

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

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| IN THE MATTER OF |) | |
| |) | |
| RICHMAN GORDMAN STORES, INC., |) | CASE NO. BK92-81073 |
| RICHMAN GORDMAN DEPARTMENT |) | CASE NO. BK92-81074 |
| STORES, INC., |) | |
| 1/2 PRICE STORES, INC., |) | CASE NO. BK92-81075 |
| |) | |
| DEBTOR(S) |) | CH. 11 |

MEMORANDUM

Hearing was held on December 18, 1992, on Motion of F.W. Woolworth Co. for Payment of Administrative Claim. Appearing on behalf of F.W. Woolworth was Paul Elofson of McGill, Gotsdiner, Workman & Lepp, P.C., Omaha, Nebraska. Appearing on behalf of the Unsecured Creditors' Committee was Robert Bothe of McGrath, North, Mullin & Kratz, P.C., Omaha, Nebraska. Appearing on behalf of the debtors were Kathryn Derr and Harry Dixon of Dixon & Dixon, P.C., Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

Upon motion by F.W. Woolworth Co. for payment of administrative claim; objection by the debtors; and objection by the Official Unsecured Creditors' Committee, it is ordered:

The motion is granted.

F.W. Woolworth Co. (Woolworth), the sub-lessor, seeks payment of \$42,843.76 as an administrative expense for rent and real estate taxes on a store location subleased to the debtors. Woolworth and Richman Gordman Stores, Inc., one of the debtors herein, entered into a sublease agreement on August 4, 1983, for a portion of a shopping center located at 3221 S.E. 14th St. in Des Moines, Ia. The debtors operated a 1/2 Price Store at this location until the summer of 1992. The debtors stopped making lease payments on the property as of June 1, 1992. The debtors claim they closed the store on that date and had removed all inventory and equipment by June 8, 1992, (Ex. 4). They subsequently filed for bankruptcy on June 17, 1992.

Under 11 U.S.C. § 365, the debtor-in-possession has sixty days from the date of the order for relief within which to assume or reject an unexpired lease of non-residential real property. Because of the large number of leases under which the debtors were obligated and the complex process of deciding how to treat the various leases, the debtors requested additional time to assume or reject their leases. Woolworth objected because it had received no rent payments from the debtors since before the bankruptcy petition was filed. At the hearing on debtors' motion on August 19, 1992, debtors' counsel, with the agreement of counsel for the creditors' committee, informed the Court that debtors had elected to exclude the Woolworth lease from the pending motion and thereby reject it. This Court entered an order (Filing No. 197) acknowledging that Woolworth's lease was deemed rejected as of August 19, 1992.

Woolworth now requests payment pursuant to Section 365(d)(3) of the amount of rent and related charges due from the petition date of June 17, 1992, to the date the Court approved debtors' rejection of this lease, August 19, 1992. The proration is:

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| Balance of June rent: (14/30 [46.7%] x 19,597) | \$ 9,151.80 |
| July rent | \$19,597.00 |
| August rent proration to date of rejection [8/19/92] (19/31 [61.3%] x 19,597) | \$12,012.96 |
| Prorated Real Estate Taxes \$41.64/day x 50 days (July 1 - August 19) | \$ 2,082.00 |
| Total due as Administrative Claim | \$42,843.76 |

The debtors and the Creditors' Committee base their objections on 11 U.S.C. § 503(b)(1), the administrative expense statute, and focus on the "actual, necessary costs and expenses of preserving the estate" language. Their position is that since the lease was of no benefit to the estate, the lease and tax proration for the post-petition retention period should not be treated as an administrative expense. This argument, although followed by some courts (see, e.g., Great W. Sav. Bank v. Orvco, Inc., (In re Orvco, Inc.), 95 Bankr. 724 (9th Cir. BAP 1989); In re Tammey Jewels, Inc., 116 Bankr. 292 (Bankr. M.D. Fla. 1990)), fails to convince this Court because it is contrary to a plain reading of Section 365(d)(3).

Section 365(d) (3) provides:

The trustee shall timely perform all the obligations of the debtor. . . arising from and after the order for relief under any unexpired lease of non-residential real property, until such lease is assumed or rejected, notwithstanding Section 503(b)(1) of this title. . . .(emphasis added)

This language clearly directs the trustee/debtor-in-possession to perform the debtors' obligations, such as paying rent on its place of business, on time. This prevents the lessor from unwillingly being put in the position of being forced to carry the debtor until the debtor decides whether to assume or reject the lease. As this Court previously held in In the Matter of World Radio Laboratories, Inc., Neb. Bkr. 90:653 at 654:

The language of the statute seems rather plain to this Judge. The trustee or debtor-in-possession is required to make the rent payments during the first 60 days whether the trustee assumes or rejects the lease. If the trustee is required by the statute to make the payments during the first 60 days and fails to do so, it seems quite strange that the trustee would thereafter be excused from making the rental payments until some time in the future, either at confirmation or otherwise, when other administrative claims were determined and a determination was made concerning whether they would all be paid in full or there would be a proration.

See also, Paul Harris Stores v. Mable L. Salter Realty Trust (In re Paul Harris Stores, Inc.), 148 Bankr. 307 (S.D. Ind. 1992); In re Telesphere Communications, Inc., 148 Bankr. 525 (Bankr. N.D. Ill. 1992); Montrose Centre v. Northeast Consumer Technology Stores, Inc., (In re The Appliance Store, Inc.), 148 Bankr. 234 (W.D. Pa. 1992); In re Worths Stores Corp., 135 Bankr. 112 (Bankr. E.D. Mo. 1991).

As the Supreme Court has recently indicated, the plain language of a statute should not be disregarded without substantial justification. See, e.g., Patterson v. Shumate, _____ U.S. _____, 112 S. Ct. 2242 (1992); United States V. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1026 (1989).

The debtors also suggested in their materials that they terminated the lease prior to the petition date. Woolworth's counsel has stated he was unaware the debtors were rejecting the lease with Woolworth until debtors' counsel so indicated at the August 19th hearing on debtors' motion for leave to extend time to assume or reject. In addition, Woolworth's counsel submitted, as admissions against interest by the debtors, copies of two affidavits he received from debtors' counsel in anticipation of

the August 19th hearing (Ex. 2). The affiants were officers of Richman Gordman Stores, Inc., one of the debtors herein. Although apparently neither affidavit was offered at the August 19th hearing, one refers to the debtors' ability to timely perform all financial obligations under their leases. The other discusses the value of the various leases and indicates the benefit to the debtors if they were to assume and assign the Woolworth lease. Such statements fly in the face of any argument at this point that debtors surrendered the property prepetition. Although the debtors may have vacated the premises pre-petition, there is no evidence they either did or intended to return control of the property to Woolworth.

Because this Court holds that Woolworth is entitled to payment of the post-petition rent as an administrative expense, the question of enforcement, although not raised in Woolworth's motion, needs to be addressed. Section 365(d)(3) leaves to the Court's discretion the appropriate procedure for ensuring the lessor gets paid. In this case, where the statute required the debtor to keep payments current pending rejection and where a review of the materials submitted for hearings on other motions indicates the debtors have the ability to pay their administrative claims, there is no reason to make the lessor wait any longer for payment. See World Radio, supra; In re Homeowner's Outlet Mall Exchange, Inc., 89 Bankr. 965 (Bankr. S.D. Fla. 1988); Telesphere Communications, supra.

Therefore, pursuant to Section 365(d)(3), the debtors are ordered to immediately pay F.W. Woolworth Company \$42,843.76 for the use of the subleased premises from the petition date to the date the Court approved rejection of the lease.

Separate journal entry to be entered.

DATED: April 6, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Clerk to give immediate notice of the Court's ruling to all parties appearing at hearing.

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STORES, INC.,)
1/2 PRICE STORES, INC.,) CASE NO. BK92-81075
) CH. 11
DEBTOR(S)) Fil. No. 278, 311, 317

DATE: April 6, 1993
HEARING DATE: Dec. 18,
1992

JOURNAL ENTRY

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion of F.W. Woolworth Co. for Payment of Administrative Claim; Objection by the debtor; Objection of Creditors' Committee to Motion.

APPEARANCES

Paul Elofson for F.W. Woolworth
Robert Bothe for Unsecured Creditors' Committee
Kathryn Derr and Harry Dixon for the debtor

IT IS ORDERED:

Motion granted. Pursuant to Section 365(d)(3), the debtors are ordered to immediately pay F.W. Woolworth Company \$42,843.76 for the use of the subleased premises from the petition date to the date the Court approved rejection of the lease. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Clerk to mail copies to parties appearing at hearing.