

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN THE MATTER OF:)
)
FORT WAYNE TELSAT, INC.) CASE NO. 05-12177
)
)
Debtor)

**DECISION, NOTICE OF HEARING
AND ORDER FOR ADDITIONAL BRIEFS**

At Fort Wayne, Indiana, on January 28, 2008.

“Wireless cable television” would seem to be an oxymoron. It is also an idea whose time has come and gone. That is largely the reason Fort Wayne Telsat, Inc. is a debtor under Chapter 7 of the United States Bankruptcy Code. Among the assets of the bankruptcy estate is a lease between the debtor and Via/Net Companies, by which the debtor leased, from Via/Net, an FCC license to operate on particular microwave channels – the H-1 license. The lease also contained an option to purchase, by which the debtor could purchase the H-1 license from Via/Net for the sum of \$40,000. Although the license is no longer of any use for wireless cable, it is valuable for other reasons. As a result, the trustee seeks the court’s permission to assume the lease and exercise the option to purchase the H-1 license. See, 11 U.S.C. § 365(a), (b). If his motion is granted, the trustee stands ready, willing, and able to immediately pay Via/Net all amounts needed to cure the debtor’s defaults under the lease and the \$40,000 option price. Having done so, the Trustee anticipates being able to sell the license for a much greater amount, thus benefitting the bankruptcy estate and generating funds which can be used to help pay the debtor’s creditors. Via/Net opposes the trustee’s motion on a number of grounds. For the most part, it argues that at some point in time, whether prior to or after the date of the petition, and for various reasons, the lease has terminated and, therefore, is not capable of being

assumed. The matter is before the court following trial of the issues raised by the trustee's motion and Via/Net's objection thereto.

Section 365 of the Bankruptcy Code allows "the trustee, subject to the court's approval, [to] assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). If there has been a default in the performance of the debtor's obligations under such an agreement, in connection with assumption, the trustee must also cure the default or provide adequate assurance that the default will be promptly cured, compensate (or provide adequate assurances of prompt compensation) the other party for the actual pecuniary loss caused by the default, and provide adequate assurances of future performance. 11 U.S.C. § 365(b). The authority given by this portion of the Bankruptcy Code allows "the trustee to maximize the value of the debtor's estate by assuming executory contracts and unexpired leases that benefit the estate and rejecting those that do not." In re Rickel Home Centers, Inc., 209 F.3d 291, 298 (3rd Cir. 2000). The opportunity to do so does not, however, last forever. In cases under Chapter 7, unless extended, the trustee must act within sixty days after the order for relief or such agreements are deemed rejected. 11 U.S.C. § 365(d)(1).

Assuming that the requirements of the statute have been met – the existence of an executory contract or unexpired lease, appropriate cure of and compensation for any defaults, adequate assurance of future performance and timely action – in ruling upon a motion to assume or reject an executory contract, the court does not second guess the trustee's decision or substitute its own judgment for that of the trustee. Instead, the decision as to whether assumption or rejection is in the best interests of the bankruptcy estate is measured by the business judgment test. In re G.L. Industries, Inc., 204 F.3d 1276, 1282 (9th Cir. 2000); Richmond Leasing Co. v Capital Bank, N.A., 762 F.2d 1303, 1309 (5th Cir. 1985). As a result, if assumption appears to enhance the estate, court

approval should only be withheld if the “decision to assume . . . is clearly erroneous, too speculative or contrary to the provisions of the Bankruptcy Code.” Richmond Leasing, 762 F.2d at 1309.

Here, although Via/Net attempts to argue otherwise, there can be no serious debate that assuming the lease and exercising the option to purchase will enhance the estate or that the trustee’s decision to do so constitutes an appropriate exercise of his business judgment. The trustee has very good reason to believe that, after purchasing the license, he will be able to sell it, and whatever rights might go with it, for more than the forty thousand plus dollars it will cost the estate to cure defaults and pay the option price.¹ Consequently, his decision is neither clearly erroneous nor too speculative and is well within the scope of his business judgment. Thus, the only remaining issues involve whether trustee’s actions are contrary to the Bankruptcy Code.

This case began on May 3, 2005, with an involuntary petition for relief under Chapter 7.² Interestingly, Via/Net was one of the petitioning creditors. Although the creditors’ petition was granted, the debtor almost immediately converted to Chapter 11. Nonetheless, on October 5, 2005, the court converted the case to Chapter 7 and R. David Boyer subsequently became the Chapter 7 trustee. As of both the date of the petition and the date of conversion the debtor was operating its wireless cable franchise and was using the H-1 channel it had leased from Via/Net. The trustee’s motion to assume the lease and the option to purchase was filed on December 5, 2005, within the

¹It is obvious that Via/Net must also believe the license and whatever rights go with it is worth more than the amount the trustee is required to pay to assume the lease and exercise the option to purchase. If it did not, it would be acting against its own self interest by opposing the motion.

²As a case filed prior to October 17, 2005, it is governed by the law as it existed prior to that date.

sixty days required by § 365(d)(1).³

Via/Net's first argument in opposition to the motion is that the lease no longer existed when the trustee sought to assume it, either because it had expired by its own terms after the date of the petition or because Via/Net had terminated it in 2004 as the result of defaults which the debtor failed to cure. Neither argument is persuasive.⁴

Via/Net had been granted a license by the Federal Communications Commission that allowed it to construct and operate "private operational fixed microwave service" on the H-1 channel to serve Fort Wayne, Indiana and the surrounding area. That license was originally issued on September 10, 1990, for a term of five years, and has been regularly renewed ever since. Under the contract in question Via/Net leased this license to the debtor. The lease was executed on October 3, 1990. It began on that date and was to continue for "for a period of sixty months following the License Date."

Exhibit 1, OFS Channel Lease Agreement, ¶2. The agreement also provided:

Assuming that Carrier's License to operate the H-1 Channel has been renewed as necessary by the FCC, this Agreement shall be automatically renewed for five (5) additional sixty (60) month consecutive terms unless the Customer [Fort Wayne Telsat] delivers to the Carrier [Via/Net] a notice of termination at least sixty (60) days before the end of the then existing term in which event this Agreement shall

³The sixtieth day after October 5, 2005, December 4, 2005, fell on a Sunday. Consequently, the trustee's deadline for filing the motion to assume was Monday, December 5, 2005. Fed. R. Civ. P. Rule 6(a); Fed. R. Bankr. P. Rule 9006(a).

⁴Via/Net also tries to argue that its agreement with the debtor no longer constitutes an executory contract, as that term has come to be understood for the purposes of § 365, and therefore cannot be assumed or rejected. The argument has no merit. While an unexpired lease would seem to be the quintessential example of an executory contract, it does not matter if it is not. By its very terms § 365 applies to "executory contracts and unexpired leases." An unexpired lease is either a species of executory contract or it is something entirely different. Yet, § 365 applies equally to both. So, the court need only determine whether the agreement between the debtor and Via/Net is an unexpired lease. If it is, it is capable of being assumed. If it is not, the court's inquiry is at an end.

terminate as at [sic] the end of the term during which such notice is delivered.⁵ Id.

As a result of this provision, so long as the FCC had renewed Via/Net's license, the lease to Fort Wayne Telsat was to be automatically renewed for another sixty months on the fifth, tenth, fifteenth, twentieth and twenty-fifth anniversaries of the license. The most recent of those anniversaries was the fifteenth – September 10, 2005 – which occurred shortly before the case was converted to Chapter 7. No notice of termination was ever delivered or sent to Via/Net prior to that date. Consequently, the lease was (“shall be”) automatically renewed for another sixty months on September 10, 2005 and, thus, was in full force and effect when the trustee sought to assume it on December 5, 2005.

The agreement's only condition upon the automatic renewal of the lease was the FCC's renewal of Via/Net's H-1 license. Despite that unambiguous language, Via/Net argues that an implied at law condition of the contract prevented its renewal because of the debtor's default, unless Via/Net, as the non-defaulting party, consented. The only authorities it cites for this proposition are the 1961 versions of Williston on Contracts and Corbin on Contracts. Those authorities are not only outdated,⁶ but they also do not stand for the proposition Via/Net asserts. The current corresponding portion of Corbin deals with “constructive conditions” generally and characterizes such implied terms as “a pure construction by the court itself for the purpose of attaining a ‘just’ result under

⁵The typed copy of the agreement reverses the use of the terms “carrier” and “customer” in specifying who has the opportunity to deliver a notice of termination in order to halt the otherwise automatic renewal of the lease. Those typed terms have been crossed out and replaced with the handwritten terms “customer” and “carrier” and the court's quotation from the agreement is based upon the handwritten revisions. Nonetheless, since neither party gave such a notice, it does not matter which one had the opportunity to do so.

⁶Williston appears to be in its 4th edition, issued in 2001, and Corbin was revised at least as recently as 1993.

circumstances the parties did not foresee and about which they had no ideas and had made no provision.” 8-30 Corbin on Contracts, § 30.11 (2007).⁷ The lease between the debtor and Via/Net does not even begin to fulfill these criteria. The parties clearly foresaw the possibility of defaults and made provisions for them elsewhere in their agreement. See e.g., Exhibit 1, OFS Channel Lease Agreement, ¶10. Since the parties specifically addressed the issue of default and did not limit or condition the otherwise automatic renewal of the lease upon the absence of a default, the court has no basis for implying such a condition. Furthermore, even if there were a basis for doing so, § 541(c)(1) of the Bankruptcy Code would then come into play and prevent the estate from losing its interest in the lease because of the default. 11 U.S.C. § 541(c)(1)(a).

As indicated above, defaults are the subject of paragraph 10 of the lease. In the event of a default, this portion of the agreement gives the non-defaulting party the option of terminating the lease, upon written notice to the other, but it also gives the defaulting party a sixty day opportunity to cure the default. Exhibit 1, OFS Channel Lease Agreement, ¶10.5. Prior to the petition, on November 18, 2004, Via/Net sent the debtor notice that it was in default because it had failed to provide required certificates of insurance and had failed to maintain the requisite number of subscribers.⁸ See, Exhibit J. Via/Net contends that the debtor failed to cure those defaults, with the

⁷Because of formatting differences, the renumbering of sections and the lack of a table cross referencing the old sections to the present ones, the court cannot locate the present iteration of the portion of Williston which has been cited to it.

⁸The primary purpose of this letter was to acknowledge a notice given by Fort Wayne Telsat announcing its intent to terminate a separate agreement with Via/Net for what are referred to as the F-Group Channels. Via/Net attempts to argue that two agreements should be construed together, such that a default under one is a default under the other, or that the H-1 lease was somehow tied to the debtor’s continued use of the F-Group Channels. That is not so. There is nothing in the H-1 lease or the other documents that have been introduced into evidence that indicates the F-Group Channel agreement and the OFS Channel Lease Agreement for the H-1 channel are anything other

result that the lease terminated prior to the petition. The court disagrees.

In response to Via/Net's letter of November 18, on December 21, 2004, the debtor provided the requisite certificates of insurance, demonstrating that it had and always had insurance protecting Via/Net's interest. See, Exhibit K. This was well within the sixty days contemplated by paragraph 10.5 and effectively cured any default in this regard. While Via/Net tries to argue that the default was not cured because the debtor did not have the right type of insurance or that some particular designation had not been made, the evidence at trial indicates that this insurance and its designations were precisely the same as what the debtor had carried throughout the previous fourteen years of the parties' dealings and which Via/Nat had uncomplainingly accepted as sufficient. Furthermore, in the notice of default Via/Net never complained about the type of insurance the debtor had in place, only the absence of a certificate. Since the default in that regard was cured, any complaints about the insurance itself would have to have been the subject of another notice – as well as another opportunity to cure – which was never given.⁹

As for Via/Net's complaints about the number of subscribers, there was no default by the debtor in that regard. The debtor did not, as the notice asserts, convert subscribers to satellite; it did not offer satellite television. While the number of subscribers declined, no provision of the parties' agreement required the debtor to maintain a particular level of subscribers. The court accepts Via/Net's argument that the absence of such a provision required a good faith effort on the debtor's

than two separate agreements, independent of one another, or that a default under one was to be construed as a default under the other.

⁹Although Sharon Hilliard testified that many other notices of default were sent to the debtor with regard to the H-1 lease and were not responded to, the letter of November 18, 2004 is the only one offered into evidence. In this and other areas where the testimony is in conflict, the court finds that Sharon Hilliard is not a credible witness.

part, but finds that the debtor made such an effort. One must remember that by November 2004, the debtor was in a dying industry and was faced with competitors (traditional cable and satellite) that were able to offer a better product to the same customer base the debtor was trying to serve. In light of this, it is no surprise that the number of subscribers fell as low as it did. Indeed, the real surprise is that the debtor – and later the trustee – was able to keep any customers for as long as it did.

Moreover, after these events, the parties continued to behave as though the lease was in effect and the debtor had the right to use the H-1 license. With the full knowledge of Via/Net, and without complaint or any murmur of protest, the debtor continued to use the license to broadcast to its customers. It continued to provide Via/Net with the same reports as before and to tender the required lease payment. While at some point Via/Net stopped cashing those checks, it never complained about, questioned or even commented upon the debtor's actions – and continued to send the debtor monthly bills for the continued use. Such actions are highly unusual for someone whose property was being used by somebody else, unless that somebody else had a right to do so.

Via/Net also argues that the lease terminated post-petition, following conversion, because the trustee breached it by ceasing to transmit to subscribers, dismantling the transmission facilities and then selling that transmission equipment without recognizing Via/Net's right of first refusal to purchase it. All of those events took place after the trustee sought to assume the lease and are not relevant to the question of whether an executory contract or unexpired lease existed at the time the trustee sought to assume it. They are more appropriately examined in connection with the trustee's obligation to cure defaults and provide adequate assurance of future performance.

The trustee acknowledges that at the time he sought to assume the H-1 lease there was a default in the payments due Via/Net under the lease. Based upon the number of subscribers and the

terms of the agreement, the trustee calculates that Via/Net is owed no more than \$360.00 in unpaid rent and contends that payment of this amount is sufficient to cure that default. Via/Net does not challenge this calculation, and the court finds that it is correct. Instead, Via/Net argues that there are other – non-monetary – defaults under the lease which cannot be cured. Those defaults deal with the fact that the trustee has ceased transmitting a signal to subscribers, no longer has any subscribers, has dismantled and sold the transmission equipment, without recognizing Via/Net’s right of first refusal, and can no longer transmit a signal. As indicated above, all of these events took place after the trustee filed the motion to assume and sought to exercise the option to purchase.

In connection with the assumption of the lease the trustee is required to cure any default (or provide assurance that it will be promptly cured), 11 U.S.C. § 365(b)(1)(A), and compensate Via/Net (or provide adequate assurance of prompt compensation) for the actual pecuniary loss caused by such defaults. 11 U.S.C. § 365(b)(1)(B). Yet, the defaults about which Via/Net complains are largely historical events and defaults which cannot possibly be cured. For example, to the extent the H-1 lease requires the lessee to transmit, it is not possible to cure the fact that the trustee ceased doing so. Even if the trustee were somehow able to resume transmitting, that would not change the fact that he previously ceased to do so. It is not possible to change the past and section 365 does not require the trustee to do the impossible. A default that is impossible to cure does not have to be cured as a condition of assumption.¹⁰ In re BankVest Capital Corp., 290 B.R. 443, 446-47 (1st Cir. BAP 2003); In re GP Express Airlines, Inc., 200 B.R. 222, 233-34 (Bankr. D. Neb. 1996). Instead,

¹⁰Via/Net argues that the 2005 amendments to § 365(b)(1) require these types of non-monetary defaults to be cured upon assumption. Without regard to whether that change does or does not require the impossible, since this case began prior to the effective date of the 2005 amendments, they do not apply.

it is sufficient that the trustee fully compensate the other party for the losses caused by those defaults and provide adequate assurance that they will not recur in the future. GP Express, 200 B.R. at 234.

Here, there is no evidence that Via/Net has been harmed by any of the non-monetary defaults about which it complains, whether they involve the cessation of transmitting or the sale of the transmission equipment, and Via/Net does not even appear to argue that it has been harmed by them, only that they constitute defaults which the trustee cannot cure. As for being deprived of the opportunity to purchase the transmitting equipment, the court is not even certain that has occurred, much less that Via/Net has been damaged by it. While paragraph 7.4 of the lease certainly gives Via/Net the first right to purchase the equipment, at a price determined by a bona fide offer from another party, it says nothing about how that right is to be exercised. It is important to remember that bankruptcy trustees cannot surreptitiously dispose of property of the estate. See, 11 U.S.C. § 363(b); Fed. R. Bankr P. Rule 2002(a)(2),(c)(1). Here, the debtor's creditors – including Via/Net – were entitled to and did receive notice of the trustee's proposed sale and had the opportunity to object to it. Had Via/Net wanted to assert its right to purchase that equipment it had the opportunity to do and did not. Having failed to do so when it had the chance, it cannot complain now. Consequently, the only default that the trustee needs to cure, and for which any compensation is due, is the default in payments, which requires the trustee to pay \$360.00.

Curing past defaults is not the only requirement of assumption. The trustee must also provide adequate assurance of future performance, 11 U.S.C. § 362(b)(1)(C), in other words assurances that, once assumed, the contract will be successfully performed in the future, without further default. In this instance, if assumption of the H-1 lease was the only thing the trustee wanted to do – so that the parties would go forward in a lessor/lessee relationship – the trustee would not be able to give those

assurances. The trustee does not intend to resume transmission of wireless cable television, does not have the ability to do so, and has no customers who could receive any transmissions. Yet, that is not what the trustee proposes to do. Instead of continuing to lease the H-1 license, the trustee is also exercising the option to purchase that license for the sum of \$40,000. Once he has done so, there will be no future performance owed to Via/Net – the estate will be both the owner and the lessee of the license and what happens from that moment on will be of no concern to Via/Net. As a result, the only assurance of future performance the trustee needs to provide in order to assume the lease and exercise the option to purchase is proof of the estate's ability to pay the \$40,000 option price. There is no dispute that the estate stands ready, willing and able to do so, and so the requirements of § 365(b)(1)(C) have been satisfied.

Of course, this entire dispute is really about the option to purchase and who will end up owning the H-1 license at the end of the day – the estate or Via/Net. Without the ability to purchase the license, the trustee has no reason to assume the lease, and were it not for the fact that the option price is less than the value of the license and the rights that go with it, Via/Net would have no reason to oppose the trustee. This brings the court to the final dispute between the parties – whether the trustee gave timely notice of his intent to exercise the option to purchase. Via/Net contends that the trustee had to do so by October 10, 2005 – thirty days after the anniversary of the most recent renewal of the license – and since he did not, the option has expired. The trustee contends that the appropriate anniversary date is the date of the parties' agreement – October 3 – with the result that he had at least 30 days from that date to exercise the option and, through the provisions of the Bankruptcy Code, 60 days after the order for relief within which to do so. Since the order for relief under Chapter 7 was entered on October 5, 2005, giving notice on December 5, 2005 with the

motion to assume would be timely.¹¹ Thus, the issue is whether the trustee had until December 5, 2005 to give notice of his intent to exercise the option or whether he had to do so by October 10, 2005.

An addition or rider to the lease between the debtor and Via/Net was an option to purchase which gave the debtor the right to purchase the H-1 license for \$40,000. The option was exercisable by giving notice “during the thirty-day period following each of the first, second and third anniversaries of this agreement.” Exhibit 1, Option to Purchase, ¶3. The dispute between the parties involves what the date of that anniversary is.¹² Via/Net argues that the anniversary occurred on September 10, which was the date the license was issued by the FCC and from which the sixty month lease term ran, while the trustee argues that the anniversary occurred on October 3, which is the date both the lease and the option to purchase were executed.

The trustee’s argument is the better of the two. The option quite plainly specifies that it is exercisable during the thirty days following the appropriate anniversary “of this agreement.” Whether that agreement was the option or the lease of which the option is a part does not matter, for both were executed upon and dated October 3. Furthermore, it is apparent that the parties knew how to differentiate between the date of their agreement (October 3) and the date of the license (September 10), did so when appropriate, see e.g., Exhibit 1, OFS Channel Lease Agreement, ¶ 2,

¹¹Actually, it may not matter whether the appropriate date was 30 days after September 10, 2005, as urged by Via/Net, or 30 days after October 3, 2005, as urged by the trustee. Neither deadline would have expired before the October 5, 2005 order for relief. So, if the trustee’s bankruptcy-based arguments are correct, and the Bankruptcy Code gives the trustee sixty days from the order for relief to exercise the option, it would not seem to matter which deadline might otherwise apply.

¹²There is no dispute that 2005 was an appropriate anniversary year. The controversy involves whether the anniversary occurred on September 10 or October 3 of that year.

and would have done so here had that been their intent. Accordingly, by its terms, the option to purchase was exercisable by giving notice during the thirty days following October 3, 2005.

Upon conversion, the order for relief under Chapter 7 was entered in this case on October 5, 2005. As of that date the option to purchase had not expired and, by its terms, had twenty-eight days still to run.¹³ Although the trustee did not attempt to exercise the option until December 5, he relies upon the provisions of the Bankruptcy Code to make his effort timely, arguing that he had sixty days from the order for relief within which to do so. It is not entirely clear, however, which portion of the Code this argument is based upon. In some respects it seems to be tied to § 365(d)(1) and the deadline for assumption or rejection. Via/Net, however, appears to believe the trustee's position is based upon § 108(b) and spends a great deal of time arguing that this portion of the Bankruptcy Code does not apply to options. In light of these uncertainties, the court feels that this particular issue has not been adequately addressed in the parties' briefs and that further inquiry is appropriate.

The court will, therefore, hold a hearing on **February 26, 2008 at 3:00 p.m.**, in Room 2127, Federal Building, 1300 South Harrison Street, Fort Wayne, Indiana, to receive additional arguments concerning whether the trustee gave timely notice of his intent to exercise the option to purchase the H-1 license and what, if any, portion of the Bankruptcy Code would extend the contractual deadline for doing so. Any additional briefs concerning this issue shall be filed and served no later than seven (7) days prior to the hearing.

SO ORDERED.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court

¹³By Via/Net's calculation, it had five days still to run.