

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

FURR'S SUPERMARKETS, INC.,
A Delaware corporation,

Case No. 01-11-10779 SA
Chapter 11

Debtor.

**OBJECTION OF TRI-STATE COMEMRCIAL ASSOCIATES TO
DEBTOR'S MOTION FOR ORDER APPROVING SALE OF SOME OR ALL
OF DEBTOR'S OPERATING ASSETS**

Tri-State Commercial Associates (Tri-State), 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. Tri-State is the lessor under an unexpired lease of non-residential real property (the "Lease") designated as location no. 987 in Schedule "2" to the Sale Motion. The Lease covers certain premises located at 1300 W. Dickenson Blvd., Fort Stockton, Texas (the "Premises").

3. On or about May 11, 2001, Debtor filed its "Motion for Order Extending Time to Assume or Reject Unexpired Lease with Tri-State Commercial Associates" seeking an extension of time to assume or reject the Lease. This was the second such request by the Debtor, the first request having been denied. This Court granted such extension over the objection of Tri-State on

May 24, 2001, and extended the deadline under 11 U.S.C. § 365(d)(4) by which Debtor must assume or reject the lease until August 10, 2001.

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 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 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, Tri-State opposes the Sale Motion, unless the relief requested in the Sale Motion is conditioned in accordance with the concerns addressed in the objection.

II.

SUMMARY OF TRI-STATE'S OBJECTION

8. Tri-State 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.

III.

ARGUMENT AND AUTHORITIES

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

9. Tri-State objects to the Sale Motion filed by the Debtor because it denies Tri-State a number of the protections afforded to it by Section 365 as a lessor under an unexpired 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.

10. 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.

11. 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. One of the important limitations on the Debtor's right to assume a lease is the Debtor's obligation to cure any default under the lease. 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 payments.

12. The Debtor's motion does not provide for cure of all defaults under the Tri-State Lease. While the Debtor's Schedule "2" attached to the Sale Motion correctly states the pre-petition default of rent in the amount of \$1,453.00. Schedule "2" and the Sale Motion incorrectly specify the Debtor's default in its obligations to reimburse Tri-State for its portion of the 2000 ad valorem property taxes. The taxes assessed against the leased premises for the year 2000 were in the amount of \$7,728.01. Tri-State received the tax bill in the normal course and paid it, and in March 2001, sent the Debtor an invoice for the 2000 taxes. Tri-State objects to the Sale Motion insofar as it does not accurately provide for cure of the Debtor's default under its obligations under the Tri-State Lease to reimburse Tri-State for the 2000 taxes.

13. In addition, Tri-State 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 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 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, Tri-State objects to such assumption and assignment.

2) Debtor’s Sale Motion Fails to Provide Adequate Assurance of Future Performance

14. 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. 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.

15. Satisfaction of the requirements of both Sections 365(b)(1) and 365(f)(2)(B) depends on whether the prospective assignee can provide adequate assurance of future performance. Congress intended that the words “adequate assurance” be given a practical, pragmatic construction, and to be determined under the facts of each particular case. No guarantee is required, but the lessor must be given adequate assurance of future performance that it will be protected from having to take on the burden of a tenant who may likely to default on his lease obligations after the assumption and assignment have occurred.

16. Tri-State 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 Tri-State Lease. Furthermore, Debtor has offered no assurance that the assignment will be subject to any of the provisions of the lease.

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

17. 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. Section 365(k) changes the common law rule and relieves the estate of liability, which is analogous to a novation.

18. 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 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 assurance of performance by the assignee. If the 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 leases have no claim against the estate of 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. Tri-State therefore objects to the Sale Motion to the extent that it seeks to expand the relief afforded by Section 365(k).

WHEREFORE, Tri-State Commercial respectfully requests the Court to 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 relief that the Court deems just and proper.

Respectfully submitted:

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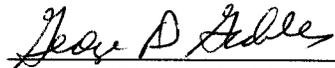
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this 18th day of June, 2001.



George "Dave" Giddens