

FILED
U.S. DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re:

GIBSON PRODUCTS COMPANY,
INC.,

Debtor.

MEMORANDUM DECISION
AND ORDER

GIBSON PRODUCTS COMPANY,
INC.,

Appellant,

Civil No: 86-C-709W

-vs-

86C-00933

ALBERTSON'S, INC.,

Appellee.

This matter is presently before the court on the debtor's and the unsecured creditors' committee's motion to stay the effect of the bankruptcy court's order denying the debtor's motion for an extension of time in which to assume or reject the sublease on the premises previously occupied by the debtor at 5954 South State Street, Murray, Utah,¹ and to enjoin Albertson's, Inc., the sublessor, from transferring, assigning,

¹ This order, signed by the bankruptcy court on August 11, 1986, and entered on August 20, 1986, is the one that the debtor has appealed to this court.

or otherwise conveying the debtor's leasehold interest in the premises during the pendency of this appeal. The motion is made pursuant to Rule 8005 of the Bankruptcy Rules.

A hearing on the motion was held on September 26, 1986. The debtor, Gibson Products Company, Inc., was represented by Herschel J. Saperstein; and the unsecured creditors' committee was represented by William G. Fowler. Albertson's, Inc., was represented by Paul James Toscano. At the conclusion of the hearing, the court took the matter under advisement. The court has reviewed and considered carefully the parties' oral arguments and memoranda, including various authorities cited therein. Now being fully advised, the court renders the following memorandum decision and order.

Discussion

The debtor is entitled to appeal the bankruptcy court's denial of an extension of time and thus to have the bankruptcy court's order reviewed by this court to determine whether the court abused its discretion in denying the extension. And based on the following discussion and a review of the materials presently before it, this court believes that the effect of the bankruptcy court's order should be stayed pending this appeal. Additionally, to give effect to the stay, Albertson's must necessarily be enjoined, during the appeal, from alienating the

debtor's leasehold interest in the premises.²

This court clearly has the power to enjoin any action that would or could only be taken as a result of the bankruptcy court's order, which may later be found to have been wrong, and to make any other appropriate order pending this appeal. Specifically, in this case the debtor requested an extension of time, pursuant to 11 U.S.C. § 365(d)(4), in which to assume or reject the sublease. The bankruptcy court's order ultimately denied the requested extension. The effect of that order made the 60-day deemed rejection provision of § 365(d)(4) applicable.³ That is, as a direct result of the bankruptcy court's denial of additional time for the debtor to assume the sublease and in accordance with § 365(d)(4), the leasehold would have reverted in Albertson's upon the running of the 60-day time period.⁴ However, it must be remembered that the debtor appealed

² The court is convinced that the stay and the injunction that the debtor and the unsecured creditors' committee seek at this time are to preserve the status quo and thereby to insure that the debtor's leasehold interest in the Murray store, which is sought to be preserved by the appeal, is not transferred by Albertson's during the pendency of the appeal.

³ Had the bankruptcy court granted an extension of time, the running of the 60-day time period would have been immaterial and the leasehold could not have reverted in Albertson's at that time.

⁴ In other words, the debtor's leasehold interest could only revert in Albertson's because of the running of the 60-day time period and the bankruptcy court's order denying an extension of time to assume the lease.

the bankruptcy court's order; and a stay of that order would obviously stay the applicability of the 60-day deemed rejection provision and thus the reversion to Albertson's. Therefore, if a stay of the bankruptcy court's order is granted by this court, it would surely be proper also to enjoin Albertson's from alienating the debtor's leasehold interest during the appeal. In other words, although 60 days since the order of relief have come and gone, as Albertson's contends, it ultimately may be determined on this appeal that the debtor should have received additional time in which to assume the sublease.⁵ Consequently, the debtor must be entitled to seek a stay and injunction to protect its valuable leasehold interest pending this appeal. The 60-day deemed rejection provision cannot bar the debtor from seeking and obtaining this relief.⁶

⁵ Indeed, a question that will necessarily be answered on this appeal is whether the time period for the debtor to assume the sublease should have run since, as the debtor contends, the bankruptcy court may have abused its discretion in refusing to extend the time for the debtor to assume the sublease.

⁶ Obviously, if the bankruptcy court erred in denying the extension of time and the debtor is given additional time in which to assume or reject the sublease, the deemed rejection provision in § 365(d)(4) cannot preclude the debtor from assuming the sublease within the prescribed additional time. Moreover, the debtor may run into substantial problems and difficulty in attempting to assume and assign the sublease if Albertson's is not enjoined from subleasing the property to a third party or otherwise alienating the debtor's leasehold interest during the pendency of this appeal.

It should be noted, too, that Rule 8005 expressly authorizes a stay of a bankruptcy court's judgment, order, or decree, and any other relief pending appeal. Moreover, Rule 8005 makes it clear that this court may "make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." Obviously, Rule 8005 contemplates the granting of relief, including a stay and an injunction, which the debtor and the unsecured creditors' committee seek pending this appeal in order to protect the debtor's leasehold interest until it is finally determined whether the debtor should have received an extension of time. See also Fed. R. Civ. P. 62(g) (appellate court may stay proceedings or grant injunctions during the pendency of an appeal, and it may make any order appropriate to preserve the status quo or the effectiveness of a judgment which may subsequently be entered); Fed. R. App. P. 8(a).

The foregoing discussion indicates that the debtor and the unsecured creditors' committee are entitled to seek the stay and injunction as presented in their present motion and also that this court has the power to grant such relief. In deciding whether to actually issue the stay of the bankruptcy court's order and to enjoin Albertson's from alienating the debtor's leasehold interest during the pendency of this appeal, this court considered and balanced the following four factors: (1)

irreparable injury to the debtor if the stay and injunction are not granted; (2) likelihood of success on the merits of the debtor's appeal; (3) harm to Albertson's if the stay and injunction are granted; and (4) harm to the public interest. These four factors must be viewed in light of the importance of the right of an effective appeal, the special interest in protecting the property interests of a debtor in bankruptcy; and the importance of preserving the status quo and the parties' rights during an appeal.

1. Irreparable Injury

The court believes that the debtor has made a sufficient showing that it may suffer irreparable injury if a stay and injunction pending this appeal are not granted. Denial of a stay may result in a loss of a valuable asset of the estate, i.e., the debtor's leasehold interest, which may adversely and irreparably affect the debtor, the administration of the estate, and the effectiveness of this appeal.

2. Likelihood of Success

Where the debtor has adequately shown that it may suffer irreparable injury if the stay is not granted, and the balance of hardships tips in the debtor's favor, the "likelihood or probability of success" requirement may be somewhat relaxed. It is enough that the debtor has raised issues on appeal of such a substantial and disputed nature as to make them deserving of

and fair grounds for further litigation and deliberation.

The court believes that the debtor in this case has met the "likelihood of success on the merits" requirement since the balance of hardships tips in the debtor's favor and the debtor has sufficiently shown that it will raise issues in this appeal of such a substantial and disputed nature as to make them fair grounds for further litigation. Such issues, as presented by the debtor, include questions about (1) the consequences of a debtor's failure to perform under 11 U.S.C. § 365(d)(3); (2) the appropriateness of a bankruptcy court's reliance on § 365(d)(3) in denying a debtor's motion for an extension of time in which to assume or reject a lease; (3) what constitutes adequate performance under § 365(d)(3); (4) whether a debtor's failure to adequately stock its shelves is a violation of § 365(d)(3); and (5) whether a covenant in a lease to keep the store stocked, even during a debtor-lessee's liquidation, has the effect of an anti-assignment clause made inapplicable by 11 U.S.C. § 365(f).

3. Harm to Albertson's

Based on a review of the materials before it, the court is of the opinion that Albertson's will not be substantially harmed by the stay and injunction pending disposition of this appeal. Although Albertson's may suffer losses by not being able to immediately re-let the premises as a result of the delay caused by this appeal, the court believes that Albertson's

recoverable losses will be calculable and compensable. In addition, the court directs the debtor to file a bond or other appropriate security in the amount of \$100,000 in order to minimize Albertson's harm and to compensate Albertson's for damage caused by the injunction. See Bankruptcy Rule 8005.

4. Harm to the Public Interest

The court is of the opinion that the stay and injunction pending this appeal will not have an adverse impact on the public interest. Additionally, since the debtor is hoping to realize upon its leasehold interest in order to increase the estate's ultimate recovery, it is in the best interest of the estate's other creditors that the debtor obtain a stay and injunction pending the appeal to preserve the valuable leasehold interest.

Based on the foregoing, the court is of the opinion that the effect of the bankruptcy court's order denying an extension of time should be stayed and that Albertson's should be enjoined from re-letting the premises or otherwise conveying the debtor's interest in the leasehold during the pendency of this appeal.

Accordingly,

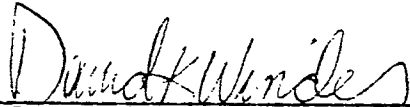
IT IS HEREBY ORDERED that the debtor's and the unsecured creditors' committee's motion to stay the effect of the bankruptcy court's order denying the debtor's motion for an

extension of time in which to assume or reject the sublease, is granted.

IT IS FURTHER ORDERED that the debtor's and the unsecured creditors' committee's motion to enjoin Albertson's, Inc., from transferring, assigning, or otherwise conveying the debtor's leasehold interest in the Murray store, until this matter is resolved on appeal, is granted, on the condition that the debtor file an appropriate security in the amount of \$100,000.

Although this appeal will not be placed on an expedited schedule, the court is aware of the need to have this appeal heard on the merits as quickly as possible. Consequently, counsel are notified that they will be held strictly to all time requirements and deadlines relevant to this appeal. The briefs on the merits must be submitted in a timely fashion; and if either party desires oral arguments, arrangements should now be made with the court's secretary.

Dated this 30th day of September, 1986.



David K. Winder
United States District Judge