UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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July 23, 1999

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Subject: *In re Lyndon M. Franzen,*
Chapter 11; Bankr. No. 99-50153

Dear Counsel:

The matter before the Court is the Motion for Assumption or Rejection of Leases filed by Trans Lease, Inc., and Debtor's response thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions. As set forth below, the Court concludes that the several agreements between Debtor and Trans Lease are true leases which Debtor may be compelled to accept or reject under 11 U.S.C. § 365. Therefore, Trans Lease's Motion for Assumption or Rejection of Leases will be granted and Debtor will be given 10 days to assume or reject the leases.

SUMMARY OF FACTS. An involuntary Chapter 7 petition was filed against Lyndon M. Franzen (Debtor), who is in the trucking business. Debtor voluntarily converted to a Chapter 11 on April 23, 1999. During the gap period, Debtor's trucking business essentially did not operate.

On May 25, 1999, Trans Agreement, Inc., filed a motion seeking an order compelling Debtor to assume or reject the agreements for certain trailers that Debtor had obtained from it or on an assignment. Trans Lease grounded its motion on the fact that Debtor was in arrears on the agreed payments and that the trailers were not being used.

Debtor filed a response on June 7, 1999. He acknowledged his agreements with Trans Lease but argued the agreements are actually contracts for purchase on installments, not leases governed by 11 U.S.C. § 365, since he builds equity under them, each provides

115

for a definite purchase price at the end of the agreement, and a sale of the trailers upon default can result in equity to Debtor. Debtor stated the trailers are essential to his continued trucking business. He also pointed out that he was current on all payments under the agreements until the involuntary petition was filed and his trucking operation temporarily ceased.

A hearing was held June 15, 1999 in conjunction with Trans Lease's motion for relief from the automatic stay or to compel abandonment. Debtor was ordered to make certain adequate protection payments and Trans Lease's motion for assumption or rejection of the agreements was taken under advisement on July 15, 1999, after receipt of briefs.

DISCUSSION. State law governs whether the agreement between the parties is a "true" lease or some sort of sale contract and security agreement. *Brown v. First National Bank*, 844 F.2d 580, 581 (8th Cir. 1988). The parties agree that Colorado law, most notably §§ 4-1-201(37) and the newer § 42-6-120(3), apply.

A good analysis of similar facts under similar laws is set forth in *In re Architectural Millwork of Virginia, Inc.*, 226 B.R. 551 (Bankr. W.D. Va. 1998). The Courts adopts the same reasoning and reaches the same conclusion here: Debtor's agreements with Trans Lease are true leases.

Debtor cannot unilaterally terminate the agreements before the end of the agreements without fulfilling its entire obligation to Trans Lease. *Architectural Millwork*, at 555 and 555 n.3 (good discussion of the first required condition for an agreement to be denominated a security agreement). Under § 4-1-201(37), this fact, of course, is necessary for a conclusion that the agreement is really a security document. The Court, however, cannot clearly conclude that one of the other four alternative criteria of the first paragraph under § 4-1-201(37) exists. *Id.* There was no evidence on the economic life of the trailers. Therefore, the Court cannot apply subsections (a), (b), or (c) of the first paragraph of § 4-1-201(37). As for subsection (d) of the first paragraph, even assuming that Debtor's offer of proof is correct that the trailers will be worth 50% of fair market value but that he only has to pay 20% of fair market value to own them, the Court cannot conclude that the 20% payments are of only "nominal value," as that term is defined by § 4-1-201(37)(x)(ii). *See also In re Bevis* Co., 201 B.R. 923 (Bankr. S.D. Ohio 1996)(discussion of case law tests for nominal value).

Other considerations also weigh in favor of finding that the agreements are true leases. No equity builds for Debtor *during* the agreements but is acquired only if the trailers are purchased. *Architectural Millwork*, at 557; *Colorado National Leasing, Inc. v. Gary Refining Co. (In re Mesa Refining, Inc.)*, 65 B.R. 724, 727 (D. Colo. 1986). The final compensation to Trans Lease was fixed at the time the agreement was made, whether Debtor or someone else purchased the trailers. Finally, there is no evidence that the trailers' useful life mirrors the term of the agreement.

Other case law is supportive. *In re Owen*, 221 B.R. 56 (Bankr. N.D.N.Y. 1998); *In re Bumgardner*, 183 B.R. 224 (Bankr. D. Idaho 1995); *In re Paz*, 179 B.R. 743 (Bankr. S.D. Ga. 1995); *Estep v. Fifth Third Bank of N.W. Ohio (In re Estep)*, 173 B.R. 126 (Bankr. N.D. Ohio 1994); *In re Zaleha*, 159 B.R. 581 (Bankr. D. Idaho 1993); *In re Wallace*, 122 B.R. 222 (Bankr. D.N.J. 1990); *Basic Leasing, Inc. v. Paccar, Inc.*, 1991 WL 117412 (D.N.J. June 24, 1991); and *Mesa Refining*, 65 B.R. at 727-28. *See also In re Winston*, 181 B.R. 589 (Bankr. N.D. Ala. 1995); and *Jahn v. M.W. Kellogg Co. (In re Celeryvale Transport, Inc.)*, 822 F.2d 16 (6th Cir. 1987). *But see In re Zerkle Trucking Co.*, 132 B.R. 316 (Bankr. S.D. W. Va. 1991); and *H.M.O. Systems, Inc. v. Choicecare Health Services, Inc.*, 665 P.2d 635 (Colo. Ct. App. 1983). Therefore, based on these circumstances and the Colorado statutes and present case law, the scales are tipped in Trans Lease's favor that the agreements are true leases.

Debtor is correct that the parties' intent, as determined by the facts of each case, is important. *H.M.O. Systems*, 665 P.2d at 638. The Court is confident, however, that testimony would yield a stalemate since both parties would testify in support of their cause.

An appropriate order shall be entered.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case file (docket original; copies to parties in interest)

Case: 99-50153 Form id: 122 Ntc Date: 07/23/1999 Off: 3 Page : 1
Total notices mailed: 10

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