



Assignment of Rents

Whether a debtor has a property interest in rents derived from mortgaged property after the execution of an assignment of rents has been the topic of two recent New Jersey cases.

If the debtor does not have a property interest in the rents, then upon bankruptcy, the beneficiary of the assignment of rents (i.e., the lender) is entitled to receive all future rents. However, if the debtor does have a property interest in such rents, then the rents may be able to be used by the debtor as cash collateral pursuant to Section 363(b) of the Bankruptcy Code.

In July, 1994, the United States Bankruptcy Court, District of New Jersey in In Re: John Donato, Jr. held that "absent unequivocal and unambiguous language reflecting that the parties intended to transfer title to the rents" an assignment of rents will be treated as a mere security interest and as such the rents will be part of the bankruptcy estate. This was so even though the assignment purported to be an absolute assignment of the leases with a license back to the assignor.

In October, 1994, the United States District Court of New Jersey in Fidelity Bank, N.A. v. Jason Realty, L.P., held, in contrast to Donato, that rents are not property of the estate if a creditor takes an "absolute assignment" of rents and the debtor retains a mere license in the same. Further, the court held that "an absolute assignment and a license to the assignor may certainly be used to secure a note."

Jason Realty, though not directly overruling Donato, certainly sends a message to the New Jersey Bankruptcy Court which is favorable to creditors.

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