

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:

FFP OPERATING PARTNERS, L.P.

Debtor.

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CASE NO. 03-90171-BJH-11

MEMORANDUM OPINION AND ORDER

Before the Court is the Amended Motion to Require Debtor to Perform Obligations Pursuant to § 365(d)(3), or, Alternatively, to Assume or Reject Real Estate Lease (the “Amended Motion”) filed by Thrift Distributors, Inc. (“Thrift Distributors”). FFP Operating Partners, LP (the “Debtor” or “FFP”), and certain other parties in interest in the Debtor’s bankruptcy case oppose the Amended Motion. The Court has core jurisdiction over the Amended Motion in accordance with 28 U.S.C. §§ 1334 and 157.

Factual Background and Contention of the Parties

In the Amended Motion, Thrift Distributors asks this Court to require the Debtor to honor its defense and indemnity obligations under a Ground Lease Agreement dated May 1, 1987 and a Lease Agreement dated June 24, 1999 (collectively, the “Leases”). *See* Exhibit 55.¹ Thrift Distributors is the owner of the real property and the landlord under the Leases, which cover a convenience store located at 5001 Holloway Road, Pineville, Louisiana (the “Convenience Store”). The Debtor is the tenant under the Leases and the operator of the Convenience Store. Since its bankruptcy filing, the Debtor has continued to operate the Convenience Store.

In the Leases, the Debtor agreed to “indemnify and hold Lessor harmless from and against any and all claims by or on behalf of any person . . . arising from the occupation, use, possession, conduct or management of . . . the Leased Premises.” *See* Exhibit 55 at Article VIII. In addition, the Debtor agreed to “indemnify and save Lessor harmless from and against any and all claims arising from any condition of the Leased Premises or the Improvements . . . or arising from any action, injury, or damage whatsoever caused to any person . . . in or about the Leased Premises or . . . the land adjacent thereto.” *Id.* Finally, the Debtor agreed that the “indemnification obligations of Lessee hereunder shall include all costs, expenses and liabilities incurred by Lessor, including reasonable attorneys’ fees; and in case any action . . . shall be brought against Lessor by reason of any such claim, Lessee upon receipt of written notice from Lessor covenants to defend such action . . . with counsel satisfactory to Lessor.” *Id.*

Thrift Distributors alleges that prior to the commencement of the Debtor’s bankruptcy case,

¹While the Leases were admitted into evidence, no witnesses testified at the hearing on the Amended Motion. So, certain “facts” relied upon by the Court in this Memorandum Opinion and Order are really factual allegations that the Court believes to be undisputed from the parties’ pleadings.

it was sued by Bobbie Hutchins (“Hutchins”) in state court in Rapides Parish, Louisiana (the “Lawsuit”) based upon a slip and fall accident which occurred in the parking lot of the Convenience Store on October 10, 2001. Moreover, Thrift Distributors alleges that the Debtor handled its defense in the Lawsuit as required by the terms of the Leases. But, subsequent to the Debtor’s bankruptcy filing, Thrift Distributors alleges that the Debtor notified it that the Debtor would not continue to defend it in the Lawsuit. As a result, Thrift Distributors asks this Court to require the Debtor to honor its defense and indemnification obligations under the Leases pending their assumption or rejection in accordance with § 365(d)(3) of the Bankruptcy Code or, alternatively, to require the Debtor to make an immediate decision on assumption or rejection of the Leases.²

While the Debtor does not appear to dispute these factual allegations, the Debtor and various parties in interest in the case, including certain secured creditors and the Official Unsecured Creditors’ Committee (collectively, the “Opponents”), oppose the relief requested in the Amended Motion, contending that the Debtor is not required by § 365(d)(3) to defend Thrift Distributors from the Lawsuit as that “obligation” arose pre-petition. With respect to Thrift Distributors’s request that the Debtor honor its obligation to indemnify Thrift Distributors from the Hutchins claim, the Opponents contend that this obligation also arose pre-petition and that § 365(d)(3) is inapplicable to such a pre-petition obligation. Finally, with respect to the alternative relief requested, the Opponents contend that the Debtor needs more time to make its decisions with respect to all of its remaining nonresidential real property leases, including the Leases. Given the fact that the Debtor

² By prior Orders of this Court, the Debtor has obtained various extensions of the time to assume or reject certain of its nonresidential real property leases, including the Leases. After various lease rejections post-petition, the Debtor is currently the tenant with respect to approximately 239 nonresidential real property leases. The current deadline by which the Debtor must make decisions with respect to its remaining nonresidential real property leases is August 28, 2004.

is paying rent post-petition in accordance with the terms of the Leases, the Opponents conclude that Thrift Distributors is not prejudiced by being required to wait a reasonable time for the Debtor's decision with respect to the Leases.

Legal Analysis

For the reasons explained more fully below, the Court will deny the Amended Motion. Section 365(d)(3) mandates that “the trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease . . . , until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.” 11 U.S.C. § 365(d)(3). While there is substantial disagreement among the courts as to the import of this language,³ the question is what Congress meant when it referred to obligations of the debtor arising under a lease after the order for relief. To determine when “obligations” under a lease “arise,” the Court must look to the terms of the lease itself and applicable state law. *See, e.g., Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205, 209-11 (3^d Cir. 2001).

The state court petition in the Lawsuit is attached to the Amended Motion as Exhibit 1. It appears that the Lawsuit was filed against Thrift Distributors in September 2002. Moreover, it appears that the parties agree that the Debtor was defending Thrift Distributors in the Lawsuit when the bankruptcy case was filed. From this the Court infers that Thrift Distributors gave written notice to the Debtor in accordance with the terms of the Leases prior to the commencement of this bankruptcy case, thereby triggering the Debtor's obligation to defend Thrift Distributors in the

³ The debate among the courts has arisen most often with respect to the debtor's “obligation” to pay rent and real estate taxes under the lease post-petition. Although not specifically relevant here, the decisions generally fall into one of two camps – those courts following the so-called payment rule – *i.e.*, if the “obligation” to pay first arises under the lease after the order for relief, you must pay the entire obligation, and those courts following the so-called proration rule – *i.e.*, you prorate the obligation between the pre-petition and post-petition periods and that portion of the obligation that accrues post-petition must be paid on a current basis pending assumption or rejection. *Compare Centerpoint Props. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.)*, 268 F.3d 205 (3d Cir. 2001) with *In re Handy Andy Home Improvement Ctrs., Inc.*, 144 F.3d 1125 (7th Cir. 1998).

Lawsuit.

The Leases clearly obligate the Debtor to defend Thrift Distributors in the Lawsuit with counsel acceptable to Thrift Distributors. However, because the Debtor's obligation to defend Thrift Distributors appears to have arisen pre-petition (since the Lawsuit was filed and the Debtor was defending Thrift Distributors prior to its bankruptcy filing), § 365(d)(3) is simply inapplicable as it only requires the Debtor to timely perform obligations arising under the Leases *after* the order for relief, pending the Debtor's decision to assume or reject.

Turning next to the Debtor's obligation to indemnify Thrift Distributors from claims more generally, the Court must determine when the obligation to indemnify provided by the Leases arises under state law. The Leases do not contain a choice of law provision. But, given the fact that the Debtor's principal place of business is in Texas, and the Leases provide that they were entered into in Texas and are enforceable in Tarrant County, Texas, *see* Exhibit 55 at Section 18.19, the Court concludes that Texas law governs. As noted previously, the Debtor agreed to hold the Lessor harmless "from and against any and all claims" and agreed further that its indemnification obligation includes "all costs, expenses and liabilities incurred by Lessor including reasonable attorneys' fees."

Id. at Article VIII

In *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W. 2d 203, 207 (Tex. 1999), the Texas Supreme Court recognized two distinct types of indemnity agreements:

There are two types of indemnify agreements, those that indemnify against liabilities and those that indemnify against damages. Broad language, like that in this contract, that holds the indemnitee "harmless" against "all claims" and "liabilities" evidences an agreement to indemnify against liability. Such provisions entitle the indemnitee to recover when the liability becomes fixed and certain, as by the rendition of a judgment, whether or not the indemnitee has yet suffered actual damages, as by payment of a judgment.

Given this guidance with respect to indemnity agreements under state law, the

indemnification provisions that appear to be at issue here are properly characterized as an indemnity against liability. Thus, under Texas law, the Debtor's obligation to indemnify does not arise until the liability of Thrift Distributors is established in the Lawsuit, at which time the Debtor's liability will become "fixed and certain." Since Thrift Distributors' liability to Hutchins has not yet been determined in the Lawsuit, the Debtor's obligation under the Leases to indemnify Thrift Distributors has not arisen and the Amended Motion is premature.

For the same reason, the Amended Motion is also premature with respect to the obligation to indemnify Thrift Distributors for its attorneys' fees. Under Texas state law, a claim for indemnification of attorneys' fees does not accrue until *all* of the liabilities of the indemnitee become fixed and certain by judgment. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W. 2d 203, 207 (Tex. 1999) (holding that a claim for indemnification of attorneys' fees was not mature for purposes of the compulsory counterclaim rule until judgment was entered). Therefore, the obligation to indemnify Thrift Distributors has not yet arisen, and the Debtor need not pay it on a current basis pending its decision to assume or reject the Leases. This result makes functional sense, as piecemeal recovery of attorneys' fees as they are incurred would be impractical.⁴

For these reasons, Thrift Distributors is not entitled to an order compelling the Debtor to

⁴Many courts have concluded that indemnity claims are properly characterized as pre-petition claims under the Bankruptcy Code if the contract giving rise to the claim is a pre-petition contract. *See, e.g., In re Manville Forest Prods. Corp.*, 209 F. 3d 125 (2d Cir. 2000); *In re Marshall*, 302 B.R. 711 (Bankr. D. Kan. 2003); *In re Pinnacle Brands, Inc.*, 259 B.R. 46 (Bankr. D. Del. 2001); *In re Food Barn Stores, Inc.*, 175 B.R. 723 (Bankr. W.D. Mo. 1994); *In re Highland Group, Inc.*, 136 B.R. 475 (Bankr. N.D. Ohio 1992). The decision here is not in conflict with those decisions. Because "claim" is defined in the Code broadly and includes contingent, unmatured, unliquidated rights to payment, 11 U.S.C. § 101(5), this Court agrees that an obligation to indemnify under a pre-petition contract is often properly characterized as a pre-petition claim against the debtor. But, notwithstanding the fact that the obligation to indemnify may give rise to an unsecured, pre-petition claim in the bankruptcy case, the Court concludes that if the "obligation" to indemnify "arises" (as defined by state law) under an unexpired nonresidential real property lease after the bankruptcy case is filed and before the debtor makes its decision to assume or reject that lease, then § 365(d)(3) requires the debtor to timely perform – *i.e.*, to pay the obligation when it arises. However, the Court is not re-characterizing the claim as a post-petition, cost of administration claim. Rather, the Court concludes that Congress has determined that this pre-petition claim is entitled to be paid post-petition pending the debtor's decision to assume or reject the unexpired lease.

defend the Lawsuit since the obligation to defend arose pre-petition. Moreover, Thrift Distributors is not entitled to an order compelling the Debtor to indemnify it since its request is premature.

With respect to Thrift Distributors's request for alternative relief, the Court is satisfied that the Debtor's case is sufficiently complex to require further time for management to make appropriate decisions regarding assumption or rejection of the Debtor's remaining nonresidential real property leases, included the Leases. Accordingly, the Debtor will not be compelled to make an immediate decision regarding assumption or rejection of the Leases. The Court's prior Orders giving the Debtor until August 28, 2004 will remain in effect.

SO ORDERED.

END OF ORDER