UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

In re	)	
	)	
RANDALL'S ISLAND FAMILY GOLF CENTERS, INC., et al.	)	Chapter 11
	)	
	)	Case Nos. 00-41108 through 00-41196
Debtors.	)	
	)	(Jointly Administered)

MEMORANDUM IN SUPPORT OF MOTION TO ASSUME OR REJECT EXECUTORY CONTRACT WITH ALL STATE ASSOCIATES OF WEST PALM, LLC PURSUANT TO 11 U.S.C. §365(d)(2)

INTRODUCTION

Debtor filed its Petition for Relief under Chapter 11 of the United States Bankruptcy Code on May 4, 2000, and continues to operate as Debtor in Possession. All State Associates of West Palm, LLC ("All State") is the landlord and Debtor GBGC Family Golf Centers, Inc. ("GBGC") is the tenant under a Lease Agreement dated December 31, 1996 for a certain parcel of real property located at 3100 Northlake Boulevard, Lake Park, Florida (the "Premises").

All State holds the Premises subject to a balloon mortgage which requires a large lump sum payment in August, 2000. This will make a clear title critical if All State is to refinance or sell the Premises prior to the balloon date. Debtor is presently in default under said executory Lease Agreement as more fully set forth in All State's Motion to Assume or Reject Executory Contract With All State Associates of West Palm, LLC Pursuant to 11 U.S.C. §365(d)(2) ("All State's Motion").

ARGUMENT

I. BANKRUPTCY CODE SECTION 365(d)(2) AUTHORIZES THIS COURT TO REQUIRE DEBTOR TO ASSUME OR REJECT THE CONTRACT WITHIN A DEFINITE PERIOD.

Bankruptcy Code Section 365(d)(2) provides as follows:

> (2) In a case under Chapter 9, 11, 12 or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the Debtor at any time before the confirmation of a plan, but the court, on request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

11 U.S.C. §365(d)(2). The purpose of this section is to "prevent parties in contractual or lease relationships with the debtor from being left in doubt concerning their status vis-a-vis the estate." H. Rep. No. 595, 95th Cong., 1st Sess. 348 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 59 (1978). Section 365(d)(2) authorizes the Court to require the Debtor in Possession to assume or reject within a "reasonable time." See Theatre Holding Co. V Mauro, 681 F2d 102, 105 (2d Cir. 1982); In re: New York Deli, Ltd., 41 B.R. 198, 200 (Bkrtcy D. Hawaii 1984); Matter of McLouth Steel Corp., 20 B.R. 688, 692 (Bkrtcy ED MI 1982). What constitutes a "reasonable time" is left to the discretion of the Court "in light of all the circumstances of the case." In re: New York Deli, Ltd., 41 B.R. at 200.

In determining what constitutes a "reasonable time," courts have considered a number of factors:

> 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.

Matter of Dunes Casino Hotel, 63 B.R. 939, 949 (D.N.J. 1986), quoting, In re: GHR Energy Corp., 41 B.R. 668, 676 (Bkrtcy D. Mass. 1984). These factors should be interpreted in light of the broad purpose of Chapter 11 "to permit successful rehabilitation of debtors." Matter of Dunes Casino Hotel, 63 B.R. at 949, quoting, NLRB v Bildisco & Bildisco, 465 U.S. 513 (1984). In this case, these factors weight heavily in favor of requiring the Debtor to immediately reject the Lease Agreement, or immediately cure the defaults and assume it.

The Premises at issue constitute only a small portion of the consolidated Debtors' business, and is not necessary in order to successfully reorganize. Upon information and belief, Debtor is already marketing the Lease Agreement for assignment. Conversely, the Premises are All State's only asset, and the Debtor's rental payment is All State's sole source of income. The August, 2000 balloon obligation under the mortgage places All State at unreasonable risk of loss if the Lease Agreement is not assumed or rejected immediately. All State must sell or refinance the Premises well in advance of the balloon date. The existence of an uncertain tenant, and the spectre of tax liens against the Premises make this exceedingly and unreasonably difficult. Given the cost of assumption - payment of all delinquent taxes, the cost to move the entrance, repair of the drainage area and other uncompleted maintenance items - the most beneficial course for the estate appears to be immediate rejection of the Lease Agreement. Additionally, the Transitional Use Permit under which the Debtor conducts its business will expire in 2003.

Debtor's Lease Agreement with All State represents nothing more than an ordinary business expense to the Debtor. Requiring Debtor to assume or reject the contract will not affect the successful rehabilitation of the Debtor. The Debtor is already marketing the Lease Agreement for assignment.

Meanwhile, All State continues to suffer losses as a result of uncertainty every day the contract is not assumed or rejected.

Since the date of Debtor's petition for relief, Debtor has remained in possession of the Premises as required by law, and despite the existence of significant events of default. See Federals, Inc. v Edmunton Investment Co., 555 F2d 577, 579 (6th Cir 1977). See also U.S. ex rel. U.S. Postal Service v Dewey Freight System, 31 F3d 620, 624 (8th Cir. 1994) (After commencement of Chapter 11 proceeding, executory contracts are enforceable by debtor, but not against debtor); In re: Public Service Co., 884 F2d 11, 14 (1st Cir 1989) (creditors are bound to honor executory contract prior to assumption or rejection); In re: Witcomb and Keller Mortgage Co., 715 F2d 375, 378-79 (7th Cir 1983). The Debtor's default status is set forth in detail in All State's Motion. Meanwhile, All State is severely inhibited from selling or refinancing the Premises because it cannot provide clear title due to the existence of significant tax liens.

Debtor's refusal to assume or reject places All State at an unreasonable risk of loss. Further, there are no adequate safeguards against such loss. Even if rent under the Lease Agreement were afforded administrative priority, that would do nothing to prevent the net losses All State would continue to experience due to the cloud on title and the need to refinance or sell prior to the balloon mortgage payment date in August, 2000.

Absent intervention by the Court, Debtor could assume or reject the contract any time prior to confirmation of its plan of reorganization. See In re: Mid-Region Petroleum, Inc., 1 F3d 1130, 1132 (10th Cir. 1993). On or about June 16, 2000, Debtors filed a motion to extend the time to assume or reject through the date of confirmation. Therefore, All State requests relief pursuant to 11 U.S.C. §365(d)(2)

in the form of an order requiring Debtor to immediately assume or reject its executory Lease Agreement with All State. All State suggests that the cost to cure mandates rejection in this case.

As indicated above, the Lease Agreement here at issue was dated December 31, 1996, and extends for a period of ten years. Performance has already begun and remains due on both sides under the contract. There can be no issue that the contract is executory in nature. An executory contract is defined as follows:

> a contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute material breach excusing performance of the other.

Countryman, Executory Contracts in Bankruptcy, Part 1, 57 Minn. L.R. 439, 460 (1973). The Countryman definition has been cited with approval by the Sixth Circuit and other courts. See In re: Terrell, 892 F2d 469, 471 (6th Cir 1989); In re: Walat Farms, Inc., 69 B.R. 529, 531 (Bkrtcy E.D. MI 1987). The Countryman definition is also similar to that articulated in the legislative history surrounding §365:

> Subsection (a) of this section authorizes the trustee, subject to the court's approval, to assume or reject an executory contract or unexpired lease. Though there is no precise definition of what contracts on which performance remains due to some extent on both sides. A note is not usually an executory contract if the only performance that remains is repayment. Performance on one side of the contract would have been completed and the contract is no longer executory.

H.R. Rep. NO. 95-595, 95th Cong. 1st Sess., at 347 (1977); S.Rep. No. 95-989, 95th Cong. 2d Sess. at 58 (1978), U.S. Code Cong. & Admin. News 1978, p. 5787, quoted In re: Monroe Well Service, Inc., 83 B.R. 317, 319-20 (Bkrtcy E.D. Pa 1988). See also NLRB v Bildisco & Bildisco, 465 U.S. 513, 522

n. 6 (1984). Clearly performance is incomplete on both sides, and a failure to complete performance would constitute a material breach, making the contract executory within the meaning of 11 U.S.C. §365.

CONCLUSION

For the foregoing reasons, All State respectfully requests entry of an order requiring Debtor to immediately reject its Lease Agreement with All State, or for such other and further relief as this Court deems just and equitable.

Dated: New York, New York
July 13, 2000

Yours, etc.

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