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EFFECT ON LEASE OF BANKRUPTCY OF TENANT

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IN time of prosperous business activity the desire to obtain a solvent tenant and the hurried scramble for a profitable location seems to preclude, to a large extent, consideration by both landlord and tenant of terms and obligations of a lease except as to duration of the term and amount of monthly rental. This day of economic difficulties, however, has proved that it is a wise landlord who knows his own lease and a prudent tenant who consults his lawyer in its preparation.

The decisions of our courts make it plain that much of the commonly accepted information, especially among laymen, concerning obligations and liabilities under leases, is erroneous. To call attention to a few of these liabilities and obligations in case of bankruptcy of the tenant is the purpose of this paper.

If there is no provision in a lease regarding bankruptcy of the tenant, by that contingency itself the lease passes by operation of law to the trustee in bankruptcy subject to his right to reject it, and he must within a reasonable time after his appointment elect to accept or reject it. In event of election to accept the lease, title thereto relates back to date of adjudication, but in event of rejection, as most often proves the case, the lease remains the property of the tenant, and *the tenant, notwithstanding his adjudication nor even his discharge, remains liable to the landlord for the obligations and claims not provable against the bankrupt estate.*

Rents, taxes and insurance due the landlord under the lease at the time of the filing of the petition in bankruptcy are claims provable against the bankrupt estate, but sums not due are not provable and the tenant is not discharged for rent and other obligations accruing subsequent to the filing of the petition.

Judge Sanborn of the United States Circuit Court of Appeals, in the case of *Watson v. Merrill,* 69 L. R. A. 719 (136 Fed. 273) says:

"One agrees to pay monthly rents . . . for his place of business . . . he becomes insolvent and is adjudicated a bankrupt. His obligations and

liabilities are neither terminated nor released by the adjudication. He still remains legally bound to pay the rent . . . notwithstanding the fact that his insolvency may render him unable immediately to do so."

The landlord, however, may dispossess the tenant for non-payment of rent, but he cannot dispossess the receiver or trustee who is entitled to remain in possession of the premises for a reasonable time and the bankrupt estate is liable for the reasonable value for the use and occupation thereof during such time. This reasonable value, as a matter of practice, is usually fixed by the rent which the tenant agreed to pay. If the bankrupt has paid rent in advance of the date of his adjudication, the receiver or trustee is not liable for rent during the time for which the bankrupt has paid in advance. As often happens, where a deposit has been made by the tenant to secure the performance of a lease, the receiver or trustee cannot set off rent of the premises which he occupies where the tenant is liable for any deficiency until termination of the lease, the landlord being entitled to hold tenant's deposit if the lease so provides notwithstanding bankruptcy. But where the lease provides for its termination at the option of the landlord, upon filing petition in bankruptcy, and the landlord takes possession of the premises and terminates the tenancy the trustee may offset rent due at the time of filing the petition and also for use and occupancy by the trustee. Landlords have often attempted, by provision in the lease, to reach the entire deposit made under the lease as liquidated damages or to make all future instalments of rent, in case of bankruptcy, at once due and payable but courts have not much aided such attempts.

A case in point well illustrating this attitude is *In Re Scholtz-Mutual Drug Co.,* 298 Fed. 540, wherein the lease provided termination in case of bankruptcy and "upon such termination all future instalments of rent unpaid . . . shall at once become due and payable." This clause the court held a penalty against which a court of equity should give relief.

Again in *Kothe v. Taylor Trust,* 280 U. S. 224, a lease providing termination upon filing of petition in bankruptcy and that "the lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term thereof", the court considering the time

which the lease had yet to run (2 years) held to enforce such a provision was to defeat the purpose of the Bankruptcy Act.

Even where the lease becomes terminable on the bankruptcy of tenant it is not terminated without an entry by landlord for the purpose of repossession. If the lease is executed by several tenants the bankruptcy of one does not breach the lease, and in case a third party guarantees the lease the filing of a petition in bankruptcy against the tenant does not discharge such guarantor.

CHANGES IN COURT RULES*

RULE XXI

BILLS OF EXCEPTIONS

SECTION 1. A bill of exceptions may be tendered to the judge or clerk; if to the clerk he shall note thereon the tender and without delay lay it before the judge. The judge shall then and there fix a time, to follow notice by the clerk of the tender, within which the opponent may file written objections to the bill, and if none is filed within that time he shall settle and sign it. If such objection is filed the exceptor shall be immediately notified and the objection shall be heard and the bill settled and signed with all convenient speed. (Same as Rule 10, Supreme Court.) Unless otherwise ordered by the court the opponent shall have fourteen days after date of notice of lodgment within which to file written objections to the bill.

SECTION 2. The time ordered for the filing of objections may be extended upon good cause shown, after notice to the opposite party, provided application is made therefor within the period of time allowed.

SECTION 3. Bills of exception shall not be removed from the office of the clerk without order of court upon notice to the opponent.

(Sec. 4 omitted because covered by Supreme Court rule in Section 1.)

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*The foregoing was adopted by Judges of the District Court of Denver at the opening of the September Term of Court.