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JUDGE: M. A. Mahoney

PARTIES: Mason Plan, Inc., Saad Realty Group, L.L.C.

CHAPTER: 7

ATTORNEYS: L. P. Ladd, T. L. Hall

DATE: 8/2/00

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

In re

MASON PLAN, INC.

Case No. 97-11031-MAM-7

Debtor.

**ORDER REQUIRING TRUSTEE TO PAY COMMISSION SPECIFIED IN THE  
LEASES AND REQUIRING SAAD REALTY GROUP, L.L.C. TO PAY NET  
RENTAL FUNDS TO TRUSTEE**

Leah P. Ladd, Mobile Alabama, Attorney for Saad Realty Group, L.L.C.  
Theodore L. Hall, Mobile, Alabama, Trustee for Mason Plan, Inc.

This matter is before the Court on the motion of Saad Realty Group, L.L.C. (“Saad”) for instructions as to disbursement of rental payments it has received. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, Saad is instructed to deduct the commissions specified in the leases for the property located at 355 and 365 Williams Street from any rental payments it has received or will receive under said leases and to disburse the net rental payments to the Trustee of Mason Plan, Inc.

**FACTS**

Saad represented The Elizabeth Vrachalus Trust in negotiation and obtaining leases for the property located at 355 and 365 Williams Street. The property at 355 Williams Street Lessor is currently being leased by EZPAWN Alabama, Inc. and under the lease a commission of \$70.00 per month is to be paid to Saad from the gross rents. The property at 365 Williams Street is currently being leased by PCI Capital Corporation doing business as “Pawn Mart” and under that lease a commission in the amount of 6% of the gross rent is to be paid to Saad. Both

leases provide that every provision contained in the lease shall also bind, apply to and run in favor of successors in interest. By settlement agreement dated May 17, 1999 and subsequently approved by this Court, Elizabeth Vrachalus, individually and on behalf of The Elizabeth Vrachalus Trust, agreed to turn over to the State of Alabama, for ultimate distribution to the Bankruptcy Court in connection with the Mason Plan bankruptcy, all of the right, title and interest in the property known as 355 and 365 Williams Street and 2000 Government Street, Mobile Alabama. These properties were conveyed to Theodore L. Hall as Trustee of Mason Plan, Inc., by deed dated September 3, 1999. The parties agreed in their briefs that the net rental payments are to be paid to the Trustee. Saad now asks this court: (1) for instructions as to how to disburse net rental payments from the property; (2) to instruct EZPAWN and Pawn Mart how, when, and to whom to make future net rental payments; (3) to award Saad its attorneys fees and costs incurred in connection with this matter; and (4) to provide such additional instructions as the Court deems necessary or appropriate.

#### LAW

The Elizabeth Vrachalus Trust conveyed the properties at 355 and 365 Williams street, along with any rights or interests in that property, to the Trustee of Mason Plan, Inc. Elizabeth Vrachalus Trust could not convey more than the interest it had in the property. That property interest was subject to the lease agreements concerning those properties. As such, the Trustee received the properties subject to the lease agreements and conditions contained in them. The leases themselves provided that any successors in interest would be bound by every provision they contained. Therefore, the Trustee is bound by the terms of the agreement to pay the stated commissions to Saad and the lessees are bound to pay the specified rent money to the Trustee.

If the court were to view the lease contracts as executory contracts that may be assumed or rejected by debtor, as Saad's attorney argues in her brief, it would still come to the same conclusion. As stated in their brief, it is settled law that a debtor cannot assume part of an unexpired lease while rejecting another part. *In re S. E. Nichols, Inc.*, 120 B.R. 745, 747 (S.D.N.Y. 1990) (citations omitted). "The debtor must assume the lease in toto with both the benefits and burdens in tact." *Id.*; see also, e.g., *Schokbeton Industries, Inc. v. Schokbeton Products Corp.*, 466 F.2d 171, 175 (5th Cir. 1972) (holding that a debtor in possession cannot assume the benefits of an executory contract without assuming its burdens as well). Therefore, the Trustee is bound by the terms of the agreement to pay the stated commissions to Saad and the lessees are bound to pay the specified rent money to the Trustee.

Saad's attorney also asserts in her brief that the commission amount for the lease of 355 Williams Street was changed upon oral agreement on April 4, 1997 when that lease was renewed. However, there was no evidence presented concerning such oral agreement and there is no evidence of any change in the commission amount on the face of the renewal document. Therefore, the commission rate specified in the document shall remain controlling.

Saad has requested that attorney's fees be awarded in this matter. Generally attorneys fees are recoverable only where authorized by statute, provided for in a contract or in an equitable proceeding where the efforts of an attorney create a fund out of which fees may be paid. *State ex rel. Payne v. Empire Life Ins. Co.*, 351 So.2d 538 (Ala.1977); *Shelby County Comm'n v. Smith*, 372 So.2d 1092, 1096 (Ala. 1979). There is no applicable statute and this is not an equitable action that creates a fund, so we must look to the contract to determine if

attorney's fees may be awarded. The leases have identical provisions concerning attorney's fees. They state:

“In the event of employment of an attorney for the collection of any amount due hereunder, or for the institution of any suit for possession of said property, or for advice or service incident to the breach of any other condition of this lease by the Lessee, or on account of bankruptcy proceedings by or against Lessee, or legal process being issued against the furniture and effects of the Lessee, located upon the leased premises, or the leasehold interest of Lessee, the Lessee agrees to pay and shall be taxed with a reasonable attorneys fee, which fee shall be a part of the debt evidenced and secured by this lease.”

This provision provides for attorney's fees when having to proceed against Lessee to collect monies due or for some other breach. There has been no breach alleged and this action is not against Lessees. Saad has already received all amounts due under the lease and is merely requesting instructions concerning additional money it has received. Therefore the contracts do not provide for attorney's fees to be awarded in this case.

THEREFORE, IT IS ORDERED AND ADJUDGED:

1. Saad Realty Group, L.L.C is ordered to deduct \$70.00 per month commission as specified in the lease for the property located at 355 Williams Street from any rental payments it has received or will receive under that lease and to disburse the net rental payments to the Trustee of Mason Plan, Inc.

2. Saad Realty Group, L.L.C. is ordered to deduct 6% commission as specified in the lease for the property located at 365 Williams Street from any rental payments it has received or will receive under that lease and to disburse the net rental payments to the Trustee of Mason Plan, Inc.

3. The request for attorney's fees is DENIED.

Dated: August 2, 2000

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MARGARET A. MAHONEY  
CHIEF BANKRUPTCY JUDGE