

OCT - 9 2007

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
TANNER FAMILY, LLC,)	CASE NO. 05-83622-MHM
)	
Debtor.)	
)	
<hr/>		
PAUL H. ANDERSON, JR., Trustee,)	
)	
Plaintiff,)	
v.)	ADVERSARY PROCEEDING
)	NO. 07-6034
MIDWEST HOLDING #7, LLC,)	
)	
Defendant.)	

ORDER GRANTING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT

In this adversary proceeding, Trustee seeks to establish that a lease termination payment by Debtor to Defendant is an avoidable preference. The parties have filed cross-motions for summary judgment on the narrow issue of whether the lease termination payment was on account of an antecedent debt. The facts material to this issue are undisputed.

Debtor's main bankruptcy case commenced October 15, 2005. Debtor and Defendant entered into a lease December 4, 2002, whereby Debtor leased retail space from Defendant for a term of five years, the lease term expiring March 31, 2008 (the "Lease"). On August 9, 2005, Debtor and Defendant entered into a lease termination agreement that provided for payment of delinquent rent for July and August, 2005, in the amount of \$15,215; and for payment of a Termination Fee of \$87,172.50. Both payments were made

to Defendant August 2, 2005. Debtor vacated the leased premises at the end of August, 2005. Trustee seeks to recover the Termination Fee under §§547 and 550 as an avoidable preference. The issue presented in the cross-motions for summary judgment is whether the Lease constituted an antecedent debt on account of which the Termination Fee was paid.

Trustee asserts that the Lease established at the time it was executed an unmatured claim for the full amount of the rent due under the Lease. Thus, Trustee argues, the substitution of the Termination Fee for the future rent due under the Lease was payment of an antecedent debt. Defendant asserts that the future rent due under the Lease was neither incurred nor owed until the first day of the month in which it was due and, thus, cannot constitute an antecedent debt.

The case most closely on point with the facts of this case is *Upstairs Gallery, Inc. v. Macklowe West Development Co., LP*, 167 B.R. 915 (9th Cir. BAP 1994). The parties in *Upstairs Gallery* had entered into a five year lease in 1988 and in 1990, the parties entered into a termination agreement whereby the debtor paid approximately \$38,000 to the lessor to terminate the lease. Within 90 days thereafter, the debtor filed its Chapter 11 bankruptcy petition. The debtor filed an adversary proceeding seeking to avoid the termination fee as a preference. As in the instant case, the central issue in the adversary proceeding was whether the debtor's payment of the termination fee was on account of an antecedent debt. The bankruptcy court resolved that issue in favor of the lessor, holding that no antecedent debt existed at the time the termination fee was paid because the obligation for payment of rent arises on the date the rent is due. Defendant makes the same argument in the instant case.

On appeal, the U.S. Bankruptcy Appellate Panel of the Ninth Circuit (the "BAP") began its analysis by focusing on the term "debt," which is defined in §101 of the Bankruptcy Code as "liability on a claim." 11 U.S.C. §101(12). The term "claim" is also defined in §101 as:

right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured[.]

11 U.S.C. §101(5). The BAP noted that the broad definition of "claim" supported the conclusion that the lessor had a "claim" for monthly rental payments and the debtor had a liability relating to that claim, "or in other words, a debt."

Next the BAP focused upon whether that debt was antecedent or current. The BAP examined two cases in which the courts concluded that liability for future rent was incurred when each rent payment became due.

The *Pan Trading* court reasoned that lease payment obligations arise when they become due and payable because of the contemporaneous manner in which money and services are exchanged and the facile divisibility of the separate rent payments.

Id. at 918, citing *In re Pan Trading Corp.*, 125 B.R. 869 (Bankr. S.D. N.Y. 1991). The BAP went on, however, to analyze the case upon which *Pan Trading* was based, *In re Coco*, 67 B.R. 365 (Bankr. S.D. N.Y. 1986), in which the *Coco* court concluded that the rent obligations arise when they become due because the consideration for each rental payment is the continuation of the lessee's possession of the leased premises. *Coco* and other cases have concluded that tardy rent payments are on account of an antecedent debt and may be avoided.

The BAP departed from the analysis in *Pan Trading and Coco*, however, by noting that a lease termination fee is not a payment for concurrent possession of the leased premise.

The only consideration for the [termination fee] was the cancellation and settlement of the lease obligations or debt which arose on April 29, 1988 [the date the lease was executed]. Since the payment extinguished a debt which arose on April 29, 1988, it is on account of an antecedent debt. The fact that that debt would have extended into the future but for the settlement agreement does not change the antecedent nature of the debt.


Upstairs Gallery, 167 B.R. at 918. As Trustee in the instant case noted, the BAP concluded that a later compromise of a claim does not affect the date the debt first arose. *Id.* Thus, the lease termination agreement did not create a new obligation that would be within the exception of §547(c)(1).

The reasoning and conclusions in *Upstairs Gallery* are persuasive. The obligation from which the Termination Fee arose was an antecedent debt. As this was the only issue presented by the parties in the cross-motions for summary judgment, it is hereby

ORDERED that Trustee's motion for summary judgment is *granted* and Defendant's motion for summary judgment is *denied*.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 5th day of October, 2007.


MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE