

In the United States Bankruptcy Court

for the Northern District of Iowa

ASAP PRINTING, INC.
dba JO'S INSTY PRINT, INC.
Debtor.

Bankruptcy No. 93-60443LW

Chapter 7

ORDER RE: APPLICATION FOR PAYMENT OF ADMINISTRATIVE EXPENSE

This matter came on for hearing before the undersigned on July 9, 1993 on Application for Payment of Administrative Expense filed by Hong Mao (Allen) and Chen Li Chen (the "Chens"), after which the Court took the matter under advisement. Having considered the record and arguments of counsel, the Court makes the following ruling.

STATEMENT OF THE CASE

In 1989, the Chens and Debtor ASAP Printing, Inc. entered into a lease agreement under which Debtor rented its business premises from the Chens for \$700 per month. Debtor was in default under the lease prior to filing bankruptcy on March 17, 1993. The bankruptcy trustee filed a report of abandonment of the lease and of Debtor's equipment stored at the business premises on April 20, 1993. During the 34-day period from filing bankruptcy until the report of abandonment by the trustee, Debtor was not operating its business although its business equipment remained at the leased premises. The trustee conducted evaluations of the equipment there in order to decide whether to abandon the assets or attempt to sell them.

The Chens' Application requests payment of \$782.80 for the trustee's 34-day use of the property. This amount is based on a pro rata share of the rent of \$700 per month provided by the lease. The trustee resists the application, asserting that Debtor's use of the property was not "necessary" and did not benefit the estate.

CONCLUSIONS OF LAW

The Chens make their claim under alternative theories. They assert that 1) Debtor's use and occupancy of the leased premises for storage benefitted the bankruptcy estate and was a necessary expense under 11 U.S.C. sec. 503(b)(1)(A) entitled to administrative expense priority and 2) the trustee has an absolute obligation under 11 U.S.C. sec. 365(d)(3) regardless of whether Debtor's use benefitted the estate.

Section 503 makes an allowance for the "reasonable value for the use and occupancy of the landlord's property." Zagata Fabricators, Inc. v. Superior Air Prods., 893 F.2d 624, 627 (3d Cir. 1990). The use and occupancy of leased real estate normally counts as an "actual, necessary" cost under sec. 503 because the debtor's survival can depend on the right to possess space necessary to conduct business.

Id. Absent contrary evidence, the prior lease rate is ordinarily presumed to be the proper measure of the reasonable value of use and occupancy of the property. Faber v. Wards Co., 825 F.2d 684, 689 (2d Cir. 1987); In re Mel-Hart Products, Inc., 136 B.R. 197, 199 (Bankr. E.D. Ark. 1991).

Two lines of cases have reached differing conclusions in considering what type of use of leased real estate gives rise to an administrative expense claim. In re F. A. Potts & Co., 137 B.R. 13, 17 (E.D. Pa. 1992). The majority of courts have chosen to use an objective approach by valuing the use of the property without regard to the debtor's actual use or whether the use benefitted the estate. Id. These courts have rejected the subjective approach adopted in the Second and Ninth Circuits which base the value on the debtor's actual use of the property. Id. The Eighth Circuit has not yet articulated a position on the issue.

In determining whether to allow an administrative expense, courts "should not consider that the debtor has used only for storage purposes property that had been occupied by a going business." Id., citing Diversified Servs., Inc. v. Harralson, 369 F.2d 93, 95 (5th Cir. 1966). Id. Potts held that the lessor was entitled to the fair rental value of the property notwithstanding its limited use of the property post-petition for winding down the business, storing business records and a minimal level of business operations. Id. Compare In re Lease-A Fleet, Inc., 140 B.R. 840, 846-47 (Bankr. E.D. Pa. 1992) (distinguishes equipment leases from real estate leases which are entitled to special treatment). In a case arising in the Eight Circuit on a related issue, a trustee objected to an administrative claim for rent arguing that the landlord was only entitled to rent for the portion of the property actually used by the trustee. Mel-Hart Products, 136 B.R. at 198 (Bankr. E.D. Ark. 1991). The court overruled the objection finding that the trustee had constructive possession of the entire premises entitling the landlord to full rent. Id.

The Court chooses to adopt the majority view and use the objective approach in determining whether the Chens are entitled to receive the claimed rental payment as an administrative expense. Although Debtor did not continue operating its business at the leased premises, it had the use of the premises for storage of its equipment during the 34 days in question. Arguably, this use was of limited benefit to the estate. The Court concludes, however, that the use of the real estate constitutes such "use and occupancy" that the Chens are entitled to compensation under sec. 503(a)(1)(A).

This conclusion is bolstered by an analysis of the Chens' alternative theory for recovery. Section 365 (d)(3) states, in pertinent part, as follows: "The trustee shall 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 section 503(b)(1) of this title." No court of appeals has addressed the question of whether this provision alleviates the lessor from the requirement of sec. 503(b)(1) that the rental amount provide "actual" and "necessary" benefit to the bankruptcy estate. Paul Harris Stores, Inc. v. Mabel L. Salter Realty Trust, 148 B.R. 307, 308 (S.D. Ind. 1992).

Paul Harris assembled the reported cases which consider the issue. Id. at 313. In several cases with similar facts, the lessors were awarded post-petition, pre-rejection rent according to the terms of the lease. Factors such as fair market value, extent of occupation, and benefit to the estate were considered irrelevant in computing the amounts owed. Id. The debtor in Paul Harris had vacated and surrendered the leased premises in April, 1991. Rejection of the lease was approved in August, 1991. Id. at 308. The court held that rent for the intervening months was payable to the lessor as an administrative expense. Id. at 314. The Court determined that to give sec. 365(d)(3) a narrow reading, as a minority of courts do, flouts the intent of Congress to realign the burdens incident to assumption and rejection of leases for nonresidential real property. Id.

In re Worths Stores Corp., 135 B.R. 112, 116 (E.D. Mo. 1991) (debtor vacated premises prior to filing bankruptcy; lease rejected within 60 days), also followed the majority view noted in Paul Harris. It held that a request for post-petition, pre-rejection rent under sec. 365(d)(3) need not meet the requirements of sec. 503(b)(1)(A) in order to be given administrative expense priority. The court came to this conclusion after determining that such a result is supported by legislative history, by the plain language of the statute, by policy considerations and by resort to rules of statutory construction. Id. at 114-15. See also In re Duckwell-Alco Stores, Inc., 150 B.R. 965, 971 n. 10 (D. Kan. 1993) (365(d)(3) gives favorable treatment to lessors of nonresidential property by waiving the requirements of sec. 503(a)(1)(A)). Contra In re Orvco, Inc., 95 B.R. 724, 727 (9th Cir. BAP 1989) (365(d)(3) does not completely abrogate necessity for showing factors under 503(b)(a)(A); lessor must establish administrative status) (the WestLaw Insta-Cite service lists 12 cases as negative indirect history which disagree with or refuse to follow Orvco); In re The Bedroom of Central Florida, Inc., 150 B.R. 982, 984 (Bankr. M.D. Fla. 1993) (1984 amendments to 365 do not change the necessity to show the reasonableness of the rent).

This Court, following the majority view, concludes that sec. 365(d)(3) requires the trustee to pay rent under the lease between the Chens and Debtor from the date of filing the bankruptcy petition, March 17, 1993, until rejection of the lease on April 20, 1993. This obligation is treated as an administrative expense and is not dependent on the sec. 503(a)(1) requirement that the lessor show the use was necessary or of benefit to the bankruptcy estate. The Chens should be granted a claim for an administrative expense of \$782.80 constituting 34 days of rent.

WHEREFORE, the Application for Payment of Administrative Expense filed by Hong Mao (Allen) and Chen Li Chen is GRANTED.

FURTHER, the Chens' claim of \$782.80 for rent is an administrative expense.

SO ORDERED this 26th day of July, 1993.

Paul J. Kilburg, Judge
U.S. Bankruptcy Court