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**L.A.B.
DEPUTY CLERK**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

97 NOV 19 PM 3:44

IN RE:

LIFEQUEST OF MT. PLEASANT,
INC.,

Debtor.

JUDGMENT

Case No. 97-06957-W

Chapter 11

U.S. BANKRUPTCY COURT
DIST OF SOUTH CAROLINA

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Lease between Moultrie Plaza, LLC and the Debtor shall be deemed rejected and the Debtor shall immediately on request of Moultrie Plaza, LLC surrender the leased premises to Moultrie Plaza, LLC. Moultrie Plaza, LLC shall provide Albemarle Associates and the Debtor through their counsel, reasonable notice of not less than five business days of its request for immediate possession and the opportunity to remove from the leased premises personal property in which either has an interest; and Moultrie Plaza, LLC is hereby granted a Chapter 11 administrative claim in the amount of \$36,976.44.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
November 19, 1997.

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 11-20-97, to:

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Deputy Clerk

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**L.A.B.
DEPUTY CLERK**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

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97 NOV 19 PM 3:45

**U.S. BANKRUPTCY COURT
DIST OF SOUTH CAROLINA**

IN RE:

LIFEQUEST OF MT. PLEASANT,
INC.,

Debtor.

Case No. 97-06957-W

Chapter 11

**ORDER REQUIRING SURRENDER OF PREMISES, DECLARING LEASE REJECTED, AND
GRANTING ADMINISTRATIVE CLAIM**

This matter came before the Court on November 5, 1997, on the motion of Moultrie Plaza, LLC dated October 20, 1997. Moultrie Plaza, LLC seeks an order declaring the lease between Moultrie Plaza, LLC and the Debtor to have been rejected, or in the alternative, requiring the Debtor to reject the lease. Moultrie Plaza, LLC also seeks an order requiring the Debtor to immediately surrender the leased premises, granting Moultrie Plaza, LLC an administrative priority claim for unpaid post-petition rent, and requiring immediate payment of that administrative claim. Also before the Court was the motion of the Debtor for an extension of time within which to assume or reject the Lease.

Objections were made on behalf of the Debtor and on behalf of Albemarle Associates, a creditor. Appearing at the hearing were Mark S. Sharpe, as counsel to movant Moultrie Plaza, LLC, D. Nathan Davis, as counsel to the Debtor, and S. Marshall Huey, Jr. as counsel to Albemarle Associates.

FINDINGS OF FACT

Moultrie Plaza, LLC is the landlord of the Debtor with respect to Debtor's Mt. Pleasant location pursuant to a written lease agreement (the "Lease"). The Debtor uses the leased premises in its

commercial fitness operation, and has continued its usual business operations at that location since the filing of the petition. Therefore, the Court concludes that the Lease is a lease of non-residential real property. Debtor filed its petition on August 20, 1997, but since that date has made no payment of rents accruing under the Lease to Landlord. By previous order, this Court required the Debtor to pay all accrued and unpaid post-petition rent, in the amount of \$36,976.44, not later than October 20, 1997. Debtor did not make this required payment, or any other payment of post-petition rent accruing under the Lease. At the hearing, the Debtor withdrew its motion for an extension of time within which to assume or reject the Lease.

CONCLUSIONS OF LAW

Section 365(d)(4) of the Bankruptcy Code requires a debtor to assume or reject a lease of non-residential real property with sixty (60) days after entry of an order for relief, or "within such additional time as the court, for cause, within such 60-day period, fixes." Absent such assumption or rejection, the lease is deemed rejected.

The Debtor's sixty day period expired on October 20, 1997. Because the Debtor did not elect to assume or reject the Lease within the sixty day period, and further withdrew its request to extend the sixty day period, the Lease is rejected by virtue of the provisions of Section 365(d)(4) of the Bankruptcy Code.

Moultrie Plaza, LLC also seeks an order requiring the Debtor to immediately surrender possession of the premises. Section 365 (d)(4) provides that once a lease is rejected, the Debtor "shall immediately surrender such non-residential property to the lessor." In light of the clear and unambiguous wording of this statute, Moultrie Plaza, LLC is entitled to an order requiring surrender,

and under these circumstances is not required to seek relief from the automatic stay or to pursue state court eviction procedures. See, e.g., In re Elm Inn, Inc., 942 F.2d 630 (9th Cir. 1991); In re U.S. Fax, Inc., 114 B.R. 70 (E.D. Pa. 1990); In re Kong, 162 B.R. 86 (Bkrtcy E.D. N.Y. 1993). However, based upon the statements of its counsel at the hearing, Moultrie Plaza, LLC has agreed to give Albemarle Associates, which has a lien on certain personal property of the Debtor located in the leased premises, reasonable notice of not less than five business days and opportunity to remove such personal property and further give the Debtor reasonable notice and opportunity to remove any other personal property of the Debtor located in the leased premises.

Moultrie Plaza, LLC next asks the Court to grant it an immediate administrative claim for post-petition rent, without the necessity of the notice, hearing and other requirements of Code § 503(b)(1). Moultrie Plaza, LLC bases this request on the provisions of Section 365(d)(3), which requires a debtor to perform its post-petition obligations under a lease of non-residential real property “notwithstanding section 503(b)(1) of this title.”

Although the courts are split on the applicability of Section 503(b)(1) to an administrative claim for post-petition, pre-rejection rent, the majority view now appears to be that Section 503(b)(1) is not applicable, and that the administrative priority is granted by the language of Section 363(d)(3). See e.g., In re CSVA, Inc., 140 B.R. 116 (Bkrtcy W.D. N.C. 1992); In re Worth Stores Corp., 135 B.R. 112 (Bkrtcy E.D. Mo. 1991); In re Washington Bancorporation, 125 B.R. 328 (Bkrtcy D.D.C. 1991); In re Appletree Markets, Inc., 139 B.R. 417 (Bkrtcy S.D. Tex 1992); In re Galvin, 57 B.R. 732 (Bkrtcy S.D. Cal. 1986); In re Tobago Bay Trading Co., 142 B.R. 528 (N.D. Ga. 1991); In re Virginia

Packaging Supply Co., 122 B.R. 491 (Bkrtcy E.D. Va. 1990). Contra In re Orvco, 95 B.R. 724 (9th Cir. BAP 1989); In re Mr. Gatti's, Inc., 164 B.R. 929 (Bkrtcy W.D. Tex. 1994).

While this Court has previously disallowed administrative expense claims related to rejected leases or executory contracts when there has been no showing of a benefit to the estate, see In re Myrtle Beach Golf & Yacht Club, 88-2160 (Bkrtcy. D.S.C. 1/16/1990), it now appears that the Fourth Circuit would follow the majority view which does not require this showing.

Conditioning the validity of an administrative claim for post-petition rent under 11 U.S.C. § 365(d)(3) on a showing that the bankruptcy estate derived benefit from the lease contravenes the plain language of the Bankruptcy Code. Generally, administrative claims--which are given special priority in the bankruptcy proceeding--are governed by U.S.C. § 503(b)(1), which provides that only "actual, necessary costs and expenses of preserving the estate" are entitled to administrative status. *Id.* This has been interpreted to mean, *inter alia*, that the bankruptcy estate must derive benefit from the expenditure. *See In re Stewart Foods, Inc.*, 64 F.3d 141, 145 n. 2 (4th Cir.1995). However, the administrative claim for post-petition rent arises under a separate provision, § 365(d)(3), which specifically disclaims the applicability of the § 503(b)(1) requirements: The trustee shall timely perform all the obligations of the debtor, except those specified in § 365(b)(2), arising from and after the order for relief under any unexpired lease of non-residential property, until such lease is assumed or rejected, notwithstanding § 503(b)(1) of this title. *Id.* (emphasis added). Thus, it appears from the plain language of the statute that administrative claims for post-petition rent are allowed without regard to the limitations and restrictions imposed by § 503(b)(1). We therefore refuse to graft the requirement of proof of actual benefit to the bankruptcy estate onto § 365(d)(3).

In re Geonex Corporation, No. 97-1225 (4th Cir. August 19, 1997), 1997 WL 471105.¹

¹ Although unpublished Fourth Circuit opinions are not binding precedent (I.O.P 36.5 and 36.6), they may supply "helpful guidance". In re Serra Builders, Inc., 970 F. 2d 1309, 1311 (4th Cir. 1992).

In light of this authority and the fact that the Debtor has expressed no objection to the amount of the administrative claim requested, the Court grants Moultrie Plaza, LLC a Chapter 11 administrative claim in the amount of \$36,976.44.

Finally, Moultrie Plaza, LLC seeks an order requiring the Debtor to make an immediate payment of the administrative claim granted above to the extent of available funds in the hands of the Debtor. This issue will be addressed in a separate order.

For the foregoing reasons, it is therefore,

ORDERED, ADJUDGED, AND DECREED, that

- A. The Lease between Moultrie Plaza, LLC and the Debtor shall be deemed rejected;
- B. The Debtor shall immediately on request of Moultrie Plaza, LLC surrender the leased premises to Moultrie Plaza, LLC;
- C. Moultrie Plaza, LLC shall provide Albemarle Associates and the Debtor through their counsel, reasonable notice of not less than five business days of its request for immediate possession and the opportunity to remove from the leased premises personal property in which either has an interest; and
- D. Moultrie Plaza, LLC is hereby granted a Chapter 11 administrative claim in the amount of \$36,976.44.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina

November 19, 1997.

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 11-20-97, to:

Smullen
Davis
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4 to chambers

SPB

Deputy Clerk