

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:) Case No. 13-50728-JRS
)
JOVA/DANIELS/BUSBY, INC.,)
) CHAPTER 7
Debtor.)
)
_____)

MOTION PURSUANT TO 11 U.S.C. § 365(A) AND RULES 6006 AND 9019 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE FOR APPROVAL OF JOINT STIPULATION AND SETTLEMENT AGREEMENT AND AUTHORITY TO REJECT AN UNEXPIRED LEASE

Pursuant to 11 U.S.C. § 365(a) and Rules 6006 and 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), S. Gregory Hays, Chapter 7 Trustee for the estate of Jova/Daniels/Busby, Inc. (the “Trustee”), seeks: (i) approval and authority to consummate the Joint Stipulation and Settlement Agreement (the “Agreement”) between the Trustee and TrizecHahn Colony Square GP LLC (“Colony Square”; together with the Trustee, the “Parties”); and (ii) approval and authority to reject the Debtor’s unexpired lease with Colony Square of the premises more commonly known as Suite 700 at 400 Colony Square, Atlanta, 1201 Peachtree St., N.E., Georgia 30361 (the “Premises”).

Background

1. On January 14, 2013 (the “Petition Date”), Jova/Daniels/Busby, Inc. (the “Debtor”) filed a voluntary petition for relief under chapter 7 of title 11 of the

United States Code (the “Bankruptcy Code”) commencing the above-styled bankruptcy case (the “Bankruptcy Case”).

2. On that same day, the Trustee was appointed the Interim Trustee in the Bankruptcy Case.

3. On February 13, 2013, at the conclusion of the Debtor’s Section 341 meetings of creditors, the Trustee was appointed the permanent Chapter 7 Trustee in the Bankruptcy Case for the Debtor’s estate.

4. The Debtor was an architectural firm that operated out of the Premises, as more particularly described in the Office Lease (as defined herein).

5. The Trustee is currently in possession of certain architectural drawings and plans that the Debtor made related to the Colony Square complex located on Peachtree St., N.E., Atlanta, Georgia 30361 (the “Drawings”).

6. The Debtor leased the Premises from Colony Square pursuant to that certain Office Lease dated February 22, 2005, as amended by the First Amendment of Office Lease dated July 20, 2005, as amended by the Second Amendment of Office Lease dated June 25, 2012 (the “Office Lease”).

7. The Office Lease has not expired by its terms, and is therefore, an unexpired lease that is subject to rejection or assumption by the Trustee under Section 365 of the Bankruptcy Code.

8. The Debtor is no longer operating as a going concern, and therefore, no longer needs to occupy or utilize the Premises other than to conduct the Auction (as defined herein).

9. By separate motion (the "Sale Motion") (Doc. No. 26) filed contemporaneously with this Motion, the Trustee has sought Court authority, pursuant to Section 363(b)(1) of the Bankruptcy Code, to sell certain of the Debtor's furniture, equipment, and other property (the "Sale Property") that is currently located at the Premises.

10. In the Sale Motion, the Trustee contemplates conducting an auction of the Sale Property at the Premises (the "Auction").

Agreement

11. The Parties have entered into the Agreement, which is attached to this Motion as Exhibit "A," and incorporated herein by reference.

12. The Trustee has agreed to move to reject the Office Lease.

13. Under the Agreement, upon rejection of the Office Lease, Colony Square has agreed to grant the Trustee a license to occupy and utilize the Premises to conduct the Auction. The Trustee has agreed to vacate the Premises within ten (10) business days of the completion of the Auction (the "Re-Delivery Date").

14. Colony Square has agreed to accept: (i) \$10,000 (the "Post-Petition Rent") and (ii) the Drawings in full and final satisfaction of any amounts due under the Office Lease for the Trustee's use of the Premises from the Petition Date through

the Re-Delivery Date (the “Post-Petition Period”). The Trustee shall pay Colony Square the \$10,000 portion of the Post-Petition Rent within five (5) business days of the Re-Delivery Date. The Trustee will deliver the Drawings to Colony Square at the Premises by no later than March 8, 2013.

15. Thus, according to the terms of the Agreement, Colony Square shall be excused from filing a motion or a request for payment of the Post-Petition Rent as an administrative expense. Colony Square is not releasing any claim against the Debtor, the Debtor’s estate, or the Trustee, other than claims arising under the Office Lease that accrued during the Post-Petition Period.

Relief Requested

A. Approval of the Agreement

16. By this Motion, the Trustee seeks entry of an order, pursuant to Rule 9019 of the Bankruptcy Rules, approving the terms of the Agreement, and authorizing the Trustee to consummate the Agreement.

17. Rule 9019(a) of the Bankruptcy Rules provides, in pertinent part, “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.”

18. The standard in the Eleventh Circuit for determining whether to approve a compromise or settlement pursuant to Rule 9019(a) was articulated in Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.), 898 F.2d 1544 (11th Cir. 1990):

When a bankruptcy court decides whether to approve or disapprove a proposed settlement, it must consider:

(a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Id. at 1549.

19. Under the standard set forth above, the Trustee believes the Court should grant this Motion and approve the Agreement. The approval of the Agreement will allow the Debtor's bankruptcy estate to maximize the value of the Sale Property, while limiting the administrative expenses of the Debtor's bankruptcy estate – by obtaining permission to utilize the Premises to conduct the Auction at what is effectively a significantly reduced rent. This will increase the likelihood that the Trustee can make a meaningful distribution to creditors. Absent the proposed settlement, the Debtor's bankruptcy estate would incur substantial administrative expenses if the Trustee sought to hold the Auction at the Premises or, in the alternative, was forced to relocate the Sale Property and hold the Auction at a location other than the Premises.

20. The Trustee asserts that the terms of the Agreement fall well within the range of reasonableness and will benefit the Debtor's bankruptcy estate, and therefore, respectfully requests that the Court approve the Agreement.

B. Rejection of the Office Lease

21. By this Motion, the Trustee also seeks entry of an order, pursuant to 11 U.S.C. § 365(a) and Rule 6006 of the Bankruptcy Rules, authorizing the Trustee to reject the Office Lease, including any amendments thereto.

22. Section 365(a) of the Bankruptcy Code provides, in pertinent part, that “the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.”

23. The Eleventh Circuit has noted that the only limitation on the decision of whether to assume or reject an executory contract or unexpired lease is “that it is subject to court approval. However, since courts review a trustee’s decision to assume or reject a contract under a traditional ‘business judgment’ standard, the scope of review in this area is narrow.” See In re Gardinier, Inc., 831 F.2d 974, 976 n.2 (11th Cir. 1987).

24. The Trustee has concluded that the rejection of the Office Lease (in conjunction with the approval of the Agreement) is in the best interest of the Debtor’s bankruptcy estate because it will provide the Trustee with authority to utilize the Premises to conduct the Auction post-rejection while allowing the Trustee to liquidate and minimize the administrative expenses of the Debtor’s bankruptcy estate. Given that the Debtor is no longer operating out of the Premises, the Trustee respectfully submits that that the Trustee’s request to reject the Office Lease clearly satisfies the business judgment standard set forth above.

Accordingly, the Trustee respectfully requests that the Court authorize and approve the rejection of the Office Lease.

WHEREFORE, having filed this Motion, the Trustee respectfully requests that the Court: (i) grant the Motion; (ii) approve the Agreement and authorize the Trustee to consummate the Agreement; (iii) approve and authorize the rejection of the Office Lease; and (iv) grant the Trustee such other and further relief as the Court deems just and proper.

Respectfully submitted,

ARNALL GOLDEN GREGORY LLP

/s/ Sean C. Kulka

Sean C. Kulka

State Bar No. 648919

171 17th Street, NW

Suite 2100

Atlanta, Georgia 30363-1031

(404) 873-8682

Email: sean.kulka@agg.com

Attorneys for Chapter 7 Trustee

EXHIBIT A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:) Chapter 7
)
JOVA/DANIELS/BUSBY, INC.,) Case No. 13-50728-JRS
)
Debtor.)
_____)

JOINT STIPULATION AND SETTLEMENT AGREEMENT

This Joint Stipulation and Settlement Agreement (the “Agreement”), dated as of March 1, 2013, is by and between S. Gregory Hays, as Chapter 7 Trustee for the estate of Jova/Daniels/Busby, Inc. (the “Trustee”), and TrizecHahn Colony Square GP LLC (“Colony Square”; together with the Trustee, the “Parties”).

WHEREAS, on January 14, 2013 (the “Petition Date”), Jova/Daniels/Busby, Inc. (the “Debtor”) filed a voluntary petition for relief under chapter 7 of title 11 of the United States Code (the “Bankruptcy Code”) commencing the above-styled bankruptcy case (the “Bankruptcy Case”); and

WHEREAS, on the Petition Date, the Trustee was appointed the Interim Trustee in the Bankruptcy Case; and

WHEREAS, on February 13, 2013, at the conclusion of the Debtor’s Section 341 meetings of creditors, the Trustee was appointed the permanent Chapter 7 Trustee in the Bankruptcy Case for the Debtor’s estate; and

WHEREAS, the Debtor was an architectural firm that operated out of the premises more commonly known as Suite 700 at 400 Colony Square, 1201 Peachtree

Street, N.E., Atlanta, Georgia 30361 (the “Premises”), as more particularly described in the Office Lease (as defined herein); and

WHEREAS, the Debtor leased the Premises from Colony Square pursuant to that certain Office Lease dated February 22, 2005, as amended by the First Amendment of Office Lease dated July 20, 2005, as amended by the Second Amendment of Office Lease dated June 25, 2012 (the “Office Lease”), which is attached to this Agreement as Exhibit “A”; and

WHEREAS, the Office Lease has not expired by its terms; and

WHEREAS, the Debtor is no longer operating as a going concern, and therefore, no longer needs to occupy or utilize the Premises other than to conduct the Auction (defined herein); and

WHEREAS, contemporaneous with the execution of this Agreement the Trustee is filing a motion seeking Court authority and approval to reject the Office Lease pursuant to Section 365(a) of the Bankruptcy Code; and

WHEREAS, contemporaneous with the execution of this Agreement the Trustee is filing a motion (the “Sale Motion”) seeking Court authority and approval to sell, pursuant to Section 363(b)(1) of the Bankruptcy Code, certain of the Debtor’s furniture, equipment, and other property (the “Sale Property”) that is currently located at the Premises; and

WHEREAS, pursuant to the Sale Motion the Trustee is proposing to conduct an auction of the Sale Property at the Premises (the “Auction”); and

WHEREAS, the Trustee is currently in possession of certain architectural

drawings and plans that the Debtor made related to the Colony Square complex located on Peachtree Street, N.E., Atlanta, Georgia 30361 (the "Drawings"); and

WHEREAS, the Trustee desires to retain possession of the Premises for the purpose of conducting the Auction while minimizing the bankruptcy estate's administrative expenses, and Colony Square would like to take possession of the Drawings, liquidate its administrative expense claim in the Bankruptcy Case, if any, and facilitate the Trustee vacating the Premises;

NOW, THEREFORE, the Trustee and Colony Square agree as follows:

1. This Agreement is subject to Court approval.
2. As set forth in the recitals, the Trustee will file a motion seeking Court authority and approval to reject the Office Lease pursuant to Section 365(a)(1) of the Bankruptcy Code.
3. Upon entry of a Court order approving the rejection of the Office Lease, Colony Square grants the Trustee a license to continue to occupy and utilize the Premises to conduct the Auction and to take any other actions necessary to conduct the Auction.
4. The Trustee agrees to vacate the Premises within ten (10) business days of the completion of the Auction (the "Re-Delivery Date").
5. Colony Square agrees to accept: (i) \$10,000 (the "Post-Petition Rent") and (ii) the Drawings in full and final satisfaction of any amounts due under the Office Lease for the Trustee's use of the Premises from the

Petition Date through the Re-Delivery Date (the "Post-Petition Period").

6. Colony Square forever releases the Debtor, the Debtor's estate, and the Trustee of any and all claims arising under the Office Lease that accrued during the Post-Petition Period. Colony Square is not releasing any claim that it may have under the Office Lease against the Debtor, the Debtor's estate, or the Trustee, other than claims arising under the Office Lease that accrued during the Post-Petition Period.
7. The Trustee will deliver the Drawings to Colony Square at the Premises by no later than March 8, 2013.
8. The Trustee shall pay Colony Square the \$10,000 portion of the Post-Petition Rent within five (5) business days of the Re-Delivery Date.
9. Colony Square shall be excused from filing a motion or a request for payment of the Post-Petition Rent as an administrative expense.
10. The Trustee and Colony Square each agree to take any and all actions and execute any other documents as may be reasonably required by the Trustee or Colony Square to effect the purposes and intent of this Agreement. In particular, the Trustee agrees to file with the Court a motion pursuant to Rule 9019 of the Federal Rules Bankruptcy Procedure and Section 365(a) of the Bankruptcy Code and all documents which may be necessary to obtain Court approval of this Agreement and to obtain Court authority and approval to reject the

Office Lease.

11. This Agreement may be executed in multiple counterparts and by facsimile signature, each of which shall be deemed as original, but all of which taken together shall constitute one and the same instrument.
12. The Parties to this Agreement each acknowledge and represent that they have been fully advised by their respective legal counsel of their rights and responsibilities under this Agreement, that they have read, know and understand completely the contents hereof, and that they have voluntarily executed the same. The Parties to this Agreement further hereby each acknowledge that they have had input into the drafting of this Agreement or, alternatively, have had an opportunity to have input into the drafting of this Agreement. Accordingly, in any construction to be made of this Agreement, it shall not be construed for or against any party, but rather shall be given a fair and reasonable interpretation, based on the plain language of the Agreement and the expressed intent of the Parties.
13. This Agreement contains the entire, final, complete, and exclusive agreement between the Trustee and Colony Square relating to the subject matter contained in this Agreement. There are no other representations, agreements, arrangements or understandings, oral or written, between the Trustee and Colony Square relating to the subject

matter contained in this Agreement, which are not fully expressed in this Agreement.

STIPULATED AND AGREED to this 1st day of March, 2013.

ARNALL GOLDEN GREGORY LLP

KITCHENS KELLEY GAYNES P.C.

By: /s/ Sean C. Kulka
Sean C. Kulka
Georgia State Bar No. 648919
171 17th Street N.W.
Suite 2100
Atlanta, Georgia 30363
(404) 873-8682
Sean.kulka@agg.com
Attorneys for Chapter 7 Trustee

By: /s/ Heather D. Brown
Heather D. Brown (signed with express
permission given on March 1, 2013)
Georgia State Bar No. 100169
3495 Piedmont Road, NE
Eleven Piedmont Center, Suite 900
Atlanta, GA 30305
404-237-4100
HBrown@kkgpc.com
Attorneys for Colony Square

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the following parties with a true and correct copy of the *Motion for Approval of Joint Stipulation and Settlement Agreement Between Trustee and Colony Square and Authority to Reject Unexpired Lease* by depositing same in the United States mail, postage prepaid, addressed to:

David A. Geiger
Geiger Law, LLC
Suite 525
1275 Peachtree Street, NE
Atlanta, GA 30309

Office of the United States Trustee
362 Richard Russell Building
75 Spring Street, SW
Atlanta, GA 30303

Heather D. Brown
3495 Piedmont Road, NE
Eleven Piedmont Center, Suite 900
Atlanta, GA 30305
404-237-4100

This 1st day of March, 2013.

/s/ Jonathan H. Azoff
Jonathan H. Azoff