

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

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In re
FURR'S SUPERMARKETS, INC.
Debtor.

Case No. 11-0110779
Chapter 11

**OBJECTION OF LSF BASSETT, L.P. TO
DEBTOR'S MOTION FOR ORDER APPROVING SALE OF
SOME OR ALL OF DEBTOR'S OPERATING ASSETS**

ORIGINAL

LSF Bassett, L.P., a creditor and party-in-interest in the above-styled and numbered bankruptcy case, hereby files this its "Objection to Debtor's Motion for Order Approving Sale of Some or All of Debtor's Operating Assets", as follows.

I.

BACKGROUND

1. Debtor filed its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code on February 8, 2001. Debtor continues in possession of its property and operation of its business as a debtor-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108.

2. LSF Bassett, L.P. is the lessor under an unexpired lease on non-residential real property (the "Lease") designated as location no. 933 in Schedule "2" to the Sale Motion. The Lease covers certain premises located in a shopping center known as the Bassett Shopping Center, at 1117 Geronimo, El Paso, Texas (the "Premises").

3. On or about March 1, 2001, Debtor filed its "Motion for Order Extending Time Within Which Debtor May Assume or Reject Unexpired Leases of Nonresidential Real Property" seeking an extension of time to assume or reject a number of unexpired leases of nonresidential real property, including the Lease. This Court signed and entered an order granting such extension over the objection of Bassett and others on April 6, 2001, and extended the deadline under 11 U.S.C. § 365(d)(4) by which Debtor must assume or reject unexpired nonresidential leases until August 10, 2001.

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4. To date, the Debtor has not filed a plan or disclosure statement. On or about May 14, 2001, Debtor filed its "Motion For Order Extending Periods in Which Only Debtor May File a Plan and if Necessary, a Bridge Order Extending Exclusivity Until Hearing" by which the Debtor sought an order extending the exclusivity period for filing a plan until August 10, 2001. In its motion to extend the exclusivity period, the Debtor stated that it has made good faith progress toward reorganization and made no mention of the sale under Section 363 which it now says is crucial. Then, without signal or warning, the Debtor filed and served the Sale Motion just one business day prior to the expiration of the time to object to its motion to extend the exclusivity period.

5. On or about June 1, 2001, Debtor filed its "Motion for Order Approving Sale of Some or All of Debtor's Operating Assets and Granting Related Relief" (the "Sale Motion"). Pursuant to the Sale Motion, Debtor seeks, among other relief, an order: (a) approving the sale of all or part of the Debtor's operating assets, including its licenses and permits, to a purchaser to be determined at an auction to be held on June 25, 2001; (b) determining that the purchaser will have purchased the assets in good faith, within the meaning of sections 363(m) and (n) of the Bankruptcy Code; (c) approving the assumption and assignment of such of the Debtor's executory contracts and unexpired leases as the purchaser agrees to take at the Auction and enjoining any non-debtor party to such a contract or lease from any attempt to terminate or modify the contract or lease solely because of the Debtor's chapter 11 case or the relief requested in the Motion; (d) determining that the defaults set forth in the Sale Motion are the only defaults under the Debtor's executory contracts and unexpired leases that must be cured as a condition to assumption and assignment; (e) determining that upon the assumption and assignment of such contracts and leases the Debtor shall be released from all obligations under such agreements.

6. Also on or about June 1, 2001, the Unsecured Creditor's Committee filed its "Emergency Motion For the Immediate Appointment of a Chapter 11 Trustee". The Committee's motion has been sealed.

7. For the reasons more fully set forth below, Bassett strenuously opposes the Sale Motion, and the relief requested in the Sale Motion should be denied. Alternatively, Bassett requests that the relief requested in the Sale Motion be conditioned in accordance with the concerns addressed in this objection.

II.

SUMMARY OF BASSETT'S OBJECTIONS

8. Bassett objects to Debtor's Sale Motion for the reason that it contravenes 11 U.S.C. § 363 by attempting to end-run the disclosure, solicitation and voting process of Chapter 11.

9. Bassett objects to Debtor's Sale Motion for the reason that it ignores the basic protections of 11 U.S.C. § 365 afforded to lessors of non-residential real property generally, and of shopping centers specifically.

III.

ARGUMENT AND AUTHORITIES

A. Sale Motion Impermissibly Attempts to Circumvent Disclosure Requirements of Chapter 11.

10. Fundamentally, the confirmation of a plan of reorganization is the cornerstone of a Chapter 11 case under the Code.¹ The heart of a Chapter 11 case is the proposal, approval, and confirmation of a plan, whether of reorganization or of orderly liquidation.² The central theme of the Chapter 11 plan process is to strike a bargain for the debtor's financial rehabilitation after full and fair disclosure, and then to have the court approve that bargain to make it binding on all of the interests competing for the values the debtor has available.³ Disclosure is the pivotal concept in reorganization practice under the Bankruptcy Code.⁴

11. While it is now generally accepted that Section 363(b) allows the sale of a chapter 11 debtor's assets outside the ordinary course of business prior to confirmation of a chapter 11 plan, such is not

¹ *In re Mold Makers, Inc.*, 124 B.R. 766, 767 (Bankr.N.D.Ill.1990).

² *In re Mold Makers, Inc.*, supra.

³ *In re Mold Makers, Inc.*, supra.

⁴ 7 Collier on Bankruptcy (Lawrence P. King ed., 15th Rev. Ed. 2000).

without limitations.⁵ In order to obtain approval of such a sale, the debtor must demonstrate a good, sound business justification for conducting the sale prior to confirmation, that there has been adequate and reasonable notice of the sale, that the sale has been proposed in good faith, and that the purchase price is fair and reasonable.⁶ Contrary to the Debtor's assertion, Section 363 does not authorize a debtor and the bankruptcy court to routinely short circuit the requirements of a reorganization plan by establishing the terms of the plan sub rosa in connection with a proposed transaction.⁷ Where a transaction specifies terms for adopting a reorganization plan, the debtor may not bypass the disclosure requirements of Section 1125, the voting requirements of Section 1126, the best interest of creditors test of Section 1129(a)(7) or the absolute priority requirements of Section 1129(b)(2)(B).⁸

12. Permission for Chapter 11 debtors to circumvent the disclosure and voting requirements of chapter 11 to conduct a Section 363(b) sale should be the exception and not the rule. It is not to be routinely granted. Indeed, in considering the question of whether to authorize the sale of substantially all of a Chapter 11 debtor's assets, the New Mexico Bankruptcy Court endorsed the "compelling circumstances" test that the Debtor in its Sale Motion erroneously claims the Court rejected.⁹ The Honorable Judge McFeeley held that in determining the propriety of the proposed sale, in addition to demonstrating a sound business justification for the sale, the debtor must show facts constituting an emergency, or in the absence thereof, other compelling circumstances supporting the sale. Judge McFeeley determined that the Court should make the following specific findings:

"1. Whether there are facts constituting an emergency or in the absence of a demonstrated emergency, whether there are compelling facts and circumstances which support approval of the sale, be it public or private; 2. If the trustee has not solicited other prospective

⁵ *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2nd Cir. 1983); *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir.1986). Accord *In re Condere Corp.*, 228 B.R. 615, 626 (Bankr.S.D.Miss. 1998).

⁶ *In re Lionel Corp.*, *supra*.

⁷ *In re Continental Air Lines, Inc.* *supra*, citing *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983).

⁸ *Id.*

⁹ *In re Allison*, 39 B.R. 300, 301 (Bankr.D.N.M. 1984).

purchasers, private or public, whether there are facts that justify the trustee not doing so, and 3. Whether the sale, private or public, is in the best interest of the debtor estate when the consideration paid and all other relevant factors are taken into account."¹⁰

In the *Allison* case, Judge McFeeley went on to find that there were compelling facts and circumstances which even in the absence of a demonstrated emergency would support approval of the lease by the debtor of substantially all of its property.¹¹

13. The Debtor has failed to satisfactorily demonstrate a sound business reason for sale of the assets outside the context of a plan of reorganization or liquidation. The purported justifications proffered by the Debtor are circumstances which are present in nearly every chapter 11 case. The Debtor summarily states: "Several parties have recently expressed interest in an acquisition of all or a part of the assets. In light of these expressions of interest and for the other reasons set forth below, the Debtor believes that a prompt sale of the Debtors assets will realize the best value for its creditors."¹² The Debtor's chief justification for a quick sale of the assets appears to be to prevent the accrual of further administrative expenses.¹³ If the Debtor's proffered reasons for the sale rise to the level of sound business reason, then Courts should dispense with the requirement altogether, since such reasons exist in all chapter 11 cases.

14. Even assuming that the Debtor can demonstrate a sound business justification, it has failed to demonstrate any compelling facts or circumstances which would justify bypassing the disclosure, solicitation and balloting processes which are the cornerstone of the Chapter 11 case. Accordingly, the Debtor's motion should be denied.

¹⁰ *In re Allison*, supra citing *In re Anchor Exploration Co.*, 30 B.R. 802, 807 (N.D.Okla. 1983).

¹¹ *In re Allison*, supra.

¹² Sale Motion at p. 4.

¹³ "...chapter 11 itself imposes extraordinary costs on a company." Sale Motion at p. 5; "A prompt sale will prevent further operating losses and minimize the further accrual of administrative expenses, including many of the direct costs of the chapter 11 case itself." Sale Motion at pp. 5-6.

B. Sale Motion Impermissibly Denies Protections Afforded Landlords Under Section 365.

15. Bassett objects to the Sale Motion filed by the Debtor because it denies Bassett a number of the protections afforded to it by Section 365 as a lessor under an unexpired shopping center lease. Section 365 gives to lessors of non-residential real property a number of valuable protections. The purpose behind Section 365 is to balance the state law contract right of the creditor to receive the benefit of his bargain with the federal law equitable right of the debtor to have an opportunity to reorganize. This is accomplished by forcing the debtor to abide by the contract provisions during pendency of the bankruptcy and cure any pre-petition defaults upon assumption while prohibiting the creditor from enforcing any pre-petition default remedies.¹⁴

16. Pursuant to the Sale Motion, Debtor seeks an order: (a) approving the assumption and assignment of such of the Debtor's executory contracts and unexpired leases as the purchaser agrees to take at the Auction; (b) determining that the defaults set forth in the Sale Motion are the only defaults under the Debtor's executory contracts and unexpired leases that must be cured as a condition to assumption and assignment; and (c) determining, as provided by section 365(k) of the Bankruptcy Code, that upon the assumption and assignment of any agreements under the Sale Motion the Debtor shall be released from all obligations under such agreements.

(1) Debtor's Sale Motion Fails to Provide for Cure of Entire Pre-Petition Default.

17. Section 365(a) provides that, with some notable limitations, the trustee or debtor-in-possession, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.¹⁵ One of the important limitations on the debtor's right to assume a lease is the debtor's

¹⁴ *In re Circle K Corp.*, 190 B.R. 370, 375 (9th Cir.BAP 1995), *aff'd* 127 F.3d 904 (9th Cir. 1997).

¹⁵ 11 U.S.C. § 365(a) provides: "Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."

obligation to cure any default under the lease.¹⁶ Section 365(b)(1) provides a guarantee to the non-debtor party, who may be forced to continue a relationship it would rather terminate, that as a condition to the forced continuation of the contractual relationship, any losses or defaults existing at the time will be satisfied either through a timely cure or through reasonable assurances of future payment.¹⁷

18. The Debtor's motion does not provide for cure of all defaults under the Bassett Lease. While the Debtor's Schedule "2" attached to the Sale Motion correctly states the pre-petition default of rent in the amount of \$8,072.16, Schedule "2" and the Sale Motion omit any reference whatsoever to the Debtor's default in its obligations to reimburse Bassett for its portion of the 2000 ad valorem real property taxes.¹⁸ The taxes assessed against the leased premises for the year 2000 by the El Paso City Tax Collector/Assessor were in the amount of \$41,088.75. Bassett received the tax bill in the normal course and paid it, and on January 19, 2001, sent the Debtor an invoice for the 2000 taxes. Bassett objects to the Sale Motion insofar as it makes no provision whatsoever for cure of the Debtor's default under its obligations under the Bassett Lease to reimburse Bassett for the 2000 taxes.

19. In addition, Bassett objects to the Sale Motion because it does not state when the defaults will be cured. The Sale Motion references a yet to be filed Form Asset Purchase Agreement and states that "all sales will provide for the cure of any defaults under any contracts or leases to be assumed and

¹⁶ 11 U.S.C. § 365(b)(1)(A) provides that the trustee or debtor may not assume an executory contract or unexpired lease of the debtor unless, at the time of assumption of such contract or lease, the trustee or debtor "cures, or provides adequate assurance that the trustee will promptly cure, such default."

¹⁷ *In re National Gypsum Co.*, 208 F.3d 498, 508 (5th Cir.2000).

¹⁸ Section 10 of the Lease provides: "Real Property Taxes. Lessor agrees to pay all real estate taxes and assessments levied upon and assessed against the Center except for those real estate taxes and assessments levied upon and assessed against the Premises and the Parking Area depicted on Exhibit "D". Further, to facilitate Lessee's payment of the real estate taxes hereinafter agreed to be paid by Lessee, Lessor agrees to obtain separate tax bills for the Premises and the Parking Area depicted on Exhibit "D". Lessee shall pay and discharge, in addition to the rent herein reserved, all real estate taxes and assessments levied upon and assessed against the Premises and the Parking Area depicted on Exhibit "D" and the improvements to be constructed thereon in accordance with the Plans and Specifications for any period, all of which is included within the term of this Lease, and also its pro rata share of all taxes and assessments levied or assessed thereon for any period, part of which is included within the term of this Lease. In addition, Lessee shall pay and discharge, in addition to the rent herein reserved, all personal property taxes levied or assessed against personal property in or about the Leased Premises for any period all of which is included within the term, and also its pro rata share of all such taxes and assessments levied or assessed thereon for any period, part of which is included within the term. Nothing contained in this Lease shall be deemed or construed to require Lessee to pay or discharge any tax which may be levied upon the income, profits or business of Lessor or any personal property taxes, franchise, inheritance or state taxes or taxes upon inheritance or right of succession which may be levied against any estate or interest of Lessor even though such taxes may become a lien against the Premises."

assigned...". but does not indicate when under such form agreements the default will be cured. To the extent that the Debtor's proposed sale contemplates cure of such defaults other than immediately upon assignment of the Lease, Bassett objects to such assumption and assignment.

(2) Debtor's Sale Motion Fails to Provide Adequate Assurance of Future Performance .

20. Another important limitation on a debtor's right to assume an executory contract or unexpired lease is the debtor's obligation to provide adequate assurance of future performance under the lease.¹⁹ Similarly, as a condition to assigning an executory contract or unexpired lease of the debtor, adequate assurance of future performance by the assignee of such contract or lease must be provided.²⁰ In the case of an assignment, adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance of: (a) the source of rent and other consideration due under such lease; (b) that the financial condition and operating performance of the proposed assignee will be similar to the financial condition and operating performance of the debtor as of the time the debtor became the lessee under the lease; (c) that assumption and assignment is subject to all the provisions of the lease, including provisions such as use or exclusivity provisions; (d) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.²¹

21. Satisfaction of the requirements of both Sections 365(b)(1)(C) and 365(f)(2)(B) depends on whether the prospective assignee can provide adequate assurance of future performance. Congress intended

¹⁹ 11 U.S.C. § 365(b)(1)(C) provides that the trustee or debtor may not assume a contract or lease unless, at the time of assumption of such contract or lease, the trustee "provides adequate assurance of future performance under such contract or lease."

²⁰ 11 U.S.C. § 365(f)(2) provides: "The trustee may assign an executory contract or unexpired lease of the debtor only if-- (A) the trustee assumes such contract or lease in accordance with the provisions of this section; and (B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease."

²¹ 11 U.S.C. § 365(b)(3) provides: "For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance-- (A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease; (B) that any percentage rent due under such lease will not decline substantially; (C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and (D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center."

that the words "adequate assurance" be given a practical, pragmatic construction, and is to be determined under the facts of each particular case.²² No guarantee is required, but the lessor must be given adequate assurance of future performance so that it will be protected from having to take on the burden of a tenant who may be likely to default on his lease obligations after the assumption and assignment have occurred.²³

22. Bassett objects to Debtor's Sale Motion because it fails to provide even the most basic assurance of future performance. The identity of the proposed assignee is not disclosed. With respect to the undisclosed assignee, no business or financial information of any kind has been furnished. Debtor has not disclosed the source of rent and other consideration due under such lease, nor offered any assurance that the financial condition and operating performance of the proposed assignee will be similar to the financial condition and operating performance of the Debtor as of the inception of the Bassett Lease. Furthermore, Debtor has offered no assurance that the assignment will be subject to the use restriction contained in the Lease, which restricts the use of the Premises to the operation of a "first-class" supermarket.

(3) Debtor's Sale Motion Extends Scope of Release Under Section 365(k).

23. Assignment of an executory contract or unexpired lease assumed under Section 365 relieves the debtor and the estate from any liability for any breach of such contract or lease occurring *after* such assignment.²⁴ Section 365(k) changes the common law rule and relieves the estate of liability, which is analogous to a novation.²⁵

24. Debtor attempts to expand the reach of the release afforded by Section 365(k) by relieving the Debtor of liability for pre-petition defaults as well. The Sale Motion seeks an order "determining, as provided by section 365(k) of the Bankruptcy Code, that upon the assumption and assignment of any

²² *In re Bygraph, Inc.*, 56 B.R. 596, 605 (Bankr.S.D.N.Y. 1986).

²³ *In re Bygraph, Inc., supra.*

²⁴ 11 U.S.C. § 365(k) provides: "Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment."

²⁵ *In re Anchor Resolution Corp.*, 231 B.R. 559, 562 (D.Del. 1999), affirmed in part, reversed in part *American Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76 (3rd Cir. 1999); *Wainer v. A.J. Equities, Ltd.*, 984 F.2d 679, 683 (5th Cir. 1993).

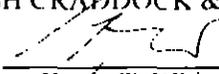
agreements under this Motion the Debtor shall be released from *all* obligations under such agreements" without regard to when such obligations accrue. The difference between the relief requested by the Debtor and that afforded by Section 365(k) is significant in a case such as this, in which the Debtor has not stated the time frame in which lease defaults will be cured and has not offered adequate protection of performance by the assignee. If this Court enters an order allowing the Debtor to assume and assign its leases and providing that the assignee is to cure any defaults under the leases, and the assignee neglects to do so, then the lessors under such lease have no claim against the estate or the debtor for any liabilities existing as of the date of the assumption and assignment. The plain language of Section 365(k) mandates a contrary result. Bassett therefore objects to the Sale Motion to the extent that it seeks to expand the relief afforded by Section 365(k).

WHEREFORE, LSF Bassett, L.P. requests that this Court deny the Debtor's Motion for Order Approving Sale of Some or All of Debtor's Operating Assets and Granting Related Relief, or alternatively, condition the relief granted therein to address the concerns more fully raised herein, and enter such other and further orders as are just.

DATED: June 7, 2001.

Respectfully Submitted,

BUSH CRAWDOCK & RENEKER, L.L.P.

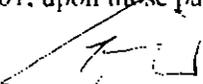
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Application has been served by first class United States mail, on June 7, 2001, upon those parties on the attached service list.


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