UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HOTEL SYRACUSE, INC. — CASE NO. 90-02921

Debtor — Chapter 11

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court considers herein the motion of the City of Syracuse Industrial Development Agency ("SIDA") for an order directing the Hotel Syracuse,

Inc. ("Debtor") to immediately surrender the premises commonly known as the Hotels at Syracuse Square ("Hotel Syracuse").

The motion, which was made returnable at a motion term of this Court held in Syracuse, New York on March 3l, l992 and was thereafter adjourned from time to time upon consent of the parties, and was finally scheduled for argument by the Court at Utica, New York on June l6, l992.

At the argument of the motion, the Debtor appeared in opposition. Also appearing, but without opposing papers, were Manufacturers Hanover Trust Company ("MHTC"), the Official Creditors' Committee ("Committee"), City of Syracuse ("City") and the United States Trustee ("UST"). Apple Bank for Savings ("Apple"), filed written opposition to the motion but did not appear at oral argument.

The Court gave all parties until June 23, l992 to submit memoranda of law. Only the Debtor and SIDA have since filed memoranda.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this motion pursuant to 28 U.S.C. §§1334(b) and l57(a), (b)(l), (2)(M) and (O).

FACTS

Much of the factual background involved in this motion has been previously set forth in the Memorandum-Decision, Findings of Fact, Conclusions of Law and Order of this Court dated August 8, l99l ("August 8, l99l Order"), and the Order of this Court dated November 27, l99l ("November 27, l99l Order"), as well as the Memorandum-Decision and Order of the United States District Court (Munson, Senior D.J.) dated November 4, l99l ("November 4, l99l Order"), and it will not be reiterated herein. Since the date of the November 27, l99l Order, however, the Court needs to visit a factual chronology of occurrences in this case.

On or about December 6, l99l, the Debtor and its primary secured creditor, MHTC, entered into a so-called "Standstill Agreement" pursuant to which both parties agreed to adjourn for several months all litigation between

themselves in an apparent effort to bring about a refinancing of the MHTC's secured debt with a view toward formulating an acceptable plan of reorganization.

On or about December 6, l99l, Debtor filed a Notice of Appeal of the November 4, l99l Order and thereafter SIDA moved to dismiss the Notice of Appeal.

Based upon Debtor's representations that it was making progress toward a consensual plan of reorganization, Debtor and SIDA entered into a stipulation to withdraw the Appeal without prejudice until February 6, l992. The parties thereafter extended the time to reinstate the Appeal until March 24, l992.[1]

In consideration of the stipulation, SIDA and the Debtor apparently agreed to a payment schedule which differed from that set forth in this Court's November 27, l99l Order. Debtor did make a payment to SIDA on January 6, l992 in the sum of $78,750 in accordance with the November 27, l99l Order. Thereafter, the Debtor paid SIDA $l0,000 on or about February 3, l992, $l2,500 on or about March 2, l992 and $l2,500 on or about March 9, l992. Debtor, however, failed to pay an agreed upon installment of $l2l,000 due on March l8, l992 and has made no further payments to SIDA in accordance with either the November 27, l99l Order or the parties' subsequent stipulations.

On March 20, l992, SIDA filed the within motion seeking an order of immediate surrender of the Hotel Syracuse by the Debtor due to the Debtor's failure to comply with the November 27, l99l Order. Neither MHTC nor Apple have indicated their consent to the Debtor's eviction from the Hotel Syracuse.

ARGUMENTS

The Debtor makes several arguments in response to the motion, not the least of which is that SIDA cannot seek its eviction from the Hotel Syracuse property unless the holders of the first and second mortgages, MHTC and Apple, give their consent. Debtor relies upon documents referred to as a conditional assignment of rents and leases for its consent argument. Debtor further asserts

[1] The Court has not been furnished with a copy of the stipulation, but accepts SIDA's characterization of its contents.

in this regard that it only recently learned, through discovery, that SIDA acknowledged in letters written by its attorneys in February and July l990, that it could not seek an eviction of the Debtor absent the consents of MHTC and Howard Curd, Apple's predecessor in interest, even though SIDA took a contrary position in a pre-petition state court eviction proceeding.

Debtor also contends, as it has since the inception of this Chapter 11 case, that the alleged lease between itself and SIDA is not in fact a lease, but rather is a financing transaction not subject to §365(d) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code").

Additionally, the Debtor argues the obvious; that if it is evicted from the Hotel Syracuse facility, its ability to reorganize will vanish.

Finally, in its memorandum of law, the Debtor postures two additional arguments, first that eviction is not the appropriate relief for its failure to comply with this Court's November 27, l99l Order and SIDA's forbearance of its right to payment under that Order vitiated the Order and SIDA cannot now seek to enforce it.

SIDA contends that the Debtor is foreclosed from making the "lack of consent" argument because it made the same argument in state court in support of a so-called "Yellowstone Injunction", and the state court rejected it. SIDA further asserts that the Debtor was well aware of the letters from its attorneys regarding the need for consent from MHTC and Apple at the time of the state court proceeding, and in fact, Debtor used the letters in that proceeding. Nevertheless the state court held in favor of SIDA.

SIDA denies that it has modified this Court's November 27, l99l Order contending that it simply delayed its right to enforce the Order. It further disputes Debtor's contention that the appropriate remedy for its failure to make timely payments is loss of the right to extend the time to assume or reject the lease. SIDA refers the Court to its broad powers under Code §105(a) and argues that the payments set forth in the November 27, l99l Order were a quid pro quo for Debtor remaining in possession of the property.

Finally, SIDA opines that though the so-called "lease v. no lease" adversary proceeding is not ready for trial, it is ripe for a summary judgment

motion, which it would be willing to file within two weeks.[2]

Apple, as an alleged second mortgagee, has asserted by way of its written statement in opposition to the motion, that it has not consented to the termination of the "lease on the Debtor's property." In addition, at the oral argument of this motion MHTC, by its attorneys, Menter, Rudin & Trivelpiece, P.C., Peter L. Hubbard, Esq., of counsel, asserted its lack of consent to a termination of the lease.

DISCUSSION

While the instant contested matter was commenced by a motion made within the Chapter ll case, it appears that it more properly should have been made within the adversary proceeding entitled "Hotel Syracuse, Inc., Plaintiff vs. City of Syracuse Industrial Development Agency, Manufacturers Hanover Company/Central New York, Apple Bank for Savings and Syracuse Economic Development Corp., Defendants, Adv. Pro. No. 9l-60l66A" (the so-called "lease v. no lease" adversary proceeding). Since the prior orders of this Court as well as the District Court, referred to in the motion papers, were entered in that adversary proceeding.

This Court's August 8, l99l Order, which was appealed to the District Court, disposed of Debtor's motion seeking an order extending its time to assume or reject an agreement entered into between the Debtor's assignor, Ho-Syr Properties and SIDA, in May of l99l entitled "Lease Agreement".

Debtor's motion, as indicated, was made within the context of the "lease v. no lease" adversary proceeding and implicated Code §365(d)(3) and (d)(4). The Court concluded that while the Debtor could obtain extensions of time to assume or reject the Lease Agreement if it proved to be a true lease, it could not gain such an extension beyond sixty days from the date of filing to meet its obligations under the alleged Lease. The Court thus directed the Debtor

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[2] The Debtor contends that it sought to bring a motion for summary judgment in November l99l by an order to show cause, and this Court refused to sign the necessary order. Debtor has indicated its desire to once again bring such a motion before the Court.

to make certain payments in compliance with Code §365(d)(3) as a condition to a further extension of time to assume the lease, if it was ultimately determined to be a lease. The District Court affirmed, but remanded the matter to this Court to revise the payment schedule since the original payment schedule set forth in the August 8, l99l Order had become moot during the pendency of the appeal. This Court's November 27, l99l Order was entered in response to the District Court's remand.

There is no real dispute between the Debtor and SIDA as to what occurred between November 27, l99l and March 20, l992, the date on which SIDA filed the instant motion.

The Debtor appears to focus on the lack of consent of the mortgagees to a termination of the lease by eviction as its primary defense to the relief sought by SIDA. It makes accusations of wrongful and misleading conduct on the part of SIDA and its counsel in the state court proceeding in which the Debtor sought and failed to obtain the so-called "Yellowstone Injunction."

Debtor insists that the state court judge did not rule on the consent to eviction argument asserted by it, but rather indicated that that issue would be left for litigation elsewhere. In an ancillary argument, Debtor contends that SIDA intentionally withheld letters authored by its counsel in which there was an admission that SIDA needed the consent of both MHTC and Apple to evict the Debtor.

The Court, however, has reviewed both the state court judgment, as well as the transcript of an oral argument on Debtor's motion for the "Yellowstone Injunction" and cannot reach the same conclusion as the Debtor.[3]

At page 3 of the transcript, the state court judge concludes

> [t]he Court finds that the Hotel cannot allege as a defense to SIDA's actions, the failure to receive consent from the mortgagees, Manufacturers Hanover Trust and CURD pursuant to the Conditional Assignment of Rents and Leases dated May 2, l98l. The possible breach of the Conditional Assignment by SIDA is a matter between Manufacturers Hanover Trust or CURD and SIDA.

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[3] Order and Judgment entered by the Hon. Norman A. Mordue, Justice of the New York State Supreme Court, dated September 28, l990, attached to Debtor's Sur-Reply as Exhibit A, and the transcript of oral argument of Debtor's motion for a "Yellowstone Inunction" before Judge Mordue on September 25, l990, attached to Debtor's Sur-Reply as Exhibit B.

At page 3, paragraph C of the Order and Judgment it is stated

> (c) Plaintiff cannot allege as a defense to SIDA's action to remove plaintiff from the Hotels at Syracuse Square that SIDA has failed to receive consent from the mortgagees, Manufacturers Hanover Trust and Howard Curd, under the Conditional Assignments of Rents and Leases dated May 2, l98l, and December l5, l983.

The Debtor contends that the forgoing findings of the state court cannot be given collateral estoppel (issue preclusion) effect primarily because the plaintiff in the state court proceeding (Hotel Syracuse, Inc.) was not the Debtor, that the Debtor is a distinct and separate legal entity which did not have the opportunity to fully litigate the "consent" issue in state court.

Neither party disputes the requirements of collateral estoppel, that the issues in both proceedings are identical, that the issue in the prior proceeding was actually litigated and decided, that there was a full and fair opportunity to litigate in a prior proceeding and that the issue previously litigated was necessary to support a valid and final judgment. See In re PCH Associates, 949 F.2d 585, 593 (2d Cir.l99l); Lane v. Peterson, 899 F.2d 737, 74l (8th Cir. l990).

It is also clear that if the party against whom collateral estoppel is asserted was not a party to the prior litigation, that party is not bound by the decision of the other court. See Pepper v. Litton, 308 U.S. 205, 60 S.Ct. 238, 84 L.Ed. 28l (l939).

This latter argument appears to be the basis for Debtor's contention that it can raise anew the lack of consent argument which was squarely before the state court in the proceeding which sought the "Yellowstone Injunction."

There appears to be some support for Debtor's argument where it can be shown that the issues upon which re-litigation sought to be precluded could not have been raised in a non-bankruptcy forum, such as resolution of pre-petition claims against the bankruptcy estate. See In re Comstock Financial Services, Inc., lll B.R. 849, 859 (Bankr. C.D.Cal. l990).

Likewise, where a trustee could have been, but was not, made a party to a state court action which was commenced post-petition, following a lifting of the automatic stay by the bankruptcy court, the trustee will not be bound by the findings of the court in that action. See In re Russell, l09 B.R. 359, 36l

(Bankr. W.D.Ark. l989).

None of the cases cited by Debtor, however, invoke the "new entity" theory from a collateral estoppel perspective, and the Court must be mindful of the language of the Second Circuit in Kelleran v. Andrijevic, 825 F.2d 692, 695 (2d Cir. l987), which provided that "[b]ankruptcy proceedings may not be used to re-litigate issues already resolved in a court of competent jurisdiction."

The Debtor might, however, take some refuge in the dissenting opinion of District Judge Blumenfeld in Kelleran:

> Given the broad equitable powers of the bankruptcy court, the majority is overly strict in its view of the grounds for collateral attack on a prior state court judgment in bankruptcy court. In its view, a prior state court judgment must be treated as res judicata unless the judgment is procured through 'fraud or collusion' or the issuing court lacked jurisdiction ... However, the very structure of the bankruptcy laws, as well as the breadth of the bankruptcy court's equity power to do justice and avoid substantial unfairness in allowing or disallowing claims, supports the view that the bankruptcy court was within its power in disallowing these claims, and that these two types of exceptions are not exclusive.

Id. at 697.

The Court concludes, however, that it need not answer the question of whether or not the Debtor is precluded from again raising the lack of the mortgagees' consent by virtue of the doctrine of collateral estoppel since it does not believe that eviction is the appropriate relief to be granted to SIDA herein.

This Court's August 8, l99l Order was entered upon the Debtor's motion to extend the time to assume or reject the so-called "Lease" until thirty days after entry of a final judgment in the "lease v. no lease" adversary proceeding.

In essence, this Court concluded that pursuant to Code §365(d)(3) it could not extend the Debtor's time to comply with its obligations under the alleged "Lease" beyond sixty days from the date of filing, even though it could extend its time to assume or reject the Lease for cause well beyond the initial sixty-day period. See Code §365(d)(4).

For that reason,the Court imposed a payment schedule on the Debtor as a condition or a consideration for the "30 days after entry of a final judgment" extension of time to assume or reject the "Lease" in accordance with

Code §365(d)(3).

The Court did not suggest nor order eviction of the Debtor from the property as a consequence of Debtor's failure to make payment in accordance with the payment schedule in August l99l, nor will it impose such a consequence now.[4]

The Debtor's failure to make payments to SIDA in accordance with this Court's August 8, l99l Order does not allow it to escape unscathed however. Rather than evicting, the Court believes that Debtor has forfeited its right to extend the time to assume or reject the "Lease" for a period of thirty days beyond final judgment in the "lease v. no lease" adversary proceeding. Should this Court ultimately conclude that in fact the relationship between SIDA and the Debtor is one of lessor/lessee, Debtor's right to assume that "Lease" will have expired prior thereto by operation of law. See Code §365(d)(4).

In reaching this conclusion, the Court rejects Debtor's contention that this Court's Orders of August 8, l99l and November 27, l99l have been vitiated by SIDA's forbearance in enforcing its right to payment thereunder, particularly where that forbearance was mutually agreed upon pending Debtor's ongoing negotiations with MHTC that focused on the filing of a consensual plan of reorganization.

While the Court believes that the "lease v. no lease" adversary proceeding needs to be resolved on the merits, both parties appear to be unprepared for an immediate trial, despite the fact that the adversary proceeding seeking a declaration as to the nature of the "Lease" was filed on July 3, l99l.

Both SIDA and the Debtor have represented to the Court, however, that the adversary proceeding might well be disposed of on a motion for summary judgment, and in fact, Debtor previously sought to bring on such a motion by order to show cause in November l99l. The Court, however, declined to entertain such a motion at that time. It appears that the appropriate time has now come.

Based upon the foregoing, it is

ORDERED, that SIDA's motion seeking Debtor's immediate surrender of the properties known as the Hotels at Syracuse Square is denied; and it is

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[4] The Court perceives nothing in the Order of the District Court dated November 4, l99l which affirmed and remanded the matter to this Court which leads to a different conclusion.

further

ORDERED, that by virtue of Debtor's having failed to comply with this Court's Orders of August 8, l99l and November 27, l99l, Debtor's right to extend its time to assume or reject the so-called "Lease" with SIDA is terminated effective March l8, l992; and it is finally

ORDERED, that the Debtor shall timely file and serve a motion for summary judgment pursuant to Federal Rules of Bankruptcy Procedure 7056 and Federal Rules of Civil Procedure 56 in Adversary Proceeding 9l-60l66A, which motion shall be made returnable before this Court at the U.S. Courthouse, Syracuse, New York on August ll, l992 at l0 a.m.

Dated at Utica, New York
this day of July, l992

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STEPHEN D. GERLING
U.S. Bankruptcy Judge