UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN RE:	)	
	)	
Ben L. Crabtree, Jr.	)	No. B-99-81504
Mona B. Crabtree,	)	
	)	
Debtors.	)	

ORDER ALLOWING CLAIMS OF JACK T. AND MARY DOSSETT

THIS MATTER came on for hearing before the undersigned bankruptcy judge on June 8, 2000, in Durham, North Carolina on the Debtors' Objection to Claims of Jack T. Dossett and Mary Dossett. Karen Macklin appeared on behalf of Ben and Mona Crabtree ("the Debtors"), James B. Craven appeared on behalf of Jack T. and Mary Dossett ("the Dossetts"), and Richard M. Hutson appeared as Chapter 13 Standing Trustee.

An objection to a claim is a contested matter under Federal Rule of Bankruptcy Procedure 9014. This Court has jurisdiction of this contested matter pursuant to 28 U.S.C § 1334. This is a "core proceeding" as the term is defined in 28 U.S.C. § 157(b)(2)(A).

After hearing the testimony and the arguments of counsel and reviewing the evidence, the Court makes the following findings of fact and conclusions of law.

FACTS

The Debtors filed this Chapter 13 proceeding on July 12, 1999, and their plan was confirmed on October 7, 1999.

The Dossetts are the owners of the property on which the Debtors operated an Exxon station for many years. The debt which is the basis for the Dossetts' claims arises from a lease agreement signed by the Dossetts and the Debtors on January 1, 1993. The Dossetts' claims total $66,150.29 and include seven months pre-petition rent arrearage, property tax liability for 1999, and the cost of necessary repairs on the property after the Debtors vacated the premises. Jack and Mary Dossett each filed a proof of claim in the Debtors' bankruptcy case on August 19, 1999[1], for half of the total amount of the claim but the proofs of claim stated that each would later amend their claims to include post-petition rent for the period that they were unable to re-lease the property.[2]

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[1] Jack and Mary Dossett are brother and sister-in-law and so filed separate proofs of claim.

[2] The amount Jack Dossett listed on his proof of claim represented half of the total claim amount reduced by a $1,600.00 partial rent payment he received in July 1999 from the Debtors.

The Debtors objected to the proofs of claim filed by the Dossetts on the grounds that the amounts claimed did not give the Debtors credit for certain trade fixtures which remained on the premises after the Debtors vacated, that the claimed costs of making repairs were too high, that the Dossetts failed to mitigate their damages by leasing the property to another suitable tenant and that the 1999 property taxes should only be assessed to them for that portion of the year that the Debtors occupied the property.

The lease agreement signed by the Debtors and the Dossetts includes a paragraph dealing with the removal of fixtures. Paragraph 29 of the lease agreement provides:

> Tenant may (if not in default hereunder) prior to the expiration of this lease or any extension thereof, remove all fixtures and equipment which it has placed in the premises, provided the Tenant repairs all damage to the premises caused by such removal. Tenant shall notify Landlord five (5) days prior to the removal, installation or delivery of any fixtures and Landlord has the right to supervise such removal, installation or delivery.

The Debtors' rent payments were in default under the lease agreement at the time that the Debtors vacated the leased premises in July of 1999. When the Debtors moved out of the premises they left behind certain trade fixtures including a canopy and underground tanks.

Since the Debtors vacated the property, Jack Dossett has spoken with several potential new tenants but the premises have not been re-leased. The Debtors contend that the Dossetts have failed to mitigate their damages under the lease by refusing to lease the property to a suitable replacement tenant. Earl Pickett was interested in leasing the property from the Dossetts. He was willing to enter a five-year lease beginning April 2000 and, as a part of the agreement, Pickett would pay to have the premises renovated. After the lease agreement was drafted, Jack Dossett decided he did not want to do business with Pickett. Pickett was also negotiating with the Debtors to lease an adjacent piece of property from them. The Debtors assert that Jack Dossett refused to lease the property to Pickett only because Pickett was also negotiating with the Debtors and that Jack Dossett told Pickett he would cut the sewer and water lines that connect the properties if Pickett leased property from the Debtors. The Dossetts presented no evidence that they had a legitimate reason for finding that Pickett was not a suitable tenant and for refusing to lease the property to him. Rather Jack Dossett's own testimony supports the Debtors' allegations that he refused to lease the property to Pickett for personal reasons.

ISSUE

Pursuant to 11 U.S.C. § 502, this Court must determine what the amount of the Dossetts' allowed claim should be. To do so, the Court must determine the amount the Dossett's will be allowed to claim for pre-petition rent arrearage, damages for the termination of the lease, the cost of repairs to the vacated premises, and 1999 property taxes and, also, if the allowed claim

amount will be offset by the value of any fixtures which the Debtors left behind on the premises.

DISCUSSION

A proof of claim filed in accordance with 11 U.S.C. § 501 is deemed allowed unless it is objected to by a party in interest. See 11 U.S.C. § 502(a). If an objection to a claim is made, the court must, after notice and hearing, determine the amount of the claim as of the date of the filing and allow the claim for the amount determined. See 11 U.S.C. § 502(b).

PRE-PETITION AND POST-PETITION RENT

The Bankruptcy Code has an exception from the general rule of § 502(b) and provides a formula for the calculation of claims of a lessor for damages from the termination of a lease of real property. See 11 U.S.C. § 502(b)(6). Section 502(b)(6) limits a claim based on the termination of a lease of real property to the rent reserved by the lease, without acceleration, for the greater of one year or fifteen percent, not to exceed three years, of the remaining term of the lease following the earlier of the petition filing date or the date of the lessor's repossession, plus unpaid rent due, without acceleration, on the earlier of the dates. See 11 U.S.C. §502(b)(6). Applying this limitation to the facts of this case, the total amount of post-petition rent for which the Debtors are liable to the Dossetts is $71,150.00 or one-year of rent under the lease.[3] In addition to this amount, the Debtors must also pay any unpaid rent which was due at filing. On the petition date, the Debtors were in default under the lease and owed seven months of rent at $5,760.00 per month for a total pre-petition rent arrearage of $40,320.00. However, this amount must be reduced by the $1,600.00 partial pre-petition rent payment received by Jack Dossett and reflected in his proof of claim. Therefore, the Court finds that the total amount of pre-petition and post-petition rent for which the Debtors are liable to the Dossetts is $109,870.00.

THE COST OF REPAIRS

The Dossetts' proofs of claim include a total of $24,095.00 for the cost of repairs which the Dossetts had to make to the property after the Debtors left the leased premises. The Debtors objected to this amount stating that the repair estimates were too high and that they had been informed that the Dossetts were seeking estimates for the highest possible cost. However, the Debtors presented no credible evidence other than the opinion of the male Debtor that the estimates were actually too high. Based on the evidence before it, the Court finds that the Dossetts should have a claim for $24,095.00 for the total cost of the necessary repairs.

THE PROPERTY TAXES

Under the terms of the lease, the Debtors are responsible for paying all property taxes that are levied during the term of the lease. The Court finds that the Dossetts are entitled to a claim for the full amount of the 1999 property taxes or $3,335.29.

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[3] Fifteen percent of the rent due over the next three years of the lease would result in a claim of only $30,142.00.

Based on the determinations made above, the Court finds that the Dossetts' total claim before any applicable reduction is $137,300.29.

DETERMINATION OF APPLICABLE REDUCTIONS

Paragraph 29 of the lease agreement executed by the Dossetts and the Debtors states that if a tenant is not in default he may, prior to the expiration of the lease term, remove all fixtures and equipment which he placed in the premises. It is undisputed that the Debtors were in default under the lease and, therefore, were not entitled to remove the fixtures which remain on the premises. The Debtors admit that, pursuant to Paragraph 29, they were not entitled to remove the fixtures, however, the Debtors contend that since the fixtures remain in place, the Debtors should receive credit for the value of the fixtures. The Debtors argue that the amount of the Dossetts' allowed claims should be reduced by the value of the fixtures left behind. The Court is unaware of any case law supporting the Debtors' position and the Debtors did not present any supporting law. The Court finds that Paragraph 29 of the lease agreement is controlling and the amount of the Dossetts' claims will not be reduced by the value of the fixtures remaining on the leased premises.

The Debtors further assert that the amount of the Dossetts' claims should be reduced by the amount of money they would have received had they performed their duty to mitigate their damages by leasing the premises to Earl Pickett. Under North Carolina law, the nonbreaching party to a lease agreement has a duty to mitigate his damages from the breach of the lease. See Isbey v. Crews, 55 N.C. App. 47, 52, 284 S.E.2d 534, 537 (1981)(citing Weinstein v. Griffin, 241 N.C. 161, 84 S.E.2d 549 (1954); Monger v. Lutterloh, 195 N.C. 274, 142 S.E. 12 (1928)). The landlord can recover only those damages which he could not with reasonable diligence avoid by reletting the premises. See id. Based on the testimony given, Earl Pickett was ready, willing and able to enter a lease with the Dossetts beginning in April, 2000 and no evidence was presented that the Dossetts had a legitimate reason for finding Pickett not to be a suitable tenant. Therefore, of the one-year's rent to which the Dossetts are entitled under the Bankruptcy Code, four-months of that rent would have been paid by Pickett under the new lease and so the Dossetts' claims should be reduced by that amount, $23,716.67. Also, Pickett testified that under the lease agreement he would have paid to renovate the premises. Therefore, by leasing the property to Pickett, the Dossetts would have avoided the costs of repairs which they are attempting to recover from the Debtors. Therefore, the portion of the Dossetts' claims arising from the estimated cost of repairs to the premises or $24,095.00 will also be disallowed.

CONCLUSION

After making the above-discussed adjustments, the Dossetts' allowed claim will consist of $47,433.33 in damages from the termination of the lease, $38,720.00 for pre-petition rent due at the time the Debtors surrendered the leased property, and $3,335.29 for the 1999 property taxes. The Dossetts' total allowed claim amount is $89,488.62. Since the Dossett's each filed a proof of claim, the Court finds that Mary Dossett will have an allowed unsecured claim in the amount of $45,544.31 and Jack Dossett will have an allowed unsecured claim in the amount of

$43,944.31.[4]

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Mary Dossett has an allowed unsecured claim in the Debtors' bankruptcy case for $45,544.31 and that Jack T. Dossett has an allowed unsecured claim in the Debtors' bankruptcy case for $43,944.31.

This the 15 day of July 2000.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge

[4] Again, this takes into account the $1,600.00 partial payment Jack Dossett received from the Debtors in July 1999.