

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

WALTER E. ADAMS,

DEBTOR

WALTER E. ADAMS, DEBTOR and  
DEBTOR-IN-POSSESSION

Plaintiff

vs.

ADAMS BROTHERS, A Partnership,  
LEO ADAMS and VIRGIL L. ADAMS,  
ROGER JIM ADAMS, JERRY ADAMS,  
FIRST NATIONAL BANK & TRUST  
COMPANY OF FREMONT, and  
METROPOLITAN LIFE INSURANCE  
COMPANY,

Defendant

CASE NO. BK85-1811

A88-165

CH. 11

MEMORANDUM

A hearing was held on the complaint of plaintiff, Walter E. Adams, Debtor-in-Possession, on May 13, 1988. Walter E. Adams was represented by James T. Gleason of Stalnaker, Becker, Buresh & Gleason, P.C., Omaha, Nebraska; defendant Adams Brothers, a Partnership, was represented by Don Swanson of Schmid, Mooney & Frederick, P.C., Omaha, Nebraska; defendant Jerry Adams was represented by Donald Schneider of Fremont, Nebraska.

Walter Adams requests the Court to grant a temporary restraining order and permanent injunction requiring the Adams Brothers and its constituent partners (hereafter "Adams Brothers") to cease and desist from any interference with Walter Adams' farming operation and to return to Walter Adams all machinery and equipment owned by him.

Walter Adams also requests the Court to order the Adams Brothers to remove from Walter Adams' property grain owned by the Adams Brothers as well as the grain bins in which the grain is stored. He also requests an accounting for all grain grown and harvested during 1987 and the turnover of any monies due him.

Statement of Facts

Walter Adams filed for Chapter 11 relief in August, 1985. The Adams Brothers, a partnership consisting of four of Walter Adams' sons--Leo, Virgil, Roger and Jerry--filed for Chapter 11 relief in August, 1985, and Leo Adams, Virgil Adams and Roger Adams also filed individual bankruptcies at the same time. Prior to the dispute in the instant case, the Adams Brothers partnership farmed all of the property owned by the partnership, the individual brothers, Mary Lou Adams, a sister, and Walter Adams. A written lease executed by Walter Adams and the partnership in March, 1980, set forth this arrangement. Sometime in 1984 prior to the parties' bankruptcy filing, a new lease was drafted setting forth the obligations of all the parties. This lease was never executed; however, testimony at the hearing indicated that the terms of this lease were the operative provisions under which the Adams Brothers continued to farm the various properties. All parties agree that they created an oral, one-year lease with the lessee, Adams Brothers, holding over each ensuing year. Mary Lou Adams' land was not included in this unexecuted lease, but she testified that all decisions regarding the property she owned were made by her father, Walter Adams.

On April 24, 1987, James Gleason, Walter Adams' attorney, gave notice to the partnership that Walter Adams desired to terminate the oral lease between Walter Adams and the partnership at the end of the 1987 crop year. No notice of default was included. A second letter was sent by Mr. Gleason to all of the brothers on August 24, 1987, giving notice that the existing oral lease for the 1987 crop year was canceled and requesting that the brothers return to Walter Adams any of his equipment that they had in their possession. This letter included default language:

Throughout the term of the lease, there have been significant problems relating to your performance under the lease. I am specifically referring to numerous episodes in which you refused to perform necessary labor. This culminated in the most recent announcement on Friday and Saturday of this week that you intended to perform no further work.

You are hereby notified that we are cancelling all existing leases for the 1987 crop year for your non-performance.

Relief from the stay was not requested by Walter Adams prior to sending either letter. Neither letter mentioned Mary Lou Adams' land.

In March, 1988, Walter Adams entered into lease agreements with other tenants, permitting them to farm his land and Mary Lou Adams' land heretofore farmed by the Adams Brothers. Both the new

tenants and the Adams Brothers have requested advance payment from the ASCS. The ASCS will not provide assistance to anyone until it is determined who has the authority to farm Walter Adams' and Mary Lou Adams' property.

At the hearing Jerry Adams and Roger Adams testified that Walter Adams had told them to ignore the formal notices of cancellation and to continue business as usual. Walter Adams denied that he made those statements. Walter Adams' testimony at an earlier hearing conforms to Adams Brothers' present testimony, but at that hearing, Walter Adams qualified his answers.

Adams Brothers claims that it is operating under an oral lease and that Walter Adams by his subsequent conduct and statements waived both Adams Brothers' duty to assume or reject under 11 U.S.C. § 365(d)(4) and his written termination of the lease. In their opinion, they are holdover tenants and able to continue, under Nebraska law, for another year's tenancy. Further, before notice of termination can be given, lessor, Walter Adams, must request relief from the stay. Adams Brothers presented no evidence of Walter Adams waiving his right to reject the oral lease during the sixty-day period following the Adams Brothers bankruptcy filing, nor did Adams Brothers present evidence of conduct of Walter Adams during that same period that could estop Walter Adams from claiming rejection under 11 U.S.C. § 365(d).

Walter Adams contends that the oral lease is rejected by operation of Section 365(d)(4) and is not property of the estate of Adams Brothers. Moreover, Walter Adams' conduct does not constitute waiver of his rights as lessor. None of the debtors--neither Walter Adams, the partnership nor any of the individual brothers--has requested from this Court permission to assume or reject any lease, nor has Walter Adams requested relief from the stay.

#### Analysis

In the instant case, the parties' testimony confirmed that all believed that they were operating under the terms of the unexecuted lease. Because Nebraska law requires a writing for any lease of real estate longer than one year, Neb. Rev. Stat. § 36-103, -105 (Reissue 1984), the oral agreement, by operation of law, becomes a one-year lease. Although Mary Lou Adams' land was not included in the unexecuted lease, farming on her property was also pursuant to an oral agreement.

From the testimony, the Court believes the one-year period coincided with the crop year, March 1 to February 28. Thus, the first year of operation under the oral leases began on March 1, 1984, and ended on February 28, 1985, prior to the parties' filing for Chapter 11 relief in August, 1985. Because the lessors, Walter Adams and Mary Lou Adams, took no action to terminate the

oral leases during this first one-year period, Adams Brothers became holdover tenants beginning on March 1, 1985, on a year-to-year basis. The first year of the holdover tenancy terminated on February 28, 1986, approximately six months after the parties' bankruptcy filing. Unexpired leases in existence at the date of bankruptcy filing become property of the bankruptcy estate, 11 U.S.C. § 541(a)(1) (1987), and bankruptcy law governs the rights to assume or reject unexpired leases. 11 U.S.C. § 365 (1987).

Section 365 of the Bankruptcy Code provides:

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c) and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

. . . .

(d) . . . (4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(a), (d)(4) (1987) (emphasis added).

Because one of the lessors, Walter Adams, and the lessee, Adams Brothers, are debtors in bankruptcy, the application of Section 365 becomes more complicated. However, subsection (d)(4) applies only to debtor as lessee.

In the instant case, under Section 365(d)(4) the lessee, Adams Brothers, did not attempt to assume or reject the oral, holdover leases within sixty days after filing its bankruptcy petition. Nor did this Court approve additional time. The plain language of the subsection requires immediate surrender of the real estate to the lessor. The burden is placed solely on the lessee to act. "The test for assumption or rejection under Section 365 is whether the trustee has indicated his decision by an unequivocal act." In re BDM Corp., 71 Bankr. 142, 144 (Bankr. N.D. Ill. 1987) (citations omitted). Thus, Adams Brothers must act to assume or reject and must seek court approval of either choice. 11 U.S.C. § 365(a) (1987). No such request of the Court

occurred either within or without this sixty-day time period provided in Section 365(d). Instead, all parties continued to perform as provided in the oral lease.

The actions which Adams Brothers claims were sufficient to constitute waiver occurred long after the sixty-day period provided in 11 U.S.C. § 365. The right to assume cannot be retroactively reinstated. In re Re-Trac Corp., 59 Bankr. 251, 256 (Bankr. D. Minn. 1986). Additionally, "nothing in the statute ... imposes a duty on the lessor to immediately take advantage of the statutory rejection." Id. at 258.

At the termination of the first holdover period, February 28, 1986, the landlord/tenant relationship between the parties had not changed. Accordingly, the Adams Brothers entered into a second year holdover tenancy on March 1, 1986. A third holdover tenancy began March 1, 1987.

The fact that Adams Brothers continued as lessee and continued performing under the terms of the oral agreements does not defeat rejection. Subsections 365(d)(3) and (d)(4) were added to the Bankruptcy Code to provide a "60-day period in which a lease of real property must be assumed or rejected, and to require continued performance under a lease until the decision to assume or reject is made." In Re PCH Associates, 804 F.2d 193, 199 (2d Cir. 1986) (citation omitted).

The Court finds that the oral leases were deemed rejected by lessee, Adams Brothers, and that the trustee "shall immediately surrender such nonresidential real property to the lessor." 11 U.S.C. § 365(d). The interest of the Adams Brothers' estate in the oral leases is terminated by operation of Section 365. Because the Adams Brothers' estate retains no interest in the oral leases, the automatic stay of Section 362 is not applicable. Therefore, the Court must examine Nebraska law to determine Walter Adams' and Mary Lou Adams' rights to evict Adams Brothers from their property.

Nebraska law is well settled that "on a holdover farm lease from year-to-year ... the landlord is required to give 6 months' notice in order to terminate the tenant's lease for the ensuing year." Mathiesen v. Bloomfield, 184 Neb. 873, \_\_\_, 173 N.W.2d 29, 30 (1969). In April, 1987, and again in August, 1987, Walter Adams gave written notice to Adams Brothers that the oral lease on his property was terminated. The Court finds that this notice was properly given, and Walter Adams' alleged statement to Jerry Adams "business as usual," which Walter Adams denies, is not sufficient to constitute waiver of his written notice.

Because the written notice was proper, the Adams Brothers holdover tenancy on Walter Adams' land terminated February 29, 1988. Not only is the lease deemed rejected by operation of bankruptcy law, 11 U.S.C. § 365(d)(4), it is terminated under Nebraska law. Adams Brothers retains no interest.

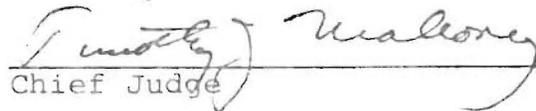
As to Mary Lou Adams' land, however, the holdover tenancy continues. Although the oral lease was deemed rejected under Section 365(d), no notice was given, as required by Nebraska law, to terminate Adams Brothers' holdover tenancy on her land. Until such notice is given and the requisite waiting period has passed, Adams Brothers' holdover tenancy on Mary Lou Adams' land is valid.

Preliminary injunction is granted. Adams Brothers, the partnership, and the individual Adams brothers and spouses are hereby enjoined from interfering with the farming operations on Walter Adams' land and enjoined from requesting the ASCS to permit them to participate in 1988 government programs concerning Walter Adams' land. Pursuant to Bankr. R. 7065 no bond is required. Any other issues not resolved by this order will be included in the final hearing on a permanent injunction which shall be scheduled by the Clerk of the Bankruptcy Court.

A separate journal entry will be entered.

DATED: June 3, 1988.

BY THE COURT:

  
Chief Judge