

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
KENNETH C. McGHEE,) CASE NO. 11-24108 jpk
) Chapter 13
Debtor.)

ORDER FOR HEARING ON THE DEBTOR'S RECORD NO. 69 OBJECTION
TO CLAIM NO. 8 OF JOSEPH FUENTES AND THE CREDITOR'S NO. 72 RESPONSE

A preliminary pretrial conference was held with respect to the contested matter arising from the claim objection and response thereto designated in the title of this order, on January 7, 2013. George P. Galanos appears as counsel for the debtor; the creditor Joseph R. Fuentes appears personally; the Chapter 13 Trustee appears by attorney Amy Godshalk. At that hearing, the court provisionally proposed a course of procedure with respect to claim No. 8. Having considered the matter in more depth, the court has decided to deal with the issues in this contested matter in another way.

It appears that claim No. 8 was filed as a general unsecured claim, and the objection contested it on that basis. At the January 7, 2013 hearing, it became clear that the amounts stated in the claim as being owed by the debtor were for post-petition rentals alleged by Mr. Fuentes, as the landlord, for the debtor's occupancy of real property – the claim had nothing to do with a pre-petition claim for unpaid rent or other debt. The record also establishes that no separate proceeding to either assume or reject what appears to have been an executory contract existing on the date of filing of the petition has been undertaken by the debtor, and that the debtor's Chapter 13 plan provides for neither assumption nor rejection of this executory contract. Under applicable law, a Chapter 13 debtor may assume or reject an executory contract at any time up to confirmation of a Chapter plan. Thus, the apparent executory lease is open at this point. It is unclear to the court whether or not the debtor has vacated the premises, or whether he continues to occupy them. The court provisionally stated that it may

be possible for Mr. Fuentes to assert an administrative claim pursuant to 11 U.S.C. § 503(b)(1)(A) with respect to rent owed by the debtor with respect to post-petition occupancy of the leased premises. On that theory, the court proposed to itself issue a “drop-dead” notice which treated claim No. 8 as a request for payment of an administrative claim, and then to proceed accordingly. The court has now determined that this proposed procedure begs a question which will arise under the procedure, i.e., whether rentals for a debtor’s occupancy of residential premises post-petition but prior to rejection of an executory residential lease may give rise to an administrative claim. 11 U.S.C. § 365(d)(2) provides the general rule that an executory contract or unexpired lease of residential real property may be assumed or rejected at any time before confirmation of a plan. 11 U.S.C. § 365(d)(3) requires a trustee to perform all obligations of the debtor under any unexpired lease of non-residential real property, until the lease is assumed or rejected; there is no parallel provision with respect to residential real property. 11 U.S.C. § 365(g)(1) provides that rejection of an executory lease constitutes a breach of the lease “immediately before the date of the filing of the petition,” giving rise to the inference that any accruing damages result in a general unsecured claim. However, this provision may not in and of itself preclude the assertion of an administrative claim for post-petition/pre-rejection rent of residential real estate if the continued occupancy of leased premises benefits the debtor and/or the debtor’s estate. Because this issue will arise if the court adopts the procedure which it proposed at the January 7, 2013 hearing, the court will not follow through with that suggested procedure. Rather, the hearing date designated for consideration of any objection to the court’s notice of administrative claim will be utilized for a preliminary pretrial conference with respect to the legal issues addressed above.

At the January 7, 2013 hearing, attorney Galanos referenced the “45-day letter/notice” required by I.C. 32-31-3-1 *et seq*, which applies to security deposits in relation to rental

agreements for dwelling units. Mr. Fuentes stated that he had provided the debtor with this letter/notice, which indicates to the court that the debtor has in fact vacated the premises leased to him by Mr. Fuentes. As the court noted at the January 7, 2013 hearing, the foregoing statutory procedure is applicable only after a rental agreement has been terminated, and thus the court would not expect there to have been any 45-day notice or 45-day letter if the lease arrangement were still in effect between Mr. Fuentes and the debtor. Moreover, a landlord's failure to provide the required 45-day letter/notice "does not preclude the landlord or tenant from recovering other damages to which either is entitled" [I.C. 32-31-3-12(c)]: the statutory procedure relates only to retention, return, or offset of security deposits.

IT IS ORDERED that a preliminary pretrial conference concerning the matters addressed by this order will be held on **February 25, 2013, at 1:00 P.M.**

Dated at Hammond, Indiana on January 29, 2013.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:

Debtor, Attorney for Debtor

Trustee, US Trustee

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