

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

PREMIER HOTEL DEVELOPMENT
GROUP d/b/a Hospitality
Consultants, The Carnegie
Hotel, Austin Spring Spa
& Salon, and Luigies;
PREMIER INVESTMENT GROUP
d/b/a Premier Investments;
and SAMUEL T. EASLEY,

Debtors.

Nos. 01-20923, 01-20940
and 01-20922
Jointly Administered
Chapter 11

PREMIER HOTEL DEVELOPMENT
GROUP and WAYNE WALLS,
Liquidating Trustee,

Plaintiffs,

vs.

FIRST TENNESSEE BANK, N.A.,

Defendant.

Adv. Pro. No. 02-2045

M E M O R A N D U M

APPEARANCES :

JAMES R. KELLEY, Esq.
NEAL & HARWELL, PLC
One Nashville Place, Suite 2000
Nashville, Tennessee 37219

-and-

FRED M. LEONARD, Esq.
27 Sixth Street
Bristol, Tennessee 37620
*Attorneys for Premier Hotel Development Group
and Wayne Walls, Liquidating Trustee*

RICHARD B. GOSSETT, ESQ.
BAKER, DONELSON, BEARMAN & CALDWELL
633 Chestnut Street, Suite 1800
Chattanooga, Tennessee 37450
Attorneys for First Tennessee Bank, N.A.

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding involves the proper interpretation of the confirmed chapter 11 plan in the underlying bankruptcy case with respect to payment of the claim of the Public Building Authority of the City of Johnson City, Tennessee ("PBA"). Presently before the court are the parties' cross-motions for summary judgment. For the reasons stated hereafter, the motion of defendant First Tennessee Bank will be denied as the court is unable to conclude that there are no disputed issues of fact and that First Tennessee is entitled to judgment as a matter of law. Similarly, the motion of the plaintiffs will be denied except as to the conclusions that PBA's claim was not a tax claim and the plan contemplated the escrow of \$320,000 from the foreclosure sale proceeds pending resolution of PBA's claim regardless of the amount of the sale proceeds. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(A) and (O).¹

¹Retention of jurisdiction to decide such matters as before the court is provided in Article X of the debtor's plan.

I.

The plan of reorganization of debtor Premier Hotel Development Group ("PHDG") was confirmed by order of this court entered December 12, 2001, and PHDG commenced this adversary proceeding against First Tennessee on May 13, 2002. The liquidating trustee under the plan, Wayne Walls, was subsequently added as a party plaintiff by agreed order entered July 24, 2002. As set forth in the complaint and admitted in the answer, First Tennessee was the major secured creditor of PHDG, holding a lien on its principal asset, the Carnegie Hotel. The complaint recites that under PHDG's plan, the Carnegie Hotel was to be sold, pursuant to a foreclosure sale under First Tennessee's deed of trust, to an entity to be formed by Callen & Johnson Investments, LLC; that \$320,000 would be escrowed from the proceeds of the foreclosure sale pending determination of the payment in lieu of tax claim of PBA; and that to the extent PBA's claim was reduced below \$320,000, 50% of the savings would go to the bankruptcy estate with the other 50% to First Tennessee. The plaintiffs allege that both First Tennessee and PBA attended the confirmation hearing and supported confirmation of the plan.

Subsequent to plan confirmation on December 12, 2001, the contemplated foreclosure sale was held on December 18, 2001.

Notwithstanding the anticipated sale to a Callen & Johnson entity, no such entity bid at the foreclosure sale. Instead, First Tennessee was the high bidder based on its credit bid of \$7 million, although within days First Tennessee sold its interest in the hotel to a Callen & Johnson entity on December 28, 2001, for a gross sale price of \$7.64 million.

The plaintiffs allege that at the time of this subsequent sale, PHDG advised the parties that \$320,000 was to be set aside pending a determination of PBA's claim. The plaintiffs assert that notwithstanding this notice and the plan provision, the funds were not set aside and that instead, PBA was paid \$320,000 from the foreclosure proceeds at First Tennessee's direction. The plaintiffs maintain that First Tennessee gave this directive because it did not wish to own the hotel at the close of its fiscal year, December 31, 2001; that Callen & Johnson would not purchase the hotel without revisions to the parking garage lease from PBA; and that PBA would not agree to the revisions without immediate payment of the \$320,000 allegedly owed to it.

After receipt of the \$320,000, PBA withdrew its \$320,000 claim against the estate. The plaintiffs allege in this adversary proceeding that because the estate's obligation to PBA is now \$0, the estate is entitled under the terms of the confirmed plan to one half of the savings or \$160,000.

Accordingly, the plaintiffs request judgment against First Tennessee in this amount plus interest, attorney fees, and costs.

In its answer, First Tennessee disputes the plaintiffs' interpretation of the confirmed chapter 11 plan. First Tennessee asserts that the plan only provided for the escrow of \$320,000 if the foreclosure sale price for the hotel exceeded the secured claims. If this scenario occurred, the excess proceeds would be paid to the debtors, the debtors would escrow from this excess the \$320,000 sum, and after resolution of the PBA claim, any savings would be split between PHDG and First Tennessee. First Tennessee states that because it credit bid \$7 million of its indebtedness at the foreclosure sale, no funds were payable to PHDG and PBA was paid with First Tennessee's own funds, rather than with funds of PHDG or the estate. According to First Tennessee, to the extent that the court determines that PBA was not entitled to those funds, any refund should be paid in its entirety to First Tennessee.

On November 15, 2002, First Tennessee filed a motion for summary judgment in its favor, supported by the affidavit of its attorney, Richard B. Gossett. Thereafter, on December 6, 2002, the plaintiffs likewise moved for summary judgment, filing in support of the motion the affidavit of Samuel T. Easley, the

majority general partner of Premier Investment Group, the majority general partner of PHDG.

II.

Rule 56 of the Federal Rules of Civil Procedure, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "When reviewing cross-motions for summary judgment, the court must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party." *Wily v. United States (In re Wily)*, 20 F.3d 222, 224 (6th Cir. 1994).

III.

As First Tennessee states in its memorandum of law, "a confirmed chapter 11 plan is essentially a new contract between a debtor and its creditors." See *Eagle-Picher Indus., Inc. v. Caradon Doors and Windows, Inc. (In re Eagle-Picher Indus., Inc.)*, 278 B.R. 437, 451 (Bankr. S.D. Ohio 2002)(citing *Nat'l City Bank v. Troutman Enters., Inc. (In re Troutman Enters.,*

Inc.), 253 B.R. 8, 11 (B.A.P. 6th Cir. 2002)). Accordingly, the court will examine the confirmed plan in this case to ascertain the obligations imposed on the parties.

Article VI, entitled "MEANS OF EXECUTION OF THE PLAN," states the following beginning on the bottom of page 18²:

The Carnegie Hotel will be transferred pursuant to the Plan and pursuant to a foreclosure sale to be conducted in connection with the Plan. Prior to the confirmation hearing, the Debtors and First Tennessee shall have entered into an agreed order modifying the automatic stay so as to allow First Tennessee to begin advertising for a foreclosure sale. (First Tennessee has previously sought stay relief....) The foreclosure sale will be scheduled as soon as practicable after the confirmation of the Plan (or before confirmation in [sic] the Court so orders). To the extent it becomes necessary to continue the scheduled foreclosure hearing, the Debtors have so consented.

Mr. Easley has entered into an agreement with Callen & Johnson Investments, LLC wherein Callen & Johnson will create a new entity to acquire the Carnegie Hotel. The purchase price will be \$8,750,000.00 payable \$800,000.00 in cash and a \$7,950,000.00 note to be delivered to First Tennessee Bank....

The procedure described below was negotiated prior to signing the agreement with Callen & Johnson. There is a remote possibility that another party could bid at the foreclosure sale but that is not likely. Assuming that Callen & Johnson buys the hotel for \$8,750,000.00, this will result in First Tennessee agreeing to release from the sale proceeds of

²The copies of the Third Modified Plan of Reorganization attached to the complaint and to Mr. Easley's affidavit are not the plan filed with the court on November 21, 2001, and thus not the plan confirmed by order entered December 12, 2001.

\$8,750,000.00 certain monies that would otherwise go to First Tennessee by virtue of its lien position. These transactions benefit the estate because, in the absence of such agreement, First Tennessee would keep all the proceeds (subject to the litigation of the lien claimants as to priority) but there would be no corresponding benefit to the unsecured creditors and to the estate. In particular, First Tennessee has agreed to release \$225,000.00 to PHI in order to obtain a release of the security interest held by PHI in certain assets of the hotel, one-half of the savings that could be negotiated with the Authority related to property taxes or payments in lieu of property taxes (the Debtors believe that they will be able to negotiate a transaction with the Authority whereby the Authority will waive this claim thereby generating \$160,000.00 in funds for the estate, and if the Debtors do not reach such an agreement, claims against the Authority will be retained by the Debtors), and \$255,000.00 for payment of remaining priority claims, administrative expenses and closing costs for which the Debtors are responsible.... Of the \$800,000.00 in cash to be paid by Callen & Johnson, First Tennessee has agreed to release up to \$640,000.00 of cash to be paid to or for the benefit of the Debtors and the estate, depending on the outcome of the property tax issue. In the absence of such agreement, all of these funds would go to First Tennessee and there would be corresponding detriment to the Debtors and their estates....

The procedure at the foreclosure sale will be as follows:

(a) First Tennessee will conduct the foreclosure sale pursuant to its deed of trust and security agreement that encumbered the real and personal property comprising the Carnegie Hotel. Pursuant to an order of the Bankruptcy Court, the purchaser at the foreclosure sale will acquire an insurable title to the Carnegie Hotel, free of all liens, claims and encumbrances that would be extinguished by a foreclosure by one holding a perfected, first in priority, deed of trust and security agreement upon the real and personal property comprising the Carnegie Hotel....

....

(d) Upon the closing of the foreclosure sale, the proceeds of the foreclosure sale (the "Proceeds") will be allocated and distributed as follows:

(i) In the event the Proceeds are less than \$8,500,000.00, the Proceeds will be distributed as follows:

(A) \$225,000.00 to pay and for release of the secured claim of Premier Hospitality, Inc., with the Plan to provide such payment is in satisfaction of all interests that Premier Hospitality may have in the assets utilized by Hotel in the operations of the Carnegie Hotel;

(B) an amount sufficient to pay accrued property taxes and payments in lieu of taxes on the Carnegie Hotel (including the proration of 2001 amounts) ("Property Taxes") after the application of all of the Debtors' cash that remains after paying postpetition accounts payable, those claims against the Debtors for which a purchaser at the foreclosure sale would be responsible and any closing costs for which the Debtors are responsible (to the extent the Property Taxes can be reduced below \$320,000.00 plus penalties and interest, 50% of that savings may be used to pay administrative and priority claims); and

(C) the balance to First Tennessee.

(ii) In the event the Proceeds equal or are more than \$8,500,000.00 but less than \$9,800,000.00, the Proceeds will be distributed as follows:

(B)³ Those amounts provided in (d)(i)(A) and (B) above;

(C) \$7,950,000.00 to First Tennessee;

(D) not more than \$255,000.00 in payment of remaining priority claims, administrative expenses and closing costs for which the Debtors are responsible; and

(E) the balance to First Tennessee.

(iii) In the event the Proceeds equal or are more than \$9,800,000.00, the Proceeds will be distributed as follows:

(A) Those amounts provided in (d)(ii)(A), (B) and (C) above [see preceding footnote];

(B) an amount equal to the amount by which the Proceeds exceed \$9,800,000.00, but in no event more than \$200,000.00, to the estate; and

(C) the balance to First Tennessee[.]

(e) On or before Confirmation, PHDG will exercise its \$10.00 purchase option and cause fee title to the Carnegie Hotel to be transferred to the purchaser at or after the foreclosure sale....⁴

....

Following the foreclosure sale, the Proceeds will be distributed as set forth above. The amount available to the estate will vary depending upon the

³Lettering of subparagraphs erroneously begins with (B).

⁴The language in section (e) was set forth in the Second Amendment to the Third Modified Plan of Reorganization filed on December 12, 2001.

amounts realized at the foreclosure sale.... If the Plan is not confirmed by December 17, 2001, First Tennessee will be able to foreclose the deed of trust and security interest against the Carnegie Hotel and retain all proceeds.

With respect to payment of PBA's claim, the plan provides the following in Article V:

CLASS II PRIORITY CLAIMS

All allowed Priority Claims will be paid as soon as practical after the Effective Date. This class is not impaired. Notwithstanding the foregoing:

(a) The Public Building Authority of the City of Johnson City has [sic] contending that it is entitled to a payment in lieu of taxes under the ground lease of the property on which the Carnegie Hotel is built of about \$320,000.00 for the years 2000 and 2001 and that such claim is entitled to Priority Claim status. Several creditors have objected to this Priority Claim status. The Debtors and the Authority have negotiated in an attempt to resolve this dispute but have not been successful. In order to effect the closing of the sale of the Carnegie Hotel, the Debtors will withhold from the sale proceeds the amount of the alleged Priority Claim of the Authority for payments in lieu of taxes approximately \$320,000.00. All rights of the Authority, including any lien rights, will attach to these escrowed funds. The Debtors and the Authority will retain their respective rights with respect to this amount and the Court will determine by subsequent proceedings the extent to which these funds should be paid to the Authority or the estate. In the event that the Authority is not entitled to payment of some or all of these funds, pursuant to the agreement between the Debtors and First Tennessee, one-half of such savings will go to the Debtors' estates and one-half will go to First Tennessee....⁵

The parties agree, as stated in First Tennessee's

⁵This section was likewise set forth in the December 12, 2001 Amendment.

memorandum, that because the proceeds from the sale of the hotel were less than \$8.5 million, "section (d)(i) [of Article VI] is the controlling provision of the Plan for the procedures to be followed at closing." First Tennessee maintains that it complied with this section, stating in its memorandum that:

As required by section (d)(i)(A) and as reflected on the Seller's Closing Statement, \$225,000.00 was disbursed to Premier Hospitality, Inc. Further, various taxes and certain closing costs were disbursed as directed by subsection (B), and the balance was paid to First Tennessee as provided in subsection (C). Subsection (B) does provide that, in the event that the Property Taxes (as defined therein), are reduced below \$320,000.00, 50% of the difference can be directed to payment of administrative and priority claims; however, the taxes were never reduced, and the full \$320,000.00 was disbursed to the PBA.

In response, the plaintiffs assert that section (d)(i) of Article VI must be read in conjunction with Article V regarding payment of PBA's claim, noting that this provision directs the escrow of \$320,000 pending further action of the court because PBA's claim is in dispute. The plaintiffs state that "First Tennessee and Mr. Gossett took it upon themselves to preempt this Court's authority to decide the validity and extent of the alleged priority claim of the PBA." The plaintiffs further contend that contrary to First Tennessee's conclusion, "no priority tax claim was owed to the PBA." According to the plaintiffs, the obligation to PBA was based on the rent due under the March 23, 2000 Lease Agreement between PHDG and PBA

and although the amount of rent is calculated therein based on a hypothetical tax rate, the obligation was in fact rent, not taxes. In this regard, the plaintiff note that "the Lease specifically states that the premises are not subject to real property taxation because the PBA is a tax-exempt entity."

First Tennessee's response to this argument is that no plan provision imposed an escrow requirement upon it. First Tennessee emphasizes that the provision of Article V of the plan which pertains to Class II Priority Claims states "the **Debtors** will withhold from the sale proceeds the amount of the alleged Priority Claim of the Authority for payments in lieu of taxes approximately \$320,000.00." According to First Tennessee, this provision anticipated the possibility that the proceeds of sale would be greater than secured claims in which case the excess would be paid to the debtors and their estates. The argument continues that since the sale proceeds were not sufficient to satisfy all of the secured claims, PHDG was not entitled to any proceeds and thus no resulting escrow requirement was triggered.

Lastly, First Tennessee maintains that PHDG's own breach of the plan's directives necessitated the payment to PBA because PBA refused to deliver a deed for fee simple title to the hotel until it was paid. First Tennessee references section (e) of Article VI, which as quoted above, provides that "[o]n or before

Confirmation, PHDG will exercise its \$10.00 purchase option and cause fee title to the Carnegie Hotel to be transferred to the purchaser at or after the foreclosure sale." As explained by Mr. Easley, "Since First Tennessee only had a deed of trust on PHDG's leasehold interest, it was necessary for PHDG to exercise its \$10.00 purchase option so as to transfer fee title to the ultimate purchaser of the Carnegie Hotel." First Tennessee asserts in its memorandum that notwithstanding this plan provision, PHDG failed to "exercise the purchase option or in any other manner cause fee title of the Carnegie Hotel to be transferred to the purchaser." According to First Tennessee, "Without the payment to the PBA, the deed would not have been delivered, and without the deed, there would have been no closing.... [Payment of the \$320,000 to PBA] was necessary because the Debtor had failed to obtain the deed prior to the closing."

From an examination of the plan as a whole, the court is convinced that it was contemplated that \$320,000 would be withheld from the foreclosure sale proceeds pending determination of PBA's claim and that these funds would be withheld regardless of the amount generated by the sale. While granted the distribution schemes set forth in section (d) of Article VI of the plan do not specifically provide for escrow of

this amount, the provision does state that to the extent the "Property Taxes" can be reduced, 50% of the savings may be used to pay administrative and priority claims. It is difficult to see how savings could be achieved and then utilized for administrative expenses if payment in full of the "Property Taxes" were to be paid at closing as First Tennessee maintains. First Tennessee's argument that payment in full was necessitated by PHDG's failure to negotiate a reduction of PBA's claim is specious. The plan in this case contemplated a foreclosure sale within days after confirmation. In fact, the plan was confirmed on December 12, 2001, and the foreclosure sale took place on December 18, 2001. It is highly unlikely that the dispute regarding PBA's claim could have been resolved during that short time period and there was no indication whatsoever that the parties anticipated such an immediate resolution. Especially considering the other plan provisions discussed below, the only reasonable construction of the language in section (d) regarding payment of the "Property Taxes" is that the funds for payment to PBA would be held pending orderly adjudication of its claim.

Also supporting this conclusion is the statement on page 20 of the plan that "First Tennessee has agreed to release ... one-half of the savings that could be negotiated with the Authority related to property taxes or payments in lieu of property taxes

...." Similarly on page 21, "First Tennessee has agreed to release up to \$640,000.00 of cash to be paid to or for the benefit of the Debtors and the estate, depending on the outcome of the property tax issue." While this latter statement was made in the context of sale proceeds of \$8.75 million, it is equally relevant to the sale proceeds in question since all three price scenarios in subparagraph (d) of Article VI, i.e., "less than \$8,500,000.00," "equal or are more than \$8,500,000.00," and "equal or are more than \$9,800,000.00" have identical language regarding payment of "Property taxes."

Lastly in this regard, the court finds the provision in Article V concerning Class II Priority Claims to be instructive. As noted by the plaintiffs, this section specifies that PBA's claim is disputed and that "[i]n order to effect the closing of the sale of the Carnegie Hotel," \$320,000 will be withheld from the sale proceeds pending determination of the claim. The court is puzzled somewhat that the plan states "the Debtors" will withhold the \$320,000 from the sale proceeds since the plan plainly contemplated that the hotel would be sold pursuant to a foreclosure sale by First Tennessee. However, the likely explanation for this wording is the fact that it was the debtor PHDG which was going to transfer fee simple title to the purchaser since First Tennessee only had a lien on PHDG's

leasehold interest. First Tennessee's argument that the escrow requirement was only triggered when sale proceeds exceeded the secured claims and the excess turned over to the debtor is illogical and inconsistent with the remaining provisions of the plan. If First Tennessee along with the other secured claims had been paid in full from the sale proceeds, a scenario which throughout this case has been highly unlikely, then there would be no reason for the bankruptcy estate to split with First Tennessee the savings derived from a reduction of PBA's claim. On the other hand, it was clear that PBA's claim would have to be addressed in a fashion that did not disrupt the contemplated foreclosure sale. Thus, the plan provided for the funds for PBA's claim to be escrowed from the sale proceeds. Based on all of the foregoing, First Tennessee's motion for summary judgment will be denied.

Denial of First Tennessee's summary judgment motion does not necessarily result in a corresponding conclusion that the plaintiffs are entitled to summary judgment. See *B.F. Goodrich Co. v. United States Filter Corp.*, 245 F.3d 587, 593 (6th Cir. 2001) ("When parties file cross-motions for summary judgments, 'the making of such contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration

and determination whether genuine issues of material fact exist'"). In order to grant summary judgment for the plaintiffs, this court must find that First Tennessee did not comply with the plan and that but for the noncompliance, the bankruptcy estate would have received \$160,000 with which to pay administrative claims because PBA's claim is not entitled to priority status. In this regard, the court will address whether PBA had a valid priority claim.

Notwithstanding the debtor's confirmed plan which states that PBA is "contending that it is entitled to a payment in lieu of taxes under the ground lease of the property on which the Carnegie Hotel is built of about \$320,000 for the years 2000 and 2001 and that such claim is entitled to Priority Claim status," the proof of claim actually filed by the PBA only listed \$159,800 as being owed based on "[i]n lieu of tax/lease agreement" and did not assert priority status. On the proof of claim form, PBA had typed "n/a" beside the words "Unsecured Priority Claim" and the words "Secured Claim." The form has the instruction "Check this box if you have an unsecured priority claim," and the blank line to insert "Amount entitled to priority \$____," but the box was not checked and no amount was inserted in the blank.

With respect to the discrepancy between the plan and proof

of claim as to the amount of PBA's claim, the court does note that the proof of claim listed "12/31/00" as being the "Date debt was incurred" and as such assumes that the claim was for one year's rent, i.e., the year 2000. The court surmises that PBA orally requested payment for rent for the year 2001, thus doubling the claim, and asserted priority status. The Sixth Circuit Court of Appeals has stated that "creditors must directly tie their priority claims to specific provisions of the Bankruptcy Code" because every such claim reduces the fund available to general creditors. *Yoder v. Ohio Bureau of Workers' Compensation (In re Suburban Motor Freight, Inc.)*, 998 F.2d 338, 342 (6th Cir. 1993). Absent a reference to a particular Code provision granting priority status, it is difficult for this court to evaluate whether PBA's claim which arose out of its Lease Agreement with PHDG was in fact a priority claim. The court will, however, adjudge whether PBA's claim was for a "tax" entitling it to priority status.

In *City of New York v. Feiring*, 313 U.S. 283, 285 (1941), the United States Supreme Court held that tax priority "extends to those pecuniary burdens laid upon individuals or their property, regardless of their consent, for the purpose of defraying the expenses of government or of undertakings authorized by it." Even though "Congress has changed the law of

bankruptcy in considerable measure since 1941" when *Feiring* was decided, "the *Feiring* definition still applies in attempting to distinguish 'taxes' from other types of exactions or payments in the bankruptcy context." *In re Suburban Motor Freight, Inc.*, 998 F.2d at 339 n.2.

The Court of Appeals for the Ninth Circuit has articulated four elements which "characterize the exaction of a tax" for bankruptcy priority purposes:

(a) An involuntary pecuniary burden, regardless of name, laid upon individuals or property;

(b) Imposed by, or under the authority of the legislature;

(c) For public purposes, including the purposes of defraying expenses of government or undertakings authorized by it;

(d) Under the police or taxing power of the state.

County Sanitation Dist. No. 2 v. Lorber Indus. of Cal., Inc. (In re Lorber Indus. of Cal., Inc.), 675 F.2d 1062, 1066 (9th Cir. 1982). In the *Suburban Motor Freight* cases, the Sixth Circuit adopted the *Lorber* test but refined the third prong regarding public purposes by adding two additional factors: "(1) that the pecuniary obligation be universally applicable to similarly situated entities; and (2) that according priority treatment to the government claim not disadvantage private creditors with like claims." See *Ohio Bureau of Workers' Compensation v. Yoder*

(In re Suburban Motor Freight, Inc.), 36 F.3d 484, 488 (6th Cir. 1994); *In re Suburban Motor Freight, Inc.*, 998 F.2d at 341.

Applying these factors to PHDG's obligations under its Lease Agreement with PBA, the court agrees with PHDG that the debt to PBA was not a tax. In addition to "Annual Rent" of \$1 per year, the Lease Agreement required PHDG as tenant to pay, on or before December 31 of each calendar year, certain "Additional Rent" equaling a "Hypothetical Tax Amount" for similar properties based upon the "combined established real property tax for the City of Johnson City and Washington County calculated ... for the tax year 1999" minus \$15,000. Notwithstanding this reference, the agreement denominated this amount as "rent" and section 10.1 of the Lease Agreement stated that "neither the Premises, nor the leasehold estate of the Tenant therein, nor the Tenant shall be subject to any state, county or local ad valorem tax on either the Premises or the leasehold estate of the Tenant during the Term of this Lease." Similarly TENN. CODE ANN. § 12-10-113(a) provides that a public building authority "and all properties at any time owned by it, and the income therefrom, and all bonds issued by it, and the income therefrom shall be exempt from all taxation in the state of Tennessee."

There is no indication that payment of this "Additional

Rent" was involuntary; it was pursuant to an agreement between the parties. Although the Lease Agreement recited in section 4.2(a) that the "Lease is a transaction permitted by the statutory authority of Landlord," and presumably it was for a public purpose or a governmental authority such as the PBA would not have entered into the agreement, there is no indication that the obligation was imposed pursuant to PBA's police or taxing power, as opposed to any other governmental power. Lastly, "the pecuniary obligation [imposed by the agreement does not appear to] be universally applicable to similarly situated entities" as required by *Suburban Motor Freight*.

Notwithstanding the conclusion that PHDG's obligation to PBA was not a tax, the court is unable to find that none of the claim was entitled to priority status. If PBA's claim was for rent for years 2000 and 2001, part of the rent obligation may have arisen postpetition because PHDG filed for bankruptcy relief on March 15, 2001. As such, the obligation may have been entitled to priority as an administrative expense under 11 U.S.C. § 507(a)(1). Accordingly, the plaintiffs' motion for summary judgment will be denied in this respect.

Finally, concerning whether First Tennessee is at fault for not escrowing the \$320,000, First Tennessee contends, as previously noted, that it was PHDG's own failure to exercise the

purchase option or in any other manner cause fee title to the hotel to be transferred to the purchaser which gave rise to the necessity of the payment to PBA. From the facts presented, the court is unable to determine whether this assertion has any merit. Accordingly, final resolution of this adversary proceeding must await an evidentiary hearing.

IV.

An order will be entered in accordance with this memorandum.

FILED: January 17, 2003

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE