

Tagged Opinion



ORDERED in the Southern District of Florida on July 14, 2009.

A handwritten signature in black ink, appearing to read "Laurel M. Isicoff".

**Laurel M. Isicoff, Judge
United States Bankruptcy Court**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

CASE NO. 08-15793-BKC-LMI

SOLAR COSMETIC LABS, INC.,

Chapter 11
(Jointly Administered)

Debtor.

**ORDER DENYING REQUEST FOR PAYMENT OF
ADMINISTRATIVE EXPENSE CLAIM BY CAP-EAST ASSOCIATES**

This matter came before the Court for evidentiary hearing on May 13, 2009, on Request for Payment of Administrative Expense Claim by Cap-East Associates (DE # 310). The Court, having considered the Request and the objections to the Request filed by the Debtor (DE # 345) and by Keybank National Association (DE # 352), as well as the evidence presented, the testimony of witnesses and the argument of counsel, makes the following findings of facts and conclusions of law pursuant to Federal Rule of Civil Procedure 52, as made applicable to this contested matter pursuant to Federal Rule of Bankruptcy Procedure 7052.

Jurisdiction

The Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A).

Factual Background

On May 6, 2008, Solar Cosmetics Labs, Inc. (the “Debtor”) filed a voluntary petition under chapter 11 of the Bankruptcy Code. At the time the petition was filed, the Debtor was a party to a lease dated November 13, 2000 (the “Lease”) as tenant and Cap-East Associates (“Cap-East”) as landlord. The Lease was amended multiple times to extend the lease term. The Debtor used the leased premises (the “Premises”) primarily as a warehouse facility.

On September 2, 2008, the Court approved an order extending the time period in which to assume or reject the Lease through December 5, 2008 (“Rejection Date”), on which date the Debtor rejected the Lease pursuant to 11 U.S.C. §365(d)(4). However, the Debtor remained in the Premises through December 31, 2008, on which date the Debtor vacated, according to the Debtor. The Debtor paid all post-petition rent at the Lease rate to Cap-East through December 31, 2008.

In a letter dated January 7, 2009, the Debtor notified Cap-East of its surrender of the Premises, and informed Cap-East that the keys to the Premises would follow. Apparently there were several phone calls between Harlan Press, at the time chief financial officer of the Debtor, and Angelo Pomares, a representative of Cap-East. Pursuant to those discussions, on January 22, 2009, Mr. Press met Mr. Pomares at the Premises for a walk-through, at which time Mr. Press attempted to deliver the keys to Mr. Pomares. However, Mr. Pomares refused to accept surrender of the keys because, during the walk-through, Mr. Pomares showed Mr. Press that the Debtor had left various boxes of material at the Premises when the Debtor vacated. Mr. Press agreed to

have what he described as trash removed at the Debtor's expense. In fact, all the material was removed at the Debtor's expense. During a follow-up walk-through of the Premises on February 3, 2009, Mr. Press insisted that Mr. Pomares take the keys, but again Mr. Pomares refused. Mr. Press advised Mr. Pomares on February 26 that he was leaving the keys no matter what.

Cap-East argues that the Debtor remained in possession of the Premises beyond the Rejection Date, and did not vacate the Premises until February 3, 2009,¹ during which time over one month of rent accrued and remains unpaid. Cap-East claims that the materials left on the Premises were valuable, and that providing storage of the materials amounts to a concrete benefit to the Debtor's estate for which the Debtor should pay rent in the full Lease amount. Cap-East also claims that it was unable to re-let the Premises to potential tenants because of the material left behind. Cap-East seeks post-rejection rent of \$41,454.52 and attorney's fees of \$2,500.

The Debtor contends that it vacated the premises on December 31, 2008, and neither used nor derived any benefit from the Premises subsequent to that date, that it did not interfere with Cap-East's ability to show the Premises to prospective tenants, and that the material left behind was of no value to the Debtor's estate as it was all trash.

KeyBank National Association ("KeyBank") also objected to Cap-East's request for payment of post-petition rent as an administrative expense. KeyBank is the Debtor's primary pre-petition secured creditor and is also providing post-petition financing to the Debtor. KeyBank asserts that by virtue of Cap-East's refusal to accept the Debtor's surrender of the Premises, Cap-East should be equitably estopped from asserting its administrative expense claim.

¹ In its request, Cap-East sought payment of rent through February 3, 2009, alleging this is the date the material was finally removed from the Premises; however, during trial Mr. Press testified that the material was not fully removed until February 28, 2009. Although counsel for Cap-East suggested he would amend his motion to seek rent through February 28, no such modified request has been filed.

ANALYSIS

Administrative Expenses for Use and Occupancy of the Premises

It is generally accepted that once a lease is rejected, “if the debtor remains in possession by failing to vacate the premises, the estate becomes liable to the lessor for an administrative expense claim arising from the benefit accruing to the estate for the continued use of the premises.” *In re Williams Contract Furniture, Inc.*, 148 B.R. 799, 804 (Bankr. E.D. Va. 1992). Pursuant to 11 U.S.C. §503(b), “[a]fter notice and a hearing, there shall be allowed, administrative expenses ... including ... the actual, necessary costs and expenses of preserving the estate[.]” The Eleventh Circuit has interpreted section 503(b) to require not only that the expense be “actual” and “necessary,” but also that it provide a concrete benefit to a debtor’s estate. *Broadcast Corp. v. Broadfoot (In re Subscription Television of Greater Atlanta)*, 789 F.2d 1530, 1532 (11th Cir. 1986). As many courts have noted, “[t]he use of the terms ‘actual’ and ‘necessary’ were not accidental but were included to impose the requirement that the estate is *actually* benefited.” *In re Mainstream Access, Inc.*, 134 B.R. 743, 749 (Bankr. S.D.N.Y. 1991) (quoting *In re Carmichael*, 109 B.R. 849, 851 (Bankr. N.D. Ill. 1990)). Furthermore, it is well settled that allocation of administrative expenses under section 503(b) must be narrowly construed in order to prevent further loss to a debtor’s estate.²

Mr. Press testified that the material left on the Premises was trash – boxes and expired product. Mr. Press also testified that the Debtor had made arrangements to have the material removed by a recycling company prior to December 31, 2008. When that arrangement fell through, a surplus company that purchased some old furniture and equipment said it would arrange for the material to be removed. According to counsel for Cap-East, Mr. Press was

² *Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 866 (4th Cir. 1994); *In re Ames Dep’t Stores, Inc.*, 306 B.R. 43 (Bankr. S.D.N.Y. 2004); *In re United Container LLC*, 305 B.R. 120 (Bankr. M.D. Fla. 2003).

surprised to see material on the Premises at the January 22 walk-through. Mr. Press testified he arranged with a trash hauler to remove the material and the Debtor paid the invoices.

Cap-East argued that, while Mr. Pomares cannot opine as to what was the material left or its value, he did take pictures. Mr. Press agreed that the pictures accurately reflect what was on the Premises on January 22. Those pictures clearly show palettes of boxes, wrapped in shrink wrap, a couple of drums of material, storage boxes filled with unidentified material, and some unframed boxes. While Mr. Pomares stated (through proffer) that he did not know what the material was and cannot *dispute* Mr. Press' testimony that all the material was trash, Mr. Pomares believes he saw the material being loaded into trailers, not dumpsters, and therefore speculates the material was not trash. Moreover, Cap-East argues, the Lease provides that the Premises "shall be used by Tenant for Storage/Shipping/Assembly of Cosmetic Products Including Gift Sets and Displays." [Cap-East's Request for Payment (DE #310), Ex. A: Business Lease, ¶5]. Since the Debtor was clearly storing the material, consistent with the Lease use, the Debtor therefore was deriving some benefit from the continued use of the space.

The Debtor relies on a different lease term:

PERSONAL PROPERTY. It is understood and agreed that any merchandise, fixtures, furniture, or equipment left in the premises when Tenant vacates *shall be deemed to have been abandoned* by Tenant and by such abandonment Tenant automatically relinquishes any right of interest therein. Landlord is authorized to sell, dispose of or destroy same.

[*Id.*, Ex. A: Business Lease, ¶14 (*second emphasis added*)]. Based on this provision, the Debtor argues that the Lease clearly contemplates the Debtor could leave behind material, and further provides the consequences of failing to remove the material. Therefore, the Debtor suggests, the Debtor need not have bothered with removing the material. Moreover, Mr. Press testified, Cap-East never asked the Debtor for access to the space, and, Mr. Press assumes, Cap-East had its own set of keys; however there was no evidence on this point. Cap-East counters that it didn't

believe it could touch the material “because it was bankruptcy property,” but Mr. Pomares conceded he never consulted a bankruptcy lawyer until after February 3rd to determine what he could or could not do.

Because there is no evidence to contradict Mr. Press’ testimony that the material was trash, it is undisputed that the material left at the Premises was of no value to the Estate. Thus, the Court must determine whether the storage of the material provided a value to the Estate.

The opinion *In re Ames Dep’t Stores, Inc.*, 306 B.R. 43 (Bankr. S.D.N.Y. 2004) is somewhat instructive. The court dismissed a landlord’s argument that the debtor could not reject the lease without removing some personal property it abandoned at the premises. In so ruling the court noted,

the debtor ha[d] no right to continued occupancy of the premises it occupied under the now-rejected lease, and it is at least strongly likely that if a debtor sought to continue occupancy after rejection (including by the storage of goods in which it had a continuing interest), the landlord would be entitled to relief ... under section 503(b) for the use of the leased premises after the date of rejection ... [W]ithout dispute, Ames *abandoned* the property in question. It was not seeking to store property in which it had a continuing interest. If a debtor-tenant did so (and, as a result, it was in essence acting as a holdover tenant), the Court could consider the award of appropriate relief to the landlord under traditional section 503(b) doctrine.

Id. at 52-53. Thus, the “storage” of the abandoned property provided no value to the *Ames* estate, just as the storage of the trash in this case provided no value. The *Ames* court then considered, and rejected, the landlord’s claim that the clean up cost was an administrative claim rather than a part of the pre-petition rejection claim. After reviewing several cases the court held that the failure to remove the abandoned material, which was a breach under the lease, did not give rise to an administrative claim “where the cleanup obligation arises upon lease termination, and there has been no showing that hazardous materials were left on the premises or that damage to the premises was caused during the post-petition period.” *Id.* at 55. The treatment of the clean up cost is not an issue here because the Debtor actually paid for the removal of the material, even

though, arguably, it was under no obligation to do so. The Court, accordingly, holds that the mere fact that valueless material was left behind on the Premises did not provide a benefit or any value to the Debtor or the bankruptcy estate and therefore Cap-East is not entitled to an administrative claim for rent in any amount.³

Attorney's Fees

Cap-East claims that it incurred \$2,500 in fees in connection with filing and prosecution of this motion, and that it is entitled to payment because a landlord is entitled to an administrative expense for reasonable attorney's fees and expenses if the fees are "(1) authorized under the lease and (2) incurred as a result of the debtor-in-possession's failure to pay post-petition rent." [Cap-East Request for Payment (DE #310), pg. 3 (*citing In re Beltway Medical, Inc.*, 358 B.R. 448, 453 (Bankr. S.D. Fla. 2006))]. Cap-East asserts that it meets both requirements, and is entitled to fees and costs as an administrative expense.

The lease between the Debtor and Cap-East provides:

ATTORNEY'S FEES. If either party becomes a party to any litigation ... the party that causes the other party to become involved in the litigation shall be liable to that party for reasonable attorney's fees and all costs and expenses incurred by it in connection with said litigation including available appeals thereof.

[Cap-East Request for Payment (DE #310), Ex. A: Business Lease, ¶13]. However, having found that Cap-East is not entitled to the relief sought, its request for attorney fees is not reasonable in

³ Cap-East has not relied on, and so the Court will not consider, what applicability, if any, there is of the case *Reading Co. v. Brown*, 391 U.S. 471 (1968). In *Reading*, the Supreme Court found that an award of tort damages to victims of a fire caused by the debtor's negligence was entitled to administrative expense priority, even though the victims did not transact with the debtor, nor did the estate benefit from the event. The court held that the tort claims arising post-petition were "actual and necessary expenses" of preserving the estate because the statutory objective of the Bankruptcy Act was "fairness to all persons having claims against the insolvent." *Id.* at 477. Therefore, *Reading* might suggest that creditors of a debtor who suffer a post-petition loss may have an equitable administrative claim. However, it is not clear *Reading* survives enactment of the Bankruptcy Code, an issue the Court need not decide. The Court also does not need to address KeyBank's argument that, by virtue of Cap-East's refusal to accept the Debtor's surrender of the premises, Cap-East should be equitably estopped from asserting its administrative expense claim for any alleged continuing occupancy by the Debtor, or for any costs and fees incurred in connection with asserting such entitlement.

any amount.

Accordingly, it is ordered and adjudged as follows:

1. Cap-East's Request for Payment of Administrative Expense Claim is denied.
2. Cap-East's Request for Payment of Attorney Fees is denied.

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Copies furnished to:
Luis Salazar, Esq.
David Ray, Esq.
Peter Shapiro, Esq.