

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

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In re ) Bankruptcy Case No. 83C-03014  
LETTUCE ENTERTAIN YOU, INC., )  
Debtor. ) MEMORANDUM OPINION

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UNPUBLISHED OPINION

APPEARANCES

B. Ray Zoll of OFFRET, ZOLL & HAMMOND of Salt Lake City, Utah, for the debtor; and Robert B. Lochhead and Thomas B. Green of ROOKER, LARSEN, KIMBALL & PARR of Salt Lake City, Utah, for Crossroads Plaza Associates and the Equitable Life Assurance Company of the United States.

CASE SUMMARY

In this case the Court is asked to determine whether certain sums, deposited into state court by the debtor who had been sued by creditor pursuant to the state's unlawful detainer statute, constituted "cash collateral" within the meaning of § 363(a) of the Bankruptcy Code. The Court finds that the funds are "cash collateral" entitled to adequate protection and, moreover, upon reconsideration, reverses its own order granting turnover of the funds to the debtor.

**PRELIMINARY FACTS AND PROCEDURAL BACKGROUND**

On March 25, 1981, Lettuce Entertain You, Inc. (hereinafter "debtor") entered into a lease agreement with Crossroads Plaza Associates (hereinafter "Crossroads") whereby the debtor leased the premises, more specifically described as Store No. 83-1 on the lower level (hereinafter "premises") and which were located in the Crossroads Plaza Mall in Salt Lake City, Utah.

Crossroads represented that, prior to the filing of its petition, the debtor defaulted on its obligations under the lease by failing to make several required monthly rental payments. On or about September 24, 1982, Crossroads sued the debtor in Utah state court, alleging unlawful detainer, seeking money damages and other relief, and later by amended complaint, electing to terminate the lease.

Debtor made certain rental payments on the premises into the state court. Those funds, approximately \$33,000, are being held by the Clerk of the Third Judicial District Court of the State of Utah, pending adjudication of certain issues raised in those proceedings.

The debtor has paid no rent into state court since May of 1983. Crossroads claims that the deposit with the state court falls short of Crossroads rent claim by \$27,000 and that the shortfall increases every month by \$3,495.64.

On November 3, 1983, the state court ordered the debtor either to (1) try the case on November 7, 1983 or (2) to pay into state court an additional \$20,000 by November 14, 1983 and make additional monthly payments into state court of \$3,495.64 beginning November of 1983. Absent such payments, the state court directed that a Writ of Restitution enter in favor of Crossroads.

A trial was not held on November 7, 1983 and on November 14, 1983, the debtor did not pay further funds into state court.

On November 14, 1983, the debtor filed its petition for relief under Chapter 11 of the Bankruptcy Code.

This matter came before the Court on January 20 and again on January 24, 1984 on a motion of Crossroads Plaza Association and the Equitable Life Assurance Society of the United States. The motion requested the Court to modify the automatic stay or, in the alternative, to order the setting of a date by which the debtor must assume or reject a lease, and to order the debtor to appear and show cause why certain funds paid into state court should not be paid over to Crossroads.

On January 20, 1984 a hearing was held at which Crossroads and the debtor in possession stipulated that the debtor in possession should have 15 days (until February 23, 1984) to assume or reject the lease. On February 8, 1984, Crossroads renewed its motion seeking a court order directing the debtor in

possession to vacate the premises. The motion was noticed for hearing to be held on February 24, 1984. Notice thereof was mailed on February 8. This February 24th hearing was continued to March 7, 1984. At that time the parties stipulated that the debtor in possession would reject the lease as of March 7, 1984 and would vacate the premises as of March 21, 1984.

At that time the only question remaining for disposition was whether or not the \$33,000 deposited into state court is property of the estate. Crossroads argued that the funds were rental payments and that the debtor had no legal or equitable interest in them and, further, that this court should lift the automatic stay so that Crossroads could recover the money, now being held by the state court clerk. Crossroads, in the alternative, requested the Court to order the debtor to show cause why the funds in state court should not be paid to Crossroads. The debtor argued that Crossroads is an unsecured creditor and that the funds deposited with the state court are the property of the "debtor's estate" under § 541 of the Code. The debtor also argued that it had the right to use these funds for rehabilitation purposes. Debtor moved for an order of the court directing Crossroads to cause the state court to release the funds it is now holding.

On April 9, 1984 this Court determined that the funds in state court were the property of the estate and granted the debtor in possession's motion for turnover.

On April 16, 1984, Crossroads moved this Court for an order prohibiting the debtor from using the funds which were the subject of the Court's April 9th order. Crossroads argues that these funds are "cash collateral" within the meaning of § 363 of the Code and that their use by the debtor in possession should be conditioned upon Crossroads' being provided "adequate protection of its interest in said funds." Crossroads requests, in the alternative, an order amending this Court's April 9th order so as to prohibit the debtor from using the funds pending resolution of the dispute between the parties in state court. Crossroads further requests this Court to stay enforcement of the April 9th order pending its resolution of Crossroads' motion to prohibit the use of "cash collateral" and for ten days thereafter, to enable Crossroads to file a notice of appeal in the event the other portions of this motion are denied.

On April 18, 1984, a hearing was held on Crossroads' motion. On that date, the Court stayed the effectiveness of its April 9th order until the matter raised by this motion is resolved and for 10 days thereafter. The Court ordered counsel to submit simultaneous briefs by April 26. Reply briefs were to be submitted by May 2, 1984. After the filing of their briefs, counsel for the

debtor made a request for a ruling without the necessity of another hearing, pursuant to this Court's Local Rule 5. The Court has had the matter under advisement since that date and now makes its ruling.

#### FINDINGS OF FACT

Upon review of the pleadings and papers in the record before it, the Court finds:

1. On September 24, 1982, Crossroads sued the debtor in the Third Judicial District Court of Salt Lake County Utah on a cause of action for unlawful detainer, pursuant to Utah Code Annotated § 78-36-8.5 (as amended in 1981), Civil No. C82-7735. (Exhibits A, B, and C, attached to the affidavit of Bruce Maak.)

2. On October 11, 1982, the debtor, by its attorney, made a motion for tender of money into the state court. The Court ordered the clerk of the state court to accept the tender of money in the amount of \$11,693.07 "pending the outcome of this lawsuit." There is no dispute that this order was signed and that said sum was paid into court. (Exhibit A, attached to the affidavit of Bruce Maak.)

3. On November 11, 1982, Crossroads, as lessor, in order to obtain possession of the leased premises for the debtor-lessee, posted with the Court an "Undertaking on Possession" in the sum of \$5,000, pursuant to UTAH CODE ANNOTATED 78-36-8.5(2)

(as amended in 1981). (Exhibit B, attached to the affidavit of Bruce Maak.)

4. On December 6, 1982, the debtor, in order to retain possession of the leased premises posted with the state court a counter bond, denominated a "Property Bond With Sureties," in the sum of \$4,500. (Exhibit C, attached to the affidavit of Bruce Maak.)

5. Between October of 1982 and May of 1983, inclusively, the debtor made its regular monthly lease payments of \$3,945.64 into state court.

6. The debtor made no further payments of rents into state court or otherwise in June of 1983 or thereafter.

7. On November 3, 1983, the state court orally ruled that the debtor pay into court additional sums to cure the shortfall in the debtor's counter bond created by its failure to make monthly payments after June 1983. In addition, the state court ruled that the debtor should try the case by November 7, 1983, or else pay \$20,000 into court on November 14, 1983, and an additional \$3,945.64 for each month thereafter until the case was resolved.

8. On November 7, 1983, no trial took place in state court, nor did the debtor make its payments on November 14 as required by the state court ruling of November 3, which was signed by the Court on November 14, 1983.

9. On November 14, 1983, the debtor filed its petition under Chapter 11 of the Code.

10. The total funds deposited into state court on the date the bankruptcy petition was filed was less than the amount owed by the debtor to Crossroads for rents accruing under the lease from the time the unlawful detainer action was commenced against the debtor.

#### CONCLUSIONS OF LAW

In light of the evidence before it and the arguments of the parties as set forth in their various memoranda, the Court makes the following conclusions of law:

1. The debtor's tender of \$11,693,07 made on October 1, 1982, in spite of the debtor's characterization of it as a tender under Rule 68(a) of the Utah Rules of Civil Procedure, was neither a tender under Rule 68(a) or Rule 68(b) of those Rules. The pertinent requirements of a Rule 68(a) tender which the debtor failed to meet are (1) that the tender be made in "an action for the recovery of money only," and (2) that "the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which the plaintiff was entitled." In this case the action was for unlawful detainer, which was not an action for the recovery of money only; and the debtor never alleged that he had "before the



commencement of the case . . . tendered to the plaintiff the full amount to which the plaintiff was entitled;" rather, the evidence shows that the tender was made after the commencement of the case. It is also clear that the debtor did not make or intend to make a Rule 68(b) offer, first, because it characterized the tender as a Rule 68(a) offer and, second, because it made a deposit of the tender into court, an act not required by Rule 68(b). The language of the tender itself shows that the offer of \$11,693.07 represented the sum which the debtor admitted in its answer that it owed to the plaintiff under the terms of the lease. The Court concludes from this evidence that the debtor paid this sum into court so that the debtor could retain possession of the premises.

2. The sum of \$4,500 was paid as a counter bond pursuant to UTAH CODE ANNOTATED 78-36-8.5(2) (as amended in 1981). This sum represented part of the money required by the statute and by the court to be paid by the debtor into court so that the debtor could retain possession of the premises during the pendency of the statutory cause of action for unlawful detainer brought by Crossroads.

3. The monthly rental sums (\$3,494.64) deposited into court between October of 1982 and May of 1983 were paid by the debtor so that the debtor could remain in possession of the premises during the pendency of its lawsuit with Crossroads; this

Court concludes that these payments were considered by the debtor and found by the state court to represent supplements to the debtor's original counter bond of \$4,500.

4. The tender of \$11,693.07 was allowed by the debtor to remain in the possession of the state court because it was intended by the debtor to serve as a supplement to the counter bond during the period of June 1983 and November 1983, when the debtor was not making any rental payments at all.

5. The Court concludes that the \$11,693.07 tender, the original \$4,500 counter bond, and the supplement sums paid into court between October of 1982 and May of 1983 were all determined by the state court, in its order of November 14, 1983, to constitute monies paid into court or allowed to remain in the possession of the court, pursuant to UTAH CODE ANNOTATED 78-36-8.5(2) (as amended in 1981), in order to provide Crossroads, as plaintiff in the unlawful detainer action, with a fund out of which it could be paid rents, accruing during pendency of the lawsuit while the debtor continued in possession of the premises, in the event that Crossroads should prevail on its cause of action against the debtor.

6. Because the funds in question were paid into state court either expressly as part of the UTAH CODE ANNOTATED 78-36-8.5(a) counter bond, or by order of the court as supplements to that counter bond, or were allowed by the debtor to

remain in the possession of the court in order to serve as supplements to the counter bond, required by state law for the protection of Crossroads during the pendency of the unlawful detainer suit, these funds constitute a statutory fund in which Crossroads has and will continue to have an "interest," within the meaning of § 363(a) of the Bankruptcy Code; and out of these funds Crossroads will be paid in the event Crossroads prevails in its unlawful detainer suit against the debtor.

7. Therefore, all these funds deposited by the debtor into state court constitute "cash collateral" within the meaning of § 363(a) of the Code.

8. Crossroads has carried its burden of proof of showing, pursuant to § 363(o)(1) of the Code, the validity, priority, or extent of its interest in the funds in state court.

9. The debtor has failed to carry its burden of proof of showing, pursuant to § 363(o)(2), that it has provided Crossroads with adequate protection of its interest in the "cash collateral."

10. Moreover, the Court, in reviewing its order of April 9, 1984, concludes that the debtor's motion for turnover was improvidently granted for the reasons set forth in the case of In re Riding, 44 B.R. 846 (Bkrtcy. D. Utah 1984). The Court also concludes that it has the power, pursuant to § 105 of the

Bankruptcy Code, to review and revise its orders, especially in a pending case.

**RULING**

On the basis of the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that (1) Crossroads' Motion to Prohibit the Use of Cash Collateral is granted, and that (2) the portion of the Court's order of April 9, 1984 granting debtor's motion for turnover of the subject funds is vacated and debtor's motion for turnover is denied.

Counsel for Crossroads shall prepare an order consistent with this opinion and approved as to form by counsel for the debtor and submit the same for signature of the Court within ten days of the date of this ruling.

DATED this 26th day of March, 1985.

BY THE COURT:

  
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GLEN E. CLARK  
UNITED STATES BANKRUPTCY JUDGE