

MAR 10 2017

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. NV-16-1242-LJuKu
)
 KITTUSAMY, LLP,) Bk. No. 2:15-bk-13868-abl
)
 Debtor.)
)
)
 PARTAP INVESTMENTS, LLC,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 KITTUSAMY, LLP,)
)
 Appellee.)

Argued and Submitted on February 24, 2017
at Las Vegas, Nevada

Filed - March 10, 2017

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable August B. Landis, Bankruptcy Judge, Presiding

Appearances: Samuel A. Schwartz of The Schwartz Law Firm argued
 for Appellant Partap Investments, LLC; Bart Kurt
 Larsen of Kolesar & Leathan, Chtd. argued for
 Appellee Kittusamy, LLP.

Before: LAFFERTY, JURY, and KURTZ, Bankruptcy Judges.

* This disposition is not appropriate for publication.
 Although it may be cited for whatever persuasive value it may
 have (see Fed. R. App. P. 32.1), it has no precedential value.
 See 9th Cir. BAP Rule 8024-1.

1 **INTRODUCTION**

2 Pre-petition, Kittusamy, LLP ("Kittusamy") defaulted on
3 payments due under agreements to lease medical imaging equipment.
4 After an order for relief was entered in Kittusamy's involuntary
5 chapter 11¹ case, the lessor filed a proof of claim asserting a
6 secured claim of approximately \$3.3 million.² Thereafter, the
7 lessor was granted relief from stay and foreclosed its security
8 interest. The equipment was sold to Partap Investments, LLC
9 ("Partap") at a private foreclosure sale; the bill of sale also
10 transferred to Partap the lessor's rights under the proof of
11 claim filed in Kittusamy's bankruptcy case and Kittusamy's rights
12 under a sublease.

13 Thereafter, Partap filed an application for allowance of an
14 administrative claim of \$917,593.26 based on unpaid postpetition
15 rent from the petition date through a date six days after Partap
16 purchased the equipment. The bankruptcy court disallowed the
17 administrative claim in its entirety, finding that the leases
18 were not true leases but were disguised security agreements, so
19 that the rights transferred to Partap could not have included an
20 administrative claim for postpetition rent. Additionally, viewed
21 through the alternative lens of a secured creditor's rights, the
22 bankruptcy court found that Partap had not met its burden of
23 proving a diminution in value of the collateral for any relevant
24 period.

25 _____
26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

28 ² Although characterized as leases, the relevant documents
granted lessor a security interest in the equipment.

1 We AFFIRM.

2 **FACTS**

3 The facts are not in dispute. Kittusamy is a Nevada limited
4 liability partnership. Prem K. Kittusamy, M.D., and Bhuvaneshwari
5 P. Kittusamy, M.D., are the principals of the LLP.

6 In 2008 and 2009, Kittusamy and its affiliate, DMP
7 Equipment, LLC, entered into agreements to lease medical imaging
8 equipment from Siemens Medical Solutions USA, Inc. ("Siemens
9 Medical"). Kittusamy leased one piece of equipment through a
10 Master Equipment Lease Agreement and Leasing Schedule that set
11 forth the details of the financing; DMP leased four pieces of
12 equipment, also via a Master Equipment Lease Agreement and a
13 separate Leasing Schedule for each item. DMP then subleased that
14 equipment to Kittusamy under an Equipment Sublease Agreement
15 ("Sublease").

16 All three parties entered into a Consent to Sublease and
17 Agreement under which Siemens Medical approved the sublease and
18 Kittusamy agreed to be bound by the terms of the DMP Master
19 Lease. All of the Leasing Schedules provided that Kittusamy had
20 the option to purchase the equipment for a "Nominal Fixed
21 Purchase Option Price of \$1.00" at the end of the lease term.
22 Thereafter, Siemens Medical assigned its interests in the Master
23 Equipment Lease Agreements, Leasing Schedules, and Sublease and
24 Consent (collectively, the "Lease Documents") to Siemens
25 Financial Services, Inc. ("Siemens Financial"). At some point,
26 Kittusamy defaulted on its obligations under the Lease Documents;
27 according to its proof of claim, Siemens Financial accelerated
28 the amounts due under the Lease Documents on November 4, 2014.

1 On July 2, 2015, an involuntary chapter 11 petition was
2 filed against Kittusamy; Kittusamy consented to entry of an order
3 for relief, which was entered August 10, 2015. Siemens Financial
4 filed proof of claim no. 23-1 asserting a secured claim of
5 \$3,343,487.18 representing prepetition amounts due under the
6 leases, including late charges, property taxes, discounted
7 accelerated balance of future rentals, and attorneys' fees and
8 costs through December 10, 2015. Siemens Financial then moved
9 for relief from the automatic stay, which the bankruptcy court
10 granted. Thereafter, Siemens Financial foreclosed on its
11 security interest, selling the equipment to Partap for
12 \$924,641.70 plus \$75,358.30 in sales tax through an "As Is,"
13 "Where Is" Bill of Sale and Non-Recourse Assignment dated
14 March 2, 2016 ("Bill of Sale"). Siemens Financial also
15 transferred to Partap "all of Siemens Financial's rights, title
16 and interests in any claim Siemens Financial has asserted in the
17 Kittusamy, LLP Bankruptcy Case No. 15-13868-ABL . . ." and all of
18 Kittusamy's and DMP's "respective rights, titles and interests,
19 in and to the equipment . . . and sublease[.]"

20 On March 3, 2016, Partap filed a Notice of Transfer of
21 Siemens Financial's claim in Kittusamy's bankruptcy case. On
22 March 9, 2016, Partap filed proof of claim no. 41-1 asserting an
23 administrative claim of \$917,593.26 pursuant to § 507(a)(2) for
24 Kittusamy's postpetition use of the equipment. The amount of the
25 claim was based on the monthly payments due under the DMP Master
26 Lease and the Sublease only (not the Kittusamy Master Lease)

1 through March 9, 2016,³ and included more than \$300,000 in late
2 fees.

3 Kittusamy filed an objection to Partap's unsecured and
4 administrative claims; Partap filed an application for approval
5 of its administrative claim, and an "opposition" to Kittusamy's
6 objection to claims. The bankruptcy court heard argument and
7 took the matters under submission. On July 19, 2016, the
8 bankruptcy court made oral findings and conclusions on the record
9 and entered written orders (1) sustaining Kittusamy's objections
10 to Partap's administrative and unsecured claims and (2) denying
11 Partap's motion to allow its administrative claim. Partap timely
12 appealed. Partap appeals only the bankruptcy court's
13 disallowance of its administrative claim.

14 **JURISDICTION**

15 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
16 §§ 1334 and 157(b) (2) (B). We have jurisdiction under 28 U.S.C.
17 § 158.

18 **ISSUE**

19 Did the bankruptcy court abuse its discretion in disallowing
20 Partap's administrative claim?

21 **STANDARDS OF REVIEW**

22 We review the bankruptcy court's legal conclusions de novo
23 and its findings of fact for clear error. See Allen v. U.S.
24 Bank, NA (In re Allen), 472 B.R. 559, 564 (9th Cir. BAP 2012).

25
26 ³ At oral argument, Partap's counsel asserted that it was
27 owed an administrative claim for amounts due through early April
28 when Kittusamy surrendered the equipment. However, both the
proof of claim and the application to approve it requested
amounts due only through March 9, 2016.

1 A bankruptcy court's order allowing or disallowing a proof
2 of claim, including an administrative claim, is reviewed for
3 abuse of discretion. Burlington N. R.R. Co. v. Dant & Russell,
4 Inc. (In re Dant & Russell, Inc.), 853 F.2d 700, 707 (9th Cir.
5 1988); Bitters v. Networks Elec. Corp. (In re Networks Elec.
6 Corp.), 195 B.R. 92, 96 (9th Cir. BAP 1996). A bankruptcy court
7 abused its discretion if it applied the wrong legal standard or
8 its findings were illogical, implausible or without support in
9 the record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d
10 820, 832 (9th Cir. 2011).

11 Questions of contract interpretation are subject to de novo
12 review unless extrinsic evidence was introduced on issues such as
13 intent. Captain Blythers, Inc. v. Thompson (In re Captain
14 Blythers, Inc.), 311 B.R. 530, 534 (9th Cir. BAP 2004), aff'd,
15 182 F. App'x 708 (9th Cir. 2006).

16 DISCUSSION

17 **A. The bankruptcy court did not abuse its discretion in** 18 **disallowing Partap's administrative claim.**

19 Under § 503(b), the bankruptcy court, after notice and a
20 hearing, shall allow an administrative expense claim for "the
21 actual, necessary costs and expenses of preserving the estate[.]"
22 The party seeking administrative priority bears the burden of
23 proof. Microsoft Corp. v. DAK Indus., Inc. (In re DAK Indus.,
24 Inc.), 66 F.3d 1091, 1094 (9th Cir. 1995). To keep
25 administrative costs to the estate at a minimum, the term
26 "actual, necessary costs and expenses of preserving the estate"
27 is narrowly construed. Id. An administrative claimant must
28 demonstrate that its claim (a) arose from a transaction with the

1 debtor in possession as opposed to the preceding entity, and
2 (b) directly and substantially benefitted the estate. Id. at
3 1094.

4 Here, the bankruptcy court made the following findings
5 relevant to Partap's administrative claim: (1) the leases were
6 security agreements under N.J. Stat. Ann. § 12A:1-203(b)⁴;
7 (2) the Bill of Sale did not transfer to Partap a right to assert
8 an administrative claim for the period prior to Partap's purchase
9 of the equipment; (3) any administrative claim would be limited
10 to the actual value of Kittusamy's use of the equipment, not the
11 monthly payments under the Lease Documents, and Partap had not
12 provided sufficient evidence of the diminution in value of the
13 equipment during the pendency of the case. The court also noted
14 that Partap might be entitled to an administrative claim based on
15 the diminution in value of the equipment from the time Partap
16 purchased the equipment in March 2016, but that Partap had not
17 provided any evidence of what that diminution might be.

18 Partap has not assigned error to the bankruptcy court's
19 finding that the leases were disguised security agreements, but
20 disputes that the Bill of Sale did not transfer to Partap a right
21 to assert an administrative claim and that any administrative
22 claim would be limited to the actual value of Kittusamy's use of
23 the equipment. We conclude that the bankruptcy court did not err
24 in these findings.

25
26 ⁴ The Lease Documents provide that they are to be construed
27 in accordance with the laws of the state of New Jersey. The
28 parties do not dispute that New Jersey law applies to the
analysis of whether the leases are security agreements. As it
happens, New Jersey and Nevada law are consistent in this regard.

1 **1. The bankruptcy court did not err in finding that Partap**
2 **had no right to assert an administrative claim for**
3 **postpetition rents based on the Bill of Sale.**

4 As noted above, the Bill of Sale transferred to Partap "all
5 of Siemens Financial's rights, title and interests in any claim
6 Siemens Financial has asserted in the Kittusamy, LLP Bankruptcy
7 Case No. 15-13868-ABL[.]" The bankruptcy court found that
8 Siemens Financial had neither filed an administrative claim nor
9 transferred any such claim to Partap under the Bill of Sale and
10 thus Partap was not entitled to assert an administrative claim as
11 successor-in-interest to Siemens Financial. Additionally, the
12 bankruptcy court found that, as a secured creditor, Siemens
13 Financial would not have been entitled to assert an
14 administrative claim for the lease payments, but would have been
15 entitled only to adequate protection for the postpetition
16 diminution in the value of the equipment. Importantly, Partap
17 has not assigned error to this latter aspect of the bankruptcy
18 court's ruling.

19 Partap argues that the bankruptcy court did not consider
20 page 2 of the Bill of Sale, which provides for the transfer to
21 Partap of "all of Kittusamy's and DMP's . . . respective rights,
22 titles and interests in, and to the equipment . . . and sublease
23 . . . described in Schedule 1 hereto . . . , subject to the terms
24 and conditions hereof." Schedule 1 lists the five pieces of
25 equipment along with "[r]ights, title and interest in and to that
26 certain Equipment Sublease Agreement entered into between
27 Kittusamy, LLC and DMP Equipment, LLC regarding the above
28 equipment." Partap contends that the transfer of the interests

1 in the Sublease entitled Partap to assert an administrative claim
2 against Kittusamy for its failure to make payments under the
3 Sublease. Partap points out that contracts should be construed
4 so as to avoid rendering portions of them superfluous, Penske
5 Logistics, Inc. v. KLLM, Inc., 285 F. Supp. 2d 468, 474 (D.N.J.
6 2003), and argues that the bankruptcy court's interpretation of
7 the Bill of Sale renders Schedule 1 meaningless.

8 Additionally, Partap notes that the Bill of Sale expressly
9 excludes certain claims that were not transferred to Partap and
10 argues that if Siemens Financial had intended to exclude the
11 transfer of its right to an administrative claim it would have
12 done so; Partap further contends that the fact that Siemens
13 Financial never filed an administrative claim or opposed Partap's
14 application for allowance of its administrative claim is evidence
15 that the Bill of Sale included the transfer of the right to
16 assert an administrative claim.

17 Finally, Partap argues that in fact Siemens Financial did
18 assert a right to file an administrative claim in its motion for
19 relief from stay, which stated:

20 [T]o the extent that the adequate protection to which
21 Siemens Financial is entitled proves to be inadequate,
22 and the value of its interest in the Siemens Equipment
23 continues to decline, Siemens Financial asserts that
any claim arising therefrom is entitled to an
administrative expense claim pursuant to Section 507(b)
of the Bankruptcy Code.

24 Partap argues that because the Bill of Sale referred to
25 "asserted" rather than "filed" claims, Siemens Financial's
26 reservation of rights in its motion for relief from stay gave
27 Partap the right to file an administrative claim.

28 We find these arguments unconvincing. With respect to any

1 right of a lessor to assert an administrative claim for unpaid
2 rent, Siemens Financial could not transfer to Partap a right it
3 did not have. As noted, Partap does not assign error to the
4 bankruptcy court's finding that Siemens Financial was a secured
5 creditor, not a lessor, and the transfer of rights under the
6 Sublease did not change the character of the leases as security
7 agreements. Where the property in question is not owned by the
8 lessor but is instead owned by the lessee under a disguised
9 security agreement, the lessor is not entitled to an
10 administrative priority claim under § 503(b)(1)(A) for unpaid
11 post-petition lease payments. See Williams v. IMC Mortg. Co.
12 (In re Williams), 246 B.R. 591, 595 (8th Cir. BAP 1999) (noting
13 that § 503(b) is not intended to provide an administrative
14 expense award to a prepetition secured lender based on the
15 debtor's postpetition possession and use of collateral, and
16 citing cases); See also In Re ES2 Sports & Leisure, LLC, 519 B.R.
17 476, 480 (Bankr. M.D.N.C. 2014). Further, the payment
18 obligations under the Lease Documents were incurred prepetition,
19 not postpetition. This circumstance alone would have barred
20 Siemens Financial from asserting an administrative claim. See
21 In re Williams, 246 B.R. at 594 (postpetition mortgage payments,
22 although not due until after the filing of the petition, were an
23 obligation incurred prior to the creation of the estate, thus the
24 requirement that the administrative claim arise from a
25 postpetition transaction was not met). This conclusion is
26 bolstered by the fact that Siemens Financial apparently
27 accelerated the amounts due under the Lease Documents in November
28 2014, eight months prepetition.

1 The bankruptcy court did not err in finding that the Bill of
2 Sale did not grant Partap a right to file an administrative claim
3 for unpaid rent for the period prior to its purchase of the
4 equipment.

5 **2. The bankruptcy court did not err in finding that Partap**
6 **had not presented sufficient evidence of diminution in**
7 **value.**

8 With respect to the transfer of any rights as a secured
9 creditor, i.e., a right to assert a claim for postpetition
10 diminution in value of the equipment, Partap asserted in the
11 bankruptcy court that the equipment had diminished in value by
12 \$525,358.30 before March 3, 2016, the date Partap purchased the
13 equipment. Partap contended that the beginning value of the
14 equipment was \$1.45 million, based on Prem Kittusamy's testimony
15 at a confirmation hearing on March 18, 2016 regarding
16 negotiations with Siemens Financial, in which Dr. Kittusamy
17 stated that the parties had agreed at some point during the
18 bankruptcy that the equipment was worth between \$1.4 and
19 \$1.5 million. Partap also noted that Kittusamy's Proposed
20 Disclosure Statement to Accompany Debtor's First Amended
21 Chapter 11 Plan of Reorganization filed October 30, 2015 valued
22 the equipment at \$1,397,518. From \$1.45 million, Partap
23 subtracted the amount it paid for the equipment, \$924,641.70,
24 yielding \$525,358.30.

25 The bankruptcy court found this evidence insufficient to
26 establish the diminution in value, but did not elaborate on its
27 specific reasoning. However, we find no error in the bankruptcy
28 court's conclusion. Even assuming (without deciding) that

1 Dr. Kittusamy's testimony and/or the disclosure statement were
2 competent evidence of the equipment value as of the petition
3 date,⁵ it is far from clear whether the price paid by Partap to
4 purchase the equipment reflects its fair market value on that
5 date.

6 First, the price obtained at a forced sale does not
7 necessarily reflect fair market value. See BFP v. Resolution
8 Trust Co., 511 U.S. 531, 537-38 (1994) (noting that market value
9 is the antithesis of forced-sale value, and that "fair market
10 value" presumes market conditions that do not obtain in the
11 context of a forced sale).

12 Second, as pointed out by Partap, it purchased not only the
13 equipment but also Siemens Financial's right to collect on its
14 claim filed in the bankruptcy case and Kittusamy's and DMP's
15 rights under the Sublease. Therefore, the purchase price does
16 not appear to have been based solely on the fair market value of
17 the equipment. In short, Partap failed to provide sufficient
18 evidence from which the bankruptcy court could discern the fair
19 market value of the equipment and therefore its diminution in
20 value.

21 **3. The bankruptcy court did not err in disallowing**
22 **Partap's administrative claim for the period after**
23 **March 3, 2016.**

24 The bankruptcy court disallowed Partap's administrative
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26 ⁵ Kittusamy notes that Dr. Kittusamy's testimony was in the
27 context of describing failed efforts to reach a compromise with
28 Siemens Financial to retain the equipment, and that no final
agreement on value was ever reached.

1 claim in its entirety, thus implicitly denying a claim for the
2 six-day period after Partap had purchased the equipment. Partap
3 argues that the bankruptcy court erred in this aspect of its
4 ruling because, as the owner of the equipment, Partap was
5 entitled to an administrative claim for Kittusamy's use of the
6 equipment after March 3, 2016.

7 Partap's argument might make sense had it filed an
8 application for allowance of such a claim. Instead, according to
9 Partap's application for allowance of its administrative claim,
10 claim no. 41-1 was based on unpaid postpetition rent from the
11 petition date through March 9, 2016. Assuming without deciding
12 that Partap was entitled to an administrative claim for unpaid
13 rent accruing after it purchased the equipment on March 3, 2016,
14 Partap did not differentiate in its application between the pre-
15 and post-purchase periods or provide any explicit evidence of the
16 amount due for the period after it purchased the equipment.
17 Keeping in mind that it was Partap's burden to prove its
18 entitlement to an administrative claim, there was a failure of
19 proof with respect to the amount of any such claim. Thus, the
20 bankruptcy court did not err in disallowing the claim in its
21 entirety.⁶

22 CONCLUSION

23 For the reasons explained above, the bankruptcy court did
24 not abuse its discretion in disallowing Partap's administrative
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26 ⁶ This is not to suggest that Partap could not seek relief
27 for Kittusamy's continued retention and use of the equipment
28 after the purchase date. However, any such relief would be
premiered upon Partap's status as the owner of the equipment.

1 claim. Accordingly, we AFFIRM.

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