

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

THE JULIEN COMPANY,

Debtor.

BK #90-20283-WHB

MEMORANDUM OPINION AND ORDER ON
MOTION OF 67 MADISON AVENUE
PARTNERSHIP TO COMPEL COMPLIANCE
WITH CONSENT ORDER

On February 14, 1991, the Court received proof and exhibits and heard arguments of counsel on the motion (Ex. 1) by 67 Madison Avenue Partnership, Ltd. ("67 Madison"), which motion seeks to compel compliance by the Chapter 11 Trustee with the terms of a consent order signed by the Court on February 9, 1990. (Ex. 2) Specifically, 67 Madison asserts that the Trustee did not fully vacate the leased premises until September 13, 1990, and that the Trustee owes rent at the agreed weekly amount until that date. The motion also sought monetary damages for damages to the leased premises and for anticipated clean-up costs.¹

FINDINGS OF FACT

1. The Trustee and 67 Madison entered into a consent order which provided that the Trustee would pay post-petition rent through February 4, 1990, and that advance weekly rentals of \$7,974.70 would be paid thereafter throughout the Trustee's "occupancy of the Premises." (Ex. 2)

¹ At the hearing, 67 Madison withdrew its demand for damages and clean-up costs, asserting that it may file a claim for those damages resulting from the rejection under 11 U.S.C. §502(g).

2. The Trustee agreed in the consent order to provide two weeks notice of the Trustee's intent to assume or reject the lease. In the event of his rejection, the order provides that the Trustee "will voluntarily relinquish possession of the Premises." (Ex. 2)

3. The consent order also provides that the order is without prejudice to the parties' "taking such further or other steps in the Bankruptcy Court . . . [as may be] necessary to protect its interests." (Ex. 2)

4. The consent order does not require any particular form for the notice of rejection.

5. The consent order does not define "occupancy" except that occupancy includes the two weeks notice period. (Ex. 2)

6. On July 11, 1990, the Trustee wrote to Union Planters National Bank, the agent for the lessor, acknowledging an oral notice of termination of the lease. This letter was accompanied by a check of the same date for one weeks rent through July 15, 1990. The check was noted as being the "Final Payment." (Ex. 5)

7. Some of the weekly rentals had been paid late and the parties dispute whether there was a mutual understanding permitting late payment. (Ex. 3) The Court finds this dispute and the fact of late payments to be of no significance in the issue before the Court.

8. The Trustee testified that he had given notice in the middle of March of his intent to move out of the leased premises at the end of March, except that some equipment and other personalty would be auctioned on the leased premises after that month. Exhibit 4 supports that such notice had been given.

9. The Trustee testified that he understood the lessor's agent had consented to the auction and to the leaving of some items in the leased premises after the auction until they could be picked up by the auction buyers. Everything had been sold by August 13, 1990.

10. The Trustee testified that he did not believe he owed rent for the partial occupancy represented by temporary storage of personalty.

11. When the Trustee was finally called upon to remove all items, including wooden cotton classing tables, the Trustee sent employees to remove those items.

12. Mr. Glenn of Union Planters National Bank testified that he had one conversation with Mr. Marlow on March 7, 1990, in reference the anticipated move from the leased premises and the auction sale. He testified that no agreement was reached on rent to be paid after the rejection of the lease. Mr. Glenn's memo to the file of March 7, 1990, reflects that partial rent would be better than nothing.

13. On August 2, 1990, Mr. Glenn called Nan Barlow, an attorney for the Trustee, concerning items still in the leased premises. The items remaining as of July 13, 1990, had been inventoried by Mr. Glenn's employees. (Ex. 10) Mr. Glenn testified that since matters had dragged out so long he thought the lessor might be entitled to more rent.

14. Mr. Glenn considered September 13, 1990, to be the day the Trustee finally vacated all of the leased premises.

CONCLUSIONS

The movant takes the position that the consent order (Ex. 2) obligates the Trustee to pay the full weekly rent of \$7,974.70 until September 13, 1990, when all items were finally removed. The Trustee takes the position that oral notice of rejection was given in March and in July 1990, the latter date being confirmed by the July 11 letter and by the final weeks rent check paying through July 15, 1990. (Ex. 5)

Counsel for the movant vigorously argued that the movant was simply seeking to enforce the Court's order, wherein the parties consented to the weekly rental "through the term of [the Trustee's] occupancy." (Ex. 2) However, the Court finds that "occupancy" was not a defined term in the order. Obviously, occupancy may include a partial as well as a complete use of leased premises. It appears clear that the Trustee discussed with Mr. Glenn the fact that he intended to move his base of operations from these leased premises, and Mr. Glenn agreed to the holding of a sale on the premises. Unfortunately, the parties never reached a mutual understanding as to the terms for the length of time or the extent of the partial occupancy of the premises. Nor did the parties agreed on partial rent. After the Trustee moved in March, 1990, it is clear that the Trustee was no longer exercising exclusive possession of or control over the premises. The Court

concludes that Mr. Glenn contemplated at most partial rent for the partial occupancy, as is reflected in his March 7, 1990 memo. (Ex. 9)

The Court concludes that the order of February 19, 1990 is a consent order reflecting the parties' agreement. The fact that the Court approved that order does not add definitions to the order in the absence of clear expressions by the parties. Specifically, the order's reference to rental throughout the occupancy can be construed to refer to rental at the agreed sum for full occupancy. For the lessor to now contend that partial, even insignificant, occupancy, which did not prevent the lessor from controlling or re-leasing the premises, requires full rental would vitiate the Court's role in fixing "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. §503(b)(1)(A). In other words, the amount of rent properly due and based upon the actual use by the Trustee from July 22, 1990, through September 13, 1990, is an administrative expense claim under 11 U.S.C. §503, and the Court declines to subvert that claim allowance process by permitting the movant to insist upon full weekly rent when the proof demonstrates that full use of the leased premises was not utilized during that period.

However, the Court does conclude that the notice given by the Trustee on July 11, 1990, required two weeks notice and rental for that full weeks was due. The Trustee paid only one weeks rental. Therefore, the Court will enforce that portion of the consent order which clearly requires the Trustee to pay one additional weeks rent so as to comply with the notice of rejection.

SO ORDERED THIS 26th day of February, 1991.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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