



Entered on Docket
July 03, 2008

Hon. Mike K. Nakagawa
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re

EQUITY RESOURCE, INC.,

Debtor.

Case No. BK-S-08-15615-MKN

Chapter 11

Date: July 2, 2008

Time: 9:30 a.m.

MEMORANDUM DECISION ON MOTION FOR REQUIREMENT TO IMMEDIATELY ACCEPT OR REJECT LEASE; MOTION FOR IMMEDIATE PAYMENT OF POST PETITION RENT; AND/OR MOTION FOR RELIEF FROM STAY

This matter was heard on July 2, 2008. The appearances of counsel were noted on the record. After presentation of oral arguments, the matter was taken under submission based on the written materials submitted by the parties and the representations of counsel at the hearing.

BACKGROUND¹

Equity Resource, Inc. (“Debtor”) filed a voluntary petition for Chapter 11 reorganization on May 30, 2008. (Dkt# 1) The petition was a “skeleton” petition inasmuch as it was accompanied only by a list of 20 largest unsecured creditors and a mailing matrix, but no schedules of assets and liabilities or a statement of financial affairs. On June 17, 2008, Debtor

¹ In this Memorandum Decision, all references to “Section” shall be to the provisions of the Bankruptcy Code, 11 U.S.C. section 101, et seq., unless otherwise indicated. Likewise, all references to “Rule” shall be to the Federal Rules of Bankruptcy Procedure unless otherwise indicated.

1 filed its amended schedules and statement of financial affairs. (Dkt# 22)

2 On June 6, 2008, creditor ASSAF Nevada, Inc. (“ANI”) filed a Motion for Requirement
3 to Immediately Accept or Reject Lease; Motion for Immediate Payment of Post Petition Rent;
4 and/or Motion for Relief from Stay (“Motion”). (Dkt# 13) The Motion is accompanied by the
5 Affidavit of Rob Namy in which the affiant verifies the matters set forth. (Dkt# 16) The
6 Motion seeks to compel the Debtor to immediately assume or reject an unexpired lease of
7 nonresidential real property located on Prairie Falcon Road in Las Vegas, Nevada, that was
8 entered into between ANI, as lessor, and the Debtor, as lessee, on or about November 7, 2007
9 (“ANI Lease”). It further seeks to direct the Debtor to immediately make a rental payment of
10 \$95,940 under the lease that was due on June 1, 2008. In the alternative, ANI essentially seeks
11 relief from stay to complete an unlawful detainer action against the Debtor pending in the Eighth
12 Judicial District for the State of Nevada, in and for Clark County, denominated Case No.
13 A554776 (“Eviction Action”).

14 On June 25, 2008, opposition to the Motion was filed by the Debtor (“Opposition”).
15 (Dkt# 23) The Opposition is accompanied by the Omnibus Declaration of Brent Lovett (“Lovett
16 Declaration”). (Dkt#28) On June 27, 2008, ANI filed a response to the Opposition (“ANI
17 Reply”). (Dkt# 31) The ANI Reply is accompanied by another affidavit from Mr. Namy
18 (“Namy Affidavit”). (Dkt# 32)

19 Oral arguments were presented at the hearing on July 2, 2008, and the matter was taken
20 under submission.

21 **APPLICABLE LEGAL STANDARDS**

22 The treatment of executory contracts and unexpired leases is governed by Section 365.
23 Subject to bankruptcy court approval, a debtor-in-possession may assume or reject an executory
24 contract or unexpired lease of the debtor. See 11 U.S.C. § 365(a)². If an unexpired lease of

25 _____
26 ² While Section 365 refers to the rights and obligations of a bankruptcy trustee, a
27 Chapter 11 debtor-in-possession has the same rights and obligations, with exceptions not
applicable to this case, under Section 1107(a).

1 nonresidential real property is not assumed by the debtor-in-possession within 120 days after
2 commencement of the bankruptcy case, the lease is deemed rejected and the subject property
3 must be surrendered. See 11 U.S.C. § 365(d)(4).³

4 With respect to an unexpired lease of nonresidential real property, Section 365 directs
5 that the debtor-in-possession “shall timely perform all of the obligations of the debtor” after the
6 case is filed “until such lease is assumed or rejected.” See 11 U.S.C. § 365(d)(3). For cause
7 shown, however, the bankruptcy court “may extend...the time for performance of any such
8 obligation that arises within 60 days after the [petition] date..., but the time for performance shall
9 not be extended beyond such 60 day period.” Id.

10 Immediately upon the commencement of a bankruptcy case, the automatic stay arises
11 under Section 362(a) that “operates as a stay, applicable to all entities, of...the commencement or
12 continuation...of a judicial...proceeding against the debtor that was or could have been
13 commenced before the [petition date]....to recover a claim against the debtor that arose before the
14 commencement of the [bankruptcy] case...” See 11 U.S.C. § 362(a)(1). Upon a showing of
15 “cause”, the automatic stay may be terminated, annulled, modified or conditioned as ordered by
16 the bankruptcy court. See 11 U.S.C. § 362(d)(1). Relief also may be granted if the debtor has no
17 equity in the property and the property is not necessary to an effective reorganization of the
18 debtor. See 11 U.S.C. § 362(d)(2). The party requesting relief from the automatic stay has the
19 burden of proof on any issues regarding the debtor’s equity in any property that is the subject of
20 the request, while the debtor or opponent has the burden of proof on all other issues. See 11
21

22 ³ Section 365(d)(4) requires unexpired leases of nonresidential real property to be
23 assumed or rejected by the earlier of 120 days after the petition date or the date a bankruptcy
24 plan is confirmed. See 11 U.S.C. § 365(d)(4)(A)(i and ii). Within the 120-day period, a 90-day
25 extension of the 120-period may be obtained from the court on cause shown. See 11 U.S.C. §
26 365(d)(4)(B)(i). Subsequent extensions may be granted only with the consent of the lessor. See
27 11 U.S.C. § 365(d)(4)(B)(ii). Assuming that ANI would not consent to any extensions of time
for the Debtor to assume or reject the ANI Lease, the maximum period of time for Debtor to
make its decision would be 210 days from the petition date, i.e., an approximate deadline of
December 29, 2008.

1 U.S.C. § 362(g)(2).

2 **DISCUSSION**

3 The Amended Schedules of Assets and Liabilities (“Schedules”) filed by the Debtor do
4 not disclose the ANI Lease. This is unusual since Debtor’s real property Schedule “A” lists a
5 leasehold interest in a commercial building located at 2400 North Tenaya Way in Las Vegas,
6 Nevada (“North Tenaya Lease”)⁴ but not the ANI Lease. Curiously, neither the ANI Lease or
7 the North Tenaya Lease are listed as unexpired leases on Debtor’s Schedule “G”.
8 Notwithstanding these omissions, Debtor does not dispute the existence of the ANI Lease and
9 the authenticity of the copy that is attached as Exhibit “1” to ANI’s motion.

10 The ANI Lease was the subject of the Eviction Action that was stayed upon the
11 commencement of the bankruptcy case. See Motion at 2:20 to 3:23 and Exhibit “2” thereto.
12 The Eviction Action is not disclosed in Section 4 of the Debtor’s Statement of Financial Affairs,
13 however, even though it obviously was pending on the date the bankruptcy petition was filed.
14 Moreover, since the Debtor provided zero information whatsoever in its Statement of Financial
15 Affairs - it checked the box labeled “None” for every question asked - there is no basis to draw
16 any inferences in its favor. This is especially glaring since the bankruptcy had been commenced
17 through the filing of a skeleton petition and the Eviction Action was heard only 10 days prior
18 thereto.

19 Debtor’s Opposition does not address at all the statutory bases for the relief requested by
20 ANI. Instead, it recites the history of the relationship between itself and ANI, and suggests that
21 it that it was attempting to purchase the Prairie Falcon Road property from ANI and was
22 defrauded into entering into the lease arrangement. See Opposition at 2:5 to 5:11. The Lovett
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24
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26 ⁴ At the hearing, counsel represented that the North Tenaya Lease is for a term of 99
27 years, but did not indicate the beginning date.

1 Declaration, much of which may not be based on personal knowledge at all⁵, recites a litany of
2 bad luck that befell the Debtor, see Lovett Declaration at ¶¶ 5 through 18, and then attests to a
3 series of events and alleged conduct by ANI, id. at ¶¶ 19 through 82, that might give rise to
4 various contract and tort claims the Debtor’s insurance provider or against ANI, if proven to be
5 true. For some reason, however, Debtor’s personal property Schedule “B” lists no claims or
6 causes of action that it may have against its insurance carrier or against ANI.

7 At the hearing, counsel for the Debtor requested a 120-day extension of the Debtor’s
8 obligation under Section 365(d)(3) to commence paying postpetition rent. Debtor apparently
9 does not have cash available to make the June 2008 rental payment; indeed, its Schedule “B”
10 shows no cash or bank accounts from which such funds would be available. Counsel argued that
11 at the end of 120 days, the Debtor either would have the funds available to pay 120 days of
12 accrued postpetition rent, or, ANI would have an administrative priority claim against the
13 bankruptcy estate. When queried as to the source of payment of any administrative expense
14 claims in the future, Debtor suggested that it conducts other viable business operations at the
15 North Tenaya Way premises. Even a sympathetic reading of the Lovett Declaration, however,
16 provides no assurance that the Debtor would be able to shoulder 120 days of accrued and unpaid
17 administrative rent.

18 ANI’s request to compel the Debtor to immediately assume or reject the lease, rather than
19 await Chapter 11 plan confirmation, is based on Section 365(d)(2). See Motion at 4:18-25.
20 ANI relies on the language “...but the court, on the request of any party to such contract or lease,
21 may order the trustee to determine within a specified period of time whether to assume or reject
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23 ⁵ Paragraph 1 of the Lovett Declaration states that it “is made based on my personal
24 knowledge, or upon my consultation with counsel or others on staff with direct responsibility for
25 the topics addressed in this declaration. If called upon to testify regarding these matters, I could
26 and would do so.” The declarant’s belief that he could testify as to the matters outside his
27 personal knowledge assumes that ANI would not object to his competency to do so under
28 Federal Rule of Evidence 602. Of course, the same competency objection could be made to the
second Namy Affidavit which is more in the nature of argument rather than percipient witness
testimony.

1 such contract or lease.” Id. at 23-25. A careful reading of that provision, however, indicates that
2 ANI has ignored the remainder of the language in Section 365(d)(2) that limits its applicability
3 to executory contracts and unexpired leases of residential real property.⁶ Moreover, the cases
4 cited by ANI, see id. at 4:27 to 5:2, either preceded the enactment of the current version of
5 Section 365(d)(2) or did not involve leases of nonresidential real property. See Theatre Holding
6 Corporation v. Mauro, 681 F.2d 102 (2nd Cir. 1982)⁷; In re Dunes Casino Hotel, 63 B.R. 939
7 (D.N.J. 1986)⁸; In re Rebel Rents, Inc., 291 B.R. 520 (Bkrcty.C.D.Cal. 2003)⁹; and In re Enron
8 Corp., 279 B.R. 695 (Bkrcty.S.D.N.Y. 2002)¹⁰. Absent a showing to the contrary, the Court is
9 not inclined to extend Section 365(d)(2) to nonresidential leases of real property when the
10 Bankruptcy Code provides specific treatment for such leases under Section 365(d)(3) and
11 Section 365(d)(4).

12 Perhaps because Section 365(d)(2) includes no provision to reduce the amount of time for
13 a debtor-in-possession to make a determination to assume or reject an unexpired lease of
14

15 ⁶ In quoting the language of Section 365(d)(2) in its brief, see Motion at 4:21-25, ANI
16 did not place emphasis on the following portion: “In a case under chapter...11...of this title, the
17 trustee may assume or reject an executory contract of unexpired lease of residential real
18 property or of personal property of the debtor at any time before the confirmation of the plan...”

19 ⁷ At the time Theatre Holding was decided, Section 365(d)(2) was not limited to
20 residential real property leases and personal real property leases; rather, those limitations were
21 implemented by the passage of the 1984 amendments to the Bankruptcy Code. See 3-365
22 Collier on Bankruptcy (15th Ed. Revised) ¶ 365.LH at [2][a].

23 ⁸ Dunes Casino Hotel involved an executory contract to purchase real property rather
24 than an unexpired lease of nonresidential real property. 63 B.R. at 943-44.

25 ⁹ Rebel Rents involved unexpired leases of construction vehicles and trucks rather than
26 nonresidential real property leases. 291 B.R. at 523-24.

27 ¹⁰ The Enron Corporation decision involved executory contracts for reservation of
28 pipeline capacity for natural gas rather than nonresidential real property leases. 279 B.R. at 699-
700.

1 nonresidential real property, Section 365(d)(3) requires immediate performance of the rent
2 obligations for such leases after the bankruptcy case is commenced. While Section 365(d)(2)
3 does not apply to Chapter 7 proceedings where no reorganization is contemplated, it clearly
4 affords more protective treatment to nonresidential lessors whose premises may be involved in
5 prolonged efforts to reorganize. A debtor-in-possession may be granted temporary relief from
6 such lease performance for a limit of sixty days from the petition date, but only upon a finding of
7 cause. Additionally, Section 365(d)(3) specifically provides that "...the time for performance
8 shall not be extended beyond such 60-day period."

9 Nowhere in the Debtor's written Opposition does it seek relief from Section 365(d)(3)
10 based on cause. Only at the hearing did the Debtor request, through counsel, a 120-day
11 extension of its obligation to pay rent. Section 365(d)(3) flatly prohibits a 120-day extension
12 even if it was properly requested.

13 If the Court were to treat Debtor's request as an oral motion under Section 365(d)(3), the
14 maximum extension permitted by the statute would be to July 29, 2008, i.e., the 60th day after the
15 filing of the bankruptcy petition. By that date, the Debtor would be obligated under Paragraph 5
16 of the ANI Lease to have made the June 1 and July 1 rental payments of \$95,940 per month, with
17 another payment due on August 1. Paragraph 9 also provides for a 5% late charge if the rent is
18 not paid on the first day of the month.

19 Because the Debtor has the burden of demonstrating cause for an extension of the
20 performance obligation under Section 365(d)(3), see, e.g., In re Pac-West Telecomm, Inc., 377
21 B.R. 119, 126 (Bkrcty.D.Del. 2007), the Court has examined the record to determine whether
22 such cause has been established.

23 As noted, Debtor's amended Schedules fail to even mention the ANI Lease let alone any
24 claims that may exist against the Debtor's insurance carrier. No affirmative claims whatsoever
25 are listed with respect to the Debtor's ongoing dispute with ANI. The Statement of Financial
26 Affairs essentially says nothing about anything.

1 The Lovett Declaration is equally unenlightening. It describes in unnecessary detail the
2 noxious events that occurred at the North Tenaya Way property, and also describes various
3 alleged misdeeds by ANI, but it does not address at all the Debtor's financial ability to make
4 good on the monthly rent obligations under the ANI Lease now or in the future. This is even
5 more curious since the Lovett Declaration is styled as an "omnibus" declaration intended to
6 support various belated "first day" motions, and yet provides no information regarding the
7 Debtor's current financial condition. It bears repeating that the Debtor's Schedules lists no
8 assets of any value and its Statement of Financial Affairs lists no income or payment history
9 whatsoever.

10 Based on this record, the Court cannot find that cause exists under Section 365(d)(3) to
11 extend the time for the Debtor to perform its obligations under the ANI Lease. For that reason,
12 even treating Debtor's argument at the hearing as an oral request for an extension of time under
13 Section 365(d)3), it must be denied and ANI's motion for payment of post-petition rent must be
14 granted.

15 ANI's alternative request for relief from stay will be denied without prejudice. In the
16 event that the Debtor fails to perform its lease obligations as required by Section 365(d)(3), ANI
17 may renew its motion for relief from stay. Under those circumstances, the Court also would
18 entertain a request for an order shortening time for a hearing on a renewed motion.

19 **CONCLUSION**

20 For the reasons set forth herein, ANI's Motion will be denied insofar as it seeks to
21 compel the Debtor to immediately assume or reject the ANI Lease or to shorten the time allotted
22 under Section 365(d)(4). Such denial is without prejudice to a further request upon submission
23 of applicable legal authority for such a request. ANI's Motion will be granted insofar as it seeks
24 immediate performance by the Debtor under Section 365(d)(3) of the payment and other
25 applicable obligations under the ANI Lease. ANI's Motion will be denied without prejudice
26 insofar as it seeks relief from the automatic stay to proceed with the Eviction Action or other
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1 nonbankruptcy remedies.

2 A separate order has been entered concurrently herewith.

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