

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

7 1 3  
JUL 1 2009  
ALBUQUERQUE, NM

In re:

FURR'S SUPERMARKETS, INC.,

11-01-10779 SA

Chapter 11

Debtor.

**TRUSTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON TGAAR,  
INC.'S MOTION FOR PAYMENT OF ADMINISTRATIVE EXPENSES**

Yvette J. Gonzales, the Chapter 7 Trustee (the "Trustee"), by counsel, pursuant to Bankruptcy Rule 7056 and Rule 56 of the Federal Rules of Civil Procedure, moves for partial summary judgment on TGAAR, Inc.'s ("TGAAR") Motion for Payment of Administrative Expenses (the "Allowance Motion"). docket # 1807.

I. Introduction

TGAAR's asserted chapter 7 administrative expense claim has two components. The first part consists of rent or storage charges alleged to have accrued because certain equipment owned by Furr's Supermarkets, Inc. ("Furr's") was left in TGAAR's building after Furr's rejected its lease with TGAAR. The amount of this claim is between \$70,000 and \$175,000, depending on whether it is calculated on the lease rate or upon the cost of comparable storage space. The second part of TGAAR's claim is for approximately \$20,000 of damages allegedly suffered when the equipment was removed after the Trustee auctioned it in May, 2002.

This Motion only addresses the claim for rent or storage charges, not the claim for removal damages.

1807

## II. Undisputed Facts

1. On February 8, 2001, Furr's filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Allowance Motion, ¶ 1.

2. At the time of the bankruptcy filing, TGAAR owned Furr's store #966, which was leased to Furr's. Allowance Motion, ¶ 2.

3. During the Chapter 11 case Furr's rejected the lease pursuant to Court order, with the effective date of rejection of August 31, 2001. Allowance Motion, ¶ 7; Order Granting in Part Debtor's Motion to Reject Certain Unexpired Real Estate Leases, Subleases, and Equipment Leases, entered September 6, 2001 as docket #1031 (the "Rejection Order").

4. Furr's surrendered the leasehold premises as of August 31, 2001. Rejection Order, ¶ 3.

5. The automatic stay was modified with respect to the leased property as of August 31, 2001. Rejection Order, ¶ 4.

6. After rejection, Furr's turned over the keys, but left most of its personal property located at the store, including shelves, racks, meat counter equipment, deli equipment, dairy cases, check out counters, and other items typically found in a retail grocery store (together, the "Equipment"). Allowance Motion, ¶ 8-10, 12.

7. The Chapter 11 case was converted to a Chapter 7 liquidation on December 19, 2001. Allowance Motion, ¶ 11.

8. The Trustee sold the Equipment at auction on or about May 30, 2002. Allowance Motion, ¶ 12.

9. Between August 31, 2001 and May 30, 2002, TGAAR did not seek relief from the automatic stay, or any other relief from the Court, to dispose of the Equipment, charge for storage, or otherwise protect its interests. Court docket.

10. No agreement was entered into between the Trustee and TGAAR regarding storage of the Equipment, and no Court order was entered regarding storage. Court docket.

### III. Discussion

Under the simple and undisputed facts outlined above, TGAAR's claim for post-rejection storage charges or rent fails.

A. TGAAR Has No Claim For Administrative Rent. First, TGAAR has no claim for rent. Pursuant to the Rejection Order, the lease at issue was rejected as of August 31, 2001. As of August 31, 2001, Furr's was deemed to have surrendered the property, and the automatic stay was modified to allow TGAAR to retake possession of and/or sell the property. After rejection and surrender, a landlord cannot collect administrative rent, although a landlord may have a prepetition claim for breach of the lease. 11 U.S.C §365(g). Thus, TGAAR has not claim for rent accruing post-rejection.

B. TGAAR Has No Claim for Storage. Second, TGAAR has no claim based upon its alleged "storage" of the Equipment. There was no contract between the Trustee and TGAAR for storage, and no court order was ever entered allowing TGAAR to charge for storing the Equipment. Since paying to store equipment on-site would not have been in the ordinary course of business (to date, the Trustee has not entered into any storage agreements with any landlord), any such agreement would require a court order to be enforceable.

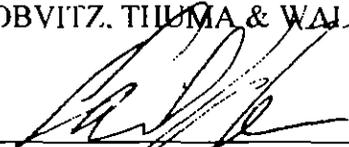
C. TGAAR Could Have Protected Its Interests If Needed. At any time after August 31, 2001, if TGAAR needed to have the Equipment removed (for example if it had found another tenant), it could have filed a motion for relief from the stay or taken other action to protect its interests. TGAAR did nothing. Likely, TGAAR hoped it could find another grocery store tenant, and therefore wanted the Equipment to remain in the

building for some period of time. In any event, having taken no action for nine months, TGAAR cannot now complain, ex post facto, that the estate should pay storage charges for leaving the Equipment in TGAAR's closed building.

IV. Conclusion

In view of the Rejection Order and the other undisputed facts of this matter, TGAAR's administrative claim for rent or storage fails. Summary judgment to that effect should be entered in favor of the Trustee.

JACOBVITZ, THUMA & WALKER, P.C.

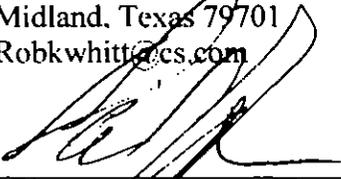
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This is to certify that on October 10, 2002,  
a copy of the foregoing was served by  
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