

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:	Jointly Administered under
	Bky. No. 17-30673 (MER)
Gander Mountain Company,	
Overton's, Inc.,	Bky. No. 17-30673
	Bky. No. 17-30675
Debtors.	
	Chapter 11 Cases

**NOTICE OF HEARING AND MOTION OF SECOND THING LLC
FOR AN ORDER ALLOWING ADMINISTRATIVE EXPENSE CLAIMS FOR
UNPAID POST-PETITION RENT, INSURANCE AND REAL ESTATE TAXES**

TO: The Debtors and other entities specified in Local Rule 9013-3:

1. Second Thing LLC ("Second Thing"), by and through its undersigned attorneys, moves the Court for the relief requested below and gives notice of hearing.
2. The Court will hold a hearing on this motion at **1:30 p.m. on August 16, 2017**, before the Honorable Michael E. Ridgway, in Courtroom No. 7 West, United States Courthouse, 300 South Fourth Street, Minneapolis Minnesota, 55415.
3. Any response to this motion must be filed and served by **August 11, 2017**, which is five (5) days before the time set for the hearing (including intermediate Saturdays, Sundays, and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**
4. This Court has jurisdiction over this motion under 28 U.S.C. §§ 157 and 1334 and Local Rule 1070-1. This proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B) & (O). The petitions commencing the Debtors' Chapter 11 cases were filed on March 10, 2017,

and these cases are now pending in this Court. Venue is proper before this Court under 28 U.S.C. §§ 1408 and 1409.

5. This motion arises under 11 U.S.C. § 503(b)(1)(A). This motion is filed under Fed. R. Bankr. P. 5005 and 9014.

6. With this motion, Second Thing requests an order allowing Second Thing an administrative expense claim under 11 U.S.C. § 503(b)(1)(A) in the amount of \$20,854.34 for base rent, common area maintenance charges ("CAM"), taxes, and insurance costs that accrued while the Debtor, Gander Mountain Company (the "Debtor") was using Second Thing's property during the period of March 10, 2017 to March 31, 2017 (i.e., unpaid March "stub rent").

FACTS

The Debtors' Lease of the Franklin Store

7. Second Thing owns certain real property commonly known as "Franklin's Riverwood Plaza" located in Franklin, Wisconsin, with a 31,080 square-foot commercial retail building located thereon. (Second Thing's real property and building are collectively referred to as the "Franklin Store").

8. On May 19, 1999, Riverwood Village, LLC and the Debtor (formerly known as Gander Mountain, L.L.C.), entered into a lease for the Franklin Store. The lease was subsequently amended by a First Amendment to Lease dated June 2, 1999, further amended by a Second Amendment to Lease dated June 15, 1999, further amended by a Third Amendment to Lease dated June 30, 1999, further amended by a Fourth Amendment to Lease dated July 1, 1999, further by a Fifth Amendment to Lease dated March 6, 2014, and further amended by a Sixth Amendment to Lease dated January 8, 2016 (collectively, the "Lease"). The landlord's interest in the lease was subsequently assigned to Second Thing. Second Thing is the current

landlord under the Lease, and the Debtor is the tenant under the Lease. A copy of the Lease, as amended and assigned, is attached hereto as Exhibit A.

9. The term of the Lease is scheduled to expire on September 30, 2026 (the “Term”). Under the terms of the Lease, until September 30, 2021, the Debtor is required to pay monthly base rent to Second Thing in the amount of \$8.75 per square foot, or \$22,662.50 per month (“Base Rent”). See Lease ¶ 4.1; Exercise of Option to Renew and Sixth Amendment to Lease ¶ 4.1.

10. On March 1, 2017, Base Rent came due under the Lease in the amount of \$22,662.50 for the month of March 2017. The Debtor did not pay the March Base Rent to Second Thing.

11. On March 10, 2017 (“Petition Date”), the Debtors filed for bankruptcy under Chapter 11 of the Bankruptcy Code. Following the Debtors’ bankruptcy filing, they continued to operate their business as debtors-in-possession under 11 U.S.C. §§ 1107(a) and 1108.

12. Following the Debtors’ bankruptcy filing, from March 10, 2017 to the present, the Debtor continues to occupy the Franklin Store and sell merchandise from that location.

Unpaid Base Rent from the Petition Date to March 31, 2017

13. On a pro-rated basis, for the Debtor’s post-petition use of the Franklin Store during the period of March 10, 2017 to March 31, 2017 (22 days), Base Rent is due to the landlord in the amount of \$16,083.06 (\$731.05 per day) (“Base Stub Rent”).

Unpaid Post-Petition Additional Rent – CAM, Taxes, and Insurance Costs

14. In addition to Base Rent, the Debtor is also required to pay Second Thing certain additional amounts under the Lease as additional rent (“Additional Rent”). Additional Rent includes, among other things, the Debtor’s obligation to reimburse Second Thing for CAM, real

estate taxes, and Second Thing's costs for insurance for the Franklin Store. *See* Lease ¶¶ 4.2, 6, 7, and 12.

15. With respect to CAM, Paragraph 7.6 of the Lease requires the Debtor to pay for its proportionate share of estimated CAM on a monthly basis.

16. With respect to insurance, Paragraph 12.3 of the Lease requires Second Thing to obtain and keep in full force and effect during the term of the Lease: (i) a policy of commercial general liability insurance with respect to the Franklin Store, and (ii) a policy of all risks direct damage insurance on the Franklin Store, to its full replacement value. *See* Lease ¶¶ 12.3.1, 12.3.2. In accordance with this provision, Second Thing maintains both property and general liability insurance for the Franklin Store.

17. With respect to the Debtors' obligation to pay Second Thing for this insurance, Paragraph 12.3.3 of the Lease provides that the Debtor is required to pay its proportionate share of insurance costs.

18. With respect to real estate taxes, Paragraph 6.2.1 of the Lease provides that "Tenant agrees to pay, as Additional Rent, the entirety of all Taxes which are assessed, levied or become a lien upon the Premises on or after the Commencement Date and during the Lease Term..." *See* Lease ¶ 6.2.1.

19. In practice, the Debtor paid Second Thing an estimated lump sum payment of \$6,723.17 per month, which amount was intended to cover estimated monthly charges for CAM, insurance, and real estate taxes. In December of each year, the parties completed a "true up" of the charges paid by the Debtor against actual CAM, insurance, and real estate tax charges. A copy of the credit memo reflecting this true up for 2016 is attached hereto as Exhibit B.

The Debtor's Post-Petition Use (and Benefit From) the Franklin Store

20. Following their bankruptcy filing, the Debtor continued to operate its business as a debtor-in-possession under 11 U.S.C. §§ 1107(a) and 1108. On March 10, 2017, the Debtors filed a motion to sell substantially all of their assets under § 363 of the Bankruptcy Code [Dkt. 31] ("Sale Motion"). In the Sale Motion, the Debtors stated that, in their judgment, the best strategy to maximize the value of their assets was to sell their business in bankruptcy as a going concern:

Following a strategic review of their businesses and operations in January 2017, the Debtors determined that the best available path forward to maximize the value of their Assets and protect the interests of stakeholders was a sale of a substantial portion or all of their Assets to one or more buyers on a going concern basis in a sale or series of sales conducted under Bankruptcy Code section 363. Debtors also determined that if no such transactions materialized by the end of the sale process in late April 2017, Debtors would engage one or more third parties to assist in conducting a "going out of business" sale process through their retail store and online sales channels

See Sale Motion, at 4-5. Consistent with this strategy, from March 10, 2017 to the present, the Debtor continued to occupy the Franklin Store and sell merchandise from that location.

21. Despite occupying and operating the Franklin Store from March 10, 2017 to March 31, 2017, the Debtor has not paid Second Thing Base Stub Rent for its use of the property during that time. Similarly, the Debtor has not paid Second Thing the amounts due under the Lease for CAM, insurance, or real estate taxes for their post-petition use of the Franklin Store.

22. On May 5, 2017, the Court entered an Amended Order Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of Liens, Claims, Rights, Encumbrances, and Other Interests [Dkt. 700] (the "GOB Sale Order"). Under the GOB Sale Order, the Court approved the sale of the Debtors' merchandise and other assets to liquidators to allow them to

conduct “going out of business” sales (“GOB Sales”) at all of the Debtors’ store locations. Pursuant to the GOB Sale Order, the Debtors (through the liquidators) are currently operating a GOB Sale of their merchandise at the Franklin Store.

23. In addition, on May 4, 2017, the Court also entered an Order Authorizing the Sale of Certain Assets Free and Clear of Liens, Claims, Rights, Encumbrances, and Other Interests [Dkt. 691] (the “CW Sale Order”). In the CW Sale Order, the Court approved the sale of the Debtors’ operating business assets (other than inventory) to CWI, Inc., an affiliate of Camping World (the “Buyer”). The CW Sale Order also authorized the Debtors to enter into a Designation Rights Agreement with the Buyer, under which the Buyer has the right to designate the Debtors’ real property leases, including the Lease of the Franklin Store, for assumption and assignment to the Buyer. The CW Sale Order sets forth the procedures for the Debtors to assume and assign, or alternatively reject, their leases for the Debtors’ store locations.

24. Under 11 U.S.C. § 503(b)(1)(A), the Debtor is required to pay Second Thing all post-petition amounts due under the Lease to the extent they constitute actual and necessary costs of preserving the Debtor’s bankruptcy estate.

25. Alternatively, if the Debtor assumes Second Thing’s Lease and assigns it to the Buyer, Paragraph 26(b) of the CW Sale Order provides “the Debtors shall pay to the applicable Landlord all undisputed Cure Costs that arose after the Petition Date with respect to each such Real Property Lease and shall deposit into a segregated account designated by the Debtors an amount equal to the Cure Costs that arose after the Petition Date that are disputed by the Debtors.” *See* CW Sale Order, ¶ 26(b). Similarly, Paragraph 2.3(a) of the Designation Rights Agreement says “[the Debtors] covenant[] and agree[] to pay the counterparties under the Real Property Leases when due all amounts payable under the Real Property Leases from and after the

Petition Date as required by the Bankruptcy Code until such Real Property Lease is assumed, assigned or rejected.” *See* Designation Rights Agreement § 2.12. Under the above provisions, regardless of whether the Debtor assumes or rejects Second Thing’s Lease, they must pay Second Thing all post-petition amounts arising under the Lease under 11 U.S.C. § 503(b)(1) until the Lease is assumed or rejected.

26. At this time, the Debtor has not yet assumed or rejected Second Thing’s Lease of the Franklin Store. Under 11 U.S.C. § 365(d)(3), therefore, the Debtor must “timely perform” all obligations under the Lease until it either assumes or rejects the Lease. In addition, under 11 U.S.C. § 503(b)(1)(A), the Debtor must pay Second Thing all post-petition amounts due under the Lease to the extent they constitute actual and necessary costs of preserving the bankruptcy estate.

REQUEST FOR RELIEF

27. With this motion, Second Thing requests an order allowing Second Thing an administrative expense claim under 11 U.S.C. § 503(b)(1)(A) in the amount of \$20,854.34 for base rent, CAM, taxes, and insurance costs that accrued while the Debtor was using Second Thing's property during the period of March 10, 2017 to March 31, 2017 (i.e., unpaid March “stub rent”).

RESERVATION OF RIGHTS

28. Second Thing reserves its rights to file additional administrative expense claims, general unsecured claims, and any other claims against the Debtors' bankruptcy estates.

WHEREFORE, based on the foregoing and for the reasons set forth in the accompanying memorandum of law, Second Thing respectfully requests that the Court enter an order:

- a. allowing Second Thing an administrative expense claim under 11 U.S.C. § 503(b)(1)(A) in the amount of \$20,854.34 for base rent, CAM, taxes, and insurance costs that accrued while the Debtor was using Second Thing's property during the period of March 10, 2017 to March 31, 2017 (i.e., unpaid March "stub rent"); and
- b. granting Second Thing such further relief as the Court deems proper.

Dated: July 17, 2017

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Attorneys for Second Thing LLC

VERIFICATION

I, David R. Blust, declare under penalty of perjury that I am the Managing Member of Second Thing LLC, the moving party named in the foregoing motion, that I have read the foregoing document, and that the facts described therein are true and correct according to the best of my knowledge, information, and belief.

Executed on: 7/17/2017

By: *David R. Blust*
David R. Blust

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	Jointly Administered under
	Bky. No. 17-30673 (MER)
Gander Mountain Company,	
Overton's, Inc.,	Bky. No. 17-30673
	Bky. No. 17-30675
Debtors.	
	Chapter 11 Cases

**MEMORANDUM OF LAW IN SUPPORT OF SECOND THING LLC'S
MOTION FOR AN ORDER ALLOWING ADMINISTRATIVE EXPENSE CLAIMS
FOR UNPAID POST-PETITION RENT, INSURANCE AND REAL ESTATE TAXES**

Second Thing LLC ("Second Thing"), through its undersigned attorneys, files this memorandum in support of its motion for an order allowing administrative expense claims for unpaid post-petition rent, insurance and real estate taxes under 11 U.S.C. § 503(b)(1)(A) ("Motion").

FACTS

The relevant facts are set forth in the Motion. All capitalized terms herein have the meanings given to them in the Motion.

ARGUMENT

I. SECOND THING IS ENTITLED TO AN ADMINISTRATIVE EXPENSE CLAIM UNDER 11 U.S.C. § 503(b)(1)(A) FOR UNPAID MARCH STUB RENT, INCLUDING BASE RENT, COMMON AREA MAINTENANCE CHARGES, TAXES, AND INSURANCE COSTS.

Under § 503(b)(1)(A) of the Bankruptcy Code, Second Thing is entitled to an administrative expense claim for the "the actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). In determining whether an expense is an "actual, necessary

cost and expense of preserving the estate,” courts generally consider: (1) whether the expense arose from a transaction with the estate, and (2) whether it benefitted the estate in some demonstrable way. *In re Williams*, 246 B.R. 591, 594 (B.A.P. 8th Cir. 1999). To gain administrative expense priority under this test, Second Thing must show it furnished consideration to the Debtor post-petition and, as a result of this consideration, it provided a tangible benefit to the bankruptcy estate. *Id.*

When a bankruptcy debtor leases commercial real property, § 365(d)(3) of the Bankruptcy Code requires the debtor to “timely perform” all obligations “arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.” 11 U.S.C. § 365(d)(3). Under this provision, the debtor must pay all rent and other charges under the lease when they arise post-petition. *Burival v. Roehrich (In re Burival)*, 613 F.3d 810, 812 (8th Cir. 2010). In situations where rent becomes due pre-petition but relates to the debtor’s post-petition use of the property,¹ courts disagree on whether the debtor’s obligation to pay rent is required under § 365(d)(3). *See Burival v. Creditors Comm. (In re Burival)*, 406 B.R. 548, 552-53 (B.A.P. 8th Cir. 2009) (describing disagreement among courts on how to treat stub rent under § 365(d)(3)).

Despite this disagreement, virtually all courts agree that a commercial landlord will possess an administrative expense claim for unpaid stub rent under § 503(b)(1)(A) where the debtor uses the landlord’s property post-petition and benefits from its occupancy:

There is no question, of course, that the payment of rent for the use and occupancy of real estate ordinarily counts as an “actual, necessary” cost to which a landlord, as a creditor, is entitled. In order to survive, a financial entity almost always needs a physical

¹ This typically happens when a rent payment is due on the first of the month, but the debtor files for bankruptcy after the first of the month. The post-petition rent due for the debtor’s use of the property from the petition date through the first of the following month is commonly referred to as “stub rent.”

space to occupy. When a debtor owns no suitable real estate of its own, its only choice is to become a tenant, and to assume the obligations of paying periodic rent to a landlord. In such circumstances, therefore, rent is clearly an “actual, necessary” cost of preserving the estate, since the debtor’s survival depends on its ability to pay the landlord for the right to possess the space necessary to conduct its business. Because bankruptcy proceedings are considered to be equitable, however, the landlord’s right to collect monetary relief is somewhat curtailed: a debtor is generally required to pay only a reasonable value for the use and occupancy of the landlord’s property, which may or may not equal the amount agreed upon in the terms of the lease.

In re Sportsman’s Warehouse, Inc., 436 B.R. 308, 315-16 (Bankr. D. Del. 2009) (quoting *Zagata Fabricators, Inc. v. Superior Air Prods.*, 893 F.2d 624, 627 (3d Cir. 1990)). Under § 503(b)(1)(A), the landlord possesses a priority administrative expense claim for the fair market value of the rent, “which is presumably the lease rate unless there is evidence to the contrary.” *Id.* (quoting *In re Goody’s Family Clothing, Inc.*, 392 B.R. 604, 614 (Bankr. D. Del. 2008), *aff’d*, 610 F.3d 812 (3d Cir. 2010)). *See also Williams*, 246 B.R. at 594 n.4 (“In rental situations, the measure [of an administrative expense claim] is the reasonable rental value of the property occupied.”); *In re Raymond Cossette Trucking, Inc.*, 231 B.R. 80, 85 (Bankr. D.N.D. 1999) (“As for leased property, most courts take the position that the rent specified in the lease itself is the presumed reasonable of the property to the debtor-in-possession”); *In re Cybernetics, Inc.*, 111 B.R. 32, 40-41 (Bankr. N.D.N.Y. 1989) (holding that the amount of the lessor’s administrative expense claim was based upon the value specified in the lease). Under § 503(b)(1)(A), therefore, where a debtor continues to occupy leased property post-petition, the landlord may assert an administrative expense claim for unpaid “stub rent” for the post-petition use of the property. *In re Goody’s Family Clothing, Inc.*, 610 F.3d 812, 818 (3d Cir. 2010).

It is undisputed that the Debtor continued to occupy and use the Franklin Store post-petition, and it received a direct and tangible benefit from using the property. As described in

the motion, throughout March of 2017, the Debtor operated the Franklin Store and sold merchandise from that location. In addition, at the same time, the Debtors were searching for a going-concern buyer for all of their stores to maximize the value of their assets. Continuing to operate their various store locations during bankruptcy, including the Franklin Store, was obviously a critical component of the Debtors' strategy. In the end, their strategy was successful: the Debtors sold all of their assets (other than inventory) to CWI, Inc. as a going-concern buyer (the "Buyer"), and they sold their inventory and other assets to various liquidators to be sold through going-out-of-business ("GOB") sales. A GOB sale is currently underway at the Franklin Store. Therefore, now that the Debtor have used the Franklin Store to sell its merchandise and locate a buyer for its assets, it is now time for the Debtor to pay the costs and expenses of those activities, which includes paying base rent, common area maintenance charges ("CAM"), taxes, and insurance costs (the "March Stub Rent") owed to Second Thing.

On a pro-rated basis, for the Debtor's post-petition use of the Franklin Store from March 10, 2017 to March 31, 2017 (22 days), March Stub Rent is due to the landlord in the amount of \$16,083.06 for base rent (\$731.05 per day) and \$4,771.28 for CAM, taxes, and insurance (\$216.88 per day), for a total of \$20,854.34.

CONCLUSION

Since the Petition Date, the Debtor has used the Franklin Store to sell its merchandise and locate a buyer for the Debtors' assets. The Debtors have benefitted from using the Franklin Store, and under the Bankruptcy Code, they are required to pay Second Thing for the costs of those activities, which includes paying March Stub Rent, including CAM, insurance premiums, and real estate taxes associated with the property. Accordingly, Second Thing requests an order

**UNITED STATES BANKRUPTCY COURT
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	Bky. No. 17-30675
Debtors.	Chapter 11 Cases

**ORDER GRANTING SECOND THING LLC'S
MOTION FOR ALLOWANCE AND IMMEDIATE
PAYMENT OF ADMINISTRATIVE EXPENSE CLAIM**

This matter came before the Court on the Motion of Second Thing LLC ("Second Thing") for allowance and immediate payment of an administrative priority claim under 11 U.S.C. § 503(b)(1)(A) ("Motion"). Appearances were as noted on the record.

Based upon the arguments of counsel and all the files, records, and proceedings herein, the Court being duly advised in the premises, IT IS ORDERED:

1. Under 11 U.S.C. § 503(b)(1)(A), Second Thing is granted an allowed administrative expense claim in the amount of \$20,854.34 for base rent, CAM, insurance cost, and real estate taxes due under Second Thing's lease for the period of March 10, 2017 to March 31, 2017.

Dated:

Michael E. Ridgway
United States Bankruptcy Judge