

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
SUNSET AMUSEMENT, LTD., : Case No. 91-727-C H
Debtor. : Chapter 7
- - - - - :
DONALD F. NEIMAN, TRUSTEE, :
Plaintiff, :
E.BUD CORIERI and : Adv. No. 92-92117
RUSSELL SCHOENAUER, :
Defendants. :

ORDER

On August 16, 1993, evidence was presented on this Complaint brought by the Chapter 7 Trustee, Donald F. Neiman. The Plaintiff was represented by attorney Thomas T. Tarbox. Defendants, E. Bud Corieri ("Corieri") and Russell Schoenauer ("Schoenauer"), were represented by their attorney Barry J. Nadler.

At the conclusion of this trial, briefing deadlines were set and the Court took the matter under advisement. Post-trial briefs have been filed and the matter is now considered fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157(b)(2)(K). Upon review of the pleadings, briefs, and arguments of counsel, the Court now enters its findings of fact and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. Corieri acquired a building at 2522 Chamberlain, Ames, Iowa in 1981. He put in acoustical paneling on the walls and ceiling on the top two levels and opened a bar.

3. On November 19, 1985, a real property lease was executed by Corieri and Schoenauer, as landlords, and Sunset Amusement, Ltd., as tenant. The lease was for the upper level and balcony of the building and ran from December 1, 1985 to November 31, 1986. The lease was signed by Corieri, and Daniel L. Kimmel, as President/Treasurer of Sunset Amusement.

4. Paragraph 8(b) of the lease provided in relevant part:

Surrender of Premises at End of Term--Removal of Fixtures:

(b) Tenant may, at the expiration at the term of this lease or renewal or renewals thereof or at a reasonable time thereafter, if Tenant is not in default hereunder, remove any fixtures or equipment which said Tenant has installed in the leased premises, providing said Tenant repairs any and all damages caused by removal.

5. On November 19, 1985, a lease was executed for personal property between Lights and Sound Unlimited, Inc., as landlord, and Sunset Amusement, as tenant. The lease was again signed by Corieri and Kimmel.

6. Subsequently, Sunset Amusement remodeled the

building in preparation of opening a bar. Sunset Amusement, at the direction of Kimmel, removed a stairway, walk-in cooler, carpet, acoustical tiles, plumbing and electrical work. Restrooms, plumbing, electrical work and wiring for the sound system were also altered.

7. On September 1, 1987, stock in Sunset Amusement was sold by Kimmel to Janice Drees, Daniel Drees, Mike Reeves and Gary Reeves. On this date a lease of real property was executed between Corieri and Schoenauer and Sunset Amusement. Daniel Drees and Mike Reeves signed on behalf of Sunset Amusement. Gary Reeves, Janice Reese, Mike Reeves and Dan Drees acted as guarantors. This lease again contained the clause discussed above entitled "Surrender of Premises at End of Term--Removal of Fixtures."

8. On September 1, 1987, a lease of personal property was executed between Lights and Sounds, Unlimited, Inc., as landlord, and Sunset Amusement, as tenant.

9. On September 1, 1987, Lights and Sounds Unlimited, Inc. sold certain personal property to Sunset Amusement in partial consideration of the lease of real property executed on the same date. The sale included an icemaker, bars, stereo system, stools, chairs, booths, tables, sinks, ice chest, safe, and soda dispenser.

10. In December of 1987 a fire occurred in the building. Damages totaled \$75,416.83. The landlord paid for structural

damages while the tenant's insurance covered other property damage.

11. Subsequently, Robert J. Wells and Brent A. Wells became involved in Sunset Amusement. On January 5, 1990, Sunset Amusement sent a letter to Defendants' attorney proposing terms for a new lease agreement. The letter was signed by Robert J. Wells, as president, and Brent A. Wells, as vice president. The letter stated that they were the current owners of Sunset Amusement along with Dennis Kragel.

12. On July 1, 1990, Janice Drees sold her share of stock in Sunset Amusement back to the corporation on contract.

13. On January 23, 1991, a 10-day Notice to Cure was served on Sunset Amusement after default on payment of rent. On February 3, 1991 the lease terminated after failure to cure within the 10-day period.

14. On February 7, 1991, Sunset Amusement was served with a Notice to Quit. Judgment was entered against Sunset in Defendants' action for forcible entry and detainer on February 22, 1991, and the property was vacated.

16. Sunset Amusement voluntarily filed for bankruptcy relief under Chapter 7 on March 13, 1991. Notice of the appointment of trustee, Donald F. Neiman, was given on March 14, 1991.

17. On April 14, 1991, the building at 2522 Chamberlain was leased to another party.

18. On June 23, 1992, the Trustee brought this complaint to recover fixtures, which Sunset Amusement installed in the leased premises.

DISCUSSION

In this complaint, the Trustee seeks to recover fixtures installed by Sunset Amusement while a tenant in the building and avoid any claimed landlord lien pursuant to 11 U.S.C. § 545(3). The Trustee attempts to characterize the retention of the tenant improvements by Defendants as a forfeiture, an improper set-off pursuant to 11 U.S.C. § 553(b), or an avoidable preference under § 547. As the Defendants have claimed no landlord lien that issue will not be considered by this Court.

Personal property becomes a fixture when it is actually annexed to the realty and when the party making the annexation intends to make a permanent accession to the freehold. Ford v. Vernard, 340 N.W.2d 270 (Iowa 1983). Paragraph 8(b) of the lease provides that the tenant may remove fixtures at the termination of the lease under certain circumstances.

The lease provides that the fixtures must be removed within a reasonable time following expiration of the lease. In this case, the Trustee, stepping into the shoes of the tenant, failed to pursue an action to recover such fixtures for a year and a half after the commencement of the bankruptcy proceeding.

The premises have been leased to a new business since April 14, 1991. Accordingly, the Court finds that the delay in acting to recover the fixtures is unreasonable and the Trustee is no longer entitled to such a removal.

Paragraph 8(b) of the lease also provides that the tenant may remove any fixtures or equipment if the tenant is not in default under the lease and if the tenant repairs any damages caused by removal of the fixtures. Sunset Amusement proposes to remove extensive improvements made to the building. The Trustee has presented to the Court no offer to repair the premises or evidence of the cost to the estate that would be required to make such repairs. Defendants introduced evidence at the trial that the cost to restore the premises would exceed \$100,000. While this estimate appears quite high, the Trustee has failed to carry forward his burden of proof in this matter. Therefore, the Court finds that the cost to restore the building outweighs the benefit the estate would receive from recovery of the fixtures. Further, Sunset Amusement was in default under the lease and fails to comply with the second provision of paragraph 8(b).

The Court finds that the estate no longer has an interest in this property. Therefore, the issues of forfeiture, set-off, or preference raised by the Trustee need not be reached. Accordingly, the Trustee's request for an order directing turnover of property is denied.

ORDER

IT IS THEREFORE ORDERED that the Trustee's prayer for an order directing turnover of property is denied.

IT IS FURTHER ORDERED that the Trustee's prayers for orders voiding a landlord's lien and requiring payment of rent are also denied.

Dated this 16th day of November, 1993.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE