

2020 Midwestern Virtual Bankruptcy Institute

Remember When We Had a Hospitality Industry?

Sponsored by Norman, Wood, Kendrick & Turner

Daniel F. Dooley, Moderator

MorrisAnderson | Chicago

Peter J. Barrett

Kutak Rock LLP | Richmond, Va.

Hon. Robert D. Berger

U.S. Bankruptcy Court (D. Kan.) | Kansas City

Kristina M. Stanger

Nyemaster Goode, P.C. | Des Moines, Iowa

Mark P. Williams

Norman, Wood, Kendrick & Turner | Birmingham, Ala.



Saving Your Restaurant Group- March 27, 2020

The Restaurant Industry much like the Retail Industry has long had too many locations and too many brands that have no current reason to exist (ironically bankruptcy filings often call these "iconic" brands). Now that the impact of the Coronus Virus has shut down the majority of the restaurant business, we are going to see many locations permanently closed and many restaurant brands closed forever. As I told a friend earlier this week, I knew that the Restaurant Industry had at least 20% too many storefronts what I didn't know was that a pandemic event would close the 20% or more within a 30-day period like we are now seeing.

This short article deals with steps you should take NOW if you own or manage a restaurant group in order to survive. My perspective is one of a consultant that has advised seven separate restaurants franchises and bank groups over the last two years that have been in financial distress. Restaurants are a cash business and so the impact of a restaurant shutdown or business model change to a delivery and takeout only service means that restaurant cash inflows have been drastically cut immediately while payments due employees, suppliers, and landlords will continue to come due for commitments previously made.

1. Hoard Cash NOW

- a. The only expenses you should be paying right now are as follows:
 - i. Payroll and Payroll Taxes
 - ii. Health Insurance
 - iii. Sales Taxes
 - iv. Product Vendors (broad line and local) but push out the pay cycle by at least 2 weeks
 - v. Utilities but push out the pay cycle by at least 2 weeks
 - vi. Insurances- workers compensation and liability (demand a payment reset based upon reduced payroll and reduced sales), and property

Corporate Headquarters
55 West Monroe Street • Suite 2350
Chicago, IL 60603 • (312) 254-0880 • Fax (312) 727-0180

- vii. Critical maintenance capital expenditures
- b. Expenses you should not pay and defer for the next 90 days are as follows:
 - i. Franchisor Fees- both royalty and marketing
 - ii. Rents
 - iii. Property Taxes
 - iv. Debt Service- all principal amortization and interest (commercial banks have been allowed to do this by the federal regulators)
 - v. All expansion capital expenditures
- 2. Reduce Payroll and Headcount NOW
 - a. Assume the government ordered shutdown will continue for at least 30 days and perhaps as much as 60 days
 - b. Assume the US economy will be in a recession when restaurants are allowed to re-open a
 - c. Assume sales volumes will ramp up gradually and sales volumes be significantly less when restaurants re-open at between 80% and 90% of prior run rate sales volumes
 - d. You need to layoff all unneeded hourly employees NOW
 - e. You need to downsize Administrative and Management employees by at least 20% NOW and be willing to cut much further if needed
 - f. You need to reduce salaries by 20% for 60 to 90 days except for lower paid employees (suggest a \$50K per year minimum threshold)
- 3. Project your weekly cash flow focusing on the next four to six weeks in full shutdown or limited operations mode if you run out of cash and can't fund your payroll, you will likely shut down never to open again. The only two options is for owners to put more cash into the business or for your bank to put in more cash. Unless you as an owner have the cash and are willing to invest it into your business potentially running out of cash may be game over.
 - a. DO NOT ASSUME YOUR BANK WILL PUT MONEY INTO YOUR BUSINESS TO KEEP IT ALIVE.
 - b. I realize the federal government is proposing loan assistance shortly but I do not suggest betting your company on this happening fast enough to save your business.

Corporate Headquarters
55 West Monroe Street • Suite 2350
Chicago, IL 60603 • (312) 254-0880 • Fax (312) 727-0180

- 4. Permanently close every marginally profitable restaurant in your restaurant group NOW- you must attempt to consolidate around your best restaurants NOW. If you want to keep open marginal restaurants all you are doing is increasing the risk that even your best restaurants will end up closing permanently.
- 5. Communicate your actions and plans to your key stakeholders on a weekly basis:
 - a. Employees
 - b. Bank
 - c. Landlords
 - d. Broad line suppliers
 - e. Local suppliers
 - f. Insurance Agents and Brokers

The Corona Virus situation will lock up the capital markets for the foreseeable future meaning that re-financings and going concern sales in virtually all industries will be totally locked up and put on pause. Chapter 11 bankruptcy offers no relief for running out of cash. Restaurant liquidations result in virtually no creditor recoveries as restaurants have virtually no assets that have any significant liquidation value.

Dan Dooley
CEO and Principal
Morris Anderson & Associates, Ltd.
Cell 630-660-8952
Email ddooley@morrisanderson.com
Web Site morrisanderson.com

9/2/2020

Restaurant Bankruptoies | Who Is At Risk in Global Foodservice?



RESTAURANT BANKRUPTCIES

Restaurant bankruptcies have always been a topic of conversation in the industry. Very seldom can there be discussions about foodservice operators without the topic of the failure rate of restaurants coming up. That said, foodservice is actually a very resilient business. There is no question — regardless of geography — we will all continue to eat; the how and where will change so dramatically that hundreds of billions of dollars in global consumer foodservice spending will shift from incumbent brands to innovators and more convenient and profitable models.

We recently conducted a study of public restaurant companies in the U.S. to assess their risk of bankruptcy in the wake of the economic uncertainty brought on from the coronavirus pandemic. This analysis is based on a calculation called the Altman-Z" Score (a variation of the Altman-Z Score which is commonly used to calculate the credit strength of manufacturing companies), based on key financial metrics including: Current Assets, Current Liabilities, Total Liabilities, EBIT, Total Assets, Retained Earnings, and Book Value of Equity.

What Does the Altman-Z" Score Mean for Restaurant Bankruptcies?

Generally speaking, an Altman-Z" Score greater than 2.6 is deemed "safe", between 1.1-2.6 is in the "gray area," and lower than 1.1 is viewed in the "distress zone." These calculations were completed in May 2020 using Q1 2020 data for U.S. publicly traded restaurant companies, or the last available data (depending on companies' fiscal year in the analysis set).

A total of 46 companies are included in the analysis ranging service styles (QSR, fast-casual, casual dining, etc.) and both franchisee and franchisor business models. These companies total an estimated \$148b in annual U.S. system-wide sales and account for 100k locations across the country. The analysis also includes Arcos Dorados and Yuml China which operate exclusively in Latin America and China, respectively. For the purposes of classification, companies considered "highly franchised" have greater than 66% franchised units system-wide, "moderately franchised" between 33-66%, and "lightly franchised" below 33%.

Some highlights of our analysis include:

- . 6 Companies with Altman-Z" score 2.6+, 19k locations, \$47b in sales
- 8 Companies with Altman-Z" score 1.1–2.6, 9k locations, \$18b in sales
- 30 Companies with Altman-Z"score <1.1, 72k locations, \$82b in sales

We'd like to not that these are not predictions nor forecasts, but rather calculations based on working capital, retained earnings, EBIT, market value, sales, and assets. Many restaurant companies operating with different models (highly franchised systems versus wholly corporate-owned systems, for instance) have naturally varied financial metrics that impact the calculations and financial performance.

9/2/2020

Restaurant Bankruptcies | Who Is At Risk in Global Foodservice?



by industry leaders.

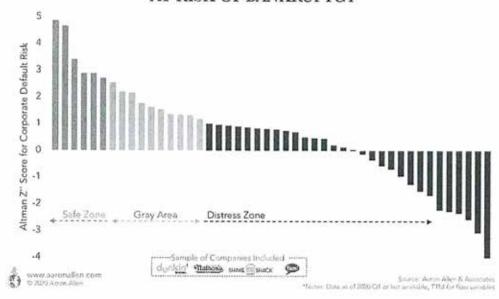
Those that are most optimistic often tend to be either those that are under-informed and bubbly optimists by nature — or, they are those that have done their homework and developed a silver-lining investment thesis. Foodservice is a multi-trillion dollar global industry that has remained as consistent as inflation and population growth for decades and spend has been irreversibly redirected in a single quarter — displacing and shifting hundreds of billions of dollars in global consumer discretionary spending. While it will be fatal for some and fortune-building for others.

NEARLY TWO-THIRDS OF PUBLIC RESTAURANTS ARE "AT RISK" FOR BANKRUPTCY

We found that more than six every ten restaurant chains are in the "distress zone" when using this calculation (highly leveraged, low earnings, or a combination of both). While this is not a direct indicator of bankruptcy risk — and there are significant differences in operating models for these companies (franchisors versus more corporate-owned locations, etc.) — there are some fascinating findings.

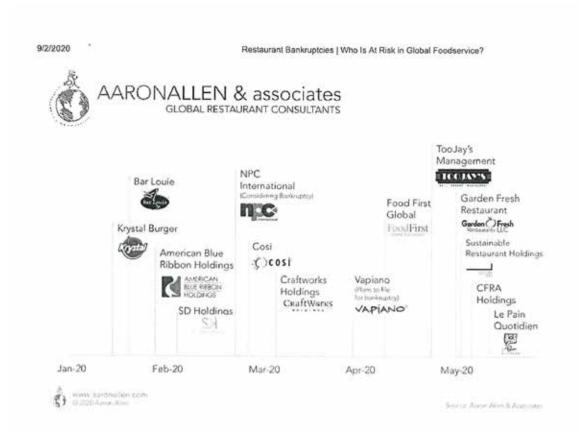
Even with the injection of liquidity, it is not enough to cover what the losses are — with the industry down tens of billions per month right now it's going to be very hard to get back, even once restaurants are at full capacity.

65% OF U.S. PUBLICLY TRADED RESTAURANTS AT RISK OF BANKRUPTCY



SHORT RUNWAY FOR MANY CHAINS ALREADY IMPACTING 2020 RESTAURANT BANKRUPTCIES

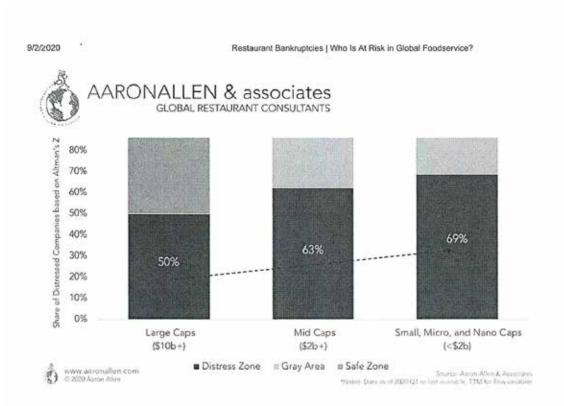
Restaurant bankruptcies are multiplying in 2020 and several chains filed for chapter 11 or debt protection across all segments; from quick-service restaurants Krystal Burger (declared bankruptcy back in January), to fast-casual chains Vaciano. Così and Le Pain



SMALLER CHAINS WERE AT HIGHER RISK OF BANKRUPTCY

It's usually the case that smaller companies are more vulnerable to economic shocks than large companies. Among U.S. public restaurants, the risk of bankruptcy increases by more than a third when comparing small-, micro-, and nano-caps to large caps. While 50% of large caps are in the distress zone according to Altman's Z"-score, the share of companies in the red zone increases to 69% for public restaurants with less than \$2b in market cap.

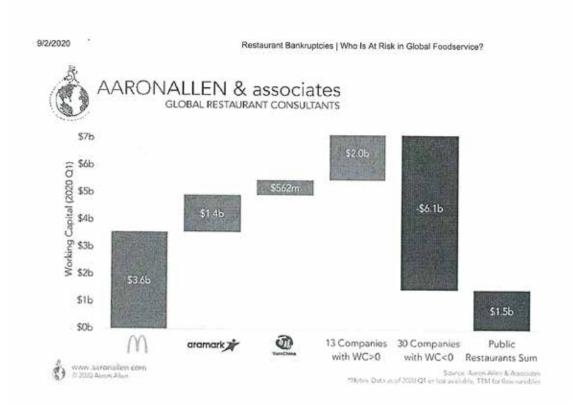
The retooling that was already in motion is accelerating and the industry will look very different a few years from now,



NEGATIVE WORKING CAPITAL IMPACTING RESTAURANT OPERATORS' PERFORMANCE

Companies with negative working capital are most likely to face liquidity issues because they lack sufficient current assets to cover current debt. In the U.S., publicly traded restaurants have a total of \$1.5b in working capital (46 companies). However, 65% of chains have negative working capital (accounting for a deficit of \$6.1b).

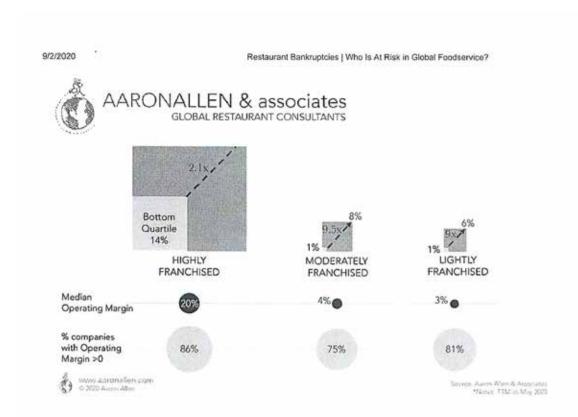
The restaurant industry received 9% of the first Paycheck Protection Program (PPP) Ioan batch (\$31b) and it's not nearly enough to cover what the losses are. Greater consolidation will happen than in any of the recessions before.



HOW FRANCHISING IMPACTS OPERATING MARGIN FOR RESTAURANT COMPANIES

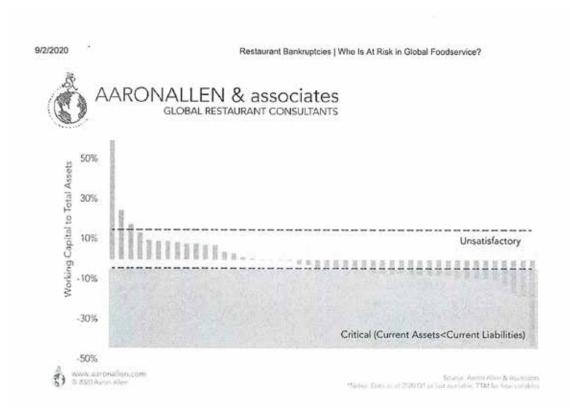
There are many proof-points to demonstrate the differences in approach of top-quartile and bottom-quartile performers. When we look at Operating Margins, the differences are staggering. In moderately and lightly franchised publicly traded restaurants in the U.S., the top-quartile Operating Margin is 9x the margin for the bottom-quartile. For highly franchised restaurants, the top-quartile makes twice the profit margin of the bottom-quartile.

The top performers are also putting more toward R&D and building proprietary systems that are reinforcing the most around their business and locking out their competition. This is a great time to make operations faster, leaner, and more agile to optimize margins and achieve top-quartile performance.



HOW A SOLVENCY CRISIS FACTORS INTO THE LIKELIHOOD OF RESTAURANT BANKRUPTCIES

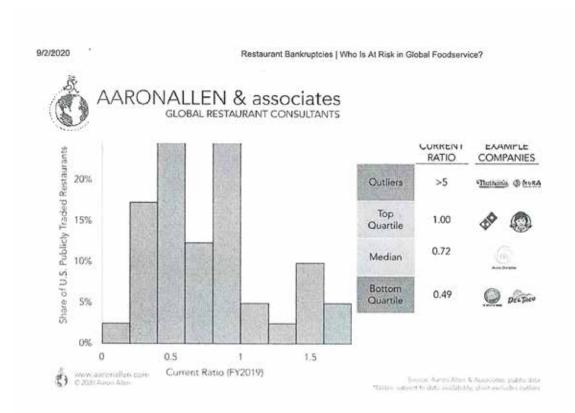
The Working Capital to Total Assets ratio reveals the percentage of remaining liquid assets, once Total Current Liabilities are paid out, compared to the company's Total Assets. As a rule of thumb, ratios lower than 15% are generally considered unsatisfactory, and negative values are considered critical. 93% of U.S. publicly restaurants are in these zones. For many restaurant chains, investors will have to step in to solve the liquidity crisis ahead of other critical initiatives focused on innovation and re-inventing the economic model.



RESTAURANTS LACKING THE ABILITY TO COVER SHORT-TERM DEBT WITH CURRENT ASSETS

The higher the Current Ratio (Current Assets to Current Liabilities), the more able a company is to pay short-term debt. In the restaurant industry, the current ratio reached a median of 0.72 (FY 2019 for publicly traded companies in the U.S.) and for three-quarters of the industry, the current assets are not enough to cover all short-term debt. Some foodservice companies in the bottom quartile had current ratios lower than 0.50 (current assets covering less than half of current debt).

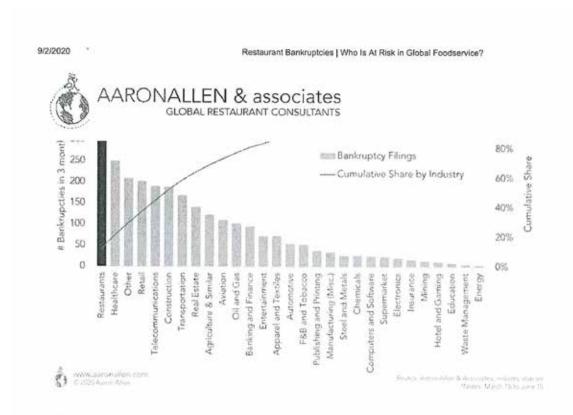
While liquidity pumping into the economy is buying time, many restaurants won't be able to sustain their existing debt levels. This scenario will likely lead to plenty of distressed restaurant assets in the near future, which will spur activity as the global pause on M&A lifts as travel restrictions are loosened.



RESTAURANT BANKRUPTCY RATES OUTPACE OTHER INDUSTRIES

A sobering stat: the restaurant industry has been the sector with the most bankruptcies in the last three months, with 12% of U.S. bankruptcies (more than 300) coming from this industry alone.

More consolidation will happen than in any previous recession. We think 10-15% of restaurants in America will close permanently by the end of the year (with that potentially increasing to 20% if another wave of the virus hits and without further government assistance). The bulk of that will be Casual Dining, full-service restaurants and independents.



ESTIMATING AS MANY AS 10-20% OF RESTAURANTS CLOSING PERMANENTLY BY END OF 2020

In the U.S., 4.4 million restaurant jobs have been lost (comparing 2019 with the average employment for April-June 2020), and though there are no official figures for closings, we estimate between 198,000-231,000 restaurants will close in 2020. This will be the first year the number of establishments doesn't climb in at least 20 years (even during the 2008/2009 recession the number of restaurants continued to grow).



Highlights of this analysis were featured in Bloomberg News.

A Timeline of Recent Restaurant Bankruptcies

The following restaurant chains have gone bankrupt or are in a bankruptcy process as of mid-2020. Many will have to liquidate their assets or be subject to massive reorganizations.

- Krystal Burger is one of the chains that filed for bankruptcy before the COVID-19 crisis (in January 2020). In declaring bankruptcy,
 the quick-service restaurant chain indicated debts of between \$50-\$100 million. Insolvency will affect around 30 unsecured
 creditors and restructuring is taking place.
- Bar Louie is a chain of pubs that filed for bankruptcy protection in January 2020. Three letters of intent were submitted for the
 acquisition and the company lenders also submitted a stalking horse bid to bankruptcy court for an undisclosed valuation.
- American Blue Ribbon Holdings (parent to the Village Inn and Bakers Square Brands) arranged for debtor-in-possession financing
 for \$20 million. Therefore, the company is continuing operations, is able to restructure and may access debt consolidation, and
 eventually pay off its debts.
- SD Holdings was on the border of being insolvent and filed for bankruptcy protection in Federal court in February 2020. SD
 Holdings franchises 73 Sonic-Drive-In restaurants, 14 MOD Pizza stores, and 3 Fuzzy's Taco Shop locations. Filing for bankruptcy
 was part of a strategy to sell its locations. Liquidation of assets wouldn't be enough to pay a secured debt of more than \$22 million.
- NPC International declared chapter 11. We indicated that the Pizza Hut and Wendy's franchisee was considering bankruptcy earlier
 in 2020. The company had missed interest payments had seen its debt downgraded. The company was able to avoid bankruptcy
 late in 2019 but had defaulted on debt financial covenants. As of June 2020, NPC declared bankruptcy citing "challenges
 magnified by COVID-19" and is expected to go through a re-organization process.
- Cosi had to file for bankruptcy for the second time since 2016. The principal of the company's majority shareholder passed away in 2018 and funding was interrupted. From there, the fast-casual chain was unable to find debt relief, leading to bankruptcy.

9/2/2020

Restaurant Bankruptoies | Who Is At Risk in Global Foodservice?



June 2020 to help re-start the brand

- Food First Global Restaurants (parent of Brio Tuscan Grille and Bravo Cucina Italiana) filed for Chapter 11 Bankruptcy in April 2020.
- Toojay's Management LLC also went bankrupt. The QSR deli chain explicitly mentioned the coronavirus crisis as the cause for its bankruptcy in the filing (despite having received a loan from the Paycheck Protection Program).
- Garden Fresh Restaurants (parent of Souplantation and Sweet Tomatoes) is another of the chains that have gone bankrupt due to
 the coronavirus crisis. The 97 salad bar restaurants are buffet-style and would struggle to see guests back even after restrictions are
 lifted. Chapter 7 bankruptcy protection was attained in May.
- Sustainable Restaurant Holdings filed for bankruptcy in May 2020 and also cited the coronavirus crisis as the reason. The company's brands, Bamboo Sushi and QuickFish, are seeking a buyer.
- CFRA Holdings (a franchisee for IHOP operating restaurants in four states) also filed for Chapter 11 in May. The franchise
 agreements with Dine Brands Global had been terminated in April.
- Le Pain Quotidien also filed for bankruptcy and is looking for an acquisition for \$3 million to Aurify Brands for 35 of its restaurants.
- BarFly Ventures (HopCat brewery and pub) filed for Chapter 11 in early June, also citing the pandemic as the reason.
- CEC Entertainment parent of Chuck E Cheese's and Peter Piper Pizza filed for chapter 11 bankruptcy in June 2020. The family
 eatertainment segment has been among the hardest-hit by the coronavirus pandemic. The company was highly leveraged, listing.
 \$1 billion in debt. The owner of CEC, Apollo Management, plans to restructure the company.
- Twisted Root Burger declared bankruptcy on three corporate stores. The fast-casual "better burger" chain is keeping six corporate stores running for off-premise sales. Assets and liabilities were indicated in the \$500k-\$1 million range.
- Luxury Dining Group, the parent company of Fig & Olive (a 10-unit, upscale Mediterranean concept operating in five markets
 including New York and Washington, D.C.) filed for Chapter 11 bankruptcy protection as all locations were closed and 700
 employees laid off as a result of the pandemic.
- Maines Paper & Food Service filed for bankruptcy (chapter 11) in June 2020. The foodservice distributor supplied QSR chains (including Burger King, Tim Hortons, Wendy's, Applebees, IHOP, and Chilli's) and also handled logistics for Darden.
- California Pizza Kitchen filed for chapter 11 bankruptcy as of July 30th, 2020 due to the Coronavirus crisis. The company is expected
 to go through restructuring with a \$30 million bridge loan and to transform long-term debt into equity. Locations will be closed (the
 company had 200 locations in the U.S. and sales for \$635 million in 2019).
- Matchbox Food Group filled for bankruptcy (Chapter 11) in early August, citing the pandemic as the cause. The casual dining chain will go through restructuring and already has an investor that could buy it.
- Garbanzo Mediterranean Grill filed for bankruptcy (Chapter 11) due to reduced sales amid the global pandemic. The fast-casual franchise was already struggling before the shutdowns, having lost \$2.2 million as of 2019.
- Blue Star Doughnuts filed for Chapter 11 bankruptcy protection at the end of August. The company indicated the lockdowns due to COVID-19 as the cause for a production halt a loss of its retail-driven revenue.

With the worst quarter in years, restaurant bankruptcy cases are likely to increase in the third quarter of 2020.

Advice for Operators in Precarious Situations

We'd recommend looking for buyers and strategic alternatives before it gets worse. The liquidity crisis will soon turn into a solvency crisis. We'd give it about 60 days. That's when travel restrictions will lift, runway and cash burn will run out for many struggling businesses, and restaurant M&A will resume to a white-hot level. There is more private capital sitting on the sidelines than the government has put into rescue plans. It's hard to get deals done without the ability to meet face-to-face. The timing of going back from pause-to-play will coincide smoothly with the solvency crisis. In some ways, you could look at this situation and point to vultures circling in the sky with smiles while the prey enters their death-throws; but — depending on perspective — what happens next could also be characterized as looking up into the sky and seeing a caped superhero coming in to rescue a struggling enterprise.

ABOUT AARON ALLEN & ASSOCIATES

We are a global strategy firm focused exclusively on the foodservice and hospitality industry helping middle-market companies and investors with both buy- and sell-side M&A advisory services. Our clients include restaurant chains, foodservice technology providers,

9/2/2020

Restaurant Bankruptcies | Who Is At Risk in Global Foodservice?



- · Commercial Due Diligence
- · Operational Due Diligence
- Value Creation Strategies
- Post-Acquisition Integration
- · Board and Management Installation
- · Growth and Expansion Planning
- · Go-to-Market Strategy
- · Performance Optimization
- · Portfolio Planning and Rationalization
- · Operating Partnerships
- · Board Participation and Advisory

Going beyond the three financial statement models to identify and unlock trapped potential and value-accretive opportunities by building a perspective from the most granular-level data to the big picture of a global market place, we apply a data-driven, analytical process combined with deep and specialized foodservice industry experience and expertise.

Put Our Experience to Work For You

Global Restaurant Industry Experts

We are focused exclusively on the global foodservice and hospitality industry. You can think of us as a research company, think tank, innovation lab, management consultancy, or strategy firm. Our clients count on us to deliver on our promises of meaningful value, actionable insights, and tangible results.

Who We Are

Founded and led by third-generation restsurates, Amon Allen, our team is consprised of experts with backgrounds in operations, marketing, frumos, and business functions essential in a realti-unit operating sevironment.

How We Help

We bring practical relevant experience ranging from the clish room to the boardroom and apply a holistic, integrated approach to strategic issues related to growth and expansion, performance optimization, and exceptible value enhancement.

Who We Serve

Working primarily with multi-brand, multinational organizations, our firm has helped clients on 6 continents, in 100 countries, collectively posting more than \$200b in revenue, across 2,000+ engagements.

What We Do

We help executive teams bridge the gap between what's happening incide and outside the business so they can find, size, and seize the greatest apportunities for their organizations.

SERVICES

Removes

Strategic Advisory Research Growth & Expansion MCA Advisory Illah & Helmanince Provide Equity Future of Fon-dervice Technology Marketing Marketing Marketing

QUICK LINKS

How To Rectaurant
Restaurant Innovation
Afternative Foodservice Formats
Restaurant Inclusing Trends
Planning with Purpose
Ristaurant Code
Conuni Clining
Many Strategy
Persons—Last Your PRS,
Brond Identity

United States Bankruptcy Court Northern District of Illinois Eastern Division

Transmittal Sheet for Opinions for Publishing and Posting on Website

Will This Opinion be Published Yes

Bankruptcy Caption: In re Hitz Restaurant Group

Bankruptcy No. 20 B 05012

Adversary Caption:

Adversary No.

Date of Issuance: June 3, 2020

Judge: Donald R. Cassling

Appearance of Counsel:

Attorney for debtor:

Jonathan D. Golding

The Golding Law Offices, PC

500 N. Dearborn Street, Second Floor

Chicago, IL 60654

Attorney for movant:

Mario Sullivan

Johnson & Sullivan, Ltd.

11 East Hubbard Street, Suite 702

Chicago, IL 60611

UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE:)	Bankruptcy No. 20 B 05012
)	Chapter 11
HITZ RESTAURANT GROUP)	Judge Donald R. Cassling
)	
Debtor.)	

MEMORANDUM OPINION

Kass Management Services, Inc. ("Creditor") has presented two motions to the Court. The first seeks to enforce the obligation of Hitz Restaurant Group ("Debtor") to pay post-petition rent under 11 U.S.C. § 365(d)(3), and the second seeks to modify the automatic stay under § 362(d)(1). (Dkt. Nos. 21 & 29.) Specifically, Creditor requests that, if the Court does not grant its motion to modify the stay, the Court should order Debtor to immediately pay post-petition rent in the amount of \$31,473.86 and to timely perform all future rent obligations. (Dkt. No. 21, p. 3.) Additionally, Creditor seeks an order requiring Debtor to vacate the premises immediately unless the post-petition rent is paid, and future obligations are kept current. (Id.)

Section 365(d)(3) requires a debtor-in-possession to "timely perform all the obligations of the debtor... arising from and after the order for relief under any unexpired lease of nonresidential real property until such lease is assumed or rejected, notwithstanding § 503(b)(1) of this title." 11 U.S.C. § 365(d)(3).

This section was added to the Bankruptcy Code in order to relieve landlords from the burden of proving that the rent payments they sought to collect from debtors prior to rejection were "actual and necessary" costs of preserving the bankruptcy estate. See In re Handy Andy Home Improvement Ctrs., Inc., 144 F.3d 1125, 1128 (7th Cir. 1998). The legislative history reflects congressional concern that lessors of nonresidential real property had frequently been forced to extend credit to an estate during the time given for assumption or rejection of the lease. In re Telesphere Comm'ns, Inc., 148 B.R. 525, 529 (Bankr. N.D. III. 1992). Thus, payments required

by § 365(d)(3) are not mere administrative expenses under § 503(b)(1). *Id.* at 530. "Section 365(d)(3) requiring 'timely performance' places payment of rent before the payment of administrative expenses. That is true even where the bankruptcy estate is administratively insolvent. Congress has spoken clearly." *In re C.Q., LLC*, 343 B.R. 915, 916 (Bankr. W.D. Wis. 2005).

Under § 365(d)(3), the first step in determining whether an obligation arises "from or after the order for relief" is to look at the terms of the lease. See In re Consolidated Indus. Corp., 234 B.R. 84, 86-87 (Bankr. N.D. Ind. 1999). Under section 2.1 of the parties' lease agreement and its accompanying exhibit labelled "Minimum Base Rent Schedule," rent is due on the first of each month. (Dkt. No. 21, Ex. Part 1, p. 9, citing Dkt. No. 21, Ex. Part 2, p. 18.) Debtor filed its Chapter 11 petition on February 24, 2020. (Dkt. No. 1.) Thus, Debtor's contractual duty to pay February 2020 rent is a pre-petition obligation; its contractual duty to pay March 2020 rent is a post-petition obligation because it arose on March 1, 2020, after the order for relief. Accordingly, § 365(d)(3) would ordinarily require full payment of the March 2020 rent and all rental payments falling due thereafter. See In re Ha-Lo Indus. Inc., 342 F.3d 794, 800-01 (7th Cir. 2003).

Debtor argues that its obligation to pay any post-petition rent is excused by the lease's force majeure clause and by Creditor's failure to make necessary repairs to the leased premises. (Dkt. No. 43.) The Court will first address Debtor's force majeure argument.

The lease's force majeure clause provides:

Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by. . . laws, governmental action or inaction, orders of government. . . . Lack of money shall not be grounds for Force Majeure.

(Dkt. No. 21, Part 2, pp. 9 & 10.)

Debtor argues that this clause was triggered on March 16, 2020, the effective date of an executive order issued by Illinois Governor J. B. Pritzker addressing the Covid-19 pandemic in Illinois. Section 1 of that executive order pertains to restaurants:

Beginning March 16, 2020 at 9 p.m. through March 30, 2020, ¹ all businesses in the State of Illinois that offer food or beverages for on-premises consumption—including restaurants, bars, grocery stores, and food halls—must suspend service for and may not permit on-premises consumption. Such businesses are permitted and encouraged to serve food and beverages so that they may be consumed off-premises, as currently permitted by law, through means such as in-house delivery, third-party delivery, drive-through, and curbside pick-up. In addition, customers may enter the premises to purchase food or beverages for carry-out However, establishments offering food or beverages for carry-out, including food trucks, must ensure that they have an environment where patrons maintain adequate social distancing.

Ill. Exec. Order 2020-7 § 1.

Because the March lease payment became fully due and payable on March 1, 2020, and Governor Pritzker's executive order did not become effective until two weeks thereafter, the lease's force majeure clause does not excuse payment of the past-due March rent. However, the Court concludes that the force majeure clause unambiguously applies, at least in part, to the rental payments which became due thereafter.

Force majeure clauses in contracts supersede the common law doctrine of impossibility. See Commonwealth Edison Co. v. Allied-General Nuclear Servs., 731 F. Supp. 850, 855 (N.D. III. 1990). Determining whether Governor Pritzker's executive order triggered the force majeure clause in the lease is a matter of contractual interpretation. For that, the Court turns to Illinois state law.

In Illinois, contracts are enforced according to their terms. See Consol. Coal Co. of St. Louis v. Schneider, 163 Ill. 393, 401 (1896). Under Illinois law, a force majeure clause will only

³ Gov. Pritzker twice extended the duration of this section: First, to April 30, 2020 via Ill. Exec. Order 2020-18 and then again to May 29, 2020 via Ill. Exec. Order 2020-33.

excuse contractual performance if the triggering event cited by the nonperforming party was in fact the proximate cause of that party's nonperformance. *Northern Ill. Gas Co. v. Energy Co-op., Inc.*, 461 N.E.2d 1049, 1058 (Ill. App. Ct. 1984).

The force majeure clause in this lease was unambiguously triggered by § 1 of Governor Pritzker's executive order. First, his order unquestionably constitutes both "governmental action" and issuance of an "order" as contemplated by the language of the force majeure clause. Second, that order and its extensions unquestionably "hindered" Debtor's ability to perform by prohibiting Debtor from offering "on-premises" consumption of food and beverages. Finally, the order was unquestionably the proximate cause of Debtor's inability to pay rent, at least in part, because it prevented Debtor from operating normally and restricted its business to take-out, curbside pickup, and delivery.

As discussed later in this opinion, it is significant to the analysis of Debtor's force majeure argument that Governor Pritzker's executive order did not prohibit all restaurant operations in Illinois. Indeed, his order not only permitted, but also encouraged, restaurants to continue to perform take-out, curbside pick-up, and delivery services. However, Creditor did not address that issue. Instead, it raised three arguments why the lease's force majeure clause had no effect at all on Debtor's obligation to pay post-petition rent under § 365(d)(3). Before turning to the issue of whether a force majeure clause can partially excuse performance, the Court addresses Creditor's three arguments that the force majeure clause does not apply to this situation at all.

Creditor first argues that the force majeure clause was not triggered because Governor Pritzker's executive order did not shut down the banking system or post offices in Illinois, and Debtor therefore would have physically been able to write and send rental checks to Creditor. (Dkt. No. 45, p. 3.) This is a specious argument that is unresponsive to Debtor's arguments and one that lacks any foundation in the actual language of the force majeure clause of the lease. The Court rejects it out of hand.

Second, Creditor characterizes Debtor's failure to perform as arising merely from a "lack of money," which it argues is not grounds for force majeure according to the lease's own terms.

(Id.) But Debtor has not argued that lack of money is the proximate cause of its failure to pay rent. Instead, it is arguing that Governor Pritzker's executive order shutting down all "on-premises" consumption of food and beverages in Illinois restaurants is the proximate cause of its inability to generate revenue and pay rent. The Court agrees, at least in part, and rejects Creditor's argument to the contrary.²

Creditor finally argues that Debtor could have obtained the money to pay the rent, despite the Governor's partial shutdown, by applying to receive a Small Business Administration loan. (Id. at p. 4.) Its failure to apply for such a loan prevents it from seeking to enforce the force majeure clause. (Id.) But Creditor has not cited any language from the lease or any case-law authority to support this argument. Nor does it acknowledge or address the plain language of the force majeure clause in the lease. As previously discussed, that clause is triggered by "governmental action" and governmental "orders." Nothing in that clause requires the party adversely affected by governmental action or orders to borrow money to counteract their effects.

The Court therefore rejects Creditor's three arguments and concludes that the force majeure clause partially excuses Debtor's obligation to pay rent for April, May, and June 2020. Nevertheless, Debtor is not off the hook entirely. Governor Pritzker's executive order did not prohibit Debtor from performing carry-out, curbside pick-up, and delivery services. Instead, it encouraged Debtor and other Illinois restaurants to perform those services. It follows that, to the

² To the extent that there is a conflict between the lease's general provision that "lack of money" does not trigger the force majeure clause, while the lease's more specific provision that a "governmental action" or "orders of government" does, the Court concludes that the "governmental action" or "orders of government" provision must prevail. In interpreting an Illinois contract, when there is a conflict between a clause of general application and a clause of specific application, the more specific clause prevails. "[T]he more specific provision of a contract governs where it arguably conflicts with a more general provision." *Aeroground, Inc. v. CenterPoint Props. Trust*, 738 F.3d 810, 816 (7th Cir. 2013) (citing *Grevas v. U.S. Fidelity and Guar. Co.*, 152 Ill.2d 407, 411 (1992)). In this case, a lessee's lack of money could arise from any number of events, including but not limited to the effect of governmental action or orders. By contrast, the Debtor's failure to pay post-petition rent is the direct and proximate result, at least in part, of Governor Pritzker's executive order.

extent that Debtor could have continued to perform those services, its obligation to pay rent is not excused by the force majeure clause. The Court therefore holds that Debtor's obligation to pay rent is reduced in proportion to its reduced ability to generate revenue due to the executive order.

Neither party offered much assistance to the Court in determining the amount of the rent reduction caused by the force majeure clause. Creditor did not address the issue at all, and Debtor offered only its estimation that 75 percent of the square footage of the restaurant, consisting of its dining room and bar, was rendered unusable by Governor Pritzker's executive order. Debtor concedes, however, that the remaining 25 percent of the restaurant's square footage, consisting of the restaurant's kitchen, could have been used for carry-out, curbside pick-up, and delivery purposes. (Dkt. No. 43, p. 5.) Although the Court has not yet conducted an evidentiary hearing to determine the final amount of rent due under the lease during the pendency of Governor Pritzker's executive order, the Court preliminarily interprets Debtor's estimation as an admission that it owes at least 25 percent of the rental payments for April, May, and June 2020. Monthly rental payments due thereafter are likely to increase as the government's shut-down restrictions are gradually lifted.³ Therefore, the Court concludes that Debtor still owes at least 25 percent of the rent amount to Creditor under § 365(d)(3), even after application of the force majeure clause.

³ On May 5, 2020, Governor Pritzker unveiled "Restore Illinois," a five-phase plan for "reopening" Illinois. (RESTORE ILLINOIS: A PUBLIC HEALTH APPROACH TO SAFELY REOPEN OUR STATE, May 5, 2020, .pdf available at http://www.coronavirus.illinois.gov.) The five-phase plan calls for incrementally relaxed restrictions by region (northeast, north-central, central, and southern Illinois) for commerce, healthcare, and social gatherings based on criteria that measures Covid-19's prevalence. Illinois is currently in phase three of five, which requires restaurants to observe the same restrictions as those in Executive Order 2020-7, except that Governor Pritzker amended phase 3 to allow restaurants to provide outdoor dine-in service. (Restaurants Can Open With Outdoor Seating in Phase 3 of Illinois' Reopening: Pritzker, NBC CHICAGO (May 20, 2020, updated at 10:32 PM), https://www.nbcchicago.com/news/local/restaurants-can-open-with-outdoor-seating-in-phase-3-of-illinois-reopening-pritzker/2275370/). Phase four permits restaurants to resume on-site service and consumption, both indoor and outdoor, but at limited capacity. Finally, phase five allows all restaurants to resume regular service with no restrictions.

However, Chicago Mayor Lori Lightfoot did not allow Chicago to join the rest of the Northeast region as it moved to phase 3 on May 29, 2020. (Chicago Announces Guidelines for Businesses to Reopen in Phase 3, NBC CHICAGO (May 26, 2020, updated at 5:09 PM), https://www.nbcchicago.com/news/local/chicago-announces-guidelines-forbusinesses-to-reopen-in-phase-3/2278309/.) Mayor Lightfoot has set out her own timetable instead. (SARAH SCHULTE & MICHELLE GALLARDO, Coronavirus Chicago: Mayor Lori Lightfoot Releases Phase 3 Reopening Guidelines (May forSpecific Industries, ABC CHICAGO, 27, 2020, 5:39 https://abc7chicago.com/business/lightfoot-releases-phase-3-reopening-guidelines-for-specific-industries/6214744/.)

The Court next addresses Debtor's argument that it is excused from paying rent due to Creditor's alleged failure to make necessary repairs to the restaurant's HVAC system. The Court rejects that argument because it is one that should be raised in state court, not here. In this Circuit, lift-stay motions are intended to be summary proceedings, not full-fledged trials to determine non-core issues of state law. In re Vitreous Steel Prods. Co., 911 F.2d 1223, 1232 (7th Cir. 1990) ("Many cases hold that the issues considered at a § 362 hearing are limited strictly to adequacy of protection, equity, and necessity to an effective reorganization." (citations omitted)). The legislative history supports this conclusion:

At the expedited hearing under subsection (e), and at all hearings on relief from the stay, the only issue will be the claim of the creditor and the lack of adequate protection or existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against the creditor on largely unrelated matters. Those counterclaims are not to be handled in the summary fashion that the preliminary hearing under this provision will be.

Id. (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 344 (1977), U.S. Code Cong. & Admin. News, 1978, pp. 5787, 6300).

But what is appropriate for the Court to address is the question of whether Debtor has adequately protected Creditor's interests. In line with the Court's previous conclusions, it follows that Debtor so far has failed to do so because it has failed to pay any post-petition rent at all. However, because this opinion offers the parties their first look at the Court's analysis of Debtor's post-petition rental obligations, the Court will give Debtor a limited amount of time to make those payments.

Specifically, the Court sets a deadline of June 16, 2020, for Debtor to pay the full rent amount for March 2020. Under the terms of the lease, the rental payment due for March is \$10,561.25, plus common area maintenance fees and real estate taxes for March 2020. (Dkt. No.

Chicago will enter Phase 3 of Mayor Lightfoot's reopening plan on Wednesday, June 3, 2020, which allows restaurants to have outdoor dining, but with limited capacity. (Chicago Will Enter Phase 3 of Reopening Wednesday As Planned, Lightfoot Says, NBC CHICAGO (June 2, 2020, updated at 11:34 AM, https://www.nbcchicago.com/news/local/chicago-will-enter-phase-3-of-reopening-as-planned-lightfoot-says/2282601/.)

21, Part 2, p. 18.) By the same deadline, Debtor must pay \$2,640.31 per month (25 percent of the base rent Debtor currently owes each month) for the months of April, May, and June 2020, plus 25 percent of both the common area maintenance fees and real estate taxes for those months. (*Id.*)

The total amount Debtor must therefore pay by June 16, 2020, is \$18,482.18, plus the full common area maintenance fees and real estate taxes for March 2020 and 25 percent of its share of both the common area maintenance fees and real estate taxes for April, May, and June 2020. Failure to pay this amount by June 16, 2020, will result in entry of an order by this Court holding that Creditor has "cause" under § 362(d)(1) to lift the automatic stay because of Debtor's failure to adequately protect Creditor's interest in the leasehold. A status hearing on this matter will be held on June 23, 2020, at 10 a.m.

ENTERED:

DATE: ______

Donald R. Cassling
United States Bankruptcy Judge

9