

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

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

In re:

FURR'S SUPERMARKETS, INC.,

Case No. 11-01-10779-SA  
Chapter 11

Debtor.

**DEBTOR'S OBJECTION TO LSF BASSETT, L.P.'S MOTION TO COMPEL DEBTOR  
TO PAY POST-PETITION OBLIGATIONS UNDER UNEXPIRED LEASE OF  
NONRESIDENTIAL REAL PROPERTY**

The debtor and debtor in possession, Furr's Supermarkets, Inc. (the "Debtor") responds to LSF Bassett, L.P.'s ("Bassett's") Motion to Compel Debtor to Pay Post-Petition Obligations Under Unexpired Lease of Nonresidential Real Property (the "Motion"), filed on or about May 25, 2001 (document # 514), as follows:

1. Bassett is the owner of real property leased by the Debtor and located on 1117 Geronimo, El Paso, Texas (the "Leased Premises"). A copy of the lease is attached to the Motion as Exhibit 1 (the "Lease").

2. Under paragraph 10 of the Lease, the Debtor is obligated to pay El Paso County, Texas all property taxes assessed on the Leased Premises. The Debtor did not pay the year-2000 property taxes assessed on the Leased Premises. Bassett admits in the Motion that the year 2000 taxes are a pre-petition obligation.

3. The Motion concerns post-petition taxes, not pre-petition taxes. In the Motion, Bassett asks the Court to ignore the plain language of the Lease and impose new terms on the Debtor relating to payment of taxes accrued post-petition. These new terms include: (i) requiring the Debtor to pay the post-petition property taxes to Bassett, rather than to El Paso County; and

605

(ii) requiring the Debtor to pay 1/12th of the post-petition property taxes every month, instead of paying the tax when due.

4. Bassett cites in support of its Motion case law exemplified by In re Handy Andy Home Improvement Centers, Inc., 144 F.3d 1125 (7th Cir. 1998). The Handy Andy decision holds that in determining what taxes are post-petition obligations that must be paid under 11 U.S.C. §365(d)(3), the court looks to when the obligations accrued, not when the tax bill is rendered and payment is due to the taxing authority. 144 F.3d at 1127-29. The Debtor agrees with Bassett that Handy Andy sets forth the majority (and correct) rule of law. That rule does not help Bassett; the Handy Andy decision did not address the issue before this Court. i.e., whether the Court should modify the lease to give Bassett additional assurance that post-petition taxes will be paid. The Handy Andy decision is irrelevant to the Motion.

5. Bassett agreed to the Lease when it was executed, including the provisions regarding the timing and method of paying property taxes. There is no reason for the Court to rewrite the Lease now to impose new obligations on the Debtor favorable to Bassett, just as there would be no basis for the Court to rewrite the Lease in the Debtor's favor. Both parties are sophisticated and did or should have taken into account the bankruptcy laws. The Bankruptcy Code requires debtors to assume or reject leases as written, and requires landlords to abide by the leases as written until they are assumed or rejected. See In re Handy Andy, 144 F.3d at 1128 (no indication Congress meant to give landlords favored treatment when it amended Code §365(d)(3) in 1984, only equal treatment).

6. In less than two months, the Debtor will determine whether to assume or reject the Lease. It is fair and reasonable, given the context of this case and the Bankruptcy Code, to require Bassett to wait until then to determine what will happen to the Lease. The property taxes

are only about 10% of the annual rent. If the Debtor assumes the Lease, the Debtor will have to cure all arrearages and give adequate assurance of future performance. If the Debtor rejects the Lease, it will be obligated to pay the post-petition taxes in any event.

7. If the Court granted Bassett the requested relief, every lessor and contracting party in this case would be tempted to file a motion asking the Court to change the terms of their agreements with the Debtor. Such a result is neither fair nor required by the Bankruptcy Code.

WHEREFORE, the Debtor objects to the Motion, asks that the Court deny the Motion, and asks for all other just and proper relief.

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this 18th day of June, 2001.

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[Redacted Signature]