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THE HONORABLE CHRISTOPHER M. ALSTON
Chapter 11
Date: May 20, 2016
Time: 9:30 a.m.
Response Date: May 13, 2016
Location: Courtroom 7206

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In Re) No. 16-11767-CMA
)
NORTHWEST TERRITORIAL MINT,) Chapter 11
LLC,)
)
Debtor.) **LANDLORD’S REPLY IN SUPPORT
OF EMERGENCY MOTION TO
COMPEL AND FOR ADEQUATE
PROTECTION AND ASSURANCES**

I. REPLY

On April 27, 2016, Gatewood-California, LLC (the “Landlord”) filed its Emergency Motion to Compel Immediate and Ongoing Compliance with Lease Agreement, and For Adequate Protection and Assurances (the “Motion”). ECF No. 143. *After* filing the Motion, the Landlord received and deposited two checks from Northwest Territorial Mint LLC (the “Debtor”). An order compelling Chapter 11 Trustee Mark Calvert’s (the “Trustee”) compliance with 11 U.S.C. § 365(d)(3) and granting adequate protection remains necessary, however, because the Debtor is still in default of its payment and other obligations under the terms of the Lease Agreement. The Reply is supported by the Declaration of George Humphrey (“Humphrey Decl.”) and exhibits attached thereto.

A. The Motion Was Filed Before The Landlord Received Any Post-Petition Rent Payments.

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No. 16-11767-CMA
120144.0010/6672507.1

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1 The Debtor's rent obligation for April 2016 (the "April Rent") came due on April 1,
2 2016. ECF No. 144, Ex. A-B (the "Lease Agreement") § 5. The Trustee was appointed by
3 Court order on April 11, 2016. ECF No. 51. Throughout April, the Landlord communicated
4 to both the Debtor and the Trustee that the April Rent was past-due. Humphrey Decl. ¶ 5.
5 For nearly a month, the Landlord was repeatedly assured that checks were being written
6 when in fact they were not.¹ *Id.* ¶ 6.

7 On April 21, 2016, the Landlord notified Paul Wagner, a representative of the Debtor,
8 that it would be directing its attorneys to file the Motion due to the Debtor's failure to
9 provide a reliable timeline for when the April Rent would be paid. *Id.* Ex. A. Soon
10 thereafter, with the April Rent nearly a full month past-due, May rent coming due, and
11 without the receipt of any checks, the Landlord directed the undersigned to file the Motion to
12 avoid further delay.² *Id.* ¶ 9. As discussed below, the Landlord has its own mortgage
13 obligations that depend on the Debtor's rent payments; continuing to patiently rely on the
14 Debtor's empty assurances was no longer an option. *Id.* ¶ 3.

15 **B. The Landlord is Entitled to Adequate Protection.**

16 The Landlord's right to seek adequate protection under 11 U.S.C. § 363(e) is well-
17 established under district precedent. *See In re MS Freight Distribution, Inc.*, 172 B.R. 976,
18 980 (Bankr. W.D. Wash. 1994) ("A landlord is free to move at the outset of a case for
19 adequate protection of its right to have obligations under its lease kept current."); *In re Ernst*
20 *Home Ctr., Inc.*, 209 B.R. 955, 965-966 (Bankr. W.D. Wash. 1997) ("this Court affirms its

21 _____
22 ¹ The Trustee also alleges that the Debtor did not receive an invoice for the April Rent. ECF No. 244, p. 2. The
23 Landlord disputes that allegation; however, whether the Debtor received an invoice has no bearing on the
24 Motion. Lease Agreement § 7.3.4 (failure to provide statements is not a waiver of tenant's requirement to pay).
25 Furthermore, the Landlord informed the Trustee on the day he was appointed that the April Rent was
26 delinquent. Humphrey Decl. ¶ 5.

² The Trustee asserts that "on or about April 21, 2016, I caused rent to be paid to the Landlord for the month of
April." ECF No. 245, Declaration of Calvert ¶ 6. On that basis, the Trustee argues that "[i]t is likely that the
check written on April 21st was received by the Landlord prior to the filing of the Motion on April 27th." ECF
No. 244, n. 1. That assertion is inconsistent with an email sent by Paul Wagner on April 26, 2016 informing the
Landlord "I assume [the April Rent] check will be cut today." Humphrey Decl. Ex. B. The Landlord did not
receive that check until April 29, 2016, *after* the Motion was filed. *Id.* ¶ 10.

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1 view that real property lessors may request adequate protection under Section 363(e).”). The
2 Court need not consider cases from other circuits on this issue.³ Furthermore, “[i]f the
3 adequate protection turns out to be insufficient, the landlord may then claim the statutorily
4 prescribed super-priority set forth in Section 507(b).” *MS Freight*, 172 B.R. at 980. The
5 Trustee bears the burden of proof on the issue of adequate protection. 11 U.S.C. § 363(p).

6 Adequate protection is especially appropriate in this case given the Landlord’s burden
7 as a single-asset LLC whose real property is subject to a lender’s security interest which the
8 Landlord’s principal personally guaranteed. Humphrey Decl. ¶ 3. The Landlord is not just
9 like any other vendor, as the Trustee suggests; rather, there are underlying real property
10 interests at stake that depend on the Trustee’s compliance with 11 U.S.C. § 365(d)(3) until
11 assumption or rejection. The Debtor’s failure to perform its obligations under the Lease
12 Agreement, financial or nonmonetary, poses a serious threat to the Landlord and its principal.
13 Adequate protection is necessary to ensure that the Landlord’s lender does not declare a
14 default. To avoid such a default, the Landlord must not only be timely on its mortgage
15 payments (which rely on the Debtor’s timely rent payments), but also keep the property
16 adequately insured and free from certain liens. Unless adequate protection is granted, the
17 Landlord will continue to face the threat of the Trustee’s late payment of rent and taxes, and
18 ongoing refusal to obtain adequate insurance.

19 Adequate protection is also necessary to ensure that the Landlord is not exposed to
20 potential liability for hazards and contamination resulting from the Debtor’s operations.⁴ The
21 Landlord’s facility is currently uninsured for hazards; the insurance carrier removed the
22 necessary coverage as a result of the Debtor’s recent liability under Washington’s Model
23 Toxics Control Act (“MTCA”) without notice to the Landlord. *See* ECF No. 143, n. 3. The
24

25 ³ The *MS Freight* court expressly disagreed with the Utah case cited in the Trustee’s Response over twenty
years ago. *In re MS Freight Distribution, Inc.*, 172 B.R. 976, 980 n. 4 (Bankr. W.D. Wash. 1994).

26 ⁴ Pursuant to the Lease Agreement, the Debtor’s bankruptcy estate would also face liability for any damages
suffered by the Landlord as a result of contamination. Lease Agreement §§ 4.2, 7.3.3, 26.1.

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1 Trustee attempts to distinguish the Debtor's operations at the Landlord's facility from the
2 operations that resulted in MTCA liability. ECF No. 244, p. 4. The Trustee has not
3 established himself as a hazardous waste expert (nor has the Landlord); his assertion that
4 enameling and epoxying⁵ do not pose a risk for environmental contamination should not be
5 determinative of whether insurance covering hazards and contamination is necessary to
6 adequately protect the Landlord or required under the terms of the Lease Agreement. *See*
7 discussion *infra* at C.3. Moreover, the likelihood of a similar MTCA judgment should not
8 weigh on the Court's decision to grant adequate protection in the form of mandatory
9 insurance, rather, such facts alleged by the Trustee should merely assist him in obtaining that
10 insurance at a lower cost to the estate.

11 **C. The Trustee Continues to Refuse to Perform Certain Obligations Under the**
12 **Lease Agreement.**

13 To date, the Landlord has received two post-petition checks: a \$9,904.27 check
14 received and deposited on April 29, 2016, and a \$9,904.27 check received and deposited on
15 May 6, 2016 (collectively, the "Rent Checks"). Humphrey Decl. ¶ 10. Despite these two
16 payments, both received *after* the Motion was filed, the Trustee still refuses to perform
17 certain obligations under the Lease Agreement, in contravention of 11 U.S.C. § 365(d)(3).

18 1. Late Charges.

19 If the Debtor fails to pay any of the amounts due under the Lease Agreement within
20 five days after they come due, a late charge is applied, calculated as five percent of the
21 Debtor's monthly rent plus one and one-half percent interest on the delinquency from the
22 date owing until payment. Lease Agreement, § 15.1. The Debtor's April Rent, including
23 NNN expenses, came due on April 1, 2016. As stated in the Motion, the Landlord seeks late
24 charges from April 1, 2016 to the date the Motion was filed, April 27, 2016. Those late

25 _____
26 ⁵ Under the Lease Agreement, "the term 'Hazardous Materials' shall be interpreted broadly." Lease Agreement
§ 26.1. The Lease Agreement's definition of hazardous materials includes, but is not limited to, definitions
under MTCA. *Id.*

1 charges and interest, totaling \$879.38, must be paid pursuant to 11 U.S.C. § 365(d)(3). *See*
2 *MS Freight*, 172 B.R. at 979 (payment of interest and late fees required); *Ernst*, 209 B.R. at
3 961 (same). The Rent Checks are insufficient to cover the late charges and interest.

4 2. Taxes and Insurance.

5 The Debtor is required to pay its proportionate share of all real property taxes for the
6 year. Lease Agreement § 7.3.2. While the Landlord has allowed the Debtor to pay its tax
7 obligation on a monthly basis in the past, the Lease Agreement does not require the Landlord
8 to do so. *Id.* In light of the Debtor's bankruptcy and the Trustee's subsequent failure to
9 timely perform the Debtor's obligations under the Lease Agreement, the Landlord has
10 asserted its right to seek payment of the Debtor's entire remaining tax obligation for the first
11 half of 2016. *Id.*; *see also* 11 U.S.C. § 365(b)(4). Those taxes came due on May 2, 2016.
12 Humphrey Decl. Ex. C. Such tax assessments, if not paid, would have become a lien on the
13 Landlord's real property, constituting a default under the Landlord's deed of trust. RCW
14 84.60.010. The Rent Checks are insufficient to cover the Debtor's tax obligation currently
15 due and owing.

16 Likewise, the Landlord is under no obligation to prorate the insurance payment
17 required under the Lease Agreement. *See* Lease Agreement, § 7.2.2. The insurance payment
18 due with the April Rent totals \$777.36. The Rent Checks are insufficient to cover the
19 Debtor's insurance obligation currently due and owing.

20 3. Hazard Insurance.

21 The Debtor is required to obtain and maintain certain insurance policies at its own
22 expense, and provide proof of such insurance to the Landlord. Lease Agreement, § 7.2.2.
23 The Lease Agreement contains further provisions granting the Landlord the right to modify
24 the insurance coverage requirements for the purpose of protecting the Landlord against the
25 Debtor's potential noncompliance with governmental rules and regulations. *See* Lease
26 Agreement § 4.2 (tenant bears expenses required to comply with rules and regulations); §

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1 7.2.2(c) (Landlord may procure insurance at tenant's expense if tenant fails to maintain
2 required insurance); § 7.3.3 (tenant is liable for costs imposed under governmental authority);
3 § 16.1 (tenant must comply with rules and regulations made by the Landlord to facilitate
4 compliance with any government entity or insurance company); § 26.1 (tenant is fully
5 responsible for costs and liabilities related to hazardous materials).

6 4. Attorney's Fees.

7 The Debtor is required to pay the Landlord's attorney's fees and costs if the Landlord
8 is the substantially prevailing party in this proceeding. Lease Agreement, § 21.14. Those
9 fees and costs now total approximately \$5,000.⁶

10 The Motion was precipitated by the Debtor's failure to perform its obligations under
11 the Lease Agreement for nearly a month, and the Debtor still remains non-compliant with its
12 obligations under the Lease Agreement. *After* the Motion was filed, the Landlord received a
13 check for April Rent, twenty-nine days late, for an amount insufficient to cover the Debtor's
14 financial delinquency under the Lease Agreement. The Trustee argues that the Motion is
15 "unmeritorious" and that he should be awarded fees and costs for the trouble of responding;
16 however, in addition to failing to timely pay April Rent prior to the filing of the Motion, the
17 Trustee still refuses to perform certain clear obligations under the Lease Agreement in
18 violation of 11 U.S.C. § 365(d)(3), thus necessitating the relief requested in the Motion.

19 **II. CONCLUSION**

20 The Landlord respectfully requests that this Court grant the Motion.

21 DATED: May 27, 2016

22 LANE POWELL PC

23 By /s/ James B. Zack

24 Mary Jo Heston, WSBA No. 11065

25 James B. Zack, WSBA No. 48122

Attorneys for Gatewood-California LLC

26 ⁶ If awarded, payment of the Landlord's attorney's fees and costs would be required under 11 U.S.C. § 365(d)(3). *MS Freight*, 172 B.R. at 979; *Ernst*, 209 B.R. at 961.

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

That she is a legal assistant in the law firm of Lane Powell PC, and on May 17, 2016, she caused the attached document to be filed electronically through the CM/ECF system which caused Registered Participants to be served by electronic means, as fully reflected on the Notice of Electronic Filing.

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Executed on this 17th day of May, 2016, at Seattle, Washington.

/s/ Denise A. Campbell
Denise A. Campbell, Legal Assistant