UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: SANDIA RESORTS, INC., Case No. 11-15-11532 JA

Debtor.

ORDER DENYING MOTION TO ESTIMATE CLAIM AND FOR TEMPORARY ALLOWANCE OF PEAK HOSPITALITY'S CLAIM UNDER RULE 3018(a)

THIS MATTER is before the Court on the Motion to Estimate Claim and for Temporary Allowance of Peak Hospitality's Claim under Rule 3018(a) ("Motion for Temporary Allowance of Claim"). *See* Docket No. 193. The Court held a final, evidentiary hearing on the Motion for Temporary Allowance of Claim on September 6, 2016 and took the matter under advisement. Richard Leverick appeared at the hearing on behalf of Peak Hospitality, LLC ("Peak"), and Shay E. Meagle appeared at the hearing on behalf of the Debtor, Sandia Resorts, Inc. ("Sandia Resorts"). Because Peak is not the holder of a pre-petition claim entitled to vote, the Court will deny the Motion for Temporary Allowance of Claim.

FACTS

Sandia Resorts owns and operates the America's Best Value Inn (the "Hotel") in Albuquerque, New Mexico. On June 9, 2015, Sandia Resorts filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Pre-petition, Sandia Resorts' primary lender initiated a foreclosure action against Sandia Resorts in state court (the "State Court Foreclosure Action"). C. Randel Lewis, of Western Receiver, Trustee & Consulting Services, Ltd. (the "Receiver"), was appointed as receiver in the State Court Foreclosure Action. *See* Receivership Order, Exhibit D-7. The Receiver hired Peak as property manager to handle the day-to-day operations of the Hotel. *Id.* The Receivership Order entered in the State Court Foreclosure Action authorized the Receiver to hire Peak to manage the day-to day-operations of the Hotel and to pay

Peak as an expense of the receivership from funds held by the Receiver or Peak arising from their operation of the Hotel.

Pursuant to the Order, the Receiver entered into an agreement with Peak dated September 9, 2014 for Peak's day-to-day management and marketing of the Hotel and accounting of Hotel operations (the "Management Agreement"). *See* Exhibit B. Walter Barela signed the Management Agreement on behalf of Peak, and C. Randel Lewis signed the agreement on behalf of the Receiver. *Id.* Sandia Resorts is not a party to the Management Agreement. The regular monthly management fee due to Peak under the Management Agreement is $3,000, or 3% of gross revenue, whichever is greater. *Id.* In addition, the Management Agreement provides for a monthly "accounting fee" due to Peak of $1,000 or 1% of gross revenue, whichever is greater. *Id.* The Management Agreement includes a provision for a 60-day exit fee to be paid at closing or termination of the Management Agreement to cover the costs of handling "all conversion of property including intellectual accounting properties" (the "Exit Fee"). *Id.* Peak started managing the Hotel at the end of September 2014.

On or about May 31, 2016, the Receiver and Peak turned over the operation of the Hotel to Sandia Resorts. Funds the Receiver held from the operation of the Hotel in the approximate amount of $1,700.00 were turned over to counsel for Sandia Resorts in the form of a check. Peak has provided Sandia Resorts with the accounting records, including invoices, from its operation and management of the Hotel. In connection with Sandia Resorts' motion for conditional use of cash collateral, the check the Receiver turned over to Sandia Resorts from the operation of the Hotel was endorsed over to NCG, LLC.

Peak filed a proof of claim on August 4, 2016. *See* Exhibit D-43. Peak's proof of claim asserts an unsecured claim in the amount of $8,575.00 for "services as co-receiver of Sandia

Resorts hotel." *Id.* Peak is the management company the Receiver employed to manage and operate the Hotel, not the court-appointed receiver. Peak did not attach to its proof of claim any documentation in support of its claim. *Id.* Peak's claim is based on the Exit Fee to be paid to it under the Management Agreement upon closing or termination of the Management Agreement. The amount of Peak's claim consists of two months' fees under the Management Agreement in the amount of $4,000 per month, plus applicable gross receipts taxes.

Sandia Resorts objected to Peak's claim on August 12, 2016. *See* Objection to Peak Hospitality's Proof of Claim No. 13 – Docket No. 175. Peak filed its Motion for Temporary Allowance of Claim on August 17, 2016. *See* Docket No. 193. Sandia Resorts and NCG, LLC ("NCG") have filed competing Chapter 11 plans. *See* Debtor's Second Amended Plan of Reorganization Dated August 1, 2016 – Docket No. 162; and Amended Chapter 11 Liquidation Plan – Docket No. 161.

DISCUSSION

Holders of claims allowed under 11 U.S.C. § 502(a) may vote to accept or reject a Chapter 11 plan. *See* 11 U.S.C. § 1126(a) ("The holder of a claim or interest allowed under section 502 of this title may accept or reject a plan.") A timely filed proof of claim is deemed allowed unless an interested party objects. *See* 11 U.S.C. § 502(a) ("A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects."). To prevent an interested party from blocking a creditor's vote by objecting to the claim shortly before the confirmation hearing,[1] Fed.R.Bankr.P. 3018(a) allows a creditor to seek the temporary allowance of its claim for purposes of voting. It provides:

[1] *See In re Armstrong*, 294 B.R. 344, 354 (10th Cir. BAP 2003) ("The policy behind temporarily allowing claims is to prevent possible abuse by plan proponents who might ensure acceptance of a plan by filing last minute objections to the claims of dissenting creditors.") (citing *Stone Hedge Properties v. Phoenix Capital Corp. (In re Stone Hedge Properties)*, 191 B.R. 59, 64 (Bankr.M.D.Pa. 1995) (remaining citation omitted).

> Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.
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> Fed.R.Bankr.P. 3018(a).

Neither the Bankruptcy Code nor the Bankruptcy Rules provide any guidelines for determining how decide whether to temporarily allow a claim for voting purposes or in what amount. *See In re Experient Corp.,* 535 B.R. 386, 405 (Bankr.D.Colo. 2015) ("The Bankruptcy Code and Rules do not provide the courts with any guidance about how and when to temporarily allow a claim.") (citation omitted); *In re Pacific Sunwear of California, Inc.*, 2016 WL 4250681, *5 (Bankr.D.Del. Aug. 8, 2016) (acknowledging that "there is no guidance in the Bankruptcy Code on how to determine the proper amount of the claim" under Rule 3018(a)). The Court, therefore, has some discretion to determine the amount of a claim for the limited purpose of voting. *See Armstrong,* 294 B.R. at 354 (temporary allowance of a claim under Rule 3018(a) "is left to a court's discretion.") (citations omitted); *Experient,* 535 B.R. at 405 ("temporary allowance is left to the discretion of the court.") (citation omitted); *Pension Ben. Guar. Corp. v. Enron Corp.,* 2004 WL 2434928, *5 (S.D.N.Y. Nov. 1, 2004) (Rule 3018(a) "'specifically and elastically provides that a court may, for the purposes of voting, temporarily allow a claim or interest *in an amount which the court deems proper.*'") (quoting *Matter of Johns-Manville Corp.,* 68 B.R. 618, 631 (Bankr.S.D.N.Y. 1986) (emphasis in *Enron*)).

The claimant requesting temporary allowance of its claim under Rule 3018(a) bears the burden of presenting "sufficient evidence that it has a colorable claim capable of temporary evaluation." *Armstrong,* 294 B.R. at 354. *See also Experient,* 535 B.R. at 405 (same).[2] Finally,

[2] *But see Hedge Properties,* 191 B.R. at 64-65 (questioning whether the burden of proof ought to be placed on the objecting party); *Pacific Sunwear,* 2016 WL 4250681 at *5 (observing that, "because a Rule 3018 proceeding is meant to enfranchise claimants, there is an inconsistency in using the burden of proof rules that apply to objections to claims.").

temporary allowance fixes the amount of the claim only for a limited time and only for a limited purpose; it does not conclusively establish the amount of the claim in the bankruptcy case. *See Armstrong,* 294 B.R. at 354 ("Temporary allowance of a claim under Rule 3018(a) is not dispositive as the amount of the claim[.]").

Peak has not met its burden of establishing it has a colorable claim capable of allowance for purposes of voting. First, Peak's proof of claim is deficient on its face due to the failure to attach any supporting documentation underlying the claim. *See In re Kirkland,* 572 F.3d 838, 840 (10th Cir. 2009) (explaining that the Bankruptcy Rules and the official proof of claim form require a claimant to attach to its proof of claim supporting documentation or an explanation for why the documents are unavailable, and concluding that the bankruptcy court properly disallowed the claim based on the claimant's failure to produce any documentation in support of its claim or to provide an explanation for such failure). Peak therefore cannot rely on its proof of claim as prima facie evidence of the validity and the amount of its claim. *See* Fed.R.Bankr.P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.").

Second, Peak does not hold a pre-petition allowable claim against Sandia Resorts. To be eligible to vote to accept or reject a Chapter 11 plan, a creditor must have an allowable claim against the debtor under 11 U.S.C. § 502, and the claim must arise before the date of filing of the bankruptcy petition commencing the case. *See In re Julian Services Indus., Inc.,* 220 B.R. 613, 617 (Bankr.N.D.Ill. 1998) ("Only holders of allowed pre-petition claims may accept or reject a plan.") (citing 11 U.S.C. § 1126(a) and 11 U.S.C. § 101(10)). *See also* 11 U.S.C. § 101(10) (defining "creditor" as an "entity that has a claim against the debtor that arose at the time of or

before the order for relief concerning the debtor."). Peak has failed to establish either of these requirements.

A. *Whether Peak has a claim against Sandia Resorts*

Once a party in interest objects to a claim, a condition to allowance of a claim under 11 U.S.C. § 502 is the enforceability of the claim against the debtor and property of the debtor. 11 U.S.C. § 502(b)(1) (upon objection, a claim will not be allowed "to the extent . . . such claim is unenforceable against the debtor and property of the debtor"). It is unclear whether Peak has any claim against Sandia Resorts. Peak does not have a contract with Sandia Resorts. The only parties to the Management Agreement are Peak and the Receiver. *See* Exhibit B. Nor is it clear from the Receivership Order whether Sandia Resorts may be liable for any fees due Peak for its services in managing the Hotel. The Receivership Order provides that [t]he fees due the Receiver and Peak Hospitality shall be payable monthly, as separate charges and expenses of the Receivership, *from funds held by the Receiver or the property manager, Peak Hospitality*." Receivership Order, ¶ 1.4 (emphasis added). If the source of payment of Peak's fees is limited to the funds held by the Receiver or Peak, Peak could not collect its fee from Sandia Resorts. The funds held by the Receiver or Peak at the time the Hotel was returned to Sandia Resorts consisted of the $1700 that Sandia Resorts ultimately endorsed to NCG.

B. *Whether Peak has a pre-petition claim*

The services Peak performed in transitioning the operation of the Hotel to Sandia Resorts that form the basis of Peak's asserted claim occurred *after* Sandia Resorts filed its Chapter 11 bankruptcy case. Consequently, Peak's claim, if any, is not a pre-petition claim. Furthermore, even if Peak could establish a claim against Sandia Resorts based on post-petition services provided to Sandia Resorts, such a claim would give rise to an administrative expense claim

under 11 U.S.C. § 503(b), not an allowed claim under 11 U.S.C. § 502. *See* 11 U.S.C. § 503(b) (administrative expenses include "the actual, necessary costs and expenses of preserving the estate"); *In re Commercial Fin. Services, Inc.*, 246 F.3d 1291, 1294 (10th Cir. 2001) (explaining that "[A]n expense is administrative only if it arises out of a transaction between the creditor and . . . debtor in possession . . . and only to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.") (quoting *In re Amarex*, 853 F.2d 1526 (10th Cir. 1988) (quoting *Cramer v. Mammoth Mart, Inc., (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir. 1976) (additional internal quotation marks omitted)). Holders of administrative expense claims under 11 U.S.C. § 503 are not entitled to vote on a chapter 11 plan. *See* 11 U.S.C. § 1126(a) (providing that "[t]he holder of a claim or interest allowed under *section 502* of this title may accept or reject a plan.") (emphasis added); *In re Valley View Shopping Center, L.P.*, 260 B.R. 10, 21 (Bankr.D.Kan. 2001) (acknowledging that administrative post-petition creditors are not entitled to vote).

Even though Peak's potential claim arises from post-petition services, Peak nevertheless asserts that it holds a pre-petition claim because the Management Agreement was entered into pre-petition. This Court disagrees. Damages arising from the rejection of a pre-petition executory contract are treated as a pre-petition claim.[3] However, to be entitled to a claim for

[3] *See* 11 U.S.C. § 365(a) (providing for assumption or rejection of executory contract); 11 U.S.C. § 365(g)(1) (rejection of an executory contract of the debtor "constitutes a breach of such contract . . . immediately before the date of the filing of the petition"); 11 U.S.C. 502(g)(1) (a claim arising from the rejection of an executory contract is treated as if "such claim had arisen before the date of the filing of the petition."); *In re Western Real Estate Fund, Inc.*, 922 F.2d 592, 595 (10th Cir. 1990), *modified on other grounds sub. nom. Abel v. West*, 932 F.2d 898 (10th Cir. 1991) (explaining that "the rejection of an executory contract 'constitutes a breach of that contract' . . . for which damages ordinarily allowed in contract are available.") (quoting 11 U.S.C. § 365(g) (emphasis and citation omitted)). However, damages arising from post-petition services rendered under an executory contract prior to rejection may be entitled to administrative expenses status but do not give rise to a pre-petition claim. *See In re Pre-Press Graphics Co., Inc.*, 300 B.R. 902, 909 (Bankr.N.D.Ill. 2003) (explaining that the rejection of an unexpired lease or executory contract "usually results in a three-prong claim against the estate: (1) a general unsecured claim

anticipated rejection damages, the pre-petition executory contract must be with the debtor. *See* 11 U.S.C. § 365(g) (applicable to executory contracts and unexpired leases "of the debtor"); *In re Magnolia Gas Co., L.L.C.*, 255 B.R. 900, 922 (Bankr.W.D.Okla. 2000) (explaining that the Code treats the rejection of an executory contract *to which the debtor is a party* as a deemed breach occurring immediately prior to the petition date, giving rise to a pre-petition claim for damages arising from the breach). As discussed above, Sandia Resorts is not a party to the Management Agreement. The Management Agreement between the Receiver and Peak cannot therefore constitute an executory contract "of the debtor" that could form the basis of a pre-petition claim against for rejection damages. 11 U.S.C. § 365(g); 11 U.S.C. § 502(g)(1) (applicable to claims "arising from the rejection . . . of an executory contract . . . of the debtor").

Finally, Peak also relies, in part, on the Receivership Order entered pre-petition in the State Court Foreclosure Action. Although Sandia Resorts was a party in the State Court Foreclosure Action and is bound by the terms of the Receivership Order, the Receivership Order does not itself constitute an executory contract[4] between Peak and Sandia Resorts.[5] Any

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for any accrued unpaid rent due under the lease or contract prior to the bankruptcy filing under 11 U.S.C. § 502(b)(6)(B), (7)(B); (2) an administrative (and therefore a priority) claim for rent amounting to either rent that accrued post-petition but prior to rejection or the reasonable value of services or goods for that same time whichever the court finds appropriate under § 503(b)(1)(A) and § 507(a)(1); and (3) a general unsecured claim for 'rejection damages' (amounts due under the remaining term of the lease or the contract) under § 502, subject to certain limitations on the maximum amount a claimant may claim as rejection damages under § 502(b)(6)(A) and § 502(b)(7)(A).") (citation omitted); *In re AppliedTheory Corp.*, 312 B.R. 225, 239 (Bankr.S.D.N.Y. 2004) (acknowledging that "the counterparty to a rejected executory contract may . . . be entitled to administrative priority for any uncompensated-for benefits received by the debtor [after the petition and] prior to the rejection."). Even if the Management Agreement were an executory contract governed by § 365, which it is not, the damages Peak claims arise from post-petition services rendered prior to rejection of the Management Agreement, and therefore does not give rise to a pre-petition claim.

[4] A contract is "executory" for purposes of 11 U.S.C. § 365 when the contract has not yet been fully completed or performed and when future material obligations under the contract remain to be performed by both parties to the contract. *In re Baird*, 567 F.3d 1207, 1211 (10th Cir. 2009) (adopting the *Countryman* definition of executory contract and construing its earlier decision in *In re Myers*, 362 F.3d 667 (10th Cir. 2004) as consistent with that definition).

[5] Counsel for Sandia Resorts did not even sign the Receivership Order indicating approval as to form.

ongoing, material obligations of Sandia Resorts under the Order, if any, run to the lender as plaintiff in the State Court Foreclosure Action and to the Receiver, not Peak. *See* Order, ¶¶ 1.9, 1.10, 1.11, and 1.13. In sum, because Peak has not demonstrated that it has a colorable pre-petition claim against Sandia Resorts, the Court cannot temporarily allow Peak's claim for voting purposes.

WHEREFORE, IT IS HEREBY ORDERED, that the Motion for Temporary Allowance of Claim is DENIED.

ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: October 11, 2016

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