

Dated: December 13, 2004
The following is ORDERED:





Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
MERIDIAN CORPORATION,
a/k/a MEDSHARES, INC.,
Debtors.

Case Nos. 99-28923-L through 99-29025-L
Chapter 11

and

In re
SYMPHONY HOME CARE SERVICES
NO. 18 - LOUISIANA, INC.,
Debtor.

Case Nos. 99-30101-L through 99-30125-L
Chapter 11
JOINTLY ADMINISTERED

In re
MEDSHARES, INC.
OF NEVADA,
Debtor.

Case No. 99-29011-L
Chapter 11

MEMORANDUM AND ORDER
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE COURT are the motion for summary judgment filed by the Debtor, Medshares, Inc. of Nevada, and the cross motion for summary judgment filed by HCA Inc., f/k/a

HCA – The Healthcare Company, formerly Columbia/HCA Healthcare Corporation, and its affiliates (collectively, “HCA”). The motions relate to an underlying motion filed October 16, 2000, by HCA for allowance of an administrative expense claim against the Debtor in the amount of \$26,074.49 arising from a lease of premises used as a home health agency in Las Vegas, Nevada. National Century Financial Enterprises (“NCFE”), the holder of certain pre- and post-petition claims against the Debtor’s bankruptcy estate, has filed a response in support of the Debtor’s motion. Both the Debtor and HCA contend that there are no genuine issues of material fact remaining to be resolved, but each asserts that it is entitled to judgment as a matter of law. This is a core proceeding. 28 U.S.C. § 157(b)(2)(B).

FACTS

The following facts are undisputed. On September 23, 1998, HCA and Medshares Consolidated, Inc. (“Medshares”) entered into an Asset Purchase Agreement (“APA”) providing for the purchase and sale of certain home health agencies owned and operated by HCA, including a home health agency known as Columbia Homecare Sunrise (the “Las Vegas Home Health Agency”) at premises known as 2061 E. Sahara Avenue, Las Vegas, Nevada (the “Sahara Avenue Premises”). Pursuant to the APA, closing was to occur on or after October 15, 1998, and, with respect to leases, was to be accompanied by an assignment executed by HCA. The APA is silent as to the assumption of the leasehold obligations of HCA by the buyer. With respect to the Las Vegas Home Health Agency, the buyer was anticipated to be the Debtor.

On July 29, 1999, the Debtor and 102 affiliated companies filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in Memphis, Tennessee. On August 20, 1999, another 25 affiliated agencies filed voluntary petitions as well. On August 30, 1999, an order was entered providing for the joint administration of all the cases. On June 26, 2003, an order was entered approving the sale of substantially all the assets of the Medshares debtors to TBJG, LLC. Pursuant to the terms of sale, all administrative claimants share pro rata in a fund of \$1,250,000.00. The court is now in the process of liquidating the remaining administrative expense claims so that payments can be made pursuant to the terms of sale.

The proof of claim filed by HCA indicates that Medshares gave notice prior to closing that it would be unable to pay the cash portion of the purchase price called for in the APA. It obtained HCA's consent to a 14-day deferral for the payment, but never made the payment. Further, Medshares defaulted on payment due HCA under a note given for the balance of the purchase price. HCA has allocated to the Debtor a portion of the amounts due by Medshares for each of these obligations. In addition, HCA claims that pursuant to the APA, Medshares and the Debtor assumed certain obligations which were not performed by the Debtor. HCA claims that its pre-petition claim against the Debtor as the result of failure to perform assumed obligations is not less than \$120,265.46. This obligation is identified in Exhibit A to HCA's proof of claim as "Lease on Real Property." Finally, HCA claims that it is owed an undetermined amount from the Debtor pursuant to a Collection Agreement entered into with Medshares and related debtors including the Debtor in this case.

In addition to its pre-petition claim, HCA has filed a motion for allowance of post-petition administrative expenses. In the motion, HCA claims that it is owed \$26,074.49 as the result of the Debtor's failure to pay post-petition rent. HCA claims that it paid rent on the Debtor's behalf and thus provided a benefit to the bankruptcy estate. Further, HCA claims that by paying the rent owed, it is subrogated to the rights of the landlord, including the right to pursue an administrative expense claim.

The original lease which is the subject of HCA's motion is dated December 1, 1994 (the "Lease"). The parties are Omega Industries, Inc., as landlord (the "Landlord"), and Prime Health, Inc., as tenant. Prime Health, Inc. was succeeded by Sunrise Hospital and Medical Center, LLC, an affiliate of HCA (the "Prior HCA Tenant."). The copy of the Lease attached to HCA's motion for allowance of administrative expense claim and to the Affidavit of Thomas F. Ramsey is incomplete. It does not contain Exhibit C, described in the Lease as a lease summary, which specifies the original amount of base rent due under the lease. Two amendments are attached to the Lease, which specify increases to the base rent of \$7,370.00 and \$825.00 respectively. The court cannot determine the amount of monthly rent due under the Lease at the time the Debtor's bankruptcy petition was filed. The court also notes that the original Lease terminated on November 30, 1999, after the bankruptcy case was filed.

The Debtor took possession of the Sahara Avenue Premises on September 23, 1998, and vacated it on December 15, 1999. The Debtor included the Lease among those that were rejected by order entered March 8, 2000, which specifies that rejection "shall be effective as of the date the

Property was or is scheduled to be closed.” The parties agree that the Debtor paid \$25,771.17 in post-petition rent directly to the Lessor. The Debtor asserts that the amount of rent due under the Lease for the post-petition period was \$38,666.22. This number results from multiplying \$8,590.39, the amount of monthly lease payments according to the Debtor, by 4.5, the number of months of occupancy by the debtor in possession. When the Debtor is given credit for post-petition rent paid in the amount of \$25,771.17, the Debtor admits that a balance of \$12,885.59 remains unpaid.

HCA asserts that the correct amount of post-petition rent is either \$43,331.10, based upon the effective date named in the rejection order (December 15, 1999), or \$69,329.76, based upon the date of entry of the order (March 8, 2000). HCA asserts that the monthly rent due under the Lease was \$8,662.22, and that the Debtor should be charged with payment of five full months’ rent for the post-petition period rather than the four and one-half months that the Debtor actually occupied the premises. HCA states in its memorandum of law in support of its motion for summary judgment that it paid \$65,929.39 in post-petition rent on the Debtor’s behalf; this figure is supported by the Ramsey Affidavit. In the administrative expense claim dated October 16, 2000, HCA claimed it had paid \$26,074.99 for post-petition rent on the Debtor’s behalf through September 30, 2000. The reason for this discrepancy is not apparent from the filings of HCA.

ANALYSIS

A. Standards for Considering Motions for Summary Judgment

Federal Rule of Civil Procedure 56(c), as incorporated by Federal Rule of Bankruptcy Procedure 7056, governs motions for summary judgment in adversary proceedings in bankruptcy. Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). When a court reviews a motion for summary judgment, “the evidence, all facts, and any inferences that may be drawn from the facts must be viewed in the light most favorable to the nonmoving party.” *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The non-moving party must present enough evidence to show that there is a genuine issue of material fact in order to prevail. *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir. 1990). “A mere scintilla of evidence is insufficient; ‘there must be evidence on which the jury could reasonably find for the [non-movant].’” *In re Morris*, 260 F.3d 654, 665 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Summary judgment should be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where both parties file motions for summary judgment, the standard for determining whether summary judgment is appropriate is not altered. “[T]he court must evaluate each party’s motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under

consideration.”” *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994) (quoting *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)).

B. The Interplay of Sections 365(d)(3) and 503(b)(1)

Upon the filing of the bankruptcy case, the Debtor became a debtor in possession, and was empowered to either assume or reject any executory contract or unexpired lease. *See* 11 U.S.C. §§ 365(a) and 1107(a). Even if the pre-petition Debtor had assumed the Lease, the post-petition debtor in possession retained the right to reject the Lease. The debtor in possession did elect to reject the Lease, and its election, effective December 15, 1999, was approved by the court by order entered March 8, 2000. Pursuant to 11 U.S.C. § 365(g), the rejection of an unexpired lease by a debtor constitutes a breach of the lease immediately before the filing of the petition. Damages flowing from the rejection of a lease become a pre-petition claim against the bankruptcy estate. *See* 11 U.S.C. § 502(g). Pursuant to Federal Rule of Bankruptcy Procedure 3002, a claim arising from the rejection of an unexpired lease may be filed within such time as the court directs. HCA filed its proof of claim on March 30, 2000, which includes a claim of \$120,265.46 arising out of the Sahara Avenue lease. No objection has been raised with respect to the timeliness of this claim.

A debtor in possession is obligated to timely perform the obligations of the debtor under any unexpired lease of nonresidential real property during the administration of a Chapter 11 case until the lease is assumed or rejected. *See* 11 U.S.C. § 365(d)(3). In this case, the debtor in possession

paid some, but apparently not all, of the rent that accrued after the filing of the case. Specifically, it paid \$25,771.17, and it concedes that a balance of \$12,885.59 remains unpaid.

Section 503(b)(1)(A) provides for allowance of claims representing the “actual, necessary costs and expenses of preserving the estate.” The Debtor argues that, notwithstanding the plain language of § 365(d)(3), HCA must show a benefit to the estate before its claim for post-petition rent will be entitled to administrative priority.

The timely-performance requirement was added to § 365 in 1984. The Bankruptcy Code specifies no remedy for failure to timely perform. *See Cannery Row Co. v. Leisure Corp. (In re Leisure Corp.)*, 234 B.R. 916, 923 (B.A.P. 9th Cir. 1999). Nevertheless, the Court of Appeals for the Sixth Circuit has held that a debtor in possession or trustee is obligated to pay all obligations that come due under an unexpired lease prior to the assumption or rejection of the lease. *See Koenig Sporting Goods, Inc. v. Morse Road Co. (In re Koenig Sporting Goods, Inc.)*, 203 F.3d 986, 989 (6th Cir. 2000). Further, the Sixth Circuit indicates in a footnote that the debtor’s obligation should be determined without regard to the principles governing administrative claims under § 503(b)(1); a landlord need not demonstrate a benefit to the estate in order to be entitled to be paid post-petition, pre-rejection rent. *Id.* at n.2.

The specific question answered by the court in *Koenig* was whether a debtor would be obligated to pay the full month’s rent that came due prior to rejection, or only a pro rata share representing the period of the debtor’s occupancy. The debtor in *Koenig* rejected its lease effective the second day of the month. Under the terms of its lease, monthly rent was due in advance on the

first day of the month. The debtor argued that it was obligated to pay a pro rata share of the rent representing its two day occupancy. The court rejected this argument and held that the debtor was obligated to pay the full month's rent. *Koenig*, 203 F.2d at 989.

The Debtor argues that *Koenig* does not apply in its case because it never assumed the Lease. The court is not persuaded that the failure of the Debtor to assume the Lease means that the Debtor has no obligation to pay rent for its occupancy of the premises. The Debtor apparently agrees because it paid rent in the post-petition period, although not in the full amount due under the Lease. See discussion of the obligations of an assignee of a real property lease under Nevada law, *infra* at Section D.

The court is persuaded that *Koenig* does apply to the present case, and that the Debtor is obligated to pay post-petition rent for the period of its occupancy. The requirements of § 503(b)(1) are not applicable here, meaning that in order to be entitled to post-petition, pre-rejection rent, a landlord need not show a benefit to the estate. The court must determine the amount of the obligation of the Debtor during that period. If the pre-petition Debtor had assumed the Lease, then clearly the terms of the Lease would control. The court now turns to a consideration of whether the Debtor did, in fact, assume the obligations under the Lease pursuant to the APA or related documents and, if not, the appropriate measure of its obligation to the Landlord for its occupation of the premises.

C. Did the Debtor Assume the Obligations of HCA under the Prior Lease?

In its memorandum, HCA asserts that the Debtor “unmistakably assumed HCA’s obligations under the lease of the premises located in Las Vegas, Nevada.” In its motion, HCA’s statement is more guarded, stating that pursuant to the APA, the Debtor “agreed to assume” the obligations related to the operation of the Las Vegas Home Health Agency, including the Lease, and that upon the closing of the sale, the Debtor took possession of the Sahara Avenue Premises. As evidence of the assumption by the Debtor of the obligations due under the Lease, HCA points to the APA and an Assignment of Contracts and Assumption of Liabilities, dated October 16, 1998, by and between the Prior HCA Tenant and the Debtor (the “Assignment and Assumption Agreement”). Pursuant to the Assignment and Assumption Agreement, the Debtor expressly assumed those obligations described in section 2.3 of the APA that arose subsequent to the date of the agreement. Section 2.3 of the APA provides:

2.3 Assumed Liabilities. As of the Closing Date, Buyer shall agree to pay, perform and discharge the Assumed Liabilities. As used in this Agreement, the term “Assumed Liabilities” shall mean the following liabilities of the Owners: (i) the obligations of the Owners arising on or subsequent to the Closing Date under the Contracts; (ii) obligations of the Owners as of the Closing Date in respect of sick leave, extended illness bank, accrued vacation and accrued paid time off (collectively “PTO”) of the Owners’ or their affiliates’ employees who are employed by the Buyer or its affiliates as of the Closing Date; and (iii) the accounts payable of the Owners related to the Agencies, but only to the extent (a) such accrued vacation and accrued paid time off and (b) such accounts payable are included in the determination of the Final Net Working Capital Statement.

If the Debtor assumed the Prior HCA Tenant’s obligations under the Lease, it must be because that Lease is a contract, because it is neither a PTO obligation nor an account payable. “Contracts” is

a defined term under the APA. It includes, without limitation, all commitments, contracts, leases, and agreements described on Schedule 4.7 to the APA. *See* APA ¶ 1.1(h). Schedule 4.7 does not make reference to the lease for the premises on Sahara Avenue, nor to any other real property lease. Real property leases are listed in Schedule 4.8, which is described in the APA as the schedule of leasehold property to be assigned to the buyer at closing. *See* APA ¶ 1.1(a). With respect to the assignment of contracts, the Assignment and Assumption Agreement provides:

1. Assignment of Contracts. Subject to all the terms of the Agreement, Assignor hereby assigns, transfers, conveys and delivers to Assignee and Assignee hereby assumes all right, title and interest of Assignor in and to the Contracts (as defined in the [APA]). Assignee shall not assume or become liable or otherwise obligated for any contracts, obligations, or agreements of Assignor whatsoever except for such Contracts. The assignment of contracts herein also constitutes a delegation of duties of Assignor under such Contracts, and, except as provided in the [APA], Assignee agrees to assume the performance of the obligations of Assignor under such contracts that arise subsequent to the date hereof.

As we have seen, “Contracts” for purposes of the APA does not expressly include real property leases. Further, pursuant to this paragraph, the Debtor “agrees to assume,” but does not in fact assume, the obligations under the contracts.

In addition to the Assignment and Assumption Agreement, a Bill of Sale was executed at closing pursuant to the APA. Pursuant to the Bill of Sale, HCA assigned its interest in all assets defined in the APA to the Debtor. Among the assets assigned to the Debtor pursuant to the Bill of Sale was the Lease for the Sahara Avenue Premises, but the Bill of Sale is silent with respect to the assumption of liabilities related to th Lease. HCA has pointed to no agreement by which the Debtor

expressly assumed obligations under the Lease. Since there was no assumption of the Lease, any post-petition obligation of the Debtor arises under Nevada law pertaining to obligations of an assignee who takes possession of leased premises under an assignment.

D. What are the Obligations of the Debtor to the Landlord under Nevada Law?

The Debtor as occupying assignee has an obligation to pay rent measured by the terms of the Lease which was assigned. The common law of the state governs these obligations. In Nevada, as in many states which have adopted traditional common law jurisprudence, the remedies for the assignor of a nonresidential lease when the assignee fails to perform under the assignment depends upon the assignee's actions post-assignment. If the assignee does not expressly assume the lease but does take possession of the premises under an assignment, the assignee is not bound by the contractual terms of the lease but is in privity of estate with the landlord, and takes the estate of the lessee (assignor) subject to the covenants that run with the land during the period of the assignee's occupancy. *See generally* 49 Am. Jur. 2d, *Landlord and Tenant* §§ 1112, 1132 (2004). The common law distinctions described in American Jurisprudence, specifically the privity of contract/privity of estate distinction, have been adopted by the Supreme Court of Nevada. *See, e.g., Anes v. Crown Partnership, Inc.* (113 Nev. 195, 200-01 (1997)). The obligation to pay rent is one of the covenants running with the land. *See* 49 Am. Jur. 2d, *Landlord and Tenant* § 1112 (2004) ("the assignee of a lease takes the whole estate of the lessee subject to performance on his part of the covenants running with the land [I]f through the assignee's neglect . . . to perform them the

lessee is obliged to pay rent, . . . the assignor may recover from the assignee the sums so paid”); *see, e.g., Ellingson v. Walsh, O’Connor & Barneson*, 15 Cal. 2d 673, 675-76 (Cal. 1940) (“[t]he lease has a dual character; it is a conveyance of an estate for years, and a contract between lessor and lessee. The result is that dual obligations arise, contractual obligations from the terms of the lease [privity of contract], and obligations under the law from the creation of the tenancy [privity of estate].”) Where an assignment is made by the tenant to a third party who does not assume the obligations of the tenant arising because of privity of contract, the entry and occupation of the third party is still considered to be under the lease. The third party successor to the original lessee is bound by the covenant to pay rent in the lease, which arises from privity of estate and which runs with the land. *Id.* Upon taking possession of the Sahara Avenue Premises, the Debtor entered into privity of estate with the Landlord and became obligated to pay rent measured by the Lease.

When the Lease expired on November 30, 1999, Debtor became a tenant at sufferance or at will, depending on whether the Debtor stayed with or without permission. Either way, at common law as interpreted and applied by the Nevada Supreme Court, the Debtor is liable as a holdover tenant for “the use and occupation of the leased property during the holdover period at a rate based on the previous rental rate” *Eikelberger v. Tolotti*, 94 Nev. 58, 62 (Nevada 1978) (citing with approval the *Restatement (Second) of Property* (Landlord and Tenant)); *see also* 1 Tiffany, *Real Property* §§ 174, 179 (3d ed. 1997).

For the post-petition, pre-rejection period, even though the Debtor did not assume the Lease, it nevertheless is obligated to pay rent measured by the terms of the Lease. The court next considers

whether the date of entry of the order approving the Debtor's rejection of the Lease or the effective date of rejection specified in that order should be used in determining the Debtor's post-petition, pre-rejection obligation to the Landlord.

E. Does Date of Entry of Order or Effective Date of Rejection Determine Debtor's Obligation?

The order approving the Debtor's rejection of the Lease was entered March 8, 2000. The order specifically provides that rejection "shall be effective as of the date the Property was or is scheduled to be closed." Neither the Landlord nor HCA objected to the entry of this order. In connection with this and related motions, the court directed the parties to prepare a chart setting forth their various factual contentions and claims (the "Location Payment History Chart"). HCA argues that "the enforcement of a retroactive rejection order in this case would eviscerate the statutory protection provided to non-residential real property lessors and would inflict harm upon HCA." Location Payment History Chart, n. 3. In support of its policy-based argument, HCA cites several cases, including the First Circuit case named above, *In re Thinking Machines Corp.*, for the proposition that "a rejection is effective only upon court approval of the decision to reject the lease." *Id.* (citing *In re Revco Drug Stores, Inc.*, 109 B.R. 264, 269 (Bankr. N.D. Ohio 1989) (holding that the rejection process was designed to "provide a degree of factual certainty in determining the actual date of rejection") and *In re Federated Department Stores, Inc.*, 131 B.R. 808, 815-16 (S.D. Ohio 1991) (holding that setting the "effective date of rejection earlier than the order approving would

put the Lessor in an unfairly awkward position”). HCA failed to point out that in *Thinking Machines*, the First Circuit noted that, “we think it behooves us to make clear that nothing in our holding today precludes a bankruptcy court, in an appropriate § 365(a) case, from approving a trustee's rejection of a nonresidential lease retroactive to the motion filing date.” *In re Thinking Machines Corp.*, 67 F.3d 1021, 1028 (1st Cir. 1995) After further analysis, the First Circuit found the entry of a retroactive order to be appropriate so long as it does not penalize a creditor and so long as it promotes the purposes of § 365(d)(3). *See id.* (citing *In re Jamesway Corp.*, 179 B.R. 33, 37 (Bankr. S.D.N.Y. 1995)); *see also In re CCI Wireless, LLC*, 297 B.R. 133, 140 (D. Colo. 2003) (“the bankruptcy court has authority under section 365(d)(3) to set the effective date of rejection at least as early as the filing date of the motion to reject”). The appropriate time for HCA to raise an objection to an order’s retroactively effective date would have been immediately following the entry of the order; had such an objection been raised, the court would have considered the equities of the case for the Landlord and the Debtor. Absent timely objection, however, HCA is bound by the terms of the rejection order, including the provision of an effective date of rejection that predates the entry of the order. The court next turns to the question of whether the Debtor is entitled to prorate rent for the month in which it vacated the property.

F. Is the Debtor Entitled to Prorate Rent for Less than a Full Month’s Occupancy?

The Debtor vacated the Sahara Avenue Premises on December 15, 1999. It actually occupied the premises for four and one-half months after the filing of its bankruptcy petition. The Debtor argues that it is entitled to prorate the rent for the month of December 1999.

Koenig holds that a debtor must pay a full month's rent in accordance with the terms of a lease that provides for payment of rent monthly in advance. We have seen that even though the Debtor did not assume the Lease, the Debtor's obligation to pay rent is measured by the terms of the Lease. The Lease expired by its own terms, however, on November 30, 1999. Thus, the Debtor is not bound by the terms of the Lease during the period of its holdover tenancy. For the period of the holdover tenancy, the rule of *Koenig* does not apply for purposes of determining rent owed since the Lease was no longer effective and the Debtor did not occupy under a lease but under a holdover tenancy. Rent for the period of time from the expiration of the Lease until Debtor vacated the premises should be prorated based upon the monthly rent paid during the Lease. The Debtor is obligated to pay the Landlord four and one-half months' rent for its post-petition use and occupancy of the premises on Sahara Avenue. Having found that at least in some respects the Debtor owes the Landlord for obligations due under the Lease, the court now turns to decide whether HCA, as subrogee, is entitled to be paid for any portion of the Debtor's tenancy.

G. Is HCA Entitled to Be Subrogated to the Rights of the Landlord?

HCA claims that it is entitled to be subrogated to the rights of the Landlord vis-à-vis the Debtor to the full extent of payments made by it to the Landlord. In its motion for summary

judgment, HCA claims that it paid \$65,929.39 to the Landlord during the period between the filing of the petition and the rejection of the Lease by the Debtor. In its earlier administrative expense claim, however, HCA alleged a far smaller amount, \$26,074.99, as noted *supra*. The payments made by HCA consist of four checks in the amounts of \$12,130.98, \$20,796.50, \$20,596.50, and \$12,206.11. *See* Affidavit of Thomas F. Ramsey, dated November 7, 2002. The court cannot determine how these amounts were derived, nor why they varied from month to month.

Section 509 of the Bankruptcy Code provides:

(a) Except as provided in subsection (b) or (c) of this section, *an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment.*

* * *

(c) The court shall *subordinate to the claim of a creditor* and for the benefit of such creditor on allowed claim, by way of subrogation under this section, or for reimbursement or contribution, of an entity that is liable with the debtor on, or that has secured, such creditor's claim, *until such creditor's claim is paid in full*, either through payments under this title or otherwise.

11 U.S.C. § 509 (emphasis added). Clearly, full payment of the debt is required by § 509 before a subrogee can receive any reimbursement for payments made, since subrogee's claim must be subordinated until the creditor is fully paid. *See In re Southwest Equipment Rental, Inc.*, 193 B.R. 276, 283-84 (E.D. Tenn. 1996) ("subrogation requires payment of the full debt"); *McGrath v. Carnegie Trust Co.*, 116 N.E. 787, 788 (N.Y. 1917) ("the equity of subrogation does not arise until the whole debt has been discharged").

HCA also asserts a right to subrogation outside of the Bankruptcy Code under principles of equitable subrogation. The question of whether § 509 and equitable subrogation are complementary, identical, or mutually exclusive has divided the courts that have considered the question. *See Pandora Industries, Inc. v. Paramount Communications, Inc. (In re Wingspread)*, 145 B.R. 784, 787 (S.D.N.Y. 1992) (describing the split of authority on the issue, identifying pertinent bankruptcy cases on point). The court in *Southwest Equipment Rentals* held that “equitable subrogation is separate and distinct from subrogation rights afforded by section 509.” *In re Southwest Equipment Rental, Inc.*, 193 B.R. at 283. The *Southwest Equipment Rentals* court went on to outline the requirements for equitable subrogation:

- (1) payment must have been made by subrogee to protect own interest;
- (2) subrogee must not have acted as a volunteer;
- (3) debt paid must be one for which subrogee was not primarily liable;
- (4) entire debt must have been paid;
- (5) subrogation must not work any injustice to rights of others.

Id. (citing *In re Flick*, 75 B.R. 204 (Bankr. S.D. Cal. 1987)). The *Southwest Equipment Rentals* court pointed out that both equitable subrogation and subrogation under § 509 require payment of the full claim by the subrogee. *In re Southwest Equipment Rental, Inc.*, 193 B.R. at 283-84.

Undoubtedly, HCA is entitled to be subrogated to the rights of the Landlord to the extent that it discharged the Debtor’s obligation to the Landlord for post-petition rent. *See* 11 U.S.C. § 509(a). HCA was liable with the Debtor to the Landlord for the value of the Debtor’s use of the property and HCA paid that claim.

The Debtor also made certain post-petition rent payments, however. The Debtor need not reimburse HCA for rent payments the Debtor already paid to the Landlord on its own behalf. At most, if indeed HCA fully discharged the obligations due the Landlord under the Lease, it is entitled to be paid the difference between the amount owed by the Debtor and the amount paid by the Debtor. The Debtor asserts that this amount is \$12,885.59, based upon four and one-half months' occupancy. HCA claims that this amount is \$17,559.93 based upon five months' tenancy. As we have seen, the Debtor is entitled to prorate rent for its month of partial occupancy. HCA has failed to prove that the measure of rent owed by the Debtor is different from that asserted by the Debtor, and HCA carries the burden of proof on this issue. In any event, the difference between the monthly rent amount admitted by the Debtor (\$8,590.39) and the monthly rent amount claimed by HCA (\$8,662.22) is \$71.83 per month or \$323.24 for the four and one-half months of the Debtor's post-petition tenancy. The Debtor is obligated to HCA in the amount of \$12,885.59.

CONCLUSION

For the foregoing reasons, the Debtor's motion for summary judgment is **GRANTED** in part and **DENIED** in part; and HCA's motion for summary judgment is **GRANTED** in part and **DENIED** in part. HCA is allowed a claim for post-petition rent in the amount of \$12,885.59, which shall have the same priority as an administrative expense claim.