

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
 )  
 J. ROBERT SCOTT, d/b/a )  
 SCOTT'S PANCAKE SHOPPE, )  
 )  
 DEBTOR )  
 )  
 J. ROBERT SCOTT, Debtor and )  
 Debtor in Possession, )  
 )  
 Plaintiff )  
 )  
 vs. )  
 )  
 FIRST CENTRAL COMPANY, )  
 )  
 Defendant )

CASE NO. BK79-L-136

MEMORANDUM OPINION

Before me is the request by J. Robert Scott, the debtor and debtor in possession in this Chapter XI proceeding, for a preliminary injunction enjoining First Central Company from terminating a lease pursuant to which First Central Company is the lessor and J. Robert Scott is the lessee.

J. Robert Scott filed his petition under Chapter XI on March 28, 1979. As of that date, Mr. Scott who does business as Scott's Pancake Shoppe as a sole proprietor operated a restaurant and English pub type bar at 401 South 13th Street, Lincoln, Nebraska. Mr. Scott's business operation is conducted in a building owned by First Central Company, the defendant herein. This business operation is Mr. Scott's only place of business and only source of income. His business premises are leased from First Central Company.

As of the date of the filing of the Chapter XI proceeding, Mr. Scott was in arrears on rental payments in the approximate sum of \$19,000.00. By a letter dated May 2, 1979, from First Central Company and received by Mr. Scott shortly thereafter, First Central Company advised Mr. Scott that if the full amount of the arrearages was not paid within ten days, First Central Company would terminate its lease with Mr. Scott. As a result of that letter, Mr. Scott applied for and was granted a temporary restraining order and, by agreement of counsel, an evidentiary hearing was scheduled on the question of the preliminary injunction. That evidentiary hearing has now been held.

The evidence before me is that the rental due First Central Company for the period of time after the filing of the petition in this Chapter XI proceeding has been paid with the exception of one-half the May, 1979, rent which the evidence before me was that it would be paid yet during May. There is also evidence before me that Mr. Scott has made bi-monthly payments of his rent for the last one and one-half to two years. That evidence suggests that First Central Company has acquiesced in bi-monthly payments prior to the filing of this Chapter XI proceeding. The

evidence before me is that if this lease is terminated and Mr. Scott forced to leave the premises, there will be no possibility of any plan of arrangement with his other creditors. Mr. Scott's business operation apparently consists of sixteen full-time employees and fifty-four part-time employees.

The position of First Central Company is that the arrearages of Mr. Scott have caused First Central Company to be unable to meet its financial obligations on time and, as a result, a Mr. Enersen who is a majority stockholder of First Central Company has had to loan funds to the company to keep the corporation going. Apparently Mr. Enersen has loaned First Central Company approximately \$79,000.00. There is no evidence before me which discloses whether or not Mr. Enersen has taken a second mortgage on the land and building. Notwithstanding that evidence, there is evidence before me which suggests that the financial difficulties of First Central Company are not attributable solely to Mr. Scott. As previously noted, Mr. Scott is in arrears to the extent of approximately \$19,000.00. There is further evidence before me to disclose that the building in which Mr. Scott's business operation is located was only recently fully rented. The disparity between the \$19,000.00 which Mr. Scott owes to First Central Company and the \$79,000.00 which Mr. Enersen has infused into the corporation when coupled with the lack of full occupancy suggests that the defendant's financial difficulties are not solely attributable to Mr. Scott.

In addition, evidence before me suggests that the value of the land and building owned by First Central Company in which Mr. Scott's business operation functions is somewhere between \$500,000.00 to \$535,000.00. Against this is a \$170,000.00 first mortgage owed by First Central Company plus approximately \$24,000.00 to \$26,000.00 owed on a land contract on what is described as the parking lot. As previously noted, it is impossible to tell from the evidence whether Mr. Enersen holds a second mortgage for the money which he has loaned to the defendant. In any event, there appears to be significant equity over the obligations on the land and building.

I have little doubt that Mr. Scott's failure to pay rent pre-petition has caused a hardship on First Central Company. Nevertheless, to that extent First Central Company is in no different position than any of the other creditors of Mr. Scott. All have suffered a hardship. However, to permit First Central Company the privilege of terminating the lease will cause a failure of any possible plan of arrangement to the specific detriment of the other creditors.

In addition, First Central Company suggests that having Mr. Scott in the premises with the possible failure to pay rent detracts from the potential sale price of the land and building. However, there is evidence before me which suggests that Mr. Scott will be able to pay post-petition rent obligations. Until there is specific evidence that Mr. Scott is unable to pay post-petition rent obligations, at this stage of the proceedings this Court must discount that argument by First Central Company.

There is respected authority for the proposition that a bankruptcy court has authority and power to enjoin a lease termination or to preclude the enforcement of a lease termination clause. See Queen's Blvd. Wine & Liquor vs. Blum, 503 F.2d 202 (2d Cir. 1974).

Mr. Scott suggests that First Central Company has waived any pre-petition breach of failure to pay rentals by accepting post-petition rental payments. In my view, this preliminary injunction hearing is not an appropriate time to make a conclusive finding that a waiver has taken place. Nevertheless, one of the considerations in arriving at a decision to issue a preliminary injunction is the probability of success on the merits at any final trial on the merits. Accordingly, I will be content at this point with the observation that there may well have been a waiver of pre-petition breaches by post-petition acceptance of rents. I make it clear that I do not make that observation with any degree of finality.

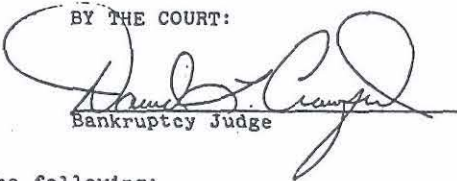
Balancing the equities, in view of the fact that this Chapter XI proceeding is in the beginning stages only and that Mr. Scott appears to be capable of making post-petition rental payments at least during the months in which they are due, it appears that no further prejudice to First Central Company will occur. However, serious harm will occur to Mr. Scott and the other creditors if the business operation is terminated at this point. Accordingly, this Court's conclusion is that the preliminary injunction should issue until further order. If additional harm can be shown by First Central Company by way of failure to make rental payments post petition or in some other manner, First Central Company may file an adversary proceeding with this Court for relief from the stay which will be entered by separate order. That, it seems to me, is the most appropriate way to approach this problem in fairness to both parties.

I should add that Mr. Scott takes the position that Paragraph 10 of the lease which speaks of the possibility of termination at the option of the lessor upon a bankruptcy occurring is, to a certain extent, ambiguous. Whether that lease provision refers to bankruptcy in the liquidation sense as opposed to a rehabilitation proceeding pursuant to Chapter XI where liquidation is not the goal is somewhat ambiguous. As the debtor points out, other courts have resolved such ambiguities in favor of the lessee and against the lessor.

A separate order is entered in accordance with the foregoing.

DATED: May 31, 1979.

BY THE COURT:

  
Bankruptcy Judge

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