UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

PROGRESSIVE RESTAURANT SYSTEMS, INC. — Case No. 95-14370 K

Debtor

In re

JAMES THOMAS FENTRESS and SANDRA RUTH FENTRESS — Case No. 95-14371 K

Debtors

In its decision dated February 7, 1997, this Court invited the Debtors to make a motion under Rule 9006(b)(1) if a showing of “excusable neglect” could be made in support of a request to extend the 11 U.S.C. § 365(d)(4) time retroactively. The Court cited the case of *In re Argonaut Fin. Servs., Inc.*, 164 B.R. 107 (N.D. Cal. 1994), for the proposition that Rule 9006(b)(1) provides authority for relief from the time period specified in § 365(d)(4). Although the Court now concludes that that proposition is

erroneous,[1] and that consequently this Court's invitation was erroneous, it is fair and appropriate to apply principles of excusable neglect here, said principles having been invoked by the Court itself without objection by Wendy's.[2] The Court's invocation of Rule 9006 here should be entitled to finality in light of the Debtors' reliance thereon.

Proceeding to the merits of the motion, the Court is greatly surprised to learn that except for the question of whether the failure to seek extension was a strategic choice or an omission, the Court had all the pertinent facts before it at the time that it rendered its February 7, 1997 decision. When the Court invited an "excusable neglect" motion it knew that no such motion would be filed if the decision not to seek extension had been a strategic decision, and believed that if an excusable neglect motion was made it would recite important facts not theretofore known to the Court; for example, facts pertaining to the dealings between the parties here that might have lulled the Debtor into a

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[1]Rule 9006(b)(1) by its own terms only applies to time bars set by the Rules themselves and set by Orders - it cannot apply to time bars set by the Code.

[2]Moreover, no matter how self-effectuating § 365(d)(4) may appear, its enforcement requires an order of the Court. Orders of the Court, even final judgments, may be revisited for excusable neglect under Rule 60 of the Federal Rules of Civil Procedure. Unless the statutory rights that accrue in a landlord's favor under § 365(d)(4) are entitled to greater immutability than are final judgments of the Court (which is possible in light of the fact that they are statutory rights rather than rights bestowed by judicial decision-making), something akin to Rule 60 must permit the Court to revisit on day 61, for example, the rights that the landlord acquired on day 60.

false sense of security (such as if Wendy's had suggested that it would await a new Plan) or facts involving the kind of office problems or health problems that have been the subject of the leading cases on the subject of "excusable neglect." Had the Court known that the motion would offer nothing new except the statement that the failure to seek the extension of time was not a strategic decision, it would not have invited the motion. Indeed, the present motion is based on a single two-tiered premise: Debtors' counsel had not foreseen the rulings contained in this Court's decision of February 7, 1997, and that under the circumstances of this case, that lack of foresight should be forgiven as "excusable neglect." That argument cannot be sustained, or else every good faith disagreement about the proper interpretation of the law governing a given deadline would itself constitute grounds to disregard that deadline.

The U.S. Supreme Court has set forth the tests of "excusable neglect" in *Pioneer Inv. Servs. v. Brunswick Assoc.*, 507 U.S. 380 (1993). In addressing the question at Bar, this writer has labored in vain to find the answer to a question I thought important in addressing the element of "prejudice" - one of the elements required by *Pioneer* which will be addressed later in this decision. The question is: What would be the date as of which the competing interests would be measured, if this Court were to rule that the Debtors' failure to seek extension of the § 365(d)(4) time was the result of "excusable neglect," and if the Debtors consequently could now argue a motion to extend the time?

At the very latest, the 60 days provided for by the statute lapsed 60 days after this Court's decision of October 18, 1996,[3] and there could be strong argument that it expired at some time sooner than that. The present moving papers submit that after Wendy's and the Debtors failed to settle their disputes at a meeting on October 21, 1996, the Debtors undertook a program of attempting to reduce their operating expenses and worked throughout the months of November and December, 1996 to draft and finalize an amended plan and disclosure statement which they filed on January 3, 1997. They now believe that they are in a position to prove to the Court, over the objection of Wendy's, that their proposal to cure their defaults to Wendy's over a further 24-month period[4] would be a "prompt cure" under 11 U.S.C. § 365(b)(1)(A) and that they can provide "adequate assurance" under that provision, of the means to accomplish that cure and to maintain its other promised payments. The present motion, therefore, presumes that if the failure to have sought an extension of time in October, November or December of 1996 was the result of "excusable neglect," then the merits of the motion seeking to extend the

[3]In that decision this Court, among other things, rejected Progressive's treatment of certain lease arrears that were subsumed into a "Restructure Agreement," and thereby denied approval of a Disclosure Statement that proposed the assumption of the leases now in question.

[4]As discussed later in this decision, a 24-month cure period proposed 15 months into a Chapter 11 case is in reality a 39-month cure period.

§ 365(d)(4) time would be addressed as of today -- in April of 1997.

In fact, that there would have been extremely little likelihood that this Court would have granted, over Wendy's inevitable objection, any extension of time at all to enable the Debtors to make the proposal that it has now made, had the Debtors made such a motion in the Fall of 1996. Although the Court would have maintained an open mind, a proposal last Fall to extend time to let the Debtors make operational and budgetary changes that would permit them to propose a cure over a further 24-month period, would have had little chance of success, over Wendy's objection. (A proposal to cure immediately might have had more success, nearly a year into the case.)

If the Court were to conclude today that the failure to make that motion was the result of "excusable neglect," should the Debtors have the benefit of the changes that it has made to strengthen its financial position since the time of the "neglect," in attempting to overcome the landlord's opposition to any further assumption proposal?

Let us state the question in other words. Excusable neglect cases most often involve rights that would have been established or preserved had a deadline not been permitted to go by, and they usually involve motions made soon after the deadline was missed. Here the Debtors had no *right* to an extension of time to assume the lease. They had no such right back in October when the Court rejected the proposed Plan and Disclosure Statement, no right 60 days thereafter, no right when they filed their amended

Plan in January of this year, and no such right today. Rather, the only right that would have been "preserved" by a timely motion to extend was a right to be heard as to why "cause" existed for such an extension. Among the generality of "excusable neglect" cases one might find a case in which a successful laches defense in an action might be established by showing that the defendant has spent considerable sums of money in reliance on the plaintiff's inaction. Assuming an "excusable" reason for the defendant's missing the answer date, and assuming that the defendant expended much money after that neglect, must the plaintiff contend with the fact that much of the reliance that might sustain the defense occurred after the defendant's own neglect?

This writer has been unable to find the answer, but it is evident that to compel Wendy's to oppose an extension motion on the basis of facts as they exist today -- now that the Debtors have made budgetary cuts and changes to attempt to demonstrate the means to achieve a "two year cure" rather than the five year cure that the Court rejected (the Court again would note that we are already 15 months into the case and the two year period has yet to begin) -- would not merely forgive the Debtors' neglect, but rather it would reward and exalt it. That will not be done by this Court in the absence of compelling authority.

Consequently, even if the Court now found that the failure to have made the extension motion back in the Fall of 1996 was the result of "excusable neglect," that

finding would not necessarily entitle the Debtors to a hearing on the present facts supporting their current proposal. Rather, the Court would likely, as Rule 9006(b)(1) expressly states, "permit the act to be done" -- the "act" in question would be the act of making the motion to extend that would have been filed last Fall had there been no neglect last Fall. In the absence of contrary authority, the Court would likely measure the competing interests as of the time of the neglect, not at the time of the excuse.

Were this Court so to roll back the clock four, five or six months, this case would have certain similarities to the situation described in this Court's June 8, 1992 decision in the case of *One Canandaigua Properties, Inc.*, Case No. 90-22631K. That decision involved a mortgagee's motion to lift the automatic stay to permit foreclosure on the Debtor's business premises, a hotel. The hotel owner had filed Chapter 11 on December 5, 1990. On December 16, 1991, in response to a succession of motions to lift stay, the Court entered an Order that would lift the automatic stay in favor of the mortgagee unless the Debtor were to bring on a plan of reorganization for confirmation hearing within 90 days from the date of that Order. Instead of submitting a "mainstream" reorganization plan, the Debtor proposed a plan that implicated some of the leading issues of the day, e.g., whether there exists a "new value exception" to the absolute priority rule manifested in 11 U.S.C. § 1129(b), and whether the deficiency claim of secured creditors may be separately classified, in order to "gerrymander" compliance with 11 U.S.C. §

1129(a)(10). At confirmation hearing, this Court denied confirmation, which lead to the mortgagees' renewed motion to lift stay.

The present writer set forth the following which could readily be adapted to speak directly to the case presently at Bar:

> **Neither the original Plan nor the subsequent proposals are within the "mainstream" of reorganization plans; rather, they have been on the frontiers. The debtor has highly skilled and experienced reorganization counsel who has candidly acknowledged the respects in which these efforts have been on such frontiers, and the reasons why the debtor has had to maneuver in that region - the mortgagees have repeatedly vowed rejection of any Plan that leaves certain members of current management and ownership in affiliation with this hotel, and every effort of the debtor (at least since this Court gave it 90 days beginning last December) has been an effort to "get around" the mortgagees' unwillingness to work with current ownership.**
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> **. . .**
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> **Six months ago the Court gave the debtor (and the [Creditors] Committee) 3 months in which to bring on a plan of reorganization, or the stay would lift. The Plan filed in January, and each of the four modifications proposed since then, test the boundaries of Chapter 11 in an effort to neutralize the vote of the mortgagees. With "adequate protection" payments being made (as they are) we can test these boundaries all summer, with no "expectation" that the mortgagees will not be left looking for a buyer in the off-season.**
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> **The current ability of the debtor to make adequate**

> **protection payments, together with the desire of the committee to still have an operating debtor while it seeks to pursue claims against mortgagees, makes this a close case. But I believe that [the case of *In re Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988)] commands lift of stay. It is my reading of *Timbers* that if an "effective reorganization" connotes one that is a reasonable "prospect" in a reasonable period of time, then once a reasonable period of time has already passed (over the objection of the mortgagees) and an inventive effort at reorganization has failed, the debtor and Committee must show more than a mere "possibility" of obtaining a final order of confirmation within a reasonable period of time. The debtor and Committee had more than a year prior to the March, 1992 denial of the confirmation of a plan to experiment with cramdown theories. They chose to do so during the small window offered by this Court's order of December 16, 1991, unsuccessfully. They now oppose the lift of stay on the grounds that they think that they now have their § 1129(b) theories "down pat." This experimentation is speculation at the expense of mortgagees on or near the "bubble." After seventeen months it is also pressing the limits of the Court's authority to prevent senior liens from realizing upon the positions they bargained for.**
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> **I find that "cause" exists for the stay to lift.**

Canandaigua Properties, supra, at 4-8.

In the case at bar, the Debtors have been dealing with a 60-day deadline contained in the statute rather than a 90-day deadline imposed by the Court. They did seek initial extensions of the deadline, but utilized those extensions to experiment on the "frontiers" regarding what constitutes a "prompt cure" and the extent to which a debtor

can attempt to deconstruct a non-bankruptcy "restructure" agreement that had presumably been intended as an effort to avoid bankruptcy. Those efforts were unsuccessful. A reasonable time has passed -- this case is 15 months old, and no "unreasonable" extension of the statutory period will be granted by this writer. Nothing had been put aside or established as a "fall back" position that could have been offered back in the Fall of 1996 in support of a request for a future extension of time. Even now the Debtors have only a proposition on the table, instead of an immediate cure. They now think that they have their arguments "down pat" -- that what they call a "two year" cure proposal (a cure period which would actually end more than 39 months from the time of the filing of the petition even if cure were to begin today) is sustainable over Wendy's objection as a "prompt" cure. They believe that if they could have a full-fledged hearing to demonstrate the feasibility of their cure proposal they could overcome Wendy's challenges to that as well, now that they have made changes during the "grace period" that they would enjoy if the Court were not only to find excusable neglect but also to find that the balancing of interests should be measured by today's fact circumstances rather than those that existed at the time of the neglect. The Debtors want a hearing to test their theories at the landlord's expense.

All of the above is by way of dictum and, perhaps, solace, in a certain sense. For the Court finds that there has *not* been a showing of excusable neglect. Rather, there

has been a showing of inexcusable neglect that nonetheless was probably *harmless*. In determining that the neglect was not excusable the Court has avoided consideration of the "prejudice" element of the *Pioneer* standards because a conclusion with regard to "prejudice" might well require providing the answer to the question posed above (regarding the relevant date for measuring the competing interests, if the motion to extend were now to be permitted), and that question has not been briefed. If Wendy's were forced to argue against a motion for extension of time that were to be tested against facts that existed on the day last Fall that the § 365(d)(4) time lapsed (presuming that it did not lapse earlier in the year), and were not forced to confront circumstances as they exist at the present time, there arguably would be little prejudice to Wendy's -- no greater prejudice, for example, than is suffered by a prevailing plaintiff who obtains a final judgment but suffers when the defendant wins the privilege, a few weeks later, of leave to file a late appeal on grounds of excusable neglect. It is virtually certain that this Court, in October, November or December of 1996, over the objection of Wendy's, would not have given the Debtors until now to offer nothing more than a proposal to demonstrate at an evidentiary hearing and further legal argument that it can cure over the course of a further 24 months, and that such a cure would be a "prompt cure."

Rather, the Court has focused on the other *Pioneer* factors. As to those, the Court agrees with the arguments of Wendy's in its opposing papers. As noted earlier in

this decision, the present motion offers no facts beyond those which the Debtor earlier argued to the Court in an effort to prove that the § 365(d)(4) time had not lapsed. Instead, the present motion is premised on the argument that the Debtors had a reasonable and good faith belief that they would convince the Court that the time had not lapsed and that that belief obviates the need for them to have so convinced the Court. That argument cannot avail. Good faith is only one of the *Pioneer* factors.

As Wendy's points out: (1) there can be no question about the fact that the Debtors clearly knew about the § 365(d)(4) deadline; (2) the delay itself clearly was not caused by anything outside the Debtors' control; (3) any "unusual" aspects to the procedures involved here were of the Debtors' own choosing, and indeed the pitfalls of those choices were discussed in open court on September 16, 1996,[5] and finally; (4) the argument that the clients here should not bear the burden of counsel's actions is rejected, as it was in dictum in *Pioneer.*

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[5]At oral argument on the present motion, an attorney for an unsecured bank argued, in support of the Debtors that he (a well-experienced bankruptcy attorney) also was left confused by the colloquy on that date. This Court told that attorney that it was not the Court's intention in that colloquy to answer the various questions that were raised by the Debtors' choice of procedure, but to point out the many unanswered questions raised thereby and send them out deciding what actions to take. It was also the Court's intent not to prejudice inadvertently the rights of any party to the various potential arguments to which the Debtors' choice of procedure had given rise.

In conclusion, the Court notes that it has previously commented on the record that the Debtors could well have made a strategic decision in October of 1996 not to make a motion to extend the § 365(d)(4) time, and such a strategic decision could have been very understandable. Had the motion been made and successfully opposed by Wendy's or other landlords, that would have been the irretrievable "end of the game" as far as these four leases are concerned and possibly other leases as well. Had the Debtors elected not to make the motion, the Debtors would have gained time to negotiate, to endeavor to find new sources of capital or financing, and to continue efforts to improve its condition to the point at which it could perhaps make a truly compelling cure proposal. If any of those efforts had been successful, then such a strategic decision would have proven to have been very wise. Under the circumstances here, the Debtors obtained all of those very same benefits and also preserved the right to argue that its neglect should be found to be "excusable." Whatever the means, the Debtors have bought a lot of time. For fifteen months, they have been in possession of rented premises as to which Congress contemplated only two months to win "peace" with the landlord or a victory over the landlord in court.

Unfortunately for the Debtors and their creditors, none of these efforts were ultimately successful. The motion to extend time retroactively is denied. Wendy's motion to settle the order lifting stay is restored to the Court's motion calendar at 10:00

a.m. on April 16, 1997.

IT IS SO ORDERED.

Dated: Buffalo, New York
April 3, 1997

/s/ Michael J. Kaplan

U.S.B.J.