

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

Clerk's Minutes

Before the Honorable James Starzynski

James Burke, Law Clerk
Jill Peterson, Courtroom Deputy

Joe Jameson Court Reporters
(505) 242-2809

Sara Edmonds Troske

Date:

WEDNESDAY, FEBRUARY 13, 2002

In Re:

FURRS

No. 7-01-10779 SA

FH on Motion to Extend Time to Assume or Reject El Paso Warehouse Lease by Trustee

Attorney for Trustee: David Thuma
Attorney for El Paso Properties: George Cheever
Attorney for MetLife: Thomas Tapia
Attorney for Heller: William Keleher

Summary of Proceedings:

Exhibits X

Testimony X

LEASE EXTENDED TO JUNE 30, 2002 - ORAL RULING ATTACHED

PARTIES WILL SUBMIT ORDER

T: I prepared an offer of proof last night and faxed it to Mr. Cheever. Think w/that we can dispense w/calling trustee. Take facts as estab. for purp. of today's hrg.

C: I so called, the trustee will stip. to these facts.

Ct: Submitting it on that basis. Is what Ms. G. will testify on.

T: Yes.

Tapia: Yes.

K: Yes.

Thuma: Last item is the offer of proof.

Ct: Have stip. regarding amts due on warehouse lease.

T: Is a differ. doc. Was going to mention after this.

Ct: Says offer of proof. What we are talking about.

T: Yes.

Ct: Fine.

T: Worked on proposed stip. on amts due under the lease. Is the doc. you just referred to. Taxes for year 2000. Trustee and landlord are prepared to stip. to these amts. Tried to do that to simplify.

Ct: What's the chg. for taxes of year 2000.

T: Lump sum and broke it out.

Ct: Interest penalty and atty fees?

T: Yes. D. Aelvoet appeared in this case. Attempt. to chg. \$70k in atty fees for 2001. I am told a lawsuit was filed in Jan. of this yr. Atty fees - is a statute that allows 15% for atty fees. Was going to see if it could be waived or reduced bec. it looked bad.

Ct: This is useful also. Good stuff. I had antic. we would call Ms. G. at 1:15. I incorp. into my plan going to mo. judge's mtg that starts at noon. Is informal and don't have to go. Was going to break at 11:45 and start at 1:15. How does that work for everyone.

T: We might finish by 11:45.

Ct: Outstanding. Want to admit these into evid. now?

T: Yes. Mr. C. has addit. exhibits.

C: Exh. 4 is a cheat sheet. Lays out how they calcul. the int. and penalties. Exh 5 is a flyer to market the property. Schematic map and thought it would be useful to see what it looks like.

T: Don't see how int. is calculated. Happy to get it in. Don't want to stip.

Ct: Don't want to stip. that they are correctly calculated. If gets to that point, my guess is it won't be the problem. Trustee won't meet this prob.

C: I share the bewilderment on how they were calculated. Just what we were told on the phone.

T: Mark exh. 4 as 4 (a). Have exh. 4 already.

Ct: Have #5. Cheat sheet becomes #6. Therefore can we admit w/o obj. 1, 2, 3, 4, 5 and 6?

Thuma: Yes.

Tapia: No obj.

Ct: Will admit int. sheet and offer of proof. Opening stmts. Read brief last night. Didn't read amended one yet.

C: Just chg'd dates.

Thuma: Trustee has estab. whet. there is cause to extend time to assume or reject warehouse lease. Value has not yet been deter. Is some risk all info. we have been told is wrong, might be a lot of value. Might be signif. value in this estate. Appears to trustee subj. to fairly creative argum. the replacement lien of lenders encumbers leasehold. Do not concede. If lenders has replacement lien is coll. asset.

Ct: Under post sale financing.

T: Replacement lien under DIP order.

Ct: Didn't have that prepet., but post petition?

T: New bank financing in year 2000. Fleet had a lien on this warehouse lease. Between time of loan closing and bankr. filing no leasehold mortg. was prov. by Heller at all. Somehow that fleet mortg. survived. That's a tough argument. Understanding I have is the DIP financing order granted a replacement lien on diminution of collateral. If use same value, was a large dimun. of value. Good chance they are lien on warehouse lease. Ntc'd out Fri. and on Mon. Trustee has reached agmt w/sec. lenders to hang onto this lease. Pay whatever is req. to be paid today and keep lease to sell to somebody. Trustee bel. benef. the estate. Get done as overall settlement. If not approved, trustee would abandon or reject lease or work out a deal

w/sec. lenders. Since there is \$6mil in value it makes a lot of sense to preserve that. Settlement is important for estate. Is cause. Not seriously disputed by landlord. Landlord is focused on cause to extend time, but trustee you must comply w/365 (b) (3). Court agreed w/that argum. Looks like that is where the court is headed. How much we need to comply w/365 (b) (3). Why we are here today. Get ext. of time to deter. val. I think when I was doing research on latter iss. it appeared to me and Mr. K. sect. 348 (a) and (c) have direct effect. 348 (a) says upon conv. w/certain except. the conv. date is deemed date for order for relief. (C) says when reading 365 (d) the order for relief date is conv. date. As a gener. proposition the conv. date is the date the court focuses on when figuring out what trustee owes after conv. If that is the right propos. of the law and date to look at the remain. iss. for court to addr. is do you use billing date rule when deter. how much is owed or accrual approach. Counsel has done a brief on that iss. In connect. w/DIP m/for global ext. filed in Mar. 2000. On the final hrg on that m/and TriCities obj. the court entered order that it is the conv. approach and not billing approach. Taxes accrued prepet. were due in full. Court ruled they ought to be prorated. Iss. is identical. Trustee is really trying to figure out what law is. Differ. from bank's int. Like more paid than less paid. Pay more unsec. clms as possible. Looks to us like 348 (a) and (c) tell you how you do the analysis. Court's ruling on which approach you use the court's ruling was correct. Prorate it. If take those two legal principles easy to figure out how much is due on this lease. When court enters order will ask sec. lenders to pay before 60 day deadline.

Ct: Saying trustee is going to go to lenders and ask them for the money to do that.

T: Trustee has a fair amt of money. Encumbered to lenders or earmarked. IF trustee had ½ mil \$ wouldn't want to pay out of these funds. In all likelihood is sec. to lenders.

Ct: I usually req. an opening stmt on what test. will show and reserve closing for later. Was mixed up so I will allow both.

K: Couple of points touched on is 348 has a real applic. in this case. Interplay between 348 and 365 (d). Conv. date was Dec. 19, 2001. 60 days after that is Feb. 19, 2002. 60 day ext. is req. under 365 (d). Lease says you have to pay rent, util. and taxes. Prov. regarding taxes is on pgs. 2 and 3. One of these drafting exercises. Introd. a lot of ambiguity. Not clear what oblig. is. Exper. w/leases can teach us what they are talking about. Pay taxes assoc. w/that bldg. during that time. At pg. 3 of that sec. it points out the lease req. taxes and those assessed during the term. After term. of the lease is prorated. Talks about a proration. Pay taxes during time you are using the property. IF lease ends and falls outside time of lease the landlord is expecting to prorate those chgs. Landlord will not expect that bec. a tax pymt is due after term of lease the lessee doesn't have to pay for it. Makes sense that these type of lease prov. for that. Pay rent and pay a prorata portion of taxes. Tax bill comes in a lump. There is a split in the auth. about how tax pymts are paid and other chgs accrued in lump sum. Brief charact. one position and major. position. Just bec. falls w/in 60 day period trustee will have to pay for a whole year of taxes. Billing date for those 2001 taxes comes due in Jan. If the bill comes due in Jan., the landlord is saying take all those due. Is a windfall to landlord. Costs

have already accrued. Just like trade creditor. Windfall that gets landlord paid right away. Leading case on the current pay for current use approach is HandyAndy. 144F3rd1125. Judge Posener. Hit highlights w/o plagiarizing his argument too much. Landlord was arguing taxes for prior yrs arose after order for relief. Taxes are inevitable. Oblig. for Judge Posener's analysis accrues on a daily basis.

Ct: Relief upon way back in in TriCities case?

K: I hope so. Fairly recent case. Envisions proration. Talks about end of lease and how taxes will be handled. Takes unsec. debt and gets them paid. Other thing they go on to do is prorate from here on out. Can't pay as you go and windfall. Asking for both worlds. Evid. will - have most of evid. already. Chgs accrue over time and are billed. Accrued prior. to order for relief. Figure out what chgs accrue. Give trustee some time to figure out if assume or reject lease.

Tapia: Will waive opening.

Cheever: Ct is familiar w/our papers. We have obj. to relief req. by trustee for 3 reasons. 1. As of this moment in time the trustee is delinq. in stat. oblig. under 365 (d)(3). Pay as they arise. Nothing has been paid under this lease since trustee's appt. Rent install. in \$66k. Taxes ...

Ct: For whole quarter.

C: Taxes due in Jan. were for 2001 tax year. Trustee may be paying util. No direct knowl. of that. Int. and penalties for taxes in year 2000. Article 19 of lease. Is ques. of insur. on property. Is now uninsured. Repair costs. Contrary to what Mr. T. has sugg. Is ques. whet. value in leasehold. Make sense to preserve this leasehold?

Ct: Is that any of the landlord's business?

C: Landlord is a creditor. All prejudiced. Prejudiced if a bad decis. is made and exercising own rates. Our primary concern here.

Ct: Separ. iss. and the landlord's concern are as a creditor?

C: Are party in interest. If maint. and repairs are not taken care of will deteriorate.

Ct: Talking about no value argum. Saying we are one of the stakeholders and we obj. to trustee trying to save something that has no value. No creditors standing beside you on those grounds.

C: That is true. Take the court's point. Is some dispute about that. Made refer. to a Deloitte and Touche appraisal. Not in evid. Like to see it. Ques. whet. it makes sense to go forward. Always my understanding if assets are fully encumbered. Abandon those assets. Speak next to the ques. of whet. the so called billing date approach or accrual approach is approp. Mr. K. says Handy Andy case is leading case. To the contrary is there are four court of appeal decis. Post date Handy Andy. Montgomery Ward case by 3rd circ. and case in 6th circ. Montg. Ward is directly on point. Also appears that in

this circ. the only appellate decis. is Duckwall case in Kansas. Adopts the billing date approach. Not familiar w/this court's decis. in TriState. Clear the trend of the law is in favor of billing date approach. If comes due during the period it is something that must be paid in full. Benef. the landlord, but was the intent of Congress. Congress felt landlord's were discrim. against.

Ct: When saying comes due talking about lang. in 365 (d) (4)?

C: Yes. What exactly do those words mean. Decis. of those court's is it arises when it matures. When due and payable. Oblig. may arise under a pre-pet. lease. (d) (3) would serve no purpose. No point in saying the trustee must perform oblig. that arise between order for relief and assumpt. for relief when arise in 1973. Not argum. Mr. K. is making. Making argum. that oblig. should be prorated. Lease term ends when a rental pymt comes due. Duckwall case. Not relev. to (d) (3). My recollect. of the case. If not that one, will get citation for court.

Ct: Patella case which you found that Judge Rose decided cites Senator Hatch's comments about 365 (d) (3). In the lang. that Senator Hatch used in explain. this is like the following: (rent due to the landlord, landlord is forced to prov. current services w/o current pymt, no other creds put in this position) Read like cash flow motion. Landlord having to lay out money, but is not getting any cash in for time and consideration. Sugg. to me we are talking about an accrual approach. Same result as Handy Andy.

C: Interesting fact that those court's who adopted billing date approach. Possible to read whatever you like into this lang. Commend to court the Montgomery Ward decis. Diffic. is it is not what Congress said when they wrote the statute. They said when an oblig. arises out of this period it must be paid. An interpret. of statute compelled by lang. That's the plate we have all been served. Have to live by it the way Congress wrote. Judge Stapleton pointed out another prob. w/billing date approach it allows people to do strategic maneuvering. Unfair to dtrs or landlords. Large part of landlord's concern is risk they are to take. Trustee has money that is locked up. Controlled by sec. creds. Trustee has no cash flow. Is a settlement in princ. w/sec. creds. Settlement is long way of being a done deal. Not effect. unless reduced to a final doc. It is approved by this court. No assur. that either or both of those will happen. No clear source we will be made whole. At some point ch. 7 estate will be solvent to pay admin. expenses. Not the case right now or for months or years it ever the case. There are oppor. here we are obliged to fork out.

Ct: Oppor. the landlord is being asked to forego. Lease to somebody else.

C: Yes, value in property itself.

Ct: Is what code provides. Enacted in 1978. Have to understand if your lessee files bankr. will be a period of time when the lessee has to make a decis. National policy. Nothing you can do about that.

C: Something can be done about that. Be more specif. Anything that is worth doing is worth doing well. Applies to marketing of this property. Are subst. outstanding maint. and repair oblig. under this lease that are

unperformed. Court said at last hrg can be deter. at time lease is assumed. Common sense req. a great deal of money be committed to this property so it will be attractive. Don't see that commitment being made. Sec. lenders are squeezing money. Don't have resources to put this property in condition it needs to be in to be marketed.

Ct: Market may go down or up. Just built into the statute. If a period of time that someone is given to make a decis., market may go up or down. W/respect to making property marketable and more valuable in theory the landlord doesn't care that much if the lease is assumed and the landlord gets what the landlord is entitled to. Basically what it is entitled to.

C: Two very big ifs.

Ct: Trustee has ltd time to do it.

C: Statute imposes no limit. Process could go on for quite some time. Suspect it will be sooner rather than later. Trustee will be left w/no alternative.

Ct: Is their choice. If want to take choice, fine.

C: No int. is served by a half hearted intent to market property. Is one of our concerns.

Ct: All kinds of landlords face decis. on whet. to put money in or get by w/o putting money into it. Standard decis.

C: Right thing to do in many cases and the right thing to do in this case. Propose to put on witnesses about condition of property. It's strength and weaknesses. Bring to a marketable situation. Don't waste the court's time. Important iss. to us.

Ct: First part is relevant. Extent the trustee wants to have oblig. to reject this lease make sure the landlords position is status quo and doesn't fall behind. If doesn't get penalized by trustee's position to take a longer amt of time to assume or reject property. To market properly have ques. about how relevant that is. See where we go in connect. w/that.

C: Our second concern has to do w/reasonable assur. the trustee can meet these oblig. I don't think landlord should be put in position where they have to rely on down the road.

Ct: Judge Rose's decis. in Patella. If code is clear the trustee will w/in 60 day period will meet it's oblig.

C: What we sugg. is if we have to live w/this is put lease on pay as you go. Made a proposal that would req. them to pay the taxes and the rent monthly. To do that thru June 30 cut off date. Mr. K. has sugg. is double dipping. We have legit. grounds to be nervous about trustee's abil. to meet these oblig.

Ct: Not using term double dipping. Trying to use two differ. theories. Billing approach and accrual approach. Understand what you are saying. Reasonable way to treat this case.

C: Yes.

Thuma: I bel. w/stip. and offer of proof that is our evid. Bel. Mr. C. will put on one or two witnesses and the evid. will be in.

K: Don't have any witnesses.

C: Call Charles Lugers.

TESTIMONY OF GEORGE LUGERS (sworn)

K: The witness is referring to notes. Could I take a look at those.

C: Looking at exhibits.

L: I have notes.

Ct: Want copies of it and he can testify from it.

TEST. CONT'D

Ct: Are you saying there is not insurance on the property.

L: Don't know that for sure. We understand there is not.

C: \$1mil of liab.

Ct: Don't need to do closing argument. Just put you on ntc it is an important issue.

TEST. CONT'D

T: Doesn't lease speak for itself.

C: Draw ct's attention to what is req. under the lease.

Ct: Don't think we need to do that. I can prob. read it faster. Also says he doesn't know whet. there is for sure insurance on the property.

TEST. CONT'D

T: Lease speaks for itself.

Ct: Not going to read the lease. If witness has competence he is welcome to do that.

C: Cut to chase here.

TEST. CONT'D

T: I obj. to extent is is testifying as expert. If trying to come up w/a

figure, is not an expert.

C: Extensive background in marketing and real estate and has examined this property.

Ct: Have obj. to that.

K: I do. Real Estate broker in Tampa. Has looked at this bldg.

T: I agree. Not an appraiser. Wants to testify about value. Not approp.

C: Is a definition. This witness has familiarity w/this property.

Ct: Isn't what trustee trying to get \$7mil of property insur. He testif. that they need \$1mil differ.?

C: Yes.

Ct: Has to explain how he reached that # and how he concluded it had that value. To make that conclusion that is what he has to do.

C: Let me move on.

TEST. CONT'D

K: Obj. Hearsay.

C: Qualified as expert on these matters.

Ct: Is he going to make the assertion for truth of matter.

C: To maintain the property as safe and marketable. Help this by asking ques.

TEST. CONT'D

K: Is hearsay what is going on in market in Mexico as far as manuf. plants. Reduce this to answers so we can antic. what is coming.

Ct: Have 3 ques. Is that the standard practice. Usually the lawyer asks a specif. ques. and the witness answers this. Do that rather than narrative approach. Second, whet. witness is qualified to testify about market in El Paso. Third, market iss. I am not - still struggling w/how relevant that is. How much more on market iss?

C: Very little.

Ct: Will let it in. Want to offer him as an expert.

C: I do. Is an expert on marketing.

K: May be in Tampa, but not in El Paso. Only test. is he has looked at bldg.

Ct: The standard that has not been chg'd by Supr. Ct is that in Fed. Ct what it takes to be an expert is a relatively low standard. Not meaning to impugn

the witness. This witness clearly qualifies. Qualifies as expert for what we are doing here this morning.

TEST. CONT'D

CROSS EXAMINATION

C: Obj. this line of questioning.

T: Will go at it another way.

CROSS CONT'D

CROSS EXAMINATION BY T. TAPIA

C: Mischaracterized the ques.

Ct: Can ask witness what he meant to say.

CROSS CONT'D

CROSS EXAMINATION BY W. KELEHER

REDIRECT

C: Only witness I will call.

Ct: Other evid. you intend to submit?

C: One thing I will submit. Haven't marked it. Set of calculations we made and proposed to sec. lenders and trustee that we think is a fair arrangement going forward. Specif. #'s as to what would be an approp. arrangement.

Ct: Talking about a settlement offer.

C: Wouldn't settle every issue.

Ct: Can't take a settlement offer. Have to decline. Is landlord resting?

C: I will rest.

Ct: Rebuttal?

T: None.

Ct: More argument. Important thing is this trial. Judge's thing is secondary importance. Don't worry about that.

T: Break until 11:00 can get argued by 11:45. Don't even need 10 min.

C: Sounds right.

RECESS

T: Iss. of cause under 365 (d) (1). Is cause to extend deadline. Bec. it is a lease and not property fee simple destruction is tantamount. IF benef. to be had for the estate, it can only be obtained not by abandonment or obj. Makes sense to know what has to be rejected. Overall agmt about all assets of the estate. Partially encumbered that she thought made sense for the estate. Not before court today to deter. whet. she properly analyzed the sec. issues. Will be decided at another point in the not too distant future. Subst. value based on testimony of landlord's witness. Gross value at \$5mil. Two \$ a sq. ft. may be on low side. Really in light of what we have been told. 60 cents a sq. ft is subst. below market. Consistent w/what this court heard this morning. Cause under 365 (d) (1) to extend. What should trustee pay? Fair deal and not just using it and making landlord come in and try and stop her. Mr. Keleher will get into this in more detail. If apply 348 and Handy Andy case. Prorated rent and taxes. Propose \$7mil of property damages. Don't know if court thinks it is approp. to make someone fix ammonia leak or oil leak. Don't think it will cost a lot of money. Our broker doesn't think there is an emergency. What Handy Andy and 348 would req. trustee to do. Is that result a fair one to landlord and trustee. Hard to say the landlord's didn't get short end of stick on conv. date. If conv. Feb. 2 than the whole year's worth of taxes would be properly due. Way I read Handy Andy trustee is not oblig. to pay whole year's taxes. No thinking when case conv. what effect this would have on El Paso landlord. Did Fleming deal end of Aug. In limbo trying to reach deal w/lenders. Couldn't reach deal so we conv.

Ct: Stmts about being serendipitous is not in evid.

T: Understand. Does seem fair to landlord is bec. I think the evid. is clear the real agenda is not protecting it's rent pymts. Real agenda is to be ext. and unburdened of totally unmarketable lease.

Ct: Doesn't make differ. whet. they have world conquest in mind.

T: Amt req. to be paid by Sunday is a fraction of what they are asking for. When faced w/situation they think is unfair do something else. Is an unfair result to anybody. Apply law as it finds it. Landlord is prosperous. Good deal for estate. Ct should apply law and not feel like applying law down the line is leaving someone in a hardship.

Ct: Situation w/insurance? Is trustee trying to find insurance at this point.

T: Trying to find insurance.

Ct: Ques. it would be approp. - Lease req. the lessee keep the place insured. Any ques. that ought to be a condition - req. under 365 (d) (3).

T: No. No ques. that should be a condition. Only ques. in my mind is how quickly we can get that in place. Might be able to get in place by Sunday or perhaps Friday. Admit it is a problem. Tried to get money from sec. lenders for insurance. Need to get it done. Don't know if we an get Heller to force place insurance until we can shop for a more competitive rate. Maybe we need to get emergency insurance from one of the banks. I could not agree more that we need to get it done immediately.

Ct: Deadline is Sunday. Between Saturday and Sunday or Sunday and Monday.

T: I thought it was midnight Sunday. Thought we had all day Sunday.

Ct: I guess Mr. C. you ought to addr. that also. 11:59 p.m.

C: I agree w/you.

T: Might make sense to have a cont'd hrg w/in a week or 10 days after hrg on settlement agmt. Position of lenders may change. Prob. approp. to revisit an extension. As soon as trustee bel. that the lenders may wish to pursue tis will file a m/to obj. To extent there is eq. addr. by amt of extension was floated by sec. lenders. Not sure they have a problem either.

K: I think I will start w/that time period that is applic. here. Asking for exten. of 30 days to decide what to do w/this lease. Are several cases on ch. 11 cases that conv. to ch. 7. Interplay between 348 and 365. 9th circ. BAP Re: Thompkins 95BR722. Ct held as follows: Order conv. ch. 11 into ch. 7 was entered June 26, 1987. Is date which the 60 day period runs. Is important...

Ct: Which is first day.

K: June 26.

Ct: Do count day of conv.

K: 60 days is Aug. 25. Point being in terms of there is a period to keep trustee from going deeper in hole. Looking to pull all those oblig. from past is what the trustee and sec. lenders feel is inapprop. Get into more. Pay as you go analysis. Chgs that accrue then, rent, utilities need to be paid. No doubt about that. Need to make that happen. #'s when put pencil to paper and figure out chgs is smaller. Is bec. what code req. is not let landlord rent to trustee while trustee thinks about this. Trustee has to pay as she goes. You had already quoted from legis. history. In re: Child World. So. Dist of NY. 25BCD4. Ct consider. same iss. and legis. history. Legis. history has compelling evid. to not to include prepet., but bill postpet. What Re: Handy Andy held as well. As far as score keeping majority vs. minority. Montgomery Ward goes a differ. way. Koenig is a sport case. Rent billed a day after pet. was filed. Payable in the future. Trustee argued only have to pay for two days until reject lease. They didn't do strict accrual. Brief period was a mo. as opposed to a yr. Chickory case. Deals w/whet. lease will conf. a benef. Ct said no. Don't do does lease benef. estate analysis. Doesn't have to benef. the estate. Not sure it stands for the proposition for which it is cited. Clearly the ques. pres. for your honor is why should landlord jump ahead of other unsec. as to taxes. Code does not say the landlord should be treated better than other unsec. If in awkward position the trustee needs to pay for time while the trustee is thinking. Very fair. Keep landlord from going backwards. Once you get to assumpt. those iss. will be dealt w/and landlord is taken care of. Landlord has complained there is risk here. That hammer has fallen. Haven't been paid for 2000 taxes or 2001. That's unfortunate, but that is the situation we are in. Don't hurt landlord during this time period. Judge Posner points out bygones and bygones. Let's give dtr time to make decisions about future and not crash under weight of prior pre-pet. debt. The final point to make is there is \$560k is the differ. in annual rent the landlord expects it might receive if lease is rejected. Rec. \$560k more per year. That same money is avail. to

the estate or some portion of it. Let trustee figure out what to do. Trustee will figure out test sugg. by witness today. Find info. out and give to potential tenants or people who want to buy leasehold. Trustee needs a little time. Is cause. Trustee should be directed to make pymts to keep from going backwards.

Ct: Mr. Tapia?

T: No.

C: Gratifying for Mr. K. to say the trustee has to pay as she goes. Has not paid as she goes and has no ability to pay as she goes. Ignores stat. oblig.

Ct: What if I give a deadline of Sunday to have insur. in place. Pay up front for ea. mo.

C: Wish I was assured they would. Doesn't necess. insure compliance.

Ct: Bankr. judge's can say if you don't pay the lease is rejected.

C: True. Is very much at risk. Sec. creds aren't bound and left holding an empty bag.

Ct: If gotten lease rejected, is what you want?

C: Sugg. if lease rejected Monday we would be taken care of as far as the future, but not as of the past.

Ct: Past is the past. Can't fix that prob. Tell them as condition of future perf. make up certain amt of past due pymts. That's the best I can do for you in these circum.

C: What we have sugg. to the sec. creds and wanted to sugg. to the court. Should be some mech. to protect us for pymt in advance. Serve that purp. pretty well.

Ct: Well good.

C: Mr. T. sugg. that abandonment of prop. would be tantamount to destruction of sec. Is pure speculation. Has to be resolved outside of this forum. No abil. to salvage. This sort of thing happens every day. Not taken as a given if trustee aband. this asset. Sec. creds can take care of themselves.

Ct: Basically whet. the trustee will realize something for the estate.

C: Any recovery on this leasehold it is contrary to our expect. would go to sec. creds. Trustee would get commission, but no eq. for sec.

Ct: Not in front of me. Need to make that decis. Need to decide case on what I have in front of me right now.

C: We agree w/that. That is why we are in nervous state we are in. Mr. T. innumer. the things he thought would be payable. Taxes prorated and rent prorated. Are other oblig. accruing here currently that would be payable by

trustee under any view. Int. and penalties accruing daily. On taxes for 2000. Current oblig. Even if cut off date is Dec. 19 the int. accrued is arising under the lease.

Ct: What's that number.

C: The cheat sheet shows the total amt accrued on int. and penalties. Gives hint on how calcul. Simple calcul. Rough # after conv. Exh. 5 or 6.

Ct: #6.

C: Is mystery on how El Paso office makes these calcul. Applied to these taxes and penalties. Current oblig. arising from lease. Oblig. of lessee. Article 19. \$184. Starts accruing Jan. 30. Another oblig. Will cont. to accrue until paid. Also do bel. the maint. oblig. and current oblig. Makes bus. sense.

Ct: Mean by repair and bus. oblig. (D) (3). Talking about protect. the landlord needs for having addit. time. Talking about getting roof repaired and oil leak cleaned up and asbestos cleaned up.

C: Asbestos will have to come to grips w/at some point. Pools of oil are a contamination hazard as it seeps into ground. Similar concern w/roof. Failure to complete roof repairs will endanger repairs already done. Basic cleanup. Part of any marketing initiative. Brings us to last issue whet. the billing date rule or accrual rule. Ct has read our brief. In most recent case which is the Montgomery Ward case found comfort for his views in legis. history. (Read from Judge Stapleton) His holding it req. current pymt. He bel. it supp. his view.

Ct: Lang. of (d) (3) was so evident.

C: Yes, icing on case.

Ct: Drafting legis. is extraord. diffic. job. When we give Congress a hard time lang. is mal. the way we humans use it. Not nearly so plain as their advocates assert. Tells you where I am coming from.

C: Not familiar w/judge's ruling in TriCity. Handed down in March of last year. Keep open mind on that issue. Trend of law.

Ct: Read Judge Stapleton's decis. Didn't chg my mind. Landlord's in TriCity said tax bill as now arrived. Needs to be paid under lease. Ought to be prorated. Part that arose for real estate pre-pet. would be treated as prepet. clm.

C: I agree. Mr. K. mentioned Duckwall case. Is on point.

Ct: Not sure I agree w/Duckwall.

C: I think ct understands our position. Thank you very much.

Ct: I need to noodle thru this a little bit. Got a # of notes. After present. take time and do a written decis., but not time to do that today or

render oral find. of fact and do that on the record. Render a ruling in connect. w/that. Need to have some time to noodle thru this. Will reread those cases. I also need - think I know where I am going w/it. Think Handy Andy is way to go. When read code the prob. w/plain meaning approach. Unfair to Congress. Part of my judicial philosophy. Need to think thru what the req. are. What the trustee needs to do no later than midnight Sunday the 17th. Sec. creds can make a decis. about what they want to spend their money on. Will go forward from there. Do you have plane reserv. back to El Paso.

F: Have flights at 5:50.

C: My flight is at 2:50. Going to Pittsburgh. Would like to be here if I could.

Ct: See - we had this sched. for all day at one point. Much rather take time to come up w /what trustee has to do. Want to hear what those things are. Will be gone Thurs. and Fri. Is day to do this.

C: Important iss. for us and our travel plans aren't an iss.

Ct: Reassemble at 2:30.

RECESS

RULING:

1334 and 157; core; 7052

Issue is extension of time under 365(d)(4) , but practically speaking it also includes a decision on (d)(3), since Congress clearly made it a policy matter that a LL should not have to pay the cost of a trustee taking time to decide about what she wants to do – that is, the LL should not have to go deeper into the hole while the trustee makes a decision. The legislative history of d3 makes that clear. At the same time, there is no call from the Code to require the trustee to fix problems or allow the LL to make up for prepetition defaults – that comes later in the context of an attempt to assume under 365(b). That includes issues of structural repairs, clean up, asbestos, etc. – not ruling on those issues, only that they are b1 issues not to be addressed until and unless necessary.

On the issue of proration, no binding decision in this circuit. Believe Handy Andy got it right, not necessarily because of the school of economics analysis but because the decision is both consistent with language of Code – which is not all that “plain” – and because it comports with philosophy and practice of BR Code. See Judge Mansmann’s dissent in Montgomery Ward case from 3rd Cir., including his analysis of Koenig case from 6th Cir.

Re d3, trustee must do the following before midnight of Sunday, Feb 17:

tender 60 days worth of rent

tender a prorated amount of 60 days worth of real estate taxes

tender proof of casualty insurance for the premises in the amount of \$7.5mm, plus \$1mm in

liability insurance for three months out
continue to pay the utilities current

Re d4, trustee must do the following, also before midnight of Sunday, Feb 17, and the before midnight on the last day of February and each month thereafter:

tender one month's rent (for rest of Feb, the rest of one month's rent)
tender one month's worth of RE taxes (same as for rent)
tender proof of casualty insurance for the premises in the amount of \$7.5mm, plus \$1mm in liability insurance for three months out (rolling figure, and taken care of if 6 months, etc.)
Continue to pay utilities current

Failure to timely meet any obligation set out in d3 or d4 paragraphs results in immediate deemed rejection of the lease.

Deadline under d4 is extended to June 30, 2002, subject to the requirements set out above.

I have some question about interest, penalties and costs for RE taxes, but that seems to me to be essentially a "prepetition" or preconversion liability, and does not come under d3 or d4. If LL wants to reargue that, can do so, but it is not an obligation to pay that I am imposing, and even if I change my mind, the ruling will not be applied retroactively such that the trustee will find herself having been in default

Was testimony about what it takes to market the property successfully – that has nothing to do with d3 and d4. Same for the impact of that testimony as it goes to the care of the building – no concrete evidence of what it takes right now to prevent significant structural damage, and what that would cost. (Roof stuff is close, but not concrete enough.)

LL needs to ID a reasonable location where performance can be tendered, even on a Sunday night.

Other issues: testimony elicited from Mr. Leugers provides evidence (.60 v. 1.50 or 2.00) of significant potential value, so clearly is within the range of reasonable business judgment for the trustee to move to extend the deadline. Thus overrule objection from LL as a creditor of estate. And that includes contention that this will only benefit lenders. Have not read the tender of proposed settlement with trustee and secured lenders – not relevant.