

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

IN RE:

NEW YORK BAKING CO., INC.,

CASE NO. 92-21865

Debtor.

DECISION AND ORDER

BACKGROUND

On July 6, 1992 the debtor, New York Baking Co., Inc. (the "Debtor") filed a petition initiating a Chapter 11 case. The Schedules filed by the Debtor on July 6, 1992 and July 29, 1992 listed total assets of \$6,000, consisting of \$1,000 on deposit with the First National Bank of Rochester and a \$5,000 security deposit with Bruce Carey ("Carey"), the Debtor's landlord under a March 20, 1992 lease (the "Lease") covering the Debtor's business premises at 195 North Avenue, Webster, New York ("195 North Avenue"). The Schedules also listed total liabilities of \$82,400, all unsecured debt, consisting of a \$25,000 loan from Thomas Vullo, a \$25,000 loan from John Baccoli, a \$20,000 loan from Emmanuele Rinzivillo and \$12,400 in rental payments due to Carey.

By motion dated July 29, 1992 and returnable August 10, 1992, Carey moved for an Order: 1) requiring the Debtor to assume or reject the Lease; 2) directing the Debtor to pay post-petition rent due and to timely perform all other obligations required of it pursuant to the Lease; and 3) requiring the Debtor to immediately surrender 195 North Avenue to Carey in the event the Debtor rejected the Lease.

On August 7, 1992 an Answering Affidavit on behalf of the Debtor was filed with the Court. The Answering Affidavit indicated that the Debtor is engaged in the wholesale business of manufacturing and distribution of baked products, such as pizza dough, cookies and bakery goods in general, and that the Debtor wished to assume the Lease. The Affidavit further indicated that a

prior tenant of the premises, Lorimar Foods, Inc. (which has a Chapter 11 case pending before this Court) had defaulted under its lease of 195 North Avenue and was evicted from the premises, and the principal of Lorimar Foods, Inc., who is also one of the principals of the Debtor, negotiated the Debtor's Lease. The Answering Affidavit also acknowledged that a base rent of at least \$6,200 per month is required under the Lease, but stated that because the Debtor is a newly formed entity it cannot generate the necessary cash flow to begin paying base rent until September 30, 1992.

Therefore, the Debtor requested that it be allowed to assume the Lease, begin paying the base rent of \$6,200 per month on September 15, 1992 and pay the arrearages for the month of August, 1992 in the amount of \$1,000 per month commencing on September 30, 1992 and monthly thereafter until the August rent is paid in full.

The motion was adjourned by consent to August 17, 1992 and, over the objection of the moving party, was adjourned by the Court to August 24, 1992 to accommodate a long planned vacation of the Debtor's counsel. However, in granting a further adjournment to August 24, 1992, the Court advised the moving party to inform the Debtor's attorney's office that by the August 24, 1992 adjournment the Court expected the Debtor to be prepared to pay the August base rent of \$6,200 and *pro rata* rent for July (from July 7, 1992 to July 31, 1992) pursuant to the provisions of 11 U.S.C. §365(d)(3).

DISCUSSION

11 U.S.C. §365(d)(3) provides:

The trustee [or a debtor in possession in a Chapter 11] shall timely perform all of the obligations of the debtor, except those specified in Section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding Section 503(b)(1) of this title. The Court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period.

This Court adopts the holdings of the Bankruptcy Courts in In re S & F Concession, Inc., 55 B.R. 689, 691 (Bankr. E.D.Pa. 1985) and Matter of Swanton Corporation, 58 B.R. 474, 475 (Bankr. S.D.N.Y. 1986) which require that for a debtor to comply with the provisions of Section 365(d)(3) it must pay *pro rata* rent from the date of the filing of the petition.

At the hearing on August 24, 1992 the Court, pursuant to Section 365(d)(3), required that by September 5, 1992 the Debtor pay *pro rata* rent for the month of July and rent in the amount of \$6,200 for the month of August, 1992.

Section 365(d)(4) allows a debtor 60 days from the date the petition is filed to decide whether to assume or reject an unexpired lease of nonresidential real property.¹ Under Section 365(d)(4), the Court has discretion to extend the 60-day period within which the Debtor may determine whether to assume or reject such a lease. However, under Section 365(d)(3), the Court does not have discretion to extend beyond the 60 days a debtor's duty to perform its obligations arising under such a lease within that 60-day period. The Debtor's proposal to pay no July rent and to pay August rent beginning on September 15, 1992 and for an additional five months is contrary to Section 365(d)(3) which requires that obligations to pay rent arising within the 60-day period be performed within that 60-day period.

CONCLUSION

By September 15, 1992 the Debtor shall pay *pro rata* rent from July 7, 1992 to July 31, 1992

¹ 11 U. S. C. §365(d)(4) states,
in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is a lessee within 60 days after the date of the order for relief or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected . . .

