UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 16-02447-JW
	Chapter 11
Chicora Life Center, LC,	
Debtor.	

ORDER IN AID OF IMPLEMENTATION OF CONFIRMED PLAN PURSUANT TO 11 U.S.C. § 1142(b)

This matter comes before the Court upon certain provisions of Chicora Life Center, LC's ("Chicora") plan of reorganization ("Plan") filed on September 23, 2016, as amended, and confirmed on January 10, 2017. Specifically, Article VII of the confirmed Plan provides that Chicora shall assume all of the executory contracts shown in Schedule G of its bankruptcy schedules, including the 25-year lease ("Lease") between Chicora and Charleston County, a political subdivision of South Carolina ("County") for a portion of the former Charleston Naval Hospital at 3600 Rivers Avenue in North Charleston, South Carolina ("Center"). No objections to confirmation were filed to the assumption of the Lease in the Plan under 11 U.S.C. § 365. While the parties previously disputed whether the Lease was terminated prepetition, the Court has since held that the County did not effectively terminate the Lease prepetition.[1] Therefore, Chicora's decision to assume the Lease was effective as part of its confirmed Plan. Pursuant to 11 U.S.C. § 1142(b), the Court makes the following findings and conclusions to assist the parties in the implementation of Chicora's confirmed Plan regarding the Lease.

[1] An oral ruling to this effect was issued on May 1, 2017. The Court is revising the proposed order presented by counsel and a written order formalizing the ruling will be issued shortly.

I. Effect of the Assumed Lease

By assuming the Lease, Chicora "is entitled to receive the benefits under the lease but, at the same time, is responsible for performing its obligations thereunder." *In re D.M. Kaye & Sons Transp., Inc.*, 259 B.R. 114, 118 (Bankr. D.S.C. 2001) (internal quotations and citations omitted). Upon assumption, an executory contract becomes a post-petition agreement between the debtor-in-possession and the non-debtor party, and the debtor-in-possession's obligations under the assumed contract become obligations of the bankruptcy estate that the debtor-in-possession is required to perform. *In re Stewart Foods, Inc.*, 64 F.3d 141, 144–45 (4th Cir. 1995). "Any subsequent breach [of the assumed] contract will no longer be a prepetition breach and any resulting damages are entitled to administrative expense priority if the breach occurs during the bankruptcy." *In re Washington Capital Aviation & Leasing*, 156 B.R. 167, 172 (Bankr. E.D. Va. 1993) (citing *Texaco, Inc. v. Louisiana Land and Exploration Co.*, 136 B.R. 658, 663 (M.D. La. 1992); *R & O Elevator Co. v. Harmon (In re R & O Elevator Co.)*, 93 B.R. 667, 672 (D. Minn. 1988)).

Assumption of the Lease entails assumption of the document *cum onere*. *In re Shangra-La, Inc.*, 167 F.3d 843, 849 (4th Cir. 1999). However, while the assumption means that all of the terms of the Lease were assumed, upon the County's failure to raise issues of prepetition defaults or breach in connection with the confirmation of the Plan, any such alleged defaults or breaches are not considered in determining Chicora's duties in future performance of the assumed Lease. *See In re Arriva Pharm., Inc.*, 456 B.R. 419, 424–25 (Bankr. N.D. Cal. 2011) (holding that the confirmation order in a chapter 11 case operated to bar a non-debtor party of an assumed executory contract from asserting pre-confirmation defaults on the contract); *In re Goody's Family Clothing, Inc.*, 443 B.R. 5, 16 (Bankr. D. Del. 2010) ("'[W]hen a bankruptcy court approves the assumption of an [unexpired lease], it necessarily finds that no uncured defaults exist.' Consequently, [the debtor] is no longer liable

for *pre*-confirmation defaults." (quoting *In re Cellnet Data Sys., Inc.*, 313 B.R. 604, 608 (Bankr. D. Del. 2004)) (emphasis in original)). In other words, the County is bound by the terms of the confirmed Plan. In addition, when an assumed executory contract, in this instance the Lease, does not provide by its terms sufficient clear criteria or deadlines to govern future performance, the Court should determine the reasonable standards to apply. *See Drews Co., Inc. v. Ledwith-Wolfe Assocs., Inc.*, 296 S.C. 207, 209, 371 S.E.2d 532, 533 (1988) (applying a reasonable time standard when the contract did not provide for a date of performance); *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98447 S.E.2d 199, 201 (1994) (requiring reasonable notice when a contract lacks a specific duration).

Due to the complicated nature of the Lease and the parties' past disputes, involving the deadline for satisfactory completion of Tenant Improvements, completion of licensing, and readiness of delivery of the premises necessary to trigger the Effective Date, the Court requested the parties to prepare statements regarding the next essential steps and timetable for the parties' performance under the assumed Lease. On May 8, 2017, the parties filed their respective reports, and a hearing was held on the reports on May 9, 2017. Based on these reports, it is fair to say the parties have taken inapposite views of the prospects of further performance under the Lease.

II. Repudiation of the Lease

While Chicora's report set forth the critical criteria for its performance under Lease, the County, in its report and at the hearing, unequivocally stated that it has no intention of occupying the Center, and that it would be futile for all parties if Chicora were to go forward with the completion of the improvements required under the Lease. In other words, it appears that the County intends to cease any further performance under the Lease. The County indicates that it "has no trust or confidence in [Chicora's] ability or even its willingness to be a responsible landlord to the citizens of Charleston County for the next twenty-five years,"

and to occupy the Center would "be doing a serious disservice to the people of Charleston County . . . ."[2] In addition, the County has indicated that it has not appropriated any funds in its annual budget to enable its performance of the Lease. The County's report states that the issue in the pending litigation between the parties "is no longer the County's occupation and lease of [Chicora's] primary asset, but instead, one of damages, if any, that [Chicora] may assert against the County in a breach of contract action."

The County relies on several provisions of the Lease to carry out its intention of not occupying the Center or moving forward with the Lease.[3] First, the County stated an intention to issue a notice of default in accordance with articles 19 and 20 of the Lease in order to terminate the Lease in thirty days.[4] Further, article 54 of the Lease provides that the County may terminate the Lease upon a 90-day written notice to Chicora if the County does not appropriate sufficient funds to pay the charges under the Lease. According to its counsel, the County has not appropriated funds for the 2017 and 2018 Fiscal Years, and it intends to issue a termination notice under this article of the Lease. The Lease provides that termination under article 54 would result in the County compensating Chicora "for all

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[2] At the May 9 hearing, counsel for the County further elaborated on the County's lack of trust in Chicora: "There is too much water under the bridge. . . . Even if this were to go forward, every day, the County would be concerned how much longer before it would be back in this Court. There is just no confidence. There is no trust. The County is fortunate to have a provision such as [article 3] for choosing to not occupy."

[3] In addition to the arguments addressed, the County continues to cite to the undersigned's opinion in *In re Greenville American, L.P.*, C/A No. 00-00721-W, slip op., 2000 WL 33710874 (Bankr. D.S.C. Mar. 24, 2000), to support its position that it may terminate the Lease independent of the requirements of articles 19 and 20 of the Lease (discussing the default and cure procedures under the Lease). In *Greenville American*, the Court found that the prepetition termination of a contract was proper because the provisions relied upon by the terminating party were independent of the contract's general provision on defaults and the curing of those defaults. However, the Court finds that the contract in *Greenville American* is distinguishable from the Lease. Unlike this case, the provision at issue in *Greenville American* clearly stated that a failure to complete and deliver the leased premise by a stated date would be grounds for termination for the lease upon a ten-day notice. The Lease in the present matter does not provide such a date or procedure.

[4] Articles 19 and 20 of the Lease provide the procedures to terminate the Lease upon a default of either of the parties and the party's failure to cure the default. However, due to the County's failure to raise prepetition defaults as an objection to the assumption provisions of the confirmed Plan, the assumption of the Lease precludes consideration of prepetition defaults or breaches.

necessary and reasonable actual costs of performing the Lease up to the date of such termination."[5]

In addition, under article 3 of the Lease, if the County fails to occupy the Center (after Chicora completes the requirements under the Lease), Chicora may recover the actual costs incurred in making the Tenant Improvements as required under the Lease. The County has indicated that if necessary, it will invoke article 3 of the Lease to achieve its intent of not occupying the Center.

This intent not to perform under the Lease is also problematic as it implies a refusal to issue an estoppel certificate that states the County's "intention to occupy or perform." This refusal to issue an estoppel certificate itself may hinder Chicora's ability to obtain financing to complete the required improvements to the Center. As stated by the County, it is no longer a question of whether the County will perform under the Lease but a question of Chicora's damages, if any, for the County's breach of the Lease due to its refusal to perform.

The County's declaration of its intent to use these provisions of the Lease clearly evidences that it will refuse to meet any future obligations or deadlines under the Lease, and therefore has repudiated the assumed Lease. "[A] promisor's renunciation of a 'contractual duty before the time fixed in the contract . . . for performance' is a repudiation." *Franconia Assocs. v. United States*, 536 U.S. 129, 143, 122 S.Ct. 1993, 2002, 153 L.Ed.2d 132 (2002) (quoting 4 A. Corbin, *Contracts* § 959, p. 855 (1951)). The Restatement (Second) of Contracts defines a repudiation as "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would give the obligee a claim for damages for a total breach . . .

[5] The Lease provides that damages in connection with the termination under article 54 would not be recoverable by Chicora, including any lost profits.

or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." Restatement (Second) of Contracts § 250 (1981).

Further, "[a] renunciation or repudiation of a contract before the time of performance, which amounts to a refusal to perform it at any time, gives the adverse party the option to treat the entire contract as broken and to sue immediately for damages as for a total breach." 30 S.C. Jur. *Contracts* § 66 (2017). A repudiation of a contract is generally actionable through a claim for anticipatory breach of contract. *See* 30 S.C. Jur. *Contracts* § 66 (2017) ("An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance, and is outcome of words or acts evincing an intention to refuse performance in the future."). The Fourth Circuit Court of Appeals has stated that:

> The doctrine of anticipatory breach has a well-defined function. It allows a plaintiff to bring a breach of contract action immediately, rather than having to wait for the promised non-performance actually to occur, which could be some time well into the future. . . The doctrine gives the plaintiff the option to have the law treat the promise to breach as a breach itself. In this way, it operates as a doctrine of accelerated ripeness.

Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr., 594 F.3d 285, 294 (4th Cir. 2010) (applying W.Va. law). Further, the anticipatory breach doctrine excuses the non-repudiating party from any condition precedent under the contract. *Studio Frames, Ltd. v. Standard Fire Ins. Co.*, 369 F.3d 376, 381 (4th Cir. 2004) ("As a leading treatise on the law of contracts makes clear, after one party to a contract repudiates its contractual rights and obligations, the right of the non-repudiating party to recover on the contract without first performing conditions precedent 'is given to the non-repudiating party *by the law*, irrespective of the repudiating party's wishes.'" (emphasis in original) (quoting *Williston on Contracts* § 39:38 (Richard A. Lord, ed., 4th ed. 2000))). Therefore, upon a repudiation of a contract, the non-repudiating party may recover damages prior to an actual breach of the

contract resulting from the repudiating party's non-performance, and it frees the non-repudiating party from any future performance.

However, a repudiation only ripens into an anticipatory breach prior to the repudiating party's time of performance if the non-repudiating party chooses to pursue the anticipatory breach. *See Roehm v. Horst*, 178 U.S. 1, 13, 20 S. Ct. 780, 785, 44 L.Ed. 953 (1900) ("Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen* [(an empty threat)], and, holding fast to the contract, to wait till the time for its performance has arrived, or to act upon it and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered.").

The Fourth Circuit Court of Appeals has noted that no single authority under South Carolina law enumerates the standard for finding an anticipatory breach; however, in the unpublished opinion of *Collins Holdings Corp. v. Wausau Underwriters Ins. Co.*, the Fourth Circuit, applying South Carolina law, listed five elements that must be established to demonstrate an anticipatory breach, which this Court finds instructive:

> (1) the repudiation must be unequivocal,
> (2) the repudiation must be a final and absolute declaration that the contract must be regarded as altogether off,
> (3) the repudiation must be unconditional,
> (4) the repudiation cannot rest on a partial breach but must go to the whole consideration of the contract, relate to the very essence of the contract, and defeat the object of the parties in making the contract, [and]
> (5) while the repudiation need not be express, if it rest on the defendant's conduct it must evince a clear intention to refuse performance in the future.

Collins Holding Corp. v. Wausau Underwriters Ins. Co., 204 Fed. App'x 208, 211–12 (4th Cir. 2006) (quotations omitted) (unpublished) (applying S.C. law).

In the present matter, based on its statements and representations, it appears that the County has made a final decision to unequivocally and unconditionally repudiate the entirety of the Lease; which would appear to give rise to a claim for anticipatory breach. For this reason, Chicora shall submit within seven (7) days of the entry of this Order a written report to the Court on whether it will elect to assert an anticipatory breach based on the County's apparent repudiation of the Lease and seek such damages as provided by the Lease or otherwise by law,[6] or whether it will continue its performance under the assumed Lease and assert a breach in the event of any future non-performance by the County.

III. Appointment of Expert

In the event Chicora elects to proceed with performance under the Lease, the Court finds that it is necessary to obtain further assistance in establishing a clear and fair delineation of the requirements and timeframe for performance of the Lease, as assumed. To that end, the Court anticipates appointing an expert in the area of construction and contract law to assist the Court by a future court order.[7]

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[6] This Order does not determine whether any damages that Chicora may recover due to an anticipatory breach or any other kind of breach by the County is limited by the language of the assumed Lease.

[7] The expert would be expected to review the Lease and related documents, the parties' reports, and the current status of the Center and any recent developments. Further, the expert would meet, if necessary, with representatives of Chicora and the County to obtain the information necessary to form a proper view under the present circumstances and file a report for the Court's consideration. The cost of the expert's services will be evenly split between the parties. The expert may issue bills to the parties at least monthly, which shall be paid within five days of billing.

IV. Further Hearing

A hearing is hereby scheduled, if necessary, on Chicora's election regarding the County's apparent repudiation of the Lease, the County's position, if any, on Chicora's election, and the expert's report (if appointed by separate order) for **June 21, 2017 at 10:30 AM at the U.S. Bankruptcy Courtroom, 145 King Street, Room 225, Charleston, South Carolina, 29401.**

AND IT IS SO ORDERED.

Columbia, South Carolina
June 1, 2017

FILED BY THE COURT
06/01/2017

Entered: 06/01/2017

John E Waites

US Bankruptcy Judge
District of South Carolina