

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

_____)	
In re:)	Chapter 11
)	Case No. 00-1982-GMS
GST TELECOM INC., et al,)	Jointly Administered
)	
Debtors.)	
_____)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On May 17, 2000, GST Telecom, Inc., GST Telecom California, Inc, and the other debtors and debtors-in-possession (collectively the “Debtors”) filed voluntary petitions for relief under 11 U.S.C. §§ 101-1330. The Debtors are continuing in possession of their respective properties and are operating their respective businesses pursuant to 11 U.S.C. §§ 1107, 1108. On April 6, 2001, the Debtors filed two motions with the court – a motion for an order extending time to assume or reject unexpired leases of nonresidential real estate nunc pro tunc (D.I. 1197) and a motion for authority to assume and assign a specific lease (D.I. 1196).¹ Lend Lease Real Estate Investments, Inc. (“Lend Lease”), the agent for the landlord of the property in question, filed a combined objection to both motions on April 20, 2001 (D.I. 1228). The Debtors filed a combined response on April 23, 2001 (D.I. 1237).

At an omnibus hearing held on May 23, 2001, the court heard testimony and entertained oral argument on the pending motions. Thereafter, the court took the matter under advisement. After reviewing the submissions of the parties, the evidence in the record, the relevant statutes and case

¹Unless otherwise indicated, all docket references are to the docket for the United States Bankruptcy Court, District of Delaware.

precedent, the court has decided that it will overrule Lend Lease's objections and grant both of the Debtors' motions. Given the time sensitive nature of the proceedings, the court will only briefly describe the relevant facts and law. Further, the court notes that it limits its ruling to the facts and circumstances of this case; it specifically declines to issue a broad ruling on the relationship between 11 U.S.C. §§ 105(a) and 365(d)(4) or the rights of debtors and landlords in similar situations.

II. FACTUAL BACKGROUND

As an initial matter, the Debtors have filed three timely motions to extend time to assume or reject unexpired leases of nonresidential real property. The court granted each of these motions and ordered 90 day extensions. The last extension expired on April 2, 2001.² There is no dispute that the Debtors filed the instant motion on April 6, four days after the expiration of the court's extension.

The lease at issue was entered into on October 22, 1999, for Suite 500, 60 South Market Street, San Jose, California (the "60 South Market Lease"). Although the lease was between the Debtors and a third party, Lend Lease at some point became the landlord's agent for the lease. On or about January 8, 2001, the Debtors – with approval of the court – retained Hilco Real Estate Services, LLC ("Hilco") to assist them in finding potential buyers for any nonresidential property leases in its possession.³ The Debtors explicitly informed the court that Hilco would attempt to find a buyer for the 60 South Market Lease.

According to an affidavit from Michael Jerbich, an associate at Hilco, he notified Peggy Toppin, Vice President of Lend Lease, that Hilco had been retained with respect to the 60 South

²The first motion extended time until October 2, 2000. The second motion extended time until January 2, 2001.

³Although the record reveals that the Debtors actually retained Hilco on December 14, 2000, the court did not approve Hilco's retention until January 9, 2001.

Market Lease and asked if Lend Lease was interested in buying it.⁴ On January 16, 2001, Toppin spoke with Jerbich and another person at Hilco and stated that “she would consider Lend Lease’s options . . . and that she would contact . . . [Hilco] once she had done so.” Jerbich spoke with Toppin on February 22, 2001, stating that Hilco had received an offer for the 60 South Market Lease and inquired whether Lend Lease would consider buying it.⁵ Toppin stated “Lend Lease might be interested in buying the Lease, [sic] but that . . . [it] would only consider making an offer . . . after the Debtors filed a motion to assume and assign the Lease [sic].”

The debtors received a second offer to buy the 60 South Market Lease from Frank, Rimerman & Co. LLP (“FRC”) on March 15, 2001. Jerbich left a message for Toppin stating there was an outstanding offer “from a buyer with good credit” and asked again whether Lend Lease was interested. Since he did not hear back from Toppin, he left several messages for her. Jerbich was finally able to speak to Toppin’s assistant on March 20, 2001. He was given the name of the person him with whom he needed to speak to obtain information regarding the “pass throughs” for the 60 South Market Lease. Jerbich has had no contact with Toppin or any other representative from Lend Lease since that date.

Jay Heinrich, an associate with Kelly, Drye, & Warren (Lend Lease’s counsel) testified at the May 23rd hearing. The court will only briefly summarize the salient parts of Heinrich’s testimony. Heinrich only became involved in this matter at some point between April 4 and 13, 2001, when a

⁴He left messages on January 11 and 12, 2001.

⁵Prior to February 22, Jerbich left two voice mail messages for Toppin relaying the same information but received no response.

colleague – who subsequently left the firm on or about April 13, 2001 – transferred “the file” to him.⁶ The file contained a draft confidentiality agreement between Lend Lease and FRC.⁷ The first conversation Heinrich had with FRC regarding the confidentiality order was not before April 10, 2001. Heinrich testified that prior to receiving the file he had no involvement with the case, nor was he personally aware of any communications between his colleague and counsel for the Debtors.⁸ Finally, Heinrich testified that Lend Lease and FRC entered into a confidentiality agreement on April 18, 2001. The agreement included language which stated “[t]his agreement shall in no way be construed as a waiver of the landlord’s rights to object to the assumption and assignment of the lease on any grounds and all such rights are hereby expressly waived.”

The court permitted FRC’s counsel to comment on the issue of the confidentiality agreement. FRC’s counsel stated that it was in negotiations with Lend Lease from April 10 to 18, 2001, and provided Lend Lease with detailed tax returns and other financial information. The purpose of this arrangement was to provide Lend Lease with adequate assurance that FRC could make the rent payments. According to FRC’s counsel “sometime after April 18th [sic] Lend Lease apparently took a different position and said . . . [it did not] want to go forward.” Further, FRC’s counsel stated that

⁶Heinrich testified that he was on vacation when he received the file. He stated that he returned approximately a day and a half after Passover. Since the last day of Passover was on April 15, 2001, the court believes Heinrich returned from vacation on or about April 17, 2001. This comports with Heinrich’s testimony that he was “probably back in the office” on that date.

⁷Heinrich also stated that the file contained the previous extension motions, the order approving the sale of the Debtors’ assets to Time Warner, and “a few notes and some phone numbers.”

⁸Heinrich actually stated “I only *know now* what I learned from my client”(emphasis added). Although the response is a bit vague, the court interprets the comment to mean that if Heinrich became aware of any conversations, it was after he received the file.

his client was already a tenant in the property and that Lend Lease was “already familiar with us.” In response, Lend Lease’s counsel pointed to the above mentioned language in the confidentiality agreement, and stated that the agreement was entered into because “there is no certainty in litigation”.

III. DISCUSSION

The threshold issue before the court is whether 11 U.S.C. § 365(d)(4) prevents it from exercising its equitable powers under 11 U.S.C. §105(a) to grant the Debtors’ motions. Although the parties raise additional arguments in support of their positions, the court believes that this is the nub of the dispute. Therefore, the dispositive questions before the court in this case are (1) whether in this instance the court may exercise its equitable powers and (2) whether the court should exercise them. Since the court finds that, in the circumstances of this case, (1) 11 U.S.C. § 365(d)(4) does not prevent it from exercising its equitable power under 11 U.S.C. § 105(a) and (2) equitable considerations tilt in favor of the Debtors, the court will overrule the objections and grant the motions.

According to the literal terms of 11 U.S.C. § 354(d)(4), debtors must decide within 60 days from the date of the bankruptcy petition whether to assume or reject a nonresidential commercial lease. The Third Circuit has concluded that Congress did not intend such a harsh result, and equity dictates that courts can grant debtors additional time in which to decide whether to assume or reject a particular lease. *See In re Channel Home Centers, Inc.*, 989 F.2d 682, 686-88 (3d. Cir. 1993). In deciding that courts may exercise their discretion to grant extensions before the expiration of any extension period, the Third Circuit left open the question of the court’s power to grant an extension nunc pro tunc. *Cf. id.* at 688 & n.11; *see also In re American Healthcare*, 900 F.2d 827, 830 & n.2 (5th Cir. 1990) (describing disagreement over whether § 365(d)(4) permits court to rule on timely

filed motion after the expiration of extension period). The court notes, however, that the weight of authority appears to suggest that courts are not required to rule on motions to extend the assumption or rejection period before the expiration of the previously granted extension. See *In re Southwest Aircraft Serv.*, 831 F.2d 848, 852 (9th Cir. 1987). Thus, the court starts from the premise that 11 U.S.C. § 365(d)(4) is not as unambiguous as Lend Lease suggests and that the courts, in certain situations, have applied equitable principles in interpreting it.⁹ Thus, there is no mandatory precedent in this specific situation.¹⁰

The touchstone of the court's analysis is the balance of prejudice to Lend Lease and the Debtors (rather than all landlords and debtors). When pressed, Lend Lease resorts to general arguments regarding certainty and prejudice. Granting the Debtors' motion, it argues, would open the floodgates and allow debtors seemingly infinite time to assume or reject leases while forcing landlords to live with the uncertainty of what would happen to their leases. Although this may be true in the larger sense, such is not the case in this situation. The uncontraverted evidence in the

record demonstrates that Hilco, on behalf of the Debtors, contacted Lend Lease numerous

⁹Lend Lease's reliance on *Norwest Bank of Worthington v. Ahilers*, 485 U.S. 197, 206 (1988), is misplaced. Although it is true that the Court observed that the equitable powers of the bankruptcy courts "must and can only be exercised within the confines of the Bankruptcy Code [sic]," *Ahilers* dealt with an entirely different – and seemingly less ambiguous – statutory section. Lend Lease attempts to paint *Ahilers* as breaking new ground and superceding earlier cases. The court, however, believes the statement in *Ahilers* regarding the interaction with equitable and statutory powers is not new; it is long been held that courts cannot – and should not – substitute their judgment in the face of clear congressional action. In this case, however, 11 U.S.C. § 365(d)(4) is ambiguous and has been interpreted more expansively than its literal words. Therefore, the court is not contravening the language of the statute.

¹⁰Although Lend Lease relies heavily on a Ninth Circuit case, *Harvest Corp. v. Rivera Land Co.*, 868 F.2d 1077, the court is not persuaded by the holding in light of the facts of this case.

times from January through March, 2001 to inform it that it had received offers for the 60 Market Street Lease. Lend Lease had at least two opportunities to buy the lease in question. Although Toppin stated that she was merely waiting for the Debtors to file a motion to assume and assign the lease, this statement is not the ‘smoking gun’ Lend Lease would have the court believe it is. At the time of the statement, the Debtors had already filed two motions to assume and assign the lease; it is unclear whether Toppin was referring to a past or future motion.¹¹ Furthermore, by informing Toppin that the Debtors were seeking to assign the lease, Lend Lease was at least on notice that there was a good chance the lease would be assigned rather than rejected. Indeed, by first retaining Hilco and later authorizing it to seek Lend Lease’s input, the Debtors made it at least implicitly clear that it would prefer to assign rather than reject the 60 South Market Lease.

The court also takes note of the curious timing of the negotiations between Lend Lease and FRC. Heinrich’s testimony is largely unhelpful on this point since he was not aware of any discussions between the parties prior to his involvement in the case. Even using Heinrich’s vague time line and affording Lend Lease every inference, it is clear that it knew of the Debtors’ intention to file a motion to extend time well before it filed its opposition; the Debtors filed the motion on April 6, 2001 but Lend Lease waited until April 20, 2001 to register its objection. Although Lend Lease reserved its rights to object, the record demonstrates that at least as of April 18 it was in good faith negotiations with FRC. Furthermore, in its motion Lend Lease complains that it has not had sufficient time to determine whether it had adequate assurances from FRC that payment of rent would

¹¹Counsel for Lend Lease makes much of the fact that Toppin is not an attorney and therefore cannot be presumed to know the legal requirements. Nevertheless, Toppin appears to have know about the potential sale and was less than diligent in following up with Hilco regarding any possible extension.

not be interrupted. Certainly by this time Lend Lease has had enough time to gain adequate assurances from FRC regarding the 60 South Market Lease.

On the other side of the coin, the court believes that the prejudice to the Debtor is more direct and less speculative. Should the court sustain the objection, the Debtors' estate would lose at least \$150,000 (the price FRC will pay for the lease). Furthermore, sustaining the objection would result in Lend Lease obtaining the lease on a technicality (i.e. the attorneys' slight delay in filing a motion). The court does not believe allowing Lend Lease to acquire the 60 South Market Lease serves the best interests of the Debtors' estate, nor would such a result serve to promote the goals of the Bankruptcy Code in general. *See In re Curio Shops*, 55 B.R. 148, 154 (Bankr. D. Conn. 1985). Finally, the Debtors' delay was a mere four days. Even if the Debtors had timely filed the motion to extend time, the court would not have addressed it until the April 23, 2001 omnibus hearing. Weighing the asserted potential prejudice to Lend Lease, which is somewhat general and speculative, against the direct monetary prejudice to the Debtors, the court concludes that equity dictates that it grant the Debtors' motions.

One final note. In overruling Lend Lease's objections, the court explicitly rejects the Debtors' argument that it fully complied with the dictates of 11 U.S.C. § 365(d)(4) when it filed for its first extension. According to the Debtors' argument, after filing an initial extension within the first 60 days, they complied with the dictates of the statute. This position is not only illogical and in direct contravention of Congress' intent, but the Debtors' own actions undermine their argument. Although it is true that the Debtors voluntarily chose to ask for 90 day extensions, doing so does not strip the plain language 11 U.S.C. § 365(d)(4) of its force. Just as the Third Circuit was concerned with the seemingly harsh result of the statutory language, it was also cognizant of Congress' intention not to

give debtors unlimited time to assume or reject these types of leases. The court believes the Debtors' position ultimately does violence to the statutory language and disrupts the balance of interests the Third Circuit was trying to weigh. Furthermore, the record reveals that up until this point the Debtors timely asked for and received extensions. Presumably, the request for extensions was not merely based on the inherent authority of the court but relied, in part, at least, on 11 U.S.C. § 365(d)(4). Indeed, the Debtors explicitly rely on the statutory language in the most recent request to assume and assign the 60 South Market Lease.

IV. CONCLUSION

Given the unique facts of this matter, after analyzing the relevant statutes and case precedent, and the parties' arguments, the court finds it possesses the equitable power to grant the Debtors' motions. Furthermore, after weighing the balance of prejudice, the court deems it appropriate to exercise this power to overrule the objection of Lend Lease and grant the Debtors' motions. Even within a broader context, the court believes that Lend Lease's arguments would be unavailing, however, by limiting its ruling to the facts of this case, the court is confident the parade of horrors predicted by Lend Lease will not come to fruition.

Therefore, IT IS HEREBY ORDERED that:

1. The objection of Lend Lease (D.I. 1237) is OVERRULED.
2. The Debtors' motions (D.I 1196, 1197) are GRANTED.

Dated: June 8, 2001

Gregory M. Sleet

UNITED STATES DISTRICT JUDGE