


Dated: August 23, 2017
The following is ORDERED:




Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
GREGORY DON SHAW, JR.,
Debtor.

Case No. 13-22513-L
Chapter 7

Gregory Don Shaw, Jr.,
Plaintiff,
v.
Dixie Rents, Inc., Marcus Dorris,
and Darryl Humphrey,
Defendants.

Adv. Proc. No. 15-00209

Dixie Rents, Inc.,
Counter-Claimant,
v.
Gregory Don Shaw, Jr.,
Counter-Defendant.

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT IN FAVOR
OF COUNTER-CLAIMANT AND AGAINST COUNTER-DEFENDANT**

BEFORE THE COURT is the second motion for summary judgment filed by Counter-

Claimant, Dixie Rents, Inc. Dixie Rents filed its counterclaim against Gregory Don Shaw, Jr. (“Shaw”) on July 7, 2015, seeking a declaration that a judgment it obtained against Shaw on June 5, 2014, in the amount of \$131,316, was not discharged in bankruptcy. Shaw filed an answer to the counterclaim asking that the court dismiss the counterclaim and declare that any debt arising out of the lease should be discharged. Dkt. No. 21. Shaw was given leave to amend his original complaint, which he did on December 4, 2015, adding the individual defendants. Dkt. No. 30. Dixie Rents seeks no relief as to those defendants. Dixie Rents filed its first motion for summary judgment on February 2, 2016, which was denied on March 15, 2016. With respect to that motion, the court found that the lease between Shaw and Dixie Rents was deemed rejected by operation of law as the result of the failure of the Chapter 7 trustee to timely assume it, and thus that any claim that Dixie Rents had against Shaw arising out of the lease would be treated as a prepetition claim against his bankruptcy estate by virtue of 11 U.S.C. § 502(g)(1). The court concluded that the personal liability of Shaw for this claim was discharged when Shaw received his discharge in bankruptcy. See Order Denying Motion for Summary Judgment, March 15, 2016, Dkt. No. 38.

Dixie Rents filed a second motion for summary judgment on June 29, 2017, and an amended second motion for summary judgment on July 3, 2017. Dkt. No. 60. This amended second motion is now before the court. Notice was given to Shaw of the filing of the motion directing him to file a response on or before August 3, 2017. That date has passed, and Shaw has filed no response. It is ready for decision.

In the amended second motion for summary judgment, Dixie Rents again seeks a declaration with respect to the judgment taken by it against Shaw on June 5, 2014. In the present motion, Dixie Rents argues that a portion of that judgment should not be discharged because it

relates to the period after the lease was deemed rejected by the trustee in bankruptcy. Dixie Rents alleges that Shaw continued to occupy the property as a holdover tenant, and that as a result, it is entitled to judgment against him in the amount of \$60,000 in rent, and \$19,988 in attorney fees.

JURISDICTION

Original but not exclusive jurisdiction over civil proceedings under title 11 of the United States Code (i.e., the “Bankruptcy Code”) lies with the district courts. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all civil proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The original adversary complaint filed by Shaw as amended raised questions concerning the dischargeability of his debt to Dixie Rents. Dkt. No. 7. The determination of the dischargeability of a particular debt is a question arising under title 11 of the United States Code and is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(I). The bankruptcy court clearly has authority to enter orders determining the dischargeability of a particular debt subject only to appellate review. 28 U.S.C. § 157(b)(1). That determination has been made, however. Dixie Rents continues to pursue relief against Shaw individually as the result of events that occurred after the bankruptcy case was filed. Federal Rule of Bankruptcy Procedure 7013 directs that

Rule 13 Fed. R. Civ. P. applies in adversary proceedings, except that a party sued by a trustee or debtor in possession need not state as a counterclaim any claim that the party has against the debtor, the debtor’s property, or the estate, unless the claim arose after the entry of an order for relief.

The original complaint in this adversary proceeding was filed by the Debtor, rather than the trustee or debtor in possession, to enjoin a wage garnishment and was later amended to ask that the court determine the dischargeability of the debt owed by the Debtor to Dixie Rents. When a debtor files an adversary proceeding, Federal Rule of Civil Procedure 13 applies by virtue of Rule 7013. Rule 13 requires that a pleading state as a counterclaim any claim that the opposing party has against the pleader if the claim arises out of the transaction or occurrence that is the subject of the opposing party's claim. Dixie Rent's claim against Shaw arises out of Shaw's occupation of the Winchester property and the judgment that was rendered against him in Dixie Rents' favor. These are the transactions and occurrences which were the subject of the original complaint. Thus the raising of Dixie Rents' counterclaim was compulsory. Dixie Rents now seeks relief with respect to acts of Shaw that occurred after the filing of his bankruptcy petition and after the termination of the lease. This claim is not a claim against Shaw's bankruptcy estate, but against Shaw individually. It will have no effect upon the bankruptcy estate. Nevertheless, this court retains jurisdiction because the compulsory counterclaim was pled in response to an original claim within the bankruptcy jurisdiction granted to the district courts.

SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), incorporated at Fed. R. Bankr. P. 7056. ““Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.”” *Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz)*, 718 F.3d 582, 586 (6th Cir.

2013), quoting *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir. 2007). The Court of Appeals for the Sixth Circuit has described the standards for granting summary judgment as follows:

A genuine issue of material fact exists when, “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In deciding whether this burden has been met by the movant, this court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). However, to survive summary judgment, the plaintiff must present affirmative evidence sufficient to show a genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. 2505. Therefore, “[i]f evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Id.* at 249-50, 106 S. Ct. 2505.

White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 475-76 (6th Cir. 2010).

The Counter-Defendant Shaw has not filed a response to the motion for summary judgment. Nevertheless, the court must consider the record and measure the Counter-Claimant’s right to summary judgment against the standards articulated by the court of appeals.

UNDISPUTED FACTS

The following relevant facts are not disputed.

1. Shaw filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on March 7, 2013.
2. At that time, he was party to a lease with Dixie Rents for property known as 6920 Winchester, Suites 102 and 103, Memphis, Tennessee, for a term of five years commencing February 1, 2008, and ending January 31, 2013, which was subsequently extended to January 31, 2014 (the “Lease”).
3. The Lease as extended called for payment of monthly rent in the amount of \$4,000 per month. The Lease also called for payment of \$1,016 per month to be credited to past due

rent. Past due rent in the amount of \$35,562.52 was memorialized in a note dated September 20, 2010, signed by Shaw.

4. Shaw failed to disclose the existence of the Lease in his bankruptcy filings.
5. Norman Hagemeyer was appointed trustee in bankruptcy on March 7, 2013. Hagemeyer had no knowledge of the existence of the Lease.
6. The Lease was deemed rejected by operation of law 120 days after the entry of the order for relief, or July 5, 2013. 11 U.S.C. § 365(d)(4)(A).
7. Shaw received a discharge in bankruptcy on June 17, 2013. As a result of the discharge, prepetition obligations owed by Shaw to Dixie Rents under the Lease and note were discharged. Bankruptcy Dkt. No. 14.
8. There were no non-exempt assets available for distribution to creditors of the bankruptcy estate and Hagemeyer was discharged as trustee pursuant to the Final Decree entered June 20, 2013. Bankruptcy Dkt. No. 16.
9. Unaware of the filing of the bankruptcy petition, Dixie Rents filed suit against Shaw on August 13, 2013, in General Sessions Court, for possession and arrearage.
10. Shaw did not raise discharge in bankruptcy as a defense in the General Sessions Court.
11. Judgment was taken by default against Shaw for \$24,000.
12. A motion to set aside the judgment was filed on behalf of Shaw which was granted.
13. Judgment was subsequently taken in favor of Dixie Rents against Shaw on June 5, 2014, in the amount of \$131,316.
14. Shaw failed to disclose the existence of his bankruptcy case and discharge to Dixie Rents until his wages were garnished in February 2015.

15. The Lease and modifications to it were appended to Shaw's response to Dixie Rents' first motion for summary judgment. Dixie Rents provided no additional proof in support of its amended second motion for summary judgment.
16. At paragraph 17, the Lease provides that in the event of holdover, the tenant would become a tenant from month to month at 125% of the monthly rental payable under the Lease for the prior month. Under the terms of the Lease, the holdover tenancy remains in effect until thirty days after either party serves notice of intent to terminate the tenancy. Any unearned prepaid rental is to be refunded to the tenant.
17. At paragraph 22, the Lease provides for the payment by the Lessee of all reasonable attorney fees and expenses incurred by the Lessor in enforcing the obligations of the Lessee under the lease.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court has previously held that all prepetition claims arising from the Lease were discharged in bankruptcy when Shaw received his discharge on June 17, 2013. In this second motion for summary judgment, Dixie Rents asks whether Shaw may be held responsible for paying rent for use of the leased property in the post-bankruptcy period.

The General Sessions Court entered judgment for rent through at least the end of May 2014. This provides some evidence that Dixie Rents did not receive possession of the leased property until after judgment was entered against Shaw on June 5, 2014. There is no evidence that the trustee in bankruptcy turned over possession of the leased premises to Dixie Rents at any time. Shaw has not contested Dixie Rents' assertion that he continued to exercise control over the leased property until the judgment was entered. There is thus no genuine dispute that Shaw continued to enjoy the use and possession of the leased property until June 5, 2014.

By operation of law, the Lease was deemed rejected, and thus breached immediately before the filing of the bankruptcy petition on March 7, 2013. 11 U.S.C. § 365(d)(4); *see Miller v. Chateau Communities, Inc. (In re Miller)*, 282 F.3d 874, 877 (6th Cir. 2002). Breach of a lease does not, however, terminate the lease. *Id.* at 878. During the pre-rejection period, the trustee in bankruptcy is obligated to timely perform all of the obligations of the debtor arising under the Lease from and after the order for relief. 11 U.S.C. § 365(d)(3). Any unpaid obligations that arise during the pre-rejection period are generally treated as expenses of administration. *See In re TSB, Inc.*, 302 B.R. 84 (Bankr. D. Idaho 2003).¹

The obligation of the estate for rent during the pre-rejection period is established by the terms of the Lease, in this case \$4,000 per month. The administrative period of the bankruptcy case was 105 days (March 7 to June 20, 2013). Based on that period, Hagemeyer should have paid rent in the amount of \$14,000 ($\$4,000/30 \times 105 = \$14,000$). As a general rule, that would be an administrative expense claim entitled to priority of distribution from any assets of the bankruptcy estate. In this case, there were no assets of the estate, and the estate was administratively insolvent. Ordinarily that would mean that rent accrued during the administrative period would simply not be paid.

In this case, however, the trustee in bankruptcy had no knowledge of the Lease. Thus, he was not afforded an opportunity to make a decision concerning the rejection of the Lease, and the full 120-day period provided by section 365(d)(4) ran before the Lease was deemed rejected.

¹ In this case the Final Decree was entered and the case administratively closed before 120 days after the filing of the petition. Thus, it is not necessary to address a post-rejection administrative period. The court notes, however, that in those cases in which a trustee in bankruptcy refuses or fails to immediately surrender leased premises upon rejection, many bankruptcy courts have found that the estate incurs an administrative obligation for the use of the property pursuant to section 503(b)(1) of the Bankruptcy Code. *See, e.g., In re TSB*, 302 B.R. at 88; *In re Davenport Beverage Corp.*, 505 B.R. 374 (Bankr. D. Mass. 2014); *In re PYXSYS Corp.*, 288 B.R. 309 (Bankr. D. Mass. 2003).

It would be inequitable to allow Shaw to escape liability for the use of the leased property during the pre-rejection period when the failure of the trustee to act was the direct result of Shaw's concealment of the Lease. This case is analogous to those in which a debtor conceals the fact of his bankruptcy filing and then complains of a violation of the discharge injunction. "[A] debtor does not waive a discharge by failing to assert it, but a sophisticated debtor who conceals the fact of her bankruptcy protection from a creditor in order to preserve a relationship or some other benefit should not be surprised if the court does not share her indignation when the creditor violates the discharge injunction." *In re Hager*, 510 B.R. 131, 138 (Bankr. W.D. Mich. 2014). Had Hagemeyer known about the Lease, he could have promptly rejected it, minimizing the expense to the bankruptcy estate. Had Dixie Rents known about the bankruptcy filing, it could have taken steps to gain possession of the leased property much sooner than it ultimately did. Shaw has multiplied the damages suffered by Dixie Rents through his fraud or negligence. Thus Shaw should bear the burden of paying the administrative rent of \$13,999.99.

Shaw continued to enjoy the use of the leased property after his bankruptcy case was complete. At no time did he attempt to terminate the Lease. His use continued until the entry of the judgment by the General Sessions Court, June 5, 2014, *i.e.*, well after he received a discharge and the bankruptcy case was closed. Shaw concealed the fact of his bankruptcy filing and discharge while the General Sessions Court litigation with Dixie Rents was ongoing. During this period he should be treated as a holdover tenant. A holdover tenant is a tenant who remains in leased property after a lease expires. In Tennessee, where there is no agreement between the parties, the holdover tenant is "liable for the fair market rental value for the period in which it occupied the premises" beyond the terms of the lease. *AHCI, Inc. v. Lamar Advertising of Tennessee, Inc.*, 898 S.W.2d 191, 195 (Tenn. 1995). In this case, however, the parties

contractually anticipated a holdover tenancy. The Lease provides for rent in the amount of 125% of the base rent in the event of a holdover tenancy. The base rent was \$4,000. Holdover rent calculated according to the lease would be \$5,000 per month, which is the monthly amount that Dixie Rents seeks. Shaw has not responded to the motion for summary judgment and thus has not suggested any alternative method for calculating the amount of rent to be paid during the holdover period. The holdover period should be calculated from the discharge of the trustee in bankruptcy, June 20, 2013, until the entry of the General Sessions Court Judgment, June 5, 2014. This is a period of 350 days. Using \$5,000 as the monthly rental amount, judgment should be entered against Shaw in favor of Dixie Rents for the post-bankruptcy closing period in the amount of \$58,333 ($\$5,000/30 \times 350 = \$58,333$).

Dixie Rents also asks that it be awarded attorney fees. Under the American Rule, the presumption is that each party will bear its own attorney fees unless a statute or contract provides otherwise. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S. Ct. 1612, 1617, 44 L. Ed. 2d 1141 (1975). The award in this case includes damages for the administrative period of the bankruptcy case. During the pre-rejection period, these are appropriately measured by the Lease because of the trustee in bankruptcy's obligation under 11 U.S.C. § 365(d)(3) to timely perform all obligations of the debtor. At paragraph 22, the Lease provides for "reasonable attorney fees and expenses which the Lessor incurs in enforcing any of the obligations of the Lessee under this lease." The rent owed for the bankruptcy administrative period was \$14,000. It is appropriate to award Dixie Rents attorney fees in the amount of one-third of this amount, or \$4,667, which represents a reasonable attorney fee that would be owed by the estate for the collection efforts expended on behalf of Dixie Rents to assert its administrative expense. Again, this amount should be borne by Shaw because of his failure to

disclose the Lease to the trustee and the bankruptcy to Dixie Rents in time to enable them to make appropriate choices concerning the Lease.

CONCLUSION

For the foregoing reasons, Counter-Claimant Dixie Rents' amended second motion for summary judgment is **GRANTED**. Dixie Rents is awarded a judgment of \$14,000 plus attorney fees in the amount of \$4,667 against Counter-Defendant Gregory Don Shaw, Jr., representing the value of the use of the leased premises during the administration of the bankruptcy case. Dixie Rents is awarded an additional amount of \$58,333, which represents holdover rent during the period between the discharge of the trustee in bankruptcy and the entry of the General Sessions Court judgment. The total award is \$77,000, for which let execution issue.

cc: Debtor/Counter-Defendant
Attorney for Debtor/Counter-Defendant
Counter-Claimant
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Defendants
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Chapter 7 Trustee