United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

Patriot Aviation Services, Inc.
Debtor.

Case 11-98-16029 SR

Patriot Aviation Services, Inc.
Plaintiff,
vs.

City of Roswell,
Defendant.

Adv. No. 98-1229 S

Memorandum Opinion in Support of
Order Granting Preliminary Injunction filed October 6, 1998

The verified Motion for Temporary Restraining Order and Preliminary Injunction ("Motion"), filed by Patriot Air Services, Inc. ("Debtor") came before the Court for a hearing on Monday, October 5, 1998. Present for the Debtor were its counsel R. "Trey" Arvizu, III and its acting president, Fred Olsen ("Olsen"); present for the City of Roswell ("City") was its counsel Hinkle, Cox, Eaton, Coffield & Hensley, L.L.C. (Margaret P. Ludewig).[1] The Motion seeks to restore possession to debtor of its business premises under a lease the City claims was terminated prepetition.

The Debtor is in the business of servicing airline industry aircraft, including the inspection and repair of engines and other systems. The Debtor also paints aircraft. As of October 1, 1998, Debtor had aircraft to be serviced from Mesa, United, U.S. Air, Sky West,

[1] This memorandum opinion constitutes findings of fact and conclusions of law as may be required by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

America West and Kiwi airlines. The Debtor was performing these services on the premises it rents from the City pursuant to a Lease Agreement dated June 10,1997 ("Lease") as amended by that certain Amendment to Grant Agreement and Building Lease dated September 24, 1998, effective by its terms on August 1, 1998 ("Amendment"). On September 17, 1998, City mailed a letter to the Debtor giving notice of default for failure to pay rent. On October 1, 1998, the City locked Debtor out of its business premises.

The Debtor filed its voluntary Chapter 11 petition, this adversary proceeding and motion for a temporary restraining order or preliminary injunction early on Monday, October 5, 1998. The Court began the hearing on the Motion at 10.30 a.m., then recessed the hearing until shortly after 1.30 p.m. the same day. At the afternoon portion of the hearing, the Court admitted as evidence four (4) exhibits without objection. The Debtor presented the testimony of Mr. Olsen in person and of William F. Brainerd by telephone, the latter an attorney in and former mayor of Roswell who served as counsel for the Debtor in connection with the events that led to the filing of the adversary proceeding. The City declined to present witnesses of its own, in person or by telephone, on the grounds that its counsel had not had sufficient time to confer with the witnesses before the hearing; however, it did cross examine the Debtor's witnesses and presented opening statement and closing argument.[2]

[2] It appears that the City learned of the Chapter 11 filing and, more importantly, of the filing of the adversary proceeding sometime between 9.00 a.m. and 10.00 a.m. of the morning they were filed. The City's counsel received a copy of the adversary proceeding complaint shortly after 10.00 a.m. The City's counsel did not receive a copy of the Motion until shortly after the hearing commenced at about 10.30 a.m.; however, the bulk of the significant information, including three of the four exhibits admitted as evidence, are in the complaint rather than the Motion. The morning session of the hearing, comprised of presentations by counsel and the Court pointing out certain areas of concern, concluded at about 11.05 a.m. The afternoon session was to have begun about 1.30 p.m., but instead began about 2.00 p.m., and concluded about 5.30 p.m. The Court finds that there was sufficient albeit minimal time and notice of the issues for the City to have prepared for the hearing, including presenting testimony concerning the termination of the

Section105 (a) of the Bankruptcy Code, 11 U.S.C. §105 (a), provides that a bankruptcy court may "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." When issuing a preliminary injunction pursuant to its powers set out in §105(a), the bankruptcy court must consider the traditional factors governing preliminary injunctions issued pursuant to Federal Rule of Civil Procedure 65. *In re Eagle-Picher Industries, Inc.,* 963 F.2d 855, 858 (6th Cir. 1992) (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985)). The "traditional factors" that the plaintiff must establish are 1) the likelihood of the plaintiff's success on the merits, 2) whether plaintiff will suffer irreparable injury without the injunction, i.e. no adequate remedy at law, 3) the harm to others which will occur if the injunction is granted, and 4) whether the injunction would serve the public interest. *Id.*

Having considered the presentations of counsel, the testimony and the exhibits admitted into evidence, the Court finds that the Debtor has sufficiently established the four elements required for injunctive relief, at least at this stage, so that the Court has issued a preliminary injunction, subject to the conditions set out below and in the accompanying order.

Addressing these factors in reverse order, neither party suggested any public policy that would be violated by the entry of an injunction, and the Court cannot think of any. In fact, it may serve the public interest . Not permitting the Debtor to resume operations not only assures that the Debtor will not be able to pay the City the monthly rental payments

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lease. In any event, the City will shortly have the opportunity to present testimony and additional argument.

called for in the lease amendment, but, according to Mr. Olsen's testimony, will also put out of work as many as eighty (80) employees.

There was little discussion of the sufficiency of a legal remedy; however, since the Debtor will be irretrievably out of business without the injunction, the Court finds that the legal remedies available to the Debtor, including those included in the complaint, are insufficient. For the same reason, it is clear that the Debtor will suffer substantial and irreparable harm if the relief is not granted, and granted immediately. Mr. Olsen testified that various of the airlines had informed the Debtor that unless it informed them by Monday, October 5, that the Debtor would be operational no later than Tuesday, October 6, at 7.00 a.m., those airlines would remove their aircraft. The City, on the other hand, will suffer little if any harm from the issuance of a preliminary injunction. Indeed, the negative impact on the City from the closing of the operation is sufficient to raise the inquiry of whether the City itself will be irreparably harmed if the facility is not reopened for business.

In its closing argument, the City presented at least two other concerns about the entry of injunctive relief: the potential loss of its landlord lien rights, and potential claims against the City for items that would be claimed to be missing during the City's occupation of the premises. Neither of these concerns matches, much less overrides, the severity of the Debtor's situation, or even, for that matter, matches the benefit that the City will derive from the reinstatement of the Debtor into the premises.[3] And the City's concerns can be

[3] Ms. Ludewig explained that the City had "reached the end of its rope" in dealing with the Debtor, presumably under former management as well as under Mr. Olsen. Since the arrearages dated back to 1997, and since, by October 1, 1998, the new management of the Debtor had made only one rent payment since taking control in July 1998, the City's attitude is understandable.

addressed by permitting the City to retain whatever landlord lien rights it now has, and by permitting the City to continue to document the condition of the premises and the assets now on site.[4]

The question of the likelihood of success on the merits is more problematic. The Debtor essentially argues that the City told the Debtor it need not pay rent for September or October pending a workout of the financial issues between the Debtor and the City, that in any event the Lease was not effectively terminated by the City, and that even if the lease were properly terminated, the existence of the Unlawful Detainer and Forcible Entry statute, §35-10-1 *et seq.* N.M.S.A. 1978 (1996 Repl.) precludes the City from using the self-help provisions of the Lease to forcefully evict the Debtor from the premises.[5] The City disputes the Debtor's arguments and asserts that it was entitled to follow and did follow the provisions of the Lease and the Amendment (which incorporates the provisions of the Lease), thereby legitimately terminating the Lease and taking possession prior to the Debtor's filing its Chapter 11 petition.

The Court must apply these facts under the guidance set out by the Tenth Circuit Court of Appeals in *Community Communications Company, Inc. v. City of Boulder, Colorado*, 660 F.2d 1370, 1375-76 (10th Cir. 1981), *cert. dismissed* 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982). The Court stated:

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[4] The City stated that as part of its operation now, it was allowing employees to remove personal items from the premises, and using photography to document that process.

[5] The Debtor also argued that the Amendment amended the Grant Agreement dated November 13, 1996, and that the termination should have complied with the provisions of the Grant Agreement also. However, the Debtor did not tender a copy of the Grant Agreement, and therefore the Court is unable to make any determination of that issue.

> where irreparability exists and the balance of hardships tips in favor of a movant, the probability-of-success requirement may be somewhat relaxed: "It will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." (Citing *Lundgrin v. Taylor*, 619 F.2d 61, 63 (10th Cir. 1980)).

Thus, there are two questions the Court must address. First, was the lease validly terminated prepetition? And, if not, can the plaintiff demonstrate a likelihood of success on the merits?

First, of course, if the Lease were terminated prior to the filing of the petition, the Court would be unable to grant the requested relief. 11U.S.C. Section 365(c)(3); *cf.* 11U.S.C. Section 362(b)(10) (filing of a petition does not act as a stay of an act by the lessor to obtain possession of nonresidential real property subject to a lease which by its terms has expired). Therefore the Court must find that it is likely that the Debtor will be able to show that the Lease was not terminated prior to the filing of the Chapter 11 petition. The Court so finds, although of course that determination is subject to reconsideration upon the presentation of additional evidence or argument. This finding is based on the testimony of Mr. Olsen regarding certain understandings entered into by the parties surrounding the execution of the Amendment, and the testimony of Mr. Brainerd regarding who had authority to terminate the lease as well as possible improprieties under state law in the actions taken to terminate the lease. Specifically, Mr. Brainerd, having served as mayor of the City for a number of terms, testified that he had several contacts with various of the responsible City officials about any action the City was going to take, and was assured that the City was taking no action by way of terminating the Lease. Mr. Brainerd also had

reviewed the agendas for the City Council meetings, and found nothing to suggest that the City had scheduled an item to terminate the Lease (as at least arguably required by the Open Meetings Act, §10-15-1 N.M.S.A. 1978 (1998 Supp.)), and that the major step of terminating the Lease would not ordinarily have been delegated to any entity (including a committee) or person other than the City Council. The Debtor presented this testimony to suggest that the City had not terminated the Lease. The City did not present any evidence that effectively rebutted this testimony, although the Debtor admits, in its complaint, that the City manager, John Capps, took action to evict the Debtor on the evening of October 1, 1998, following an executive (closed) session of the City Airport Committee.[6] No evidence was presented by either side about what decision, if any, the Airport Committee had made in its executive session on October 1, 1998.

The Court finds that the evidence presented so far makes it likely that the Debtor will ultimately prove that the City as such did not effectively terminate the Lease prior to the filing of the Chapter 11 petition. (Therefore it is not necessary for the Court to make any findings about any alleged agreement not to terminate the Lease during negotiations, nor for the Court to make any ruling about the City's right to use self-help measures.) Further, given the "irreparability and balance of hardships" considerations of *Community Communications Co.*, 660 F.2d at 1375, the Court finds that the Plaintiff has raised questions going to the merits that are "strong, substantial, difficult and doubtful".

[6]Mr. Brainard testified that there are about ten committees which report to the city council. Three of the city council members sit on the Airport Committee.

The second issue is the likelihood of success on the merits if the Court finds that the termination of the Lease was invalid. The Court has examined the exhibits, which consist of the Lease; the Amendment, the purpose of which was to provide a schedule whereby the Debtor would make up approximately $130,000.00 in arrearages (including late charges) and which requires the payment of $29,241.68 on September 1, 1998 and on the first of each month thereafter through August 1, 1999; a copy of a letter dated September 15, 1998, signed by R. Spencer Fields for the City, urging the Debtor to make the September 1998 payment; and a letter dated September 17, 1998, also signed by Mr. Fields for the City, consisting of a one-sentence notice informing the Debtor it was in default pursuant to Paragraph 10(a) of the Lease.

Several portions of the testimony seem especially relevant on this issue. To begin with, Mr. Olsen testified that he is an officer of Direct Jet Aviation Group ("Direct Jet") and, by virtue of proxies from the shareholders of the Debtor, the acting president of the Debtor. Before and following the filing of the Chapter 11 petition, Direct Jet has been operating the Debtor while it completes its due diligence and attempts to purchase the Debtor on terms it finds acceptable. The Debtor (through Direct Jet) attempted to reach a payment agreement with its creditors prior to the filing of the Chapter 11 petition, and determined to file the Chapter 11 when it was initially unsuccessful in that effort at a workout. Although Mr. Olsen testified that Direct Jet had "set aside" $1,000,000.00 in operating capital and likely would have available to it a $2,500,000.00 credit line from NationsBank of Roswell, the Debtor has been paying its bills out of its own operations. Further, although it had $120,000.00 in the bank on October 1, 1998, the Debtor did not pay the September rent

at least in part because Mr. Olsen did not want to spend the approximately $30,000.00 without having reached a workout agreement with the creditors. While the Debtor asserts that it believed the City was not threatening termination of the Lease, for nonpayment, the clear implication of the testimony is that Direct Jet is spending as little of its money as it can while it tries to make the purchase on terms it finds sufficiently favorable.[7] Probably as a consequence, the City appears to have decided not to let the Debtor continue the negotiating process without making any payment. And that decision may have been encouraged or hastened by the Debtor's informing the City, through Mr. Brainerd, that the Debtor had decided to file for Chapter 11 relief.[8] In short, despite (or perhaps because of) what may have been the motivation of the various persons involved for the two sides, the Court finds there is a sufficient likelihood that the debtor will be successful on at least some of the merits of its complaint to justify the limited injunctive relief being order by the Court.

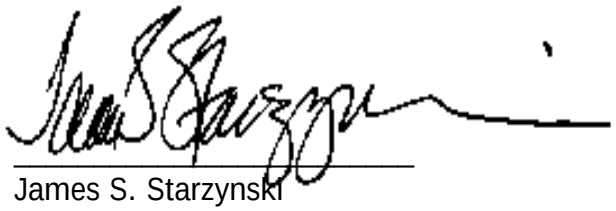
However, the Court is also concerned, given the testimony about why the City has received no payment since August, about the Debtor's abilities to meet its obligations under 11 U.S.C. Section 365(d)(3) and 365(b)(1)(A). Were the Debtor to find itself unable or unwilling to assume the lease because it had failed to abide by the requirements of the

[7] The Debtor testified that if its second solicitation to the creditors, sent out shortly before the filing of the Chapter 11 petition, was successful, it would dismiss the Chapter 11 case; and if unsuccessful, it would file a Chapter 11 plan. The Debtor should be aware, now that it is in Chapter 11, that it cannot solicit a payout over time except pursuant to a Chapter 11 plan.

[8] There is also an issue about what the City's liability is, if any, to the Debtor for the defective roof, lack of heating and lack of a fire suppression system, including whether any such liability might constitute the basis for a setoff or recoupment by the Debtor. Paragraph 2(b) of the Lease states that "certain systems" are not fully operational and "the repair and/or installation of those systems are covered in a separate agreement." No such agreement has been presented to the Court, and in any event the Court makes no findings on that issue.

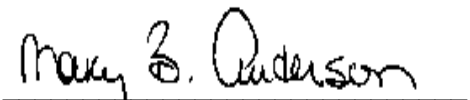
Lease prior to being permitted to assume the Lease, or because it was unable to promptly cure or provide assurances of a prompt cure of the arrearages, then the injunctive relief would be largely wasted. For that reason, the Court will require the Debtor to promptly make one payment to the City in the amount of $29,241.68, no later than October 7, 1998.

For the foregoing reasons, the Court finds good cause to grant the relief requested by the Debtor, in the form and as conditioned in the Order Granting Preliminary Injunction which the Court filed on October 6, 1998.



James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on the date filed stamped above, a true and correct copy of this document was faxed to Margaret C. Ludewig (768-1529) and R.Trey Arvizu (623-6420)



Mary B. Anderson