

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

IN RE:	)	CASE NO. 90-10168
)	
MARVIN CHARLES BECKLER and	)	CHAPTER 12
SALLY ANN BECKLER,)	
)	
	)	MEMORANDUM OF DECISION
	)	RE: AMENDED APPLICATION
Debtors.	)	TO ACCEPT EXECUTORY
	)	CONTRACTS WITH FUNDING
	)	FROM USE OF CASH COLLATERAL

The matter before the Court is the Amended Application to Accept Executory Contracts with Funding From Use of Cash Collateral filed by Debtors Marvin C. and Sally A. Beckler and the resistance thereto filed by creditor First Bank of South Dakota, N.A. A hearing was held December 18, 1990 and the matter was taken under advisement. It is a core proceeding under 28 U.S.C. § 157(b) (2). This ruling shall constitute Findings and Conclusions as required by Bankr. R. 7052.

I.

Debtors Marvin C. and Sally A. Beckler (Debtors) filed a Chapter 12 petition for reorganization on October 1, 1990 and an Order for Relief was entered that day. On December 4, 1990, Debtors filed an Application to Accept Executory Contracts with Funding From Use of Cash Collateral. On December 6, 1990, they filed an Amended¹ Application to Accept Executory Contracts with Funding From Use of Cash Collateral wherein they declared their acceptance of executory

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The only appreciable difference that the Court could discern between the original Application and the Amended Application is that the Amended Application better describes the two leases and further clarifies the relief sought.

leases of real property with Norwest Bank South Dakota, N.A., as Trustee of Binger Trust, and with Alta Binger. Debtors also sought the Court's approval for using cash collateral to make post-petition payments on the leases totaling \$6,357.

Creditor First Bank of South Dakota, N.A., (First Bank) resisted the Application. Among other things, First Bank argued that both leases are deemed rejected because Debtors did not accept or reject the leases within 60 days from the Order of Relief as required by 11 U.S.C. § 365(d) (4).

A hearing was held December 18, 1990 in conjunction with a hearing on Debtors' Motion for Use of Cash Collateral. At the hearing, the parties informed the Court that Debtors did not need use of cash collateral prior to the January, 1991 term of Court and that matter was continued.

II.

Section 365(d)(4) provides that in Chapter 12 the debtor-in-possession must assume or reject an unexpired lease of nonresidential real property² of which the debtor is the lessee "within 60 days after the date of the order for relief ... [or] such lease is deemed rejected" Bankruptcy Rule 6006 declares that a proceeding to assume or reject an unexpired lease is governed by the motions procedure set forth at Bankr. R. 9014. Notice of and a hearing on the motion is at the discretion of the Court. Bankr. R. 6006(c).

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Neither party specifically addressed whether the leases were for non residential or residential real property. A review of the leases , attached to the Amended Application as Exhibits A and B, indicates both are for non residential real property.

The majority of courts have ruled that a formal motion is required for assumption of an unexpired lease. In re Tulp, 108 B.R. 214, 217 (Bankr. N.D. Iowa 1989) (see cases cited therein). The debtor-in-possession must file the motion within the 60-day limit of § 365(d) (4) but the court need not rule within that same time frame. TMS Associates v. Kroh Brothers Development Co. (In re Kroh Brothers Development Co.), 100 B.R. 480, 484-86 (W.D. Mo. 1989) (see cases cited therein) . Once the 60-day period has expired and if no motion to assume has been filed, the lease is deemed rejected as a matter of law. In re Helco, Inc., 87 B.R. 80, 82 (Bankr. D.Neb. 1988).

III.

In consideration of the pleadings before the Court and upon review of 11 U.S.C. § 365(d)(4) and relevant case law, the Court concludes that the two leases were not timely assumed and, therefore, they are deemed rejected as a matter of law. Debtors filed their initial application to assume the leases more than 60 days after the Order for Relief. Moreover, there was no other pleading timely served on interested parties that indicated Debtors' desire to accept the leases. See Tulp, 108 B.R. at 218. Accordingly, the Court must deny Debtors' Application.

While Debtors' counsel argued that the two lessors had no objection to Debtors' assumption of the leases, that statement did not sufficiently raise the issue of whether a lessor may waive the "deemed rejected" provision of § 365(d)(4). Therefore, the Court renders no opinion on that issue. Further, the Court's ruling today does not address whether Debtors may negotiate post-petition leases for the properties in question.

An order denying Debtors' Amended Application to Accept Executory Contracts with Funding From Use of Cash Collateral will be entered.

Dated this 31st day of December, 1990.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By Deputy Clerk
(SEAL)

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IN RE:)	CASE NO. 90-10168
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MARVIN CHARLES BECKLER and)	CHAPTER 12
SALLY ANN BECKLER,)	
)	ORDER RE: AMENDED
Debtors.	)	APPLICATION TO ACCEPT
	)	EXECUTORY CONTRACTS
	)	WITH FUNDING FROM USE
	)	OF CASH COLLATERAL

In recognition of and in compliance with the Memorandum of Decision Re: Amended Application to Accept Executory Contracts With Funding From Use of Cash Collateral entered this day,

IT IS HEREBY ORDERED that Debtors Marvin C. and Sally A. Beckler's Amended Application to Accept Executory Contracts With Funding From Use of Cash Collateral is DENIED.

So ordered this 31 st day of December, 1990.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By

Deputy Clerk

(SEAL)