

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
97 NOV 26 AM 11:53
U.S. BANKRUPTCY COURT
DIST. OF SOUTH CAROLINA

IN RE:

Lifequest of Mt. Pleasant, Inc.,

Debtor.

C/A No. 97-06957-W

Chapter 11

JUDGMENT

ENCL

NOV 26 1997

R.U.U.

Based upon the findings as recited in the attached Order of the Court, the Court will again order the immediate payment of \$36,976.44 in post-petition rent to Moultrie Plaza, LLC. The Court will hold an additional hearing on Wednesday, December 3, 1997 in the United States Bankruptcy Courthouse in Charleston, South Carolina at 1:30 p.m. to determine if cause exists for the Debtor's non-compliance with this Court's Order of October 21, 1997 in withholding the payment and whether cause exists for sanctions, a determination of contempt and/or for the subordination of any other claims, including those, if any, of Albemarle Associates, the principals of the Debtor, the attorney's or other professionals of the Debtor to the post-petition rent claim of Moultrie Plaza, LLC.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
November 26, 1997.

97-274

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CERTIFICATE OF MAILING
The undersigned clerk (or deputy clerk) of the United States Bankruptcy Court for this district hereby certifies that a copy of the document on which this stamp appears was mailed on NOV 26 1997 to:

DEBTOR,
DEBTOR'S ATT.
TRUSTEE

*Served to Huey,
W. Davis & M.
Shaype on
11/26/97*

*Debtor, Debtor's atty,
Trustee, WST, Huey
Davis & Shaype
Served by mail on 11/26/97*

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Lifequest of Mt. Pleasant, Inc.,

Debtor.

C/A No. 97-06957-W

Chapter 11

FILED
97 NOV 26 AM 11:53
U.S. BANKRUPTCY COURT
DIST OF SOUTH CAROLINA

EM
NOV 26 1997
R-101

ORDER REQUIRING IMMEDIATE PAYMENT OF ADMINISTRATIVE CLAIM

This matter came before the Court on November 5, 1997, on the motion of Moultrie Plaza, LLC ("Moultrie Plaza") dated October 20, 1997, seeking rejection of a lease, surrender of the premises and an order granting it an administrative priority claim for unpaid post-petition rent, and requiring immediate payment of that administrative claim not subject to disgorgement. By separate order, this Court has granted the surrender of the premises and an administrative claim in the amount of \$36,976.44. This order addresses the issue of whether Moultrie Plaza is entitled to the immediate payment of that claim which is not subject to reduction or disgorgement if the estate becomes administratively insolvent.

By way of background, Moultrie Plaza is the landlord of the Debtor with respect to the Debtor's Mt. Pleasant location pursuant to a written lease agreement (the "Lease"). The Debtor filed its petition on August 20, 1997. Moultrie Plaza then moved for an order requiring the Debtor to perform its post-petition obligations under the lease as required by 11 U.S.C. § 365(d)(3).¹ After

¹ Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* shall be by section number only.

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notice and a hearing, this Court issued an order requiring the Debtor to pay all accrued and unpaid post-petition rent then due under the Lease (which included rent through October, 1997), in the amount of \$36,976.44, not later than October 20, 1997. The Debtor did not make this required payment, or any other payment of post-petition rent accruing under the Lease. The Lease has been rejected by operation of law pursuant to §365(d)(4) upon the withdrawal by the Debtor of its request for an extension of time to assume or reject and the premises were ordered surrendered by the Court.

Objections to the relief sought by Moultrie Plaza were made on behalf of the Debtor and on behalf of Albemarle Associates ("Albemarle"), a creditor. The Debtor's objection was primarily that there were no funds available for its payment and that it was seeking to sell its business operations. Albemarle's objection was that it has a first lien on all of the Debtor's assets including cash collateral and that if the case were subsequently converted, there is a likelihood that there would not be a full payment to the other administrative claims. However, Albemarle voiced this position for the first time at the hearing and did not file a written objection to Moultrie Plaza's motion. In fact, in response to Moultrie Plaza's initial motion to compel the Debtor to make post-petition lease payments, Albemarle recognized that § 365(d)(3) required Moultrie to be paid post-petition rent pending assumption or rejection and only voiced a limited objection stating that it did not consent to the posting of a two month security deposit.

Furthermore, at the November 5, 1997 hearing on the motion of Moultrie Plaza to compel the rejection of its lease, the surrender of the leased premises and for immediate payment of post-petition rent claim, Albemarle did not object to Moultrie Plaza's request for administrative claim but based its objection on the immediate payment of the claim because Albemarle alleges a perfected

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first lien position on all of the assets of the Debtor including cash collateral. However, even though this Court has previously approved the use of cash collateral through consent orders between the Debtor and Albemarle, Albemarle did not at the November 5, 1997 hearing or in any prior hearing present proof of its lien or its perfection to the Court. The Court's cash collateral orders do not substantiate Albemarle's priority cash collateral position as to other creditors. Additionally, at the initial hearing which resulted in an order of October 21, 1997 requiring immediate payment of the postpetition prerejection rent, Albemarle did not voice an objection or assert a cash collateral interest which would preclude payment to Moultrie Plaza. Albemarle is now estopped to assert that while Moultrie Plaza is entitled to payment, it is not entitled to immediate payment.

Speaking generally, however, it may be said that estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, either by the acts of judicial or legislative officers, or by his own deed, acts, or representations, either express or implied.

28 Am Jur 2d Estoppel § 2. Additionally, it also does not appear equitable to now allow Albemarle to take the position that Moultrie Plaza is not entitled to immediate payment since the use of Moultrie Plaza's premises benefitted Albemarle's collateral and allowed the Debtor to continue in its reorganization efforts including its efforts to sell its business operations as a going concern. In this case, it appears that Albemarle as well as the Debtor, has enjoyed the benefits of the use of Moultrie Plaza's premises and through their conduct have waived any right to now object to the immediate payment of this post-petition rent claim.

As to whether this Court should compel the immediate payment of the post-petition rent claim and provide that it is not subject to reduction or disgorgement if the estate becomes

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administratively insolvent, the Court must begin its inquiry by looking to § 365.

Section 365(d)(3) requires a Debtor to perform all of its post-petition obligation under a lease of non-residential property pending acceptance or rejection. To this extent, lessors of non-residential property are given special treatment. See In re Rich's Department Store, 209 B.R. 810, 815 (Bkrcty D. Mass. 1997). The Bankruptcy Code is silent, however, as to the remedies available in the event the Debtor fails to comply. In discussing this issue and § 365 (d)(3), one commentator has noted as follows:

The apparent purpose of these provisions is to provide lessors of nonresidential real property timely payment of rent. By the time the issue at hand arises, this purpose has already been partially circumvented because the payment is late. Obviously, requiring timely payment during the initial sixty days accords a nonresidential real property lessor some sort of special treatment, so there is little question Congress intended to prefer these claims over others. However, once rejection has occurred and the lessor has his property back, the question is whether Congress intended the lessor to still receive prompt payment.

C. Alan Gauldin, The Commercial Real Estate Landlord's Rights to Receive Post-Petition Rental Payments under Section 365(d)(3) of the Bankruptcy Code, 14 U. Ark. Little Rock L.J. 491, 505 (1992), quoted with approval in In re Rich's Department Store, 209 B.R. 810, 815-16 (Bkrcty D. Mass. 1997).

Several cases have held that, where, as here, the Court has issued an order requiring the payment of post-petition rent, and the Debtor fails to do so, then the landlord is entitled to immediate payment of the resulting administrative claim, without regard to the administrative solvency of the estate. See, e.g., In re Peaberry's, 205 B.R. 6 (1st Cir. B.A.P. 1997); In re Rich's Department Store, 209 B.R. 810 (Bkrcty D. Mass. 1997). Although In re Peaberry's related to payment of post-petition rent after assumption, both of the foregoing cases emphasize that a bankruptcy court is obligated to



enforce its prior orders, and that as a result a landlord is entitled to immediate payment in full irrespective of the sufficiency of funds to pay other administrative creditors.

If immediate superpriority payment is not required, Moultrie Plaza asserts that the Debtor is effectively causing the court to retroactively rewrite its prior order requiring payment. In re Peaberry's, 205 B.R. at 9; In re Rich's Department Store, 209 B.R. at 817. The issue was stated by one commentator as follows:

There is no good reason to require timely payment prior to rejection and then hold a trustee who disobeys the statute absolved of any duty for timely or immediate payment after rejection, or to accord the trustee greater recovery rights against the claimant by virtue of the trustee's disobedience to the Code. Under the language of the statute, the obligation for timely payment perhaps cannot be created after rejection of the lease, but neither is the obligation which arose prior to rejection dissipated. The statute does not terminate the obligation for timely payment simply because of the rejection of the lease or the trustee's failure to comply.

The end result ... is that a trustee who obeys the statute has to pay the contract rate on time, with no chance of future recovery. If he disobeys the statute, he may be able to put off payment of the administrative claim and reduce it pro rata.

Gauldin, supra, at 506.

Thus, if this Court were not to require immediate payment, the Debtor will be rewarded for disobeying this Court's earlier order and the Bankruptcy Code itself. In fact, absent a rule requiring immediate payment, the Debtor will always be better off disobeying the Bankruptcy Code and any order requiring the payment of post-petition rent.

Even where there has been no violation of a prior court order requiring payment of post-petition rent, a number of courts have held that a lessor is entitled to immediate payment of its administrative claim, irrespective of the administrative solvency of the estate. See e.g., In re Brennick, 178 B.R. 305 (Bkrcty D. Mass. 1995); In re Telesphere Communications, Inc., 148 B.R.

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525 (Bkrcty N.D. Ill. 1992); In re Leisure Time Sports, Inc., 189 B.R. 511 (Bkrcty S.D. Ca. 1995); In re Duckwall -ALCO Stores, Inc., 150 B.R. 965 (D. Kan. 1993).

However, other courts have held that § 365(d)(3) entitles a landlord to immediate payment only where there appear to be sufficient funds available to pay other administrative expenses in full, and that absent funds to pay all administrative claims in full, a landlord is entitled only to pro rata payment. See, e.g., In re Orvco, 95 B.R. 724 (9th Cir BAP 198), overruled in part by In re Pacific-Atlantic Trading Co., 27 F.3d 401 (9th Cir. 1994); In re Virginia Packaging Supply Co., 122 B.R. 491 (Bkrcty E.D. Va. 1990). These Courts have stressed that §365 does not by its specific wording provide a superpriority payment remedy if the rent is not timely paid.

One court recognizing the need for an immediate payment but also recognizing that a claim for rent under § 365(d)(3) does not have priority over the specifically mandated claims of § 726(b), has ordered the immediate payment of post-petition rent but made the payment subject to recapture if there are insufficient funds to pay other administrative claims.

This Court agrees with the reasoning and analysis of the court in In re Granada, Inc., supra, and adopts the same. That court concluded that § 365(d)(3) rent (for the first 60 days post-petition) must be paid immediately unless the trustee establishes good cause for withholding the payment. There has been no evidence presented to establish good cause herein. However, such a claim for immediate payment does not constitute a superpriority, and any such payment is subject to recapture by the trustee if there are insufficient funds to pay all other administrative claims.

In re Buyer's Club Markets, Inc., 115 B.R. 700 (Bkrcty.D.Colo. 1990).

The Buyer's Club Markets approach appears to this Court to be the best method to proceed

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in this particular case at this time.² Therefore, the Court will again order the immediate payment of \$36,976.44 in post-petition rent to Moultrie Plaza. However, this Court is very concerned that its prior order requiring payment has not been complied with. The Court will therefore hold an additional hearing on Wednesday, December 3, 1997 in the United States Bankruptcy Courthouse in Charleston, South Carolina at 1:30 p.m. to determine if cause exists for the failure to abide by this Court's previous order by withholding the payment and whether cause exists for sanctions, a determination of contempt or the subordination of any other claims, including those, if any, of Albemarle Associates, the principals of the Debtor, the attorney's or other professionals of the Debtor, to this post-petition rent claim of Moultrie Plaza. Service of this Order shall be made in the usual fashion by the Clerk's office but in addition, in order to provide expedited notice of this hearing, the Court shall serve a copy hereof by facsimile upon counsel for the Debtor, Albemarle and Moultrie Plaza and herein require their attendance as well as the attendance of the principals of the Debtor at the hearing on December 3, 1997.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
November 26, 1997.

² This Order shall not prejudice Moultrie Plaza's future argument that its rent payment should have priority over specific administrative expenses claims or that such claims should be subordinated to its rent claim.

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CERTIFICATE OF MAILING
The undersigned clerk (or deputy clerk) of the United States Bankruptcy Court for this district hereby certifies that a copy of the document on which this stamp appears was mailed on NOV 26 1997 to:

DEBTOR.
DEBTOR'S ATTN.
TRUSTEE

Deputy Clerk

*Forwarded to Hwy. David
Sharp on 11/26/97.
Debtor, Debtor atty. Trustee
Ust, Hwy David Sharp
Served by mail on
11/26/97*