

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
FITNESS WORLD WEST, INC., : Case No. 90-3112-C H
Debtor. : Chapter 11

ENROLLED ORDER--APPELLANT'S MOTION FOR RESTORING
AUTOMATIC STAY DURING PENDENCY OF APPEAL

Debtor-Appellant's Motion for Restoring Automatic Stay During Pendency of Appeal came on for hearing on April 15, 1991. Debtor appeared by Richard M. LaJeunesse and Ronald L. Hansel, Dreher, Wilson, Simpson, Jensen, Sellers, Harvey, Butters, Adams and Kaiser, P.C.; the landlord-creditor-appellee, Paul From, appeared by James L. Spellman, Neiman, Neiman, Stone and Spellman, P.C.; and, the U.S. Trustee appeared by John Waters, attorney for U.S. Trustee.

Debtor prays that this Court enter an order restoring the automatic stay which was lifted by order of March 4, 1991, and restore the stay during the pendency of this appeal. The Court orally denied this motion at the conclusion of the hearing on April 15, 1991, and now enters its enrolled order.

JURISDICTION

Essentially the Court is not asked to restore the automatic stay provided in 11 U.S.C. § 362, but it is prayed that a stay pending appeal pursuant to Fed.R.Bankr.P. 8005 be granted.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334; 28 U.S.C. 157(b)(2)(A); and Fed.R.Bankr.P. 8005.

FACTS

1. Fitness World West, Inc. (herein "Fitness World"), is a fitness and athletic club located at 3200 Westown Parkway, West Des Moines, Iowa.

2. Fitness World filed a voluntary petition under Chapter 11, 28 U.S.C., on December 6, 1990, and an order for relief was issued on the same date.

3. Fitness World leased the building it currently occupies from Paul From.

4. On December 5, 1990, the Iowa District Court, Polk County (herein "Iowa District Court") entered a Decree and Forcible Entry and found that Fitness World breached the terms of the lease with Paul From and that the lease between these parties had been terminated. Fitness World continued in possession and was holding over after the term of the lease. The Iowa District Court ordered that Fitness World remove from the leased premises; ordered execution for possession by Paul From; and, ordered Paul From to be put in complete possession.

5. The Iowa District Court issued its Warrant of Removal and Forcible Entry and Detainer on the same date, to-wit: December 5, 1990.

6. As stated, Fitness World filed for protection on December 6, 1990, prior to the time that the above warrant was served.

7. On January 3, 1991, Fitness World filed a Notice of Appeal in Iowa District Court and on January 7, 1991, filed an Appeal Bond Secured by Cash in the amount of \$300.00.

8. This Court entered an order granting Paul From's motion for relief from stay on March 4, 1991. This Court concurred with the Iowa District Court and concluded that the lease had been terminated under Iowa law. This Court concluded that this termination of lease was prior to the filing of Fitness World's bankruptcy petition and permitted Paul From to proceed with further action in the state court proceeding for forcible entry and detainer.

9. Fitness World filed its Notice of Appeal from this Court's order granting motion for relief from stay on March 4, 1991, and this order is presently on appeal.

10. On March 7, 1991, Paul From obtained an order from Iowa District Court scheduling a hearing on his application to increase the supersedeas bond. This hearing was held on March 13, 1991, and said court entered an order continuing the \$300.00 supersedeas bond until April 15, 1991, when the supersedeas bond was to increase to \$200,000.00.

11. On April 9, 1991, the Iowa Supreme Court denied Fitness World's Application for Stay on Reduction in Bond and

determined that the \$200,000.00 supersedeas bond was appropriate.

12. This order by the Iowa Supreme Court occasioned Fitness World's Motion for Restoring Automatic Stay Pending Appeal to the United States District Court, Southern District of Iowa.

13. Fitness World, although continuing in possession of the premises, has paid no rent since the rent for September 1990, which was due on October 15, 1990. The rent and taxes due each month total approximately \$20,600.00 and this amount would be lost each month pending appeal. It is estimated that an appeal to the Iowa Supreme Court would take about 15 months.

14. Fitness World has been in possession of the premises since the order for relief on December 6, 1990, and Fitness World has not filed an assumption of the lease pursuant to 11 U.S.C. § 365(d)(4). Subject real estate is non-residential and the Court has not granted additional time for the filing of an assumption of the lease.

15. The schedules filed herein, over the signature of David C. Rosenberger, President, show total liabilities of \$513,744.00, of which \$103,311.00 are taxes owing to the Internal Revenue Service, and \$25,570.00 are taxes owing to the State of Iowa. Fitness World lists assets of \$1,151,638.00, of which \$1,000,000.00 is listed as a

contingent and unliquidated claim against 7 Flags Fitness and Racquet Club and LeMar Koethe in Iowa District Court, Polk County.

16. The schedules list no value for any asset as a claim against Paul From nor any asset consisting of club memberships.

17. Fitness World contends that Paul From stands to benefit in the amount of \$3,815,500.00 from the eviction of Fitness World from the building. This is based on a value of improvements in the amount of \$830,000.00 and value of the business in the amount of \$2,985,500.00.

18. Fitness World's figures were assembled by Mr. John Foust, an accountant from Fitness World. Mr. Foust is a CPA and has a law degree. He maintains an independent accounting office and clientele. He states that his business is advising companies that are struggling financially and attempting to reorganize their debt.

19. Mr. Foust was placed on Fitness World's payroll as an employee for the stated purpose of avoiding the necessity of seeking this Court's approval in employing a professional person, to-wit: an accountant, (11 U.S.C. § 327) and avoiding the Court's review of compensation paid to a professional person. (11 U.S.C. §§ 328, 330).

20. Mr. David Rosenberger, president of Fitness World, has testified that he is so personally involved with the

membership of Fitness World that if he is replaced the business will collapse because of loss of membership.

21. Fitness World has filed monthly reports, but monthly reports have been filed late and they do not reveal the financial circumstances of the business as required. Fitness World has not filed its March report as of this date.

22. John Foust has the knowledge and experience to properly and accurately prepare the monthly reports.

CONCLUSIONS OF LAW

Fitness World's motion for stay pending appeal is governed by Fed.R.Bankr.P. 7062 and 8005.

Rule 7062, as relevant herein, provides that "Rule 62, Fed.R.Civ.P., applies in adversary proceedings except that an order granting relief from an automatic stay provided by § 362...of the Code...shall be additional exception to Rule 62(a)." Rule 9014 makes Rule 7062 applicable to contested matters.

Rule 8005 provides as follows:

A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order

during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for modification or termination of relief granted by a bankruptcy judge,, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy judge. The district court or the bankruptcy appellate panel may condition the relief it grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court. When an appeal is taken by a trustee, a bond or other appropriate security may be required, but when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States a bond or other security shall not be required.

Ordinarily, an appellant who desires the stay of a money judgment or of one determining an interest in property should present a supersedeas bond in an amount adequate for the protection of the appellee. An appellant who desires the stay of a judgment that is not stayable as of right, which includes an order granting relief from the automatic stay, should submit a motion for a stay giving reasons why the court should grant a stay. Rule 7062 and 8005.

The standard for determining a motion for stay pending appeal is essentially the same as the standard for granting a preliminary injunction. The movant must clearly establish each of the following:

1. A likelihood that the parties seeking the stay will prevail on the merits of the appeal;

2. The movant will suffer irreparable injury unless the stay is granted.
3. Other parties will suffer no substantial harm if the stay is granted;
4. The public interest will not be harmed if the stay is granted.

Matter of Baldwin United Corp. 45 B.R. 385, 386 (Bankr. S.D. Ohio 1984); In re Barrington Fair & Amusement, 53 B.R. 237, 239 (Bankr. D. Mass. 1985).

Fitness World has shown that it will suffer irreparable injury unless the stay is granted. Fitness World's business cannot operate without the building. Consequently, the second factor has been established. However, a question does develop when Fitness World contends that it is attempting to "resurrect" a lease. The question becomes whether Fitness World can assume a "resurrected" lease when it has failed to indicate that it will assume the lease within the 60-day requirement of 11 U.S.C. § 365(d)(4). Perhaps it is deemed rejected. This issue does not need to be resolved at this time but it does bear on the factor of irreparable injury.

Considering the other factors, this Court concludes that Fitness World has failed to show that it is likely to prevail on the merits of the appeal and that Paul From will suffer no substantial harm if the stay is granted.

The Iowa law is fairly clear that provisions for termination of a lease can be made contractually. Gendler

Stone Products Co. v. Laub, 179 N.W.2d 628, 631 (Iowa 1970).

The lease by and between Paul From and Fitness World provided that the landlord could terminate the lease upon the failure of the tenant to pay rent as provided. Paul From gave Fitness World a notice of default and intent to terminate the lease. Fitness World did not cure the default within 10 days, and Paul From served a three-day notice to quit and notice of termination of tenancy upon Fitness World.

After Fitness World failed to cure the default, Paul From filed a petition for forcible entry and detainer and the Iowa District Court, after hearing, found that Fitness World had breached the terms of the lease and the lease had been terminated.

It is without dispute that the lease provided that Paul From could terminate the lease upon the failure of Fitness World to pay rent as provided; that Fitness World failed to pay rent; that the real estate involved herein is non-residential property; that notice of default and intent to terminate the lease was served on Fitness World; Fitness World did not cure the default within 10 days; and, Fitness World was served with a three-day notice to quit.

Accordingly, the Court concludes that Fitness World is unlikely to succeed upon appeal.

It is also without dispute that Fitness World has not paid rent since the September 1990 payment was due in October

1990. Fitness World is therefore delinquent in pre-petition rent and post-petition rent. Paul From has suffered substantial harm already.

Fitness World's claim that Paul From is over-secured is not persuasive. Paul From is not secured at all. He owns the real estate, including the building, and is not receiving rent.

Fitness World's investment figures and business valuation figures are contradicted by Fitness World's schedules and the prior testimony of David Rosenberger. The failure to file proper monthly reports suggest an attempt to conceal the true financial picture of Fitness World by people who are very familiar with the requirements of these monthly reports.

Accordingly, Fitness World has failed to show that the appellee, Paul From, will suffer no substantial harm if the stay is granted.

The "public interest" factor is not involved in the circumstances shown in the instant facts. Any public interest factors involved in this case would neither justify nor rule against the imposition of a stay.

The Court concludes that Fitness World has failed to show that a stay pending appeal is warranted herein. Further, Paul From's interest should be protected and a supersedeas bond in the amount of \$200,000.00 is reasonable.

IT IS ACCORDINGLY ORDERED, as follows:

(1) Debtor-Appellant's Motion for Stay Pending Appeal is denied;

(2) Debtor-Appellant shall post a \$200,000.00 supersedeas bond; and

(3) This order is stayed pending hearing on Fitness World's Application of Debtor-in-Possession to Use Cash Reserves of Estate, Cash Collateral of Estate, Property of Estate and to Incur Indebtedness up to and including the amount of \$200,000.00 to Post Appellate Bond which is set for hearing on April 16, 1991, at 9:00 A.M.

Dated this 17th day of April, 1991.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE