

Tagged Opinion



ORDERED in the Southern District of Florida on February 14, 2012.

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

Case No. 09-38795-BKC-LMI

IN RE:

Chapter 13

ORLANDO C. RUIZ AND MARIA
ESTARELLA,

Debtors.

**ORDER DENYING CREDITOR'S MOTION FOR PAYMENT OF ADMINISTRATIVE
EXPENSES AND MODIFICATION OF CONFIRMED CHAPTER 13 PLAN**

This matter came before me on April 5, 2011 upon the Lessor's Motion for Payment of Administrative Expenses (ECF #103).¹ The issues before me are whether a debtor-lessee's breach of an assumed lease entitles a lessor to an administrative claim and whether the lessor may then compel modification of a confirmed chapter 13 plan to reflect such administrative claim arising from the breach. Having considered the argument of counsel and the applicable case law, the Motion for Payment of Administrative Expenses is denied for the reasons set forth below.

¹ On July 28, 2011 I delivered a brief oral ruling advising the parties of my holding, with the understanding I would enter a detailed written opinion at a later date.

JURISDICTION

I have jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

FACTUAL BACKGROUND

The Debtors, Orlando C. Ruiz and Maria Estarella, filed their voluntary chapter 13 petition (ECF #1) on December 29, 2009. On September 27, 2008 the Debtors originally entered into a lease agreement with Capital Group for a 2008 Landrover Sport (the “Landrover Lease” or “Lease”). The Debtors’ amended chapter 13 plan (ECF #79) (the “Plan”) was confirmed on July 22, 2010 (ECF #92). Pursuant to the Plan, the Debtors’ assumed the Landrover Lease.² On November 3, 2010 the Debtors filed a modified chapter 13 plan (ECF #98) (the “Second Modified Plan) which provided for the Landrover Lease to be paid outside of the plan and directly to the lessor, Capital Group. At some point Cab East, LLC/Ford Credit (“Cab East” or “Lessor”) assumed the Lease from Capital Group. The Landrover Lease expired September 27, 2010 but the Debtors returned the Landrover to the dealer on October 14, 2010.

Cab East filed a Motion for Payment of Administrative Expenses on March 21, 2011 (ECF #103) (the “Motion for Payment”). The Motion for Payment asserts that as of March 21, 2011, the Debtors owe \$4,787.17 to the Lessor for excess vehicle use charges, taxes, a disposal fee, and delinquent monthly lease payment charges (the “Default Charges”). Cab East seeks to compel modification of the Second Modified Plan to provide for payment of the Default Charges as an administrative expense.

² Pursuant to 11 U.S.C. §1322(b)(7), a chapter 13 debtor may assume a lease in a chapter 13 plan.

ANALYSIS

Assumption of the Lease

Under section 365 of the Bankruptcy Code, “the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C.

§365(a). Moreover, in a chapter 13 case,

[T]he trustee may assume or reject an executory contract or unexpired lease ... 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.

11 U.S.C. §365(d)(2).

If a trustee fails to assume a lease of personal property “the leased property is no longer property of the estate and the stay under 362(a) is automatically terminated.” 11 U.S.C.

§365(p)(1). However, individual chapter 11 and chapter 13 debtors may assume personal property leases not previously rejected even if the trustee chooses not to do so. 11 U.S.C.

§1123(b)(2); 11 U.S.C. §1322(b)(7). In these instances, if a debtor fails to assume the lease in the plan, it is “deemed rejected” and the stay is terminated. 11 U.S.C. §365(p)(3).

In this case, since the chapter 13 trustee did not assume the Landrover Lease, the Lease was no longer property of the estate. 11 U.S.C. §365(p)(1). Nonetheless, the Debtors assumed the Lease, and pursuant to the Second Modified Plan, agreed to make payments outside of the plan directly to Cab East. Neither Cab East nor the trustee objected to this provision and the Second Modified Plan was confirmed. Once an executory contract is assumed, the debtor is

bound by its terms as if the bankruptcy had not occurred. The Debtors are therefore responsible for the Default Charges.³

Consequence of Lease Default

Cab East argues that, as a consequence of the Debtors' post-surrender default, it is entitled to an administrative claim for the Default Charges and that the Second Modified Plan should be modified accordingly.

The allowance of an administrative claim is governed by section 503 of the Bankruptcy Code. Section 503(a) allows an entity to timely file a request for payment of administrative expenses, or tardily if permitted by the court for cause. 11 U.S.C. §503(a). Administrative expenses are allowed if they comprise "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. §503(b)(1)(A). The Eleventh Circuit has held that allowable administrative claims must have an "actual, concrete benefit to the estate." *In re Subscription Television of Greater Atlanta*, 789 F.2d 1530, 1532 (11th Cir. 1986). Administrative expenses are afforded the highest priority and should be allowed only after careful consideration by the court. *Id.* See 11 U.S.C. § 507(a)(1); 11 U.S.C. § 503(b). The nature of allowable administrative claims varies with each case, but generally such claims include a trustee's expenses in maintaining a debtor's business and any other expenses that provide a concrete benefit to the estate. *Id.* Administrative claims that only potentially benefit the estate are generally regarded as "too speculative to be allowed as an 'actual, necessary cost and expense of preserving the estate.'" *Id.*

³ If, after assumption, a debtor or a trustee then seeks to reject a lease, the rejection is deemed a breach that occurs at the time of rejection. 11 U.S.C. §365(g)(2)(A). However the Debtors did not reject the Landrover Lease so I need not address the impact or meaning of this statute to resolve the issue before me.

Historically, the non-breaching non-debtor party, without proving a benefit to the estate, has been generally successful in asserting an administrative claim after a debtor assumes and subsequently defaults on an executory contract. The benefit to the estate is presumed by the assumption itself. In *In re Pearson*, 90 B.R. 638 (Bankr. D.N.J. 1988), the court held that a car lessor was entitled to an administrative claim after the debtor assumed and then rejected a car lease. The *Pearson* court, relying on chapter 11 case law, held that the debtor's

[A]ssumption was an act of administration that created an obligation of the post-petition bankruptcy estate which is legally distinct from the obligations of the parties prior to assumption.... Any breach of the assumed obligations, whether in the form of a default or a formal rejection of the lease thereby constitutes a breach by the postpetition debtor of postpetition obligations. This postpetition breach or rejection after a prior assumption is afforded priority as an administrative expense claim under 11 U.S.C. §365(g)(2)(A).⁴

The *Pearson* court's reliance on chapter 11 cases may or may not have been appropriate in 1988, but it is certainly not appropriate now after BAPCPA's enactment. In a chapter 11 case a debtor in possession operates on behalf of the estate until confirmation, while in a chapter 13, the trustee represents the estate. Section 365(p), a new addition of BAPCPA, clearly distinguishes between assumption by the trustee on behalf of the estate and assumption by the debtor. In this case, since the chapter 13 trustee did not assume the Landrover Lease, it ceased to be property of the estate under section 365(p)(1) and any argument regarding entitlement to administrative claim would need to satisfy the requirements of *Subscription Services*. As the Sixth Circuit noted in *In re Parmenter*, 527 F.3d 606, 610 (6th Cir. 2008): "[w]hereas a chapter 11 debtor-in-possession acts on behalf of the estate when it assumes a lease and thus creates a

⁴ 90 B.R. at 642 (citing *In re Multech Corp.*, 47 B.R. 747, 750–51 (Bankr. N.D. Iowa 1985).

legal obligation on the estate, *see In re Multech Corp.*, 47 B.R. at 750-51, a chapter 13 debtor who assumes and pays for a lease outside of the plan does not.” *Accord In re Williamson*, 1997 WL 33474939 (Bankr. S.D. Ga. 1997); *Cf. In re Michalek*, 393 BR 642 (Bankr. E. Wisc. 2008) (rejection of an assumed lease gives rise to an administrative claim only if the creditor shows a benefit to the estate).⁵

In *Parmenter*, the bankruptcy court confirmed a chapter 13 plan in which the debtors agreed to assume an executory car lease and make the remaining lease payments directly to the lessor, outside of the plan. The debtors defaulted on the lease, after which the lessor repossessed the vehicle and sold it at auction. The bankruptcy court denied the lessor’s subsequent motion for administrative expenses that included attorney’s fees and the deficiency balance on the lease. The *Parmenter* court did not allow the lessor’s administrative claim, reasoning that “like all creditors and the debtor, [the lessor] is bound by the terms of a confirmed plan and accordingly may not unwind those terms in order to elevate its losses into administrative expenses.” The court concluded that if the lessor wished to obtain additional relief from the debtors, it needed to do so outside the plan. *Id.* at 609. There are several other courts that have also held that a default

⁵ In *In re Rosenhouse*, 2011 WL 2551497 (Bankr. E.D.N.Y. 2011) the bankruptcy court held that the assumed lease in chapter 13 is an estate liability because section 365(p)(2) specifically provides that a chapter 7 debtor’s assumption of a lease is one not assumed by the estate. Since section 365(p)(3) does not contain the same express differentiation, the court ruled that the assumption by a chapter 13 debtor creates an estate liability. I disagree with this interpretation. Although section 365(p) does not specifically divide liability issues between the estate and debtors in chapter 13 cases, the only logical interpretation of section 365(p)(1) and section 365(p)(3) is that the chapter 13 debtor has a right to assume an executory contract separate from the estate’s rights and obligations – similar to reaffirmation in chapter 7. There is simply no Bankruptcy Code provision applicable here, other than 11 U.S.C. §503(b), that provides administrative status to a liability created for an asset that is not an estate asset. Thus, for use of an asset that is not an estate asset to be the basis for an administrative claim, the use must confer an actual benefit to the estate. The mere act of assumption is not enough. *Cf. In re Mandel*, 319 B.R. 743 (Bankr. S.D. Fl. 2005) (In a chapter 13 case the landlord of an unassumed residential lease was entitled to post-petition pre-confirmation rent as an administrative claim so long as the landlord demonstrated “a concrete benefit to the estate”).

under an assumed car lease will not give rise to an administrative expense claim, and that, moreover, a chapter 13 plan cannot be modified to alter a creditor's classification.

In re White, 370 B.R. 713 (Bankr. E.D. Mich. 2007) contains facts almost identical to the instant case. In *White*, a vehicle lessor sought to assert an administrative expense claim after the debtors breached their assumed lease by failing to pay for excess mileage and wear-and-tear on the vehicle. As in the instant case, the debtor also confirmed a plan which provided for payments directly to the lessor and not through the plan. The court reasoned that the treatment of an obligation in a confirmed plan is binding on all creditors, and since the lessors' claim was not originally classified as an administrative claim in the plan, it could not subsequently be reclassified as one.⁶ The court held that classification and treatment of the car lessor's claim was *res judicata* and therefore the court did not need to consider whether use of the vehicle provided a benefit to the estate. *Id.* at 717.

Consequently I find that the assumption of an executory contract by an individual chapter 13 debtor alone does not create an administrative claim for its breach. A claimant first needs to demonstrate that the assumption confers an actual benefit to the estate.

Modification of the Plan

However, even if the Lessor were entitled to an administrative claim to the extent a benefit to the estate is demonstrated, since the Plan has already been confirmed, how are the Default Charges to be paid other than as a continuing obligation of the Debtors outside the Second Modified Plan? Anything else would require modification of the Second Modified Plan,

⁶ As the court observed "in assuming the Lease, Debtors became obligated to pay not only the monthly payments of \$568.77 through the remaining term of the Lease, but also any other sums that became due at any future time under the terms of the Lease including any sums contractually due for excess mileage wear and tear." *Id.* at 718.

which, for the purpose sought here, the Bankruptcy Code does not authorize. 11 U.S.C. §1329 sets forth the parameters and requirements for plan modification.⁷ While that Code section recognizes various reasons to modify the payment to creditors, no provision in chapter 13 allows for the modification of a plan to change the claim priority of an obligation. *See Parmenter*, 527 F.3d at 609. *See also In re White*, 370 B.R. 713 (Although the relief was not explicitly requested by the lessor, the court considered whether the confirmed plan could be modified. The court, citing *Chrysler Financial Corp. v. Nolan (In re Nolan)*, 232 F. 3d 528 (6th Cir. 2000), held that a chapter 13 plan cannot be modified to reclassify a claim.)⁸

⁷ 11 U.S.C. §1329 provides in pertinent part that :

- (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--
- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
 - (2) extend or reduce the time for such payments;
 - (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or
 - (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) if the debtor documents the cost of such insurance and demonstrates that....

⁸ Instructive, although not controlling, are those cases that have considered whether 11 U.S.C §1329 allows for the modification of a confirmed plan to reclassify the deficiency on a secured claim after a debtor surrenders the collateral halfway through the plan. There is a clear split of authority and an ongoing debate. In *In re Arencibia*, 2003 WL 21004969, *2 (Bankr. S.D. Fla. 2003) the court held that 11 U.S.C. §1329(a) allows for the modification of a chapter 13 plan in order to reclassify a secured claim to an unsecured claim when, post-confirmation, a debtor surrenders the collateral. *Accord In re Marino*, 349 B.R. 922, (Bankr. S.D. Fla. 2006); *In re Amador*, 2008 WL 1336962 (Bankr. S.D. Fla. 2008); *see also Bank One, NA v. Leuellen*, 322 B.R. 648 (S.D. Ind. 2005). Some courts have held that section 1329 in tandem with 11 U.S.C. §502(j) allows modification of a plan to reclassify a claim. *See e.g. In re Zeider*, 263 B.R. 114 (Bankr. D. Ariz. 2001); *In re Johnson*, 247 B.R. 904 (Bankr. S.D. Ga. 1999). The Middle District of Florida follows the *Nolan* and *White* decisions: “§1329(a) does not allow a debtor to reclassify an allowed secured claim as an unsecured claim. The claim amount is fixed at the confirmation hearing, and no provision in §1329 allows for the later modification or reexamination of the claim amount.” *In re Meeks*, 237 B.R. 856, 860 (Bankr. M.D. Fla. 1999). In this case the status of the collateral has not changed. The issue here is whether it is appropriate to recharacterize contract damages arising out of an assumed contract being paid outside a plan, not whether surrender or loss of collateral warrants reclassification of a claim within the plan.

In this case there is no question that the Debtors are obligated to pay the Default Charges to Cab East: the Debtors are bound by the Second Modified Plan. Moreover since the Debtors must complete “all payments under the Plan” to receive a discharge under 11 U.S.C. §1328, and the direct payments to the Lessor as provided in the Second Modified Plan are still payments under the plan,⁹ it is possible that the Debtors’ failure to pay Cab East the Default Charges may result in the Debtors’ inability to receive a discharge.¹⁰

In the absence of modification, the treatment of the Landrover Lease in the Second Modified Plan is *res judicata*. Cab East had the opportunity to object to the confirmation of the Second Modified Plan. By failing to object, Cab East agreed to the terms in the Second Modified Plan, which treats all Lease obligations outside of the Plan. Surely the possibility of a default or overage charges were reasonably contemplated at the time the Second Modified Plan was confirmed and adequate provision for default treatment could have been made. Allowing Cab East to compel modification of the Second Modified Plan in order to elevate its unsecured claim to an administrative claim due to the Debtors’ breach of the Landrover Lease would be unfair to the other creditors within the Plan even if such modification were authorized under the Code.¹¹ The Debtors are required to meet their obligations under the Landrover Lease, but like the lessor in *Parmenter*, if Cab East wishes to obtain additional relief from the Debtors’ breach, it must do so outside the Second Modified Plan.

Accordingly, Cab East’s Motion is DENIED.

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⁹ *Id.*

¹⁰ This issue was not brought before me by the parties.

¹¹ 11 U.S.C. §502(j) allows a court to reconsider a claim that has been allowed or disallowed, but such reconsideration is made “according to the equities of the case.” Thus, even if section 502(j) and section 1329 together authorize a creditor to reclassify a claim, the equities of this case do not support reclassification.

Copies furnished to:
Michael A. Frank, Esq.
Leslie Gomez, Esq.

Attorney Frank shall serve a copy of this order upon all parties in interest and file a certificate of service with the clerk of court.