

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of                         :  
  
STEPHEN F. SESKER and                     : Case No. 87-3014-C  
SANDRA L. SESKER,                         : Chapter 12  
  
                       Debtors.                     :  
  
   :

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ORDER - MOTION FOR DETERMINATION OF LESSEE'S  
RIGHT TO FARM DEBTORS' REAL ESTATE

On May 31, 1988, a hearing was held on the motion for determination of Lessee's right to farm Debtors' real estate. Jerrold Wanek appeared on behalf of the Debtors and Daniel E. Bappe appeared on behalf of the Lessee, Jeffrey Longnecker (hereinafter "Lessee"). At the conclusion of said hearing, the Court took the matter under advisement upon a briefing deadline of June 30, 1988. Briefs were timely filed and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The Court, upon review of the pleadings, testimony, arguments and briefs of counsel, now enters its findings and conclusions pursuant to F.R. Bankr. P. 7052.

FINDINGS OF FACT

1. On March 1, 1987, Debtors entered into a written farm lease with Lessee. Said lease covered 147 acres of real estate located in Polk County, Iowa, which is legally described in the lease as:

South East 1/4 of South East 1/4 of Section Sixteen (16) and East 1/2 of South West 1/4 of Section 35, Township 81 North, Range 22, Polk County, Iowa.

2. The term of the lease was to cover the 1987 crop year beginning on March 1, 1987, and continuing until March 1, 1988.

3. In consideration for leasing the property, Lessee agreed to pay Debtors cash rent of seventy-six dollars (\$76.00) per acre, which, per the terms of the lease, was payable on March 1, 1987, the first day of the term.

4. Lessee farmed said real estate during the 1987 crop year.

5. On December 10, 1987, Debtors filed a Chapter 12 petition.

6. On or about December 12, 1987, Steven Sesker notified Lessee that Debtors had filed their Chapter 12 petition and of their desire and intent to farm the real estate in 1988 as part of an effort at reorganization. Steven Sesker stated the lease relationship with Lessee would be terminated at the end of the term of the original lease on March 1, 1988. Steven Sesker asked Lessee to sign a disclaimer of any interest in the leased real estate but Lessee refused to do so.

7. Upon learning this, Lessee failed to indicate in any manner that he intended to renew the lease for an additional term and farm the real estate in 1988. In

addition, Lessee failed to either offer to pay or pay the cash rent necessary to carry the lease over into an additional term.

Lessee voluntarily surrendered possession of the leasehold property and allowed Debtors to take possession and make preparations for the planting of the 1988 crop.

8. On February 2, 1988, Debtors filed a notice of rejection of executory contract in which the lease between Debtors and Lessee was rejected by the Debtors pursuant to 11 U.S.C. §365. In said notice, Debtors stated they had the understanding that the lease was cancelled and would not carry over to the 1988 crop year, and that Lessee was claiming a leasehold interest in the property pursuant to the terms of the lease.

9. Steven Sesker also talked with Lessee in February 1988, and advised Lessee that Debtors were going to farm the tract for the 1988 crop year.

10. Debtors have had actual possession of the leasehold property since March 1, 1988, when the original lease expired by its own terms. Lessee voluntarily surrendered possession of the farm after the February 1988, conversation.

11. Debtors enjoyed nearly one and one-half months of dispute-free possession of the property during which they planted the majority of their 1988 crop. Lessee did not prepare the ground for planting and did not plant any of the

crop. In addition, Lessee did not protest when Debtors planted the crop.

12. On April 18, 1988, Lessee filed the instant motion to determine his rights to farm Debtors' real estate. In said motion, Lessee argued he has a legal right, pursuant to 11 U.S.C. §365(h)(1), to farm Debtors' real property in 1988 because Debtors failed to serve him with written notice of termination of lease by September 1, 1987, as required by Iowa Code sections 562.6, 562.7.

13. On April 27, 1988, Debtors filed a response and argued Lessee is limited in his remedies to filing a Proof of Claim for an unsecured amount to compensate him for damage sustained because Debtors have actual possession of the farm real estate and have rejected the lease as a matter of law.

#### DISCUSSION

The issue in this case is whether Lessee is entitled, pursuant to 11 U.S.C. §365(h)(1), to farm Debtors' real estate in 1988.

Section 365(h)(1) provides, in relevant part:

If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, ..., the lessee ... under such lease ... may treat such lease ... as terminated by such rejection, where the disaffirmance by the trustee amounts to such a breach as would entitle the lessee ... to treat such lease ... as terminated by virtue of its own terms, applicable nonbankruptcy law, or other agreements that the lessee ... has made with other parties; or, in the alternative, the

lessee ... may remain in

possession of the leasehold ... under any lease ... the term of which has commenced for the balance of such term and for any renewal or extension of such term that is enforce-able by such lessee ... under applicable non-bankruptcy law.

11 U.S.C. §365(h)(1) (emphasis added). In interpreting §365(h)(1), the Court in In re Marina Enterprises, Inc., 14 B.R. 327, 334 (Bankr. S.D. Fla. 1981) noted the phrase "may remain in possession" implies a continuation of existing possession on the part of the lessee. The Court determined that in the absense of such continued possession, the lessee may not rely on the remedy found in the statute. Id.

In the case at bar, Debtors, pursuant to section 1203, rejected the lease with Lessee by filing a notice of rejection on February 2, 1988. As a result, Lessee's only possible right to continue farming Debtors' real estate in 1988 rested solely upon the remedy found in section 365(h)(1). However, Lessee did not remain in possession of the leasehold property but instead voluntarily surrendered possession to Debtors who then proceeded to make preparations for and planted the 1988 crop. As noted above, a lack of continued possession will preclude Lessee from relying upon the remedy found in section 365(h)(1). Id. Therefore, the Court concludes Lessee is not entitled to farm Debtors' real estate in 1988.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes Lessee's voluntary surrender of possession of the leasehold property to Debtors precludes Lessee from relying upon the remedy found in 11 U.S.C. §365(h)(1).

IT IS ACCORDINGLY ORDERED that Lessee has no right to farm Debtors' real estate in 1988.

Dated this 22nd day of September, 1988.

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RUSSELL J. HILL  
UNITED STATES BANKRUPTCY JUDGE