UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

DEPOT RESTAURANT, INC. Case No. 94-21412 K
Debtor

THE DEPOT RESTAURANT, INC.

Plaintiff

-vs- AP 95-2464 K

E.J. DELMONTE CORPORATION

Defendant

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This is a case in which a Chapter 11 Debtor (a long-established motor inn and restaurant in an upscale suburb of Rochester, New York) is operating under a confirmed Plan of Reorganization.

The issue is whether the Debtor must now pay $21,000[1] to

[1]There may also be a dispute as to whether the amount should be $21,000 or $10,800. Today's decision renders that argument moot.

its landlord, an amount which it claims it cannot afford. Moreover, any monetary default could result in forfeiture of the enterprise to the landlord because of some unusual and somewhat draconian self-help measures contained in the agreements. The landlord's claim is for "percentage rent" for the month of September, 1995, when the Ryder Cup Golf Tournament was played in Rochester and the Debtor enjoyed particularly good revenues from room rents and special functions.

The $21,000 claim by the landlord clearly has its origins in non-refundable room deposits of nearly $100,000 which the Debtor received in June of 1994 to reserve rooms for the Ryder Cup week. It is the timing of those deposits that has given rise to the dispute. This Chapter 11 case was filed on June 30, 1994.

Many affidavits, documents, transcripts and written arguments have been submitted. Proper procedures have been followed: This is an Adversary Proceeding, agreed to be within the "core" or "retained" jurisdiction of this Court, and suitable cross-motions for summary judgment are before the Court. This matter may either be decided, if appropriate, or set for trial.

It is the Court's view that when all disputed issues of fact are assumed, arguendo, to be resolved in the landlord's favor, and when all undisputed facts are considered, summary judgment in favor of the Debtor is clearly appropriate.

That formulation results in the following simple "abstract" of the case.

In 1994, the landlord was entitled to monthly payments of 25% of the room rentals for the previous month. Although hotly disputed, the Court will presume for present purposes that that meant room rentals for occupancy dates that have come and gone, and therefore have been fully "earned."

In June of 1994, the Debtor received nearly $100,000 in deposits for rentals for the Ryder Cup that was to be played in September of 1995. Such an advance booking was a highly unusual event in the decades-long experience of the Debtor.

When the Chapter 11 case was filed, those deposits were the subject of specific attention by the parties and the Court. (*See*, e.g. Transcript of hearing on use of cash collateral, July 12, 1994.) The landlord made no specific claim for any portion of them or for immediate rental payments on account of them, but did seek escrow of all such deposits. (Resp. of E.J. DelMonte Corp to Debtor's proposed use of cash collateral.)

The Debtor did not claim entitlement to those deposits "free and clear" of anyone's claims, but argued the need to use those funds for ongoing operations.

There were no pertinent dispositive rulings by this Court and no compelling recitations or admissions by either party, beyond the fact that there clearly was a question in the minds of the parties and the Court as to what, if any, rights the landlord had with respect to these receipts.

The disputes between the Debtor and landlord ranged well

beyond these receipts. Several hundreds of thousands of dollars were in default on the leases, whether one considers this $21,000 to be among those defaults or not.

There were other substantial disputes that did not directly involve the landlord. The survival of the Debtor was very much in question. But the principals of the various entities were not strangers or enemies. The owner of the Debtor, Mr. Neenan, had once been an employee of Mr. DelMonte, the principal of the landlord. And another major creditor, Mr. Turgeon, was the previous owner of the motor inn and restaurant. Mr. DelMonte controls several major hotels, and Mr. Turgeon a number of restaurants.

They and a bank or two, with assistance of counsel, negotiated global accords that permitted a Plan of Reorganization, funded by the landlord.

The accords were manifested in a myriad of stipulations, releases, substitute contracts, novations, a "termination agreement" and a "global agreement." Despite the fact that the issue had already been raised on the record, it is not disputed that during the critical times, no one gave any specific thought to whether the Ryder Cup room deposits received in June 1994 gave rise to a percentage rent claim at that time, or only after the rooms were occupied in September of 1995.

The landlord's argument focuses on the new lease that was part of the settlement accords. By the landlord's view (and some evidence of industry standards), hotels do not earn room rents under

such leases until the reserved dates have come and gone.

The Debtor vigorously disputes that argument, particularly because it claims to have been on a cash-basis accounting system for tax purposes for many, many years. Additionally, the Debtor claims that the various releases and the intervening bankruptcy obviate any reference to the new or old leases.

A closer case might be presented if the new lease did not purport to have an "effective date." In that event, it would be necessary to determine whether the right of the landlord to seek these rents had, by the prior agreements or events, been waived, estopped, or subject to a covenant not to sue.[2] But, in fact, the new lease stated: "The term of this lease shall be nineteen (19) years beginning on January 1, 1995 and ending on December 31, 2013 . . . ." (1995 Hotel Operating Lease ¶ 2(b).) It called for the payment of rent to begin on April 1, 1995, equal to 24% of "the Gross Hotel Rental Income" for the prior month, but in no event less than $15,000 per month. (1995 Hotel Lease ¶ 3.)

"Gross Hotel Rental Income" was defined as: "All money received by or paid to [Debtor], and all credit extended by [Debtor] for the sublease or use of any part of the Demised Premises or any of the hotel rooms at the Demised Premises," excluding taxes. (1995 Hotel Lease ¶ 1(a).)

[2]The "release" or "discharge" language contained in the settlements related to the old lease. To rely on them without addressing the significance of the new lease is to beg the question at bar.

As argued by the Debtor (*see* ¶ 30 of the October 1995 Affirmation of Gerald Dibble, Esq.), the money in question was "received" several months before the effective date of the new lease - January 1, 1995. If the old lease contained the same definition, it was "past due rent" under the old lease and was discharged by the releases.

The proffered evidence of hotel bookkeeping is inadmissible in the face of the clear definition in the agreement itself.

SANCTIONS, FEES, ETC.

From the Debtor's perspective, the forfeiture and self-help provisions that ran in the landlord's favor gave cause for great alarm when its September, 1995 rent remittance was questioned. It is not clear, however, that the landlord acted at all unreasonably. There was no declaration of default, no threat of takeover, etc.

To be sure, the landlord's attitude and legal posture before the Court since the Debtor's dramatic response to the landlord's inquiry has been uniformly professional, reasonable, and reserved, without sacrifice of capable and vigorous advocacy.

The Court believes that the substantial commitment of resources to this issue is not a consequence of any "fault" on the part of either party, but is a natural consequence of the unusual

self-help provisions of the agreements, in light of the absence of express language resolving the disposition of the Ryder Cup room deposits.

The parties shall bear their own costs and fees. They are encouraged to agree to assure that any future "inquiry" or "challenge" by the landlord that is not intended as an announcement of imminent self-help may be treated calmly and efficiently.

Dated: Buffalo, New York
April , 1996

/s/Michael J. Kaplan
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U.S.B.J.