

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

In re:

ART VAN FURNITURE, LLC, *et al.*,¹

Debtors.

Chapter 7

Case No. 20-10553 (CSS)

(Jointly Administered)

Related Docket No. 230

**OBJECTION OF THE CHAPTER 7 TRUSTEE
TO MOTION OF SOUTH LINDBERGH PROPERTY, LLC,
JS WESTFLO, LLC, ROTHMAN-O'FALLON, LLC AND O'FALLON
MISSOURI PROPERTIES, LLC FOR RELIEF FROM THE AUTOMATIC STAY**

Alfred T. Giuliano, chapter 7 trustee (the "Trustee") to the estates of the above-captioned debtors (the "Debtors"), hereby objects to the *Motion of South Lindbergh Property, LLC, JS Westflo, LLC, Rothman-O'Fallon, LLC and O'Fallon Missouri Properties, LLC for Relief From the Automatic Stay* [Docket No. 230] (the "Motion").² In support of this objection, the Trustee respectfully states as follows:

PRELIMINARY STATEMENT

1. Despite the recent conversion of these cases to chapter 7 and the COVID-19 pandemic that has brought this country to a halt, the Landlords are moving forward with their Motion and seek immediate relief from the automatic stay to evict the Debtors from the Premises and sell any assets remaining on the Premises. However, the Leases have not been rejected, the Trustee's time for performance has not lapsed, and the Trustee is in the process of developing an

¹ The Debtors in these chapter 7 cases, along with the last four digits of each Debtor's federal tax identification number, include: Art Van Furniture, LLC (9205); AVF Holding Company, Inc. (0291); AVCE, LLC (2509); AVF Holdings I, LLC (2537); AVF Holdings II, LLC (7472); AVF Parent, LLC (3451); Levin Parent, LLC (8052); Art Van Furniture of Canada, LLC (9491); AV Pure Sleep Franchising, LLC (8968); AVF Franchising, LLC (6325); LF Trucking, Inc. (1484); Sam Levin, Inc. (5198); and Comfort Mattress LLC (4463). The location of the Debtors' service address in these chapter 11 cases is: 6500 East 14 Mile Road, Warren Michigan 48092.

² A capitalized term used but not defined herein shall have the meaning ascribed to it in the Motion.

orderly liquidation process with its professionals to maximize the value of the Debtors' assets for the benefit of all creditors. Moreover, the Landlords have failed to carry their burden of proof that the Debtors do not have equity in the leasehold interests and personal property at each of the Premises. Accordingly, in light of the procedural posture of these cases and the failure to meet the burden of proof, the Motion should be denied. Alternatively, the Court should invoke its discretion under section 362(d)(2) to condition relief from the automatic stay and delay the requested stay relief until the earlier of August 31, 2020 and the effective date of rejection of the Leases.

RELEVANT BACKGROUND

2. On March 9, 2020 (the "Petition Date"), the Debtors each commenced a voluntary petition for relief under chapter 11 of Title 11 of the United States Code.

3. On April 2, 2020, the Landlords filed the Motion seeking immediately relief from the automatic stay to exercise its state law remedies.

4. On April 6, 2020, the Court granted the Debtors' request to convert the cases to chapter 7 pursuant to section 1112(a) of the Bankruptcy Code, effective April 7, 2020 (the "Conversion Date"), and entered its *Order (I) Converting Their Chapter 11 Cases to Cases Under Chapter 7, (II) Establishing a Deadline for Filing Final Chapter 11 Fee Applications and Setting a Hearing Thereon, and (III) Granting Related Relief* [Docket No. 263] (the "Conversion Order").

5. The Trustee has prepared and anticipates that he will file and seek shortened notice and an expedited hearing on the *Motion of the Chapter 7 Trustee for Entry of an Order Extending the Time for Performance of Any Obligations of the Debtors Under Any Unexpired Lease of Nonresidential Real Property Pursuant to Section 365(d)(3) of the Bankruptcy Code*

(the “Motion to Extend”). Pursuant to the Motion to Extend, the Trustee will seek to extend the time for the Trustee to perform any obligations of the Debtors under any unexpired lease of nonresidential real property for 60 days from the Conversion Date.

6. Additionally, the Trustee is in process of finalizing an agreement with Wells Fargo Bank, National Association (the “ABL Lender”) on the use of cash collateral. Once an agreement is reached, the Trustee will file a motion for approval of a second interim cash collateral order and the scheduling of a final hearing on the use of cash collateral (the “Cash Collateral Motion”). Subject to reaching agreement with the ABL Lender on the use of cash collateral, the Trustee proposes to pay post-Conversion Date rent beginning the first week of June, which coincides with the anticipated commencement of the going out of business sale.

7. The Debtors’ aggregate monthly rent obligations to the Landlords are approximately \$135,000. The aggregate cost value of the Debtors’ inventory located at the Premises is approximately \$1.75 million, with an aggregate suggested retail price of \$3.97 million.

OBJECTION

A. The Leases Have Not Been Terminated or Rejected

8. The Landlords allege that the Debtors vacated the Premises and breached each of the Leases by failing to pay March and April rent. However, there is no evidence that the Leases have been rejected pursuant to section 365 of the Bankruptcy Code or that the Debtors abandoned the Premises or their property located at the Premises. To the contrary, the aggregate cost value of the Debtors’ inventory located at the Premises is approximately \$1.75 million (not including fixtures and equipment). There is also no evidence that the Landlords took any actions prior to the Petition Date to terminate the Leases.

9. Accordingly, as of the Conversion Date, certain of the estates' assets are located at the Premises and the Leases remain in effect.

B. The Trustee Is Not Obligated to Pay Pre-Conversion Date Rent

10. Pursuant to section 365(d)(3) of the Bankruptcy Code, the Trustee is required to perform all the obligations of the Debtors, "arising from and after the order for relief under any unexpired lease of nonresidential real property." Pursuant to section 348(c) of the Bankruptcy Code, section 365(d) applies in a case that has been converted under section 1112 of the Bankruptcy Code, "as if the conversion order were the order for relief." Because these cases were converted pursuant to section 1112(a) of the Bankruptcy Code, the operable date for the "order for relief" is the Conversion Date. In other words, the Trustee is only required to pay rent arising after the Conversion Date and is not obligated to pay March and April rent. Moreover, pursuant to the Motion to Extend, the Trustee will request the entry of an order extending the time to commence rent payments for 60 days from the Conversion Date (*i.e.*, until June 6, 2020) pursuant to section 365(d)(3) of the Bankruptcy Code.

C. The Landlords Are Not Entitled to Relief From the Automatic Stay

11. The Landlords seek relief from the automatic stay pursuant to section 362(d)(2), which provides relief from the stay with respect to an act against property when (a) there is no equity in the property and (b) the property is not necessary for an effective reorganization. Both factors must be met. *See Pegasus Agency, Inc. v. Grammatikakis (In re Pegasus Agency, Inc.)*, 101 F.3d 882, 886 (2d Cir. 1996). As a matter of law, chapter 7 of the Bankruptcy Code does not provide a debtor or trustee with an opportunity to conduct a reorganization. As such, the only issue is whether the estates have equity in the property. *See, e.g., B.N. Realty Assocs. v. Lichtenstein*, 238 B.R. 249, 258 (S.D.N.Y. 1999) ("Since a Chapter 7 petition does not contemplate reorganization, the only issue in a Chapter 7 case under 362(d)(2) would be whether

a tenant's lease gave him equity in the property.”). As acknowledged by the Landlords in the Motion, the Landlords have the burden of proof as to the estates’ equity in the property. Motion at ¶ 14. The Landlords have failed to offer any evidence with respect to the value of the estates’ interest in the property and have failed to meet their burden of proof.

12. The Landlords assert, without any supporting case law, that these estates have no equity in the Premises because the Premises are leased rather than owned by the Debtors. There is no basis for this conclusion. The “property” at issue in the Motion is the estates’ *leasehold interests* and the inventory, furniture, fixtures, and equipment at each of the Premises (collectively, the “Property”). Unless the Landlords can establish that the value of the Property is less than the allowed amount of the Landlords’ secured claims, the Landlords have not carried their burden of proof and the Motion must be denied. Moreover, as discussed above, the value of the inventory on the Premises far exceeds the monthly rent obligations.

D. The Court Is Authorized to Condition the Relief Requested on Completion of the Going Out of Business Sale

13. Assuming that the Landlords are able to establish that the Debtors do not have equity in the Property, the Court may – and should – delay granting relief from the automatic stay until the earlier of (a) August 31, 2020 (*i.e.*, the anticipated conclusion of the going out of business sale) and (b) the effective date of rejection of the Leases (*i.e.*, the date the Trustee concludes the going out of business sale at each of the Premises).

14. “The flexibility of section 362 is underscored by the language of subsection (d), which provides that relief may be granted by ‘terminating, annulling, modifying, or conditioning’ the stay. The effect is to permit the court to fashion the relief to the particular circumstances of the case. . . . [A] court might permit a debtor to retain the use and possession of

property subject to a lien but condition the continued possession on the debtor's timely payment of tax and insurance expenses." 3 Collier on Bankruptcy P 362.07 (16th 2020).

15. Here, it is critical to maximizing the value of the estates' assets that the Trustee be provided an opportunity to conduct an orderly going out of business sale utilizing the Debtors' store locations and distribution centers. The Trustee cannot do this if landlords are provided stay relief to terminate their leases and dispose of the Debtors' assets. Moreover, the Trustee is in the process of negotiating a consensual budget with the ABL Lender that will provide sufficient funds to pay post-Conversion Date rent obligations in full.

16. For the foregoing reasons, the Trustee respectfully submits that, to the extent the Court is inclined to grant the relief requested in the Motion, that such relief be narrowly tailored to allow the Trustee to utilize the Premises during the planned going out of business sale.

Dated: April 23, 2020

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Bradford J. Sandler

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