

ORDERED.

Dated: June 01, 2023


Grace E. Robson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re)	
)	
Smart Baking Company, LLC,)	Case No. 6:22-bk-02365-GER
)	Chapter 11
Debtor.)	
_____)	

**ORDER (1) GRANTING IN PART MOTION
TO COMPEL, (2) AWARDING ADMINISTRATIVE
EXPENSE, (3) SETTING HEARING, AND (4) CANCELING HEARING**

This case came before the Court on May 10, 2023 at 10:00 a.m. for a trial (the “Trial”) on the Motion to Compel¹ and Supplement² filed by Powers Industrial LLC (“Powers” or the “Landlord”) and the Response³ filed by Smart Baking Company, LLC (the “Debtor”). The Court allowed the parties to submit supplemental authority in support of their positions by May 12, 2023, and the parties timely filed their supplemental authority.⁴ The Court, after considering the testimony, documents and video admitted into evidence, argument and supplemental authority

¹ Powers Industrial LLC’s Motion to Compel Debtor’s Compliance with Confirmation Order and Plan (the “Motion to Compel”) (Doc. No. 124).

² Powers Industrial LLC’s Supplement to its Motion to Compel Debtor’s Compliance with Confirmation Order and Plan (the “Supplement”) (Doc. No. 129).

³ Debtor’s Response in Opposition to Powers Industrial, LLC’s Motion to Compel Debtor’s Compliance with Confirmation Order and Plan (the “Response”) (Doc. No. 157).

⁴ Debtor’s Notice of Filing Case Law (Doc. No. 177); Debtor’s Notice of Filing Case Law (Doc. No. 178); Powers Industrial, LLC’s Notice of Filing Supplemental Case Law (Doc. No. 179).

submitted by the parties, as well as the Court docket, FINDS, ORDERS, and ADJUDGES as follows:

The Parties' Stipulation of Facts

A. The parties stipulated on the record to the following:

i. Powers and the Debtor were parties to a lease for real property located at 297 Power Court Unit 1, Sanford, Florida 32771 (the "Premises") on the terms set forth in the Lease Agreement (the "Lease") admitted as Powers' Exhibit 1.⁵

ii. Powers has not been paid rent for the period of October 2022 through the date the Lease was terminated.

iii. The Tenant Statement admitted as Powers' Exhibit 20⁶ is an accurate calculation of the amount Powers asserts is due for rent, common area maintenance, sales tax, and late charges for the period of October 2022 through January 2023, which totals \$49,732.49 (not including attorneys' fees and costs).

iv. Powers is holding a security deposit in the amount of \$14,319.40.

v. An online auction of personal property was conducted on December 8, 2022.

The Court's Additional Findings and Conclusions

***The Amended Plan and Confirmation Order
Include Powers' Entitlement to Administrative Claim***

⁵ Powers' Ex. 1 (Doc. No. 155-1); *see also* Annotated Exhibit List of Creditor, Powers Industrial (Doc. No. 173).

⁶ Powers' Ex. 20 (Doc. No. 155-20); *see also* Annotated Exhibit List of Creditor, Powers Industrial (Doc. No. 173).

B. On November 1, 2022, the Court conducted a hearing to consider confirmation of the Debtor's Amended Plan,⁷ as modified orally on the record to provide for payment of Powers' administrative expense claim and the filing of a rejection damage claim.⁸

C. The Court approved the Amended Plan, as modified at the November 1 hearing, and on November 17, 2022, entered the Confirmation Order.⁹

D. The Confirmation Order incorporates the oral modification to the Amended Plan and provides, in relevant part:

Administrative Expense Claim of Powers Industrial LLC and Deadline to File Rejection Damage Claim. Powers Industrial LLC ("Powers Industrial"), landlord with respect to the premises located at 297 Power Court Unit 1, Sanford, Florida 32771 (the "Sanford Property"), shall have an Allowed Administrative Claim that shall be paid in full by the Effective Date in an amount equal to the outstanding October rent, including late fees, pro rated November rent for the period through November 21, 2022, plus Powers Industrial's reasonable attorneys' fees incurred in connection with such Allowed Administrative Claim. In the event the Debtor fails to vacate the Sanford Property by 5:00 p.m. on November 21, 2022, as determined in Powers Industrial's sole and absolute discretion, Powers Industrial shall have an Allowed Administrative Claim for any such holdover period, which Debtor shall pay in full within five (5) days after Powers Industrial determines that it has fully vacated the Sanford Property. The Lease Agreement between the Debtor and Powers Industrial shall be deemed rejected as of the date Powers Industrial determines the Debtor has fully vacated the Sanford Property. **Within 3 business days of vacating the Sanford Property, the Debtor shall file a notice indicating the date that the Sanford Property was vacated. Powers Industrial shall have thirty (30) days after the Debtor vacates the Sanford Property to file any and all rejection damages claim,** which claim shall be treated and paid as a Class 3 Claim; provided that Debtor shall be obligated to pay in full all costs of removal of its personal property and equipment, including all costs and expenses required to be paid to repair any damage or alteration to the premises caused or required by Debtor's removal of such personal property or equipment. Debtor shall allow representatives for Powers Industrial full access to inspect the Sanford Property prior to, and at the time of, removal of any personal property or equipment, and the parties shall discuss and agree upon (i) a plan for removal of such items, and (ii) which items are fixtures incapable of removal without causing damage to the

⁷ Amended Plan of Liquidation for Smart Baking Company, LLC (the "Amended Plan") (Doc. No. 93).

⁸ Ore Tenus Motion to Modify Plan to Reflect Powers [Industrial's] Administrative Claim (Doc. No. 114).

⁹ Order (1) Confirming Debtor's Amended Plan of Liquidation, as Modified, (2) Granting and Denying Certain Motions, (3) Setting Deadlines, and (4) Setting Hearing (the "Confirmation Order") (Doc. No. 118).

Sanford Property. The Debtor reserves its rights against Powers Industrial related to any breach of the Lease Agreement.¹⁰

Post-Confirmation Auction and Removal of Equipment and Fixtures

E. On November 15, 2022, a date after the oral modification was made to the Amended Plan and approved by the Court granting Powers an allowed administrative claim, the Debtor, through Harvey Heuvel, met with Mark DeVasto, William Dillon, and Powers' representative, Christina Redman, at the Premises.

F. Ms. Redman testified that at the time of this meeting, the Premises appeared to be in good condition with no visible damage.

G. At the November 15, 2022 meeting, it was discussed that the Debtor's personalty would be sold to Mr. DeVasto's company, Atlantic Restaurant Equipment & Refrigeration Company ("Atlantic") and Badger Auctions, whom Mr. Dillon represented. It was also discussed that Badger Auctions would conduct an auction of the personalty.

H. During or shortly after this meeting, the Debtor entered into a written agreement for the sale of the personalty to Atlantic as reflected in a purchase order, a *Contract for Purchase of Equipment* and addendum thereto (collectively, the "Contract").¹¹

I. Mr. Heuvel testified that he informed Mr. DeVasto of the ongoing rent obligation of \$405 per day, and that Mr. DeVasto agreed to pay this amount as reflected in the parties' Contract.

J. Ms. Redman testified she was aware that Messrs. Heuvel, DeVasto and Dillon were contemplating that an auction would take place on site at the Premises, and that she specifically told the gentlemen to let her know the date and time so that she could make sure she could be on

¹⁰ Confirmation Order ¶ 15 (Doc. No. 118).

¹¹ Powers' Exs. 9 and 21 (Doc. Nos. 155-9; 155-21); *see also* Debtor's Exs. 4 and 5 (Doc. No. 156).

site during the auction. She testified that she provided her business card containing her phone number, email address and business address to Messrs. DeVasto and Dillon, and that Mr. Heuvel already had this information from their prior communications.

K. Ms. Redman testified that she never received any notice of when an auction would take place and only learned of it after it happened.

L. As noted above, the parties stipulated that an online auction took place on December 8, 2022.

M. Included in the items sold at this auction were all 14 of the air conditioning units at the Premises, as well as a steel building that was located at the Premises.

N. There was conflicting testimony as to whether the Debtor authorized the inclusion of the steel building and air conditioning units as part of the auction; however, it is undisputed that the air conditioning units and the steel building were removed from the Premises after the auction.

O. Furthermore, while there was no evidence that the Debtor authorized the removal, the air handlers, condensing units, copper and electrical wiring were also removed from the Premises after the auction.

Lease Rejection Date is January 10, 2023

P. The Debtor argues that November 15, 2022 is the date the Lease was rejected and terminated because that is the date it stopped using the premises and sold its personalty to Atlantic, who then agreed and became liable to pay the rent. Therefore, the Debtor asserts that no administrative expense should arise for periods after November 15, 2022.

Q. On the other hand, Powers asserts the termination date is January 10, 2023, the date it changed the locks on the Premises.

R. The Court rejects the Debtor's argument and finds the Lease was rejected effective as of January 10, 2023, when Powers changed the locks to the Premises. The Confirmation Order is clear that Powers had the sole discretion to determine the date the Premises was vacated and the Lease was rejected. The Confirmation Order also required the Debtor to file a notice with the Court indicating the date the Premises was vacated, but such notice was never filed. Furthermore, the Debtor did not enter into a sublease with Atlantic, nor was there any other agreement with Powers that relieved the Debtor of its obligations under the Lease as of November 15, 2022. Therefore, the Debtor remained liable under the Lease through the date Powers changed the locks, *i.e.*, January 10, 2023.

***Powers' Administrative Claim Also Includes Damages
Resulting from Removal of the A/C Units, Condensers and Wiring***

S. In addition to the post-petition, pre-rejection rent that is due to Powers, the Debtor is also liable for the damage caused prior to the rejection. After the filing of the Bankruptcy Petition¹² and before the Lease was rejected, there was significant damage caused to the Premises due to the removal of the air conditioning units, condensers, copper and electrical wiring.

T. While it is undisputed that the Debtor did not own the steel building and that it was removed from the Premises without authorization, the Court cannot determine an amount to award Powers with respect to the steel building as the only testimony regarding the value of the steel building was hearsay.¹³

U. Mr. Heuvel testified at the Trial that at the time of the November 15, 2022 meeting, he believed the air conditioning units that the Debtor paid for belonged to the Debtor.

¹² *Voluntary Petition under Chapter 11 Subchapter V* (Doc. No. 1).

¹³ Ms. Redman testified that she was told by the prior owner of the Premises that the prior owner paid \$50,000 for the steel building. There was no admissible evidence of the value of the steel building.

V. The Debtor's schedules reflect ownership of only two air conditioning units.¹⁴

W. Paragraph 9 of the Lease provides, in relevant part:

Alteration. Tenant shall not make or permit any alterations or improvements to the Premises, including, without limitation, the Initial Tenant Improvements, without the prior written consent of Landlord, which consent shall not be unreasonably withheld, conditioned or delayed ***Unless Landlord shall elect otherwise in writing, any such alterations or improvements shall become the property of the Landlord as soon as they are affixed to or installed in or upon the Premises,*** and all right, title and interest of Tenant shall cease at the termination of the Term.¹⁵

The Lease is clear and unambiguous that any improvement becomes the Landlord's property as soon as it is affixed on the Premises. Therefore, even if the Debtor paid for all of the air conditioning units,¹⁶ the air conditioning units became property of Powers once affixed to the Premises.

X. Mr. Dillon's deposition testimony reflects that the Debtor authorized the air conditioning units to be sold at auction.¹⁷

Y. During the Trial, Mr. Heuvel denied he authorized the sale of the air conditioning units; however, this testimony was impeached by his February 10, 2023 deposition testimony which reflects he told Mr. Dillon to include the air conditioning units in the sale. Furthermore, there was an email from Mr. Heuvel to Ms. Redman dated November 23, 2022 indicating that the air conditioning units would be put up for sale if he did not hear back from Ms. Redman.¹⁸ Ms. Redman's response was to have the parties communicate through counsel on this issue,¹⁹ and counsel for Powers made clear that the air conditioning units belonged to Powers.²⁰

¹⁴ Powers' Ex. 2 at 15 (Doc. No. 155-2).

¹⁵ Powers' Ex. 1 ¶ 9 (Doc. No. 155-1) (emphasis added); *see also* Debtor's Ex. 1 (Doc. No. 156).

¹⁶ There was no evidence that the Debtor paid for any of the air conditioning units.

¹⁷ Dillon Dep. 38:14-24 (Doc. No. 166).

¹⁸ Powers' Ex. 7 (Doc. No. 155-7).

¹⁹ Powers' Ex. 7 (Doc. No. 155-7).

²⁰ Powers' Exs. 6 and 8 (Doc. Nos. 155-6; 155-8).

Z. Furthermore, the removal of the air handlers, which were affixed or installed in the ceiling, as well as the related copper and electrical wiring, caused damage to the Premises. Mr. Dillon testified that it was ordinary that copper wiring and condensers would be part of an auction sale of air conditioning units as the items go together.

AA. Powers obtained an estimate from Jessee Construction for the cost to repair the Premises.²¹ Raun Jessee, the president of Jessee Construction, is a licensed general contractor and credibly testified that the work reasonably necessary to repair the Premises is \$724,922.

BB. The Debtor also argues that an administrative expense should not accrue for periods after it stopped using the Premises (i.e., November 15, 2022) because there was no benefit to the Debtor or the bankruptcy estate. The Court rejects this argument. A debtor-in-possession is required to assume or reject an unexpired lease of nonresidential real property within the earlier of 210 days²² from the petition date or the date of the entry of an order confirming plan.²³ If a lease is rejected, the rejection constitutes a breach of the lease that is deemed to have occurred pre-petition, and any damage claim for breach of a rejected lease is a general unsecured claim.²⁴ However, with exceptions not relevant to this dispute, § 365(d)(3) of the Bankruptcy Code²⁵ requires a debtor-in-possession to timely perform all of the debtor's obligations under an unexpired lease pending the decision to assume or reject. Section 365(d)(3) expressly provides that the

²¹ Powers' Ex. 15 (Doc. No. 167).

²² On December 21, 2020, Congress passed the Consolidated Appropriations Act (2021) (the "Act"), and the Act was signed into law on December 27, 2020. Before Congress passed the Act, 11 U.S.C. § 365(d)(4) gave debtors 120 days from the petition date to assume or reject an unexpired nonresidential lease; however, the Act amended § 365(d)(4) to give debtors 210 days. While the amendment to § 365(d)(4) had a sunset provision of two years from the date of enactment, the Act included a specific provision providing that certain amendments, including the extension of the lease-assumption deadline from 120 to 210 days, "shall apply in any case commenced under subchapter V of chapter 11 of title 11, United States Code, before the date that is 2 years after the date of enactment of this Act." Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, § 1001(f)(2)(B). The voluntary petition in this subchapter V case was filed on July 5, 2022, and the amendment to § 365(d)(4) therefore applies.

²³ 11 U.S.C. § 365(d)(4) (2022).

²⁴ See 11 U.S.C. § 365(g)(1) (2022).

²⁵ All references to the Bankruptcy Code refer to Title 11 of the United States Code.

debtor-in-possession must timely perform any such obligation regardless of whether it qualifies as an administrative expense under § 503(b)(1).²⁶ Therefore, if a debtor-in-possession fails to timely perform any lease obligations that accrue during the post-petition, pre-rejection period, the lessor is entitled to an administrative claim for damages regardless of whether the use of the leased property during this period benefitted the estate.²⁷

CC. Here, the parties agreed that the Lease would be rejected on a date determined by Powers, i.e., January 10, 2023; therefore, even if the Debtor did not authorize the sale of the air conditioning units, because the Debtor remained liable to comply with the Lease prior to the rejection date, the Court finds the resulting damages are allowable as an administrative expense.

Powers' Administrative Claim Also Includes Attorneys' Fees and Costs

DD. Powers presented testimony that it incurred attorneys' fees and costs as a result of it having to file and prosecute the Motion to Compel.

EE. "Generally, in federal litigation, including bankruptcy litigation, a prevailing litigant may not collect an attorney's fee from his opponent unless authorized by either a federal statute or an enforceable contract between the parties."²⁸

FF. Paragraph 23.g. of the Lease provides:

In the event of a dispute arising under this Lease, . . . the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs, including attorneys' fees and costs incurred in litigating entitlement to attorneys' fees and costs, as well as in determining or quantifying the amount of recoverable attorneys' fees and costs. The reasonable costs . . . shall include costs that are taxable under any applicable statute, rule or guideline, as well as non-taxable costs . . .²⁹

²⁶ 11 U.S.C. § 365(d)(3)(A) (2022).

²⁷ *In re Nat'l Refractories & Minerals Corp.*, 297 B.R. 614, 617 (Bankr. N.D. Cal. 2003) (citing *Towers v. Chickering & Gregory (In re Pac.-Atl. Trading Co.)*, 27 F.3d 401, 403-05 (9th Cir. 1994)).

²⁸ *Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286, 1288 (11th Cir. 2005) (first citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); and then citing *All Am. of Ashburn, Inc. v. Fox (In re Fox)*, 725 F.2d 661, 662 (11th Cir. 1984)).

²⁹ Powers' Ex. 1 ¶ 23.g. (Doc. No. 155-1).

GG. In addition, the Confirmation Order, incorporating the modified terms of the Amended Plan, provides that Powers' Allowed Administrative Claim includes Powers' reasonable attorneys' fees incurred in connection therewith.

HH. The Court finds that Powers is entitled to its reasonable attorneys' fees and costs in prosecuting the Motion to Compel as an Allowed Administrative Claim based on the terms of the Lease, Amended Plan, as modified, and the Confirmation Order.

Powers' Request to Impose Liability on Leventhal Family Trust

II. The Debtor's confirmed Amended Plan provided, in relevant part:

To fund this Plan of Liquidation, Debtor shall sell (the "Sale") all its Assets, excluding cash on hand, to the Leventhal Family Trust (also known as the "Buyer"). The Buyer's consideration for the Sale consists of (1) the acquisition of the Class 1 Claim; (2) the payment of all Allowed Administrative Claims³⁰

JJ. Based on this and other provisions of the Amended Plan, as well as the Confirmation Order, Powers asserts in the Supplement that its allowed administrative claim is due to be paid from the Leventhal Family Trust (the "Trust")³¹ and asks that the Court hold the Trust jointly liable with the Debtor.

KK. While the provisions of the Amended Plan and Confirmation Order are clear, Powers did not serve the Motion to Compel or the Supplement on the Trust. Therefore, the requirements of due process have not been satisfied as to the Trust.³²

FOR THE FOREGOING REASONS, IT IS ORDERED:

1. The Motion to Compel (Doc. No. 124) is **GRANTED IN PART**.

³⁰ Amended Plan, Art. VI, § C (Doc. No. 93).

³¹ Amended Plan, Art. III, § A (Doc. No. 93).

³² See, e.g., *In re Britt*, 199 B.R. 1000, 1010 (Bankr. N.D. Ala. 1996) (quoting *Mullane v. Cent. Hanover Bank*, 339 U.S. 306, 314 (1950)) ("Due process requires, at a minimum, notice and an opportunity to be heard; adequate notice is 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'").

2. The relief sought in the Supplement (Doc. No. 129) as to the Trust is **DENIED WITHOUT PREJUDICE**.

3. The Court awards Powers an Allowed Administrative Claim in the amount of \$49,732.49 for the rent, common area maintenance, sales tax, and late charges for the period of October 2022 through January 2023.

4. The Court also awards Powers an Allowed Administrative Claim in amounts it actually incurs and pays to repair the Premises, in an amount not to exceed \$724,922.

5. Powers is also entitled to an Allowed Administrative Claim for its reasonable attorneys' fees and costs. Powers shall file an affidavit or declaration of attorneys' fees and costs, along with supporting time records and other documentation regarding the amount it is seeking as recoverable attorneys' fees and costs, by **July 14, 2023**.

6. The Debtor may file a response to the fees and costs requested by Powers on or before **August 4, 2023**.

7. The Court shall conduct a hearing to determine whether an evidentiary hearing is required on the fees and costs requested on **August 16, 2023 at 1:30 p.m.** in Courtroom D, Sixth Floor, 400 West Washington Street, Orlando, Florida 32801.

8. The hearing scheduled for June 8, 2023 at 9:30 a.m. is **CANCELED**.

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Attorney Christopher R. Thompson is directed to serve a copy of this order on interested parties who do not receive service by CM/ECF and file a proof of service within three days of entry of this order.