

administrative priority expense under 11 U.S.C. § 365(d)(3) and/or § 503(b)(1). Oak View alleges that the debtor has not paid any rent or other charges due under the terms of the lease since February 1, 1995, well before the petition date. Oak View is seeking \$17,331.86 for postpetition rent, late fees, additional charges, and attorney fees incurred through October 22, 1995, calculated as follows:

July Pro Rated Rent and Additional Charges	\$1,647.36
August Rent and Additional Charges	4,167.50
August Late Fee	100.00
September Rent and Additional Charges	4,167.50
September Late Fee	100.00
October Pro Rated Rent and Additional Charges	2,957.58
Attorney Fees and Court Costs	<u>4,191.92</u>
Total	\$17,331.86

Additional charges represent monthly maintenance and operational charges, e.g. common area upkeep, real estate tax, insurance, electrical service, pest control, trash removal, sprinkler system, media, merchant's dues. See Lease, at 2 (j) - (v) [hereinafter these charges shall be collectively referred to as "additional charges"]. Oak View alleges that the attorney fees were properly chargeable to the debtor under the terms of the lease agreement and that the total attorney fees are for fees incurred from the date of the petition through the date the debtor vacated the retail space.

The debtor and the Unsecured Creditors Committee (Committee) have objected to the motion. The debtor takes the position that since the lease was rejected, the lease agreement provision for attorney fees was not in effect, and therefore, Oak View is not entitled to any attorney fees. The debtor acknowledges that postpetition rent is due, but argues that the postpetition rent should be a general unsecured claim because the monthly charges under the lease agreement were not reasonable. The debtor also alleges that Oak View failed to return property of the debtor, consisting of display cases, when the debtor vacated the retail space, and the debtor argues that the value of the display cases should offset the claim of Oak View.

The Committee argues that the claims sought to be recovered by Oak View -- postpetition rent, additional charges, late fees, attorney fees and costs associated with the removal of the debtor -- are not administrative expense priority claims because none of the claims are necessary costs and expenses of preserving the estate under 11 U.S.C. § 503(b)(1).

Statutory Authority

Section 365(d) (3) states:

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.

11 U.S.C. § 365(d) (3). The reference in Section 365(d) (3) to "trustee" applies to the debtor as the debtor-in-possession through 11 U.S.C. § 1107(a).

Section 503(b) (1) (A), which is the general provision for administrative expenses, states:

(b) After notice and a hearing, there shall be allowed administrative expenses, ..., 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).

Issues

1. Whether Section 365(d) (3) grants administrative expense status to all "obligations" that were due to Oak View under the lease until the date that the debtor is deemed to have rejected the lease, without consideration for whether those expenses were reasonable or necessary under Section 503(b) (1) (A).

2. Whether the postpetition rent, late fees, additional charges, or attorney fees constitute "obligations" under the lease agreement pursuant to Section 365(d) (3).

3. Whether Section 365(d) (3) administrative priority expenses are deemed to have "superpriority" and are payable before other administrative priority expenses.

4. If Section 365(d) (3) applies only to those postpetition obligations incurred before the date the lease was deemed rejected,

whether postpetition claims due for attorney fees, rent, late fees, and additional charges which were incurred after the rejection date through the date the debtor vacated the premises, are necessary and reasonable expenses of the estate under Section 503(b)(1)(A) and thus, entitled to be treated as administrative priority expenses of the estate.

Discussion and Decision

A. Post Petition--Date Lease Rejected Obligations

I have previously followed the majority line of cases and held that obligations incurred by the lessee post petition through the date of rejection are administrative claims under Section 365(d)(3) and that those obligations do not have to be justified as necessary or reasonable expenses of the estate under Section 503(b)(1)(A). In re Richman Gordman Stores, Inc., Neb. Bkr. 93:161, 163 (Bankr. D. Neb. 1993); In re World Radio Lab., Inc., 90:653, 654 (Bankr. D. Neb. 1990); Towers v. Chickering & Gregory (In re Pacific-Atlantic Trading Co.), 27 F.3d 401, 404-05 (9th Cir. 1994); In re Worths Stores Corp., 135 B.R. 112, 114-15 (Bankr. E.D. Mo. 1991) (discussing case law following majority position and the legislative history surrounding § 365(d)(3)); In re Washington Mfg. Co., 1993 WL 156083, *8-*9 (Bankr. M.D. Tenn. May 11, 1993); In re Mr. Gatti's, Inc., 164 B.R. 929, 937-40 (Bankr. W.D. Tex. 1994) (opining that minority view was favorable, but extensively citing cases following majority position); In re Compuadd Corp., 166 B.R. 862, 863 (Bankr. W.D. Tex. 1994); In re Wingspread Corp., 116 B.R. 915, 925, 926 (Bankr. S.D.N.Y. 1990) (citing additional cases in favor of majority position); In re Rare Coin Galleries of America, Inc., 72 B.R. 415, 416 (D. Mass. 1987).

The majority position is that the plain language of the statute expressly provides that Section 365(d)(3) is independent from Section 503(b)(1) and from the requirements of notice and a hearing before the bankruptcy court. Worths Stores, 135 B.R. at 115 (quotation omitted); Wingspread Corp., 116 B.R. at 926; Compuadd Corp., 166 B.R. at 865; Washington Manufacturing, 1993 WL 156083, *8-*9. Under the general principles of statutory construction, a statute that is specific, like Section 365(d)(3), controls over a general statute, like Section 503(b)(1)(A). Worths Stores, 135 B.R. at 115 (citing United States v. Eagle, 539 F.2d 1166, 1173 (8th Cir. 1976)).

Section 365(d)(3) was passed by Congress in 1984 in response to lobbying pressure by shopping center landlord associations. Compuadd Corp., 166 B.R. at 865. The legislative history supports the rationale that Congress did not want nonresidential landlords

to have to bear the burden of providing postpetition services while the decision to accept or reject the lease was pending:

In this situation [pre-§ 365(d)(3)], the landlord is forced to provide current services -- the use of its property, utilities, security, and other services -- without current payment. No other creditor is put in this position...[§ 365(d)(3)] would lessen these problems by requiring the trustee to perform all the obligations of the debtor under a lease of nonresidential real property at the time required in the lease. This timely performance requirement will insure that debtor-tenants pay their rent, common area, and other charges on time pending the trustee's assumption or rejection of the lease.

130 CONG. REC. S8895 (daily ed. June 29, 1984) (statement of Senator Hatch); see also Worthy's Stores Corp., 135 B.R. at 114-15 (quoting In re Lonqua, 58 B.R. 503, 505 (Bankr. W.D. Wis. 1986)); Wingspread Corp., 116 B.R. at 926.

A minority of bankruptcy courts hold that when a lease is deemed rejected, postpetition/pre-rejection obligations are entitled to administrative priority status under Section 365(d)(3) only if the lessor establishes that its claim is also entitled to administrative priority under Section 503(b)(1)(A). Great Western Sav. Bank v. Orvco, Inc. (In re Orvco, Inc.), 95 B.R. 724, 728 (Bankr. 9th Cir. 1989); In re JAS Enters., Inc., 180 B.R. 210 (Bankr. D. Neb. 1995) (Minihan, J.); Mr. Gatti's, 164 B.R. at 935-37 (listing and discussing case law supporting minority position); In re RB Furniture, Inc., 141 B.R. 706, 714 (Bankr. C.D. Cal. 1992); Worthy's Stores Corp., 135 B.R. at 115-16 (following majority position, but discussing case law in support of the minority holding).

The leading case for the minority position, which is the Ninth Circuit Bankruptcy Appellate Panel decision in Orvco, is no longer valid law because the Ninth Circuit Court of Appeals has subsequently ruled that Section 365(d)(3) obligations are entitled to administrative priority treatment, without consideration of Section 503(b)(1)(A) requirements. See Pacific-Atlantic, 27 F.3d 404-05. As a result of Pacific-Atlantic, the minority position is substantially weaker because those bankruptcy courts in the Ninth Circuit, which previously followed Orvco, now follow Pacific-Atlantic. See, e.g., In re MS Freight Distribution, Inc., 172

B.R. 976 (Bankr. W.D. Wash. 1994) (holding that Pacific-Atlantic overruled Orvco on this point, and reversing itself accordingly).

I shall continue to follow the majority position and find that Oak View is entitled to an administrative priority claim under Section 365(d)(3) for the postpetition obligations incurred pursuant to the terms of the lease through September 27, 1995, the date the lease was rejected. The plain language of Section 365(d)(3) expressly excludes any consideration of Section 503(b)(1)(A) requirements, and Oak View does not, therefore, have to show that such obligations were reasonable or necessary.

1. Superpriority v. General Administrative Status

Since Oak View has an administrative claim pursuant to Section 365(d)(3), the next issue is whether a Section 365(d)(3) claim is equal in priority to other administrative expenses or whether a Section 365(d)(3) claim is elevated to "superpriority" status and paid before other administrative claims.

A few bankruptcy courts have ruled that administrative expenses under Section 365(d)(3) are entitled to immediate payment as "superpriority" administrative expenses. Rare Coin Galleries, 72 B.R. at 416; Mr. Gatti's, 164 B.R. at 940-42 (holding that no "superpriority" status was conferred on § 365(d)(3), but discussing cases in favor of "superpriority status"). The conclusion of these courts is based on the observation that the plain language of Section 365(d)(3) requires Section 365(d)(3) obligations to be paid by the debtor in the ordinary course without notice and hearing before a bankruptcy court (as required under Section 503(b)(1)(A)) and therefore, when the debtor fails to pay Section 365(d)(3) obligations, the court should order immediate payment of those obligations so the landlord is in the same position as if the debtor had complied with Section 365(d)(3) and paid in the ordinary course. Mr. Gatti's, 164 B.R. at 942 (quoting In re Teleshpere Communications, Inc., 148 B.R. 525, 531-32 (Bankr. N.D. Ill. 1992)). These courts find that Section 365(d)(3) obligations are immediately payable as "superpriority" administrative claims on the authority of 11 U.S.C. §§ 105(a) and 363(c)(1). Mr. Gatti's, 164 B.R. at 942.

Most bankruptcy courts hold that when there are insufficient funds to pay all administrative claims, the administrative claimants under Section 365(d)(3) should be paid pro rata with other administrative claims. Wingspread Corp., 116 B.R. at 932 ("But section 365(d)(3) does not serve as the basis for a superpriority claim." (citations omitted)); In re Orient River Invs., 112 B.R. 126, 134 (Bankr. E.D. Pa. 1990); In re The Tandem Group, Inc., 61 B.R. 738, 742 (Bankr. C.D. Cal. 1986) ("Had

Congress intended to create a super-priority for subsection 365(d)(3) it would have done so by express statutory language."); In re American Resources Management Corp., 51 B.R. 713, 719-21 (Bankr. D. Utah 1985); In re Standard Furniture Co., 3 B.R. 527, 530, 532 (Bankr. S.D. Cal. 1980); MS Freight Distribution, 172 B.R. at 979 (holding that part of Orvco decision, which denied "superpriority," was not overruled by Pacific-Atlantic); see also Richman Gordman, Neb. Bkr. 93: at 164 & World Radio, Neb. Bkr. 90: at 654-55 (paying § 365(d)(3) administrative claims before other administrative claims, but finding in both cases that all administrative claims would eventually be paid).

In this case, Section 365(d)(3) administrative claims should be paid on a pro rata basis with other administrative claims. No evidence was presented by Oak View to show that administrative claims would be paid in full in this case, and therefore, Oak View is not entitled to immediate payment of its Section 365(d)(3) administrative claim ahead of other administrative claimants.

2. Obligations Entitled to Priority

Oak View has requested that an administrative claim be granted for rent, late fees, additional charges, and attorney fees incurred under the terms of the lease. Section 365(d)(3) requires that the debtor pay "all obligations" arising under the lease until the date the lease is rejected.

The monthly charges for rent, the late fees, and additional charges are "obligations" under Section 365(d)(3). The terms of the lease explicitly provide for each of these charges, and, therefore, these charges are obligations "arising ... under any unexpired lease." The legislative history of Section 365(d)(3), supra at 4-5, supports the conclusion that the debtor should pay all charges which become due under the terms of a lease through the date that the debtor rejects the lease agreement.

However, Oak View is not allowed an administrative claim under Section 365(d)(3) in the total amount requested. Section 365(d)(3) applies only to those obligations which arose prior to the date the lease was rejected, September 27, 1995, not through the date that the debtors vacated the premises, as Oak View has requested. Had the debtor paid the pre-rejection obligations, his statutory requirement to do so would have expired on the rejection date and, thereafter, the terms of the lease were not applicable.

The debtor alleged in its objection that it owed a different amount in rent to Oak View, but at the hearing, the debtor did not submit any evidence to contradict the figures supplied by Oak View. Therefore, the court finds that Oak View has an allowed

administrative claim under Section 365(d)(3) for rent, late fees and additional charges in the following amounts:

July Pro Rated Rent and Additional Charges	\$1,647.36
August Rent and Additional Charges	4,167.50
August Late Charges	100.00
September Rent and Additional Charges (Pro Rated 27/30 x 4,167.50)	3,750.75
September Late Charges (Pro Rated 27/30 x 100.00)	90.00
Total	<hr/> \$9,755.61

The remaining obligation is for attorney fees incurred by Oak View. The provision in the lease pertaining to attorney fees is very broad:

In case Landlord ... shall be made a party to any litigation commenced by or against Tenant, then Tenant shall pay all costs, expenses and reasonable attorneys' fees incurred or paid by Landlord ... in connection with such litigation. Tenant shall also pay all costs, expenses and reasonable attorneys' fees that may be incurred or paid by Landlord ... in successfully enforcing the covenants and agreements of this Lease.

Lease, Article 26 at 21.

Attorney fees are administrative priority expenses under Section 365(d)(3) if the terms of the lease provide for reimbursement of attorney fees. MS Freight Distribution, 172 B.R. at 978-79 (citing additional cases in support of proposition); In re Revco D.S., Inc., 109 B.R. 264, 272 (Bankr. N.D. Ohio 1989) (discussing additional case law); In re Narragansett Clothing Co., 119 B.R. 388, 391 (Bankr. D.R.I. 1990); Washington Manufacturing, 1993 WL 156083, *11 (denying fees under § 365(d)(3) where fees incurred not in accordance with lease agreement, but instead were determined to be default damages).

In this case, Oak View submitted a blanket request for fees incurred from the date of the petition through the date the debtor vacated the premises. Under Section 365(d)(3), Oak View is only entitled to attorney fees that were incurred up to the date of rejection of the lease on September 27, 1995. Oak View has not identified the amount of fees that were incurred prior to September 27, 1995, and therefore, it cannot be determined what, if any, administrative claim for attorney fees Oak View is entitled to receive.

The second problem with the request for attorney fees is that Oak View has not shown that these fees were incurred as a result of actions by the debtor which would trigger the attorney fee clause in the lease. The affidavit testimony of the manager of Oak View suggests that the attorney fees were incurred as a result of the "default" of the debtor under the lease, but even though the language in the lease is broad, this reference is too vague. I cannot determine whether "default" refers to the state court action, the bankruptcy case, or to default damages for rejecting the lease.

Oak View will be granted additional time to submit documentary or affidavit evidence to establish an administrative claim to pre-rejection attorney fees.

B. Date of Rejection--Date Premises Vacated Expenses

The remaining claim by Oak View is for the expenses which were incurred after the date the lease was deemed rejected until the date the debtors vacated the premises. Generally, claims arising as a result of the rejection of a lease under Section 365 are treated as if the claim arose before the date of the filing of the bankruptcy petition. 11 U.S.C. § 502(g); 11 U.S.C. § 365(g); Narragansett, 119 B.R. at 392 & n. 4; In re Gillis, 92 B.R. 461, 465, 468 (Bankr. D. Haw. 1988).

The bankruptcy court has, however, discretion to find that post-rejection expenses, e.g. rent, are entitled to administrative expense priority under Section 503(b)(1)(A). In re Mainstream Access, Inc., 134 B.R. 743, 749 (Bankr. S.D.N.Y. 1991) (citing additional cases therein). To constitute an administrative priority claim under Section 503(b)(1)(A), the creditor must show that the bankruptcy estate actually benefitted from the consideration supporting the creditor's claim. Kinnan & Kinnan Partnership v. Agristor Leasing, 116 B.R. 162, 166 (D. Neb. 1990) ("The use of the terms "actual" and "necessary" were not accidental but were included to impose the requirement that the estate is actually benefitted." (quotation omitted)); In re Statmore, Neb. Bkr. 95:24, 25 (Bankr. D. Neb. 1995) ("[T]he benefit to the estate must be tangible; incidental benefit is not sufficient for an administrative expense." (citation omitted)); Mainstream Access, 134 B.R. at 749. (citing additional cases therein). The mere fact that the debtor had control and possession over the property is not sufficient to show a benefit to the estate, and thus, allow the claim as an administrative claim. Kinnan & Kinnan, 116 B.R. at 166.

In the nonresidential lease situation, once a lease is rejected, its terms no longer control. Rare Coin Galleries, 72

B.R. at 417 (quotation omitted). A landlord is, therefore, only entitled to a reasonable rental rate, but a bankruptcy court may assume that the lease provides evidence of a reasonable rate, unless the debtor produces evidence that the lease rate is unreasonable. JAS Enters., 180 B.R. at 217 (citing additional cases in support of this proposition); Rare Coin Galleries, 72 B.R. at 417 (citations omitted); see also Gillis, 92 B.R. at 465 (holding that full rental value is fair when debtor enjoys actual use and possession of premises after the lease is rejected).

I find that Oak View is entitled to an administrative claim for rent and for additional charges under Section 503(b)(1)(A). The debtor did not pay rent or the additional charges after the date the lease was deemed rejected, but the debtor continued to operate its business and earn income from the location. Therefore, the debtor received an actual benefit from retaining possession of the premises, while Oak View had to maintain the premises at its own expense. Oak View is requesting an administrative expense claim in the amount that would be due if the terms of the lease still applied, and I agree that such an amount establishes a reasonable rate in the absence of other evidence.

The debtor submitted evidence that the rate charged in the lease for rent and additional charges was unreasonable, but the evidence is not in proper form under court rules and the evidence is not sufficiently detailed to defeat the presumption of the reasonableness of the lease terms. Since the debtor did attempt to raise the issue and since Oak View is authorized to supplement its record on attorney fees, debtor may supplement his evidence regarding the reasonableness of the rental rate.

Oak View is not entitled to an administrative priority claim for attorney fees or for late fees incurred after the date the lease was rejected. Oak View raised the argument that it is entitled to attorney fees pursuant to the lease agreement by analogy to 11 U.S.C. § 506(b). However, Section 506(b) applies only to secured creditors, and in the commercial landlord context, once the lease is rejected, the lease agreement is no longer authority for attorney fees. The only basis for an administrative expense for attorney fees incurred after a lease is rejected is through Section 503(b)(1)(A), but in this case, Oak View has failed to show that the attorney fees benefitted the estate as an actual and necessary expense of preserving the estate.

The post-rejection late fee charged by Oak View for late rent payments also does not benefit the estate as required under Section 503(b)(1)(A). The late fee is a penalty which arose solely under the terms of lease and not in exchange of a benefit conferred to the debtor.

C. Offset for Display Cases

The debtor asserts that Oak View refused to return display cases belonging to the bankruptcy estate after the debtor was evicted from the premises, and the debtor has requested that the court set off Oak View's administrative claim in the amount of the value of the property. Oak View denies that the display cases belong to the debtor. Whether a creditor has possession of property of the bankruptcy estate and should turn it over or suffer an offset is not properly addressed in a contested matter regarding administrative expenses. Therefore, the debtor is not entitled to offset the value of the property against Oak View's administrative claim.

Conclusion

1. Oak View is entitled to an administrative expense claim under 11 U.S.C. § 365(d)(3) in the amount of \$9,755.61, and said claim shall be paid on a pro rata basis with other administrative claims of the bankruptcy estate.

2. Oak View has 15 days to submit additional evidence regarding attorney fees. Thereafter, the debtor and Committee have 15 days to respond. This matter will then be considered submitted.

3. Oak View is entitled to an administrative expense claim under Section 503(b)(1)(A) for rent and additional charges for the period of time after the lease was rejected until the debtor vacated the premises. Generally a lease agreement is evidence of a reasonable rate for the amount of rent and additional charges due after a lease expires, but the debtor is granted 15 days to submit evidence to contest the reasonableness of the lease rate. Thereafter, Oak View has 15 days to respond to the debtor's supplemental evidence. The matter will then be considered submitted.

4. Oak View is not entitled to an administrative priority claim under Section 503(b)(1)(A) for attorney fees and late fees which arose after the date the lease was rejected through the date the debtor vacated the premises.

5. There is no setoff right to the debtor against the administrative claim of Oak View for the fair market value property of the estate allegedly still in the possession of Oak View.

6. This memorandum and the numbered items in the Conclusion section do not constitute a final order for purposes of appeal. A

final appealable order will be entered when the court decides the remaining issues.

DATED: March 5, 1996

BY THE COURT:

Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

SALADINO, THOMAS 390-2866

Copies mailed by the Court to:

Richard Drews, Commercial Federal Tower, Suite 940, 2120 So.
72nd Street, Omaha, NE 68124-2384
Samuel Rubens, 9374 Cady Court, Omaha, NE 68134
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.