

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

In re

Case No. 6:07-bk-00575-ABB  
Chapter 11

F.F. STATION, LLC,

Debtor.

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**ORDER**

This matter came before the Court on the Request for Payment of Administrative Expense (Doc. No. 239) (“Request”) filed by Elite Entertainment, LLC, d/b/a Elite Enterprises, LLC (“Elite”), seeking allowance of administrative claims of \$304,960.00 and \$408,899.86 pursuant to 11 U.S.C. Sections 365(b)(5) and 503(b)(1)(A), respectively. An evidentiary hearing was held on September 11, 2007 at which counsel for F.F. Station, LLC, the Debtor herein (“Debtor”), appeared. The Debtor was directed to file a response to the Request and the parties were directed to file a joint stipulation of facts. The Debtor filed an Opposition to the Request (Doc. No. 281) and the parties filed a joint stipulation of facts (Doc. No. 282). Elite filed a Memorandum of Law (Doc. No. 276) and a Supplemental Memorandum of Law (Doc. No. 284) in support of its Request.

The parties requested this matter be decided on the stipulated facts without further proceedings. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live argument, and being otherwise fully advised in the premises.

**FINDINGS OF FACT**

***Lease Execution and Build Out***

The majority of the material facts are not in dispute. The Debtor and Elite executed a License Agreement (“Lease”) on March 2, 2006 pursuant to which Elite leased from the Debtor approximately 7,624 square feet of commercial space at 123 West Church Street, Orlando, Florida (the “Premises”) for the purpose of operating an upscale nightclub. Don Seligman (“Seligman”), an employee of Quest Company of Central Florida, which performed property management services for the Debtor,

negotiated the Lease on behalf of the Debtor with Elite.

The Premises delivered to Elite was a gutted shell, not viable for Elite’s business purposes, and not in compliance with governing Orlando City and/or County Codes. Elite, pursuant to the Lease, agreed to build out the Premises and was to be reimbursed \$304,960.00 by the Debtor:

... as partial reimbursement to the Tenant for the costs of Tenant’s work, with such amount to be paid to [Elite] not later than sixty (60) days after the submission by [Elite] to [Debtor] of copies of invoices for labor, materials, or equipment charges incurred by [Elite] in connection with the completion of [Elite’s] Work, and receipt of one set of as-built plans, general contractors lien waiver, a copy of the certificate of occupancy, and [Elite] has opened for business.<sup>1</sup>

Seligman testified the sum of \$304,960.00 was calculated based upon \$40.00 per square foot and was intended to compensate Elite for the construction work a landlord would typically undertake to deliver viable space.

The Debtor approved Elite’s “final building plans” and Elite began construction on or about February 6, 2006 (prior to execution of the Lease). Elite expended construction costs of \$450,603.04 from February 6, 2006 through February 20, 2007. Half of the build-out was completed as of February 20, 2007.

***Bankruptcy and Post-petition Events***

The Debtor, through its President Terry J. Soifer, filed a voluntary Chapter 11 case on February 20, 2007 (“Petition Date”) and it continues to be a debtor-in-possession. Elite was not listed in the Debtor’s original matrix (Doc. No. 1). Elite, pursuant to the Appearance and Request for Bankruptcy Notice filed by its counsel (Doc. No. 53), was aware of the bankruptcy filing on March 5, 2007 and may have been aware of the bankruptcy filing prior to that date.<sup>2</sup> Schedule F was filed on March 15, 2007 (Doc. No. 88) listing Elite as holding an

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<sup>1</sup> Doc. No. 276, Exh. 1, Lease at p. 1, Paragraph (p) of Data Sheet.

<sup>2</sup> Counsel for Elite also filed an Appearance and Request for Bankruptcy Notice on behalf of Quest on May 17, 2007 (Doc. No. 192).

unsecured contingent, disputed claim of \$304,960.00 for “Buildout Funds.” Written notice of the Debtor’s bankruptcy case was provided to Elite on March 16, 2007 (Doc. 99).

The Debtor received a letter of intent from Kuhn Church Street Station, LLC (“KCSS”) on February 26, 2007 offering to purchase the Debtor’s real property commonly known as the Church Street Station Entertainment Complex (“Complex”), consisting of approximately 291,292 square feet, including the Premises, for \$40,000,000.00. KCSS subsequently withdrew its offer.

The Debtor filed a Motion for an Order Approving Sale of Assets Free and Clear of Liens (Doc. No. 100) (“Sale Motion”) seeking an order approving the sale of the Complex to the successful bidder at an auction to be held on April 5, 2007. The Sale Motion requested the sale, including the Premises, be “free and clear of any and all liens, claims, encumbrances or interests in such property.” The Sale Motion was served on Elite. The Complex was marketed with or without the existing leases, at the option of the ultimate purchaser.

The Court held an evidentiary hearing on the Sale Motion on April 5, 2007 at which Elite appeared and orally objected to the Sale Motion. The Court overruled the objection, granted the Sale Motion, found KCSS was a qualified bidder, and directed all tenants to vacate the Complex on or before closing.

The auction was held on April 5, 2007 and KCSS, the only bidder, was the successful bidder with a final bid of \$34,000,000.00. The sale was free and clear of leasehold interests.<sup>3</sup> The Sale Motion was approved by the Order entered on April 16, 2007 (Doc. No. 154) (“Sale Order”)<sup>4</sup> and provides in part:

The Court finds that the Leasehold Interests are inferior to the First Mortgage and/or the Leasehold Interests are in default and, as such, the Sale may be approved free and clear pursuant to Bankruptcy Code § 363(f)(1) and (f)(4).

<sup>3</sup> It was undecided prior to April 5, 2007 whether the existing leases were to be assumed and assigned to the buyer as part of the sale, or whether the sale would be free and clear of leasehold interests.

<sup>4</sup> The Sale Order was amended by Order entered on June 13, 2007 (Doc. No. 241) to correct a scrivener’s error. The Buyer was “Kuhn Church Street Station, LLC,” not “Kuhn Church Street, LLC.”

Sale Order at p. 8, ¶X.<sup>5</sup>

The sale of the Assets *shall be free and clear of all liens, claims, and encumbrances, including all of the Leases* so that Buyer has no responsibility thereunder and the tenants thereunder have no rights or claims whatsoever against Buyer or the Property whether legal, equitable or possessory . . . All entities that are presently in possession of any portion of the Property are directed to surrender possession. All holders of any Leasehold Interest or rights related thereto, tenants and other occupants claiming a right to possession to the Property are ordered to vacate the leased premises effective as of the Closing.

Sale Order at pp. 12-13, ¶11 (*emphasis added*).

The Sale Order further provides Elite and the two other objectors (Church Street Steak House, LLC and Inno-Cepts Exchange LLC):

“. . . shall be entitled to adequate protection pursuant to 11 U.S.C. § 363(e). The adequate protection is inferior to the Secured Claims. [] The amount of adequate protection, if any, is subject to a future hearing to be held within thirty (30) days. [] The tenants named in this Paragraph agree to vacate the Property no later than May 31, 2007 unless the Successful Bidder agrees otherwise.”

Sale Order at pp. 13-4, ¶12. The Sale Order was served on Elite’s counsel. The Debtor sent written notices to each tenant, including Elite, to vacate the Premises on or before May 31, 2007.

Elite obtained a Certificate of Occupancy for the Premises on April 30, 2007 and opened for business on or about May 1, 2007. Elite, d/b/a Bliss, and KCSS executed a Commercial Lease on May 31, 2007 (“KCSS Lease”), pursuant to which Elite leases the Premises from KCSS. The KCSS Lease does not provide for any payment to Elite for the buildout. Elite currently occupies the Premises pursuant to the KCSS Lease.

<sup>5</sup> “Leasehold Interests” include “those claims, liens, encumbrances and interests of any kind and nature . . . held by tenants pursuant to respective license or lease agreements with Debtor as licensor, lessor or landlord . . . .” Sale Order at p. 8, ¶X.

The sale to KCSS closed on June 18, 2007. The Debtor, at closing, paid four lien claims totaling \$95,000.00 as set forth in the Seller's Closing Statement. None of the lien claims were based upon any work or materials related to the Elite buildout. The Debtor is not aware of any lien claims on the Premises related to the construction performed by Elite.

Elite filed an unsecured proof of claim, Claim No. 242, on June 18, 2007 for \$1,376,628.88 for "breach of lease" and stating: "A portion of this Proof of Claim duplicates the amounts sought as administrative expenses, but which are being included on a cautionary basis." The proof of claim contains no breakdown or calculation of the claim amount. The only supporting documentation attached to the proof of claim are portions of the Lease.

Between the Petition Date and April 30, 2007, Elite incurred improvement costs of \$472,964.22. Between the Petition Date and April 5, 2007 (sale hearing held) Elite incurred improvement costs of \$292,113.25. Elite incurred improvement costs of \$343,263.98 between the Petition Date and April 16, 2007 (the entry of Sale Order). The Trustee has not sought to assume or reject the Lease. No plan has been confirmed.

### ***Elite's Request***

Elite asserts it is entitled to administrative expense claims of \$304,960.00 pursuant to the Lease and \$408,899.86 as the "actual and necessary expenses of preserving the estate."<sup>6</sup>

Elite contends it "satisfied all of the prerequisites of Paragraph P of the Lease, the tenant buildout provision."<sup>7</sup> It asserts the Debtor's obligation to pay Elite \$304,960.00 "arose after the order for relief" was entered<sup>8</sup> and "became due in a lump sum post-petition."<sup>9</sup>

The terms of the Lease are controlling and define whether the Debtor had an obligation to pay Elite \$304,960.00. Paragraph (p) of the Lease is plain and unambiguous. No payment obligation arose unless and until Elite fulfilled the conditions of Paragraph (p), namely: (i) submission of copies of invoices for labor, materials or equipment charges

incurred by Elite in the buildout; (ii) receipt of as-built plans, general contractors lien waiver; (iii) a copy of the certificate of occupancy; and (iv) opening for business. The Debtor, pursuant to Paragraph (j), was required to pay Elite \$304,960.00 within sixty days of the fulfillment of the conditions.

Elite has not established it met each of the Paragraph (j) conditions. Elite's principal Vito Badalamenti testified he submitted the Paragraph (j) documentation to the "male" "Court Receiver" in April 2007. He was unable to identify what specific documents were delivered and to whom they were delivered. He has no records of the alleged delivery of the documents. The Debtor has no knowledge or record of the submission of such documents.

No obligation for the Debtor to pay Elite \$304,960.00 arose because Elite did not fulfill the conditions of Paragraph (j). Elite did not establish it submitted to the Debtor: copies of invoices for labor, materials, or equipment charges incurred by Elite in connection with the completion of the buildout; one set of as-built plans; general contractors lien waiver; and a copy of the Certificate of Occupancy.<sup>10</sup> Elite's \$304,960.00 administrative claim request is due to be denied.

Elite, knowing as early as March 5, 2007 the Debtor had filed for bankruptcy, continued to incur buildout costs post-petition. It continued to incur buildout costs throughout the sale process with notice the sale would be free and clear of leasehold interests. Elite, despite its knowledge of and active participation in the bankruptcy proceedings, incurred buildout costs postpetition. It incurred such costs at its own peril.

Elite has not established its buildout expenditures provided an actual concrete benefit to the Debtor's estate. Elite has not established its expenditures of \$408,899.86, or any sums expended by it related to the buildout, constitute actual, necessary costs and expenses of preserving the Debtor's estate. Elite's \$408,899.86 administrative claim request is due to be denied.

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<sup>10</sup> The parties include in their Stipulation: "Don Seligman testified [at deposition] that Elite submitted 'final building plans' which were approved by FF Station and that Elite had the consent of FF Station to make various improvements." Seligman is an employee of Quest and is not a representative of the Debtor. Elite has not established to whom the "final building plans" were submitted and that such documents constitute the "one set of as-built plans" required by Paragraph (p).

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<sup>6</sup> Request at ¶¶ 9, 11.

<sup>7</sup> Doc. No. 284 at p. 1.

<sup>8</sup> Request at ¶9.

<sup>9</sup> Doc. No. 276 at p. 2.

## **CONCLUSIONS OF LAW**

### ***11 U.S.C. Section 365(d)(3)***

Elite asserts it is entitled to an administrative expense claim of \$304,960.00 pursuant to 11 U.S.C. Section 365(d)(3). Section 365(d)(3) requires a trustee to:

timely perform all the *obligations of the debtor*, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title.

11 U.S.C. § 365(d)(3) (2006) (*emphasis added*).<sup>11</sup>

Both parties assert the resolution of this matter turns upon the application of either the “accrual” (a/k/a “pro-ration”) or “billing date” approach for determining whether a lease obligation constitutes a pre- or post-petition obligation.<sup>12</sup> Neither approach is relevant because the Section 365(d)(3) threshold requirement of the existence of an “obligation” of the Debtor is not present.

The plain language of Section 365(d)(3) “mandates the trustee to comply with all obligations of the debtor with regard to any unexpired lease of non-residential real property until it is assumed or rejected . . . .” In re Florida Lifestyle Apparel, Inc., 221 B.R. 897, 900 (Bankr. M.D. Fla. 1997). “The clear and express intent of § 365(d)(3) is to require the trustee to perform the lease in accordance with its terms.” CenterPoint Props. v. Montgomery Ward Holding Co. (In re Montgomery Ward Holding Corp.), 268 F.3d 205, 209 (3d Cir. 2001).

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<sup>11</sup> Section 365(d)(2) provides a Chapter 11 trustee “may assume or reject an executor contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.” The Lease has not been rejected or assumed.

<sup>12</sup> There is a split of authority amongst the courts regarding how to determine whether a nonresidential lease obligation is a pre-petition or post-petition obligation. Some courts employ the “accrual” or “pro-ration” approach and others employ the “billing date” approach. See In re Winn-Dixie Stores, Inc., 333 B.R. 870, 873 (Bankr. M.D. Fla. 2005) (providing a detailed discussion of the two approaches).

Section 365(d)(3) by its plain, unambiguous language requires the existence of a lease obligation of the Debtor. The Bankruptcy Code does not define “obligation.” The terms of the underlying Lease are determinative as to whether an obligation exists and when it arose. Montgomery Ward, 268 F.3d at 210-11. “[A]n obligation arises under a lease for the purposes of § 365(d)(3) when the legally enforceable duty to perform arises under that lease.” Id. at 211. The “accrual” and “billing date” cases all begin with the existence of a lease obligation.<sup>13</sup> If no lease obligation exists, there is no basis for conducting an “accrual” or “billing date” analysis.

Elite’s \$304,960.00 claim is not entitled to administrative status pursuant to Section 365(d)(3) because no obligation to pay \$304,960.00 arose pursuant to the plain and unambiguous terms of the Lease. The \$304,960.00 payment provision is contingent upon Elite’s fulfillment of the conditions of Paragraph (j) of the Lease. Elite did not establish it fulfilled each of the conditions of Paragraph (j). No payment obligation arose. The Debtor has no duty to pay Elite \$304,960.00 and such claim is not entitled to administrative expense status pursuant to 11 U.S.C. Section 365(d)(3).

Elite’s request for an administrative expense claim of \$304,960.00 is denied pursuant to 11 U.S.C. Section 365(d)(3).

### ***11 U.S.C. Section 503(b)(1)(A)***

Elite asserts it is entitled to an administrative expense claim of \$408,899.86 for post-petition expenditures pursuant to 11 U.S.C. Section 503(b)(1)(A). Section 503(b)(1)(A) provides “there shall be allowed, administrative expenses . . . including, the actual, necessary costs and expenses of preserving the estate.” 11 U.S.C. § 503(b)(1)(A) (2006).

“There must be an actual concrete benefit to the estate before a claim is allowable as an

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<sup>13</sup> See, e.g., Winn-Dixie, 333 B.R. at 871-72 (“The expenses claimed in the Pre-Petition Invoice are required to be paid by Winn-Dixie Montgomery to Transamerica as additional rent under . . . the Lease.”); Montgomery Ward, 268 F.3d at 207 (“Thus, two separate lease provisions obligate Montgomery Ward to reimburse CenterPoint for tax liabilities incurred during the term of the lease.”); In re Handy Andy Home Improvement Ctrs., Inc., 144 F.3d 1125, 1127 (7th Cir. 1998) (“But since death and taxes are inevitable and Handy Andy’s obligation under the lease to pay taxes was clear . . .”).

administrative expense.” Broadcast Corp. of Ga. v. Broadfoot (In re Subscription Tel. of Greater Atlanta), 789 F.2d 1530, 1532 (11th Cir. 1986). The party requesting an administrative claim bears the burden of establishing the estate received an actual, concrete benefit in exchange for its expenditures. In re Sports Shinko (Fla.) Co., Ltd., 333 B.R. 483, 490 (Bankr. M.D. Fla. 2005).

Elite has not established its buildout expenditures provided an actual concrete benefit to the Debtor’s estate. The expenditures are not actual, necessary costs and expenses of preserving the estate. Elite’s request for an administrative expense claim of \$408,899.86 is denied pursuant to 11 U.S.C. Section 503(b)(1)(A).

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that Elite’s Request (Doc. No. 239) is hereby **DENIED**.

Dated this 3rd day of December, 2007.

/s/ Arthur B. Briskman  
ARTHUR B. BRISKMAN  
United States Bankruptcy Judge