



SO ORDERED,

A handwritten signature in blue ink that reads "Katharine M. Samson".

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: August 31, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE: AMBER MARIE THOMAS

CASE NO. 15-00890-KMS

DEBTORS

CHAPTER 13

**ORDER GRANTING IN PART AND DENYING IN PART
APPLICATION FOR ADMINISTRATIVE EXPENSES**

Before the Court is the Application for Administrative Expenses (Dkt. No. 72) filed by Creditor Ford Motor Credit Company and the Response (Dkt. No. 78) filed by the Chapter 13 Trustee, J.C. Bell. The Court held a hearing on the application on April 28, 2016, and took the matter under advisement. Dkt. No. 94. Having considered the arguments and evidence, the Court finds that only the unpaid post-petition lease payments are administrative expenses.

I. Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), & (O).¹

¹ Pursuant to Federal Rule of Civil Procedure 52, made applicable here by Federal Rules of Bankruptcy Procedure 9014(c) and 7052, the following constitutes the findings of fact and conclusions of law of the Court.

II. Findings of Fact

On February 16, 2013, Amber Marie Thomas leased a new 2013 Ford Explorer with Ford Motor Credit Company (“Ford Credit”) as the finance company. Dkt. No. 72 at 5-12. The lease was for a term of thirty-nine months with monthly payments of \$569.81 due on the 18th of each month. Dkt. No. 72 at 6. At the end of the lease, Thomas could purchase the vehicle for an additional \$21,243.75. Dkt. No. 72 at 6.

On March 13, 2015, Thomas filed a petition for Chapter 13 relief. Dkt. No. 1. Thomas listed the lease in her schedules. Dkt. No. 4 at 14. On March 19, 2015, Ford Credit filed a claim for \$8,233.29 related to the lease. Claim 2-1. On March 30, 2015, Ford Credit moved for relief from the automatic stay and to compel Thomas to either accept or reject the lease. Dkt. No. 21. On June 8, 2015, the Court entered an agreed order resolving the motion: Thomas assumed the lease, but if she were to become more than thirty days delinquent in her lease payments, then the automatic stay would terminate as to the vehicle. Dkt. No. 55. On July 9, 2015, the Court approved Thomas’s Chapter 13 plan. Dkt. No. 62. The plan provided that Thomas would make the lease payments directly to Ford Credit. Dkt. No. 62 at 5. On August 20, 2015, Ford Credit filed a Notice of Termination of the Automatic Stay because Thomas had become more than thirty days behind on her payments. Dkt. No. 70. On October 28, 2015, Ford Credit amended its claim to \$8,577.69 to include costs incurred repossessing, reconditioning, and auctioning the vehicle. Claim 2-2.

On November 23, 2015, Ford Credit filed its Application for Administrative Expenses. Dkt. No. 72. The Chapter 13 Trustee J.C. Bell responded. Dkt. No. 78. On February 22, 2016, Ford Credit submitted the affidavit of Tiffany Didur, a business analyst with Ford Credit, who swore to the additional expenses incurred by Ford Credit. Dkt. No. 88. Didur avers that the

\$8,577.69 claim includes: “Expenses of repossession in the amount of \$450.00; reconditioning expenses in the amount of \$72.50[;] auction fees in the amount of \$115.00; maintenance fee in the amount of \$167.99; service charges in the amount of \$2,124.55; and a lease term balance in the amount of \$5,647.65.” Dkt. No. 88 at 2. Ford Credit is also seeking \$1,280.00 in attorney’s fees (Dkt. No. 72 at 1) but has not included this amount in its proof of claim. On April 28, 2016, the Court held a hearing on the motion and took the matter under advisement. Dkt. No. 94.

III. Conclusions of Law

Whether the breach of an assumed vehicle lease by a Chapter 13 debtor creates an administrative expense claim has already been carefully considered by other courts. *See, e.g., Ford Motor Credit Co. v. Estate of Parmenter (In re Parmenter)*, 527 F.3d 606 (6th Cir. 2008) (denying administrative expense based on res judicata); *In re Michalek*, 393 B.R. 642 (Bankr. E.D. Wis. 2008) (allowing administrative expense because lease benefited the estate); *In re Rosenhouse*, 453 B.R. 50 (Bankr. E.D.N.Y. 2011) (same); *In re Ruiz*, No. 09-38795, 2012 WL 5305741 (Bankr. S.D. Fla. Feb. 15, 2012) (denying administrative expense and citing *Parmenter*). These cases have followed different logic to reach different results. The Court cannot find any authority, and the parties have identified none, to bind the Court to a particular decision. So now the Court wades into this unsettled area of law.

A Chapter 13 debtor may assume or reject an unexpired lease agreement. 11 U.S.C. § 365. Thomas assumed the lease by a separate agreed order prior to confirmation of the plan. Her lease payments were not included in the payments made to the Chapter 13 trustee.²

Once a default occurs in an assumed lease, 11 U.S.C. § 365(g)(2)(A) controls the timing of the breach, i.e., whether the breach is deemed to arise pre- or post-

² “[O]nce a debtor assumes an obligation, the payment may be made in one of three ways under 11 U.S.C. § 1322:(1) entirely from the property of the estate; (2) partially from the property of the estate and property of the debtor; or (3) entirely from the property of the debtor.” *In re Michalek*, 393 B.R. at 643-44 (citing *Ford Motor Credit v. Benn*, 362 B.R. 1, 3 (E.D. Mich. 2007)).

petition. That section provides that if the “rejection,” obviously used here to mean the default and end of the assumed contract, occurs in an unconverted case, the time of the rejection is the actual time of the breach. This is the time the breach matures into a claim. I say “obviously” because there is not an actual rejection, as that term is used in other parts of section 365, at the moment of default. The contract was assumed pursuant to the plan and order of confirmation, and “rejection,” with the attendant notice and motion, is impossible at this point. Thus, the breach arises post-petition, and 11 U.S.C. § 502(g), relating to rejection damages for unassumed leases, does not apply.

In re Michalek, 393 B.R. at 644. The lease was rejected when Thomas ceased making the required payments and became more than thirty days delinquent.

Ford Credit asks this court to convert its claim to one for administrative expenses *in toto*, including the remainder of the payments due under the lease, the costs of repossession, and the costs of reconditioning the vehicle before its liquidation by Ford Credit. “The moving party bears the burden of showing, by a preponderance of the evidence, its claim is entitled to administrative expense priority.” *Id.* at 644-45. Section 503 of the Bankruptcy Code governs administrative expense claims. *ASARCO Inc. v. Elliot Mgmt. (In re ASARCO, L.L.C.)*, 650 F.3d 593, 601 (5th Cir. 2011).

Claims under this section “generally stem from voluntary transactions with third parties who lend goods or services necessary to the successful reorganization of the debtor's estate.” *In re Jack/Wade Drilling, Inc.*, 258 F.3d 385, 387 (5th Cir. 2001). Subsection 503(b) allows parties to recover administrative expenses “including the actual, necessary costs and expenses of preserving the estate.” 11 U.S.C. § 503(b)(1). But as used in this section, “the words ‘actual’ and ‘necessary’ have been construed narrowly: ‘the debt must benefit the estate and its creditors.’” *In re TransAmerican Natural Gas Corp.*, 978 F.2d 1409, 1416 (5th Cir. 1992) (quoting *NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957, 966 (5th Cir. 1991)); *see also Jack/Wade Drilling*, 258 F.3d at 387 (“To qualify as an actual and necessary cost under section 503(b)(1)(A), a claim against the estate must have arisen post-petition and as a result of actions taken by the debtor-in-possession that benefitted the estate.” (internal quotation marks omitted)).

Id. This case law comes from the Chapter 11 context, and the Sixth Circuit expressly rejected application of such cases to the Chapter 13 context finding that “a Chapter 13 debtor who

assumes and pays for a lease outside of the plan does not” “act[] on behalf of the estate when . . . assum[ing] a lease and thus” cannot “create[] a legal obligation on the estate.” *In re Parmenter*, 527 F.3d at 610. But this distinction has been rejected by subsequent courts. *See In re Michalek*, 393 B.R. at 646 (“I see no reason to apply different principles of liability for assumed lease defaults in ongoing chapter 11 and 13 cases; both are subject to chapters 3 and 5 of the bankruptcy code, and both are forms of an ongoing case and reorganization.”). This Court also declines to draw a distinction between assumed leases in Chapter 11 and Chapter 13 cases. Further, the Court finds “that principles of res judicata do not apply because breach or rejection damages are not addressed at the time of confirmation.” *Id.* at 646 (agreeing with *Parmenter* dissent). The Court next looks at the individual costs to see whether they provided a benefit to the estate.

First, the Court considers the lease payments. “[T]he use of an automobile is ubiquitous in this society and it is reasonable and necessary for the debtors to perform in this case.” *Id.* A vehicle allows a debtor to go to work, to the grocery store, to medical appointments, “and other activities that are part of everyday life. This is the sort of contract that benefits the reorganization of a chapter 13 debtor.” *Id.* Only those lease payments that came due post-petition are eligible, however. *See In re Jack/Wade Drilling*, 258 F.3d at 387. Further, the Court finds no benefit that accrued to the estate from any payments due under the contract after Ford Credit repossessed the vehicle. Therefore, Ford Credit is only entitled to those payments that were due and unpaid between the time of filing and the time of rejection. Because Thomas assumed the lease³ on June 8, 2015, and Ford Credit filed its notice of termination of the stay on August 20, 2015, the most

³ A debtor cannot assume a lease without first becoming current (or providing for the prompt cure of any arrearage) on the obligations under the lease. § 365(b)(1)(A). The agreed order does not reference any arrearage, and neither the original nor amended claim list any arrearage. So the Court finds based on the facts before it that Thomas cured the arrearage, if any, at the time the lease was assumed.

that Thomas could have failed to pay would be two months of payments or \$1,139.62. The remainder of the \$5,647.65 loan balance is not an administrative expense because Thomas's estate received no benefit from it since she was no longer able to use the vehicle. This decision accords with the Court's own precedent. *See In re Campbell*, No. 14-50914-KMS, at 1-2 (Bankr. S.D. Miss. Apr. 15, 2015) (ordering administrative expense claim only for unpaid post-petition lease payments until time of rejection).

Next the Court considers the remaining expenses in the proof of claim: repossession, reconditioning, auction, maintenance, and service charges. The Court finds that these expenses have not conferred any benefit on the estate and only worked to the benefit of Ford Credit in collecting on its claim. These expenses are part of Ford Credit's claim to the extent it is entitled to them under the lease agreement, but that does not "automatically obligate[] the estate, or the plan, for [those] damages." *In re Michalek*, 393 B.R. at 644 (rejecting holding in *In re Wells*, 378 B.R. 557, 560 (Bankr. S.D. Ohio 2007), that all damages from breach of an assumed lease were automatically administrative expenses); *but see In re Rosenhouse*, 453 B.R. at 58 (awarding administrative expense claim for unpaid lease payments, excess mileage, tax, and attorney's fees because debtor did not oppose motion). The remainder of Ford Credit's claim is a general unsecured claim. *See Century Indem. Co. v. Nat'l Gypsum Co. Settlement Trust (In re Nat'l Gypsum Co.)*, 208 F.3d 498, 505 (5th Cir. 2000) ("The 'claim' created by the rejection of the contract or lease is then afforded treatment similar to all other unsecured claims. . . .").

Lastly, the Court considers the attorney's fee request. Ford Credit asks this Court to award \$1,280.00 in attorney's fees related to this claim. The lease agreement provides that upon default, Thomas shall "pay all expenses, including reasonable attorneys fees" paid by Ford Credit to repossess the vehicle and collect on the debt. Claim 2-2 at 5. "[C]reditors are entitled to

recover attorney's fees in bankruptcy claims if they have a contractual right to them valid under state law.” *Jordan v. Se. Nat’l Bank (In re Jordan)*, 927 F.2d 221, 226-27 (5th Cir. 1991), *overruled on other grounds by Coston v. Bank of Malvern (In re Coston)*, 991 F.2d 257, 260-61 (5th Cir. 1993). However, the Court’s local rules provide that “a motion for attorney’s fees must include an itemization and description of the legal work performed and all costs sought to be charged as part of the attorney’s fee” and “be accompanied by an affidavit from the attorney responsible for the billings in the case authenticating the information contained in the motion and confirming that the bill has been reviewed and edited and that the fees and costs charged are reasonable and necessary.” Miss. Bankr. L.R. 7054-1(b)(2)(A)-(B). Ford Credit has provided no such itemization or affidavit. Further, any award of attorney’s fees would be treated the same as the other damages flowing from the breach of the lease, i.e., included as part of Ford Credit’s general unsecured claim.

IT IS HEREBY ORDERED THAT the Application for Administrative Expenses (Dkt. No. 72) is GRANTED IN PART and DENIED IN PART. Ford Motor Credit Company is entitled to an administrative expense claim in the amount of \$1,139.62 based on the unpaid post-petition lease payments due before rejection. The remainder of Ford Motor Credit Company’s \$8,577.69 claim is a general unsecured claim.

FUTHER ORDERED THAT the Court DENIES WITHOUT PREJUDICE the request for attorney’s fees because Ford Motor Credit Company’s request fails to comply with the Court’s local rules.

##END OF ORDER##