

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re

FURR'S SUPERMARKETS, INC.,

Debtor.

Case No. 11-01-10779-SA
Chapter 11

FILED
12:00 MIDNIGHT

MAY 10 2001

DROP BOX
United States Bankruptcy Court
Albuquerque, New Mexico

DEBTOR'S OBJECTION AND RESPONSE TO TRI-STATE COMMERCIAL'S
MOTION FOR RELIEF FROM AUTOMATIC STAY

Furr's Supermarkets, Inc., debtor and debtor in possession (the "Debtor"), responds to Tri-State Commercial Associates' Motion for Relief from Stay (Document No. 359), as follows:

1. Tri-State is the owner of a supermarket leased by the Debtor and located in Fort Stockton, Texas. A copy of the lease is attached to Tri-State's Motion as Exhibit A.
2. Under section 9.1 of the lease, Tri-State must pay property taxes promptly when due.
3. The Debtor commenced this case on February 8, 2001. On March 5, 2001, Tri-State sent the Debtor a reimbursement request for \$7,528.01 of year-2000 property taxes. A copy of the request is attached to the Motion as Exhibit B. The Debtor concluded that it could not make the reimbursement payment post-petition, because the obligation – relating to pre-petition taxes – was a pre-petition obligation.

4. Tri-State now moves for relief from stay to terminate the lease. It argues that the reimbursement obligation is a post-petition obligation and that the breach is grounds for relief from stay. Its argument is wrong for at least three reasons.

5. First, the Debtor's obligation to pay a portion of the taxes is not a post-petition obligation under the lease. Tri-State is required to pay the taxes promptly when due (*see* Lease, Section 9.1), which, on information and belief, was on January 31, 2001 for the final installment of Texas real property taxes for the 2000 tax period. Under the lease (which is silent on when the reimbursement obligation becomes due), the Debtor's obligation to reimburse Tri-State for the taxes, at the very latest, arose or accrued on or before January 31, 2001 when Tri-State was, at the latest, to pay the taxes— before the Debtor commenced this case.¹ The Debtor's obligation to pay a portion of the taxes is therefore a pre-petition obligation.

6. Second, the fact that Tri-State billed the Debtor for reimbursement in March 2001, after the petition date, is irrelevant. Tri-State cannot convert an obligation that arose, at the latest, on January 31, 2001, to a post-petition obligation by sending a bill in March. If it could, landlords could make all obligations post-petition by delaying the rendering of their bills.

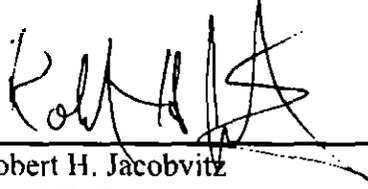
7. Third, even if, under the lease, the Debtor's reimbursement payment was not due until after February 8, 2001, the obligation would still be a pre-petition obligation. A Seventh Circuit's 1998 decision, *In re Handy Andy Home Improvement Ctrs Inc.*, is directly on

¹ The Debtor asserts that its obligation to pay the taxes actually arises or accrues throughout the tax period for which the taxes are owed.

point.² Under the lease in that case, the reimbursement payment for pre-petition taxes was clearly due post-petition. Nonetheless, the court held that the obligation arose pre-petition, as the taxes accrued. It stated that "silliness" would result if the creditor's right turned on the "happenstance" of the dating of the tax bill.³ Because the obligation was a pre-petition obligation, the debtor was not required to pay it before it decided whether to assume or reject the lease. *Handy Andy* is the only Court of Appeals decision to discuss the issue.

WHEREFORE, the Court should deny Tri-State Commercial's motion to lift the automatic stay and grant such further relief as is just and proper.

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² 144 F.3d 1125 (7th Cir. 1998).

³ *Id.* at 1128-29.

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this 10th day of May, 2001.

