

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)

JERRY R. KNIGHT,)

BANKRUPT)

CASE NO. BK78-0-1336

MEMORANDUM AND ORDER

Before me is the motion of claimant Melvin Simon & Associates, Inc., which seeks an order granting it possession of certain premises for which it is the lessor, an order directing the trustee to remove property from the premises, for an order forbidding any liquidation sale on the premises and for related relief.

On October 27, 1978, the bankrupt filed his voluntary petition in this proceeding. At the first meeting of creditors, Kenneth Shreves was appointed trustee in bankruptcy. On January 17, 1979, the trustee applied for authority to enter into a contract for the sale of certain property, which contract called for a third party to conduct a sale of the stock of merchandise of the bankrupt located at the premises now under discussion. The trustee sought authority to conduct a liquidation sale of the merchandise from a period from January 15, 1979, to a date of not more than seven weeks thereafter. The application was approved by this Court by an order dated January 17, 1979.

On January 19, 1979, Melvin Simon & Associates, Inc., filed the motion which is presently pending. Hearing has been held at which the movant presented no evidence and the hearing was conducted upon the oral argument of counsel.

The motion discloses that the bankrupt was in possession of the leased premises at the time of his voluntary petition.

Bankruptcy Rule 607, which supersedes the first four sentences of §70b of the Act, requires that the trustee affirmatively assume a contract within sixty days after qualification of the trustee and, if he fails to do so, the executory contract will be deemed rejected. There is no such assumption by the trustee in this case and, accordingly, I conclude that the lease has been rejected by the trustee. As a result, provisions of the lease between the movant and the bankrupt which prohibits the conduct of liquidation or going out of business sales are not binding on the trustee. In addition, even if the lease is deemed terminated by the lessor, it is well settled that:

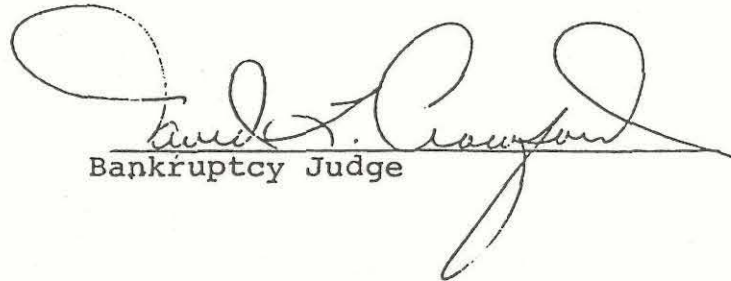
". . . a trustee may continue to occupy the premises for a reasonable period, sufficient to enable him to remove the bankrupt's property or sell the same." Schultz v. England, 106 F.2d 764 (9th Cir. 1939).

The Court's conclusion is that the period of time estimated by the trustee for the sale of the property is not unreasonable. Of course, the trustee is liable for the value of the use and occupancy of the premises during the period of his actual presence. That matter may be reserved for later determination. In accordance with the foregoing, it is

ORDERED that the motion filed herein by Melvin Simon & Associates, Inc., be, and the same hereby is, denied.

DATED: January 22, 1979.

BY THE COURT:


Bankruptcy Judge

Copies mailed to each of the following:

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