

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF  
IOWA

IN RE: )

) Chapter 11 SHALOM HOSPITALITY, INC. )  
) Bankruptcy No. 02-00276

Debtor. )

**ORDER RE MOTION TO FIX DEADLINE FOR  
DEBTOR TO ASSUME OR REJECT EXECUTORY CONTRACT (DOC. #30)**

On May 1, 2002, the above-captioned matter came on for hearing on Maha-Vishnu Corporation's (MVC) Motion to have the Court fix a deadline for Debtor to assume or reject an executory contract. Debtor was represented by Attorney John Titler. MVC was represented by Attorneys Wesley Huisinga and Dennis McMenimen. Firststar Bank N.A., n/k/a U.S. Bank, N.A. was represented by Sean Pellitier. The U.S. Trustee's Office was represented by Assistant U.S. Trustee Janet Reasoner.

The facts in this case are set out in substantial detail in an order filed in this matter relating to MVC's Motion for Relief from Automatic Stay. In summary, Debtor Shalom Hospitality, Inc. (Shalom) is the purchaser of a 108 unit motel located in Iowa County, Iowa. MVC sold the real estate and the motel to Shalom by contract dated November 30, 1999 and filed of record on January 6, 2000 in the office of the Iowa County Recorder. It is this executory contract which is the subject of this motion. MVC seeks to have the Court set a deadline for Debtor to assume or reject this executory contract.

Debtor is in possession of the parcel of real estate which is the subject of the contract in question. On this parcel of real estate is located a 108 unit motel which has been largely destroyed by a fire occurring in August 2001. Debtor has had the property since 1999 and the tax returns reflect a continuous loss from that time until the fire. Though the motel continued to do a minimal amount of business after the fire, the electricity was shut off on April 1, 2002 for failure to pay the electrical bill. The building is now dark and is generating no income. Though there is fire loss insurance and business interruption insurance, there is no evidence that the claims will be adjusted at any time in the near future.

Debtor has discontinued making all payments on its obligations including tax obligations and payments to creditors. It has not made any contract payments to MVC since October 1, 2001. It does not appear to have a cohesive plan for rebuilding the motel on any type of expedited basis. Even if rebuilding commences, the building will not be open for business for some time. MVC has an underlying indebtedness on this property for which it is required to make payments of \$10,900 per month. MVC's representative testified that if MVC does not receive some type of relief, it will also soon be in financial difficulty.

Debtor filed its Chapter 11 petition on January 21, 2002. Movant MVC now seeks to have the Court set a deadline within which Debtor must assume or reject the real estate contract. The motion speaks in terms of § 365(d) (2). This Court has recently addressed deadlines for assumption or rejection of executory contracts, as follows:

In Chapter 11 cases, § 365(d) (2) applies to allow a party to request a specific time to assume or reject a residential or personal property lease. In the absence of such request, Chapter 11 debtors need not assume or reject until plan confirmation. 11

U.S.C. § 365(d) (2). The question of whether such a deadline should be ordered is left to the court's discretion, with no statutory guidelines. In re Resource Technology Corp., 254 B.R. 215, 227 (Bankr. N.D. Ill. 2000). One court refused to set such a deadline where the creditor was receiving payments during the administration of the Chapter 11 estate

and the parties stipulated that the rights of the lessor would attach to proceeds from the sale of the debtor's assets. Whitcomb & Keller, 715 F.2d at 379.

A variety of factors are considered in the exercise of a court's discretion to set a deadline to assume or reject contracts in Chapter 11 cases under § 362(d)(2), including:

The nature of the interests at stake, the balance of the hurt to the litigants, the good to be achieved, the safeguards afforded those litigants, and whether the action to be taken is so in derogation of Congress' scheme that the court may be said to be arbitrary. Above all, the court should interpret reasonable time consistent with the broad purpose of Chapter 11, which is to permit successful rehabilitation of debtors.

In re Monroe Well Serv., Inc., 83 B.R. 317, 323 (Bankr. E.D. Pa. 1988) (internal quotations and

citations omitted). Courts seek an approach which hopefully balances the interests of not only debtors and lessors but also reflects concern for the interests of other creditors, as well, that are entitled to recover from the estate. In re New Almacs, Inc., 196 B.R. 244, 250 (Bankr. N.D.N.Y. 1996).

In re Tama Beef Packing, Inc., No. 01-03822, slip op. at 3-4 (Bankr. N.D. Iowa Jan. 25, 2002).

Factors considered in addressing whether to shorten or extend time to assume or reject executory contracts also have relevance. Id. at 4. These are:

1. Whether the lease is the primary asset of the debtor.
2. Whether the debtor has had time to intelligently appraise its financial situation and potential value of its assets in terms of the formulation of a plan.
3. Whether the lessor continues to receive the rent required in the lease.
4. Whether the lessor will be damaged beyond the compensation available under the Bankruptcy Code due to the debtor's continued occupation.
5. Whether the debtor has failed or is unable to formulate a plan when it has had more than enough time to do so.

In re Ernst Home Ctr., Inc., 209 B.R. 974, 980 (Bankr. W.D. Wash. 1997) (citing Theatre Holding Corp. v. Mauro, 681 F.2d 102 (2d Cir. 1982); In re Victoria Station, Inc., 88 B.R. 231, 236 (B.A.P. 9th Cir. 1988), aff'd, 875 F.2d 1380 (9th Cir. 1989); In re Wedtech Corporation, 72 B.R. 464, 471-473 (Bankr. S.D.N.Y. 1987)).

Applying the foregoing standards to this case, it is apparent that MVC has a substantial interest in this property. MVC has the right, under the contract, to forfeit or foreclose if the payments are in default. The Court has, by separate order, modified the stay to allow, as a minimum at the present time, a forfeiture of the land contract. Debtor is in substantial arrears in contract payments. As of the time of hearing, Debtor was in excess of \$100,000 in arrears on its contract payments. In addition, MVC is required to make payments of its own on an underlying obligation in the amount of \$10,900 per month. Without some expedited relief involving Debtor, MVC may also suffer financial hardship. Debtor has been negotiating with its insurance company since August 2001. There appears to be very little progress in moving this project toward reconstruction and continuation as a going concern. Debtor has had this case on file since January 21, 2002. There is no plan on file and it does not appear that a plan is

forthcoming at any time in the immediate future.

The motel property is the only asset of Debtor. MVC has a reversionary interest in the property, either by way of foreclosure or forfeiture, if the contract becomes in default, which it is at the present time. It appears to the Court that Debtor has had sufficient time to evaluate its financial situation and make some determinations as to its future. However, no comprehensive plan appears to be forthcoming. Debtor has discontinued payments on its contract and has not made a contract payment to MVC since October 2001. MVC will be significantly damaged if concrete decisions are not made on an expedited basis by Debtor.

As such, it appears to this Court that Debtor has had a reasonable time within which to formulate business decisions. However, this is a business which has gone dark and has no plan for reopening in the immediate future. MVC is the holder of an executory contract which is in significant default. MVC has underlying obligations of its own which will or may impair its financial stability if decisions are not made by Debtor on an expedited basis. Weighing all of the various factors, as well as the interests of all parties, it is the determination of this Court that Debtor is in default under the contract and substantial difficulties remain in its path toward a successful reorganization. Under all of these circumstances, the Court feels that it is fair to require Debtor to make a decision whether it will assume or reject this executory contract in a reasonable period of time.

**WHEREFORE**, for all the reasons set forth herein, Debtor shall make an election whether to assume or reject the executory contract involving MVC and fully described in the motion no later 4:30 p.m. on Friday, May 31, 2002. If no written election is made by said date and time, the Court will order the contract rejected.

**SO ORDERED** this   9th   day of May, 2002.

PAUL J. KILBURG  
CHIEF BANKRUPTCY JUDGE