

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
THOMAS ALBERT CARLSON, : Case No. 88-110-C
dba Carlson's TV & Appliance; :
dba Carlson's Westside Sales, : Chapter 11

Debtor.

ORDER

On March 18, 1988 Thomas A. Carlson, the debtor in possession (debtor), filed a combined application to remain in business premises pending order and for approval to enter into real estate lease. On March 25, 1988 David Henderson filed his landlord's resistance to debtor's application. Ray Sullins represents the debtor. David Tank represents the landlord.

In his application, the debtor states that he found other premises from which to operate his business and thus will reject the lease. He further states that he has negotiated the terms of a lease for the new premises and that the lessor is awaiting the debtor's execution of the lease. The debtor contends that he will be prejudiced if he is forced to vacate the 5th Street premises before he receives permission to enter into the new lease. The debtor prays that he be permitted to remain in the 5th Street premises until the court approves the new lease.

DISCUSSION

I. Effect of Lease Rejection

On February 29, 1988 the court ordered the debtor to assume or reject the unexpired lease of nonresidential property located at 202 5th street, West Des Moines, Iowa by March 21, 1988. The court noted that the property was nonresidential, that March 21, 1988 was the 60th day after the date of the order for relief and that cause did not exist for extending the time frame set forth in 11 U.S.C. section 365(d)(4). That Code provision states:

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. (Emphasis added.)

A debtor in possession is presumed to reject an executory contract upon failure to meet the deadline to assume or reject set by the court. Matter of Theatre Holding Corp., 22 B.R. 884, 886 (Bankr. S.D. N.Y. 1982). An examination of the file reveals that the debtor had not formally assumed nor rejected the lease by March 21, 1988. Accordingly, the lease to the 5th Street premises is deemed rejected. As such, the lease is no longer property of the estate and the debtor must surrender the property to the landlord. 11 U.S.C. § 541(b)(2); 11 U.S.C. § 365(d)(4).

II. New Lease Arrangement

The debtor also requests that an expedited hearing be set with respect to his application for approval of the new lease. Entering into a new lease arrangement does not require court approval.

Under Chapter 11, the debtor in possession has the rights, powers and duties of a trustee with certain exceptions. 11 U.S.C. § 1107(a). Therefore, Code references to the trustee generally apply to the debtor in possession. Under 11 U.S.C. section 1108, the trustee (the debtor in possession) is endowed with the power to run the business. Basic to the operation of many businesses, including that of this debtor, is securing a premises from which to run the business. Unless the debtor owns suitable real property, a premises must be leased. In such a situation, lease payments are an ordinary business expense. Court approval usually is not required before entering into a lease and making lease payments. Two exceptions to this rule warrant comment.

Assuming the debtor needed cash collateral to make lease payments and such use was other than in the ordinary course of business, notice and hearing would be required. 11 U.S.C. § 363(b)(1). Secondly, notice and hearing would be required if the debtor proposed to make lease payments by incurring debt allowable as an administrative expense or secured by property of the estate. 11 U.S.C. §§ 364(b),(c) and (d). Debtor's application does not appear to contemplate the use of cash collateral or the incurrence of debt.

CONCLUSION AND ORDER

WHEREFORH, based on the foregoing analysis, the court finds that the lease is rejected, that the lease is no longer property of the estate and that the debtor must surrender the property to the landlord. Further, the debtor's proposal to enter into a new lease arrangement does not require court approval.

THEREFORE, the debtor's application is denied.

Signed and filed this 28th day of March, 1988.

LEE M. JACKWIG
CHIEF U.S. BANKRUPTCY JUDGE