

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF VERMONT**

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**In re:**

**DIANA FRECKLETON and  
WILLIAM FRECKLETON,**

**Chapter 13 Case  
# 00-11053 cab**

**Debtors.**

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*Appearances of Counsel:*     *Rebecca Rice, Esq.  
Cohen & Rice  
Rutland, Vermont  
Attorney for BHA*

*Geoffrey Walsh, Esq.  
Vermont Legal Aid  
Springfield, Vermont  
Attorney for the Debtors*

**MEMORANDUM OF DECISION  
FIXING COSTS OF ASSUMPTION AND ADDRESSING OBJECTION TO LANDLORD'S  
ATTORNEYS' FEES**

The matter before the Court is whether the landlord, Brattleboro Housing Authority (“BHA”), is entitled to the recover its attorneys fees and costs as actual pecuniary loss incident to the Debtors’ Motion to Assume Residential Lease filed on October 10, 2000 (herein “Debtors’ Motion to Assume Lease”)[Dkt. #9-1], and the accompanying Memorandum of Law [Dkt. # 10-1]. BHA filed an Objection to Debtors’ Motion on November 9, 2000 (herein “BHA’s Objection”)[Dkt. #19-1]. BHA also filed an Objection to Chapter 13 Confirmation on November 9, 2000 [Dkt. #20-1] contending that the proposed plan failed to (1) provide adequate assurances of future performance; (2) cure the rental arrearage and costs; and (3) pay the lessor’s actual pecuniary loss as a condition for assuming the subject Lease. The debtors filed their Reply to [BHA’s] Objection to Confirmation on November 14, 2000 [Dkt. #22-1].

On November 16, 2000, a hearing was held regarding the Debtors' Motion to Assume Lease and the confirmation of Debtors' proposed chapter 13 Plan. The proposed chapter 13 plan was confirmed subject to being extended as a result of the outcome of the dispute regarding any actual pecuniary loss recoverable by BHA pursuant to Debtor's Motion [Dkt. #24-1; 31-1]. Furthermore, the Debtors' Motion to Assume Lease was granted with the Court reserving decision on the amount of any actual pecuniary losses to be paid by the Debtors in favor of BHA as a condition of the lease assumption pursuant to 11 U.S.C. §365(b)(1)(B) [Dkt. #24-1]. At the hearing, BHA submitted invoices pertaining to legal fees purportedly incurred as a result of the debtors' default and pursuant to the attorneys fee provision under the subject lease [Dkt. #25-1]. On November 27, 2000, the debtors filed their Objection to [BHA]'s Claim for Attorney's Fees (herein "Debtors' Objection") [Dkt. #29-1]. On April 18, 2001, BHA filed its Supplement to Objection to Motion to Assume Lease ("BHA's Supplement") [Dkt. #39-1].

For the reasons set forth below, the Debtors' Objection is sustained, and BHA's request for "any actual pecuniary loss" incurred pursuant to 11 U.S.C. §365(b)(1) and the provisions of the subject lease is determined in the amounts set forth below.

### **ISSUES**

The issue presented is the amount of actual pecuniary loss that the BHA is entitled to recover as a condition of the debtors' assumption of the lease, pursuant to 11 U.S.C. §365(b)(1)(B).

### **BACKGROUND**

The debtors, Diana and William Freckleton, commenced this case by filing a petition under chapter 13 of Title 11 U.S.C. ("the Bankruptcy Code") on September 22, 2000. The record indicates that prior

to the commencement of this case, the debtors had been in default under the payment terms of their lease with BHA. BHA commenced an action to evict the debtors and the parties entered into a repayment agreement on or about February 22, 2000 (see BHA's Objection, *Proof of Claim*). This repayment agreement includes a rental arrears in the amount of \$1,179.00 and collection costs of \$460.00. BHA asserts that the debtors defaulted on this initial repayment agreement and that a second repayment agreement was then executed between the parties on June 5, 2000. Upon a reported default in this second repayment agreement, BHA commenced eviction proceedings.

In its Objection to Motion to Assume Lease, BHA claims entitlement not only to pre-petition collection costs, including attorneys fees (\$1,261.00) and costs (\$390.00) totaling \$1,651.00, but seeks post-petition collection costs as well. BHA's Supplement lists pre-petition attorneys fees (\$1,219.00) and costs (\$390.00) as totaling \$1,679.00. Nonetheless, the debtors object to BHA's attorney's fee claim in its entirety as unwarranted under the lease and unsupported by the applicable facts and case law. The debtors assert that the only potential basis for the recovery of pre-petition attorney's fees would be the eviction action filed by BHA in Windham County Vermont Superior Court and pending at the time the debtors filed for bankruptcy relief, but that the state court never entered an order determining a prevailing party or entitlement to fees therein. Moreover, the debtors contend that there is no legal basis for BHA to recover any of its legal fees incurred post-petition in these bankruptcy proceedings. Assuming *arguendo* a possible entitlement to attorney's fees, the debtors have reviewed the invoices submitted at the November 16<sup>th</sup> hearing by BHA and assert that only \$126.50 could be found to be reasonable attorneys fees recoverable by BHA under the terms of the lease, in addition to \$195.00 for court costs. The record regarding entitlement and amount of "any actual pecuniary losses" incurred by BHA was recently

supplemented by BHA, and the debtors have not supplemented their objections to the amounts being sought by BHA purportedly incident to their lease assumption.

In total, BHA's Supplement appears to seek pre-petition "rent and utility charges" of \$764.21<sup>1</sup>, pre-petition attorney's fees of \$1,219.00<sup>2</sup> (including \$460.00 incurred pursuant to an earlier foreclosure judgment dated February 18, 2000<sup>3</sup>) and pre-petition costs in the amount of \$390.00 (including \$195.00 incurred pursuant to foreclosure proceedings pending at time petition filed)<sup>4</sup>. BHA's Supplement also requests post-petition attorneys fees in the amount of \$544.00<sup>5</sup>. As shown below, any inconsistency in these amounts being sought is immaterial to a resolution of this matter. Pursuant to Debtors' Objection, the debtors object to all amounts being requested, except for pre-petition rent in the amount of \$764.21 and pre-petition costs of \$195.00, both of which they propose to pay pursuant to their proposed Chapter 13

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<sup>1</sup> BHA's Supplement and Amended Proof of Claim seek \$764.21 for pre-petition rent, although BHA's earlier Objection to Motion to Assume Lease states that the arrears is \$761.21. The debtors propose to cure their arrears in order to assume their lease by payment to BHA of \$764.21 for rent arrears. Debtors do not dispute the nature of this sum or suggest that it includes anything other than pre-petition rent arrearage.

<sup>2</sup> While BHA's Supplement is a bit unclear, it appears that the amounts being requested for the period of 2/22/00 - 9/22/00 total \$1,219.00. The invoices of Fitts, Olson & Giddings reflect pre-petition charges through 9/20/00 for legal services total \$759.00, in addition to the \$460.00 prior attorneys fees judgment. As such, the amount being requested is \$460.00 plus \$759.00, totaling \$1,219.00. There are no pre-petition fees being requested by bankruptcy counsel.

<sup>3</sup> BHA describes this sum as an attorney's fee award pursuant to the judgment dated February 22, 2000 in BHA's Supplement. However, the pertinent Order is dated February 18, 2000 and the Agreement between the parties dated February 22, 2000 as attached to the Amended Proof of Claim describes the sum of \$460.00 as representing "reasonable attorneys fees, court costs, sheriff's fees and other costs incurred in connection with [debtors'] eviction."

<sup>4</sup> As indicated in footnote 3, it is unclear whether the earlier costs claim of \$195.00 is already included in the \$460.00 "attorneys's fee award" as set forth in the Agreement between the parties dated February 22, 2000.

<sup>5</sup> The amount claimed for post-petition attorneys fees is also problematic. Fitts, Olson & Giddings' invoices indicate post-petition attorneys fees of \$149.50. BHA's Supplement also seeks post-petition legal fees of Cohen & Rice totaling \$394.50, while the law firm's invoices for legal services filed of record total \$230.00. As such, the amount of post-petition attorneys fees appear to actually equal \$379.50.

plan.

### **DISCUSSION**

In the chapter 13 plan and also pursuant to their Motion to Assume Residential Lease, the debtors propose to assume their unexpired public housing lease pursuant to 11 U.S.C. §§ 365 and 1322(b)(7). When a debtor assumes an unexpired lease, it is well-settled that the debtor assumes it *cum onere* and the debtor must accept the obligations of the executory contract along with the benefits. See In re Shangra-La, Inc., 167 F.3d 843, 848-49 (4<sup>th</sup> Cir. 1999); In re Village Rathskellar, 147 B.R. 665 (Bankr. S.D.N.Y. 1992). Attorney's fees incurred by the non-debtor party to a lease to collect sums due from the debtor following a default may be recovered as pecuniary loss under §365(b)(1)(B), if such sums were expended as the result of a default under the lease agreement between the parties and are recoverable under applicable state law. See In re Shangra-La, Inc., 167 F.3d at 849; see also In re Sokolowski, 205 F.3d 532, 535 (2<sup>nd</sup> Cir. 2000). While it sets out the requirements for assuming a lease and the pecuniary costs that must be paid as a condition of assumption, §365 does not create an independent right to an attorneys fee award. See In re Shangra-La, Inc., 167 F.3d at 849.

The subject lease provides for the recovery of certain attorneys fees and costs [see Lease, para. 12(f)], and such fees are allowable generally under Vermont law. See 12 V.S.A. §4854. However, under Vermont law, a tenant is allowed to redeem the premises upon payment of rent arrears and costs, and without payment of any associated award or judgment of attorneys fees. See 12 V.S.A § 4773. The Supreme Court of Vermont has specifically addressed the issue of whether attorney's fees can be inferred from a lease provision allowing the compensation of costs.

We held in [the Anderson case] that when attorney's fees are awarded, they are

assessed as part of “damages or costs.” We did not imply that a statute requiring payment of costs, but not mentioning attorney’s fees, includes the latter within the former.

Ravenwood Estates, Inc. v. Mason, 156 Vt. 642, 590 A.2d 884, 885 (1991).

The BHA lease at issue here is silent regarding any requirement that a tenant pay attorneys fees incurred thereunder in order to cure a default. Curing a default generally involves taking care of the triggering event and returning the parties to the pre-default conditions. *See In re Taddeo*, 685 F.2d 24, 26-27 (2<sup>nd</sup> Cir. 1982). It is incumbent upon this Court to review any request for attorneys fees and costs alleged to have been incurred pursuant to the terms of a lease to ensure that the fees are specifically authorized by the applicable lease provision and to verify that the fees and costs requested are reasonable and necessary. *See In re Mid American Oil, Inc.*, 255 B.R. 839, 842 (Bankr. M.D.Tenn. 2000).

There are several criteria applicable to a landlord’s right to receive compensation for attorneys fees from a debtor seeking to assume a lease. For example, when the litigated issues involve not basic contract enforcement issues, but rather issues peculiar to federal bankruptcy law, attorney’s fees will not be awarded unless there is an adequate showing of bad faith or harassment by the losing party. *See In re Sokolowski*, 205 F.3d at 535; *In re Fobian*, 951 F.2d 1149 (9<sup>th</sup> Cir. 1991); *In re Ryan’s Subs, Inc.*, 165 B.R. 465 (Bankr.W.D.Mo. 1994). The rule that requires a debtor to pay a lessor’s attorneys fees as a condition of assuming a lease if a contract provides for attorneys fees presupposes that the attorneys fees being requested relate to the contract clause that allows them to be paid. *See In re Health Science Products, Inc.*, 191 B.R. 895, 910 (Bankr. N.D.Ala. 1995)(collected cases). The contract or lease determines the latitude and scope of the right to recover attorneys fees and expenses incurred upon a debtor’s assumption of an executory contract or unexpired lease. *In re Ryan’s Subs, Inc.*, 165 B.R. 469; *In re Westview 74<sup>th</sup> Street Drug Corp.*, 59 B.R. 747, 757 (Bankr.S.D.N.Y. 1986). If a

creditor chooses to challenge rights granted to a debtor by the Bankruptcy Code to assume or reject an executory contract or unexpired lease, and seeks to have the automatic stay lifted, then the creditor generally must bear the risk of attorneys fees incurred in such action. *See In re Child World, Inc.*, 161 B.R. 349, 354 (Bankr.S.D.N.Y. 1993); *In re Ryan's Subs, Inc.*, 165 B.R. 468-69; *see also In re Entertainment, Inc.*, 223 B.R. 141 (Bankr.N.D.Ill. 1998).

Furthermore, in addition to determining whether attorney's fees and costs being requested by a lessor are in accordance with the terms of the subject lease, this Court has the authority and obligation to award only reasonable compensation and to compensate only for the actual and necessary services. *See In re Health Science Products, Inc.*, 191 B.R. at 910. In evaluating BHA's claim for attorney's fees, this Court is not only required to scrutinize the language of the lease that authorizes the recovery of such fees, but must also examine the invoices underlying the attorney's fee claim to make an independent determination as to whether the fees and costs requested were reasonable as well as necessary to enforce the rights granted to BHA by the subject Lease.

The parties have filed various invoices, amended proofs of claim, legal memoranda and supplemental legal memoranda regarding BHA's claim for attorneys fee sought as actual pecuniary loss associated with the lease assumption by the debtor, and the debtor's related opposition. In order to assume the lease in accordance with the above legal authorities, the debtors are required to (i) cure the default or provide adequate assurance that the default will be cured timely, (ii) compensate or provide adequate assurance that the debtor will timely compensate BHA for any pecuniary loss to BHA resulting from the default, and (iii) provide adequate assurance of future performance under the lease. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1309-10 (5<sup>th</sup> Cir. 1985); *Pieco, Inc. v. Atlantic Computer Systems, Inc.*, 173 B.R. 844 (S.D.N.Y. 1994).

In this instance, this Court has granted the Debtors' Motion to Assume Lease [Dkt. #24-1] subject to

the debtors complying with §365. In order to assume the lease, the debtors must compensate BHA fully for all pre-petition rent arrears in the requested amount of \$764.21 and shall also reimburse BHA \$195.00 for related pre-petition court costs. Under Vermont law and the terms of the lease, the Court declines to require the debtor to compensate BHA for pre-petition attorneys fees. Any requirement that the debtor compensate BHA for such fees as a prerequisite for assuming the lease would not only contravene Vermont law, but is unwarranted under the lease because it does not appear that BHA actually prevailed in the state court action that was pending when the petition was filed. While it is clear that BHA initiated the state court legal action to obtain past due rent and to evict the debtor, no final judgment was entered and the debtors have in fact succeeded in finding a mechanism to cure their default.

This Court also declines to require the payment of post-petition attorneys fees as a condition for assuming this lease. As indicated above, when the litigated issues involve not basic contract enforcement issues, but rather issues peculiar to federal bankruptcy law, there is no requirement that attorney's fees be awarded and there are no special circumstances or bad faith by the debtors to warrant such an award here. The post-petition legal fees were incurred in attending the unsuccessful hearing regarding BHA's objection to Debtors' Motion to Assume Lease, attendance at the §341 meeting of creditors, filing the original proof of claim, and related matters. As such, I find that these activities constitute non-compensable attorneys fees in this case under the lease and applicable law.

The foregoing analysis is also relevant to BHA's claim for payment of a prior attorneys fee judgment in the requested amount of \$460.00. Under the terms of the lease and applicable federal law, the prior judgment does not appear to constitute "rent." *See* 42 U.S.C. §1437a(a)(1)(A); 24 C.F.R. §966.4; *see also* Ravenwood Estates, Inc. v. Mason, 590 A.2d 884, 156 Vt. 642 (1991). Furthermore, the Agreement between



the parties dated February 22, 2000 resolved any dispute concerning the payment of the prior judgment. Consequently, the Agreement dated February 22, 2000 resolved payment of the Judgment dated February 18, 2000, and any related bankruptcy claim arises from a breach of that Agreement. However, these remaining claims for pre-petition attorneys fees and costs shall be allowed as general unsecured claims under an amended chapter 13 plan.

The debtors are directed to submit a motion to modify their confirmed chapter 13 plan within 15 days of the date of this decision in order to include the claims of BHA incident to their lease assumption as set forth above.

May 8, 2001.  
Rutland, Vermont

/s/ Colleen A. Brown  
Colleen A. Brown  
United States Bankruptcy Judge