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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: CASE NO. 04-78434

Rhodes, Inc.,

CHAPTER 11

Debtor.

JUDGE MASSEY

Publix Super Markets, Inc.,

Movant,

v.

CONTESTED MATTER

Rhodes, Inc.,

Respondent.

ORDER DENYING MOTION TO COMPEL PAYMENT OF POSTPETITION EXPENSE

Publix Super Markets, Inc. is the sublessor of property located in Jacksonville, Florida to Rhodes as the sub-sublessee. Publix moves for an order allowing an administrative expense claim for rent for November 2004 and for attorney's fees paid by Publix in litigating issues related to the sub-sublease. Since the filing of the motion, Debtor has paid the pro rata portion of November rent at the contract rate for the period beginning on November 4, 2004, the petition date, through the end of that month. Publix has only a prepetition claim for the rent for the first three days of November.

The balance of the motion, as amended, seeks the allowance of an administrative expense with respect to attorney's fees incurred by Rhodes, first with regard to Debtor's motion to extend

the time to assume or reject the sub-sublease and second with regard to Publix's motion seeking payment of rent for November 2004. The Court held a hearing on the motion on June 30, 2005.

Most of the background facts relevant to this matter are not in dispute, as reflected in the documents filed by the parties. In a nutshell, Rhodes had a deadline of December 14, 2004 to notify Publix that it elected to extend the term of the sub-sublease for an additional five years, and Publix had a deadline of January 28, 2005 within which to notify its landlord that it wished to extend the term of the sublease an additional five years. In asserting that it was electing to extend the lease term, Rhodes made it clear that it reserved the right to reject the sub-sublease. This action seemed to put Publix between the proverbial rock and hard place. If it failed to renew the sublease and Rhodes sought to assume the sub-sublease as extended, Publix might have been exposed to a damage claim if Rhodes were evicted when the sublease term expired. On the other hand, if it notified its landlord that it wished to extend the term of the sublease and then Rhodes rejected the sub-sublease, Publix would have continued to owe rent but might not have been able to find a tenant that would pay at least the rent Rhodes had been paying.

There was the only sensible resolution to this dilemma, which was that Rhodes had to decide whether or not to assume the sub-sublease prior to the last day on which Publix and its landlord could elect the renewals of sublease and lease, respectively. Rhodes' goal of making a sound, businesslike decision on assumption or rejection could not possibly have come at the price of forcing Publix to renew the sublease with no assurance that Rhodes would cover the downside.

The Court notes, without deciding, that a demand by a trustee (or debtor in possession) that the non-debtor party to an unrejected unexpired lease or executory contract undertake liability or expense triggered by a postpetition demand by the trustee (or debtor in possession)

would arguably give rise to an administrative expense, *cf. In re Patient Educ. Media, Inc.*, 221 B.R. 97, 101 (Bankr. S.D.N.Y. 1998), perhaps measured by the cost incurred by the non-debtor party in complying with the demand. (Publix did not make this argument.)

The effect of electing the extension of the sub-sublease was to attempt to require Publix to perform its duty under paragraph 5 of the sub-sublease to extend the sublease, a duty it did not have prior to the demand made by Rhodes. Had Publix extended the sublease (laying aside the issue of whether Rhodes had the authority to issue the election letter to Publix in the first place), the effect would have been to preserve Rhodes' option to assume the sub-sublease with an extended term of five years. Publix's performance would arguably have created an administrative expense, even though a subsequent rejection of the sub-sublease would have made the extension at that point valueless to the estate. Such an expense would have been incurred at the time of performance by Publix, which would have been the point at which the amount of the expense would have been determined. The value bestowed on the estate at that point might arguably have been equal to the future net cost to Publix in complying with the demand to extend the sublease.

Section 503(b)(1)(A) permits a bankruptcy court to allow as an administrative expense, "the actual, necessary costs and expenses of preserving the estate." Publix is in effect arguing that it preserved the estate by opposing the motion to extend the time within which Rhodes could assume or reject the sub-sublease. The alleged benefit to the estate would have had to have been either (1) contributing to a substantial degree to the decision not to assume the sub-sublease and thereby preserving the estate by discouraging Rhodes from making what would have been a poor and costly business decision or (2) dissuading Rhodes from making a poor and costly business

decision in its attempt to force Publix to renew the sublease and thereby preserving the estate by avoiding the creation of a large administrative expense.

Publix introduced no evidence to support either of these possibilities. In particular, it did not show that assumption of the sub-sublease would have resulted in a net loss to the estate over time. Nor did Publix show that if it had renewed the sublease, Rhodes would not have assumed the sub-sublease. Indeed, if anything, the evidence shows that Rhodes made the wrong decision in not assuming the sub-sublease with an extended term. It offered no evidence to show what the amount of an administrative expense might have been if it had renewed the sublease as demanded by Rhodes but Rhodes had rejected the sub-sublease. In short, Publix has offered a great deal of speculation but no facts and thus failed to carry its burden of proof that the costs it incurred were necessary to preserve the estate.

The second part to the motion also relates to attorney's fees. Publix contends that it is entitled to an administrative expense for attorney's fees it incurred in its efforts to get Rhodes to pay what Rhodes now concedes it owes for the period November 4 through November 30, 2004. Publix relies on this Court's Second Supplemental Order on Debtor's Motion for an Extension of Time filed on January 20, 2005 , which states in paragraph 5:

If and to the extent that the Court orders the Debtor to pay a prorated portion of rent for the month of November 2004 to landlords other than Publix pursuant to Section 365(d)(3) of the Bankruptcy Code, the Debtor shall pay a prorated portion of the rent owed under the Publix Lease for the month of November 2004 to Publix.

This paragraph is a reference to other contested matters that the Court resolved in an Order entered on February 11, 2005. In neither Order did the Court set a deadline for paying the November rent.

Paragraph 5 of the January 20 Order, which the parties prepared and submitted, assumed that, as other courts had done, the Court would grant or deny the motions of other landlords based on a legal ruling binding on Rhodes and all landlords. This assumption turned out to be incorrect.

In the February 11 Order, the Court held that under section 365(d)(3), the issue of when an obligation arises under a lease is a matter of contract interpretation and that the question is not necessarily resolved by a provision requiring the tenant to pay rent on a due date such as on the first day of each month. There is no general legal rule under section 365(d)(3) that applies to all leases; the issue under that section is primarily a factual one that turns on the intentions of the parties to a particular lease. Consequently, the Court set up a briefing schedule to narrow the issues. Thereafter, the parties to that dispute resolved it by Rhodes' agreement that it would owe the contract rate anyway so that it made no difference whether the payment of postpetition rent for November was based on section 365(d)(3) or section 503(b)(1). Thus, the Court has never entered an order directing Rhodes "to pay a prorated portion of rent for the month of November 2004 to landlords other than Publix pursuant to Section 365(d)(3)."

On March 7, 2005, the attorney for Publix wrote one of the attorneys for Rhodes inquiring when the November stub rent would be paid but says that he received no response. It took Rhodes approximately two more months to pay the rent, which is regrettable. The March 7 letter argued that witnesses at a hearing on January 13 testified that Rhodes generated "millions of dollars of gross income and profit, both pre- and post-petition from those premises." The argument presumably was that there could be no question that the appropriate expense was the full amount of the monthly rent under the sub-sublease, prorated for the stub period.

The Court has reviewed that testimony, and there was no testimony that Rhodes was generating millions of dollars in profits at that location for any period of time. In fact, the testimony was to the effect that Rhodes was looking for a rent reduction as a basis for assuming the sub-sublease. The Court has no evidentiary basis to infer or find that Rhodes had determined earlier than the time it paid Publix that the administrative expense would be as much as what was otherwise due under the sub-sublease for the stub period.

The Court concludes that Rhodes did not violate the January 20 Order by not paying until May the November stub rent and hence that there is no factual basis on which the Court could sanction Rhodes by requiring it to pay Publix's legal expenses. The Court also concludes that the legal expenses incurred by Publix with respect to demanding payment do not constitute a necessary and reasonable expense for the preservation of the estate under section 503(b)(1).

For these reasons, it is

ORDERED that the Motion of Publix Super Markets, Inc. To Compel Payment of Postpetition Expense (document no. 636) is DENIED.

Dated: June 30, 2005.



JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE