

# FLORIDA FEATURE: DISLOCATION EXPENSES IN AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS

Fall, 2012

## Reporter

11 Ave Maria L. Rev. 193 \*

**Length:** 9048 words

**Author:** Judge Robert A. Rosenberg and Dara J. Glasser+

+ Robert A. Rosenberg is a Circuit Judge for the 17th Judicial Circuit of Florida in Fort Lauderdale, Florida. He received his law degree from the University of Wisconsin Law School in 1967 and his undergraduate degree from the University of Michigan in 1964. He is a former Assistant U.S. Attorney and Chief of the Civil Division (Eastern District of Michigan and Southern District of Florida). He has been a guest lecturer, instructor, and/or panel member for the Florida Bar, American Bar Association, United States Department of Justice, and the Federal Law Enforcement Training Center. He was a Visiting Professor of Comparative Constitutional Law at Ramkhamhaeng University, Bangkok, Thailand, in 2008. Dara J. Glasser is a member of the District of Columbia and Maryland Bars, and a graduate of the Harvard Law School (2009), and University of Miami, cum laude (2006). She served as a Summer Law Clerk for the 17th Judicial Circuit of Florida (2008).

## Text

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[\*193]

### Introduction

The subject of this Article is whether incurred dislocation expenses, based on pre-existing leases, are allowable as administrative costs in the context of an assignment for the benefit of creditors. The discussion necessarily begins with a reference to the assignment statute.

The assignment for the benefit of creditors statute, chapter 727 of the Florida Statutes, recognizes "administrative expenses" which the assignee must pay "to the extent reasonable and necessary." <sup>1</sup> "Expenses incurred during the administration of the estate" are accorded a first priority right of payment from assets of the assignment estate, after the satisfaction of secured creditors from the liquidation of any collateral. <sup>2</sup>

### I. Factual Background

Great Western Steamship Company ("GWS") was in the business of transporting cargo from ports in Asia to the United States and [\*194] various nations in the Caribbean. <sup>3</sup> In January 2006, there were fourteen leases between GWS and GE Seaco. <sup>4</sup> Seven were long-term leases (for a period of five years) and the others were for

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<sup>1</sup> [Fla. Stat. § 727.108\(6\)](#) (2012).

<sup>2</sup> [Fla. Stat. § 727.114](#) (2012).

<sup>3</sup> See generally Motion for Partial Summary Judgment, In re Great Western Steamship Co., No. 06-000750 CA 02 (Fla. Cir. Ct. May 30, 2008) (The 17th Circuit Court considered the treatment of dislocation expenses, providing the basis for this Article).

shorter terms.<sup>5</sup> GWS leased approximately 1,600 cargo containers from GE Seaco for use in its shipping business.<sup>6</sup> The majority of these containers were either twenty or forty feet in size.<sup>7</sup> The variations in the terms of the leases and the sizes of the containers yielded slight variations in the daily base rental charged for each piece of equipment while it was on-hire.<sup>8</sup> Each of these leases specifically required GWS to redeliver all of the equipment to specified locations in Asia when the leases concluded.<sup>9</sup>

GE Seaco asserted that all leases between the parties were subject to the General Trading Terms Agreement.<sup>10</sup> Pursuant to Section 10 of the Agreement, GE Seaco had various remedies including, but not limited to, the right to take possession of the containers and to recover from GWS any amounts due under the particular lease, along with any rent that may become due in the future.<sup>11</sup> In addition to the remedies provided in Section 10, the Agreement described in the meaning of "Dislocation Charges":

Lessee shall also be obliged to pay to [GE Seaco] a dislocation charge of US\$ 750 per 20 ft. container and US\$ 1,500 per 40 ft. container to compensate [GE Seaco] for lost rent and administrative costs arising from the default.<sup>12</sup>

**[\*195]** On January 17, 2006, GWS executed an assignment in favor of the assignee.<sup>13</sup> The assignee filed the Petition Commencing Assignment for the Benefit of Creditors on January 19, 2006 (the "Petition Date").<sup>14</sup> On the Petition Date, GWS was transporting goods for numerous customers in cargo containers that GWS had leased from GE Seaco and other cargo container leasing companies.<sup>15</sup> The laden cargo containers were aboard ships at various points of transit and not immediately identifiable by the assignee.<sup>16</sup> In order to maximize the estate to provide the greatest return to creditors, the assignee chose to complete the delivery of the goods in transit.<sup>17</sup>

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<sup>4</sup> Id. at Exhibit B.

<sup>5</sup> See Assignee's First Supplement to Objection to Claim Filed by GE Seaco Am., LLC at 2, In re Great Western, No. 06-000750 CA 02 (Fla. Cir. Ct. Aug. 3, 2007) [hereinafter Assignee's First Supplement].

<sup>6</sup> Emergency Motion for Temp. Injunction, In re Great Western, No. 06-000750 CA 02 (Fla. Cir. Ct. Jan. 26, 2006) [hereinafter Emergency Motion]; Assignee's Motion to Strike False and Inflammatory Statements Contained in GE Seaco Am., LLC's Motion for Continuance and for Extension of Time and for the Imposition of Sanctions Pursuant to [Fla. Stat. § 57.105](#) at 2, In re Great Western, No. 06-000750 CA 02 (Fla. Cir. Ct. May 23, 2008).

<sup>7</sup> Assignee's First Supplement, supra note 5.

<sup>8</sup> Id.

<sup>9</sup> Id. at Exhibit A.

<sup>10</sup> See Motion for Turnover of Sec. Deposit Posted to Secure Returns of Leased Equip. at 1, In re Great Western, No. 06-000750 CA 02 (Fla. Cir. Ct. Apr. 30, 2007).

<sup>11</sup> Id. at Exhibit A.

<sup>12</sup> Id.

<sup>13</sup> See Petition Commencing Assignment for the Benefit of Creditors at 1, In re Great Western, No. 06-000750 CA 02 (Fla. Cir. Ct. Jan. 19, 2006).

<sup>14</sup> Id. at 2.

<sup>15</sup> See id. at Exhibit 1.

<sup>16</sup> See Transcript of Deposition of Rhys William Dale at 24, In re Great Western, No. 06-000750 CA 02 (Fla. Cir. Ct. Feb. 17, 2006).

<sup>17</sup> See id. at 24-25.

On January 19, 2006, GE Seaco demanded in writing that the assignee disclose the location of each cargo unit and not move loaded units until GE Seaco agreed in writing. <sup>18</sup> GE Seaco sent a Notice of Default and Termination to GWS terminating the leases between the parties on January 20, 2006. <sup>19</sup> GE Seaco never sent the assignee any writing withdrawing or attempting to withdraw the Notice of Default and Termination. <sup>20</sup> Triggered by the assignee's disregard of GE Seaco's written demand, on January 25, 2006, GE Seaco filed an Emergency Motion for Temporary Injunction (the "Injunction Motion") seeking to prevent any further usage of its equipment by the assignee. <sup>21</sup> GE Seaco confirmed that "the cargo container leases have all been terminated in accordance with their terms." <sup>22</sup>

On January 26, 2006, the court conducted a hearing to consider the Injunction Motion. <sup>23</sup> At this hearing, GE Seaco's counsel announced that an agreement between the assignee and GE Seaco resolved the Injunction Motion, whereby \$ 300,000 of the estate's funds were to be placed in the trust account of the assignee's counsel as a security [\*196] deposit in case any of the GE Seaco containers were not returned. <sup>24</sup> The assignee's counsel added that by agreeing to the resolution of the injunctive motion, the assignee was simply agreeing to a resolution of the injunction, was not admitting any of the allegations contained in the motion, and the agreement was without prejudice to the assignee contesting any claims made by GE Seaco in the future. <sup>25</sup> The words "assume" and "assumption" appear nowhere in the transcript from the proceedings on January 26, 2006. <sup>26</sup>

The assignee paid \$ 300,000 to GE Seaco pursuant to two separate orders dated March 26, 2007 and July 20, 2007. <sup>27</sup> Thus, the assignee was free to continue to use the leased equipment. By doing so, the assignee was able to both generate more than \$ 1 million of additional revenue for the estate and avoid a number of significant claims that could have been asserted by scores of GWS customers whose merchandise would not have been delivered as promised.

Pursuant to [Fla. Stat. § 727.112\(2\)](#), the deadline for creditors of the estate to file claims was May 19, 2006, or 120 days after the Petition Date. <sup>28</sup> GE Seaco timely filed its Proof of Claim. On July 28, 2006, the assignee filed his First Omnibus Objection to Claims. <sup>29</sup> Included in that pleading was an objection to GE Seaco's Proof of Claim. <sup>30</sup> On October 1, 2007, GE Seaco filed its Supplemental Claim. As set forth in Section B of the Supplemental Claim:

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<sup>18</sup> Emergency Motion, supra note 6, at 2.

<sup>19</sup> Id.

<sup>20</sup> See generally Transcript of Jan. 26, 2006 Hearing, In re Great Western, No. 06-000750 CA 02 (Fla. Cir. Ct. Jan. 26, 2006).

<sup>21</sup> Emergency Motion, supra note 6.

<sup>22</sup> Id. at 2.

<sup>23</sup> Assignee's Motion for Entry of an Order Authorizing the Release of Funds Held in Law Firm Trust Account of Rice Pugatch Robinson & Schiller P.A. as Sec. Deposit for GE Seaco Am., LLC's Containers at 2, In re Great Western, No. 06-000750 CA 02 (Fla. Cir. Ct. June 24, 2008).

<sup>24</sup> Id.

<sup>25</sup> Transcript of Jan. 26, 2006 Hearing, supra note 20, at 4-5.

<sup>26</sup> See id.

<sup>27</sup> Agreed Order Granting Motion to Compel Payment of Undisputed Items Re: Sec. Deposit Filed by GE Seaco Am., LLC at 1, In re Great Western, No. 06-000750 CA 02 (Fla. Cir. Ct. July 20, 2007); Order on GE Seaco's Motion to Compel Payment for Lost Leased Equip., In re Great Western, No. 06-000750 CA 02 (Fla. Cir. Ct. Mar. 26, 2007).

<sup>28</sup> [Fla. Stat. § 727.112\(2\)](#) (2006).

<sup>29</sup> Michael P. Phelan, Assignee's First Omnibus Objection to Proofs of Claim Filed by Various Creditors at 2, In re Great Western, No. 06-000750 CA 02 (Fla. Cir. Ct. July 28, 2006).

[GE Seaco] seeks an allowance as an administrative expense the \$ 2,384,072.45 of "dislocation charges" that were included as part of its Proof of Claim previously filed herein. That amount is based upon the provisions of Article 10 of the General Trading Terms executed by ... Assignee on 1/26/06 when he elected to continue **[\*197]** the use of the equipment which [GE Seaco] had leased to Great Western.<sup>31</sup>

On November 5, 2007, the Special Magistrate appointed to preside over GE Seaco's motion for administrative rent issued a Report and Recommendation.<sup>32</sup> The Special Magistrate rejected GE Seaco's argument that the agreement emanating from the January 26, 2006 hearing represented the assignee's assumption of any of the leases:

GE Seaco claims that the January 26, 2006 agreement amounted to an assumption of the leases. Chapter 727, which was only recently amended to provide that a trustee may reject real property leases in order to limit accelerated rent damage claims, has no provision authorizing assumption of leases ... and if it were possible it would require an explicit judicial act that did not occur during the January 26 [2006] hearing, or apparently, ever. Indeed, there is no indication in the record that GE Seaco's January 20, 2006 termination of the leases was ever withdrawn. The agreement announced at the January 16 (sic) hearing was merely a means to assure GE Seaco that the containers would be returned and to assure the assignee that GE Seaco would not restrain the containers with a maritime lien.<sup>33</sup>

## II. The Legal Context

Chapter 727 "provides a uniform procedure for the administration of insolvent estates, and to ensure full reporting to creditors and equal distribution of assets according to priorities as established under this chapter."<sup>34</sup> The statute lists the duties of the assignee, the powers of the court, and the priority of claims. According to the Special Magistrate's Report and Recommendations on GE Seaco's Motion for Allowance of Administrative Expense Re: Detention of Cargo Containers, "few decisions have been reported under chapter 727."<sup>35</sup>

**[\*198]** In *Moecker v. Antoine*, Florida's First District Court of Appeals stated, in a footnote, that "state courts often look to federal bankruptcy law for guidance as to legal issues arising in proceedings involving assignments for the benefit of creditors."<sup>36</sup> Thus, the *Moecker* court found the United States Bankruptcy Code instructive in defining the term "arose," which was not defined in chapter 727.<sup>37</sup>

The Eleventh Circuit Court of Appeals interpreted the Bankruptcy Code as requiring "an actual, concrete benefit to the estate before a claim is allowable as" an administrative expense.<sup>38</sup> In *In re Spencer*, the court held that "when

<sup>30</sup> Id. at Exhibit A.

<sup>31</sup> GE Seaco's Supplemental Claim for Admin. Expense Re: Dislocation, *In re Great Western*, No. 06-000750 CA 02 (Fla. Cir. Ct. Oct. 1, 2007) (emphasis added).

<sup>32</sup> Special Magistrate's Report and Recommendations on GE Seaco America LLC's Motion for Allowance of Admin. Expense Re: Det. of Cargo Containers at 1, *In re Great Western*, No. 06-000750 CA 02 (Fla. Cir. Ct. Nov. 5, 2007) [hereinafter Special Magistrate's Report].

<sup>33</sup> Id. at 10 (footnote omitted).

<sup>34</sup> [Fla. Stat. § 727.101](#) (2006).

<sup>35</sup> Special Magistrate's Report, *supra* note 32, at 4.

<sup>36</sup> [Moecker v. Antoine, 845 So. 2d 904, 911 n.10 \(Fla. 1st DCA 2003\)](#).

<sup>37</sup> Id.

<sup>38</sup> [Broad. Corp. of Ga. v. Broadfoot, 789 F.2d 1530, 1532 \(11th Cir. 1986\)](#) (quoting [Broad. Corp. of Ga. v. Broadfoot, 54 B.R. 606, 613 \(N.D. Ga. 1985\)](#)) (internal quotation mark omitted).

a lease is assumed during the pendency of a chapter 11 case which is later converted to chapter 7, the lease is considered to have been a benefit to the estate. Accordingly, damages flowing from a breach are entitled to administrative expense priority."<sup>39</sup>

### III. Discussion

The assignee did not assume or reinstate any of the leases and therefore the GE Seaco claim was necessarily denied as a matter of law.

#### A. Both the Applicable and Current Versions of Florida's General Assignment Statute Do Not Authorize an Assignee to Assume Unexpired Leases.

Neither the term "assume" nor the term "assumption" appear in [Fla. Stat. § 727.101](#), et seq. (2006).<sup>40</sup> Section 727.108, lists the duties of an assignee, none of which include the assumption of unexpired leases of personal property.<sup>41</sup> This list is preceded by the word "shall" and only includes the duties that an assignee must perform.<sup>42</sup> This section does not restrict an assignee from assuming an unexpired [\*199] lease of personal property, even though the section does not require an assignee to do so.

Section 727.109 sets forth the powers of the court, none of which include authorizing an assignee to assume unexpired leases of personal property.<sup>43</sup> Despite this lack of authority, there was still a possibility that the 2006 statute allowed an assignee to assume unexpired leases of personal property with authorization from the court. The amendments in the 2007 version of the statute, however, clarified the intent of the legislature.<sup>44</sup>

The amended version of Florida's General Assignment Statute, [Fla. Stat. § 727.101](#), et seq. (2007), which became effective on July 3, 2007, does not contain the terms "assumption" or "assume."<sup>45</sup> The amended statute requires that an assignee, "to the extent reasonable in the exercise of the assignee's business judgment, reject an unexpired lease of nonresidential real property or of personal property under which the assignor is the lessee."<sup>46</sup> Despite these two additions, it was still theoretically possible that both the 2006 and 2007 statutes allowed an assignee to assume unexpired leases of personal property without authorization from the court. The legislature could have plausibly intended to require the court's authorization to unilaterally reject an existing agreement, but not require the court to authorize entrance into a new mutual agreement.

An additional amendment, however, demonstrates that the legislature did not intend to allow an assignee to assume unexpired leases of personal property.<sup>47</sup> This amendment, moreover, does not describe how to calculate the administrative expense for rent incurred when the assignee assumes a lease after the date of assignment. The legislature apparently did not contemplate that an assignee would be allowed to assume an unexpired lease after the date of assignment.

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<sup>39</sup> [In re Spencer, 139 B.R. 562, 564 \(Bankr. M.D. Fla. 1992\)](#) (emphasis added).

<sup>40</sup> See [Fla. Stat. § 727.101-16](#) (2006).

<sup>41</sup> See [Fla. Stat. § 727.108](#) (2006).

<sup>42</sup> See id.

<sup>43</sup> [Fla. Stat. § 727.109](#) (2006).

<sup>44</sup> 2007 Fla. Laws 185, §§6-7, 10.

<sup>45</sup> See [Fla. Stat. § 727.101-16](#) (2007).

<sup>46</sup> [Fla. Stat. § 727.108\(5\)](#) (2007).

<sup>47</sup> See [Fla. Stat. § 727.114\(1\)\(b\)](#) (2007).

This conclusion is consistent with the Special Magistrate's Report and Recommendation of GE Seaco's Motion for Allowance of Administrative Expense Re: Detention of Cargo Containers, stating that "chapter 727, which was only recently amended to provide that a trustee may reject real property leases in order to limit accelerated [\*200] rent damage claims, has no provision authorizing assumption of leases or executory contracts of any kind." <sup>48</sup>

#### B. The Bankruptcy Code is Applicable and Its Application Favors the Assignee.

The assignee relied upon *Moecker v. Antoine* for the proposition that "state courts often look to federal bankruptcy law for guidance as to legal issues arising in proceedings involving assignments for the benefit of creditors." <sup>49</sup> The Special Magistrate invoked federal bankruptcy cases to reach his conclusions as well. <sup>50</sup> GE Seaco, however, claims that federal bankruptcy cases are not analogous in terms of creditors' rights. <sup>51</sup> GE Seaco reasoned that "the concept of assumption, which is a term of art in the Bankruptcy Code, has nothing to do with what we did in this case in January of '06." <sup>52</sup> GE Seaco did not cite any authority that gives meaning to the term "assume" or "assumption." Like the *Moecker* court, which used federal bankruptcy law to determine the meaning of "arose" (because chapter 727 did not define it), the circuit court may use federal bankruptcy law to determine the meaning of "assume" because chapter 727 does not define it. <sup>53</sup> Although GE Seaco then asserted that bankruptcy law is not applicable for a variety of reasons, it had argued in its June 24, 2008 Reply Memorandum that "indeed the foregoing fundamental premise from common law of contracts is exactly the same in a bankruptcy case" and cited no fewer than eight bankruptcy decisions. <sup>54</sup>

#### [\*201]

#### C. Terminated Leases Cannot be Assumed as a Matter of Law.

The court in *In re Key Largo Watersports, Inc.*, a bankruptcy case, stated that "a terminated lease cannot be assumed." <sup>55</sup> It is undisputed that GE Seaco terminated the container leases pursuant to its January 20, 2006 Notice of Default and Termination sent to GWS. GE Seaco acknowledged that a terminated lease cannot be assumed as a matter of law, yet argued that the leases were "reinstated" as a result of the January 26, 2006 hearing. <sup>56</sup> During oral argument regarding GE Seaco's Summary Judgment Motion, GE Seaco never used the words "reinstated" or "reinstatement." Rather, GE Seaco argued, as it did in its Motion for Summary Judgment, that the assignee "assumed" the leases as a result of the January 26, 2006 hearing. <sup>57</sup>

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<sup>48</sup> Special Magistrate's Report, *supra* note 32, at 10 (footnote omitted).

<sup>49</sup> [\*Moecker v. Antoine\*, 845 So. 2d 904, 911 n.10 \(Fla. 1st DCA 2003\)](#).

<sup>50</sup> Special Magistrate's Report, *supra* note 32, at 4-9.

<sup>51</sup> Transcript of Hearing on Motion for Partial Summary Judgment at 19, *In re Great Western*, No. 06-000750 CA 02 (Fla. Cir. Ct. July 8, 2008).

<sup>52</sup> *Id.*

<sup>53</sup> See Assignee's Motion to Strike GE Seaco Am., LLC's Admin. Expense Claim for Dislocation Charges and for the Imposition of Sanctions Pursuant to [Fla. Stat. § 57.105](#) at 6-8, *In re Great Western*, No. 06-000750 CA 02 (Fla. Cir. Ct. May 20, 2008); Special Magistrate's Report, *supra* note 32, at 4-6.

<sup>54</sup> GE Seaco's Reply Memorandum Re: Assumption of Leases at 3, *In re Great Western*, No. 06-000750 CA 02 (Fla. Cir. Ct. June 24, 2008) [hereinafter Reply Memorandum].

<sup>55</sup> [\*In re Key Largo Watersports, Inc.\*, 337 B.R. 738, 741 \(Bankr. S.D. Fla. 2007\)](#).

<sup>56</sup> Reply Memorandum, *supra* note 54, at 2.

<sup>57</sup> Motion for Partial Summary Judgment Re: Assignee's Assumption of Equip. Leases at 2, *In re Great Western*, No. 06-000750 CA 02 (Fla. Cir. Ct. May 30, 2008) [hereinafter Motion for Partial Summary Judgment].

The court, however, in *Shannon v. Reynolds Shipyard Co. (In re Murphy Pacific Marine Salvage Co.)*, another bankruptcy case, held:

A contract for rental of personal property having terminated (whether by expiry or by appropriate action of a party), the further retention of the property does not permit the lessor or bailor to treat the contract as continuing nor, of course, to reinstate it by subsequent notice or other unilateral action, as plaintiff in this case attempted to do.<sup>58</sup>

This holding still leaves open the possibility that a terminated lease may be assumed by an agreement between two parties. Yet the broad statement in *Watersports* does not seem to permit such an assumption.

Even if it were permissible to assume a terminated lease through mutual agreement between two parties, no such agreement took place. The following constitutes the agreement made on January 26, 2006:

[Counsel for GE Seaco]: Your Honor, the motion is before the Court seeking injunctive relief with respect to the assignee's use and movement of our shipping containers, which are presently in [\*202] different places around the world. Our biggest concern is with respect to the containers that have been identified in Port Everglades and in Long Beach, California.

Our agreement today is with respect to the containers that had been leased by my client to Great Western as to which the assignee is continuing to use them. The agreement is, \$ 300,000 will be placed into the trust accounts of [the assignee's] law firm. That \$ 300,000 will serve as deposit in favor of my client to insure the return of all of the boxes. We're talking about approximately 1600 seagoing containers. At this moment, a number of those containers, their whereabouts [are] unknown and they're in the process of gathering information and so are we, but the real concern is with respect to containers that may be in China that may never come back, so the focus of this \$ 300,000 deposit is to secure my client against the eventual non-return of our equipment that's out on lease.<sup>59</sup>

Immediately following GE Seaco's announcement of this agreement, assignee's counsel stated that by agreeing to this resolution of the Injunction Motion, the assignee was not admitting any of the allegations contained in the motion and the agreement was without prejudice to the assignee contesting any claims made by GE Seaco.<sup>60</sup>

According to the Special Magistrate's Report and Recommendation on GE Seaco's Motion for Allowance of Administrative Expense Re: Detention of Cargo Containers, "the agreement announced at the January 16 hearing was merely a means to assure GE Seaco that the containers would be returned and to assure the assignee that GE Seaco would not restrain the containers with a maritime lien."<sup>61</sup>

Thus, the assignee could not have legally assumed the GE Seaco leases due to their termination on January 20, 2006. Even if the parties were allowed to assume the terminated leases or reinstate them through a mutual agreement, no such agreement ever took place.

### [\*203]

D. The Assignee's Continued Use of the Containers Subsequent to the Petition Date Does Not Constitute an Assumption as a Matter of Law.

GE Seaco urged the court to rule as a matter of law "that the rights and remedies of the parties against one another shall be determined and calculated in accordance with all of the terms of [the] leases, and not by the hodge-podge of only certain terms of those leases which the Assignee might consider to be advantageous."<sup>62</sup>

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<sup>58</sup> *In re Murphy Pac. Marine Salvage Co., 1982 Bankr. LEXIS 3600, at 33 (Bankr. E.D.N.Y. 1982)* (quoting *Howes v. Peckham Rd. Corp., 14 A.D.2d 940 (N.Y. App. Div. 1961)*).

<sup>59</sup> Transcript of Jan. 26, 2006 Hearing, *supra* note 20, at 3-4.

<sup>60</sup> *Id.* at 4-5.

<sup>61</sup> Special Magistrate's Report, *supra* note 32, at 10.

During the oral argument on its Summary Judgment Motion, GE Seaco claimed the assignee "cherry picked" only the favorable portions of the leases.<sup>63</sup>

The court in *In re Florida Airlines, Inc.*, held, however, that "the mere payment by a Debtor-in-Possession of the monthly charges under the two leases [at issue there] does not constitute a tacit assumption of the lease. Court approval is required for the assumption or rejection of any executory contract or unexpired lease."<sup>64</sup> In this bankruptcy case, a debtor-in-possession continued to use an aircraft during a chapter 11 proceeding.<sup>65</sup> The debtor-in-possession also made payments for use of the aircraft.<sup>66</sup> The lessor argued that the leases were "impliedly assumed" due to the debtor-in-possession's continued use and payment.<sup>67</sup> Thus, according to the lessor, the attorneys' fees and costs provided for under the leases should be treated as administrative expenses.<sup>68</sup> Yet, the court stated that "it is evident that there was no assumption of the two leases by the Debtor-in-Possession."<sup>69</sup>

In *Florida Airlines*, the debtor-in-possession benefited from continuing to use the aircraft and paying under the terms of the lease without being obliged to follow certain terms that were not as favorable.<sup>70</sup> GE Seaco's primary argument here was that the assignee's continued use of its property and payments under the leases constituted an agreement by the assignee to follow all terms of the [\*204] leases.<sup>71</sup> GE Seaco, however, never directly distinguished the facts in *Florida Airlines* from the current case.<sup>72</sup> Rather, it argued that federal bankruptcy law does not apply, but failed to cite authority to support that position.<sup>73</sup>

The court in *In re Spencer* held that "assumption of a lease cannot be implied, it requires specific court approval."<sup>74</sup> The assignee claimed "it is undisputed that the Assignee did not ever seek approval from this Court to assume any of the Seaco leases. It is also undisputed that this Court never authorized the Assignee to assume any of the Seaco leases ... ." <sup>75</sup> GE Seaco argued that the voluntary expense incurred in the January 26, 2006 hearing "was pursuant to the clear and unambiguous terms of the reinstated leases."<sup>76</sup>

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<sup>62</sup> Motion for Partial Summary Judgment, *supra* note 57, at 7 (emphasis added).

<sup>63</sup> Transcript of Hearing Jan. 26, 2006, *supra* note 20, at 47.

<sup>64</sup> [\*In re Fla. Airlines, Inc.\*, 73 B.R. 64, 66 \(Bankr. M.D. Fla. 1987\)](#).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See Assignee's: (I) Response to GE Seaco America, LLC's Motion for Partial Summary Judgment Re: Assignee's Assumption of Equip. Leases; and (II) Cross Motion for Partial Summary Judgment on Preliminary Objection to GE Seaco Am., LLC's Supplemental Claim for Admin. Expense Re: Dislocation at 2-3, *In re Great Western*, No. 06-000750 CA 02 (Fla. Cir. Ct. June 10, 2008) [hereinafter Assignee's Response and Cross Motion].

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> [\*In re Spencer\*, 139 B.R. 562, 564 \(Bankr. M.D. Fla. 1992\)](#).

<sup>75</sup> Assignee's Response and Cross Motion, *supra* note 71, at 13-14.

<sup>76</sup> GE Seaco's Post-Hearing Memo Re: Assumption of Equip. Leases at 2, *In re Great Western*, No. 06-000750 CA 02 (Fla. Cir. Ct. Aug. 1, 2008).



The court never specifically authorized assumption of the leases. Indeed, the parties themselves did not agree that the leases would be assumed. Moreover, according to the Special Magistrate's Report and Recommendation on GE Seaco's Motion for Allowance of Administrative Expense Re: Detention of Cargo Containers:

It is questionable whether assumption of a lease under which the assignee has not obtained court permission to expend money to cure the defaults is even possible, and if it were possible it would require an explicit judicial act that did not occur during the January 26 hearing, or apparently, ever. Indeed there is no indication in the record that GE Seaco's January 20, 2006 termination of the leases was ever withdrawn.<sup>77</sup>

The assignee did not tacitly assume the leases through continued use of containers and the making of payments. Assumption of the leases requires court approval, approval which the parties never obtained.

**[\*205]**

Conclusion

The assignee did not assume or reinstate any of the pre-existing leases with GE Seaco, and accordingly, the motion for administrative expenses was denied.

The court's ruling should have positive implications for assignees and claimants in assignment for the benefit of creditor actions and be a warning to those desiring to recover administrative expenses in such circumstances. The continued use of property after the petition date does not constitute an assumption, and accordingly, petitions for administrative expenses based on such claims should be denied unless the use has been previously approved by the court.

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<sup>77</sup> Special Magistrate's Report, *supra* note 32, at 10.