

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA**

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

**DEBTOR'S LIMITED OBJECTION TO MOTION OF ETCO PROPERTIES, INC. FOR
AN ORDER ALLOWING ADMINISTRATIVE EXPENSE CLAIMS FOR UNPAID
POST-PETITION RENT, INSURANCE AND REAL ESTATE TAXES**

1. Debtor Gander Mountain Company (the "Debtor") submits this limited objection to the *Motion Of ETCO Properties, Inc. for an Order Allowing Administrative Expense Claims for Unpaid Post-Petition Rent, Insurance and Real Estate Taxes* (the "Motion"). [Dkt. No. 920.]

BACKGROUND

2. The Debtor and ETCO Properties, Inc. ("ETCO") are parties to that certain lease dated May 4, 2001, as amended on November 18, 2016 (as amended, the "Lease"), for the Debtor's Davenport, Iowa store (the "Davenport Store").

3. On March 10, 2017 (the "Petition Date"), Debtors Gander Mountain Company and Overton's, Inc (the "Debtors") commenced the above-captioned proceeding under chapter 11 of Title 11 of the United States Code.

4. On June 13, 2017, ETCO filed the Motion seeking allowance of administrative expense claims as to three categories of expenses. First, ETCO seeks an administrative expense claim for stub rent for the month of March 2017 in the amount of \$12,923.58 under 11 U.S.C. § 503(b)(1)(A) (the "Stub Rent Claim"). Second, ETCO seeks an administrative expense claim and immediate payment of unpaid insurance premiums in the amount of \$10,032.00 under 11

U.S.C. § 365(d)(3) (the “Insurance Claim”). Third, ETCO seeks an administrative expense claim for real estate taxes in the amount of at least \$22,122.10 under 11 U.S.C. § 503(b)(1)(A) (the “Tax Claim”).

5. On July 27, 2017, the Debtor gave notice that it was rejecting the Lease effective as of July 31, 2017 [Dkt. No. 1060], which was amended on August 4, 2017 [Dkt No. 1078] (as amended, the “Rejection Notice”).

RESPONSE

I. ETCO’s Stub Rent Claim Must Be Reduced

ETCO’s Stub Rent Claim arose on March 1, 2017, prior to the Petition Date. ETCO apparently concedes that the Stub Rent Claim is not entitled to administrative priority under Section 365(d)(3) of the Bankruptcy Code. (Memorandum in Support of Motion at 2).

ETCO seeks allowance of the Stub Rent Claim as an administrative expense claim under section 503(b)(1)(A), as an “actual, necessary” expense of preserving the estate. As noted in the *In re Sportsman’s Warehouse*, ETCO is only entitled to a claim for the “reasonable value of 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.” 436 B.R. 308, 315-16 (Bankr. D. Del. 2009). To have the Stub Rent Claim allowed under section 503(b)(1)(A), ETCO has the burden to prove that the estate received a benefit equal to the \$12,923.58 it seeks treated as an administrative expense claim. *In re Sylva Corp.*, 519 B.R. 776, 782 (B.A.P. 8th Cir. 2014) (“[T]he burden of proof under § 503(b)(1) is on the claimant seeking an administrative expense claim.”) (citing *Williams v. IMC Mortg. Co. (In re Williams)*, 246 B.R. 591, 594 (B.A.P. 8th Cir. 1999)).

With respect to the Stub Rent Claim, the Debtor does not object to the allowance of an administrative expense claim. However, the quantum of the claim must be reduced. First, the Debtor calculates the amount of the Stub Rent Claim as no more than \$12,336.15. Second,

pursuant to the Court's final order approving the debtor-in-possession financing [Dkt. No. 443] (the "Final DIP Order"), the Debtors funded a \$1,600,000 reserve (the "Stub Rent Reserve") to be used for payment to holders of allowed unpaid administrative expense claims for post-petition March rent on a pro rata basis. As directed by the Final DIP Order, the Debtors have distributed the funds in the Stub Rent Reserve. Pursuant to this procedure, which is set forth in the Final DIP Order, the Debtors have already paid the Landlord \$3,053.82 in partial payment of its administrative expense claim. Accordingly, the Stub Rent Claim must be further reduced to \$9,282.33.

The Debtor therefore does not object to allowance of the Stub Rent Claim as an administrative expense claim under section 503(b)(1)(A) in an amount equal to \$9,282.33.

II. The Debtor Does Not Object to Allowance of the Insurance Claim as an Administrative Expense Claim

ETCO's second request is for allowance of the Insurance Claim as an administrative expense claim under section 365(d)(3). ETCO submitted the insurance bill for the period from November 16, 2016 to November 18, 2017, to the Debtor on March 10, 2017. Under the terms of the Lease, the Debtor was then required to pay ETCO the Insurance Claim amount within thirty days.

The Eight Circuit is a "billing date" method jurisdiction with respect to determining whether a claim is a pre-petition or post-petition obligation under section 365(d)(3). *See Burival*, 406 B.R. at 553. Under this method, if a lease obligation that is entitled to administrative priority becomes due post-petition, but pre-rejection, it is to be paid in full when due rather than prorated. *Id.* at 552-554. With respect to the Insurance Claim, under the terms of the Lease, the obligation to pay ETCO for insurance amounts arose at the time the Debtor received the notice to pay such amounts and was due no later than 30 days afterward. (Lease, ¶ 12.3.4.) The Debtor

does not object to allowance of the Insurance Claim as an administrative expense claim under section 365(d)(3) of the Bankruptcy Code in the amount of \$10,032.00.

III. The Tax Claim is Not Allowable as an Administrative Expense Claim

The final claim ETCO seeks to have treated as an Administrative Expense Claim is the Tax Claim. The Tax Claim is for an unliquidated amount and is not entitled to treatment as an administrative expense claim.

ETCO noted in a footnote to the Motion that it would seek the entire amount of the Tax Claim as an administrative expense under section 365(d)(3) when it became due under the Lease. (*See* Motion, fn. 2.) Since the filing of the Motion, the Debtor has rejected the Lease, effective as of July 31, 2017, as set forth in the Rejection Notice. As a result, the Tax Claim is not and will never become allowable under section 365(d)(3). The Debtor is only required to perform obligations as they come due from the Petition Date until the lease is rejected. *See Burival*, 406 B.R. at 553 (“The language is clear: the debtor shall timely perform all obligations arising from and after the order for relief until the lease is assumed or rejected.”). Here, the Tax Claim will not arise until after rejection. The Tax Claim amount is therefore not entitled to payment under section 365(d)(3). Rather, the Tax Claim is now part of ETCO’s general unsecured claim, if any, for rejection damages.

While ETCO relies on the “billing date” method adopted by the Eighth Circuit to establish its administrative priority for the Insurance Claim, it tries to apply the “prorated method” to its Tax Claim. ETCO cannot have it both ways. In fact, ETCO cites no authority where a court in the Eighth Circuit has allowed a similar claim for post-petition taxes or other additional rent amounts on a prorated basis, whether based on section 503(b)(1)(A) or otherwise. *See Burival*, 406 B.R. at 553 (rejecting the prorated method for post-petition administrative

claims). Because the Tax Claim did not arise post-petition and pre-rejection, the Debtor is not entitled to administrative expense treatment of the Tax Claim.

CONCLUSION

The Debtor does not object to the allowance of the Stub Rent Claim in the amount of \$9,282.33 or the Insurance Claim in the amount of \$10,032.00 as administrative expense claims.

The Debtor respectfully requests that the Court deny ETCO's request for the allowance of the Tax Claim as an administrative expense claim, as no legal basis exists to allow this claim.

Dated: August 11, 2017

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**ATTORNEYS FOR GANDER
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VERIFICATION

I, Timothy G. Becker, the Executive Vice President of Lighthouse Management Group, Inc., the Chief Restructuring Officer of the Debtors, declare under penalty of perjury that the facts contained in *Debtor's Limited Objection to Motion Of ETCO Properties, Inc. for an Order Allowing Administrative Expense Claims for Unpaid Post-Petition Rent, Insurance and Real Estate Taxes* are true and correct to the best of my knowledge, information, and belief.

August 11, 2017



Timothy G. Becker