

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION

In the Matter of

Centre Tech III, LLC

Docket BD 11-08

Creditor Claim
Norlarco Credit Union

Decision and Order on Appeal

Decision

This matter comes before the National Credit Union Administration Board (Board) pursuant to Section 709.8 of the NCUA Regulations (12 C.F.R. 709.8), as an appeal of the determination by the Liquidating Agent of Norlarco Credit Union denying Centre Tech III's claim in the amount of \$13,582.

Background

Norlarco Credit Union (Norlarco) originally received a federal credit union charter in 1959 to serve employees of Colorado State University and the Poudre School District; in 1979 it converted to a state charter. On May 15, 2007, the Division of Financial Services of the State of Colorado placed the Norlarco into conservatorship and appointed NCUA as conservator. NCUA placed Norlarco into involuntary liquidation on February 29, 2008.¹ Public Service Credit Union entered into a purchase and assumption agreement with NCUA, acquiring most of the assets and liabilities of Norlarco upon its liquidation.

Norlarco (tenant) leased its premises at 2409 Research Boulevard, Fort Collins, Colorado, Suite 100, from Centre Tech III, LLC (landlord or Centre Tech). Landlord and tenant entered into a five year lease on January 13, 2004 running from March 1, 2004 through February 28, 2009. The lease sets forth annual base rent as well as operating fee adjustments, which are paid in addition to the base rent.

Pursuant to paragraph 36. of the lease, landlord paid tenant \$70,250.00 cash as its contribution toward tenant finish construction costs. There is no mention that this cash is a loan from landlord to tenant or that tenant is required to reimburse landlord for this amount. We are not aware of a separate loan agreement regarding the tenant finish construction costs.

¹ All references to AMAC throughout this Decision refer to it in its capacity as agent for the liquidating agent.

Paragraph 34.U. of the lease addresses brokers. It states:

Tenant warrants it has had no dealings with any real estate broker or agents in connection with the negotiation of this Lease excepting only *Everitt Commercial Partners, LLC*, and it knows of no other real estate broker or agent who is entitled to a commission in connection with this Lease.

Centre Tech's Claim

AMAC issued a notice of repudiation of contracts to Norlarco's creditors, including its landlord. Landlord Centre Tech submitted a claim to AMAC in the amount of \$22,913.26. Centre Tech provided additional documentation including an invoice from Everitt Commercial Partners, LLC to landlord/Centre Tech which appears to set forth a commission due from landlord to Everitt Commercial Partners in the amount of \$11,240 for the lease involving Norlarco. Centre Tech explained its claim as follows: \$9331.26 for contractual, unpaid rent; \$11,708.50, the unamortized balance of the \$70,250 cash for tenant finish construction costs; and \$1,873.50, the unamortized balance of the real estate commission paid by Centre Tech to Everitt Companies Real Estate Services for the five-year lease term.

AMAC paid the claim for \$9331.26 in unpaid rent and denied the claim for \$11,708.50 (unamortized balance of tenant finish) and \$1873.50 (unamortized balance of real estate commission). AMAC noted claimant's appeal rights as set forth in Part 709 of the NCUA Rules and Regulations, 12 C.F.R. Part 709. Section 709.7 authorizes the claimant to either file an administrative appeal pursuant to Section 709.8 or to file suit against the liquidated credit union. Section 709.8(a) of the Regulation states that any appeal must specify whether a hearing on the record is requested pursuant to §709.8(b) or the appeal is a less formal appeal to the Board pursuant to §709.8(c)(1). Centre Tech submitted its administrative appeal to the Board in a letter dated November 5, 2008; it did not request a hearing on the record. The appeal was handled pursuant to §709.8(c)(1).

Appeal and Analysis

Section 207(c) of the Federal Credit Union Act provides the liquidating agent with repudiation authority for contracts entered into prior to conservatorship or liquidation. (12 U.S.C. §1787(c)). Section 207(c)(4) applies specifically to damages in the case of lease repudiation when a credit union is the tenant or lessee. The relevant provisions follow:

§207(c)(1) **Authority to repudiate contracts** – In addition to any other rights a conservator or liquidating agent may have, the conservator or liquidating agent for any insured credit union may disaffirm or repudiate any contract or lease –

- (A) to which such credit union is a party;
- (B) the performance of which the conservator or liquidating agent, in the conservator's or liquidating agent's discretion, determines to be burdensome; and
- (C) the disaffirmance or repudiation ... in the conservator's or liquidating agent's discretion, will promote the orderly administration of the credit union' affairs.

...

(c)(3) Claims for damages for repudiation. –

(A) **In general.** – Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6) the liability of the conservator or liquidating agent for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be –

- (i) limited to actual direct compensatory damages;

...

(4) Leases under which the credit union is the lessee. –

(A) **In general.** – If the conservator or liquidating agent disaffirms or repudiates a lease under which the credit union was the lessee, the conservator or liquidating agent shall not be liable for any damages (other than damages determined pursuant to subparagraph (B)) for the disaffirmance or repudiation of such lease.

(B) **Payments of rent.** – Notwithstanding subparagraph (A), the lessor under a lease to which such subparagraph applies shall –

- (i) be entitled to the contractual rent accruing before the later of the date-

- (I) the notice of disaffirmance or repudiation is mailed; or

- (II) the disaffirmance or repudiation becomes effective, unless the lessor is in default or breach of the terms of the lease;

- (ii) have no claim for damages under any acceleration clause or other penalty provision in the lease; and

- (iii) have a claim for any unpaid rent, subject to all appropriate offsets and defenses, due as of the date of the appointment which shall be paid in accordance with this subsection and subsection (b).

In its appeal Centre Tech states it loaned Norlarco \$70,250 (to pay costs associated with tenant finish requirements) on the condition that it be repaid in equal monthly payments over the lease term at 0% interest, by adding said monthly payment to the monthly base rent amount due. As noted above, there

was no loan agreement addressing this payment, only paragraph 36 of the lease setting forth the amount of the tenant finish costs. Centre Tech also implies that the \$11,240 real estate commission it paid was amortized and included as part of the base rent over the term of the lease. We assume the determination of the amount of monthly base rent Norlarco/tenant paid Centre Tech/landlord included the monthly amortizations of the \$70,250 tenant finish costs and the \$11,240 real estate commission. It appears that claimant believes the unamortized portions of these two amounts (\$11,708.50 for tenant finish costs and \$1873.50 real estate commission for a total of \$13,582) are payable as its actual direct compensatory damages pursuant to FCU Act.

AMAC made the correct decision in denying the claim. AMAC paid \$9331.26 for contractual, unpaid rent due as requested by claimant. Section 207(c)(4) specifically limits damages in the case of a credit union lessee to contractual rent due to the lessor. There is no provision for any additional payment in damages. The repudiation provision of the FCU Act allows for actual direct compensatory damages in general cases (see Section 207(c)(3)(A)), but if the repudiation involves a lease where the credit union is the lessee, the lessor's damages are specifically limited to rent due. See Section 207(c)(4).

Order

For the reasons set forth above, it is ORDERED as follows:

The decision of the National Credit Union Administration's Asset Management and Assistance Center (AMAC) denying Centre Tech's claim in the amount of \$13,582 is affirmed and Centre Tech's appeal is denied.

The Board's decision constitutes a final agency determination. Pursuant to 12 CFR 709.8(c)(1)(iv)(B), this final determination is reviewable in accordance with the provisions of Chapter 7, Title 5, United States Code, by the United States Court of Appeals for the District of Columbia or the court of appeals for the Federal judicial circuit where the FCU's principal place of business was located. Such action must be filed within 60 days of the date of this final determination.

So **ORDERED** this 21st day of April, 2009 by the National Credit Union Administration Board.

/s/

Mary Rupp
Secretary, NCUA Board