

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

MICHELLE MARIE WARD

CASE NO. 03-66503

Debtor

Chapter 13

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER**

Presently under consideration by the Court are three separate motions filed in the

bankruptcy case of Michelle Marie Ward, d/b/a H&R Block (“Debtor”). On October 22, 2004, a motion was filed by Edward and Sandra Quinn seeking relief from the automatic stay to proceed with the eviction of the Debtor from premises located at 2666 Main Street, Whitney Point, New York (the “Business Premises”). The Debtor filed opposition to the Quinns’ motion on November 10, 2003, to which the Quinns filed a reply on November 11, 2004. On November 12, 2004, H&R Block Eastern Tax Services, Inc. (“H&R Block”) filed a response in support of the Quinns’ motion.

On December 6, 2004, H&R Block filed a motion seeking relief from the automatic stay with respect to a franchise agreement (“Agreement”) between it and the Debtor. Opposition to H&R Block’s motion was filed by the Debtor on December 16, 2004.

In addition to filing opposition to H&R Block’s motion, the Debtor also filed a motion on December 16, 2004, seeking to modify her chapter 13 plan to provide for the assumption of the Agreement, as well as the lease (“Lease”) of the Business Premises.

The three motions were originally heard by the Court at its regular motion term in Syracuse, New York, on December 21, 2004. The Court adjourned the motion to January 18, 2005, in order to allow the parties an opportunity to submit memoranda of law. On January 18, 2005, following further oral argument by the parties, the Court agreed to take the motions under submission.

### **JURISDICTIONAL STATEMENT**

The Court has core jurisdiction over the parties and subject matter of these contested

matters pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A), (G) and (O).

### FACTS

The Debtor filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”), on September 25, 2003. In her schedules, the Debtor lists a debt to the Internal Revenue Service of \$5,294.85 for unpaid income taxes. *See* Debtor’s Schedule E. The Debtor also lists Sandra Quinn as holding an unsecured claim in the amount of \$39,510, identified as a “Loan.”<sup>1</sup> *See* Schedule F. H&R Block is not listed as a creditor. The Debtor lists no executory contracts or leases in her Statement of Financial Affairs.

The Debtor’s Amended Plan, filed February 13, 2004, was confirmed by Order of this Court on July 14, 2004. The plan provides for payments of \$250 per month for 60 months at a dividend to unsecured creditors of approximately 4.85 per cent. According to ¶ 3.H. of the Debtor’s plan, entitled “Leases and Contracts,” the Debtor responded to the statement that she “hereby assumes the following unexpired leases and executory contracts, and rejects all others” by answering “NONE.”

On or about January 2, 2002, the Debtor and H&R Block entered into the Agreement. *See* Exhibit 1 of H&R Block’s Motion. Paragraph 10 of the Agreement requires that the Debtor, *inter alia*, maintain office hours of six hours per week during the Off Season and inform clients

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<sup>1</sup> According to the claims registry in the Debtor’s case, Sandra Quinn filed three proofs of claim in the amount of \$40,318, identified as the sale of business/business property in December 2001. The claim is identified as “secured.” *See* Claims 14 and 15, filed December 15, 2003, and Claim 18, filed February 17, 2004.

of the availability of Off Season service by means of information signs and a “phone referral service or answering service or device.” *See* Exhibit A of H&R Block’s Motion at ¶ 10. In addition the Debtor was required to file all business and personal tax returns and pay all taxes due in a timely manner. *Id.* The latter requirement is further identified at ¶ 14(c) of the Agreement as being a basis for termination by H&R Block “with opportunity to cure.”<sup>2</sup> *Id.* at 14(c).

By letter dated September 20, 2004, approximately one year postpetition, H&R Block notified the Debtor of various breaches of the Agreement and informed her that she had fifteen days from the date of the notice to cure the breaches or the Agreement would be terminated. This “cure” included providing H&R Block with “written evidence that delinquent rent and amounts due for electric service for your tax office have been paid in full; (b) re-open your tax office with the Required Off Season hours; and (c) establish a telephone answering service or device.” *See* Exhibit 2 of H&R Block’s Motion. It also asked that the Debtor provide it with written confirmation that she had filed bankruptcy, as well as the name and address of the attorney representing her in the case. H&R Block also inquired whether a trustee had been appointed in the Debtor’s case and whether the trustee had assumed or rejected the agreement. *Id.* By letter dated October 6, 2004, H&R Block notified her that the Agreement was terminated “effective immediately.” *See* Exhibit 3 of H&R Block’s Motion.

The Debtor and the Quinns entered into the Lease of the Business Premises on July 11, 2002. *See* Exhibit attached to the Quinns’ Motion. The Lease provides for monthly payments

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<sup>2</sup> This is to be distinguished from other actions by the Debtor which are not subject to cure. For example, one such action which cannot be cured is “[t]he adjudication of the Franchisee as a bankrupt or the filing of any petition by or against Franchisee under any bankruptcy statute unless such petition is dismissed within 30 days after it is filed.” *Id.* at ¶ 13(a).

of \$400, beginning August 10, 2002, through July 31, 2007. At the time that they originally filed their motion, the Quinns indicated that the Debtor had failed to pay rent under the terms of the Lease for the months of September 2004 through November 2004. According to the affidavit of Scott R. Kurkowski, Esq., attorney for the Quinns, sworn to on January 13, 2005, the Quinns accepted payment of \$1,600 from the Debtors on or about December 24, 2004 to cure the arrears and a payment of \$400 covering the rent due for January 2005.

## **DISCUSSION**

### **Debtor's Motion to Modify Plan**

Code § 1329(a) sets forth the purposes for which a debtor may modify his/her plan after confirmation. These include to “(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; or (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan . . . .” 11 U.S.C. § 1329(a). No where in the statute is there authority for a debtor to request modification of his/her plan to allow for assumption of a lease of nonresidential real property or of an executory contract. Accordingly, the Court must deny the Debtor's motion seeking to modify her plan.

### **Lease of the Business Premises**

Debtor filed her petition on September 25, 2003. She neither assumed the Lease within the sixty day period following commencement of the case; nor did she seek an extension of time to assume the Lease within that same period. Pursuant to Code § 365(d)(4), applicable to leases

of nonresidential real property, the Lease of the Business Premises was deemed rejected as a matter of law due to her failure to assume it within the sixty days after filing her petition. *See In re Damianopoulos*, 93 B.R. 3, 6 (Bankr. N.D.N.Y. 1988).

Pursuant to Code § 365(d)(4), the Debtor was required to immediately surrender the Business Premises to the Quinns once the sixty day period had run. The Quinns' attorney acknowledged that his clients continued to accept payments from the Debtor for approximately nine months postpetition until she defaulted in approximately July 2004 and they later learned that her agreement with H&R Block had been terminated. *See* Quinns' Motion at ¶ 4 and Reply Affidavit of Sandra Quinn, sworn to November 11, 1004, at ¶ 4. Because the Lease was deemed rejected in late November 2003, the Court finds that it is no longer property of the estate, leaving the parties "with the rights and remedies available outside of bankruptcy law." *Stoltz v. Brattleboro Housing Auth. (In re Stoltz)*, 315 F.3d 80, 86 n.1 (2d Cir. 2002). In other words, once the Lease was deemed rejected as a result of the Debtor's failure to assume it within the sixty days following commencement of the case, any action premised on the Debtor's failure to pay postpetition rent under what has become a month-to-month arrangement between her and the Quinns is no longer within the scope of the automatic stay. *See In re Goldrich*, No. CV-92-3924, 1992 WL 404725, at \*2 (E.D.N.Y. Dec. 23, 1992). Accordingly, there is no reason for the Court to deny the relief sought by the Quinns to permit them to pursue their rights in state court should they choose to do so.

#### Franchise Agreement with H&R Block

The franchise relationship between the Debtor and H&R Block is based on an executory contract, namely the Agreement entered into in January 2002. *See, generally, In re Quinones*

*Ruiz*, 98 B.R. 636, 638 (Bankr. D. Puerto Rico 1988). Code § 365(d)(2) provides that in a case under chapter 9, 11, 12 or 13 a trustee, or in this case a debtor, may assume or reject an executory contract at any time before confirmation of a plan. 11 U.S.C. § 365(d)(2). The statute's language is permissive, rather than mandatory. Case law has developed a "ride through" or "pass through" doctrine applicable to those situations in which the debtor fails to assume an executory contract and both parties continue to perform as if there had been no bankruptcy filing. *See National Labor Relations Board v. Bildisco*, 465 U.S. 513, 546 n. 12 (1984) (Brennan, J., dictum, concurring in part and dissenting in part) (explaining in dicta that "[i]n the unlikely event that the contract is neither accepted nor rejected it will 'ride through' the bankruptcy proceeding and be binding on the debtor even after a discharge is granted.); *Strumph v. McGee (In re O'Connor)*, 258 F.3d 392, 404 (5<sup>th</sup> Cir. 2001); *In re Hernandez*, 287 B.R. 795, 804 (Bankr. D. Ariz. 2002); *In re Texaco, Inc.*, 254 B.R. 536, 558 (Bankr. S.D.N.Y. 2000); *see also Boland v. Parmelee*, No. Civ. A.96C311, 1997 WL 642550 at \*5 (N.D.N.Y. Oct. 15, 1997) (stating that the "effect of neither accepting nor rejecting an executory contract is that the contract remains in force").

Under the "ride through" doctrine, a chapter 13 debtor has the option of simply continuing to perform the executory contract outside the plan as if it had been assumed. *See Texaco*, 254 B.R. at 536. In *Boland* the chapter 13 debtor had answered "None" to the demand for a list of executory contracts being rejected by the debtor. *Boland*, 1997 WL642550 at \*3. His plan was subsequently confirmed without any provision or mention of the executory contract which required that Boland turn over his interest in a corporation upon, *inter alia*, payment by the debtor of \$25,000 and the execution of a promissory note. *Id.* at \*4. The court concluded that the debtor had not assumed the contract simply by failing to reject it. *Id.* at 5. The court further

found that “[j]ust as the [a]greement could not be assumed by implication, it also could not be rejected by implication.” *Id.*

In the case before this Court, H&R Block contends that the Agreement was rejected since the Debtor never moved for its assumption and did not include a provision in her plan to do so. The Court concludes that her failure either to assume the Agreement or to include it in her plan does not constitute a rejection of the Agreement within the meaning of Code § 365(d)(2) despite the fact that there was a response of “None” to the question concerning whether the Debtor intended to assume any executory contracts. H&R Block had no notice of the plan provision as it was not listed as a creditor and, accordingly, did not rely on it. In fact, it was not until sometime after confirmation of the Debtor’s plan that it learned of the bankruptcy case. Furthermore, there is nothing in the Order confirming the Debtor’s plan that indicates either assumption or rejection of the Agreement.

Under these circumstances, the Agreement “rides through” and remains in full force as if the chapter 13 case was never filed, and the Court must determine whether to grant H&R Block relief from the automatic stay. Code § 362(a)(3) stays an entity from exercising control over property of the estate. The Debtor’s rights as a franchisee under the Agreement became property of the estate at the time she filed her petition on September 25, 2003. On October 6, 2004, subsequent to the confirmation of the Debtor’s plan, H&R Block notified the Debtor that the Agreement was terminated based on certain alleged defaults, including her prepetition failure to pay income taxes.

This action was void if it violated the automatic stay as set forth in Code § 362(a)(3), despite the fact that H&R Block had no notice of the existence of the stay at the time because it

was not listed as a creditor in the Debtor's schedules. *See In re 48<sup>th</sup> Street Steakhouse*, 835 F.2d 427, 431(2d Cir. 1997); *Federal Ins. Co. v. Sheldon*, 150 B.R. 314, 319 (S.D.N.Y. 1993); *In re Deppe*, 110 B.R. 898, 902 (Bankr. D. Minn. 1990). However, there is certainly an argument to be made that upon confirmation of the Debtor's plan, the Agreement revested in the Debtor and is no longer property of the estate. *See* Code § 1327(b). Under the terms of the Order confirming the Debtor's plan, all property of the estate which "is not proposed or reasonably contemplated to be distributable to the claimants under the Plan, shall revest in the Debtor(s) . . . ." *See* ¶ 14 of the Order of Confirmation, signed on July 14, 2004. Pursuant to Code § 362(c), the automatic stay continues as to an act against property until such property is no longer property of the estate.

Accordingly, the Agreement, which obviously was not intended to be distributed to creditors, upon confirmation of the Debtor's plan, became property of the Debtor, not the estate as of July 4, 2004. When H&R Block sent the letter of October 6, 2004, notifying the Debtor that it was terminating the Agreement, it was not exercising control over property of the estate and was not attempting to collect on a prepetition debt. Thus, it was not in violation of the automatic stay. This conclusion is also consistent with the prior finding by the Court that because the Debtor failed to assume the Agreement, it was left to "ride through" the Debtor's bankruptcy. Accordingly, the Court will grant H&R Block's motion seeking relief from the automatic stay to allow the parties to resolve matters, whether through agreement or through state court proceedings.

Based on the foregoing, it is hereby

ORDERED that Debtor's motion to modify her plan pursuant to Code § 1329(a) is denied; it is further

ORDERED that the Quinns' motion seeking relief from the automatic stay is granted; it is finally

ORDERED that H&R Block's motion seeking relief from the automatic stay is granted.

Dated at Utica, New York

this 28th day of February 2005

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge