were treated as a single contract because "under New York law, instruments executed at the same time, by the same

parties, for the same purpose and in the course of the same transaction will be read and interpreted together").

The Debtor's reliance on its one sentence conclusory allegation that agreements reflecting separate transactions among parties are generally presumed to be separable, even if the transactions may be closely related is misplaced. An examination of the cases cited by the Debtor to support this assertion, National Union Fire Ins. Co. v. Clairmont, 662 N.Y.S.2d 110 (App. Div. 1997) and First Nat'l Bank v. Jarnigan, 794 S.W.2d 54 (Tex. App. 1990, writ denied), reveals that these cases are inapposite. The Court's ruling in these cases that two agreements should be treated as separate transactions hinged upon a clear manifestation of the parties' intent that such agreements should be treated separately. For example, Clairmont involved a promissory note between two parties and an indemnity agreement between two *different* parties. The Court noted that the existence of separate parties weighed heavily in favor of contract separability and that the indemnity agreement was clearly entered into as a form of separate protection in case the promise of payment under the promissory note was not fulfilled. Clairmont, 662 N.Y.S.2d at 112. In Jarnigan, the Court noted that the parties had evidenced a clear intent that the deed of trust and mechanic's lien contract in questions were to be considered separate agreements; thus the Court would treat them as such. Jarnigan, 794 S.W.2d at 59. In the instant case, there is no evidence that the parties intended the Heller Leasing Documents to be treated as separate agreements. In fact, the opposite is true. The Heller Leasing Documents were executed by the same parties, expressly incorporate and cross reference each other and explicitly state that together they constitute the entire agreement between the parties.

C. The Three Prong Test Set Forth in Gardinier Mandates That the Heller Leasing Documents Be Treated as One Contract

Even if the Court utilizes the three prong test set forth in In re Gardinier, 831 F.2d 974 (11th Cir. 1987) for determining whether documents should be treated as a single contract, it is clear that in this case, the Heller Leasing Documents must be considered one agreement. The Gardinier three prong test proffered by the Debtor includes: (1) whether the nature and purpose of the agreements are different; (2) whether the consideration for each agreement is separate and distinct; and (3) whether the obligations of each party to the instruments are interrelated. Id. at 976.

The Court in In re Atlantic Computer Systems, Inc., 173 B.R. 844 (S.D.N.Y. 1994) examined this three prong test in the context of a lease of computer equipment (clearly more relevant to the instant case than Gardinier, which discusses a sale contract for real property and a broker agreement). In In re Atlantic Computer, there was a master lease and several equipment lease schedules as well as several flexleases corresponding to the equipment schedules. Id. 846. The chapter 11 debtor sought to assume the master lease and equipment schedules but reject the flexleases. The equipment schedules expressly incorporated the master lease and provided supplemental terms concerning the leased equipment, including the type, quantity and rental rate for different equipment. Id. at 847. The flexleases cross referenced both the master lease and the equipment schedules. Id. When using the three prong test set forth in Gardinier, the Court found that with respect to prong 1, the nature and purpose of the documents were "substantially similar" and "arose contemporaneously in the same transaction," which was the leasing of computer equipment. Id. at 854. The Court made it clear that "[t]he test ... is whether the agreements cover the same subject matter, not whether they

contain identical provisions. By definition the agreements each provide for distinct rights and obligations; nonetheless, it is undisputed that they concern this same transaction." Id. Similarly, in this case, the purpose of the Heller Leasing Documents is to lease equipment to the Debtor. The fact that the Closing Schedules contain further information regarding the leased equipment does not alter the overall purpose of the transaction, which is to lease equipment. With respect to prong 2, the Court in In re Atlantic Computer noted that the only real consideration given in exchange for the leasing of equipment was rent payments. Id. at 855. Likewise, in this case, the only consideration given by the Debtor is the payment of rent. While the amount of rent may vary, there is no separate consideration. Finally, with respect to prong 3, the Atlantic Computer Court found that the right under the flexleases to exchange equipment contracted for under the equipment leases evidenced interrelatedness. Id. The Heller Leasing Documents expressly incorporate each other and contain multiple cross references to each other each manifesting their interrelatedness. See supra at pp. 2-4.

Further distinguishing the instant case from Gardinier is that the Court's decision in Gardinier rested largely on the fact that there was no clear indication on the face of the document that the parties intended to make only one contract. See Gardinier, 831 F.2d at 976. In contrast, the Heller Leasing Documents clearly express the intent of the parties that these documents be treated as one agreement. See supra at pp. 2-4. Moreover, the Court in Gardinier placed considerable importance on the fact that the promises in the sale contract and brokerage agreement were between different parties. Id. at 977. Indeed, the Court used the fact that in Gardinier, there were different promises ("Burley agreed to pay Gardinier ... Gardinier separately agreed to pay Kilgore a

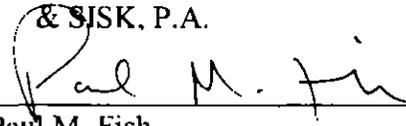
commission ... there was no consideration flowing between the broker and the buyer") to distinguish this case from another case where the Florida District Court had found a sale contract and brokerage agreement to be interdependent. Id. at 976 (contrasting Florida Mortgage Financing, Inc. v. Flagler Plaza Corp., 308 So.2d 571 (Dist. Ct. App. 1975). In contrast, the only parties to the Heller Leasing Documents are the Debtor and Heller, and the Debtor agreed to pay Heller for all the equipment leased under the Equipment Lease.

IV. CONCLUSION

In this case, the clear manifestation of the parties that the Heller Leasing Documents constitute a single agreement for the leasing of equipment is evidenced by the documents themselves and further solidified by applying the three factor test recommended by the Debtor. Accordingly, the Debtor's attempt to separate the Heller Leasing Documents and cherry-pick those portions of the Equipment Lease it wishes to assume must fail.

August 17, 2001

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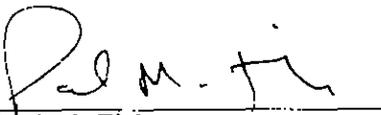
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WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed this 17th day of August, 2001 to the following:

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