

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

DELBERT J. McKEAG and  
CAROLYN A. McKEAG,

DEBTORS

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CASE NO. BK87-71

CH. 12

MEMORANDUM

Hearing was held on October 18, 1988, on application for allowance and payment of administrative expense and motion for summary judgment. Appearing on behalf of debtors was David Pederson of Murphy, Pederson, Piccolo & Pederson, North Platte, Nebraska. Appearing on behalf of Agristor Leasing was Patrick Nelson of Jacobsen, Orr, Nelson, Wright & Harder, P.C., Kearney, Nebraska.

Debtors entered into two leases for the use of certain personal property several years prior to filing bankruptcy. In 1985, prior to bankruptcy, debtors failed to pay the annual lease payments. Lessor, applicant herein, notified debtors that the leases were terminated for cause (Ex. 20). Pursuant to Exhibit 20, debtors emptied the personal property units and awaited further contact from applicant. Rather than contacting debtors and making arrangements for removing the personal property from debtors' premises, applicant filed suit in United States District Court requesting a money judgment for breach of the leases.

Almost two years later, debtors filed for relief under Chapter 12. They listed the leases on their statement of executory contracts and when the Chapter 12 plan was filed it specifically rejected the leases.

Applicant did not object to the plan and did not request relief from the automatic stay to repossess its property. Instead, applicant treated the leases as if they had not been terminated and filed a motion requesting the Court to require the debtors to assume or reject the lease. The Court, not being informed by either party of the existence of Exhibit 20, overruled the motion because the plan specifically rejected the leases.

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Judith M. Napier	
Clerk, U.S. Bankruptcy Court	
By	Deputy

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At trial, the applicant's representative testified that she was not aware of the terminology in the plan rejecting the leases with the intent to surrender the property nor was she aware of anyone at the applicant who had read the plan and understood debtors proposed to surrender the property.

Applicant argues that the parties, during the bankruptcy case, treated the leases as if they were unexpired and, therefore, applicant has a right to an administrative expense for the fair use value of the property up to the date the plan was confirmed which resulted in rejection of the leases.

Debtors move for summary judgment on the grounds that Exhibit 20 is a termination of the leases prior to bankruptcy and further that debtors indicated in their timely filed plan in early 1987 that any interest in the leases would be rejected and the property surrendered.

Debtors admit using the property by storing grain in it and admit receiving storage rental payments for such use in the amount of approximately \$11,000 during the pendency of the case.

Section 365 of the Code permits debtors to assume or reject unexpired leases. It does not permit assumption of leases which terminated prior to the commencement of a case. 2 Collier on Bankruptcy ¶ 365.04 (15th ed. 1979).

These leases were terminated prepetition. Applicant could have taken action at any time after termination and prior to petition date to take possession of the property. It did not. Post petition, it could have requested relief from stay to take possession. It did not. It could have made the Court aware of Exhibit 20 when it participated in the case. It did not.

Debtors testified that the property was filled with grain to protect it from wind damage and that the property was not necessary to the estate for storage purposes because of a significant amount of unused storage available to debtors. Debtors received \$11,000 in rent but would have received such rent if alternate facilities were used. In addition, debtors incurred costs because of using the property for a purpose different from that for which it was designed.

Debtors' testimony is believable and unrebutted. This estate did not benefit from the use of the property. Creditor/applicant should not be allowed to terminate a lease prepetition, fail to recover the property, hope the debtors will attempt to assume such terminated lease and then decide whether to raise the termination issue or accept the assumption (and full payment) offer. Applicant should also not be permitted to participate in the case knowing the leases have been terminated and then upon the confirmation of a plan purporting to reject the lease be rewarded for sitting on its rights by payment of an administrative expense.

Applicant is charged with knowledge of Exhibit 20 and its legal meaning. Applicant is responsible for its tactical decisions during a case. In this case, it appears from the evidence that the tactic was to "wait and see" if debtors would assume the leases.

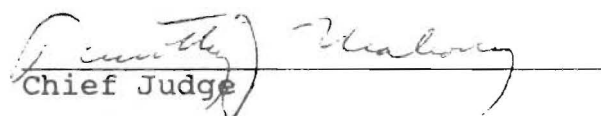
There were no unexpired leases to assume or reject. Applicant is charged with such knowledge. Use of the property was not of benefit to the estate.

Application for administrative expense allowance is overruled.

Separate journal entry shall be filed.

DATED: December 2, 1988.

BY THE COURT:

  
Chief Judge