ESSEX-NEWARK LEGAL SERVICES
Larry Lesnik, Esq.
81 Main Street
Orange, New Jersey 07050
(201) 672-3838
Attorney for Bankrupt

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

In the Matter of :

DONNA SMALLWOOD : BANKRUPTCY NO. B-78-02468

Bankrupt :

BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE

On the Brief:

Larry Lesnik, Esq.

STATEMENT OF FACTS

On or about March 1, 1978, bankrupt, Donna Smallwood, commenced occupancy of premises located at 40 Washington Street, East Orange, New Jersey by virtue of a month-to-month tenancy with the owner of such property, Washington Towers, through its agent, Raymond P.Marzulli..Rent for the demised premises was $325. per month.

On October 11, Donna Smallwood filed a petition in bankruptcy in the United States District Court For the District of New Jersey. At such time, Smallwood owed Washington Towers at least $1512. for rent for June, July, August, September and October, 1978. Smallwood duly included her debt for rent in Schedule A-1(c) of her bankruptcy petition by listing the agent of Washington Towers, Raymond Marzulli, in the amount of $1700.

On or about September 29, 1978, Washington Towers commenced a summary dispossess proceeding against Smallwood in the Essex County District Court, captioned Washington Towers v. Donna Smallwood, Docket No. R 441464. Washington Towers sought a judgment for possession of the aforementioned premises based on Smallwood's failure to pay rent owing for June, July, August and September and any rental accruing after the date of the filing of its complaint.

The return date of such dispossess proceeding was October 16, 1978. However, the bankrupt applied for an Order from

Bankruptcy Judge Vincent J. Commisa prohibiting Washington Towers from pursuing its dispossess action. On October 13, 1978, Bankruptcy Judge Commisa signed an Order to Show Cause and Temporary Restraining Order requiring Washington Towers to appear on October 26th at 10:00 A.M. to show cause why it should not be permanently enjoined from proceeding with its attempt to obtain a judgment of possession against Smallwood and enjoining Washington Towers & the Essex County District Court from prosecuting or hearing such matter until the further Order of such Court.

ARGUMENT

1. WASHINGTON TOWER'S TENANCY ACTION MUST BE STAYED PURSUANT TO THE PROVISIONS OF 11 U.S.C. §29 AND BANKRUPTCY RULE 401 AS IT IS AN ACTION FOUNDED ON AN UNSECURED PROVABLE DEBT.

Section 11a of the Bankruptcy Act, 11 U.S.C. §29, provides that:

> A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition;.....

This provision for an automatic stay of certain actions has been embodied in Bankruptcy Rule 401(a) reading:

> The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1),(5),(6), or (7) of §17a of the Act.

Accordingly the tenancy action commenced by Washington Towers, being founded upon a claim which is dischargeable in bankruptcy, must be stayed by the Bankruptcy Court.

Washington Tower's tenancy complaint is clearly an action which is founded upon the debt duly scheduled by the bankrupt. The operative facts set out therein are that Smallwood has occupied the subject premises but has failed to pay the rent owing for June, July, August and September 1978 (see copy thereof attached in two parts). It is the failure of the

tenant (bankrupt) to have paid the rent or delivered possession of the premises upon which Washington Towers bases its demand for a judgment for possession.

Pursuant to N.J.S.A. 2A:18-61.1, the county district court lacks authority to remove Smallwood from her premises except upon the establishment by her landlord of one of the grounds of good cause specified therein (see copy of statute attached in two pages). Washington Towers obviously relies upon N.J.S.A. 2A:18-61.1a in its complaint, alleging that Smallwood has failed to pay rent and owing under her lease. In other words, the foundation of Washington Towers's action is the debt it is owed by the bankrupt which was duly listed on her bankruptcy petition.

Washington Towers could not dispossess Smallwood, or any other tenant without some statutory good cause. As the Court stated in 25 Fairmount Ave. Inc. v. Stockton, 130 N.J. Super 276,284,285 (Dt. Ct. Bergen Cty. 1974), in discussing N.J.S.A. 2A:18-61.1, the Act establishing grounds for evicting tenants, "[T]he right established by the act is the right to remain in possession of the rented property until there is good cause for him [the tenant] to be removed...A 'right' to bring a landlord-tenant summary dispossess action is not a right but a privilege established by statute..."

In fact, if Washington Towers were not alleging or could not prove a default in the payment of rent, the Essex

County District Court would not even have jurisdiction to consider its complaint. In reviewing a summary dispossess proceeding, the New Jersey Supreme Court in Marini v. Ireland, 56 N.J. 130,137,139 (1970), stated that "[T]he County District Court in the present matter, is vested with jurisdiction as noted, only where there exists a rent default...Failure to furnish either such allegations [of default] in the complaint or proof in the trial, is sufficient ground to warrant dismissal for lack of jurisdiction...Whatever jurisdiction means in other settings, here it uniquely connotes the existence of one of the factual situations delineated in N.J.S.A. 2A:18-53." (Pursuant to the 1974 amendment thereto, N.J.S.A. 2A:18-53 is now supplemented by N.J.S.A. 2A:18-61.1) Also see Housing Authority of Passaic v. Torres, 143 N.J. Super 23,236 (App. Div. 1976), stating that "[T]he jurisdiction of the county district court is bottomed upon a showing that there was a default in payment of rent (N.J.S.A. 2A:18-53)."

Further proof of the bankrupt's contention that Washington Tower's tenancy proceeding is founded on a dischargeable debt is found in N.J.S.A. 2A:18-55. Such statute provides that when a summary dispossess proceeding has been commenced against a tenant for failure to pay rent, if such tenant pays the rent alleged to be due and owing (plus court costs) at any time prior to the entry of final judgment against him, the dispossess proceedings shall be stopped. The proceedings having

been founded upon a debt which no longer exists, no eviction can result.

The New Jersey Supreme Court appears to acknowledge the argument of the bankrupt herein that a tenancy proceeding based on non-payment or rent is suit founded upon the claim therefor. In Vineland Shopping Center Inc. v. DeMarco, 35 N.J. 459,469 (1961), the Court stated:

> As we have said, N.J.S.A. 2A:18-55 provides the proceeding shall stop if the tenant pays the rent and accrued costs on or before final judgment...Expressed another way, the summary procedure is designed to secure performance of the rental obligation, and hence, it having been perfected, the summary remedy may not be further pursued.

The Court thus expresses its awareness that the real purpose of a landlord's summary dispossesses proceeding based on non-payment of rent is to compel the tenant to pay the rent due and owing. Such efforts by Washington Towers against Smallwood are strictly enjoined by Bankruptcy Rule 401 and §11 of the Act, 11 U.S.C. §29.

If the tenancy proceeding was based on allegations of disorderly behavior, willful damage to property or violations of the landlord's rules and regulations, the underlying purpose of such proceeding would be to remove an objectionable tenant and replace him with a rule-abiding individual. Such a proceeding, commenced subsequent to the filing of a bankruptcy petition by the tenant, would not be founded upon any debt or

claim owed by the bankrupt and would not be properly enjoined by the Bankruptcy Court. But the instant tenancy proceeding, although seeking a judgment for possession, is founded on Smallwood's debt duly scheduled on her bankruptcy petition and as such this proceeding must be stayed by the provisions of 11 U.S.C. §29 and Bankruptcy Rule 401.

II EVICTION OF THE BANKRUPT PURSUANT TO STATE LAW FOR FAILURE TO PAY A DISCHARGEABLE DEBT LISTED ON HIS BANKRUPTCY PETITION WOULD FRUSTRATE THE FULL EFFECTIVENESS OF THE BANKRUPTCY ACT AND WOULD THEREFORE BE INVALID UNDER THE SUPREMACY CLAUSE

A. THE BANKRUPTCY ACT IS TO BE LIBERALLY CONSTRUED IN FAVOR OF THE BANKRUPT

The Bankruptcy Act is remedial legislation, In Re Pioch, 235 F.2d 903,905 (3rd Cir. 1956), and is thus to be liberally construed. Sutherland Statutory Construction 60.01 (1973). The provisions of §11 of the Bankruptcy Act and Bankruptcy Rule 401 should be strictly construed against creditors. Levin v. Mauro, 425 F.Supp. 205,207 (D. Mass. 1977).

To liberally construe a statute is to make the statute apply to more situations than under a narrow construction and to construe the statute in such a way as to promote the remedial purpose of the law. Sutherland Statutory Construction 60.01 (1973). Accordingly, any ambiguities or uncertainties in interpreting the extent of the suits which should be stayed by the provisions of §11 of the Act should be resolved to maximize the matters so stayed, in order to assist the bankrupt in obtaining the relief sought by the filing of his petition in bankruptcy. As the United States Supreme Court commented on this principal in Lines v. Frederick, 400 U.S. 18,19 (1970): "[T]he various provisions of the bankruptcy act...are to be construed when reasonably possible in harmony with the [the basis purpose of the Act] so as to effectuate the general

purpose and policy of the act." (citation omitted) The relief sought by the creditor herein, Washington Towers, is the eviction of the bankrupt from premises in which she presently resides. Such a devastating result must be avoided if possible by an application of the Bankruptcy Act and Rules.

B. ONE OF THE GENERAL PURPOSES OF THE BANKRUPTCY ACT IS TO PERMIT THE BANKRUPT TO START AFRESH FREE FROM HIS PAST OBLIGATIONS AND RESPONSIBILITIES.

The United States Supreme Court has consistently articulated the principle that a major purpose of bankruptcy legislation is to free the bankrupt from the yoke of past indebtedness and allow him to go forward unfettered by the debts scheduled in his petition. To become entitled to such a "fresh start", the bankrupt has to submit himself and his assets to the jurisdiction of the Bankruptcy Court where he will be required to provide an honest accounting of his assets and financial affairs and turn over to the trustee in bankruptcy, for distribution to his creditors, his non-exempt assets. Donna Smallwood has properly exercised her responsibilities to the Bankruptcy Court, and she has thus earned the protection of such court in providing her with a new opportunity in life.

Perhaps the clearest expression of this principle was provided by the Supreme Court in Local Loan Co. v. Hunt, 292 U.S. 234,244,245 (1933) in which the Court stated:

> One of the principal purposes of the bankruptcy act is to relieve the honest debtor

> from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.[citation omitted]. This purpose of the act has been again and again emphasized by the Courts as being of public as well as private interest, in that it gives the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field, for future effort, unhampered by the pressure and discouragement of pre-existing debt [citation omitted] (emphasis supplied).

This explanation of one of the principal purposes of the Bankruptcy Act has been cited and relied upon by the Court again in Lines v. Frederick, supra, and Perez v. Campbell, 402 U.S. 637 (1971).

C. IF THE EFFECT OF AN APPLICATION OF STATE LAW RELIED UPON BY A CREDITOR WOULD BE TO THWART THE PURPOSE OF THE BANKRUPCY ACT, THE CREDITOR MUST BE ENJOINED FROM APPLYING SUCH LAW.

Perez v. Campbell, supra, is dispositive on this point. There the issue was the validity of the Arizona Motor Vehicle Safety Responsibility Act which specified that an unsatisfied tort judgment arising out of an automobile accident would subject the judgment debtor to suspension of his driver's license even though the judgment had been discharged in bankruptcy. The Court specifically rejected the rational of its earlier decisions in Reitz v. Mealey, 314 U.S. 33 (1941) and Kesler v. Department of Public Safety, 369 U.S. 154 (1962) and held that the Arizona law frustrated the full effectiveness

of the Bankruptcy Act and was therefore invalid under the Supremacy Clause of the United States Constitution.

Kesler and Reitz had upheld provisions in motor vehicle responsibility acts similar to the Arizona law struck down in Perez. These earlier decisions recognized that the challenged laws left debtors somewhat burdened by a discharged debt, but held that the state laws were not invalid under the Supremacy Clause because the purpose of the laws was not to circumvent the Bankruptcy Act, but to promote highway safety. See Perez v. Campbell, 402 U.S. at 650,651.

Such rationale was definitively laid to rest by the Court in Perez when it stated:

> We can no longer adhere to the aberrational doctrine of Kesler and Reitz that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration...Thus, we conclude that Kesler and Reitz can have no authorative effect to the extent they are inconsistent with the controlling principal that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause. Perez v. Campbell,402 U.S. at 651,652. (emphasis supplied)

Accordingly, in determining whether state law, or the application thereof, is invalid under the Supremacy Clause, as conflicting with federal law, an inquiry must be made as to whether the effect of the state law frustrates the full effectiveness of the objectives of the federal statute. It is now clear that a state law which has the effect of inter-

ferring with a bankrupt's right to a 'new opportunity in life and a clear field for future effort, unhampered by the pressures and discouragement of pre-existing debts' is unconstitutional under the Supremacy Clause and any action taken thereunder or predicated thereon must be enjoined by the Bankruptcy Court. Perez v. Campbell, 402 U.S. 651,652.

If Washington Towers is permitted to pursue its summary dispossess proceeding and the state court continues to hear same, the result may be that Smallwood will be forcibly removed from her premises pursuant to the judgment of possession which Washington Towers seeks. Thus the state court through its application of state law in the tenancy proceeding would thwart the purpose and intent of the Bankruptcy Act, violating the Supremacy Clause.

Even before this concept was articulated by the Perez Court, the United States Supreme Court had been sensitive to action taken against the bankrupt which would infringe upon his fresh start. In enjoining a creditor's attempt to execute on post-bankruptcy wages to satisfy a pre-bankruptcy, discharged debt, the Court in Local Loan Co. v. Hunt, supra, stated that:

> The new opportunity in life and the clear field for future effort, which it is the purpose of the bankruptcy act to afford the emancipated debtor, would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings

> for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy. Local Loan, at 245.

Such a new opportunity would be of even less value if the bankrupt were obliged to face the horrors of eviction due to failure to pay an indebtedness incurred prior to his bankruptcy.

The Supreme Court has recognized that "[W]here the minimal requirements for the economic survival of the debtor are at stake, legislatures have recognized that protection that might be unnecessary or unwise for other kinds of property may be required." Lines v. Frederick, 400 U.S. at 19. In Lines, the Court was concerned with the bankrupt's entitlement to vacation pay, and held that "[T]he wage earning bankrupt who must take a vacation without pay or forego a vacation altogether cannot be said to have achieved the 'new opportunity'...which it was the purpose of the statute to provide.' Lines at 20. Unquestionably, shelter is considerably more important to the bankrupt than vacation pay and entitled to at least as much, if not more, concern and protection from the Court. It is eviction that Smallwood faces from the tenancy action commenced by Washington Towers.

Subsequent to Perez, courts have consistently applied the test set forth therein to strike down state laws or rules which had the effect of interfering with the fresh state to be supplied by the Bankruptcy Act. In Grimes v. Hochler,

525 P. 2d 65 (Cal. 1974), the California Supreme Court declared unconstitutional a regluation which allowed for the suspension or revocation of the license of a contractor who failed to pay debts which were discharged in bankruptcy. The Court stressed that under Perez it is the effect of the regulation which is important. The opinion states that:

> ...the existence vel non of a conflict depends on the effect of the state statute and cannot be determined merely be a consideration of its purpose.....: Our task in the case at bench, therefore, is to determine whether the challenged provision...represents an obsticle to the accomplishment and execution of the full purpose and objectives of Congress..... although a state statute is not expressly designed to promote the collection of debts, it may still offend the purpose of Congress if its effect is to deny debtors the benefits of the bankruptcy act. Grimes, at 68, 70.

In Rutledge v. City of Shreveport, 387 F. Supp. 1277 (W.D. La. 1975), the Court held unconsitiutional, under the Supremacy Clause, an administrative rule which rendered a policeman who filed for bankruptcy subject to dismissal. The Court recognized that the purpose of the rules was legitimate, but held that the administrative action was in contravention of the purpose of the Bankruptcy Act.

Similarly, the Louisiana Court of Appeal En banc ordered a fireman reinstated to his job after he had been terminated for filing a bankruptcy petition pursuant to a policy of the local fire department in Matter of Lofkin, 327 So. 2d 543 (La. App. 1976). The Court acknowledged that the fire

department was not intending to frustrate the purposes of the Bankruptcy Act, but held that, reagrdless of its purposes, the policy was invalid under the test established by Perez since it "conflicts with, frustrates and clashes with the purposes and objectives of the federal bankruptcy law in that it effectively hampers a fireman from obtaining a new opportunity in life and clear field for future effort." 327 So. 2d at 547.

Recently in Handsome v. Rutgers University, Civ. No. 76-143 (D. N.J. 1978), Judge Herbert Stern held that"...the Supremacy Clause prevents a state from frustrating even the spirit of a federal law." Rutgers having transgressed upon the fresh start policies of the Bankruptcy Act (by refusing to register the bankrupt or release her transcripts because she failed to pay alleged debts which had been discharged in bankruptcy), the Court enjoined its actions which violated the Supremacy Clause. The Court cites McCulloch v. Maryland, 4 Wheat 313,435 17 U.S. 316,436 (1819) for the proposition that "...the state may not by its actions 'retard; impede, burden or in any manner control the operations of the laws... enacted by Congress'".

445 F. Supp 1362

In the instant case the issue is whether the effect of the challenged tenancy proceeding commenced by Washington Towers in the Essex County District Court" stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress" in enacting the Bankruptcy Act. Perez v. Campbell, 402 U.S. at 649 quoting Hines v. Davidowitz, 312 U.S. 52,67 (1941). More specifically, the question is whether Washington Tower's action interferes with the bankrupt's right to a fresh start, unhampered by the pressures of debts which were duly scheduled on her bankruptcy petition and which are subject to discharge in bankruptcy. Washington Towers seeks to remove Smallwood from her premises solely because she has failed to pay a debt owed thereto which is properly dischargeable in bankruptcy. Washington Towers is telling Smallwood: You cannot continue to reside in your premises because of your debt for past rent, unless you repay such debt, even though you have sought (and presumably will receive) a release from any obligation to pay this debt by federal law.

No matter how the action of Washington Towers is construed, the effect of the judgment of possession which it seeks in its summary disposses proceeding will unquestionably frustrate the full effectiveness of the policy of the Bankruptcy Act. The discharge provision is to encourage the debtor to be productive in the future by preventing past failures and misfortunes from sapping his ambitions. MacLachlan, Handbook of the Law of Bankruptcy §100 (1956). The burden and pressure that Washington Towers is placing on Smallwood by threatending her with eviction is exactly what the Bankruptcy Act seeks to avoid by providing debtors with a new

opportunity in life and a clear field for future effort unhampered by the pressure and discouragement of pre-existing debt.

Washington Tower seeks to punish Smallwood for her failure to pay rent. Her only recourse to avoid such punishment is to pay the dischargeable debt. Invoking such a coercive measure against Smallwood because she has not paid a debt which she is not legally obligated to pay, due to the filing of her bankruptcy petition, constitutes the type of powerful weapon for collection of a debt which the Supreme Court found clearly objectionable in Perez. The tenancy action filed against the bankrupt by his landlord frustrates the full effectiveness of the objective of the Bankruptcy Act and must therefore be enjoined under the Supremacy Clause.

CONCLUSION

For all of the foregoing reasons, bankrupt respectfully requests this Court to enjoin the continuation of any dispossess proceedings against Donna Smallwood founded upon her non-payment of rent for any and all months prior to and including October 1978.

Respectfully submitted,

ESSEX NEWARK LEGAL SERVICES

BY: _____
Larry Lesnik
Attorney for Bankrupt