

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

GORDON'S TRANSPORTS, INC.,
Debtor.

BK #83-20481-WHB
Chapter 7 (asset)

**MEMORANDUM OPINION AND ORDER
REGARDING TRUSTEE'S OBJECTIONS
TO CLAIMS OF GENERAL MOTORS
ACCEPTANCE CORPORATION**

This cause is before the Court on the objections of A. J. Calhoun, Chapter 7 Trustee ("Trustee") for the estate of Gordon's Transports, Inc. ("Transports") to claims filed against the estate by General Motors Acceptance Corporation ("GMAC"). At issue in this proceeding is: (1) whether GMAC's claim relating to Transports' breach of a lease of vehicles is allowable and (2) whether GMAC's application for an administrative expense claim is timely filed. The issues raised are core pursuant to 28 U.S.C. §157(b)(2)(B). The following constitutes findings of fact and conclusions of law pursuant to F.R.B.P. 7052.

FACTUAL SUMMARY

The facts pertinent to resolution of this controversy have largely been stipulated. They may be summarized as follows:

On September 17, 1982, Woodmere Equipment Company ("Woodmere") entered into retail installment sales contracts with General Motors Corporation for the purchase of 113 trucks. The sales contracts were assigned to GMAC. (Stipulation of Facts, ¶2, Ex. A) On August 25, 1982, Woodmere agreed to lease the 113 trucks to Transports which was then in the business of long haul trucking for sixty (60) months at the rate of \$104,670.14 per month. On September 21, 1982, Woodmere granted GMAC a security interest in all of its "accounts, contract rights, chattel paper, instruments, general intangibles, inventory,

equipment, leases [including the Transports' lease], acceptances and documents . . ." (Stipulation of Facts, ¶3 & 4, Exs. B & C) In addition, Gordon's Industries, Inc., an affiliate of Transports, guaranteed Woodmere's obligations to GMAC. (Stipulation of Facts, ¶5)

On February 11, 1983, Transports filed a voluntary petition with this Court for relief under Chapter 11 of the Bankruptcy Code. On April 14, 1983, the Chapter 11 case was converted to a Chapter 7. No lease payments were made on the Woodmere lease during the pendency of the Chapter 11 case. (Stipulation of Facts, ¶'s 6, 7, & 8) GMAC has not received payment on the Woodmere lease since the filing of the Chapter 11 petition from any other source. (Stipulation of Facts, ¶8).

Following a hearing on GMAC's motion to compel the Trustee to reject the Woodmere lease and abandon the leased property, the Court entered an Order on May 5, 1983, granting GMAC the relief requested. (Stipulation of Facts, ¶12, Ex. F) GMAC took possession of the trucks on May 6, 1983, and subsequently sold them in a commercially reasonable manner. (Stipulation of Facts, ¶14)

The total amount due GMAC from Woodmere at the time of repossession was \$5,586,520.89. After disposing of the Woodmere trucks and applying the sales proceeds, GMAC had a deficiency claim against Woodmere of \$1,728,749.83 according to its records. By virtue of its security agreement and assignment with Woodmere, it had recourse against its additional collateral. GMAC also had a claim against Gordon's Industries for the deficiency by virtue of Gordon's Industries' guaranty. (Stipulation of Facts, ¶'s 15, 16 & 17)

Accordingly, on February 5, 1986, GMAC filed a proof of claim in the Gordon's Industries case for \$1,872,402.75 representing the deficiency due on the Woodmere lease. This proof of claim was subsequently amended to reflect an amount due of \$1,728,749.83. The Trustee agrees to the allowance of this claim. (Stipulation of Facts, ¶'s 18, 23, 24)

On February 5, 1986, GMAC filed a proof of claim in the Transports case for \$3,333,113.03 of which \$1,856,400.73 was attributable to the deficiency amount resulting from disposition of the Woodmere trucks. This portion of GMAC's claim against Transports is the deficiency owed by Woodmere on the retail installment sales contracts following disposition of the trucks. (Stipulation of Facts, ¶19, Ex. I)

The Trustee filed an objection to the Transports claim filed by GMAC on August 18, 1986. The Trustee renewed his objection on February 12, 1991, asserting that GMAC is not entitled to the claim for the deficiency under the terms of the controlling lease contract and the law governing the surrender of the property. (Stipulation of Facts, ¶ 20, Ex. J)

GMAC subsequently filed an amended proof of claim in the Transports case for \$3,424,864.92 on May 30, 1991. This amount reflects corrected mathematical errors made in the original claim. It is comprised of the deficiency claim under the Woodmere lease of \$1,728,749.83 to which the Trustee objects and a deficiency claim arising out of another contract with Transports, to which the Trustee does not object. (Stipulation of Facts, ¶'s 22, 25)

On April 25, 1991, GMAC filed an application for allowance of a portion of its claim against Transports as an administrative expense claim. According to GMAC, \$220,237.45 of its claim relating to the Woodmere lease is comprised of per diem rent which accrued during the pendency of Transports' Chapter 11 case. Therefore, GMAC contends that this amount is allowable as an administrative expense claim. The Trustee objects to the allowance of this claim as one for administrative expenses on the basis that it was filed untimely. (Stipulation of Facts, ¶'s 26 & 27, Ex. L)

At the hearing on these issues, counsel for GMAC stated that the Woodmere lease "deficiency" claim filed against Transports is actually comprised of damages arising out of rejection of the lease. According to counsel, the damage claim amount exceeded that of the deficiency claim, thus, GMAC chose to limit the claim to the deficiency amount. The Trustee contends that as a deficiency claim, GMAC's claim is one for future and additional rents to which it is not entitled, given its repossession of the trucks, under the terms of the lease agreement and applicable law.

With respect to the administrative expense claim, GMAC contends that nothing in the case record reflects that Chapter 7 schedules were filed when the case was converted nor was notice given of a bar date for filing of Chapter 11 administrative expense claims. Moreover, an order was entered on March 22, 1984,

granting GMAC a general extension of time within which to file its proof of claim. Finally, GMAC asserts that this controversy is governed by the 1974 Rules of Bankruptcy Procedure.

The Trustee contends that the Federal Rules of Bankruptcy Procedure promulgated after 1983 control disposition of this controversy and that pursuant to such, this claim for administrative expenses is filed untimely. Moreover, the Trustee has supplied the Court with copies of the notice issued by the United States Bankruptcy Court Clerk which established the necessity for filing proofs of claims in Transports' converted Chapter 7 case. This notice was published in the Memphis Press Scimitar on June 15, 1983 and the Commercial Appeal on June 15, and June 17, 1983 ("Response of . . . Trustee, To The Trial Brief of [GMAC]," Exs. 4, 5, 6). In pertinent part, the notice provides:

In order to have his claim allowed, a creditor must file a claim, whether or not he is included in the list of creditors filed by the debtors.

The June 15, 1983 notices further provide:

Claims of creditors will not be allowed, except as otherwise provided by law. A claim may be filed in the office of the Clerk of the Bankruptcy Court . . .

The June 17, 1983 notice stated:

Claims which are not filed within six months after the above date set for the meeting of creditors [June 29, 1983] will not be allowed except as otherwise provided by law. A claim may be filed in the office of the Clerk of the Bankruptcy Court . . .

Finally, the Trustee questions the validity of the March 22, 1984 order granting GMAC a general extension of time for filing its proof of claim.

DEFICIENCY CLAIM

The crux of this controversy is whether this claim qualifies as one of the remedies available under the parties' contract. The pertinent provisions of the lease agreement provide:

(3)(A) the term of this lease shall be for a period of sixty (60) months from [August 25, 1982] . . .

(B) The rental to be paid by Lessee to Lessor for the use of the leased equipment shall be:

One Hundred Four Thousand Six Hundred Seventy and 14/100 (\$104,670.14) per month . . .

13. Default

In the event that Lessee defaults or fails to perform any of the terms of this lease, . . . and fail to fully remedy such default within ten (10) days after receipt of written notice from Lessor so to do, Lessor may:

A. Proceed by appropriate court action or actions, either at law or in equity, to enforce performance by Lessee of the applicable covenants and terms of the Lease or to recover damages for the breach thereof; or

B. By notice in writing to the Lessee terminate this Lease, as to all or any of the items of equipment leased . . . and thereupon Lessor may, . . . enter upon the premises of Lessee . . . and take possession thereof and thenceforth hold, possess and enjoy the same free from any right of Lessee, or its successors or assigns, including any receiver, trustee in bankruptcy, or creditor of Lessee, . . . but Lessor shall nevertheless have a right to recover from Lessee any and all amounts which, under the terms of this Lease, may be then due and be unpaid hereunder for use of said equipment (including rentals accruing on said equipment after the date of default) together with any damages in addition thereto which Lessor shall have sustained by reason of the breach of any covenant or covenants of this Lease, together with a reasonable sum for attorney's fees and such expenses as shall be expended or incurred in the seizure, rental or sale of said equipment or in the enforcement of any right or privilege hereunder or in any consultation or action in such connection.

The remedies in the Lease provided in favor of Lessor shall not be deemed exclusive, but shall be cumulative, and shall be in addition to all other remedies in its favor existing at law or in equity. Lessee hereby waives any mandatory requirements of law, now or hereafter in effect, which might limit or modify any of the remedies herein provided, to the extent that such waiver is permitted by law.

(Emphasis added)

Paragraph 16 of the lease agreement provides that it is to be construed in accordance with the laws of Tennessee.

As noted above, it is the Trustee's position that the claim filed by GMAC represents rental payments which would have been due under the lease for the time period following GMAC's repossession of the trucks until the date of the lease's expiration. According to the Trustee, such a claim is not allowable pursuant to the above quoted language and applicable law which limit GMAC's remedy to repossession.

Conversely, GMAC contends that its claim is for "damages equivalent to what would have been received had there been no breach." (Trial Brief of General Motors Acceptance Corporation, ¶11) "GMAC has included in its Transports claim only such portion of the lease deficiency necessary to cover GMAC's loss on the contracts which the lease secured." (*Id.*) Moreover, according to counsel, GMAC's damages exceeded the deficiency. Therefore, GMAC asserts that inasmuch as the lease agreement allows for the recovery of damages, its claim is clearly allowable.

Under Tennessee law, it is well settled that when there is no ambiguity in a contract, it is the duty of the Court to give effect to the written language and apply the words used in their ordinary meaning. See, e.g., Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc., 521 S.W. 2d 578, 580 (Tenn. 1975); Taylor v. White Stores, Inc., 707 S.W. 2d 514, 516 (Tenn. App. 1985); Heyer-Jordan & Associates, Inc. v. Jordan, 801 S.W. 2d 814, 821 (Tenn. App. 1990).

No questions of ambiguity have been raised here nor does the agreement appear ambiguous on its face. Thus, the Court will attempt to give effect to the language by application of its ordinary meaning. It is evident from the language quoted above that the lease does not contain an accelerated rent clause. Rather, the language reflects that the lessor is given a choice of three remedies upon default. These are: to file an action for specific performance or for damages or to terminate the lease and recover possession of the trucks and damages resulting from the breach of any covenant. (Emphasis added) Therefore, it is clear that even with repossession, the lessor is entitled to a claim for damages arising out of the breach.

However, the Trustee takes issue with the claim asserting that it is comprised of future rents rather than damages. GMAC admits that the claim is a deficiency claim but asserts that the amount of damages arising from breach of the contract exceeds the deficiency balance, thus, it chose to file the lesser claim.

There is authority for the Trustee's position that in the absence of an accelerated rent clause, repossession of leased property by a lessor operates as the lessor's sole remedy. See, Lamson Consol. Store Service Co. v. Bowland, 114 F. 639, 642-43 (6th Cir. 1902); In re Morrison-Barnhart Motors, Inc., 142 F. Supp. 845, 847 (N.D. Ohio 1956). Moreover, rent in Tennessee is "consideration for the use or occupancy of property." Galbreath v. Harris, 779 S.W. 2d 392, (Tenn. App. 1989). Inasmuch as the contract here lacks an accelerated rent clause and the trucks were not used by the debtor following their repossession, it may be concluded that no rent or consideration for such use became due during the post repossession period.

However, the contract at issue clearly renders GMAC entitled to damages in addition to repossession. Consequently, in order to give effect to the agreement, the Court is compelled to conclude that to the extent GMAC's claim is for damages, it is allowable.¹ Moreover, if the claim is one for the balance of unpaid rents due on the lease filed in lieu of a larger damage claim it is likewise allowable. To hold otherwise would result in placing form over substance.

Unfortunately, the Court has been presented with no evidence which establishes the composition of GMAC's claim. Therefore, in order for the Court to finally dispose of this matter, counsel for GMAC is directed to provide the Court with evidence of the composition of GMAC's deficiency claim within fifteen days after the entry of this order.

ADMINISTRATIVE EXPENSE CLAIM

¹ The Woodmere lease deficiency claim is allowed by consent in the Gordon's Industries case and its allowance in the Gordon's Transport's case is based upon the Court's assumption that the claim will be paid only one time.

The issue presented here concerns whether GMAC's claim for an administrative expense should be disallowed as filed untimely.

As discussed above, the claim of \$220,237.45 is comprised of per diem rents for the Woodmere trucks which accrued while Transports was in a Chapter 11 case. The case was converted to a Chapter 7 on April 14, 1983. On June 17, 1983, notice by publication of a December 29, 1983 deadline for filing proofs of claims in the Transports' Chapter 7 case was given. On March 22, 1984, the Honorable William B. Leffler, then presiding over this case, signed an order granting GMAC a general extension of time within which to file its proof of claim. GMAC filed its proof of claim in the Transports case on February 5, 1986, as amended on May 30, 1991, for \$3,424,864.92 of which \$1,728,749.83 arose from disposition of the Woodmere trucks. On April 25, 1991, GMAC filed an application for allowance of \$220,237.45 of its claim as an administrative expense claim.

Administrative expense claims are described as the actual, necessary costs of preserving the bankruptcy estate. 11 U.S.C. §503(b)(1). The Bankruptcy Code provides priority for administrative expense claims to "facilitate the rehabilitation of insolvent businesses by encouraging third parties to provide those businesses with necessary goods and services." In re Johnson, 901 F. 2d 513, 517 (6th Cir. 1990) quoting In re United Trucking Service, Inc., 851 F. 2d 159, 161 (6th Cir. 1988). According to GMAC, the use of the Woodmere trucks during Transports Chapter 11 case fostered Transports' rehabilitation efforts and aided in preservation of the estate, thus, its claim for the use of the trucks is entitled to administrative expense status.

The Trustee has raised no objection to the claim on the basis that it does not meet the statutory criteria for an administrative expense claim; rather, his objection is to the timeliness of the asserted administrative expense claim.

As stated by the Court in In re Transouth Truck Equipment, Inc., 87 B.R. 937, 938 (Bankr. E.D. Tenn. 1988),

[a]dministrative expense status is important because administrative expense claims are first priority unsecured claims; they are paid ahead of all other unsecured claims. 11 U.S.C. §507(a)(1).

Consequently, where a creditor seeks to file an administrative expense claim or amend a general unsecured claim to administrative expense status after the deadline for filing proofs of claims has expired in a given case, the claim or amendment is generally not allowed. In re Walls & All, Inc., 127 B.R. 115, 118 (W.D. Pa. 1991); In re Transouth Truck Equipment, Inc., 87 B.R. 937 (Bankr. E.D. Tenn. 1988). However, the facts presented here are unique and warrant further consideration of applicable law before reaching a conclusion to allow or disallow this claim as an administrative expense.

The Court is presented with the assertion of an administrative expense claim which arose in the debtor's Chapter 11 case prior to its conversion to a Chapter 7. It is settled in this Circuit that, under these circumstances and the applicable statutes and rules, such a claim must be filed as a prepetition claim within the time specified by the Court for filing such. In re Johnson, 901 F. 2d at 520. Thus, the issue becomes what time period was specified by the Court in this instance.

GMAC contends that no Chapter 7 Schedules and Statement of Financial Affairs (listing preconversion claims) were filed following the conversion and that no notice was issued regarding a deadline for filing such claims. The case file reflects that no Chapter 7 schedules were filed; however, the Trustee has provided the Court with evidence that notice of a bar date for claims was indeed issued, albeit by publication. However, at the same time in support of its position, GMAC has presented an order entered after expiration of the original deadline which generally extends the time for its filing of claims and which confers upon the Trustee the right to object to the order and/or request a hearing to establish a deadline by which time GMAC must file a claim. The order states that it is being entered pursuant to GMAC's requests for extensions. The case file reflects that three orders granting 30 day extensions were entered previously on December 27, 1983, January 24, 1984, and February 22, 1984. The Trustee questions the validity of this order which essentially exempts GMAC from compliance with the deadline established for filing proofs of claims by creditors in this case.

Thus, the question becomes what, if any, authority existed for the issuance of such an order. As noted above, GMAC contends that the 1978 Bankruptcy Code and the 1974 Bankruptcy Rules are applicable to disposition of the issues raised here. The Trustee asserts that the controversy is governed by the current Code. As will be shown, there is no substantive difference in the pertinent provisions of either version of the Code, although interpretation and application of the provisions are different.

Under either version of the Code, §503 provides in pertinent part:

- (a) An entity may file a request for payment of an administrative expense.
- (b) After notice and a hearing, there shall be allowed administrative expenses, . . . including -
 - (1)(a) the actual, necessary costs and expenses of preserving the estate, . . . rendered after commencement of the case.

At the time GMAC's extension order was entered at least one Court had ruled that this language rendered administrative expense claims payable without the filing of proofs of claim. See, In re Parker, 15 B.R. 980, 982 (Bankr. E.D. Tenn. 1981), aff'd, 21 B.R. 692 (E.D. Tenn. 1982). See also In re Chicago Pacific Corp., 773 F. 2d 909, 917 (7th Cir. 1985). According to the Parker Court, a request for payment rather than a proof of claim was required for assertion and payment of an administrative expense claim. Conversely, the Sixth Circuit Court of Appeals has since ruled that the assertion of a preconversion administrative expense claim, should be made with the timely filing of a proof of claim and that the proof of claim may be viewed as a "request for payment." In re Johnson, 901 F. 2d 520. However, it may be concluded that the language of §503(a) and (b) as interpreted by Parker provided some authority at the time of issuance of the extension order for its issuance. In addition, Judge Leffler possessed equity power, which under all of the circumstances before him may have provided a basis for his order at the time. See, e.g., In re Unroe, 21 B.C.D. 1462 (7th Cir. 1991). Moreover, although the order provides for objection by the Trustee, the Trustee has previously raised no objection. Thus, the Court is satisfied that Judge Leffler's order became final as the law in this case and in fact excepted GMAC from the deadline for filing claims established by the June 17,

1983 notice. Consequently, GMAC, under these circumstances, should and will be permitted to file its proof of claim for administrative expenses.

From the above findings and conclusions, **IT IS HEREBY ORDERED THAT:**

1. To the extent GMAC's deficiency claim is for damages arising out of Transport's breach of the lease agreement, it is allowed and the Trustee's objection is overruled. Counsel for GMAC is to provide the Court with documentation of the components of its deficiency claim within fifteen days after the entry of this Order.

2. The Trustee's objection to the allowance of GMAC's administrative expense claim is overruled. The allowance and payment of the administrative expense claim will reduce the amount of the Woodmere lease deficiency claims in both the Gordon's Industries and the Gordon's Transport's cases.

SO ORDERED this 27th day of August, 1991.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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