

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN  
DISTRICT OF IOWA

IN RE: )

) Chapter 7

TAMA BEEF PACKING, INC. )

) Bankruptcy No. 01-03822-C

Debtor. )

**ORDER RE MOTION FOR EXTENSION OF TIME**

This matter came before the Court on March 12, 2002 on Trustee's Motion for Extension of Time to Assume/Reject Lease. Trustee Renee Hanrahan appeared with attorney Jeff Taylor. Attorney Carroll Reasoner appeared for the City of Tama, Iowa. Attorney Eric Lam appeared for creditor General Electric Capital Corp. (GECC). AgriProcessors, Inc. was represented by attorney Jeff Courter. Iowa Quality Beef Supply Network appeared by Wythe Willey and attorney Lynn Hartman. After hearing arguments of counsel, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (M).

**STATEMENT OF THE CASE**

Debtor filed its Chapter 11 petition on November 8, 2001 and converted to Chapter 7 on December 18, 2001. Trustee filed a Motion for Extension of Time to Assume or Reject Debtor's Lease with the City of Tama on December 28, 2001, to which the City objected. The Court ruled on January 9, 2002 that Trustee had 60 days from the date of conversion to decide to assume or reject the lease.

Trustee filed the second Motion for Extension of Time to Assume/Reject Lease on February 15, 2002, requesting an additional 45 business days, or until April 23, 2002 to accept or reject the lease with the City of Tama. The Court extended the period 10 days to preserve the rights of Trustee. The City filed a Motion to rescind the order granting the additional 10 days. In its Order filed February 22, 2002, the Court refused to rescind the 10-day extension and further extended the deadline for assumption or rejection until ruling on this underlying Motion for Extension of Time.

The City of Tama filed an Objection to Motion to Extend Time on the bar date. It renews objections contained in its previous motions and objections. The City states Trustee is not paying, and cannot pay, rent, utilities, real estate taxes, water bills and legal fees required by the lease. The only payment Debtor has made is \$9,601 for Jan. 23 - Feb. 25 utility bills. Debtor's former employees have been out of work since August 2001. The City asserts the lease is only a part of a complex process to get the plant operating and it is in a better position than Trustee to see the process gets completed. Further delay will be detrimental to buildings, sewage lagoons and the community. Insurance will lapse; utilities and water will be cut off. Debtor will be unable to pay damages resulting from further delay.

On the date of the hearing, Trustee filed a Motion to Assume and Assign Unexpired Lease, including an Assignment and Assumption Agreement submitted by AgriProcessors, Inc., who seeks to take assignment of the lease between Debtor and the City of Tama. Trustee points out the agreement requires curing of all defaults under the Lease. It provides payment of \$50,000 to Trustee for disbursement to creditors. The \$50,000 payment is dependent on several contingencies, however, and would not be paid until closing. The Agreement does not offer any earnest money or other immediate payment by AgriProcessors.

#### CONCLUSIONS OF LAW

The decision to grant or deny a motion for an extension of time to assume or reject leases for cause is within the discretion of the court. In re Burger Boys, Inc., 94 F.3d 755, 760-61 (2d Cir. 1996). The test for "cause" under § 365(d)(4) leaves a great deal of discretion to the court to weigh all relevant factors. Id.; In re Ernst Home Ctr., Inc., 209 B.R. 974, 981 (Bankr. W.D. Wash. 1997). Such factors include: (1) whether the debtor is paying for the use of the property, (2) whether the debtor's continued occupation of the property could damage the lessor beyond the compensation available under the Code, (3) whether the lease is the debtor's primary asset, (4) whether the landlord would receive a windfall, (5) the complexity of the case, and (6) the amount of time the trustee has had to analyze the estate. Id. at 980; Burger Boys, 94 F.3d at 760-61; In re Columbus One Parcel Serv., Inc., 138 B.R. 194, 195 (Bankr. S.D. Ohio 1992); 2 Lawrence P. King, Collier on Bankruptcy ¶ 365.03[3], at 364-38 (15th ed. 1995).

The City of Tama complains that Debtor has not been reimbursing it for ongoing expenses as agreed and approved by the Court. While the Court may extend the deadline to assume or reject a lease for cause, the deadline for payment of rental payments falling due within the 60-day period may not be extended beyond the 60-day period. In re Homeowner's Outlet Mall Exch., Inc., 89 B.R. 965, 969-70 (Bankr. S.D. Fla. 1988); 11 U.S.C. § 365(d)(3). A trustee's failure to pay post-petition obligations could constitute sufficient cause to grant the landlord relief from the automatic stay. In re Musikahn Corp., 57 B.R. 942, 945 (Bankr. E.D.N.Y. 1986).

According to § 365(b)(1), Trustee may not assume the Lease unless she cures defaults, or provides adequate assurance of prompt cure; promptly compensates the City for pecuniary losses resulting from the defaults; and provides adequate assurance of future performance under the lease. See In re JAS Enterprises, Inc., 180 B.R. 210, 215 (Bankr. D. Neb. 1995), aff'd 113 F.3d 1238 (8th Cir. 1997). "That the obligations of an executory contract be accepted along with its benefits is made plain by the Bankruptcy Code's requirement that, as conditions of the contract's assumption, the debtor cure any existing default and compensate all non-debtor parties for actual pecuniary losses that have resulted therefrom." Adventure Resources, Inc. v. Holland, 137 F.3d 786, 798 (4th Cir. 1998), citing NLRB v. Bildisco & Bildisco, 465 U.S. 513, 531 (1984).

### ANALYSIS

The Court has reviewed the record with the foregoing in mind, as well as conclusions made in the several other orders entered concerning the Lease since conversion of this case to Chapter 7. Debtor is not currently paying for the use of the leased property. Under the proposed Assignment Agreement with AgriProcessors, any further payments will be delayed until Closing. Under Paragraph 4 of the Agreement, Closing will occur one week after entry of a Court Order, not subject to further appeal, approving Trustee's assumption of the Lease and assignment to AgriProcessors. Currently, hearing on these matters is scheduled for April 12, 2002. Additional time is necessary to file a ruling and allow the appeal period to expire. With the additional one week set out in the Agreement, the period of continuing nonpayment of rent under the lease extends into May, which will be five months after conversion of this case to Chapter 7.

Debtor's continued occupation of the property will result in either further disbursements by the City of Tama for utilities, taxes and other obligations, or shut-off of utilities and delinquencies in paying taxes. The bankruptcy estate has no funds with which to reimburse the City for past or future costs. Again, the proposed Assignment Agreement delays any payment toward such accruing costs until after closing, without any guarantee that all contingencies will be met and or that Closing will inevitably occur.

The Lease with the City is Debtor's primary asset. If it is rejected, the City may receive a windfall. Counsel for Iowa Quality Beef indicated at the hearing that it has an offer on the table with the City which is more beneficial than that proposed to Trustee by AgriProcessors. The Court notes, however, that all benefit from that offer will flow solely to the City, rather than to the bankruptcy estate for distribution to creditors.

Also relevant to the Court's determination of cause to extend time under § 365(d)(4) are the complexity of the case and the amount of time Trustee has had to analyze the case. This matter is not all that complex. Either the Lease has value to the estate or it doesn't. Considering the ongoing accruing costs, any value is diminishing quickly. Trustee has had more than 60 days to analyze the situation, although she has been hindered to some extent by the City's desire to negotiate outside the bankruptcy arena.

The Court sees merit in allowing interested parties to fully examine the Assignment Agreement with AgriProcessors and going forward with notice and hearing concerning approval of that Agreement. In the meantime, however, accruing costs relating to the Lease continue to mount and Debtor continues to be in default under the Lease terms with no funds to rectify the situation. The Assignment Agreement appears to lack complete commitment in that it offers no earnest money, as is common when a buyer makes an offer concerning real estate. Although the Agreement appears to contemplate curing Lease defaults, no protections are offered for costs which have already accrued and will continue to accrue prior to Closing. In this situation, the Court cannot approve further extension of time to assume or reject the Lease without tangible proof of sincerity and commitment by AgriProcessors in the form of an initial, irrevocable

payment of \$100,000, as an advance under the provisions of the Assignment Agreement. This amount will protect the interests of all parties and reimburse the City for accruing costs while the process of consideration of assumption of the lease and the Assignment Agreement grinds to a close.

WHEREFORE, the Court will conditionally grant Trustee's Motion to Extend Time to Assume/Reject Lease

FURTHER, the condition precedent to extension of time requires AgriProcessors to pay and Trustee to receive an irrevocable payment of \$100,000, as an advance under the provisions of the Assignment Agreement, no later than 4:30 p.m. CST on Friday, March 15, 2002.

FURTHER, if Trustee receives such payment, she will immediately so inform the Court and the Court will enter a final order extending the time to assume or reject the lease until ruling on Trustee's Motion to Assume and Assign Unexpired Lease, currently set for hearing on April 12, 2002.

FURTHER, if Trustee does not receive such payment, she will immediately so inform the Court and the Court will enter a final order denying extension of time to assume or reject the lease and declaring the lease rejected.

SO ORDERED this 12th day of March, 2002.

PAUL J. KILBURG  
CHIEF BANKRUPTCY JUDGE