U.S. BANKRUPTCY COURT
District of South Carolina

Case No. 09-02140 (HB)

ORDER

The relief set forth on the following pages, for a total of 7 pages including this page, is hereby **ORDERED**.

FILED BY THE COURT
05/25/2010

US Bankruptcy Judge
District of South Carolina

Entered: 05/26/2010

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re:	§	**Case No. 09-02140 (HB)**
	§	
BI-LO, LLC *et al.*,	§	**Chapter 11**
	§	
Debtors.[1]	§	**(Joint Administration)**
	§	

ORDER ON DEBTORS' OBJECTION TO PROOF OF CLAIM NO. 1559 FILED BY NEW SPRING COMMUNITY CHURCH

This matter comes before the Court for hearing on Debtors' Objection to Proof of Claim No. 1559 Filed by New Spring Community Church (the "Objection") [Docket Entry 2815]. The Objection requests the Court enter an Order disallowing New Spring Church's claim. At the hearing, Frank B.B. Knowlton and K. Cameron Currie appeared on behalf of the Debtors ("BI-LO"); James W. Sheedy and Susan E. Driscoll appeared on behalf of New Spring Community Church ("New Spring Church" or the "Church"); and G. William McCarthy appeared on behalf of the Official Committee of Unsecured Creditors. The Court, upon the agreement of the parties, held a bifurcated hearing on the Objection to determine whether New Spring Church was legally entitled to recover the damages asserted in the Claim.

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and Local Civil Rule 83.IX.01, D.S.C. This Objection is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) & (B).

[1] The Debtors and the last four digits of their respective tax identification numbers are: BI-LO, LLC (0130); BI-LO Holding, LLC (5011); BG Cards, LLC (4159); ARP Ballentine LLC (6936); ARP James Island LLC (9163); ARP Moonville LLC (0930); ARP Chickamauga LLC (9515); ARP Morganton LLC (4010); ARP Hartsville LLC (7906); and ARP Winston Salem LLC (2540).

2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

PROCEDURAL HISTORY

3. On March 23, 2009 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, thereby commencing the above-captioned bankruptcy cases (the "Chapter 11 Cases"). On the Petition Date, the Court entered an order designating the BI-LO Chapter 11 Cases as Complex Chapter 11 Cases pursuant to SC LBR 2081-2. On March 24, 2009, the BI-LO Chapter 11 Cases were administratively consolidated under Case No. 09-02140.

4. The Debtors are operating their business and managing their properties as debtors in possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

5. BI-LO operates as a regional retail supermarket chain under the "BI-LO" and "Super BI-LO" banners. As of the Petition Date, BI-LO was one of the largest food retailers in the Southeast United States, operating more than 200 stores in South Carolina, North Carolina, Georgia and Tennessee, with the majority of stores located in South Carolina.

FACTS

6. On April 20, 1995, Roper Mt. Rd. Assoc., L.L.C., predecessor in interest to Landlord, The Delta Interests, LLC (the "Landlord"), and Harris Teeter, Inc., predecessor in interest to the Debtors, entered into a Lease Agreement (the "Master Lease").

7. On October 16, 2007, with the consent of the Landlord, the Debtors and New Spring Church entered into a Sublease Agreement (the "Sublease"), which allowed New Spring Church to occupy the premises located at 401 Roper Mountain Road, Greenville, South Carolina (the "Premises") at a rental rate that was far lower than the Master Lease rate, with BI-LO paying

the difference in the rate to the Landlord to fulfill its obligations under the Master Lease. The initial term of the Sublease was set to expire on August 13, 2016.

8. Pursuant to the terms of the Sublease, New Spring Church's rent obligations did not commence until ninety (90) days after it accepted delivery of the Premises.

9. Because BI-LO was obligated to pay Landlord a significant amount each month to meet its portion of the obligations under the Master Lease in addition to the amounts paid by New Spring for occupancy under the Sublease, the Court authorized the Debtors' rejection of the Master Lease by order entered April 23, 2009 [Docket Entry 487].

10. The Court authorized the Debtors' rejection of the Sublease by order entered May 21, 2009 [Docket Entry 656].

11. On August 13, 2009, New Spring Church filed Proof of Claim No. 1559 (the "Claim") in the Chapter 11 Cases in the amount of $3,338,786.60.

12. The Claim seeks $2,606,932.19 in damages for its "Net Rental Loss Due to Exiting BI-LO Site," including $2,751,422.51 in the remaining unamortized portion of the Church's initial costs to upfit the Premises, offset by $144,490.32 in occupancy savings through its new lease arrangements. Additionally, the Claim includes $607,656.84 in moving expenses and $124,197.57 for the return of the Church's initial security deposit.

DISCUSSION and CONCLUSIONS OF LAW

Federal Rule of Bankruptcy Procedure 3001(f) provides that a proof of claim filed in accordance with the rules "shall constitute *prima facie* evidence of the validity and amount of the claim." FED. R. BANKR. P. 3001(f). Bankruptcy Rule 3007 allows any party in interest to file objections to claims. FED. R. BANKR. P. 3007. In this Circuit, proofs of claim are analyzed as follows:

> The creditor's filing of a proof of claim constitutes *prima facie* evidence of the amount and validity of the claim. 11 U.S.C. § 502(a); FED. R. BANKR. P. 3001(f). The burden then shifts to the debtor to object to the claim. 11 U.S.C. § 502(b); *Canal Corp. v. Finnman*, 960 F.2d 396, 414 (4th Cir. 1992). The debtor must introduce evidence to rebut the claim's presumptive validity. FED. R. BANKR. P. 9017; FED. R. EVID. 301; Collier at ¶ 501.02[03][d]. If the debtor carries its burden, the creditor has the ultimate burden of proving the amount and validity of the claim by a preponderance of the evidence. *Id.* at ¶ 502.02[3][f].

In re Harford Sands Inc., 372 F.3d 637, 640 (4th Cir. 2004).

The Debtors' Objection asserts that New Spring Church is not entitled to recover the damages it has claimed because the express terms of the Sublease do not permit the Church to seek damages or other remedies following termination of the Master Lease. The Debtors claim that the Church's right to occupy the premises under the Sublease was subject and subordinate to BI-LO's rights to occupy the premises under the Master Lease, and any such right was terminated upon BI-LO's rejection of the Master Lease on April 23, 2009. *See, e.g.*, 49 Am. Jur. 2d Landlord and Tenant § 1001 (2006) ("The right of the subtenant to the possession of the premises, against the landlord, terminates with the original lessee's lease."). Additionally, while the Sublease does include express provisions that set forth BI-LO's remedies upon the Church's default or insolvency, it does not provide for any remedies for the Church upon BI-LO's default or insolvency.

In further support of their Objection, the Debtors assert that the Sublease expressly limits BI-LO's liability to the extent of its interest in the Master Lease and Sublease. Paragraph 42 of the Sublease provides that

> [New Spring Church] agrees that it shall look solely to the interest of [BI-LO] in the Master Lease . . . for the collection of any judgment (or other judicial process) requiring payment of money by [BI-LO] in the event of any default or breach by [BI-LO] with

> respect to any of the terms, convenants and conditions of this Sublease to be observed and/or performed by [BI-LO]. . . .

Paragraph 26 of the Sublease further provides that "[New Spring Church] agrees to look solely to [BI-LO's] interest in the Sublease for recovery of any damages sustained by reason of performance or failure to perform." Because the Master Lease was terminated on April 23, 2009 and the Sublease was terminated on May 21, 2009, both pursuant to Orders of the Court, BI-LO has no interest in either the Master Lease or the Sublease, and therefore the Debtors assert that no damages can be recovered under the Sublease.

With respect to the portion of the Claim for the "Remaining Unamortized Portion of Initial Upfit Cost" in the amount of $2,606,932.19, the Debtors assert that in addition to the provisions that preclude the Church from recovering any damages, the Sublease specifically provides that BI-LO is not responsible for costs incurred by the Church to upfit the Premises. BI-LO agreed to "deliver the Premises for [New Spring Church]'s use and occupancy in accordance with specifications for 'Delivery Specifications,'" which were set forth in Exhibit B to the Sublease. Exhibit B to the Sublease provided that "[New Spring Church] has agreed to accept possession of the Premises in 'AS-IS, WHERE IS' condition with all faults and with no right of set-off or reduction in Rent." The Sublease further provided that "[a]ny work in addition to any of the items specifically enumerated in said Exhibit 'B' shall be performed by [New Spring Church] at its own cost and expense." Accordingly, New Spring Church agreed that it would perform all new work at the Premises, including any upfit work, at its own cost and expense, and the Church is not entitled to recover such amounts from the Debtors.

Lease provisions are subject to general rules of contract construction. *See South Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008). A court must determine and give effect to the intention of the parties, and "[w]hen a

contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002). Further, "[t]he court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Lindsay v. Lindsay*, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997). After considering the unambiguous terms of the Sublease, the Court finds that New Spring Church is not entitled to recover damages for the "Remaining Unamortized Portion of Initial Upfit Cost" in the amount of $2,606,932.19 or for Moving Expenses in the amount of $607,656.84, and those portions of the Claim must be disallowed.[2] The Court finds that the terms of the Sublease expressly limit BI-LO's liability to the extent of its interest in the Master Lease, and BI-LO did not hold any interest in the Master Lease at the time the Court authorized the rejection of the Sublease. The Court further notes the absence of any provisions in the Sublease granting New Spring Church any remedies upon default or insolvency by BI-LO. Additionally, the terms of the Sublease specifically preclude New Spring Church's claim for damages for the "Remaining Unamortized Portion of Initial Upfit Cost."

The Court will hold a further hearing on **June 11, 2010** in the Donald Stuart Russell Federal Courthouse, 201 Magnolia Street, Spartanburg, SC 29306, on the issue of whether the Church is entitled to the return of its initial security deposit.

THEREFORE, IT IS ORDERED, that the Debtors' Objection to Proof of Claim No. 1559 Filed by New Spring Community Church is **GRANTED IN PART**, and the portions of the

[2] New Spring Church asserts that the terms of the contract do not control the measure of damages in this case because the Debtors rejected the Sublease in the Chapter 11 Cases. The Court has reviewed all of the authorities introduced by the Church, both in its briefing and at the hearing on this matter, and finds that none of the authorities support the Church's position that the terms of the contract do not dictate the damages available to the Church as a result of the Debtors' rejection of the Sublease.

Claim for Remaining Unamortized Portion of Initial Upfit Costs and Moving Expenses are disallowed.

AND IT IS SO ORDERED.