

**In the United States Bankruptcy Court**  
**for the Northern District of Iowa**

ASAP PRINTING, INC.  
dba Jo's Insty Print, Inc.  
Debtor(s).

Bankruptcy No. 93-60443LW  
Chapter 7

**ORDER**

The above captioned matter came on for hearing on October 29, 1993 on a Motion Seeking Clarification filed by Creditors Chen Li and Hong Mao Chen (the "Chens"). Hearing was held by telephone conference call. After hearing the parties' respective arguments, the Court took the matter under advisement. The Court has reviewed the file and considered the statements of counsel. The matter is now ready for determination.

On July 26, 1993, the Court entered an Order re: Application for Payment of Administrative Expense. This Order holds that the Chens are entitled to an administrative expense claim under 365(d)(3) and 503(a)(1)(A) for postpetition rent of \$782.80. The Chens now seek a ruling determining the priority of that claim and the time for payment. They argue that 365(d)(3) requires immediate payment without regard to whether Debtor's estate has sufficient assets to pay other administrative claims.

Trustee, Habbo Fokkena, joins in the Motion for Clarification. He feels that the Chen's assertions do not represent the majority position. He points out that, although the cash involved is quite small, the ruling may have significant future impact. He requests that the Court distinguish between rent as an operating expense in Chapter 11 cases and postpetition rent in a Chapter 7 no-asset case.

The U.S. Trustee submitted a brief. He urges the Court to adopt a flexible standard requiring immediate payment unless there is substantial doubt all administrative expenses will be paid in full. The U.S. Trustee shares the Trustee's concern about the impact of the ruling in this case on future cases.

The Chen's position is stated in a recent decision from the Northern District of Illinois. In re Telesphere Corp., 148 B.R. 525 (Bankr. N.D. Ill. 1992). Telesphere acknowledges that a majority of decisions construing 365(d)(3) hold that postpetition rental payments should be made only to the extent that other administrative claims are paid. Id. at 527. However, it finds two flaws with this interpretation: 1) it dilutes the plain meaning of the language requiring that the trustee "timely perform" the debtor's lease obligations, and 2) it assumes that 365(d)(3) payments are payments of administrative expenses under 503(b)(1). Id. at 528-30. Part of its reasoning rests on a distinction between operational expenses in a Chapter 11 context and court-ordered administrative expenses under 503(b)(2). Telesphere concludes that a "superpriority" for 365(d)(3) rent payments is implicit in the direction that the debtor make the payments without court involvement. Acknowledging that 365(d)(3) contains no remedy for violation of the duty to "timely perform", the court finds that 105(a) authorizes the court to fashion an appropriate remedy. "The most appropriate remedy in the present case would place [the landlord] in the position it would have occupied if the debtor had complied with the requirements of 365(d)(3)." Id. at 532. The court, in Telesphere, ordered the debtor in possession to pay the rent obligation immediately.

Other Bankruptcy Courts and two appellate courts accept this position. In re Duckwall-Alco Stores, Inc., 150 B.R. 965, 971 n.10 (D. Kan. 1993), notes that it is in agreement with courts that have held that 365(d)(3) creates obligations with priority over 503 administrative claims. In re Rare Coin Galleries, Inc., 72 B.R. 415, 416 (D. Mass. 1987), held that the trustee must immediately pay rent due for the holdover period because 365(d)(3) gives it special priority. See also In re Bio-Med Labs., 131 B.R. 72, 74 (Bankr. N.D. Ohio 1991) (holdover period rent constitutes a priority administrative

expense even where there are insufficient funds to pay all other priority claimants); In re Western Monetary Consultants, 100 B.R. 545, 547 (Bankr. D. Colo. 1989) (amount must be paid immediately); In re Gillis, 92 B.R. 461, 470 (Bankr. D. Hawaii 1988) ( 365(d)(3) distinguishes nonresidential lessors from all other creditors; lessor is entitled to immediate payment in full notwithstanding other administrative expense claims); In re Coastal Dry Dock & Repair Corp., 62 B.R. 879, 883 (Bankr. E.D.N.Y. 1986) (right to rent under 365(d)(3) is independent of the normal standards for administrative expense claims).

Telesphere and Duckwall-Alco acknowledge that a majority of the cases reach the conclusion that immediate payment of rent under 365(d)(3) is only appropriate if it appears that the assets of the estate are sufficient to pay all other administrative claims. Telesphere, 148 B.R. at 527 n.4; Duckwall-Alco, 150 B.R. at 971 n.10. Contra Miles Archer Woodlief, Commercial Lessors and Nonresidential Lessee-Debtors: Developing Case Law Under 11 USC 365(d)(3), 1993 Norton Bankruptcy Law Advisor No. 8, at 9 (August, 1993) (stating that the majority position creates a special or superadministrative class of commercial lessors, citing Rare Coin Galleries). For example, a recent case from the same jurisdiction as Telesphere finds that the "timely perform" requirement of 365(d)(3) does not expressly elevate the obligation to superpriority status. In re Joseph C. Spiess Co., 145 B.R. 597, 608 (Bankr. N.D. Ill. 1992). "In light of the already numerous advantages conferred to lessors, this Court will not alter the priority of payment without an express mandate from Congress." Id.

If the Court orders immediate payment, a superpriority may result where none was intended. In re Virginia Packaging Supply Co., 122 B.R. 491, 494 (Bankr. E.D. Va. 1990) (finding that the greater weight of authority rejects the proposition). In re Orvco, Inc., 95 B.R. 724, 728 (BAP 9th Cir. 1989), also states that 365(d)(3) does not grant superpriority status to claims for postpetition rent. It identifies and follows the majority view which holds that where there are insufficient funds to satisfy all administrative claims, the landlord is only entitled to its pro rata share. Id. See also In re Appliance Store, Inc., 148 B.R. 226, 233 (Bankr. W.D. Pa. 1992) (generally entitled to immediate payment absent showing of substantial doubt sufficient funds will be available to pay all administrative claimants in full); In re Laurence R. Smith, Inc., 127 B.R. 715, 717 (Bankr. D. Conn. 1991) (payment may be made if there are funds available to pay all administrative claims); In re Washington Bancorp., 126 B.R. 130, 131 (Bankr. D.D.C. 1991) (immediate payment required absent showing of good cause for withholding payment); In re Cardinal Indus., Inc., 109 B.R. 738, 742 (Bankr. S.D. Ohio 1989) (payments made are subject to recovery if other administrative claimants are not paid in full); In re Wingspread Corp., 116 B.R. 915, 932 (Bankr. S.D.N.Y. 1990) ( 365(d)(3) does not serve as a basis for superpriority claim); In re Buyer's Club Mkts., Inc., 115 B.R. 700, 702 (Bankr. D. Colo. 1990) (pay immediately unless trustee establishes good cause for withholding payment); In re Orient River Invs., Inc., 112 B.R. 126, 134 (Bankr. E.D. Pa. 1990) (discusses the split of authority and adopts the holding of Orvco); In re Granada, Inc., 88 B.R. 369, 375 (Bankr. D. Utah 1988) (immediate payment should be made absent showing of substantial doubt will ultimately be sufficient funds available to pay all administrative expenses); In re United West, Inc., 87 B.R. 138, 140 ( 365(d)(3) does not grant superpriority or alter rule giving court discretion in determining time for payment of administrative expense).

Some of these cases hold that the timing of payment of administrative expense claims is generally left to the court's discretion. Cardinal Indus., 109 B.R. at 742; Orvco, 95 B.R. at 72; United West, 87 B.R. at 141. Factors to be considered in exercising this discretion include the status of the case, the likelihood there will be full payment of all administrative claims, the ability of the lessor to return the payment if necessary, and the efficacy of payment subject to disgorgement. Cardinal Indus., 109 B.R. at 742; United West, 87 B.R. at 141.

Many of the cases which adopt the majority position note that 365(d)(3) fails to provide a remedy for the failure to timely perform a lease obligation. See Virginia Packaging, 122 B.R. at 494 (listing some of the remedies ordered in other cases). Orient River states that the lessor is not allowed immediate payment unless it establishes that there is a likelihood that the debtor will pay all administrative claims in full. 112 B.R. at 134. Granada holds that when immediate payment is sought, it should be made absent a showing by the trustee of substantial doubt that there will ultimately be sufficient funds available to pay all administrative expenses. 88 B.R. at 375. Other courts allow immediate payment, in the absence of a showing of good cause for withholding payment, subject to recapture if there are insufficient funds to pay all administrative claims. Washington Bancorp., 126 B.R. at 131; Buyer's Club Mkts., 115 B.R. at 702.

This Court concludes that it is inappropriate to order immediate payment without considering the solvency of the bankruptcy estate. To do so seems inconsistent with the administrative expense priority scheme of the Bankruptcy Code

and implies a nonexistent superpriority from the 365(d)(3) "timely perform" requirement. This Court accepts the majority position. Payment of postpetition rent under 365(d)(3) must be made immediately upon demand unless a showing is made by the trustee or debtor in possession that there is substantial doubt that sufficient funds will be available to pay all administrative claimants in full. Appliance Stores, 148 B.R. at 233; Washington Bancorp., 126 B.R. at 131; Buyer's Club Mkts., 115 B.R. at 702; Orvco, 95 B.R. at 728; Granada, 88 B.R. at 369. If insufficient funds exist to satisfy all administrative claims, the lessor shall only receive its pro rata share along with all other allowed administrative claims. In re Four Star Pizza, Inc., 135 B.R. 498, 500 (Bankr. W.D. Pa. 1992). Any order directing immediate payment will be subject to the trustee's right to seek recovery in the event all other administrative claimants are not paid in full. Id.

The record is unresolved whether the bankruptcy estate contains assets in excess of the costs of administration. The Trustee seems to take the position that this is a "no asset" case. However, an order fixing time for filing claims filed May 19, 1993 states that there may be excess assets beyond the costs of administration. In light of the Court's ruling, the parties will be given an opportunity to present evidence on the extent of assets available for distribution. The parties are given until December 10, 1993 to request a hearing or file a stipulation regarding the extent of assets available to administrative claimants. If no hearing is requested and no stipulation is filed by that date, the Court will order that immediate payment be made to the Chens under 365(d)(3).

**WHEREFORE**, the Court concludes that immediate payment of the Chens' 365(d)(3) administrative expense claim is appropriate absent a showing by the trustee or debtor in possession of substantial doubt that sufficient funds will be available to pay all administrative claimants in full.

**FURTHER**, the Court will order immediate payment of \$782.80 to the Chens under 365(d)(3) unless a hearing is requested or a stipulation is filed regarding the extent of assets available for administrative claimants prior to December 1, 1993.

**SO ORDERED** this 24th day of November, 1993.

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