

Landlords: “Pausing” Retail Bankruptcies in the Time of COVID-19

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Bankruptcy Code Rent Protection for Landlords:

The Bankruptcy Code provides that the company in bankruptcy shall “timely” perform all obligations of a lease arising “from and after” the bankruptcy filing date through the date the lease is assumed or rejected. Section 365(d)(3) of the Bankruptcy Code permits the bankruptcy court to extend, for cause, timely payment of rent and other obligations under a lease that arises within 60 days after the date of the bankruptcy filing date.

The New Concept of “Pausing” Retail Bankruptcies:

Recently, a number of retailers have filed for bankruptcy and then sought to “pause” aspects of the bankruptcy case, including the payment of post-bankruptcy rent to landlords.

On March 27, 2020, a New Jersey bankruptcy court suspended for 34 days the chapter 11 case of Modell's Sporting Goods, Inc., a northeastern sporting goods retailer, which was in the process of conducting going-out-of-business sales. See *In re Modell's Sporting Goods, Inc.*, No. 20-14179 (VFP), Docket No. 166 (Bankr. D.N.J. Mar. 27, 2020). The stated reason for Modell's bankruptcy “suspension” was the inability to conduct the proposed going-out-of-business sales due to the various “stay at home” orders preventing the stores from operating. See *In re Modell's Sporting Goods, Inc.*, No. 20-14179 (VFP), Docket No. 115 (Bankr. D.N.J. Mar. 27, 2020).

The Modell debtor moved under both Section 305(a) of the Bankruptcy Code (which generally permits the bankruptcy courts to suspend or abstain from a bankruptcy case, if in the best interest of the debtor and creditors) and Section 105(a) of the Bankruptcy Code (which permits bankruptcy courts to issue any order necessary to carry out the provisions of the Bankruptcy Code). Notably, the Modell bankruptcy court permitted Modell to abate rent for over 60-days beyond the date the bankruptcy case was filed, more than the statutory limit provided by Section 365(d)(3) of the Bankruptcy Code.

On April 30, 2020, the New Jersey bankruptcy court extended the suspension of the Modell bankruptcy case through May 31, 2020.

Following Modell's success, other debtors have sought and obtained similar relief, including the suspension of rent payments during the time the bankruptcy case is “paused.” For example, CraftWorks Parent, LLC—a brew pub chain—and Pier 1 Imports, Inc. were granted similar relief by Delaware and Virginia bankruptcy courts, respectively. See *In re CraftWorks Parent, LLC.*, No. 20-10475 (BLS), Docket No. 217 (Bankr. D. Del. Mar. 30, 2020); *In re Pier 1 Imports, Inc.*, No. 20-30805 (KRH), Docket Nos. 493 & 629 (Bankr. E.D. Va. Apr. 2, 2020). The order entered in the Pier 1 bankruptcy case expressly stated that “the Debtors are authorized to temporarily defer making all other payments not contemplated by the Final DIP Order or the Interim Budget, including rent payments to landlords who have not voluntarily consented to a rent deferral and certain payments to vendors” and adjourned all motions for relief from the automatic stay for no less than 45 days. *In re Pier 1 Imports, Inc.*, No. 20-30805 (KRH), Docket No. 493 (Bankr. E.D. Va. Apr. 2, 2020).

Other retailers, including Creative Hairdressers, Inc., have requested similar relief and are awaiting hearings on such motions. See *In re Creative Hairdressers Inc., et al.*, No. 20-14583, Docket No. 12 (Bankr. Md. Apr. 23, 2020).

Before Covid-19, most landlords could expect regular rent from a tenant that filed for bankruptcy beginning no later than 60 after the case was filed. Now, that is not necessarily the case. Landlords should be aware that these “suspension” or “pausing” motions are filed early in cases and, in some cases, on an expedited basis, such that landlords should act quickly to preserve their rights if presented with such a motion.

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