

11 USC §365(a)
11 USC §365(d)(3)
11 USC §503(b)

In re Plaid Pantries, Inc. Case No. 389-31028-S11

2/12/90 DDS unpublished

Contrary to Judge Sullivan's memorandum in this case dated Nov. 9, 1989, the Ninth Circuit recently ruled that rejection of a non-residential real property lease cannot be accomplished under §365(a) without court approval. In re Arizona Appetito's Stores, Inc., 893 F.2d 216 (9th Cir. 1990). As a result, the Nov. 9, 1989 memorandum and order were set aside.

Although the lease was not rejected on the date the debtor unequivocally informed the lessor of it's intent to reject the lease, the landlord was still not entitled to immediate payment of it's unpaid post petition rent. The lease was rejected 60 days from the petition date by operation of §365(d)(4). If a lease is rejected, and the debtor has not paid the post petition rent in full, the landlord must file a claim and establish that it is entitled to administrative status under §503(b)(1)(A). In re Orvco, 95 Bankr. 724 (Bankr. 9th Cir. 1989).

The landlord's remedy was to file an administrative proof of claim in accordance with LBR 2016-1(a).

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

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|-----------------------|---|--------------------------|
| In Re: |) | Bankruptcy Case No. |
| |) | 389-31028-S11 |
| PLAID PANTRIES, INC., |) | |
| |) | MEMORANDUM REGARDING |
| Debtor. |) | RECONSIDERATION OF ORDER |
| |) | DATED NOVEMBER 9, 1989 |

My earlier ruling denying the motion of Wanda and Jose Vigil to compel the debtor to comply with 11 U.S.C. § 365(d)(3) was incorrect and should be set aside. The ruling lacked the benefit of a recent decision and, in an attempt to expedite resolution of the controversy, erroneously failed to enforce a local rule requiring the filing of a claim and governing the processing of such claim. Priority, allowability, and timing of contested requests for payment should be decided together as required by the rule. My reasons follow.

Contrary to my earlier findings, rejection of a non-residential lease of real property under 11 U.S.C. § 365(a)

before the expiration of 60 days from filing cannot be accomplished without court approval. In re Arizona Appetito's Stores, Inc., to be reported at 893 F.2d 216 (9th Cir. 1990). The consequences of a debtor-in-possession's failure to "timely perform all of the obligations of the debtor . . . until such lease is assumed or rejected" under 11 U.S.C. § 365(d)(3) depends upon "the particular facts and circumstances involved in each bankruptcy case." In re Southwest Aircraft Services, Inc., 831 F.2d 848, 854 (9th Cir. 1987). "Nothing in the language of the section [11 U.S.C. § 365(d)(3)] requires administrative or, worse yet, super-administrative status." Unlike an adoption case, the landlord in a rejection case is not relieved of the necessity for showing the reasonableness of the rent or any of the other factors considered under Section 503(b)(1)(A). In re Orvco, Inc., 95 Bankr. 724, 726 (Bankr. 9th Cir. 1989). L.B.R. 2016-1(a) governs the procedure which must be followed to establish an administrative claim.

The debtor rejected the lease in this case on May 12, 1989 by operation of law upon the expiration of the 60-day period under 11 U.S.C. § 365(d)(4). Instead of paying the full rent to the date of rejection, the debtor paid rent to May 1, 1989, relying on prior written and oral notice of rejection given to the landlord. Neither the landlord nor

the debtor obtained an order of the Court approving rejection as required by Arizona Appetito. Because of the lack of an order, the Vigils' claim entitlement to payment for rent for the remaining 12 days of the 60-day rejection period and attorneys' fees in an uncertain amount.

Under the cases cited, the Vigils are not entitled to an abstract determination of priority or the right to immediate payment independent from facts governing the amount of, and the allowability of, the request for payment. The Vigils' motion should be denied without prejudice to their filing an appropriate proof of claim and without prejudice to further proceedings on their claim.

DATED this _____ day of February, 1990.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Jeffrey C. Misley
Fred M. Granum
Bruce H. Orr
Leon Simson
U. S. Trustee