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NOTES

PROVABILITY OF LANDLORDS' CLAIMS IN BANKRUPTCY

Prior to the amendment of § 63a of the Bankruptcy Act[1] only claims for rent that had accrued prior to the filing of the petition in bankruptcy were provable. The requirement of § 103a (1926) that to be provable a claim must be a "fixed liability . . . . absolutely owing at the time of the filing of the petition" was construed to exclude claims for unaccrued rent.[2] To reach this result reliance was placed on the notion that the landlord had no present claim for rent,[3] since "rent issues from the land, is not due until the rent day, and is due in respect

[1] 48 Stat. 923 (1934), 11 U.S.C.A., § 103a (7) (1934 Supp.).

[2] Manhattan Properties, Inc. v. Irving Trust Co., 291 U.S. 320 (1934); Watson v. Merrill, 136 Fed. 359 (C.C.A. 8th 1905); In re Roth & Appel, 181 Fed. 667 (C.C.A. 2d 1910); Orr v. Neilly, 67 F. (2d) 423 (C.C.A. 5th 1933), *cert.* denied 291 U.S. 679 (1933). *Contra*, In re Chakos, 24 F. (2d) 482 (C.C.A. 7th 1928).

[3] Manhattan Properties, Inc. v. Irving Trust Co., 291 U.S. 320 (1934); In re Arnstein, 101 Fed. 706 (D.C. N.Y. 1899); In re Goldberg, 52 F. (2d) 156 (D.C. N.Y. 1931).

of the enjoyment of the premises."[4] Since events might occur which would absolve the lessee of his obligation to pay rent, the landlord's claim was said to be too contingent to be provable.[5] And even though it had been held that bankruptcy could be an anticipatory breach of an ordinary contract,[6] this did not apply to leases of realty, which were said to be *sui generis*.[7]

In an attempt to secure provability of landlord's claims resort was had to covenants embodied in the lease.[8] Covenants giving the landlord a right to enter and terminate the lease on the filing of a petition in bankruptcy, the lessee to indemnify the landlord for any loss, proved unavailing. The claim was still held to be contingent and unprovable, for the landlord at the time of the filing of the petition had not yet exercised his option to enter.[9]

[4] Holmes, J., in Wm. Filene's Sons Co. v. Weed, 245 U.S. 597, 601 (1915); *cf.*, Central Trust Co. v. Chicago Auditorium, 240 U.S. 581 (1916).

[5] Watson v. Merrill, 136 Fed. 359 (C.C.A. 8th 1905); In re Roth & Appel, 181 Fed. 667 (C.C.A. 2d 1910); Colman Co. v. Withoft, 195 Fed. 250 (C.C.A. 9th 1912); In re Scruggs, 205 Fed. 673 (D.C.Ala. 1913); Britton v. Western Iowa Co., 9 F. (2d) 488 (C.C.A. 8th 1925). "It is not an existing demand, but both the existence and the amount of the possible future demand are contingent upon unforeseen events, such as default of the lessee, re-entry by the lessor, and assumption by the trustee, so that it is neither an unliquidated nor a liquidated provable claim." Sanborn, J., in Watson v. Merrill, 136 Fed. 359, 361 (C.C.A. 8th 1905).

[6] Central Trust Co. v. Chicago Auditorium, 240 U.S. 581 (1916). The court distinguished leases "because of the diversity between duties which touch the realty and the mere personalty," citing Co. Litt., 292, b, § 513.

[7] Manhattan Properties, Inc. v. Irving Trust Co., 291 U.S. 320 (1934); Wells v. Twenty-first Street Realty Co., 12 F. (2d) 237 (C.C.A. 6th 1926); In re Metropolitan Chain Stores, 66 F. (2d) 482 (C.C.A. 2d 1933), appeal dismissed 290 U.S. 789; *contra*, In re Munsie, 32 F. (2d) 304 (D.C. Conn. 1929), reversed 33 F. (2d) 79 (1929). For a criticism of this distinction see Frank and Douglas, Landlords' Claims in Reorganizations, 42 Yale L. J., 1003, 1004 (1933). This distinction may, perhaps, not obtain in states where the doctrine of anticipatory breach does apply to leases. *Cf.* Grayson v. Mixon, 176 Ark. 1123, 5 S.W. (2d) 312 (1928); Campbell v. McLaurin Investment Co., 74 Fla. 501, 77 So. 277 (1917); Wilson v. Natl. Refining Co., 126 Kan. 139, 266 Pac. 941 (1928); 82 Univ. Pa. L. Rev. 530 (1934). Equity receivership, however, is regarded as an anticipatory breach of a lease for the purpose of proving claims in the receivership. Wm. Filene's Sons Co. v. Weed, 245 U.S. 597 (1918); Gardiner v. Butler & Co., 245 U.S. 603 (1918). There is a difference of opinion as to whether an equity receivership followed by bankruptcy constitutes an anticipatory breach of a lease for the purpose of proving in bankruptcy. In re Mullings Clothing Co., 238 Fed. 58 (C.C.A. 2d 1916) (claim is provable), overruled by In re F. & W. Grand 5–10–25 Cent Stores, 74 F. (2d) 654 (C.C.A. 2d 1935); In re National Credit Clothing Co., 66 F. (2d) 371 (C.C.A. 7th 1933), *cert.* denied, 291 U.S. 668 (1933); In re F. & W. Grand 5–10–25 Cent Stores, 69 F. (2d) 807 (C.C.A. 2d 1934) (claim is not provable). Bankruptcy, however, can be an anticipatory breach of a covenant in a lease other than a covenant to pay rent. Trust Co. of Ga. v. Whitehall Holding Co., 53 F. (2d) 635. (C.C.A. 5th 1931) (covenant to repair); In re Marshall's Garage, 63 F. (2d) 759 (C.C.A. 2d 1933) (covenant to buy the premises leased).

[8] See Schwabacher and Weinstein, Rent Claims in Bankruptcy, 33 Col. L. Rev. 213 (1933); Fallon, Lessors as Creditors in Bankruptcy, 11 A.B. Rev. 124, 154, 169 (1934).

[9] Manhattan Properties, Inc. v. Irving Trust Co., 291 U.S. 320 (1934); Slocum v. Holiday, 183 Fed. 410 (C.C.A. 1st 1910); In re Metropolitan Chain Stores, 66 F. (2d) 482 (C.C.A. 2d

More favorable treatment was accorded stipulations providing that the filing of a petition in bankruptcy should *ipso facto* terminate the lease and give the landlord a claim for damages. Covenants which measured damages by the amount of rent reserved for the rest of the term less the fair rental value of the premises were held to give rise to provable claims founded upon an express contract within § 63a(4) of the Bankruptcy Act.[10] But not all such covenants were upheld. Thus stipulations for damages equal to the rent reserved for the balance of the term were held void as penalties.[11] The same fate met a provision measuring damages by the difference between the annual rental payable and the annual rental value of the premises at the time of the breach multiplied by the number of years remaining in the term.[12] If the lease had not been terminated, at least one circuit allowed claims to be proved which were founded upon provisions accelerating the rental for the balance of the term on bankruptcy.[13] But another circuit has indicated that such acceleration clauses would be regarded as penalties.[14]

Despite the amendment of § 63a of the Bankruptcy Act allowing landlords' claims to be proved, decisions construing § 63a as it was before amendment may not be entirely obsolete. The amendment to § 63a allows the landlord to prove for an amount equal to "the rent reserved by the lease without acceleration for the year next succeeding the date of the surrender of the premises plus an amount equal to the unpaid rent accrued up to said date." If the purpose of the amendment is merely to allow proof of rent claims that were previously unprovable, claims based on covenants that were formerly provable will still be provable in full even though they amount to more than a year's rent. If the amendment, in allowing partial provability, represents an indication of legislative policy toward all rent claims, a compromise of the conflicting policy considerations involved in rejecting entirely or in allowing entirely claims for future rent, it should apply to all rent claims whether hitherto provable or not.[15]

1933), appeal dismissed, 290 U.S. 709 (1933); Quinn v. Jaloff, 71 F. (2d) 707 (C.C.A. 9th 1934); *contra*, In re Caloris, 179 Fed. 723 (D.C.Pa. 1910). Entry on default prior to the filing of a petition did not give rise to a provable claim if the lessee had not convenanted to indemnify the landlord. In re Rite's Clothes, 49 F. (2d) 393 (D.C.N.Y. 1931).

[10] 30 Stat. § 62 (1898), 11 U.S.C.A. § 103a (4) (1926); Irving Trust Co. v. Perry, 293 U.S. 307 (1934).

[11] Kothe v. R. C. Taylor Trust, 280 U.S. 224 (1930).

[12] In re Louis K. Liggett Co., 8 F. Supp. 90 (D.C.N.Y. 1934).

[13] Wilson v. Pa. Trust Co., 114 Fed. 742 (C.C.A. 3d 1902); Rosenblum v. Uber, 256 Fed. 884 (C.C.A. 3d 1919); In re Schechter, 39 F. (2d) 18 (C.C.A. 3d 1930). If, however, the landlord accepted a surrender of the premises, the lease was terminated and he thereby lost his claim for rent. Electric Appliance Co. v. Ellis, 4 F. (2d) 109 (C.C.A. 3d 1925); In re Frey, 26 F. (2d) 473 (D.C.Pa. 1928). These seem to have been overruled by Kothe v. R. C. Taylor Trust, 280 U.S. 224 (1930).

[14] See In re Barnett, 12 F. (2d) 73 (C.C.A. 2d 1925); *cf.* In re Merwin & Willoughby Co., 206 Fed. 116 (D.C.N.Y. 1913); In re United Cigar Stores Co. of America, 4 F. Supp. 859 (D.C.N.Y. 1933), affd. 71 F. (2d) 1018 (C.C.A. 2d 1934).

[15] 44 Yale L. J. 680 (1935).

Since claims for future rent were not provable before the amendment, they were not discharged. Bankruptcy, of itself, did not terminate the lease, and the lessee was still liable for rent.[16] The amendment in allowing partial proof of rent claims raises a question as to the extent of discharge: is the claim discharged in full or only to the extent provable? Discharge in full may not seem very objectionable where bankruptcy, by virtue of a stipulation, terminates or allows the lessor to terminate the lease, but if the lease is not terminated by bankruptcy and the effect of partial provability is to discharge the lessee from all obligation for future rent, the lessee will have the entire term, even though the landlord can prove for only one year's rent. This consideration may lead to the conclusion that the bankrupt is discharged as to rent claims only to the extent that they are provable. Another solution, perhaps, is to construe the amendment as changing the rule that bankruptcy, of itself, does not terminate the lease.[17] § 77b(b) of the Bankruptcy Act,[18] regulating provability of landlords' claims in corporate reorganizations, raises a parallel problem.[19]

DELEGATION OF LEGISLATIVE POWERS TO THE EXECUTIVE—THE NIRA OIL CASE

A recent decision exciting much comment was that in the NIRA Oil Case, *Panama Refining Co. v. Ryan*,[1] dealing with the power of Congress to delegate legislative functions to the executive.[2] The case marks the first time such a delegation has been held invalid by the Supreme Court.[3] It is noteworthy that,

[16] Schneck v. Lewis, 121 Misc. 370, 201 N.Y.S. 282 (1923); Metropolitan Life Ins. Co. v. Levinsky, 153 Misc. 204, 274 N.Y.S. 577 (1934). One reason given at an early date for the rule that claims for future rent were not provable in bankruptcy was that bankruptcy terminated the lease. In re Jefferson, 93 Fed. 948 (D.C. Ky. 1899); In re J. Sapinsky & Sons, 206 Fed. 523 (D.C.Ky. 1913); Patterson, Does the Relation of Landlord and Tenant Become Severed by Operation of the Bankrupt Law?, 39 Am. L. Reg. 656 (1900). This was soon repudiated. In re Ells, 98 Fed. 967 (D.C.Mass. 1900); In re Roth & Appel, 181 Fed. 667 (C.C.A. 2d 1910); In re Sherwoods, Inc., 210 Fed. 754 (C.C.A. 2d 1913); In re Mlle. Lemaud, 14 F. (2d) 208 (D.C. Mass. 1925); Kessler v. Slappey, 34 Ga. App. 614, 130 S.E. 921 (1925).

[17] 2 Remington, Bankruptcy (1935 Supp.), § 793.

[18] 48 Stat. 912 (1934), 11 U.S.C.A. § 207 (1934 Supp.).

[19] Brady, Satisfaction of Dissenting Claims in Reorganization Schemes under § 77B, 19 Marq. L. Rev. 106 (1935).

[1] 55 Sup. Ct. 241 (1935), reversing 71 F. (2d) 1 (C.C.A. 5th 1934), reversing 5 F. Supp. 633 (E.D. Tex. 1934).

[2] See 48 Harv. L. Rev. 798 (1935). This note considers both the delegation problem and a second point of the case, namely, the holding that the executive order issued in compliance with the terms of the NIRA was a violation of due process of law for failure to state any findings on which the order was based. This latter holding establishes a new rule of law.

[3] Black, The National Recovery Act and the Delegation of Legislative Power to the President, 19 Corn. L.Q. 389, 392 (1934).