

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
 )  
SKX, INC., ) CASE NO. BK93-81224  
 )  
DEBTOR ) CH. 11  
 ) Filing No. 27

MEMORANDUM

Hearing was held on September 20, 1993, on a Motion for Relief from Automatic Stay filed by Stoughton Trailers, Inc. Appearing on behalf of debtor was James Stumpf of Harris, Feldman, Stumpf Law Offices, Omaha, Nebraska. Appearing on behalf of Stoughton Trailers, Inc., was Rick D. Lange of Rembolt, Ludke, Parker & Berger, Lincoln, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (G).

BACKGROUND

The debtor, SKX, Inc., filed a petition for Chapter 11 bankruptcy relief on July 28, 1993. A party in interest, Stoughton Trailers, Inc., requests that the Court grant Stoughton relief from the automatic stay.

On April 1, 1992, the debtor and Stoughton entered into a lease whereby the debtor leased twenty-five used semi-trailers from the lessor, Stoughton. The lease signed on April 1 was the fourth of a series of different leases entered into between the parties since October 22, 1990. The lease has been construed by the parties to be a true lease, and not a disguised financing arrangement and security interest. However, copies of the lease were filed with the Uniform Commercial Code division of Nebraska Secretary of State for the protection of the lessor.

Stoughton determined on July 1, 1993, that the debtor owed \$22,190.00 in lease payments which were more than thirty days overdue. In the event of nonpayment, the lease agreement stated:

If Lessee defaults in the payment of rent and such default continues for more than twenty (20) days,

. . . , Lessor, at its option may, by action or written notice to Lessee, declare this lease in default, and thereupon all equipment then subject to this lease, and all the rights of the Lessee therein shall be surrendered to Lessor and Lessor may take possession of the equipment wherever it may be found, and for that purpose may enter upon any property subject to the Lessee's control and possession. Lessor shall hold equipment so repossessed free and clear of this lease and of any rights of Lessee hereunder. In addition thereto, Lessor shall be entitled to recover from Lessee, as liquidated damages for breach of this lease and not as penalty: (a) the unpaid balance of the total rent due and to become due up through the normal expiration date of this lease. . .

Filing no. 27, attached Lease "Exhibit A", p. 6, paragraph 12.

On July 8, 1993, Stoughton informed the debtor by letter that it was exercising its rights under the lease to immediately terminate the lease, accelerate future rent payments and demand the return of all semi-trailers. In the letter, Stoughton also requested that the debtor contact Stoughton to make arrangements for the return of the semi-trailers. The debtor did not respond, but, instead, filed its bankruptcy petition and invoked the automatic stay.

Over the course of the lease, and a predecessor lease, prior to the default which is the subject of this motion, the debtor had been delinquent on a few payments. The debtor asserts that on three occasions--December 6, 1991, (which is prior to the current lease), October 20, 1992, and April 1, 1993,--Stoughton informed the debtor that the debtor was in default and exercised its right to accelerate the balance owed under the lease, demand immediate return of the semi-trailers, and demand immediate payment of all arrearage. At the hearing, the debtor submitted letters regarding two of these occasions, December 6, 1991, and October 20, 1992, to the Court. In the identical letters, Stoughton gave the debtor ten days to contact Stoughton with regard to the debtor's intentions, after which time the matter was to be referred to Stoughton's attorneys. After each of such notices, the debtor tendered the past-due amounts and continued to use the trailers in accordance with the lease terms.

The debtor argues in its resistance to the motion that Stoughton's prior letters and prior acceptance of late payments led the debtor to rely on the inference that late payments under the lease were permissible. According to the debtor, since it was not

notified that strict compliance with the terms of the lease was necessary, the debtor believed that the default that led to the letter from Stoughton dated July 8, 1993, was in the same course of conduct as the prior defaults and did not terminate the lease between the two parties.

Stoughton requests relief from the automatic stay on the basis that the July 8, 1993, letter terminated the lease between Stoughton and the debtor, and reverted all ownership rights in the property to Stoughton, not to the bankruptcy estate. In addition, the motion alleges Stoughton's interest in the semi-trailers is not being adequately protected by the debtor, the debtor has no equity in the semi-trailers, and the semi-trailers are not necessary for an effective reorganization because such reorganization is not feasible.

#### DECISION

The Court finds that the letter dated July 8, 1993, did effectively terminate the lease between the debtor and Stoughton Trailers, Inc. As a result of the termination, the lessor is entitled to relief from the automatic stay on the grounds that the leased property is not property of the debtor's estate.

#### DISCUSSION

##### A. Termination

The general rule for waiver of forfeiture rights under a lease agreement in Nebraska is that the leniency of a lessor in not insisting on prompt payment of the rent does not constitute a waiver of his rights to forfeit the lease for nonpayment. O'Connor v. Timmermann, 123 N.W. 443, 85 Neb. 422 (Neb. 1909). An exception to this rule arises when the lessor accepts irregular payments on a regular basis. Marine Equipment & Supply Co. v. Welsh, 196 N.W.2d 911, 188 Neb. 385 (Neb. 1972). These cases concern real property leases, but since there appear to be no Nebraska waiver cases that address personal property other than U.C.C. Article 9 cases, there seems to be no reason to have a separate, and different, waiver rule for real property and personal property leases in the absence of a statute.

Nebraska U.C.C. Section 2A dealing with leases supports pre-U.C.C. case law by stating that the express terms of a written lease control over course of dealing when the two are inconsistent. Neb. Rev. Stat. U.C.C. § 2A-207. Section 2A's scope applies to any transaction that creates a personal property lease. See Neb. Rev. Stat. U.C.C. § 2A-102.

Nebraska's rule concerning the waiver of forfeiture rights under lease agreements is similar to the rule under general contract law and similar to the result under Nebraska U.C.C. Article 9 decisions.

With regard to general contract law, the Nebraska Supreme Court defined "waiver" in Katskee v. Nevada Bob's Golf of Nebraska, Inc., 238 Neb. 654, 472 N.W.2d 372 (1991), where it held that "to establish waiver of a legal right, there must be clear, unequivocal, and decisive action by the party which demonstrates such purpose, or acts amounting to estoppel." Id. at 657, 376. With a written contract, the court held that "the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the party's intention to waive. Id.

Under Article 9 of the Nebraska U.C.C., the Nebraska Supreme Court holds that the express provisions of a contract will control over the course of dealing between two parties when there is a conflict between the agreement and the course of dealing. State Bank v. Scoular-Bishop Grain Co., 217 Neb. 379, 385, 349 N.W.2d 912 (1984). See also Neb. Rev. Stat. U.C.C. 1-205(4) (stating that express terms of a contract control course of dealing). However, Nebraska also recognizes that an implied waiver may arise when there is a voluntary, intentional relinquishment by the secured party of a known and existing right, or the conduct of the parties warrants an inference of a waiver of a contract right. Id. at 386; Lipe v. World Ins. Co., 142 Neb. 22, 27, 5 N.W.2d 95, 98 (1942). Determining whether the prior course of dealing created an implied agreement which waived the written agreement is a fact question. Five Points Bank v. Scholar-Bishop Grain Co., 217 Neb. 677, 350 N.W.2d 549 (1984).

Nebraska's Article 9 case law follows the general rule of looking for regularity in conduct constituting a waiver of the contract provision. Farmer's State Bank v. Farmland Foods, Inc., 225 Neb. 1, 402 N.W.2d (1987) (holding that there was a waiver of a contractual right when the secured party did not object or rebuke the debtor for previously selling collateral in over 130 instances without the approval of the secured party, as required in the written security agreement); Neu Cheese Co. v. FDIC, 825 F.2d 1270 (1987) (holding that a dissolved bank had for twenty years (or 700 occasions) waived the terms of the written agreement by not objecting or rebuking the debtor or for his conduct; therefore, FDIC could not assert terms of written agreement which had been waived); Matter of Selden, 58 B.R. 667 (Bankr. D. Neb. 1986) (holding that under Nebraska law, the bank waived its written contractual right to notice of the sale of collateral by failing to

object to the daily disposition of the collateral by the debtor).

In the debtor's Resistance, the debtor cited Cobb v. Midwest Recovery Bureau Co., 295 N.W.2d 232 (Minn. 1980), as authority for requiring Stoughton to provide notice that it would not permit future defaults to be cured, but would reserve the right to terminate the lease pursuant to its terms. In Cobb, an Article 9 case, the court held that because the debtor had paid every payment under the security agreement late without objection by the creditor, the creditor had to provide the debtor with notice of its intent to repossess or terminate the contract. However, like the Nebraska case Marine Equipment, supra, Cobb is an exception to the general rule stated in another Minnesota U.C.C. case -- Wabasso State Bank v. Caldwell Packing Co., 308 Minn. 349, 251 N.W.2d 321 (Minn. 1976) (holding when course of dealing is in conflict with the written agreement, the terms of the written agreement will prevail).

Under the analysis in these cases, Stoughton may enforce its rights to terminate the lease as provided in the lease agreement absent a showing by the debtor that the debtor relied on Stoughton's previous acceptance of late payments to mean that Stoughton intended to waive its forfeiture rights under the lease agreement. After reviewing the evidence presented by the parties, it is apparent that Stoughton did not waive its forfeiture rights under the contract, and the debtor could not have relied on these prior communications to expect that strict adherence to the lease agreement would not be required.

The debtor submitted two letters dated December 6, 1991, and October 20, 1992, that were sent by Stoughton to the debtor after two prior defaults. The Court will not consider the December 1, 1991, letter as proof of a course of dealing between the parties because that letter dealt with a default under a different lease, and the term of the prior lease is not in evidence.

In Marine Equipment, supra, the court noted that the evidence of accepting late payments was regular over the course of the agreement. Even if the Court was to presume that the prior lease was identical to the April 1, 1992, lease, the December and October letters (two incidents) do not set a pattern of regularity in accepting late payments. In the case law submitted by the debtor, Cobb, supra, the debtor was late with twenty out of twenty payments, to which the creditor did not object before the creditor asserted its forfeiture rights under the written agreement. Stoughton's acceptance of two late payments out of a possible fifteen payments under the April 1, 1992, lease and at a minimum five additional payments under the previous lease does not establish a basis upon which the debtor could have relied to think

that strict compliance with the lease agreement was not required. Stoughton's actions do not constitute a waiver of its contractual rights under Nebraska law.

The December 1 and October 20 letters purport to cancel the lease agreement; however, both letters also grant the debtor ten days to respond to the cancellation with the debtor's "intentions." Apparently, the debtor and Stoughton worked out an agreement to continue the lease. Stoughton's willingness to accept a late payment on one or two prior occasions is not such a variance from the written lease as to permit the inference of a waiver of the timely payment requirement in the lease. The lease itself provides that Lessor may act at its option once a payment becomes overdue for more than twenty days. Therefore, Stoughton's actions are not in conflict with the written default provision of the lease agreement and do not constitute a waiver of those rights.

On July 8, 1993, Stoughton declared that the debtor was in default under the lease and that the lease was terminated immediately. There was no provision in this letter which permitted the debtor to respond concerning its intentions. The letter was worded differently from the previous letters and terminated the lease with finality. Under the lease, the Lessor was entitled to declare the lease in default and terminate all of the Lessee's rights in the semi-trailers once the debtor failed to cure twenty days after the due date for the lease payment. Stoughton alleges in its Motion that the \$22,190.00 determined to be owed on July 1, 1993, was an amount which accumulated from failure by debtor to pay several months in a row. The July 8, 1993, letter was sent after the twenty-day cure period provided for in the lease and was a valid termination of the lease agreement. Stoughton demanded the immediate return of the twenty-four semi-trailers in the debtor's possession. The debtor did return six of the trailers; but the remaining semi-trailers remain in the debtor's possession.

The Court holds that Stoughton did terminate the lease agreement between the debtor and Stoughton in the letter dated July 8, 1993, as permitted under the lease agreement entered into between the debtor and Stoughton.

#### B. Automatic Stay

The debtor may not assume a lease that terminated pre-bankruptcy because there is nothing left for the debtor to assume under the Bankruptcy Code. Moody v. Amoco Oil Co., 734 F.2d 1200, 1202 (7th Cir. 1984), cert. denied, 469 U.S. 982, 105 S. Ct. 386 (1984). The Code at 11 U.S.C. § 365(a) only permits the trustee to assume an unexpired lease; therefore, in the case of a terminated lease, there is no interest for the bankruptcy estate to assume.

Kopelman v. Halvajian (In re Triangle Laboratories, Inc.), 663 F.2d 463, 467-68 (3d Cir. 1981); In re Scarsdale Tires, Inc., 47 B.R. 478, 480 (Bankr. S.D.N.Y. 1985). Since the lease was never the property of the estate, the automatic stay under 11 U.S.C. § 362(a) does not apply to the terminated lease. Scarsdale Tires, 47 B.R. at 480. Therefore, when a lease terminates as a matter of law prior to the bankruptcy filing, the lessor is entitled to relief from the automatic stay because there is no lease for the bankruptcy estate to assume and the debtor has no further right to possession. In re Masterworks, Inc., 94 B.R. 262, 268 (Bankr. D. Conn. 1988).

The lease was terminated prepetition. The lease is not property of the estate. Relief from the automatic stay is granted.

Separate journal entry to be entered.

DATED: October 6, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing  
[ ] Chapter 13 Trustee [ ] Chapter 12 Trustee [ ] U.S.Trustee

Movant is responsible for giving notice of this journal entry to any parties in interest not listed above.

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
SKX, INC.,	)	CASE NO. BK93-81224
	)	A
<u>DEBTOR(S)</u>	)	
	)	CH. 11
	)	Filing No. 27
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
	)	
	)	DATE: October 6, 1993
<u>Defendant(s)</u>	)	HEARING DATE: September
	)	20, 1993

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Relief from Automatic Stay filed by Stoughton Trailers, Inc.

APPEARANCES

James Stumpf, Attorney for debtor  
Rick D. Lange, Attorney for movant

IT IS ORDERED:

The lease was terminated prepetition. The lease is not property of the estate. Relief from the automatic stay is granted. See memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing  
[ ] Chapter 13 Trustee [ ] Chapter 12 Trustee [ ] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.