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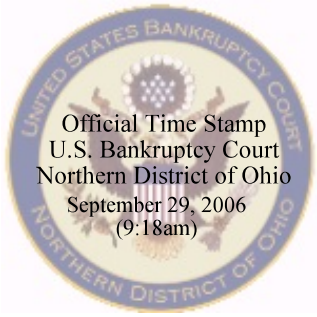

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 05-93363
	)	(jointly administered with 05-93295
THE AUSTIN COMPANY, et al.,	)	and 05-93422)
	)	
Debtors.	)	Chapter 11
	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

Prepetition, Kilroy Realty L.P. and one of the chapter 11 debtors, The Austin Company, entered into a commercial real estate lease. Austin rejected the lease as of the petition date. Kilroy then filed an administrative expense claim for rent and expenses for more than two months after the lease was rejected, claiming that Austin did not actually abandon the real estate during that time.[1] The debtors and the official committee of unsecured creditors object and argue that any amount due is a general unsecured claim for damages for breach of the lease, only.[2] For the reasons stated below, the claim is denied administrative expense status.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

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[1] Docket 408, 470, 836, 881, 947.

[2] Docket 435, 441, 839, 902. Although the lease was entered into with Austin, all of the debtors in this administratively consolidated case join in the objection.

FACTS[3]

Prepetition, The Austin Company and Kilroy Realty, L.P. entered into a lease for commercial real estate located in Seattle, Washington (the premises). The lease term started October 1, 1998 and ended May 31, 2006, with a monthly rent of $30,955.00 plus certain operating expenses.

In February 2005, Glenn Hobratschk, a representative of Austin, met with Dan Camilleri, a representative of Kilroy. Mr. Hobratschk told Mr. Camilleri that Austin planned to vacate the premises and would try to find a subtenant. Kilroy, at Austin's request, later arranged for a dumpster to be brought to the premises so that Austin could dispose of some of its personal property. Other property remained at the premises, including documents related to projects Austin had handled (the documents), other papers, supplies, and equipment (the miscellaneous property), and furniture (all three collectively, the remaining personal property).

In April 2005, Austin asked Kilroy to change the locks at Austin's expense and to keep the keys so that they would be available for such persons as Austin might designate. That same month, Austin sold the furniture to H2 Office Designs. H2 removed the furniture that did not contain documents or miscellaneous property and left some furniture that contained documents as well as some miscellaneous property. In July 2006, H2 submitted a proposal to Austin in

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[3] The court originally set this matter for an evidentiary hearing. (Docket 571). Before the hearing, the parties submitted stipulated facts (Docket 574) and briefs indicating that additional facts were disputed. On the hearing date, the parties stated that they preferred to submit the matter on briefs and stipulated facts. *See* docket entry for 6/21/06. The court adjourned the hearing to accommodate this request. (Docket 869). After the parties submitted amended hearing briefs to reflect that they were relying solely on the stipulated facts, the court held oral argument. *See* docket entry for 8/15/06.

which it offered to remove the remaining personal property at a cost of $3,689.00. Mr. Hobratschk rejected the proposal, stating in a letter to H2:

> After further consideration I have decided to wait to clean up the space since we have until next May 31 to do so, and in the meantime there may be something there that will come in useful [sic].

H2 responded by removing some of the remaining furniture, but leaving behind the remaining personal property. Austin never removed the remaining personal property from the premises.

Austin paid rent through July 2005. On October 6, 2005, Kilroy sent Austin a 5-day notice to pay rent or vacate the premises.

On October 14, 2005, Austin and related companies filed chapter 11 cases which are being administered jointly. On the next business day, October 17, 2005, the debtors filed a motion to reject the Kilroy lease as of the petition date.[4] The rejection motion stated that the debtors had vacated the premises, the premises had no value to the estate, and the lease should be rejected as of the petition date. It included a proposed order granting the motion as an exhibit. The debtors served Kilroy with the rejection motion and a notice setting November 7, 2005 as the deadline for filing objections to the motion and also setting a hearing for November 17, 2005.

Kilroy's Washington counsel sent a letter to the debtors' counsel dated November 2, 2005 in which she asked that the order granting the motion include this language: "any and all remaining personal property is deemed abandoned and may be retained by the landlord as the landlord's property without accountability to the debtor." The letter also requested that the

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[4] Docket 20. The motion also addressed a lease with a third-party that is not at issue here.

debtors remove all remaining personal property or Kilroy would remove it and expect to charge the estimated $5,846.95 cost to the debtors.

Counsel for the parties discussed a proposed agreed order resolving the debtors' motion, but could not reach agreement on the terms.[5] Despite that, Kilroy did not file an objection to the motion and did not appear at the hearing. The court granted the unopposed motion at the hearing and the debtors submitted a proposed order for the court's review. On November 29, 2005, the court entered the order as proposed by the debtors (the rejection order).[6] The rejection order stated that the lease was rejected as of the petition date and did not include the language from Kilroy's November 2, 2005 letter.

By letter dated November 30, 2005, Kilroy's counsel advised the debtors' counsel that the remaining personal property would be boxed and moved to a storage space. The debtors responded through counsel that they considered this property to have been abandoned. Later, Kilroy's Cleveland counsel told the debtors' counsel that Kilroy was concerned that it might be exposed to liability if it disposed of the remaining personal property without a court order. Two of the debtors' counsel responded separately that the remaining personal property was not part of the estate and disposing of it would not expose Kilroy to liability. To resolve the concern of Kilroy's counsel, however, the debtors' counsel agreed to enter into a stipulated order. That order, entered on January 26, 2006, stated that the:

> Lease Rejection Order is hereby amended and supplemented to provide that all personal property of every kind or nature, tangible or intangible, which was (as of the Petition Date) and remains located in the premises described by the [lease]

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[5] The stipulated facts do not state what the disagreement was over.

[6] Docket 197.

(the "Personal Property") is abandoned and such Personal Property is not part of the Debtors' estate.[7] (the abandonment stipulation).

In addition to the stipulated facts, the court finds that the lease provides that at lease termination, Austin shall surrender the premises in "good, neat and clean order and well-maintained condition . . .and . . . shall remove all of its property[.]"[8]

KILROY'S ADMINISTRATIVE EXPENSE REQUEST

Kilroy requests administrative expenses totaling $89,863.79, consisting of:

Rent	
October 14, 2005 through October 31, 2005	$18,682.30
November 1, 2005 through November 30, 2005	$32,175.08
December 1, 2005 through December 31, 2005	$32,175.08
Storage fees	
January 1, 2006 through January 31, 2006	$ 984.38
Removal and Disposal of remaining personal property	
(Estimated)	$ 5,846.95

THE POSITIONS OF THE PARTIES

The parties' arguments have evolved in the course of the briefing and so a review of the positions is helpful.

[7] Docket 398.

[8] Lease ¶19.1. See also ¶ 7.2 and ¶ 17.6.

Kilroy's original motion[9] cited both 11 U.S.C. §§ 365(d) and 503(a) as the source of its entitlement to recovery. In that motion, Kilroy asked for rent and expenses from the petition date through December 31, 2005. Kilroy, anticipating that the debtors would argue that Austin abandoned the premises before filing the bankruptcy petition, countered that Austin did not abandon the premises because it left personal property behind.

The debtors objected and responded[10] that they rejected the lease as of the petition date. As a result, any damages claimed by Kilroy (including unpaid rent, clean-up charges, and storage costs) flow from that breach and are general, unsecured damages under § 502(g). Alternatively, they contend that Kilroy failed to show that the claimed rent was an actual, necessary cost of preserving the estates, a precondition to being paid as an administrative claim under § 503. And they posit that Kilroy should have mitigated its damages by exercising its lease rights to dispose of property left on the premises.[11]

Kilroy's amended hearing brief[12] takes the position that the lease continued to exist until the lease rejection order was docketed on November 29, 2005 and that even after that date the debtors are liable for rent until the abandonment stipulation was entered on January 26, 2006. Looking to the § 503 argument, Kilroy contends that it provided value to the chapter 11 estates at

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[9] Docket 408.

[10] Docket 435, joined in by the committee at docket 441.

[11] The court will not address this argument in this opinion because it goes to the amount of the damage claim, rather than the priority to be given to it.

[12] Docket 881. The parties amended their hearing briefs to delete references to non-stipulated facts as well as to address certain legal issues at the court's request.

least until the lease rejection order was docketed because the debtors had the right to enter the premises and to get their remaining personal property.

The debtors' amended hearing brief[13] reiterates their arguments and denies that Kilroy provided value to the estates because the remaining personal property had no value.

Kilroy's rebuttal brief seems to say that it seeks recovery only under § 365(d)(3).[14] Kilroy argues that: (1) Washington state law, not federal bankruptcy law, determines when the lease was terminated; (2) under Washington law, the debtor is required to prove that it abandoned the premises before the lease is considered terminated; (3) the debtors' failure to remove the remaining personal property means that they did not abandon the premises, which means that rent is owed until the abandonment stipulation was entered; and (4) all of this gives rise to an administrative claim for the postpetition rent and related charges.

Additionally, Kilroy argues that equity favors permitting it to recover in full.

The difference between the two positions is, not surprisingly, significant from a monetary standpoint. If Kilroy's claim is entitled to priority either under bankruptcy code § 365(d) or § 503, it will be paid as a first priority claim under § 507(a)(1). Otherwise, it is a general unsecured claim and Kilroy will share with other unsecured creditors to the extent that funds are available.

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[13] Docket 839.

[14] Docket 947 at 2. (". . . the correct issue (as Kilroy has consistently stated) is whether the Lease remained in existence and unexpired as of the relevant dates (in this case at least until the date of the Rejection Order). This is a question under Code Section 365(d)(3) [and applicable state law].")

DISCUSSION[15]

I. 11 U.S.C. § 365

A.

Kilroy makes an overarching argument that equity favors granting it the relief requested. Kilroy bases this on two points, one relating to Congressional intent and the other to the specific facts of this case. On the first point, Kilroy argues that Congress adopted § 365(d)(3) in 1984 to give relief to landlords who in many cases were not being paid rent in the gap period between the petition filing date and the date on which a debtor decided to assume or reject a lease, and yet were still required to provide utilities and similar services to the debtor during that time. To remedy this problem, the new law requires a debtor to perform its obligations during the gap period. Kilroy argues that if the debtors' argument prevails it would be contrary to legislative intent because:

> [it] would mean that if a chapter 11 debtor occupied a building for one (or 3 or 10) years at a contractual rate of $10,000.00 a month and then rejected the lease–either because it couldn't get a plan confirmed or found cheaper space–it would have no obligation to pay any post-petition rent (or that any post-petition rent paid should be reimbursed under the theory of mistake) as long as the debtor could get an order rejecting the lease 'as of the petition date.'[16]

On the second point, Kilroy contends that it tried to resolve the issue early on when it asked the debtors to include language in the lease rejection order relating to abandoning the remaining

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[15] The debtors' chapter 11 cases were filed on October 14, 2005, prior to the effective date of many of the provisions of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The version of the bankruptcy code cited in this opinion is the one that was in effect on that date.

[16] Docket 881 at 9.

personal property and the debtors declined to do so. The fault, therefore, lies with the debtors, not with Kilroy.

Both arguments must be analyzed in the context of bankruptcy code § 365. Chapter 11 corporate debtors frequently are parties to commercial real estate leases. Bankruptcy code § 365(d)(3) provides that the debtor may assume or reject such a lease, subject to limitations not at issue here. A debtor who wishes to reject a lease initiates the process by filing a motion and giving other parties appropriate notice and an opportunity to be heard. The debtor is required to perform all of its obligations under the lease from the time of the bankruptcy filing until the lease is rejected. *See* 11 U.S.C. § 365(d)(3).

The code does not dictate any particular date on which a lease rejection becomes effective. In many cases, a lease is rejected as of the date on which the rejection order is entered. Courts, however, have the equitable power to approve rejection as of a variety of dates, which range from the date on which the petition is filed, to the date the motion to reject is filed, to the date the order rejecting the lease is entered. *See In re O'Neil Theatres, Inc.*, 257 B.R. 806 (Bankr. E.D. La. 2000) (court permitted the debtor to reject a lease retroactive to the petition date). *See also, Thinking Machines Corp. v. Mellon Fin. Servs. Corp. #1 (In re Thinking Machines Corp.)*, 67 F.3d 1021, 1028-29 (1st Cir. 1995); and *In re Chi-Chi's, Inc.*, 305 B.R. 396 (Bankr. Del. 2004) (both cases recognizing the general equitable principal that a court has discretion to order a rejection to be effective retroactively).

In this case, the debtors filed the motion to reject the lease two days after they filed their petition and specifically asked at that time that the lease be rejected as of the petition date. They gave Kilroy appropriate notice and an opportunity to respond. Kilroy admits receipt of the

motion and some contact with the debtors concerning it. Kilroy also admits it did not have an agreement with the debtors as to how the motion should be resolved and yet it did not file an objection to the motion or appear at the hearing. Kilroy does not challenge the fact that the order submitted by the debtors and entered by the court is consistent with the relief requested in the motion. The order is a final order, *see Delightful Music Ltd. v. Taylor (In re Taylor)*, 913 F.2d 102, 104 (3d Cir. 1990), and no appeal was taken from it.

Kilroy's equitable argument that it should not now be bound by the rejection date stated in the lease rejection order is unavailing. Kilroy had notice and an opportunity to be heard on this issue. The order entered is supported by law and is identical to the proposed order served on Kilroy and other parties in interest. Kilroy could have objected to the lease rejection motion, could have appeared at the hearing on the motion, could have appealed from the order granting the motion, could have raised this as an issue when it asked to amend and supplement the order, and/or could later have provided a legal argument that the judgment should be set aside.[17] Since Kilroy did not do any of these things, equity does not demand or support a change in the rejection date at this point.

This result does not run afoul of Congress's intent in adopting the 1984 change. Kilroy had a full and fair opportunity to argue that the lease rejection should have been effective as of a date other than the petition date. Had it made that argument, the court would have considered the Congressional intent argument at that time. Although the time for that analysis has passed, the court nevertheless notes that the debtors in this case acted promptly to notify Kilroy that they intended to reject the lease, which is consistent with the statutory intent to reduce a landlord's

[17] *See* FED. R. BANKR. P. 9024.

uncertainty during the gap period between the petition date and the lease rejection date. If Kilroy had acted promptly to protect its own interests, it would not have found itself uncertain or mistaken about its rights.

B.

When the debtor rejects a lease, it is a court-approved breach of contract that gives rise to a cause of action for damages. The damages are deemed by statute to arise before the petition date and are, therefore, paid as a general unsecured, nonpriority claim. *See* 11 U.S.C. §§ 365(g)(1), 502(g). The parties agree on these principles. The debtors, however, argue that this ends the discussion because Kilroy's claim for rent and cleanup is a general unsecured claim arising out of the lease rejection, while Kilroy contends that the analysis continues under § 365(d)(3). In particular, Kilroy's theory is that the lease rejection did not cut off the debtors obligation to pay rent in full because the debtors continued to occupy the premises. Kilroy argues that a lease can only be terminated under Washington law if the debtors unequivocally abandon the premises and that the debtors failed to do so because they left behind personal property.[18]

As noted above, a debtor must timely perform all lease obligations until the lease is rejected. 11 U.S.C. § 365(d)(3). Once a lease is rejected, however, this section no longer applies. *See In re Roberds*, *Inc.*, 270 B.R. 702, 705 (Bankr. S.D. Ohio 2001). *See also Cukierman v. Uecker (In re Cukierman)*, 265 F.3d 846, 852 (9th Cir. 2001) (stating that "[s]ection 365(d)(3) applies only to obligations that arise under a lease 'until it is assumed or

[18] For clarity, the court notes that neither party makes any argument regarding prorating rent. *See Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986 (6th Cir. 2000).

rejected.'"). Here, the debtors rejected the lease as of the petition date, which means that the debtors do not have any lease obligations to Kilroy that would be covered by this section. Section § 365(d)(3) does not, therefore, provide a basis for Kilroy to recover post-rejection rent or expenses.

Kilroy's argument that Washington state law should govern this analysis is mistaken. The concept of lease rejection is created by bankruptcy law and the code clearly provides that the section only applies until the lease is rejected. The question of when a lease is rejected is a federal bankruptcy law issue, as discussed above, not a state law issue. Here, the court order unambiguously states that the lease is rejected as of the petition date. Under the circumstances of this particular case, where the court has already entered an order establishing the rejection date, Washington law is irrelevant.

Moreover, even if state law were relevant, it would not dictate a different result. Kilroy argues that under Washington law a lease cannot be terminated until the tenant abandons the premises and that abandonment must be shown by both "an act or omission and an intent to abandon," citing *Aldrich v. Olson*, 531 P. 2d 825 (Wash. Ct. App. 1975). Here, Austin turned the keys over to Kilroy prepetition, stopped conducting business on the premises, cleaned out most, but not all, of its personal property, stopped paying rent, and failed to respond to a notice to pay rent or vacate. Taken as a whole, these are acts showing an intent to abandon the real estate. Additionally, Austin did not make any affirmative statement to Kilroy after it stopped paying rent that would indicate anything other than an intent to abandon. Similarly, after the debtors filed their petition, they consistently and clearly stated that they had no interest in the premises or the remaining personal property. The Washington standard is, therefore, established.

The fact that personal property remained at the premises is similarly irrelevant. Kilroy essentially argues that the debtors could not reject the lease until they complied with their lease obligations to leave the premises in "neat and clean order." This is again an untimely attempt to challenge the rejection date, but the court will address it nevertheless. The court in *In re Ames Dep't Stores, Inc.*, 306 B.R. 43 (Bankr. S.D. N.Y. 2005) considered a somewhat similar argument. There, the court framed the issue as "whether a debtor-tenant's lease can be rejected when, contrary to a cleanup obligation in its lease, it leaves behind, on the premises, abandoned personal property that assertedly results in a continued occupancy of the premises on the part of the tenant[.]" *Id.* Among other things, the court rejected the landlords':

> implicit contention that the Debtors' statutory right to reject can be qualified by requirements not in the Bankruptcy Code itself, and especially by an implied requirement of compliance with lease covenants that are burdensome to the debtor, and that may form part of the rationale for rejection in the first place.

Id. at 51. The court then also rejected the landlords' argument that, by leaving personal property on the premises, the debtors failed to surrender possession with the result that the rejection did not become effective. *Id.* at 53-54. On this point, the court distinguished between a debtor who deliberately stores estate property on the premises after rejecting a lease and the debtor who clearly abandons the personal property. In the former circumstance, the landlord may well have a remedy in the form of a cause of action to evict the debtor and/or a § 503 administrative claim for rent, while in the latter circumstance the landlord has only a general unsecured claim for breach of a lease term. The debtors in this case did not take advantage of Kilroy by storing estate property at Kilroy's expense. Instead, they disclaimed any interest in the property on the

premises. This may breach the lease term requiring Austin to leave the premises "neat and clean," but it does not adversely affect the debtors' lease rejection.

II. 11 U.S.C. § 503

The bankruptcy code's general principle is that a debtor's assets are to be distributed equally to creditors who are similarly situated. The code does, however, deviate from this general rule by establishing priority for certain types of claims. One departure is that a creditor who provides actual benefit to the bankruptcy estate is entitled to have that claim paid as a first priority administrative expense. 11 U.S.C. §§ 503, 507(a)(1).

Requests for a debt to be paid as an administrative expense are governed by bankruptcy code § 503. That section states in relevant part that:

> After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including–
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case[.]

11 U.S.C. § 503(b)(1)(A). "The focal point of the allowance of a priority is to prevent unjust enrichment to the estate, not to compensate the creditor for its loss . . . Thus a court looks to the actual benefit to the estates and not the loss sustained by a creditor." *In re Globe Metallurgical, Inc.*, 312 B.R. 34, 40 (Bankr. S.D. N.Y. 2004) (citations omitted). To come within this section, "the claimant must prove that the debt (1) arose from a transaction with the debtor in possession as opposed to the preceding entity (or alternatively, that the claimant gave consideration to the debtor-in possession); and (2) directly and substantially benefitted the estate." *Employee Transfer Corp. v. Grigsby (In re White Motor Corp.)*, 831, F.2d 106, 110 (6th Cir. 1987). *See*

also, Pension Benefit Guar. Corp. v. Sunarhauserman, Inc. (In re Sunarhauserman, Inc.), 126 F.3d 811, 816 (6th Cir. 1997) ("[T]he well-accepted 'benefit to the estate' test . . . states that a debt qualifies as an 'actual, necessary' administrative expense only if (1) it arose from a transaction with the bankruptcy estate and (2) directly and substantially benefitted the estate.").[19] The claimant has the burden of proof by a preponderance of the evidence. *In re HNRC Dissolution Co.*, 343 B.R. 839, 843 (Bankr. E.D. Ky. 2006).

If a debtor fails to vacate premises after rejecting a lease, the landlord may potentially recover the post-rejection rent as an administrative expense. *See In re Roberds, Inc.*, 270 B.R. at 706 (". . . § 503(b)(1)(A) governs the determination of post petition rent owed to a lessor for the period after rejection of the lease until the property is vacated."). *See also* William L. Norton, *Norton Bankruptcy Law and Practice* § 39.42 (2d ed. 2006); 4 Collier on Bankruptcy ¶ 502.08[2][a], p. 502-71 (15th ed. rev. 2006). To obtain priority payment for the rent, cleanup, and storage charges, Kilroy must prove that it meets the *White Motor* two-prong test for each part of the claim.

1. Rent

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[19] The Sixth Circuit recognized an exception to the general rule established in the *White Motor* decision in *United Trucking Serv., Inc. v. Trailer Rental Co. (In re United Trucking Serv., Inc.)*, 851 F.2d 159 (6th Cir. 1988) based on unjust enrichment. In that case, the circuit court held that the "inducement" portion of the *White Motor* test was not relevant under the facts of that case and that a lessor's claim for postpetition damage to leased property under a breached lease covenant was entitled to administrative priority. The exception is appropriately limited to egregious fact patterns in which a debtor continues to take advantage of a lessor's property in the post-petition operation of its business; the debtors here did not continue to use Kilroy's property in their postpetition operations. S*ee XL Specialty Ins. Co. v. James River Coal Co. (In re James River Coal Co.),* 2006 WL 2548456 at *5 (M.D. Tenn. 2006); *Beneke Co. v. Economy Lodging Sys., Inc. (In re Economy Lodging Sys., Inc.)*, 234 B.R. 691, 699 (B.A.P. 6th Cir. 1999); *In re Cardinal Indus., Inc.*, 142 B.R. 801, 805-6 (Bankr. N.D. Ohio 1992).

Kilroy did not prove that it entered into a transaction with the debtors that would obligate them to pay rent postpetition. The only real estate transaction Kilroy entered into was the lease transaction with Austin. The debtors have consistently taken the position that they did not intend to have a landlord-tenant relationship with Kilroy, as seen by these facts:

(1) the motion to reject was filed just a few days after the petition date and stated that (a) the debtors had vacated the premises and (b) the premises had no value to the debtors' estates.

(2) the motion proposed to reject the lease as of the petition date.

(3) when Kilroy sent a letter dated November 30, 2005 asking for instructions from the debtors as to what to do with the remaining personal property, debtors' counsel wrote back that the remaining personal property had been abandoned and was not part of the estate.

(4) separately, two of the debtors' counsel told Kilroy's Washington counsel that the remaining personal property was not part of the estate and that Kilroy could dispose of it without violating the automatic stay;[20] and

(5) the stipulation ultimately entered into regarding the remaining personal property states again that the property is not part of the debtors' estate and is abandoned.

These facts point ineluctably to the conclusion that the debtors did not enter into a lease transaction with Kilroy postpetition.

Even if Kilroy had proven that it entered into a postpetition transaction with the debtors, it would also have to prove that the transaction directly and substantially benefitted the estate before Kilroy would be entitled to payment ahead of general unsecured creditors. Kilroy places great reliance on Mr. Hobratschk's statement to H2 in July 2005 that he would leave the property

[20] *See* 11 U.S.C. § 362.

on the premises at that time because "there may be something there that will come in useful [sic]." There are several reasons why this evidence is unpersuasive on this point: (1) on its face, it is far from a ringing endorsement as to the value of the remaining personal property; and (2) because the statement was made prepetition by Austin, it says nothing about what the value is to the debtors and the estate. Kilroy does not identify any statement made by the *debtors* as to the positive value the documents had to them. To the contrary, the debtors repeatedly advised Kilroy that they did not consider the remaining personal property to be property of the estate.

Kilroy also attempts to show that the debtors enjoyed substantial benefit because they had the right to enter the premises and remove the remaining personal property. If the debtors had actually done this, it might have been a step toward showing benefit. The undisputed fact, however, is that the debtors never re-entered the premises, consistent with their position from the beginning of these chapter 11 cases that there was nothing of value to them in that space.

2. Cleanup Expenses

Kilroy's argument that its cleanup expenses should be given priority is similarly unavailing. The obligation to leave the premises clean arose solely from Kilroy's lease with Austin, not from any transaction with the debtors. And removing the property in which the debtors claimed no interest could not possibly provide direct and substantial benefit to the estate. *See In re Ames Dep't Stores, Inc.* 306 B.R. at 55-56.

3. Storage Charges

Kilroy's claim for administrative expense for storing the remaining personal property does not meet with any greater success. The debtors did not ask Kilroy to store this property and they did not benefit from any storage because, as discussed above, they repeatedly and

consistently denied any interest in it. There was no transaction with the debtors and no benefit to the estate from Kilroy's unilateral decision to store the remaining personal property.

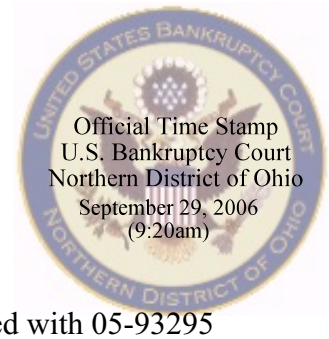
CONCLUSION

For the reasons stated, Kilroy's request for payment of rent and related expenses as an administrative expense, whether under § 365 or § 503, is denied. A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 05-93363
	)	(jointly administered with 05-93295
THE AUSTIN COMPANY, et al.,	)	and 05-93422)
	)	
Debtors.	)	Chapter 11
	)	
	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion entered this same date, the application of Kilroy Realty, L.P. for payment of rent and related expenses as an administrative expense is denied. (Docket 408).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge