UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

November 13, 2017 at 9:00 a.m.

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1. 13-35308-A-7 DOROTHY PARENT — MOTION TO VACATE
15-2229 LB-15
FUKUSHIMA V. SWENDEMAN — 9-6-17 [166]

Final Ruling: Given the request for continuance by Laurence Blunt, counsel for the defendant, the hearing on this motion is continued to November 20, 2017 at 10:00 a.m. Docket 216. The deadline for Mr. Blunt to respond to the questions posed in the court's October 30 ruling (Docket 214) is extended to November 13. Given the request for voluntary dismissal of the related matter, the defendant's motion to amend her answer will remain on this calendar.

The court reminds the parties to use *consecutive* docket control numbers in compliance with Local Bankruptcy Rule 9014-1(c).

2. 13-35308-A-7 DOROTHY PARENT — MOTION TO AMEND OR TO FILE CROSS COMPLAINT
15-2229 LB-15
FUKUSHIMA V. SWENDEMAN — 9-21-17 [186]

Tentative Ruling: The defendant has filed a notice of withdrawal of this motion. However, given the plaintiff's response to the motion, there is no unilateral right to dismiss it. See Dockets 209 & 203. The motion will be dismissed subject any opposition to dismissal the plaintiff may raise at the hearing.

The court reminds the parties to use *consecutive* docket control numbers in compliance with Local Bankruptcy Rule 9014-1(c).

3. 10-34418-A-11 CORINA DRAGNEA — MOTION FOR ENTRY OF DISCHARGE
GEL-2 — 10-20-17 [353]

Final Ruling: The motion will be dismissed without prejudice because it was not properly served. The IRS was not served in accordance with the guidelines in the court's roster of government agencies. See http://www.caeb.uscourts.gov/documents/Forms/EDC/EDC.002-785.pdf. Docket 357. Although this motion is not an adversary proceeding, it is a contested matter. The IRS was served only at its Philadelphia address. It was not served at its Washington D.C. and Sacramento addresses.

Even if the court were to ignore the foregoing, it cannot grant the motion because the supporting declaration does not indicate whether the debtor is in compliance with 11 U.S.C. § 1141(d)(5)(C)(ii) – namely, whether there is *pending any proceeding* in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B). See Docket 355. While the motion and memorandum of points and authorities refer to facts pertaining to section

1141(d)(5)(C)(ii), the supporting declaration says nothing. See Dockets 353, 355, 356.

4. 17-26125-A-11 BAL-1 ARDEN FAIR ASSOCIATES, L.P. VS. FIRST CAPITAL RETAIL, L.L.C. MOTION FOR RELIEF FROM AUTOMATIC STAY 10-23-17 [69]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted.

The movant, Arden Fair Associates, L.P, seeks relief from the automatic stay with respect to a commercial real property in Sacramento, California. The debtor has been leasing the property from the movant. The debtor failed to make pre-petition payments to the movant under the lease agreement.

The movant filed and unlawful detainer action against the debtor on July 3, 2017. Judgment was entered on August 10, 2017 against the debtor terminating the lease and entitling movant to obtain possession of the property. Docket 74, Ex. 5. A writ of possession was issued on August 29, 2017. Docket 74, Ex. 6.

The debtor is not operating at the subject premises and it has no ownership interest in them. The debtor is a tenant in this nonresidential real property. The debtor is unable to assume the lease for the property because its right to possess the property ended when the lease terminated. See In re Windmill Farms, Inc., 841 F.2d 1467 (9th Cir. 1988).

The motion will be granted for cause pursuant to 11 U.S.C. § 362(d)(1) in order to permit the movant to recover possession of the property as permitted by the state court.

No fees and costs are awarded because the movant is not an over-secured creditor. See 11 U.S.C. § 506.

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived.

5. 17-26125-A-11 BAL-2 FIRST CAPITAL RETAIL, L.L.C. MOTION TO ALLOW AN ADMINISTRATIVE EXPENSE 10-30-17 [89]

Tentative Ruling: Because less than 28 days' notice of the hearing was given by the creditor, this motion is deemed brought pursuant to Local Bankruptcy Rule 9014-1(f)(2). Consequently, the other creditors, the debtor, the trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the

court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The motion will be granted in part.

The movant, Westfield, L.L.C., as the managing agent for the landlords of the Westfield Century City and Westfield Oakridge shopping centers, moves for an order (1) allowing as an administrative expense post-petition rent and lease charges under 11 U.S.C. §§ 365(d)(3) and 503(b); and (2) compelling the debtor's immediate payment of administrative expenses by November 17, 2017.

Westfield is the landlord and the debtor is the tenant under four unexpired leases of nonresidential real property at Westfield Century City in Los Angeles, California (Auntie Anne's and Cinnabon), and Westfield Oakridge in San Jose, California (Cinnabon and Mrs. Fields). See Docket 92, Declaration of Scott L. Grossman ("Grossman Decl.") at ¶¶ 1, 3. The debtor has failed to pay all of the post-petition rent due for the period from September 14, 2017 through October 30, 2017, approximately $83,440.62, under its four shopping center lease with Westfield. See Docket 92, Grossman Decl. at ¶ 5.

11 U.S.C. § 365 authorizes the debtor-in-possession to assume or reject executory contracts and unexpired leases. See 11 U.S.C. §§ 365, 1107(a). The trustee is required to assume or reject a nonresidential unexpired lease by the earlier of (i) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming a plan. 11 U.S.C. § 365 (d)(4)(A). Failure to assume or reject within the aforementioned time period results is automatic rejection. 11 U.S.C. § 365 (d)(4)(A).

Section § 365(d)(3) requires that the debtor in possession to "timely perform all the obligations of the debtor, except those specified in section 365(b)(2), 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). In other words, "[u]ntil the trustee assumes or rejects an unexpired lease of nonresidential real property, the trustee must perform obligations under that lease." Cukierman v. Uecker (In re Cukierman), 265 F.3d 846, 849 (9th Cir.2001).

According to section 365(d)(3), then, the debtor must pay post-petition, pre-rejection rent and lease charges to Westfield.

The Ninth Circuit has adopted a bright-line rule that all claims arising from a debtor's nonperformance of post-petition, pre-rejection lease obligations are entitled to administrative expense priority. In re TreeSource Indus., Inc., 363 F.3d 994, 997 (9th Cir. 2004)(citing Cukierman, 265 F.3d at 851). Therefore, the request that the post-petition rent be allowed as an administrative expense will be granted.

Westfield alos contends that the debtor's obligations under section 365(d)(3) have priority over other administrative expenses and requests immediate payment of post-petition rent past due.

Courts are divided as to whether a section 365(d)(3) claim for post-petition rent should be paid as soon as the rent becomes due, giving that claim de facto

"superpriority" over other administrative claims. The majority of courts addressing the super-priority issue, including those in the Ninth Circuit, have held that section 365 does not create any kind of super-priority in favor of a landlord and that the landlord is entitled to payment of its administrative expense claim when and to the extent that other administrative expense claimants are paid.

The Ninth Circuit Bankruptcy Appellate Panel has concluded that there is no super-priority under § 365(d)(3). In re Orvco, 95 B.R. 724 (9th Cir. BAP 1989). "In the absence of such language, we hold that after rejection of the lease, the payment of an administrative claim for rent, like all other administrative claims is within the sound discretion of the bankruptcy court and should be determined under section 503." Orvco, 95 B.R. at 728. The BAP concluded that it would not award immediate payment where the record indicated there may insufficient funds in the estate to pay all administrative claimants in full. Id. Other courts within the Ninth Circuit have followed *Orvco*. See, e.g., In re Bryant Universal Roofing, Inc., 218 B.R. 948, 953 (Bankr. D. Ariz. 1998); In re MS Freight Distribution, Inc., 172 B.R. 976, 978 (Bankr. W.D. Wash. 1994).

This court is persuaded that section 365(d)(3) claims are not entitled to super priority status warranting immediate payment. Accordingly, the court will not compel the debtor to immediately tender rent payments to Westfield for the period of September 14, 2017 through October 30, 2017.

In the alternative, Westfield requests that the court enter an order deeming the leases rejected and compelling the debtor to surrender the premises.

Subsection (d)(3) of section 365 does not expressly state what consequences follow from a debtor's violation of its terms. Subsection (d)(4) of section 365 addresses the circumstances in which a debtor's nonresidential lease is deemed rejected. It does not include any reference to a violation of subsection (d)(3). As noted by the Ninth Circuit in In re Southwest Aircraft Svcs., Inc., 831 F.2d 848, 853-54 (9th Cir. 1987) *cert. denied*, 487 U.S. 1206 (1988), "[n]othing in either subsection, in any other part of the Bankruptcy Code, or in the legislative history of that Code suggests a reading such as is suggested by the [lessor].

When a debtor-tenant of an unexpired commercial lease fails to pay post-petition rent in violation of section 365(d)(3), "bankruptcy courts . . . have the discretion to consider all of the particular facts and circumstances involved in each bankruptcy case and . . . decide whether the consequence of a violation of subsection (d)(3) should be forfeiture of the unassumed lease, some other penalty, or no penalty at all." Id. At 854.

The only circumstance presented to the court in this case is a breach of the obligation to pay rent. As in Southwest, the court concludes this is insufficient basis, without additional facts, to deem the leases rejected.

Westfield requests that its attorneys' fees and costs in the amount of $4,310.00 incurred in the preparation and prosecution of this motion be included in their section 365(d)(3) administrative claim. Section 20.09 of each of the leases contain attorney fee provisions entitling Westfield to recover fees in the event it is required to take legal action to enforce the terms of the lease specifically in the context of a bankruptcy case.

Many courts have considered the language of section 365(d)(3), and have concluded that both the legislative history of that section and the language of

the section itself mandate that a lessor be paid interest, late fees, and legal fees incurred in the post-petition, pre-rejection period of the bankruptcy case, provided these amounts are obligations of the debtor under the lease. See In re MS Freight Distribution, Inc., 172 B.R. 976, 978–979 (Bankr. W.D. Wash. 1994)(citing In re Washington Bancorporation, 126 B.R. 130 (Bankr. D. D.C. 1991) (late fee of 1% per day allowed); In re Pacific Sea Farms, Inc., 134 B.R. 11 (Bankr. D. Haw. 1991) (landlord entitled to reasonable legal fees); In re Revco D.S., Inc., 109 B.R. 264 (Bankr. N.D. Ohio 1989) (lessor's attorneys fees allowed); In re Narragansett Clothing Co., 119 B.R. 388 (Bankr. D. R.I. 1990) (lessor's attorneys fees allowed).

This court, however, is unconvinced, that it was necessary for Westfield to file this motion inasmuch as it is without controversy in this circuit that the post-petition rent is an administrative expense. This motion was not necessary to establish this fact and no other relief has been granted.

The court concludes that Westfield is entitled to an administrative priority claim for post-petition, pre-assumption/rejection lease obligations under section 365(d)(3) to be paid when and to the extent that other administrative expense claimants are paid. All other relief is denied.

6.	17-26125-A-11 GEL-4	FIRST CAPITAL RETAIL, L.L.C.	MOTION TO USE CASH COLLATERAL 10-6-17 [45]

Tentative Ruling: The motion will be granted.

First Capital Retail, L.L.C., the chapter 11 debtor, seeks approval to use the cash collateral of several creditors secured by fourteen retail franchise locations throughout California, which the debtor owns and operates. These retail franchises include Focus Brands such as Auntie Anne's, Cinnabon and Mrs. Fields. The cash collateral at issue is the income generated by the debtor’s business transactions.

The supplemental motion (Docket 82) seeks to approve use of cash collateral for the period of November 1, 2017 through December 31, 2017 for the payment of the operating expenses as set forth in the budget filed concurrently with the motion. Docket 84, Ex. A. The court previously approved the use of cash collateral through November 13, 2017. Docket 95.

11 U.S.C. § 1107(a) provides that a debtor-in-possession shall have all rights, powers, and shall perform all functions and duties, subject to certain exceptions, of a trustee, "[s]ubject to any limitations on [that] trustee." This includes the trustee's rights under 11 U.S.C. § 363. 11 U.S.C. § 363(c)(2)(B), (c)(3), (e) provides that, when the secured claimants with interest in the cash collateral do not consent, after notice and a hearing, "the court . . . shall prohibit or condition such use [of cash collateral] . . . as is necessary to provide adequate protection of such interest."

The proposed budget includes labor, accounting, advertising, maintenance, insurance, technology, and miscellaneous expenses. See Docket 84, Ex. A.

The proposed use of cash collateral will preserve the going concern of the debtor’s businesses, allowing the debtor to continue operating them, thus permitting realization of income through retail transactions. This is in the best interest of the estate and the creditors.

There are five creditors that hold security interests against the debtor’s cash

collateral: (1) ByLine Bank, successor by merger of Ridgestone Bank, SBA loan; (2) ByLine Bank, successor by merger of Ridgestone Bank, SBA construction loan; (3) ESBF California, L.L.C., factoring loan; (4) Global Merchant Cash, factoring loan; (5) YellowStone Capital West L.L.C., factoring loan; and (6) World Global Financing, factoring loan.

The debtor proposes to remit to ByLine Bank monthly adequate protection payments of interest only payment on both notes in the total amount of $11,032.47 no later than the 15th of each month, such payments to be retroactive to the petition date.

As for the remaining factoring loans, the debtor is currently not seeking authorization to pay any adequate protection payments. Rather, all excess funds will be set-aside in a DIP account, which the debtor will not use without further permission from creditors or the court. The debtor asserts that no adequate protection payment is required because the factoring loans are adequately protected by their security interest in the debtor's cash on hand, inventory, all assets - equipment and fixtures. The aggregate value of the factoring loan debts is approximately $670,000.00. As of October 23, 2017, the debtor's cash, cash equivalents, and financial assets from operating the business has increased from $278,416.99 to $740,868.76 ($525,936.43 represents assets held in Debtor-in-possession bank accounts and the balance of $214,932.33 is held by First Data, a third-party merchant operator). Docket 82 at 2-3.

As further partial adequate protection for the continued use by the debtor of the cash collateral, the debtor proposes to grant continuing replacement liens in favor of the Byline Bank on the debtor's property, to the extent of his interest in cash collateral on the date of the order for relief.

Accordingly, the court will approve the debtor's use of the creditors' cash collateral, consistent with the budget proposed in the motion.

By authorizing cash collateral use, the court is not approving the compensation of professionals of the estate, even if such compensation is accounted for in the cash collateral budget.

7. 17-26125-A-11 FIRST CAPITAL RETAIL, L.L.C. — STATUS CONFERENCE 9-14-17 [1]

Tentative Ruling: None.