

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF VERMONT**

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**In re:**

**MELISSA ANNE PARKER,  
Debtor.**

**Chapter 13  
Case #00-10906 cab**

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

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

**MEMORANDUM OF DECISION  
GRANTING MOTION TO ASSUME RESIDENTIAL LEASE, FIXING COSTS OF  
ASSUMPTION, ADDRESSING OBJECTION TO LANDLORD’S ATTORNEYS FEES,  
AND DENYING RELIEF FROM STAY**

There are several open issues before the Court in this matter and it is the Court’s intent to address all of them in this decision. The debtor filed a Motion to Assume Residential Lease on October 19, 2000 (herein “Debtor’s Motion”)[Dkt. #30-1] with an accompanying Memorandum of Law [Dkt. # 31-1]; the Brattleboro Housing Authority (“BHA”) filed an Objection to Motion to Assume Lease on November 7, 2000 (herein “BHA’s Objection”)[Dkt. #42-1]; and the debtor filed a Reply to Creditor Brattleboro Housing Authority’s Objections to Confirmation and Motion to Assume Residential Lease on November 15, 2000 (herein “Debtor’s Reply”)[Dkt. #46-1]. The parties have also raised the related issue of whether and to what extent the BHA may recover attorneys fees, costs and additional charges as a condition of lease assumption. To pursue this, BHA filed an Objection to Chapter 13 Confirmation on November 9, 2000 [Dkt. #44-1], and the debtor filed a Reply and an Objection to Brattleboro Housing Authority’s Claim for Attorney’s Fees on November 28, 2000 (herein “Debtor’s Objection”)[Dkt. #49-1]. Lastly, this Court has reviewed the BHA’s Motion for Relief from Automatic Stay and/or Motion to Dismiss Chapter 13 Case

dated January 25, 2001 (herein "Motion for Relief from Stay")[Dkt. #51-1; 51-2], Debtor's Answer and Objection to Motion for Relief from the Automatic Stay dated February 12, 2001 (herein "Debtor's Answer")[Dkt. #57-1], and BHA's Reply to Debtor's Answer and Objection to Motion for Relief from Automatic Stay dated March 1, 2001 (herein "BHA's Reply")[Dkt. #62-1]. The Court has likewise considered the BHA's Amended Proof of Claim, the BHA's Supplement to Objection to Motion to Assume Lease [Dkt. #70-1], and the BHA's Memorandum of Law Addressing Brattleboro Housing Authority v. Cleaves and Brattleboro Housing Authority v. Macelman Decision [Dkt. #76-1], the debtor's Reply Memorandum [Dkt. #79-1], and the underlying state court opinions and orders.

For the reasons set forth below, the Motion to Assume Residential Lease is granted, the nature and extent of "any actual pecuniary loss" incurred by the BHA pursuant to 11 U.S.C. §365(b)(1) is determined, and the BHA's Motion for Relief from Stay is denied.

### **ISSUES**

The issues presented are:

- [1] whether the debtor/tenant is entitled to assume her public housing lease with the BHA and cure her pre-petition rental arrearage pursuant to 11 U.S.C. § 365 and §1322(b),
- [2] the amount of actual pecuniary loss, if any, that the BHA is entitled to recover as a condition of lease assumption pursuant to §365(b)(1)(C), and
- [3] whether the BHA is entitled to lift stay relief to pursue eviction and related relief or to have the debtor's chapter 13 case dismissed.

### **BACKGROUND**

The debtor, Melissa Ann Parker, commenced this case by filing a petition under chapter 7 of Title 11 U.S.C. ("the Bankruptcy Code") on August 10, 2000. On October 2, 2000 (i.e., less than 90 days later),

the debtor converted the case from chapter 7 to chapter 13. The record indicates that prior to the commencement of this case, the debtor had apparently been served with a writ of possession issued by the Windham Superior Court for failure to pay rent in accordance with a prior Order of that court issued in connection with eviction litigation between the debtor and the BHA. The parties dispute the legal significance of the issuance of the state court writ of possession in favor of the BHA pre-petition. It appears beyond dispute, however, that a writ of possession was not executed against the debtor prior to her filing for bankruptcy relief.

On October 16, 2000, the debtor filed her proposed chapter 13 plan, and on October 19, 2000 she filed a motion to assume her lease with BHA. The BHA opposed both the proposed plan and the lease assumption. On November 16, 2000, a hearing was held regarding the confirmation of the chapter 13 plan and the Debtor's Motion to Assume Residential Lease, and this Court reserved its ruling at that time. At the hearing, the BHA submitted a partial account of its claim for the attorneys fees and costs it purports to have incurred in the prosecution of its legal action and it alleges to be due to the landlord under the terms of the subject lease. Thereafter, the debtor filed an objection to the attorney's fees requested by the BHA. The parties have subsequently supplemented the record regarding the cost of the assumption dispute and the debtor filed a First Amended Chapter 13 Plan [Dkt. #67-1] on March 29, 2001. Furthermore, as a result of the debtor's admitted failure to make her post-petition rental payments, the BHA has filed a motion requesting that this Court lift the automatic stay to allow the BHA to pursue an eviction and related remedies in state court.

### **DISCUSSION**

The premise enunciated at the March 29<sup>th</sup> hearing, and underlying the Court's ruling today, is that the First Amended Plan will be confirmed and the direct pay arrangement proposed by the debtor (whereby the state welfare office will pay the plan payments and the post-petition rent payments) will be

implemented immediately. Since no other creditor has objected to the Plan and the chapter 13 trustee had no objection to confirmation, it appears that there is no question that if the objection of the BHA is resolved the First Amended Plan will be subject to confirmation at the hearing scheduled for April 26, 2001. The debtor has acknowledged that if the BHA's objection is overruled she will need to modify the plan to include the attorney's fees and costs which are allowed herein as a condition of the cure *as a priority debt*, and may need to increase the attorney's fees allowed to the BHA *as a general unsecured claim*. However, based upon the representations made by the debtor's counsel at the most recent hearing, the Court is persuaded that the debtor will be able to accomplish this by extending the term of the plan, without further notice or hearing.

#### 1. Lease Assumption

Pursuant to Vermont law, a landlord seeking to evict a residential tenant for failure to pay rent must: (1) give notice by certified mail or have the notice served by a law enforcement officer at least fourteen (14) days prior to the termination date in the notice; (2) wait for the termination date in the notice to pass; (3) obtain a judgment of possession by filing an action of ejectment; (4) obtain a writ of possession; and (5) execute the writ of possession. *See* 9 V.S.A. §4467(a); 12 V.S.A. §4854; In re Stoltz, 197 F.3d 625, 630 (2<sup>nd</sup> Cir. 1999). Furthermore, upon a default for nonpayment Vermont law allows a tenant to redeem his or her interest in a residential lease by paying the rent arrears with interest and the costs of the suit before final judgment. 12 V.S.A. §4773; In re Stoltz, 197 F.3d at 630. Therefore, it is clear that Vermont law recognizes the right of a tenant to redeem a residential lease by curing a default and the right of tenant to remain in possession of residential property even after the issuance of a writ of possession is completed, provided a judgment has not become final. It has been determined by the U.S. District Court of this District that a tenant retains a possessory interest in an apartment until the execution - not merely the issuance or service - of the writ of possession. In re Couture, 225 B.R. 58, 62-63 (D.Vt.

1998); *see also* In re Morgan, 181 B.R. 579 (Bankr. N.D.Ala. 1994); In re Ross, 142 B.R. 1013 (S.D.Fla. 1992); In re Talley, 69 B.R. 219 (Bankr.M.D.Tenn. 1986). Thus, I find that the debtor retained the right to cure her payment default until she was actually evicted and that had not yet occurred as of the bankruptcy filing date.

There is no dispute that a pre-petition writ of possession had not been executed prior to the entry of an order for relief in the debtor's bankruptcy case. Accordingly, the debtor's public housing lease was unexpired and she retained a possessory interest in her apartment at the time she filed for bankruptcy relief on August 10, 2000. As a result, I find that the Debtor is entitled to assume her residential lease provided she fulfills the requirements for lease assumption set forth in 11 U.S.C. §365(b).

## 2. BHA's Attorney's Fee Request

In her First Amended Chapter 13 Plan and also in her Motion to Assume Residential Lease and related papers, the debtor proposes to assume her 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 the lease and applicable state law. 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)(a party may be entitled to attorneys fees in bankruptcy actions in accordance with state law). 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 (collected cases).

In this instance, the lease provides for the recovery of certain attorneys fees and costs [see Lease, para. 12(f)], and such fees are generally allowed as damages under Vermont law pursuant to the lease terms. *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. 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 (1991). The subject lease agreement itself 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 the actual and necessary services. See In re Health Science Products, Inc., 191 B.R. at 910. In evaluating the BHA's claim for attorney 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 attorneys fee claim to make an independent determination as to whether the fees and costs requested were reasonable and were necessary to enforce the rights granted to the BHA by the subject lease.

The parties have filed various invoices, amended proofs of claim, legal memoranda and supplemental legal memoranda regarding the 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 debtor shall be 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 the BHA for any pecuniary loss to the 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, the debtor shall compensate the BHA fully for all pre-petition rent arrears in the requested amount of \$784.00 and shall also reimburse the BHA \$204.25 for related court costs. While the debtor disputes the BHA's entitlement to \$9.25 of costs, the record does not substantiate the challenge. Furthermore, as discussed more fully below, the chapter 13 plan must also provide for the payment in full of all post-petition rent arrears in the amount of \$603.00.

Under Vermont law and the terms of the lease, the Court declines to require the debtor to compensate the BHA for pre-petition attorneys fees. Any requirement that the debtor compensate the BHA for such fees as a prerequisite for assuming the lease would not only contravene Vermont law, but appears unwarranted under the lease because it does not appear that the BHA actually prevailed in the state court action. While it is clear that the BHA initiated the state court legal action to obtain past due rent and to evict the debtor, no final judgment was entered and the debtor has in fact succeeded in finding a mechanism to cure her 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, attorney's fees will not be awarded. The post-petition legal fees were incurred in the unsuccessful pursuit of lift stay relief, attendance at the §341 meeting of creditors, unarticulated computerized research, and an objection to lease assumption. As such, these activities constitute non-compensable attorneys fees under the lease and applicable law.

The foregoing analysis likewise bears upon the BHA's claim for payment of a prior attorneys fee judgment in the outstanding amount of \$1,391.50 and related costs and interest, as well as certain pre-petition and post-petition unpaid utilities charges and work orders. Under the terms of the lease and applicable federal law, the prior judgment and additional charges for utility use and repairs do not



constitute “rent” or costs and, consequently, need not be paid as a prerequisite for lease assumption. *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). However, these claims shall be allowed as general unsecured claims under the amended chapter 13 plan.

### 3. Lift Stay Relief

The BHA has also requested that this Court grant it lift stay relief to permit the BHA to recover the subject leasehold and to pursue its eviction related remedies. Section 362(d) provides in pertinent part as follows:

On request of a party in interest and after notice and a hearing, the court shall grant relief from stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

- (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
- (2) with respect to a stay of an act against property under subsection (a) of this section, if
  - (A) the debtor does not have any equity in such property; and
  - (B) such property is not necessary to an effective reorganization.

The BHA contends that it is entitled to relief under §362(d)(2) by virtue of the debtor’s failure to pay post-petition rent that was due for the months of January, February and March, 2001. The debtor acknowledges that she has failed to make these rent payments. Moreover, the BHA asserts that the debtor has no equity interest in the subject leasehold and that the property is not necessary for an effective reorganization. In response, the debtor asserts that her failure to submit the subject post-petition rental payments is the result of a short term reduction in her monthly welfare grant, a requirement that she purchase certain furniture for her children or face having her children taken from her, some apparent miscommunication regarding arrangements for direct payments to the BHA by her income source, and certain mental or emotional impairments that impact upon her ability to manage her income. The debtor also

contends that her lease is essential to an effective reorganization, that the rent arrearage can be cured pursuant to her First Amended Chapter 13 Plan, that the Joint Motion for Wage Assignment Order filed March 29, 2001 is evidence of her good faith intention to cure the rent arrears, and that her ability to submit her April, 2001 rental payment timely resolves any concerns regarding lack of payment and the lack of adequate protection. The debtor also asserts that she has an equity interest in her public housing tenancy.

After reviewing the record and considering the argument of counsel presented at the hearing on March 29, 2001, this Court finds that the Debtor has effectively cured her post-petition arrearage and provided adequate protection of the BHA's interests in the leased premises by including the payment of all post-petition rent arrearage in the amount of \$603.00 in her proposed First Amended Plan. Moreover, this Court finds that for purposes of determining the propriety of granting lift stay relief, that the right of a debtor as a public housing tenant to perpetually renew her public housing lease constitutes an equity interest in the property. *See In re Day*, 208 B.R. 358, 365 (Bankr.E.D.Pa. 1997).

Based upon the BHA's motion and the debtor's response, it appears that a critical issue in the lift stay dispute is the question of bad faith by one or both of the parties. The issue focuses on whether the debtor had offered to pay her rent through a direct assignment of her welfare benefits and whether the BHA had either refused that offer or thwarted the debtor's transactions with the welfare department generally. However, the testimony during the March 29<sup>th</sup> hearing on this issue was not helpful to either party. The Court finds credible the debtor's testimony that she did intend to make an assignment of benefits so as to avoid any further rent payment delinquency, that she pursued it with her case worker and that her case worker told her that BHA refused to cooperate in this arrangement. Hence I find no bad faith on the part of the debtor. The BHA employee who testified however was also credible in her assertion that neither the debtor nor anyone from the welfare department had ever approached her – or anyone else at the BHA as far as she knew – about setting up this direct payment arrangement; and that she had completed and returned the rent certification form to the welfare office within one business day of receipt. Neither the

welfare case worker nor any other witness testified on this issue. Based upon the record then, it appears that there may have been a mis-communication between the debtor and her case worker, or a misunderstanding of the BHA's position by the debtor's caseworker, but there was no proof sufficient to demonstrate bad faith by either party. Accordingly the Court does not include the alleged bad faith of either party as a factor in its determination of the lift stay issue.

The critical factor for a lift stay determination is whether the creditor demonstrated grounds for relief under the statute. Since I find that the debtor does need the leasehold interest in order to effectuate an effective reorganization, that she has equity in the property, that she has demonstrated equitable grounds to justify her default, and that her amended plan provides adequate protection to the BHA, the creditor is not entitled to lift stay relief at this time, provided a proposed amended chapter 13 Plan is confirmed promptly and contains terms consistent with this decision.

Therefore, the BHA's motion for lift stay relief is denied.

#### 4. Conclusion

Based upon the foregoing, the Motion to Assume Residential Lease is granted; the nature and extent of "any actual pecuniary loss" incurred by the BHA pursuant to 11 U.S.C. §365(b)(1) is the pre-petition rent arrearage and related costs in the amount of \$988.25, which must be paid to the BHA by the debtor in order to assume the subject Lease; and that the BHA's Motion for Relief from Stay is denied, provided an Amended Plan is confirmed timely and the direct payment arrangement of both the post-petition rent and the plan payments is implemented forthwith.

April 24, 2001  
Rutland, Vermont

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