

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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IN RE: CASE NO. 02-66158

Clinton H. Brown and Beverly J. Brown,

CHAPTER 13

Debtors.

JUDGE MASSEY

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Mazda American Credit,

Movant,

v.

CONTESTED MATTER

Clinton H. Brown and Beverly J. Brown,

Respondents.  
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ORDER DENYING MAZDA AMERICAN CREDIT'S  
REQUEST FOR PAYMENT OF AN ADMINISTRATIVE EXPENSE

Pursuant to 11 U.S.C. § 503(a), Mazda American Credit ("Mazda") requests payment of an administrative expense for damages allegedly arising from the breach of a lease of a pickup truck that Mazda contends Debtors assumed in this Chapter 13 case. Debtors dispute that any such damages should be allowed as an administrative expense. The Court held a hearing on the motion on May 17, 2006. Mazda asked to present the dispute on briefs.

A copy of the first page of the lease dated April 28, 2001 between Mazda and Clinton Harris Brown for the lease of a Mazda B3000 truck is attached to Mazda's Motion for Allowance of Payment of Administrative Expense Claim (doc. no. 48). That portion of the lease states that the lease term was for 48 months and that the monthly payment was \$254.81. The first page of

the lease also includes a provision for the calculation of damages for excessive wear and use of the vehicle, which states:

Excess Wear and Use. You may be charged for excessive wear based on our standards for normal use. At the scheduled end of this lease, unless You purchase the Vehicle, You must pay to Lessor 15 cents per mile for each mile in excess of 48616 miles shown on the odometer. See items 3 and 7 on the back for additional excess wear and use terms.

Debtors filed a joint petition initiating this case on June 4, 2002. At the same time, they filed their Chapter 13 plan. The plan mentions Mazda only in paragraph 8, which states:

8. PAYMENTS DIRECT TO CREDITORS: (a) Debtor to continue post-petition mortgage payments to COUNTRYWIDE and BANK ONE directly. (b) Debtor to continue post-petition lease payments to Mazda American Credit directly.

Chapter 13 plan, document no. 2, ¶ 8.

On August 27, 2003, Debtors filed a document entitled “Amendment to Chapter 13 Case” in which they stated in part:

3. The debtors amend their Chapter 13 plan to modify the lease plan provision as follows: “Payments to increase by \$254.00 monthly in June, 2005 after lease with Mazda American Credit expires on May 28, 2005.

Amendment to Chapter 13 Case, document no. 9, ¶ 3. The Court confirmed the plan as amended on August 31, 2002.

The Lease term expired on May 28, 2005, but Mazda did not obtain possession of the vehicle until July 5, 2005. Mazda contends, and Debtors do not dispute, that the vehicle had been driven 34,703 miles in excess of the 48,616 miles allowed by the Lease. Mazda contends that the damages for excess wear and use calculated according to the terms of the Lease is \$7,505. That amount is larger than the excess mileage multiplied by 15 cents, but perhaps “items 3 and 7” on

the reverse side of the lease provide for additional damages. The partial copy of the Lease submitted by Mazda with its motion does not include the reverse side, and the copy of the reverse side attached to Mazda's proof of claim is not entirely legible. In any event, Debtors do not contest Mazda's calculation of damages.

Undoubtedly, the use of the vehicle benefitted Debtors. That is not the standard, however, for establishing a right to priority under section 503(b)(1). Allowed administrative expenses entitled to be paid on the first level of priority under section 507 of the Bankruptcy Code include 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). The party claiming administrative expense priority has the burden of proof. *In re Mid Region Petroleum, Inc.*, 1 F.3d 1130, 1132 (10th Cir. 1993). Mazda has failed to allege any facts that if true would support the conclusion that the use of the vehicle, particularly the use resulting in excess mileage, in any way preserved or benefitted the Debtors' estates, as opposed to Debtors personally.

Mazda contends that Debtors assumed the lease pursuant to the Consent Order entered on March 28, 2003 and that the debt owed under the lease thereby was elevated to an administrative expense. Brief In Support of Mazda American Credit's Motion for Allowance of Payment of Administrative Expense Claim, document no. 51, ¶ 2. That Order says no such thing. Its only purpose was to reimpose the stay that had been lifted in a prior order; it is silent as to assumption of the lease. Section 365(d)(2) provides:

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time *before the confirmation of a plan* but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(Emphasis added.) The plan in this case was confirmed in August 2002. Hence, not only was the Court not asked in the motion of Debtors to reimpose the stay to approve assumption of the lease, the Consent Order in March 2003 was entered after the confirmation of Debtors' plan and hence came too late to approve an assumption.

Nor was the lease otherwise assumed by Debtors. Section 365(a) of the Bankruptcy Code provides that a trustee may with court approval assume or reject an executory contract or unexpired lease of the debtor. The only provision in Chapter 13 dealing with executory contracts or unexpired leases is section 1322(b)(7), which states that a plan may "(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section." The implication of this subsection is that a motion might be made prior to confirmation to assume or reject an executory contract or unexpired lease. Chapter 13 is murky when it comes to the question of whether a debtor may exercise the powers of a trustee in this regard. Compare § 1302 (providing for duties a trustee shall perform - with no mention of section 365) with § 1303 (providing for powers of the trustee that a debtor may exercise exclusive of the trustee - again with no mention of section 365). But no such motion was filed in this case.

An order confirming a Chapter 13 plan providing for assumption of a lease satisfies section 365(a)'s requirement of court approval. See *In re Aneiro*, 72 B.R. 424, 428 (Bankr. S.D. Cal. 1987) ("[W]hen the court confirmed the debtor's plan...the court approved the debtor's lease assumption as required by § 365(a)."). But the Browns' plan as amended, like the Consent Order on which Mazda relies, does not mention assumption of the lease. Paragraph 10 of the plan purports to list rejected executory contracts but none is listed. Paragraph 8 of the plan as

amended states only that Debtors would make the payments under the lease directly to Mazda through May 28, 2005, at which time their plan payment would increase by \$254, which was (within \$.81) the amount of the lease payment. The lease includes obligations other than making payments, such as the responsibility to maintain the vehicle properly, but there is nothing in the plan that states that Debtors would honor that responsibility. Had they not maintained the vehicle properly, Mazda might have obtained possession of the vehicle earlier, but that possible consequence of failing to maintain the vehicle does not prove that the lease was assumed.

To assume a lease, a plan must state expressly that the lease is to be assumed. See *Stumpf v. McGee (In the Matter of O'Connor)*, 258 F.3d 392 (5th Cir. 2001). In that case the bankruptcy court decided that confirmation of a Chapter 11 plan providing that contracts not rejected “will be assumed” did not result in the assumption of a contract not specifically identified as one to be assumed. The district court affirmed. The Court of Appeals in affirming stated that this “interpretation is consistent with the conclusions by other courts that *an executory contract may not be assumed by implication* or through the use of boiler plate language.” *Id.* at 401. (Emphasis in original).

Had the Browns’ plan specifically stated that they would assume the lease, creditors might have objected to confirmation by contending, for example, that Debtors were unable to provide “adequate assurance of future performance.” See 11 U.S.C. § 365(b)(1)(C), the applicability of which section 1322(b)(7) makes plain. Such an objection might have raised the very problem that gave rise to this dispute - the possibility of a large excess mileage charge. The language used in the plan, however, provided no hint that the lease was to be assumed.

Assumption cannot be presumed or implied by the agreement to make payments on the lease through May 2005.

Finally, note that this is a joint case. Had the plan provided for assumption, not only would Mr. Brown have been assuming the lease, but Mrs. Brown would have been also. But Mrs. Brown was not a party to the lease. She had no personal liability to Mazda when this case was filed. Had she assumed the lease, she would arguably have been agreeing to be bound by all of the terms of the lease, and that liability, if not satisfied, could have followed her after this case is closed. Yet, nothing in the record shows that assuming the lease provided any benefit to Mrs. Brown that would offset the liability she would arguably have been assuming. In other words, the plan does not make it clear that Mrs. Brown was assuming the lease. If she was not assuming it, then neither could Mr. Brown because they share the same plan.

Mazda relies on several cases for the proposition that breach of an assumed contract gives rise to an administrative expense. It cites *In re Airlift Int'l, Inc.*, 761 F.2d 1503 (11th Cir. 1985), in which the Court of Appeals opined that “if [the debtor] had been required to assume the entire contract under section 365, upon default [the creditor] would have an administrative expense claim for any deficiency on the *entire* note after it repossessed and sold the aircraft.” *Id.* at 1513 (emphasis in original). This dicta does not apply here because the Browns did not assume the Mazda lease. Similarly, Mazda relies on *In re Norwegian Health Spa, Inc.*, 79 B.R. 507 (Bankr.N.D.Ga. 1987) for the proposition that damages flowing from the rejection of an assumed lease is an administrative expense. In that Chapter 11 case, the debtor in possession had assumed a commercial real property lease and subsequently rejected it. The Court opined that “[b]y defining the time at which a rejection of an assumed contract or lease constitutes a breach,

section 365(g) clearly indicates that the act of assumption creates an administrative expense obligation of the particular proceedings in which the contract or lease was assumed.” *Id.* at 509. The act of assumption in these types of commercial cases arguably establishes that the debt is incurred to preserve and benefit the estate, thereby giving rise to an administrative expense. This Court does not read *Norwegian Health Spa* as holding that merely because a charge is incurred under a lease postpetition, that charge is necessarily classified as an administrative expense. In any event, the fact that the Browns did not assume or reject the Mazda lease makes *Norwegian Health Spa* inapposite.

In summary, the Consent Order entered on March 28, 2003 did not approve an assumption of the lease between Mr. Brown and Mazda; because the plan as amended did not purport to assume the lease, the confirmation order did not approve an assumption of the lease; and Mazda has not alleged any facts or presented any evidence to show that the lease provided a benefit that helped to preserve the estate. Consequently, Mazda has no allowable claim for an administrative expense in this case. Accordingly, it is

ORDERED that Mazda American Credit’s Motion to Pay Administrative Expense Claim (doc. No. 48) is DENIED.

Dated: July 7, 2006.

  
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JAMES E. MASSEY  
U.S. BANKRUPTCY JUDGE