Tucker Arensberg Vindicates Rights of Government Landlords In Bankruptcy Appeal

Articles February 4, 2015

Attorneys Michael Shiner and Irving Firman obtained a successful decision on appeal confirming the right of a governmental landlord to evict tenants following rejection of leases in bankruptcy. The Housing Authority sought a declaratory judgment from the Bankruptcy Court that the anti-discrimination provisions in Section 525(a) of the Code did not apply to leases. Section 525(a) of the Code provides that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant…solely because such bankrupt or debtor is or has been a debtor…." 11 U.S.C. § 525(a).

The Bankruptcy Court followed a decision from the United States Court of Appeals for the Second Circuit holding that a public housing lease was protected under the "other similar grant" language of the Section 525. Accordingly, a public housing authority could not evict a tenant for failing assume the lease (and cure all arrears) as required under Section 365 of the Bankruptcy Code. Mr. Shiner & Mr. Firman appealed this decision to the United States District Court for the Western District of Pennsylvania.

Sitting as an appellate court, Judge Cohill of the United States District Court for the Western District of Pennsylvania reversed the Bankruptcy Court's decision. Judge Cohill rejected the analysis utilized by both the Second Circuit and the Bankruptcy Court. Instead, the District Court followed Third Circuit precedent from *Watts v. Pennsylvania Housing Finance Co.*, 876 F.2d 1090 (3d Cir. 1989) which held that the qualities of the enumerated items in Section 525(a) "are in the nature of indicia of authority from a governmental unit to the authorized person to pursue some endeavor" and, in following that analysis, a public housing lease simply does not fall into the category of a "similar grant" to a license, permit, charter or franchise. Agreeing with the arguments propounded by Tucker Arensberg, the Court held that "had Congress intended a lease to be considered in [Section 525] it would have explicitly included leases in the language but it did not."

The District Court also held that even if the lease was an "other similar grant" for purposes of the statute, the lease was still rejected which puts the debtor/tenant in default under the terms of the lease and removes the lease from the bankruptcy estate. Based upon that, the District Court held that the rejection of the lease and the pre-petition breach of the lease resulting from the rejection gives the Housing Authority an independent basis to evict the tenant, and can therefore exercise its *in rem* rights against the real property.

The Court noted the fresh start policy championed by the bankruptcy court, but siding with the Housing Authority, found that the policy of the fresh start is not frustrated by this ruling because the Congress did not intend for the fresh start policy to come at the expense governmental landlords.

This decision has practical application outside of the Housing Authority context. The Government, when acting as a redeveloper, often acts as a landlord and leases real property to tenants who then file bankruptcy cases. Whether it is a public authority leasing a stadium to a sports team that files for bankruptcy or a redevelopment authority leasing space to a restaurant, governmental landlords can now rest assured that the same rules that apply to private landlords in bankruptcy will apply to the government as well.

The intersection of bankruptcy and leases of real estate is a complicated and still developing area of the law. Should you encounter this issue, do not hesitate to contact us.

Mike Shiner or Irv Firman