

THIS OPINION IS NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:) CASE NO. 00-50369
)
THE GIBSON-HOMANS COMPANY) CHAPTER 11
)
DEBTOR) JUDGE MARILYN SHEA-STONUM

**ORDER RE: REQUEST FOR
PAYMENT OF ADMINISTRATIVE EXPENSE**

This matter comes before the Court on a request [**docket #197**] and an amended request [**docket #233**] of Laurence E. Myers, trustee of the Laurence E. and Eleanor Myers Family Trust, Mark Myers and Lisa M. Goldman (collectively the "Movants") for the payment of an administrative expense (the request and the amended request shall hereinafter be referred to collectively as the "Motion") and an objection to the Motion filed by Debtor [**docket #246**]. During the hearing on this matter, counsel for the

¹ National City Bank, as agent for itself and Provident Bank (collectively, the "Banks"), also filed a limited objection to the Motion which noted that, pursuant to the Order approving financing in this case, no cost or expense (with the exception of certain "carve outs") could be senior or *pari passu* with the Banks Superpriority Claims (as that term is defined in the financing order). Accordingly, the Banks requested that, if allowed, Applicant's administrative expense be paid only pursuant to a confirmed plan of reorganization. Subsequent to the filing of the Bank's objection, Movants consented to payment of their requested administrative expense claim subject to the Bank's rights. See "Amended Request by Laurence E. Myers, Trustee of the Laurence E. and Eleanor Myers Family Trust, Mark L. Myers and Lisa M. Goldman for Payment of Expense of Administration" at page 5 [**docket #233**]. Therefore, the Bank's limited objection need

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Movants and Debtor represented to the Court that they did not choose to present any evidence regarding this matter. Based upon that representation, the matter was taken under advisement on the pleadings alone.¹

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (B) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the pleadings filed herein, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The following facts are not in dispute:

1. In December 1983, The Gibson-Homans Company, as lessee, entered into a lease (the "Lease") with 645 Associates, as lessor, for non-residential real property located at 301 C - 9th Street, Modesto, California (the "Property"). The Lease was subsequently amended in September 1999 by and between The Gibson-Homans Company, as lessee, and the Movants (successors-in-interest to 645 Associates), as lessor. The terms of the Lease required that The Gibson-Homans Company pay rent in the amount of \$11,250.00 per month, due and payable on the first day of the month. The Gibson-Homans Company did not timely pay the monthly rent installment due on February 1, 2000.

not be addressed further in this Order.

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2. On February 15, 2000 (the "Filing Date"), The Gibson-Homans Company filed a voluntary chapter 11 bankruptcy petition and continued in possession of its property and operated its business as debtor-in-possession, pursuant to §1107 and §1108 of the Bankruptcy. (The Gibson-Homans Company, as debtor-in-possession, shall hereinafter be referred to as "Debtor").

3. Pursuant to an Order approving the sale of substantially all of Debtor's assets and business as a going concern [**docket #146**] and an Order approving Debtor's rejection of the Lease under §365(a) of the Bankruptcy Code [**docket #200**], the Lease was rejected as of and Debtor vacated the Property on May 26, 2000. Movants did not object to Debtor's motion to reject the Lease.

4. The *pro rata* portion of rent due from the Filing Date through February 29, 2000 is \$5,818.96 (the "February Rent") and the *pro rata* portion of additional charges due from the Filing Date through February 29, 2000 is \$1,826.01 (the "Additional February Charges").

5. Debtor timely paid all post-petition rent installments due under Lease from March 1, 2000 through May 26, 2000.

DISCUSSION

At the beginning of the hearing on this matter, Debtor's counsel represented to the Court that Debtor would consent to the treatment of the Additional February Charges as an administrative expense. This consent apparently stems from the fact that the Additional February Charges are billed quarterly (and not monthly) and, thus, became due after the Filing Date. Accordingly, the only issue before the Court is the proper treatment of the February Rent.

Through the Motion, Movants request payment of the February Rent as an administrative expense pursuant to §503(b)(1) of the Bankruptcy Code. Through its

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objection, Debtor contends that the February Rent should not be allowed as an administrative expense because those charges became due prior to the Filing Date and thus did not arise from a transaction with the bankruptcy estate.

Pursuant to §503 of the Bankruptcy Code, there shall be allowed as an administrative expense, "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after commencement of the case. . . ." See 11 U.S.C. §503(b)(1). For a claim to qualify as an administrative expense, a claimant must prove (1) that the debt arose from a transaction with the debtor-in-possession as opposed to the preceding entity and (2) that the debt directly and substantially benefitted the estate. *Employee Transfer Corp. v. Grigsby (In re White Motor Corp.)*, 831 F.2d 106, 110 (6th Cir. 1987). The party seeking an administrative expense claim bears the burden of proving entitlement to such a claim by a preponderance of the evidence. See *In re Merry-Go-Round Enterprises, Inc.*, 180 F.3d 149, 157 (4th Cir. 1999); *In re Allen Care Centers, Inc.*, 96 F.3d 1328, 1330 (9th Cir. 1996); *In re Mid Region Petroleum, Inc.*, 1 F.3d 1130, 1132 (10th Cir. 1993); *In re Gillette Associates, Ltd.*, 101 B.R. 866, 881 (Bankr. N.D. Ohio 1989).

In support of its objection, Debtor relies upon *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Keonig Sporting Goods, Inc.)*, 203 F.3d 986 (6th Cir. 2000). In that case, the debtor, as lessee, was obligated under the terms of a lease for nonresidential real property to pay rent on the first day of each month. Several months after filing its petition, the debtor rejected the lease as of and vacated the leased premises on the second day of the month. Thereafter, the lessor filed a request with the Bankruptcy Court seeking payment for the full month's rent. The debtor objected, contending that the lessor was entitled to receive only a *pro rata* payment of rent representing the two days of the month that debtor actually occupied the leased premises.

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In analyzing the language of §365(d)(3), the Sixth Circuit affirmed the Bankruptcy Court's holding that a debtor's rent obligation with respect to a rejected lease should be determined as of when that rent obligation arose. *Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Keonig Sporting Goods, Inc.)*, 203 F.3d 986, 990 (6th Cir. 2000). Because debtor's obligation to pay the entire month's rent "arose" on the first day of the month, the Bankruptcy Court determined (and the Sixth Circuit affirmed) that such obligation was a post-petition, pre-rejection obligation that debtor had to pay in full pursuant to §365(d)(3). *Id.*

The holding in the *Koenig* case does not necessarily dictate the outcome of this matter as Movants chose to frame the issue regarding the February Rent in terms of whether or not it should be deemed an administrative expense pursuant to §503(b)(1) and not whether it should be paid pursuant to §365(d)(3) of the Bankruptcy Code. Notwithstanding that fact, the Court finds the reasoning of *Koenig* to be persuasive and determines that the obligation to pay the February Rent arose, pursuant to the terms of the Lease, on February 1, 2000. Because that obligation arose before the Filing Date, Applicant's right to receive the February Rent the did not stem from a transaction with the Debtor.

Even if this Court were to determine that the February Rent arose from a transaction with Debtor (as opposed to a transaction with The Gibson-Homans Company), the Motion could not be approved because Movants have failed to present the Court with any evidence to demonstrate that Debtor's use of the Property for the portion of time represented by the February Rent "directly and substantially benefitted the estate."

CONCLUSION

Based upon the foregoing, the Court finds that the Movants have failed to prove that the February Rent should be treated as an expense of administration in the bankruptcy

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case. Accordingly, the Motion is hereby denied.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 3/20/01