

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:) In Proceedings
) Under Chapter 7
R & M ENTERPRISES, INC.)
) BK No. 90-30997
Debtor.)
)
A. J. NESTER,)
)
Plaintiff,)
)
v.)
)
R & M ENTERPRISES, INC.,)
)
Defendant.)

OPINION

The debtor, R & M Enterprises, Inc., filed a petition for Chapter 11 bankruptcy relief on November 2, 1990, which was subsequently converted to a proceeding under Chapter 7 on September 27, 1991. A. J. Nester, d/b/a Nester Management, is the lessor of the premises upon which debtor operated its business. The lessor filed a motion on October 30, 1991, seeking confirmation of the rejection of its lease with the debtor, and requesting an administrative claim for post-petition rent the debtor owed from the date the order of relief was entered, November 2, 1990, through the date the debtor vacated the premises, October 19, 1991, in the total amount of \$9,353.00. The lease commenced on September 1, 1989, and was to expire on August 31, 1992.¹ The debtor, in its

¹The lessor also sought damages for breach of the lease in the amount of \$13,630.00, representing the rent for the unexpired portion of the lease term, October 20, 1991 through August 31, 1992. The lessor, however, withdrew its claim for these damages at the hearing on its motion on November 27, 1991.

response to the motion and at the hearing on the motion, did not oppose the rejection of the lease, but disputed the lessor's right to an administrative claim, arguing that the lessor was only entitled to a general unsecured claim for any post-petition rent owed. This Court, at the hearing on the motion, orally ordered that the lease was deemed rejected, but took the motion for allowance of the administrative claim under advisement.

Before the Court can decide what portion, if any, of the lessor's claim should be allowed as an administrative expense, the Court must first determine when the lease was rejected. Under §365(d)(4) of the Bankruptcy Code, if an unexpired lease of nonresidential real property under which the debtor is a lessee is not assumed or rejected within 60 days after entry of the order of relief, then the lease is deemed rejected.² Section 348 of the Bankruptcy Code, however, states that if a case is converted, then §365(d) applies "as if the conversion order were the order of relief," thereby indicating that the 60-day period is

²Section 365(d)(4) provides:

[I]n a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

11 U.S.C. § 365(d)(4) (1991).

reinstated, or begins to run anew, from the date of conversions.³

The record reveals the lease was never expressly assumed. As this Court has previously stated, assumption of a lease pursuant to §365 "requires an unequivocal expression of intent to assume by the trustee or debtor in possession, as well as express approval by the court." In Re Uly-Pak, Inc., 128 B.R. 763, 765 (Bankr. S.D. Ill. 1991). No such action took place regarding the lease here. Under §365(d)(4), the 60 days began to run on November 3, 1990, the day after the order of relief was entered. Because the lease was never assumed, it was deemed rejected at the expiration of the 60-day period on January 1, 1991.

The new 60-day period pursuant to §348(c) does not apply in this case. Once the lease was deemed rejected at the expiration of the 60-day period on January 1, 1991, the lease was no longer property of the estate, In Re U.S. Fax, Inc., 114 B.R. 70, 72 (E.D. Pa. 1990), so there was no lease to assume or reject after the conversion of the case on September 27, 1991. Section 348(c) would have only applied if the lease had been assumed or the conversion had taken place before the expiration of the original 60-day period. In both of those instances, the lease would not yet have been rejected and therefore would still have constituted property of the estate.

Any other result puts §365(d)(4) and §348(c) in conflict with one another and poses potentially serious problems for both debtors and lessors. Suppose a debtor rejects a lease after the order of relief is

³Section 348(c) states: "Sections 342 and 365(d) of this title apply in a case that has been converted under section 706, 1112, 1307, or 1208 of this title, as if the conversion order were the order for relief." 11 U.S.C. § 348(c) (1991).

entered and the lessor relets the premises. Thereafter, the debtor converts the case and the trustee is given another 60 days to assume or reject the same lease pursuant to §348(c). If the trustee decides to assume the lease, then several problems arise, not the least of which is who is entitled to occupy the premises, the debtor or the present tenant. If such a situation is allowed to occur, lessors will be stymied in the use of their property. Lessors will fear reletting their property even after the rejection of a lease because the debtor may subsequently convert the case and thereby reassume the lease. The resolution of §365(d)(4) and §348(c) the Court adopts here fulfills both the purpose of §365(d)(4), which is to protect lessors "from the delay and uncertainty regarding assumption or rejection of nonresidential real property leases by requiring prompt action to assume the lease," and the competing purpose of §348(c), which is "to give the newly appointed trustee an opportunity to familiarize himself (or herself) with the case prior to making the decision whether to assume or reject." In Re Tandem Group, Inc., 61 B.R. 738, 740 (Bankr. C.D. Cal. 1986). For these reasons, the lease was deemed rejected on January 1, 1991, regardless of the subsequent conversion, because the lease was not assumed within the 60-day period. Id. at 741; In Re Maralak, Ltd., 104 B.R. 446, 449 (Bankr. M.D. Fla. 1989).⁴

The Court now addresses the lessor's request for an administrative claim for the rent owed from the date the order of

⁴The Court is also persuaded by the reasoning and analysis made by the Tandem court which dealt with this same issue. Tandem, 61 B.R. at 739-41.

relief was entered until the date the debtor vacated the premises. Section 365(d)(3) of the Bankruptcy Code requires that the trustee "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 [the Bankruptcy Code]." 11 U.S.C. § 365(d)(3) (1991). Section 503(b)(1)(A) provides for the allowance of administrative expenses, including "the actual, necessary costs and expenses of preserving the estate."⁵ The obligations referred to in §365(d)(3) include the obligation to pay rent. Therefore, the lessor is entitled to an administrative claim for the rent that accrued during the 60-day period prior to the rejection of the lease pursuant to §365(d)(3). U.S. Fax, 114 B.R. at 73-74; In Re Virginia Packaging Supply Co., Inc., 122 B.R. 491, 493-94 (Bankr. E.D. Va. 1990); In Re Homeowner's Outlet Mall Exchange, Inc., 89 B.R. 965, 969 (Bankr. S.D. Fla. 1988); Tandem, 61 B.R. at 741-42; In Re Fisher & Fisher, Inc., 51 B.R. 680, 682-83 (Bankr. S.D. Ohio 1985). The Court additionally notes that the lessor also would be entitled to an administrative claim under §503(b)(1)(A) for the rent which accrued during this 60-day period

⁵Section 503 of the Bankruptcy Code provides:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including-(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case. . . .

11 U.S.C. § 503(b)(1)(A) (1991).

because, inasmuch as the debtor operated its business out of the leased premises during this period, rent was an actual and necessary cost of preserving the estate.⁶

The Court cannot conclude that any of the other postpetition rent the debtor owes entitles the lessor to an administrative claim. The obligations imposed by §365(d)(3) clearly expire once the lease is rejected. Moreover, such rent cannot be a necessary cost of preserving the estate pursuant to § 503(b)(1)(A) because the lease has been rejected, thereby indicating that the lease is unnecessary to the estate. Although §365(d)(4) requires that rejected property be immediately surrendered to the lessor, there is no allegation or showing by the lessor here that it attempted to regain control of the property. The record reveals the lessor filed a motion on January 9, 1991, shortly after the original 60-day period expired, for confirmation of the rejection of the lease and for an administrative claim for rent. Upon the lessor's request, however, this Court, on February 8, 1991, allowed the lessor to withdraw its motion. Thus, the lessor has not revealed to the Court any reason which would warrant

⁶The courts are split on the issue of whether a lessor is automatically entitled by §365(d)(3) to an administrative claim for the rent owed for the 60 days prior to rejection of the lease, or whether the lessor must also show that the requirements of §503(b)(1)(A) have been fulfilled for the rent claimed during this period. See In Re Orvco, Inc., 95 B.R. 724, 727-28 (Bankr. 9th Cir. 1989); In Re Daisy/Cadnetix, Inc., 126 B.R. 87, 88-90 (Bankr. N.D. Cal. 1990); In Re Wingspread Corp., 116 B.R. 915, 925-26 (Bankr. S.D. N.Y. 1990); Homeowner's, 89 B.R. at 969-70. The Court need not address this issue because the parties did not raise or discuss it, and because the Court finds that the lessor nevertheless has met the requirements of both §365(d)(3) and §503(b)(1)(A) for the rent claimed during the 60-day period.

granting its claim, particularly in light of the lessor's apparent acquiescence in the debtor's occupation of the premises for at least eight months after the 60-day period expired. See Fisher, 51 B.R. at 683; cf. In Re Cardinal Industries, Inc., 109 B.R. 738, 739-741 (Bankr. S.D. Ohio 1989); Homeowner's, 89 B.R. at 967, 970. Consequently, the lessor's request for an administrative claim for postpetition rent incurred beyond the 60-day period is denied. See U.S. Fax, 114 B.R. at 74.⁷

In summary, the lessor's motion for an administrative claim for the post-petition rent owed by the debtor for the 60 days between the entry of the order of relief on November 2, 1990, and the rejection of the lease on January 1, 1991, is allowed. The lessor's motion for an administrative claim for the post-petition rent owed by the debtor from January 2, 1991, through October 19, 1991, is denied. Any damages resulting from the breach of the lease on January 1, 1991, constitute a general unsecured claim.⁸ See written order entered this date.

⁷At the hearing, in support of its position that the lessor is not entitled to an administrative claim for any of the postpetition rent owed, the debtor cited In Re Mlle. Lemaud, Inc., 16 F.2d 780 (1st Cir. 1926) and In Re No Care Electric Radiator Corp., 3 F. Supp. 331 (S.D. N.Y. 1933). The court has reviewed these cases and finds them distinguishable and inapplicable, principally because these cases involve the bankruptcy law as it existed prior to the enactment of the current Bankruptcy Code.

⁸The parties indicated at the hearing that upon the Court's determination of the character of the lessor's claims, they could calculate and agree upon the precise amount owed by the debtor. Therefore, the Court will leave the decision as to the amount of the claims to the parties.

/s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: January 27, 1992