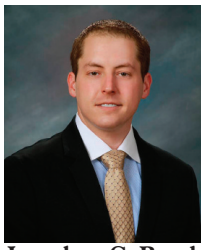
THE JOURNAL
The Magazine For Manufactured & Modular Housing Professionals
March 2016
As Printed In THE JOURNAL

Tenant Bankruptcy Proceeding Part 2



Jonathan C. Bond

Last month in part 1 of this discussion about tenants and bankruptcy we addressed two issues: (1) concerns arising out of the automatic stay and (2) whether a tenant will assume or reject the lease. This month we will focus when to seek relief from the automatic stay.

When the Landlord Must Seek Relief from Stay

Before going more in depth on this topic, a simple observation is pertinent. If the tenant has sought bankruptcy protection, and the landlord is not being paid, or has not been paid the rent owed, relief from stay is necessary *unless* a judgment for possession was obtained and entered in state court *prior* to the tenant filing bankruptcy. Thus, in the recent case of Eden Place vs. Sholem Perl the 9th Circuit Court of Appeals held that in this circumstance the tenant/ debtor no longer has any possessory interest in the rental property and thus the automatic stay does not apply. While that legal conclusion is sound, the "reality" is that if a debtor files a bankruptcy petition after judgment has been entered, but before there has been a physical "lockout" the landlord will probably need a court order before a sheriff or marshal will complete the eviction process.

While overbroad, there are three general "statuses" that arise in relief from stay settings. The three statuses are (1) current and fully performing under the lease and continuing to perform under the lease, (2) in default under the lease, or perhaps falling into default after filing the bankruptcy petition, and (3) where the landlord has already obtained a court judgment for possession of the property.

If the tenant is current in rent obligations and fully performing under the lease, and continues to do so, then practically speaking there is little for the landlord to worry about. If the tenant is in a Chapter 13 proceeding, then the landlord will want to observe the Chapter 13 Plan proposed by the tenant, and evaluate whether the Plan demonstrates that the tenant can remain current.

Second, if the tenant was already served with a notice to pay rent or quit, which notice expired prior to the bankruptcy petition being filed, then the tenant's right to possession is said to have expired "prepetition" – meaning that the tenant had no right to continued occupancy *as of the date the tenant filed the bankruptcy petition.* In this instance, for Chapter 7 and 13, the landlord should seek relief from stay to "continue" or commence a state court action for possession. In Chapter 13, the landlord should be vigilant to watch for a Plan from the tenant that purports to "cure" the lease default. If such a Plan is confirmed, it is arguable that the Court's Order Confirming the Chapter 13 Plan operates to *reinstate* the tenancy despite the tenant lacking the right to do so under applicable state law. To avoid this, a landlord should file an "Objection to Plan" if the tenant (or the tenant's attorney) has filed a Chapter 13 Plan that proposes to "reinstate" or "cure" the deficiency. Of course, if the landlord is fine with the tenant staying as a tenant so long as everything is paid, then the landlord can work this out with the tenant, but nonetheless a landlord should be careful as many of the landlord's rights can be curtailed or deemed waived by non- opposition to a plan.

Third, in the circumstance that the landlord has obtained, prior to the tenant filing the bankruptcy proceeding, a judgment for possession of the property, relief from stay is (in theory) not necessary to proceed. [I] The judgment for possession does not require relief from stay (the sheriff, marshal, or constable may restore possession to the landlord) – but any *monetary* component to the judgment will require relief from stay to obtain (and practically speaking, could well be denied in favor of the landlord's monetary claim being treated as a claim in the tenant's bankruptcy proceeding - like any other creditor). Despite the Bankruptcy's Code's rather clear statement that a judgment for possession is not "stayed" by a (former) tenant's filing for bankruptcy protection, many landlord's will discover other practical mobile home issues in enforcing the judgment, ranging from the tenant debtor's filing a motion to determine if the stay applies, or the tenant debtor filing a "certification" to the Court that the monetary default underlying the eviction was cured, or perhaps even a sheriff or marshal refusing to execute the lockout until the landlord goes into the bankruptcy court and obtains an order stating that there is no stay applicable to the judgment for possession. For the same reason that no monetary sum can be sought except through the bankruptcy proceeding, a pre- filing judgment for possession does not provide the landlord the right to institute proceedings to take title to a mobile home – because the mobile home itself remains part of the bankruptcy estate (assuming the home was owned by the tenant), and relief from stay is necessary to proceed against it to attempt to get title. Whether a court will grant relief will vary from state to state, dependent on any given state's applicable law, and will also require a showing that the landlord (1) has the right to obtain title, (2) the debtor cannot "cure" the amount due in some other fashion, and (3) that no other lien or claim is superior to the landlord's lien.

It is highly advisable to seek competent counsel to protect, and perfect, any claims of a landlord against a bankrupt tenant, and the nuances of the manufactured housing industry operate to compound that recommendation.

[I] 11 U. S. C. § 362(b) (22)
[II] In re: Perl (Jan. 2016) 9th Circuit

Jonathan C. Bond is a litigation associate with the Southern California law firm of Hart King and a member in the firm's manufactured housing industry practice group. He can be reached at (714) 432-8700, (657) 622-4705 direct dial or at jbond@hartkinglaw.com. This article is for general information purposes and is not intended to be and should not be taken as legal advice for any reader.