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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
96 DEC 11 PM 12:32  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 96-10569  
)  
MASSACHUSETTS MOTOR LODGES, ) Chapter 11  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **MEMORANDUM OF OPINION**

This matter is before the Court on the Amended and Modified Motion of Debtor to Assume Lease and the Objection of Jacob Asadoorian to it. (Docket 66, 70). For the reasons stated below, the Objection is overruled and Debtor's Motion is granted.

**JURISDICTION**

The Court has jurisdiction to hear this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(M).

**FACTS**

The Court held an evidentiary hearing at which time Debtor presented witnesses and exhibits in support of its Motion. Jacob Assadoorian offered his case through cross-examination only. These are the relevant facts as established at that hearing:

Debtor's primary assets are: (1) real estate located in Lawrence, Massachusetts in which Debtor owns a fee interest; and (2) two parcels of real estate located in Tewksbury, Massachusetts. Debtor owns a leasehold interest in parcel one of the Tewksbury property and a

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fee interest in parcel two. The current dispute centers around parcel one (the "Property"), which is operated as an Econolodge motel.

Debtor's leasehold interest in the Property stems from a lease entered into in 1964 between Jacob Asadoorian ("Lessor") and Lowell Motor Hotel, Inc. Debtor took an assignment of that lease in 1971. The lease provides for an initial term of 49 years with 5 additional terms of 10 years each, for a total of 99 years. There are approximately 66 years left under the lease. The annual rent is \$12,000 plus real estate taxes and utilities with no escalation in the rent over the lease term. The Property, which is located on the main street of Tewksbury, has as neighbors a Wal-Mart, Home Depot, K-Mart and Marshall's.

Debtor is current with the rent, taxes, and utilities on the Property post-petition. The pre-petition situation is, however, different. Debtor is in default with respect to the pre-petition taxes and utilities in the amount of approximately \$250,000. The pre-petition default came about because of cash flow problems. In response to those problems, Debtor restructured the Econolodge operations from a full-service motel to an extended stay facility with lower daily rates. This change appears to have corrected the problems to the extent that Debtor is meeting all of its post-petition obligations. Additionally, Debtor has accumulated approximately \$200,000 cash; of this, \$100,000 is earmarked for post-petition expenses and the remainder is available to be applied immediately toward curing the default. Debtor presented unchallenged evidence that, based on its projections, it will continue to be able to meet all of its post-petition obligations even without the tax relief discussed below. Those projections have been historically accurate.

A number of different entities have indicated an interest in purchasing one or both of the Tewksbury parcels over the last few years. Pre-petition, Debtor received two offers to purchase

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its interest in the Property for \$1.5 million and \$2 million. Post-petition, Debtor has made concerted efforts to market the Property. Debtor initially received an offer from Trademark Development, Inc. to purchase Debtor's interest in both of the Tewksbury parcels for \$2.4 million. Trademark intended to develop the Property for retail, a deal which fell through when certain proposed tenants backed out of their commitment. Trademark then elected not to go forward with the purchase. The Property continues to generate interest, with Debtor receiving offers to purchase in the amounts of \$1 million and \$1.1 million, as well as an offer to purchase both Tewksbury parcels for \$900,000. Debtor did not accept these offers because it is negotiating with Leatherbee Development L.L.C. to sell both Tewksbury parcels for a total of \$1.675 million. Leatherbee has made a written offer in that amount to Debtor. Such a sale may well pay all of the creditors in this case in full. Debtor's special real estate counsel opined that there is widespread interest in the Property and, even if the Leatherbee deal does not close, he believes that a sale will be closed with another buyer in the next 12 months.

Debtor has also attempted to market the Lawrence property post-petition. Debtor had an agreement with Carematrix Corp. to purchase this property for \$1 million subject to the condition that certain legislation affecting the property's use would be passed in Massachusetts. That legislation ended up being tabled indefinitely, spelling the end of this deal. Debtor now intends to employ a real estate broker to conduct a sealed bid auction for the Lawrence property and has filed a motion seeking approval to hire such a professional. The motion also requests authority to offer the Tewksbury parcels for sale by auction if the current negotiations with Leatherbee do not go forward.

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In addition to actively marketing the real estate, Debtor has also considered whether it is possible to obtain a reduction of the real estate taxes. Debtor did not challenge the tax assessments pre-petition because Massachusetts law prohibits such an action if the taxes are in arrears. Debtor believes it is entitled to pursue the issue under bankruptcy law (specifically 11 U.S.C. § 505) and that it will be successful in that action because the assessed value of the property for tax purposes far exceeds any of the recent offers to purchase it. The Lawrence real estate is presently assessed at approximately \$1.8 million and the Tewksbury parcels are assessed at \$3.8 million. As noted above, offers to purchase Debtor's interest in those properties came in well below the assessed values. Any such re-assessment and reduction would significantly improve Debtor's cash flow by approximately \$100,000 a year. Although there is no specific provision in the lease that permits Debtor to seek such relief, neither is there anything in the lease that prohibits it. Debtor has filed an Adversary Proceeding in this Court seeking that tax reduction. Lessor's position is that Debtor lacks standing to challenge the tax assessments.

**ISSUE**

Whether Debtor's motion to assume the Tewksbury lease should be granted under 11 U.S.C. § 365?

**DISCUSSION**

**A.**

Section 365(a) of the Bankruptcy Code provides that a debtor in possession may assume or reject, subject to court approval, any unexpired lease of the debtor.<sup>1</sup> "Section 365 is intended

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<sup>1</sup> A debtor in possession has all the rights, functions and duties of a trustee under 11 U.S.C. § 1107(a).

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to provide a means whereby a debtor can force another party to an executory contract to continue to perform under the contract if (1) the debtor can provide adequate assurance that it, too, will continue to perform, and if (2) the debtor can cure any defaults in its past performance. The provision provides a means whereby a debtor can force others to continue to do business with it when the bankruptcy filing might otherwise make them reluctant to do so. The section thus serves the purpose of making the debtor's rehabilitation more likely." *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1310 (5th Cir. 1985), quoted in *City of Covington v. Covington Landing Ltd. Partnership*, 71 F.3d 1221, 1226 (6th Cir. 1995).<sup>2</sup>

If a debtor is in default under the lease:

[debtor] may not assume such contract or lease unless, at the time of assumption of such contract or lease, the [debtor] --

- (A) cures, or provides adequate assurance that the [debtor] will promptly cure, such default;
- (B) compensates, or provides adequate assurance that the [debtor] will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

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<sup>2</sup> A debtor's decision to assume or reject an unexpired lease is tested under the business judgment rule. *Richmond Leasing Co. v. Capital Bank, N.A.* at 1309. *See NLRB v. Bildisco*, 465 U.S. 513 (1984). In argument, Lessor raised the issue of whether the proposed lease assumption is in the best interests of the creditors, but he did not brief it or address it via evidence. Debtor will, therefore, be deemed to have exercised appropriate business judgment in asking to assume the lease. The only issue, then, is whether Debtor should be permitted to assume the lease under the terms it proposes.

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- (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b).

Debtor proposes to comply with the provisions of this statute by (a) making a cash payment of \$100,000 now (increased at the hearing from the initial offer of \$50,000) to reduce the debt from \$250,000 to \$150,000; (b) making monthly payments totaling \$19,000 annually until the default is cured; and (c) providing for balloon payment of the default from the first proceeds of sale of the Tewksbury and Lawrence properties. Debtor's counsel represented that, allowing some flexibility for consummating the sale of one or both properties, Lessor will receive payment in full within two years. Additionally, Debtor is pursuing a reduction of the tax assessment which could result in a tax credit which would reduce the amount of the default.

Lessor argues that Debtor's motion does not provide adequate assurance that the default will be promptly cured as required by § 365(b)(1)(A). He contends that the default must be cured at the time the lease is assumed in order to come within the definition of "prompt." Lessor also questions whether Debtor is providing the adequate assurance of future performance contemplated by §365(b)(1)(C) and asks that Debtor be required to prove that it will honor all of the lease terms in the future, including paying the real estate taxes as they become due. (Objection to Amended and Modified Motion of Debtor to Assume at ¶¶ 1, 12, and 13). (Docket 70). Lessor did not provide evidence of any actual pecuniary loss resulting from the default, and so consideration of § 365(b)(1)(B) is unnecessary.

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**B.**

The parameters of “prompt cure” under § 365(b)(1)(A) depend on the facts and circumstances of each case. *In re Embers 86th Street, Inc.*, 184 B.R. 892 (Bankr. S.D. N.Y. 1995). “[F]lexibility requires that, in a proper case, a period of time be allowed for the liquidation of a default.” *In re R/P International Technologies, Inc.*, 57 B.R. 869, 873 (Bankr. S.D. Ohio 1985). “[W]hat is a prompt cure can often vary according to the circumstances of a given case . . . For instance, a debtor with 90 years remaining on a 99 year lease, who proposes to cure its arrearage over an 18 month period, might be found to have offered adequate assurance of a prompt cure.” *In re Berkshire Chemical Haulers, Inc.*, 20 B.R. 454, 458 (Bankr. D. Mass. 1982). Courts have approved extended cure periods under various circumstances. *In re Coors of North Mississippi, Inc.*, 27 B.R. 918 (Bankr. D. Miss. 1983) (three year cure met the statutory requirement); *In re Whitsett*, 163 B.R. 752 (Bankr. E.D. Pa. 1994) (cure period of slightly less than two years found to be prompt ).

Adequate assurance of a prompt cure requires that there be a firm commitment to make all payments and a reasonable demonstration of the ability to do so. *In re DWE Screw Products, Inc.*, 157 B.R. 326 (Bankr. N.D. Ohio 1993); *In re World Skating Center, Inc.*, 100 B.R. 147 (Bankr. D. Conn. 1989). In the event an extended cure is being considered, the viability of the debtor’s business and the accuracy of its business projections are relevant factors to be considered. *In re Berkshire Chemical Haulers, Inc.*

While Lessor challenges the idea that Debtor’s multi-year proposal can be deemed to be a “prompt cure”, the question of whether the offer falls within the definition of “prompt” must be

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viewed against the backdrop of the lease terms. In this case, the parties to the lease contemplated at the outset that they would have a 99 year relationship, of which 66 remain. Debtor's proposal will cure the default in time that approximately 64 years will be left on the lease. This proposal might not be deemed prompt under a different lease agreement, but the lease at issue here is sufficiently long that payment over one to two years meets the requirement that the cure be "prompt".

Debtor is also required to show adequate assurance that it will be able to honor the terms of the proposed cure. In this case, the credible, undisputed evidence established that there is significant interest in the properties at purchase prices which far exceed the default under the lease. The Property, in particular, is in a desirable location on a main street with major retailers in the vicinity. Debtor not only has written offers for the Tewksbury parcels under consideration, but has developed a plan for selling them at auction if the highest and best bid now under consideration falls through. Debtor also proposes to sell the Lawrence property at auction. Debtor has demonstrated the intent and ability to sell one or both of the properties within one year, either by private sale or auction, with consummation and payment to Lessor within the following year. Debtor also established through its projections that it will be able to pay at least \$19,000 annually until the balloon payment is made from the sale proceeds. The pending offers and auction plan, together with the immediate payment of \$100,000 and the additional payments of \$19,000 annually, are firm enough to satisfy the requirement that Debtor provide adequate assurance of its ability to meet the promise to cure.



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Additionally, in the event that Debtor is successful in the Adversary Proceeding, Debtor intends to apply any refund in overpaid taxes and/or any reduction in future taxes to reduce the default. Lessor argues that Debtor does not have standing to seek this tax relief. In light of the conclusion that the offers described above are sufficient to establish adequate assurance of a prompt cure, it is not necessary to decide whether Debtor will be successful in its efforts against the taxing authorities. In fact, it would not be appropriate to reach that issue in the context of this motion because it will be addressed in the Adversary Proceeding.

C.

The second issue under § 365(b) is whether Debtor has provided adequate assurance of future performance under the lease. The “adequate assurance of future performance” required by § 365(b)(1)(C) is not defined by the Bankruptcy Code. The term, as indicated in the legislative history, is to be given a pragmatic, practical construction given the facts of a specific case. *In re Natco Industries, Inc.*, 54 B.R. 436, 440 (Bankr. S.D. N.Y. 1985). “Courts have consistently determined whether a debtor offered adequate assurance of future performance by considering whether the debtor’s financial data indicated its ability to generate a stream sufficient to meet its obligations, the general economic outlook in the debtor’s industry, and the presence of a guarantee.” *Richmond Leasing Co. v. Capitol Bank, N.A.*, 762 F.2d 1303 (5th Cir. 1985). An absolute guarantee of future performance is not required; instead, it must appear that a debtor will meet its future obligations under the lease. *In re Embers 86th Street, Inc.* at 901.

Debtor’s undisputed projections, which have been historically accurate, show that Debtor will be able to continue to make all monthly payments due under the lease. The conclusion that Debtor will be able to perform is buttressed by Debtor’s post-petition record of


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meeting all of its obligations. Debtor has, therefore, satisfied the burden of providing adequate assurance of future performance under the lease.

**CONCLUSION**

For the reasons stated, Lessor's Objection is overruled and Debtor's Amended and Modified Motion to Assume Lease is granted. A separate order in accordance with this decision will be entered.

Date: 11 Dec 1996

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Richard Baumgart, Esq.  
Jeffrey Levinson, Esq.  
Andrew Vara, Esq.

By: Joyce L. Gordon, Secretary

Date: 12/11/96

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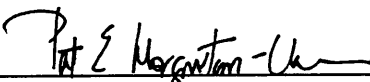
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Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **ORDER**

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that the Amended and Modified Motion of Debtor to Assume the Tewksbury Lease is granted under 11 U.S.C. § 365 and the Objection of Jacob Asadoorian to it is overruled.

Date: 11 Dec 1996

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Richard Baumgart, Esq.  
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