

settlement between RTC and its secured creditors, including Leon Greenblatt, Chiplease, Inc. (Chiplease), and Scattered Corporation (Scattered), under which Scattered and Chiplease, or their designee, would obtain the right to seek to assume and assign the Landfill Contracts. The bankruptcy court set July 7, 2006 as the deadline for motions to assume and assign RTC's executory contracts, including the Landfill Contracts. On that date, RTC's trustee filed such a motion, seeking to assign the Landfill Contracts to IIT.¹

IIT is a trust established under Illinois law. Greenblatt served as trustee of IIT from its formation until shortly before trial in the bankruptcy court, when he was replaced by John Connolly. This change was made because it was anticipated that Connolly would run the business of IIT after it was assigned the Landfill Contracts. Connolly had extensive experience running gas-to-energy facilities at landfills as an employee of RTC. IIT, however, had never operated any sort of business. The beneficiaries of IIT were Chiplease and Scattered. Chiplease is owned by Greenblatt, and Scattered is owned by Greenblatt and Andrew Jahelka. Greenblatt and Jahelka were formerly the owners of RTC.

After the parties reached agreement on several aspects of the motion to assume and assign, including how to cure existing breaches of the Landfill Contracts, the only remaining disputed issue was whether IIT could provide adequate assurance, as

¹In the proceedings below, most of the key motions that form the basis for the current appeal were filed by RTC's trustee in conjunction with IIT. IIT, however, is the real party in interest to those motions. Those motions were filed at IIT's insistence, and it is IIT, through its counsel, that has pursued this litigation at every stage of the proceedings, from discovery through appeal. The parties and the bankruptcy court both recognized, on numerous occasions, the propriety of this arrangement.

required by section 365 of the Bankruptcy Code, of its future performance of the Landfill Contracts. The parties engaged in discovery on this issue and the matter was tried in the bankruptcy court on February 12-13, 2008.

Connolly, Greenblatt, and Jahelka all testified on behalf of IIT in an attempt to provide adequate assurance that IIT would perform its obligations under the Landfill Contracts in the future if they were assigned to it. Connolly, based on pro forma financial statements he had prepared for IIT, testified that IIT would require \$3 million of funding to bring the Landfill Contracts current and perform its future contractual obligations. At the time of trial, IIT had less than \$1,000 in cash, no financial statements, and no operating history. Accordingly, it was proposed that Chiplease and Scattered would loan the necessary \$3 million to IIT. Though Greenblatt and Jahelka testified that Chiplease and Scattered would loan the necessary funds, the documents introduced to support this contention only required IIT to repay funds it borrowed – they did not actually require Chiplease and Scattered to loan any money to IIT in the first place. Connolly admitted that he had not investigated whether Scattered and Chiplease had the ability to loan IIT \$3 million and stated he likely would not sue them in the event that they failed to fund IIT.

Greenblatt and Jahelka also testified regarding Chiplease's and Scattered's respective abilities to loan \$3 million to IIT. Though both testified regarding the assets of the entities, IIT offered no financial statements to corroborate their testimony. Chiplease's and Scattered's assets included very few liquid assets.

Allied and Peoria presented evidence of past regulatory violations by RTC and under Connolly's management in an effort to demonstrate that IIT was incapable of

performing the Landfill Contracts.

On February 13, 2008, the bankruptcy court made an oral ruling denying the motion to assign because it found that IIT had not carried its burden to provide adequate assurance of the future performance of the Landfill Contracts. The bankruptcy court's primary reason was the "multitudinous" evidence indicating that the \$3 million of required funding was not "sufficiently available." Mar. 5, 2008 Tr. at 4. This finding was based on a number of considerations: (1) the note for the loan between Chiplease, Scattered, and IIT did not actually require Chiplease and Scattered to loan any money to IIT; (2) Scattered and Chiplease, as the lenders to and beneficiaries of IIT, could remove Connolly as trustee at their leisure; (3) IIT had not shown that Scattered and Chiplease had the ability to provide IIT with \$3 million; (4) the loan agreement did not require IIT to use funds loaned to it for performance of the Landfill Contracts; and (5) Peoria and Allied had no meaningful way to enforce the Landfill Contracts because IIT, on the evidence presented, was a common law trust as opposed to a business trust.

In its oral ruling, the bankruptcy court noted actions that, if taken, might provide adequate assurance of future performance. IIT took these observations as an invitation to file its post-trial motion. The bankruptcy court made clear, however, that it would consider a wholly new arrangement for assignment of the Landfill Contracts only if such a request was timely. IIT filed a post-trial motion in which it proposed the formation of a new corporation that would be assigned the Landfill Contracts, as well as other changes to attempt to allay the bankruptcy court's concerns. The bankruptcy court denied the motion, finding that it was untimely.

Discussion

The Court has jurisdiction pursuant to 28 U.S.C. § 158(a), because denial of a motion to assume and assign a contract is a final, appealable order. *Chiplase, Inc. v. Steinberg (In re Resource Tech. Corp.)*, 528 F.3d 467, 474 (7th Cir. 2008). The bankruptcy court entered its order denying the motion to assume and assign the Landfill Contracts on February 19, 2008. Ten days later, RTC's trustee and IIT filed a post-trial motion. Though not entirely clear from its title, that motion was ostensibly filed pursuant to Federal Rules of Civil Procedure 59(a) and 59(e), as incorporated by Federal Rule of Bankruptcy Procedure 9023. The motion sought to present new evidence to the bankruptcy court and requested, among other things, modification of the order entered on February 19, 2008. Thus, though not expressly saying so, the post-trial motion included a request for a new trial as well as amendment of the bankruptcy court's judgment, thereby tolling the time for filing a notice of appeal. Fed. R. Bankr. P. 8002. The order denying IIT's post-trial motion was entered on March 11, 2008, and IIT timely filed a notice of appeal on March 20, 2008.

In general, the Court reviews the bankruptcy court's findings of fact for clear error and its conclusions of law, including its interpretation of the Bankruptcy Code, *de novo*. *In re Heartland Steel*, 389 F.3d 741, 743-44 (7th Cir. 2004). In this context, the Court acts as an appellate court and applies the same standards of review that are appropriate in other appellate decisions. *Green v. Mass. Cas. Ins. Co.*, 269 B.R. 782, 787 (N.D. Ill. 2001). The bankruptcy court's decision to deny the motion to amend the judgment or for a new trial is reviewed for abuse of discretion. *E.g., Kapelanski v.*

Johnson, 390 F.3d 525, 530 (7th Cir. 2004).

1. Standing

IIT challenges Allied's standing to participate in this litigation. IIT argues that Allied lacks standing because it never proved that it became the beneficiary of the Landfill Contracts. Thus, IIT argues, Allied should not have been heard by the bankruptcy court in opposition to the motion to assign the Landfill Contracts. Documentation reflecting whether Allied acquired an interest in the Landfill Contracts was not made part of the record in the bankruptcy court. IIT and RTC's trustee, however, recognized in several filings with the bankruptcy court that Allied had an interest in the Landfill Contracts. Thus, there is a basis in the record to support Allied's standing as a party to three of the four Landfill Contracts.

As Allied notes in its response brief, it never introduced documents evidencing its assumption of three of the Landfill Contracts because IIT and RTC's trustee never actually challenged its standing.² A party cannot waive or forfeit an Article III standing argument by failing to make it in the trial court. *See Kochert v. Greater Lafayette Health Serv., Inc.*, 463 F.3d 710, 714 (7th Cir. 2006). Standing under Article III requires an injury in fact and redressibility. *Id.* Allied contends, and several prior filings reflect, that it had an interest in the Landfill Contracts that would be impaired were those contracts assigned to IIT.

IIT's standing argument is more appropriately characterized as challenging whether Allied is the real party in interest. In other words, the question is whether

²The only time that IIT challenged Allied's standing was a passing, two-sentence reference to standing made during IIT's opening statement at the start of the trial.

Allied, or someone else affiliated with Allied, is the counter-party on three of the Landfill Contracts and, accordingly, the appropriate party to challenge their putative assignment. Unlike standing, a party-in-interest challenge can be forfeited if not raised in the trial court. See *Int'l Travelers Cheque Co. v. BankAmerica Corp.*, 660 F.2d 215, 224-25 (7th Cir. 1981).

Regardless, even if Allied lacked standing, there is no question that Peoria had it. The objections that Peoria raised in response to the motions in the bankruptcy court were the same as Allied's. Moreover, as detailed in this decision, it was IIT's burden to demonstrate adequate assurance of future performance of the Landfill Contracts. The bankruptcy court found that IIT failed to do so based on the evidence IIT itself offered.

2. Adequate assurance of future performance

a. Legal standard

Under the Bankruptcy Code, a trustee may assign a debtor's executory contract only if it has properly assumed the contract and provided "adequate assurance of future performance by the assignee of such contract. . . ." 11 U.S.C. § 365(f)(2). Though there are not many circuit-level decisions dealing with the issue of adequate assurance, the authorities cited by the parties indicate that there is no conflict regarding the proper test. "Adequate assurance of future performance" is intended to have "a practical, pragmatic construction." *In re Westview 74th Street Drug Corp.*, 59 B.R. 747, 754 (Bankr. S.D.N.Y. 1986) (quotation omitted). A movant seeking assignment of a contract does not need to guarantee that the contract will be performed; rather, it need only show by a preponderance of the evidence that future performance is likely. *Id.*; *In re*

Prime Motor Inns, Inc., 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994). The inquiry is fact specific and made on a case-by-case basis. *In re General Oil Distrib., Inc.*, 18 B.R. 654, 658 (Bankr. E.D.N.Y. 1982). Factors that courts have considered include financial data submitted by the debtor or movant, the presence of a guarantee (though it is not required), industry outlooks, the nature and relationship of the parties, past dealings of the parties, and the willingness of the parties to fund payments. *See generally In re Embers 86th Street, Inc.*, 184 B.R. 892, 902 (Bankr. S.D.N.Y. 1995); *In re General Oil Distrib., Inc.*, 18 B.R. at 658.

Reviewing the oral rulings by the bankruptcy court, it is apparent that the correct legal standard was applied. IIT contends that the bankruptcy court erred by, in effect, requiring a guarantee of performance, which IIT argues is more than section 365 of the Bankruptcy Code requires. That argument is not supported by the record. Rather, the bankruptcy court's questions and analysis demonstrate that it was not attempting to hold IIT to a higher standard. Rather, the bankruptcy court was not persuaded by IIT's evidence that IIT was likely to perform on the Landfill Contracts in the future. In reaching that conclusion, the bankruptcy court never stated or suggested that absolute assurance was required.

Moreover, one of the bankruptcy court's concerns was that the assignment of the Landfill Contracts, as proposed in the motion, might leave Allied and Peoria without an adequate remedy, or any remedy, in the event that IIT defaulted on its obligations. This reflects that the bankruptcy court was not requiring IIT to guarantee its future performance – it acknowledged that the Landfill Contracts might be breached in the future.

b. Evidence of adequate assurance

IIT next claims that the bankruptcy court erred when it determined that IIT had not satisfied its burden to provide adequate assurance it would perform the Landfill Contracts in the future. This argument also fails. The bankruptcy court found that IIT had virtually no assets of its own and was wholly dependent on Chiplease and Scattered for funding. Chiplease and Scattered, however, were not obligated to loan any money to IIT – they only expressed an intention to do so. Even if they had been obligated to loan \$3 million to IIT, Chiplease and Scattered, the beneficiaries of IIT, could have removed Connolly as trustee if he sued them for failure to provide the funds – something Connolly said he was unlikely to do. Moreover, IIT introduced scant evidence to show that Chiplease and Scattered actually had the ability to make the required loans to IIT, as most of their assets were illiquid, and it introduced no documentary evidence concerning those assets. On these facts, the bankruptcy court’s determination that IIT had failed to provide adequate assurance of its future performance of the Landfill Contracts was not clearly erroneous.

IIT cites a number of cases in which courts determined that adequate assurance of future performance had been provided. Those cases, however, are distinguishable. See *In re Prime Motor Inns, Inc.*, 166 B.R. at 996-97 (finding adequate assurance based on substantial capital investments); *In re The Casual Male Corp.*, 120 B.R. 256, 264-65 (Bankr. D. Mass. 1990) (finding adequate assurance based on six-month rent deposit, irrevocable letter of credit, financial statement showing considerable liquid assets, and extensive business experience of assignee’s CEO); *In re Westview 74th*

Street Drug Corp., 59 B.R. at 755 (finding adequate assurance based on two-month security deposit that would allow landlord to cover its losses); *In re Alipat, Inc.*, 36 B.R. 274, 277-78 (Bankr. E.D. Mo. 1984) (finding adequate assurance where irrevocable letter of credit was issued in favor of contractual counter-party and contract was guaranteed by third parties whose financial condition had not deteriorated); *In re Sapolin Paints, Inc.*, 5 B.R. 412, 416-17, 420 (Bankr. E.D.N.Y. 1980) (finding adequate assurance where economic conditions definitively demonstrated that assignee would perform on contract and assignee submitted statements showing positive net worth and income). In each of these cases, considerably stronger evidence concerning the adequacy of future performance was offered in support of a motion to assume and/or assign executory contracts.

Several additional cases that IIT cites involve facts somewhat closer to those in the current appeal. In one case, the court found adequate assurance of future performance, even though the party assuming the contracts was financed by a loan that was payable “on demand.” *In re Natco Indus., Inc.*, 54 B.R. 436, 441 (Bankr. S.D.N.Y. 1985). The debtor in that case, however, had a long history of performing on the contracts in question, and past defaults had been minor. *Id.* at 439-41. Another court found adequate assurance based on testimony reflecting an investor’s resources and willingness to fund a putative assignee. *In re Bygaph, Inc.*, 56 B.R. 596, 605 (Bankr. S.D.N.Y. 1986). Though these cases contain some facts closer to those in the current case than others on which IIT relies, this does not mean that the bankruptcy court’s ruling was clearly erroneous. Rather, the bankruptcy court considered all of the

evidence presented, noted the gaps in that evidence, and, based on all the circumstances, made a ruling that was well supported.³ As IIT's own authorities make clear, adequacy of future performance is a factually intensive inquiry that must be made on a case-by-case basis.

Courts have denied motions to assume and assign contracts based on facts similar to the current case. See, e.g., *In re Wash. Capital & Aviation Leasing*, 156 B.R. 167, 175 (Bankr. E.D. Va. 1993); *In re Embers 86th Street, Inc.*, 184 B.R. at 901-02. As detailed above, the bankruptcy court explained why, based on all of the evidence presented, IIT had not provided adequate assurance that it could perform the Landfill Contracts in the future. That conclusion is not clearly erroneous and is affirmed.

3. Motion to amend judgment or for new trial

There are two ways to construe IIT's post-trial motion. First, it can be seen as proposing an entirely new transaction with respect to the Landfill Contracts, as it sought to assign those contracts to an entity other than IIT. Considered that way, the bankruptcy court did not err in denying IIT's request because, as it found, the time to propose such a transaction had expired in 2006. Nor did the bankruptcy court authorize IIT's request to propose a new transaction; rather, the bankruptcy court stated only that it would consider such a transaction if timely requested. RTC's trustee and IIT moved

³IIT argues that the bankruptcy court erred by not accepting the "unrebutted" testimony of its witnesses as true. This argument is without merit. First, the veracity of IIT's witnesses' testimony and assumptions was tested on cross-examination. More importantly, the bankruptcy court did not reject the testimony of IIT's witnesses; rather, the bankruptcy court found that the evidence presented by IIT was insufficient to meet its burden on the issue of adequate assurance of future performance of the Landfill Contracts. As stated above, it was IIT's burden to provide adequate assurance of future performance – not Peoria and Allied's burden to rebut IIT's evidence.

the bankruptcy court for assignment of the Landfill Contracts to IIT in July 2006. The parties engaged in over a year of discovery, during which IIT had ample time to marshal the assets and expertise needed to assure the court that it could perform the obligations of those contracts in the future.

IIT's post-trial motion can also be viewed as a Rule 59(e) motion to amend judgment. "Altering or amending a judgment under Rule 59(e) is permissible when there is newly discovered evidence or there has been a manifest error of law or fact." *Harrington v. City of Chicago*, 433 F.3d 542, 546 (7th Cir. 2006). IIT argues that its post-trial motion offered additional evidence concerning a new corporate entity that would be assigned the Landfill Contracts and would perform them, as well as alterations to the manner of funding from Chiplease and Scattered. Under Rule 59(e), the newly discovered evidence must exist "at the time of trial." *Peacock v. Bd. of Sch. Comm'rs of Indianapolis*, 721 F.2d 210, 214 (7th Cir. 1983). The same is true for motions under Rule 60(b). *Id.* The evidence IIT offered in its post-trial motion did not exist at the time of trial; rather, it was created after and in reaction to the trial.

Conclusion

For the foregoing reasons, the Clerk is directed to enter judgment affirming the decision of the bankruptcy court.


MATTHEW F. KENNELLY
United States District Judge

Date: November 7, 2008