

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 11
WEST ACCESS MARINA,)
) No. BK 88-30672
Debtor(s).)

MEMORANDUM AND ORDER

On February 23, 1989 this Court entered an Order denying a Motion for Approval of Assumption of Unexpired Lease filed by West Access Marina, Inc. ("debtor") and granting a Motion for Relief from Stay filed by the Secretary of the Army, Army Corps of Engineers ("Corps"). Debtor subsequently filed a "Motion to Amend Judgment and Make Additional Findings of Fact and Conclusions of Law, or, Alternatively, for New Trial, Rehearing, or Judgment Notwithstanding the Verdict." Debtor requests that the Court reconsider its order, and specifically asks that the Court either deny the Corps' motion for relief from stay or condition the lifting of the stay "upon a commercially reasonable sale of Debtor's leasehold interests within a reasonable time...." (Motion to Amend Judgment, p. 4).

Debtor has operated a marina on Carlyle Lake, Illinois, since 1968 on premises it leases from the Corps. The present lease, which has a scheduled term of twenty-five years, was executed on September 8, 1982. The Corps, in its motion for relief from stay, argued that debtor should not, for various reasons, be allowed to assume the lease, and requested that the Court lift the stay in order for the Corps to pursue eviction proceedings.

In its Order denying debtor's motion for approval of assumption of lease and granting the Corps' motion for relief from stay, the Court held that under 11 U.S.C. §365(c)(1), debtor was barred by applicable law from assuming the lease. The Court's holding was based, in part, on the premise that a Chapter 11 debtor in possession is a new entity separate and apart from the prebankruptcy company.¹ After another thorough review of the particular facts and applicable law, the Court again finds that section 365(c)(1) of the Bankruptcy Code bars debtor from assuming the lease in question. The Court further finds, however, that the issue of whether a debtor in possession is separate and distinct from the prebankruptcy company is irrelevant and that any discussion in its prior order of that particular question was unnecessary. As explained below, regardless of whether a debtor in possession and the prebankruptcy company are separate entities, under the plain and unambiguous language of section 365(c)(1), debtor is barred from assuming the lease at issue.

Section 365(c)(1) of the Bankruptcy Code provides:

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if -

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or

¹In its motion to amend judgment, debtor did not ask the Court to reconsider the issue of whether a debtor in possession is separate and distinct from the prebankruptcy company. However, at the hearing on the motion to amend, debtor did raise and argue that particular issue once again, and counsel for the Corps was subsequently granted leave to file a brief in response to debtor's oral arguments.

rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment.

11 U.S.C. §365(c)(1). The unequivocal language of 365(c)(1) thus prohibits the trustee, or debtor in possession,² from assuming or assigning an executory contract or unexpired lease if the following two conditions are met: 1) there exists applicable nonbankruptcy law that excuses the nondebtor party from accepting performance from an entity other than the debtor or debtor in possession, and 2) the nondebtor party does not consent to such assumption. As stated by the court in Matter of West Electronics, 852 F.2d 79 (3d Cir. 1988), "11 U.S.C. §365(c) (1) creates a hypothetical test - i.e., under the applicable law, could the government refuse performance from 'an entity other than the debtor or the debtor in possession.'" Id. at 83 (emphasis in original).

In the present case, both requirements are easily satisfied. There clearly exists applicable nonbankruptcy law that excuses the Corps from accepting performance from a third party, i.e., someone other than the debtor or debtor in possession. And, as is obvious from the facts of this case, the Corps has not consented to an assumption of the lease by debtor.

²Under 11 U.S.C. §1107(a), a Chapter 11 debtor in possession essentially has all the rights, powers and duties of a trustee, and is subject to the same limitations.

The applicable law referred to above can be found, in part, at 16 U.S.C. §460d, which authorizes the Secretary of the Army to grant leases "upon such terms and for such purposes as he may deem reasonable in the public interest." 16 U.S.C. §460d (emphasis added). Moreover, the Secretary has enacted several regulations concerning leases, including one that prohibits a sublease or the assignment of a lease without departmental approval. 32 C.F.R. §643.57. The Secretary's authority over leases has been delegated to local Corps of Engineer districts pursuant to Internal Regulation No. EP 405-1-2, dated April 1, 1985, and by letter dated July 2, 1981. Pursuant to this grant of authority, the District Engineer of the local Corps included a non-assignability clause in the lease at issue.

Debtor originally argued that the mere fact that the Corps had the authority to put a non-assignability clause in the lease does not mean that the assumption or assignment of the lease is restricted by applicable law for purposes of 11 U.S.C. §365(c)(1). This argument was not raised again in debtor's motion to amend judgment and was, in any event, discussed at length and rejected by the Court in its prior order.

Although debtor argues that section 365(c)(1) was not intended to bar assumption of the lease by the debtor or debtor in possession, no legislative history has been cited in support of this position. Regardless, the Court finds that "the meaning of section 365(c)(1) is clear on its face, and that it lacks the power to look behind the language of the statute in order to disregard its clear and unambiguous meaning." In re Pennsylvania Peer Review Organization, 50 B.R. 640,

646 (Bankr. M.D. Pa. 1985). Under the hypothetical test described in West Electronics, the Corps need only show that under applicable nonbankruptcy law, it could refuse performance from an entity other than the debtor or debtor in possession, and that it does not consent to assumption of the lease by the debtor in possession. Both elements have been established in this case, and debtor is therefore barred, under the terms of 365(c)(1), from assuming the lease at issue.

Debtor also raises two other arguments, based on equitable considerations, in its motion to amend judgment. First, debtor argues that the Corps will receive a windfall, in the form of substantial and valuable improvements made by debtor on the leased premises, should the Court grant the Corps' motion for relief from stay. Second, debtor argues that the Court should condition the lifting of the stay upon a "commercially reasonable transfer" of its leasehold interest.

These equitable considerations are of little significance since section 365(c)(1) of the Bankruptcy Code plainly prohibits assumption of the lease by debtor. Assuming arguendo that debtor's contentions are not without merit, granting relief from the stay and ruling that the lease was not assumable does not impair, under the provisions of the lease, debtor's rights to dispose of the improvements and physical assets. The Court recognizes that the effect its order may well be a diminution in the value of those assets. That alone, however, is not sufficient grounds for the Court to reverse its previous ruling.

With regard to debtor's argument that it should be given an opportunity to complete a "commercially reasonable transfer" of its leasehold interest, the Court notes that it originally delayed its

ruling on this matter for ninety days upon the representation of debtor's counsel that he was in the process of putting together a "commercially reasonable transfer" of the property. Furthermore, it was conceded that the debtor had, even prior to the Court's hearing on this motion, attempted to secure a purchaser for the leasehold interest. Additionally, there is no indication from the Corps of Engineers that the "commercially reasonable transfer" advocated by the debtor is acceptable. And, finally, there is nothing in the Court's order which precludes the parties from continuing to negotiate a transfer of the lease that would be acceptable to the Corps of Engineers.

THEREFORE, the debtor's Motion to Amend Judgment and Make Additional Findings of Fact and Conclusions of Laws is DENIED.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: July 20, 1989