**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | |
|---|---|
| In re: | Chapter 7 |
| ASSOCIATION OF GRAPHIC COMMUNICATIONS, INC., | Case No. 07-10278 (BRL) |
| | **NOT FOR PUBLICATION** |
| Debtor. | |

APPEARANCES:

GAZES LLC
32 Avenue of the Americas, 27th Floor
New York, NY 10013
Telephone: (212) 765-9000
By: Ian J. Gazes
John E. Oliva
*Attorneys for Chapter 7 Trustee*

ITKOWITZ & HARWOOD
305 Broadway, 7th Floor
New York, NY 10007
Telephone: (646) 822-1803
By: Jay B. Itkowitz
Simon W. Reiff
*Attorneys for Landlord Super Nova 330 LLC*

Before: Hon. Burton R. Lifland
United States Bankruptcy Judge

**MEMORANDUM DECISION AND ORDER GRANTING CHAPTER 7 TRUSTEE'S MOTION FOR SUMMARY JUDGMENT AND DENYING SUPER NOVA 330 LLC'S CROSS-MOTION**

Before the Court is a motion for summary judgment (the "Summary Judgment Motion") filed by the chapter 7 trustee (the "Trustee") in the above-captioned chapter 7 bankruptcy case, seeking, *inter alia*, to summarily deny the pending motion of Super Nova 330 LLC ("Super Nova") for administrative expenses (the "Expense Motion") pursuant to section 365(d)(3) of the Bankruptcy Code (the "Code") arising from a commercial lease, and the cross-motion of Super

Nova seeking permission to amend the Expense Motion to include a claim for administrative expenses pursuant to section 503(b)(1)(A) of the Code for costs and expenses of preserving the estate (the "Cross-Motion").

Super Nova contends that, in accordance with section 365(d)(3) of the Code, it is entitled to payment of postpetition rent obligations as an administrative expense under a lease entered into prepetition. The Trustee opposes Super Nova's Expense Motion and argues, *inter alia*, that the prepetition issuance of a warrant of eviction by the Civil Court of the City of New York (the "State Court") terminated the lease and the landlord-tenant relationship such that there is no "unexpired" lease for the Trustee to assume or reject under section 365(a) of the Code. Consequently, the Trustee argues that Super Nova is not entitled to postpetition administrative rent under section 365(d)(3) of the Code.

In connection with the Cross-Motion, the Trustee takes the position that Super Nova is not entitled to any administrative expense claim on the merits and its request to add an administrative expense claim pursuant to section 503(b)(1)(A) of the Code is procedurally inappropriate, untimely, and to grant this request would be unduly prejudicial and burdensome to the administration of this case. For the reasons set forth below, the Summary Judgment Motion is GRANTED, and the Cross-Motion is DENIED.

## BACKGROUND

### I. The Lease

Super Nova's Expense Motion, the subject of the Trustee's instant Summary Judgment Motion, arises out of a written lease agreement signed on February 10, 1992 between Four Star Holding Company c/o David Yagoda, predecessor-in-interest to Super Nova, as landlord, and Association of the Graphic Arts, Inc., predecessor-in-interest to Association of Graphic

Communications, Inc. (the "Debtor"), as tenant, and amended by a Lease Modification and Extension Agreement dated February 11, 2002 (the "Lease"). Under the Lease, the Debtor occupied a portion of the ninth floor (the "Premises"), which is now in Super Nova's possession. The Lease would have expired by its terms on February 28, 2007, twenty-six days after the Debtor filed its February 2, 2007 (the "Petition Date") bankruptcy petition.

**II. The Debtor's Default and Subsequent Bankruptcy Filing**

In the summer of 2006, the Debtor ceased its business operations and stopped paying rent. As a result, Super Nova commenced a nonpayment proceeding against the Debtor in the State Court on November 27, 2006.[1] Shortly thereafter, the State Court entered a default judgment of possession against the Debtor, and subsequently issued a warrant of eviction on February 1, 2007. The following day, the Debtor filed its chapter 7 bankruptcy petition.

On March 28, 2007, Super Nova moved for relief from the automatic stay (the "Lift Stay Motion"), seeking to execute on the prepetition warrant of eviction. Notably, in the Lift Stay Motion, Super Nova argued that the Lease had terminated prepetition upon the issuance of the warrant of eviction by the State Court, and thus was not property of the estate subject to the automatic stay.[2] The Lift Stay Motion was unopposed and was granted by this Court on April 11, 2007; on April 24, 2007, a marshal executed on the warrant of eviction.

On January 30, 2009, nearly two years later, Super Nova brought its Expense Motion seeking payment of past-due postpetition rent as an administrative expense pursuant to section 365(d)(3) of the Code. The Expense Motion additionally seeks attorneys' fees and prejudgment interest under section 365(d)(3) of the Code, as well as prejudgment interest under New York

[1] L&T Index No. 101408/06.

[2] *See* Lift Stay Mot., 5–6 (Docket No. 14).

law.[3] The Trustee opposed the Expense Motion, and a preliminary hearing was held on February 24, 2009. Thereafter, the Trustee and Super Nova engaged in discovery, including taking depositions. At the conclusion of discovery, the Trustee filed the Summary Judgment Motion.

## DISCUSSION

### I. Rule 56 of the Federal Rules of Civil Procedure – Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure ("Rule"), made applicable herein by Rule 7056 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rule"), governs the filing of motions for summary judgment and states, in relevant part, that "[t]he judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Morenz v. Wilson-Coker*, 415 F.3d 230, 234 (2d Cir. 2005).

The moving party bears the burden of demonstrating the absence of any genuine issue of material fact, and all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the non-moving party. *Celotex Corp.*, 477 U.S. at 323; *see also In re Northwest Airlines Corp.*, 383 B.R. 283, 291 (Bankr. S.D.N.Y. 2008); *Ames Dep't Stores, Inc.*, 161 B.R. 87, 89 (Bankr. S.D.N.Y. 1993). A fact is considered material if it might affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Once the moving party has established its initial burden, the non-moving party must come forward with competent summary judgment evidence of the existence of a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *In re WorldCom, Inc.*, 377 B.R. 77, 85 (Bankr. S.D.N.Y. 2007).

[3] Super Nova seeks interest under sections 5001–04 of the New York Civil Practice Law and Rules (the "NY CPLR").

## II. No Genuine Issue of Material Fact Exists as to Whether Super Nova is Entitled to Payment of Administrative Expenses Pursuant to Section 365 of the Code

Section 365(d)(3) of the Code, pursuant to which Super Nova seeks relief in its Expense Motion, provides, in relevant part, that a "trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any *unexpired* lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title." 11 U.S.C. § 365(d)(3) (emphasis added). The plain language of section 365(d)(3) makes clear that postpetition rent obligations apply only to leases that are *unexpired* as of the petition date.

Neither the Code nor its legislative history provides a definition of "unexpired." Rather, "because property interests are created and defined by state law, federal courts have looked to state law to determine a debtor's interests, including leasehold interests, in the bankruptcy estate." *In re Stoltz*, 197 F.3d 625, 629–30 (2d Cir. 1999), citing *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 329 (1993) (relying on Texas law); *In re Williams*, 144 F.3d 544, 546 (7th Cir. 1998) (relying on Illinois law). Under New York law, the issuance of a warrant of eviction cancels the lease and dissolves the relationship between landlord and tenant. N.Y. REAL PROP. ACT. & PROC. L. § 749(3) (McKinney 2008); *see also In re Sweet N Sour 7th Ave Corp.*, No. 10-12723 (MG), 2010 WL 2471033, at *2 (Bankr. S.D.N.Y. June 18, 2010) ("State law is clear that the issuance of a warrant of eviction terminates the landlord-tenant relationship."); *Bell v. Alden Owners, Inc. (In re Bell)*, 199 B.R. 451, 458 (S.D.N.Y. 1996) ("Under New York law, the issuance of a warrant of eviction cancels the lease between the parties and annuls the relationship of landlord and tenant."); *In re Marcano*, 288 B.R. 324, 330 (Bankr. S.D.N.Y. 2003) ("[U]nder New York law . . . the issuance of a warrant terminates the landlord/tenant relationship."). Accordingly, once a warrant of eviction has been issued prepetition, there can be no unexpired

lease for a debtor to assume or reject, and thus no postpetition rent obligations under section 365(d)(3) of the Code. *See In re Hudson Transfer Group, Inc.*, 245 B.R. 456, 458 (Bankr. S.D.N.Y. 2000); *In re Bell*, 199 B.R. at 458; *In re Island Helicopters, Inc.*, 211 B.R. 453, 463 (Bankr. E.D.N.Y. 1997); *Bucknell Leasing Corp. v. Darwin (In re Darwin)*, 22 B.R. 259, 262 (Bankr. E.D.N.Y. 1982). At most, a debtor who remains in possession postpetition after the issuance of a prepetition warrant of eviction merely has an equitable possessory interest in the leasehold. *See 48th Street Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th Street Steakhouse, Inc.)*, 835 F.2d 427, 430 (2d Cir. 1987).

As the Trustee argues, and this Court agrees, there is no genuine issue as to whether a warrant of eviction was issued prepetition. Specifically, both parties agree that the State Court issued the warrant of eviction on February 1, 2007, one day prior to the Petition Date. Therefore, by the time the Debtor had filed its petition, the Lease—along with the landlord-tenant relationship—had terminated, and thus was not *unexpired* as required by section 365(d)(3) of the Code.[4] Indeed, in its quest to modify the automatic stay, Super Nova conceded that the Lease was expired. Thus, Super Nova is entitled to neither postpetition rent, nor attorneys' fees or interest pursuant to section 365(d)(3) of the Code. Moreover, Super Nova's request for prejudgment interest under New York law is likewise denied because it is sought in connection with section 365(d)(3) of the Code.

In opposition, Super Nova asserts that a potential for reinstatement under state law procedures renders the Lease unexpired for purposes of section 365(d)(3) of the Code. In particular, citing to *In re P.J. Clarke's Rest. Corp.*, 265 B.R. 392 (Bankr. S.D.N.Y. 2001) and *In*

[4] In fact, Super Nova argued this very point in the Lift Stay Motion, stating correctly that "the issuance of a warrant of eviction technically terminates the landlord-tenant relationship[,] *In re Darwin*, 22 B.R. 259 ([Bankr.] E.D.N.Y. 1982)," and that upon the termination of a lease agreement "there ceases to be any executory agreement, and the lease agreement is no longer assumable pursuant to [section] 365 of the Bankruptcy Code." Lift Stay Mot., 5–6.

*re Stoltz*, 197 F.3d 625 (2d Cir. 1999), Super Nova argues that the "Lease should be deemed 'unexpired' because a month-to-month tenancy could have been created had the Debtor and/or Trustee tendered rent after the Expiration Date." Mem. of Law in Supp. of Expense Mot., 5 (Docket No. 39).[5] The *Stoltz and P.J. Clarke's* cases fail to support the Super Nova claim under section 365(d)(3) of the Code. The logic of this "deemed" argument is strained and curious, as neither the Trustee nor the Debtor tendered rent after the lease had expired by its own terms.

In *P.J. Clarke's*, a New York state court issued a summary judgment order prepetition granting the landlord possession of the debtor's leased premises. *P.J. Clarke's*, 265 B.R. at 395. Prior to the state court's issuance of a warrant of eviction and entry of a judgment, the debtor filed a chapter 11 petition, seeking to reorganize. *Id.* Before rendering its decision, the bankruptcy court granted the debtor permission to appeal the state court's summary judgment order on the condition that the debtor tender rent while the appeal was pending. *Id.* at 396. The issue raised was whether the debtor's monthly rent payments pending appeal were governed by section 365(d)(3) of the Code, which would "require[] no more than payment of the rent stated in the [l]ease," or the fair market rental value. *Id.* at 397. In finding that the lease rate controlled, the court held that the debtor "ha[d] far greater rights than a holdover with merely a naked right of possession and nothing more" and that "*[u]nder these circumstances*, where the [d]ebtor is still in possession and can reinstate its rights under the [l]ease under applicable State law, the [l]ease is 'unexpired' for purposes of [section] 365." *Id.* at 399 (emphasis added).

The circumstances here are easily distinguishable from those in *P.J. Clarke's*. To begin with, in the instant case, a judgment of possession and warrant of eviction were issued

[5] In the alternative, Super Nova argues that the Lease could have been reinstated by resorting to section 5519(a)(6) of the NY CPLR, which stays the enforcement of a judgment pending appeal. However, other than providing this blanket statement, Super Nova fails to make any showing that the Debtor could have in fact invoked this section of the NY CPLR. For example, Super Nova has failed to make a showing that Debtor's time to appeal the State Court default judgment had not expired as of the Petition Date.

prepetition. Thus, under New York law, the relationship between the Debtor and Super Nova had terminated before the bankruptcy filing. Additionally, unlike the debtor in *P.J. Clarke's*, this Debtor took no affirmative steps to challenge Super Nova's nonpayment proceeding, the State Court default judgment, or the warrant of eviction, either prepetition or postpetition; nor did it desire to do so. Moreover, in further contrast to the debtor in *P.J. Clarke's*, the Debtor here was neither in actual physical possession of the Premises doing business nor seeking to reorganize. *See* Supp. Decl. of Simon Reiff, Ex. D, Brocato Dep., 7:24–25, 8:1–25, 9:1–11, Aug. 11, 2009 ("Brocato Dep."). By misapplying a holdover concept with a naked right of possession, Super Nova ignores the factors of actual possession as between the tenant/Debtor or Trustee, and Super Nova as lessor.[6] *P.J. Clarke's*, 265 B.R. at 399. Furthermore, aside from the distinguishing circumstances, the *P.J. Clarke's* court did not make an affirmative ruling that the debtor was obligated to tender rent postpetition pursuant to section 365(d)(3) of the Code. Instead, it simply held that section 365(d)(3) of the Code applied to determine the proper rent rate when a debtor is paying rent postpetition pending the appeal of a prepetition state court ruling. Accordingly, the *P.J. Clarke's* decision does not support Super Nova's position.[7]

---

[6] Based on the facts extant, it appears that the Debtor did not even have a "naked right of possession" on the Petition Date. *P.J. Clarke's*, 265 B.R. at 399. The evidence shows that the Trustee could not enter the Premises, as he was not in possession of the keys, and could only gain access with the permission of the building superintendent. *See* Cross-Mot., Ex. D., Olivo Dep., 18:1–25, Sept. 29, 2009 ("Olivo Dep."); *In re Assoc. of Graphic Commc'ns, Inc.*, Case No. 07-10278 (BRL), Tr. of Hr'g on Sum. Judg. Mot., 12 (Docket No. 68) ("June 16th Hearing Transcript"). Additionally, it appears that prepetition, in early November 2006, Super Nova "locked the Premises and thereafter, denied the Debtor access to the Premises and to its property," thereby regaining possession. *See* Decl. in Opp. to Expense Mot., 2 (Docket No. 43). At that time, the Debtor expressed to Super Nova that it "had no intention or desire to maintain operations or otherwise occupy the Premises," and offered to enter into a surrender agreement. *Id.* In fact, the former Chairman of the Debtor, Joseph M. Brocato, testified in his deposition that the keys were left on the front desk of the Premises no later than December 2006, prior to the bankruptcy. Brocato Dep., 13:20–25, 14:1–25, 15:1. According to the Trustee, even absent a key, Super Nova could have easily accessed the Premises through a freight elevator. *See* June 16th Hearing Transcript, 13. Thus, while it may remain in dispute, the evidence points to prepetition possession and control of the Premises by Super Nova.

[7] Following the hearing on the Summary Judgment Motion and Cross-Motion, counsel for Super Nova sent a letter to chambers regarding a recent decision in this District. *See In re Sweet N Sour 7th Ave Corp.*, No. 10-12723 (MG), 2010 WL 2471033 (Bankr. S.D.N.Y. June 18, 2010). In that case, the court held that a chapter 11 debtor

The Second Circuit's decision in *Stoltz* likewise does not support Super Nova's position that the possible creation of a month-to-month tenancy under New York law somehow rendered the Lease unexpired. In *Stoltz*, the Court deemed a residential lease unexpired—and therefore subject to assumption under section 365 of the Code—under Vermont law where a writ of possession (or warrant of eviction) had not been issued prepetition. *Stoltz*, 197 F.3d at 631. Super Nova declares that the Second Circuit "deemed the lease 'unexpired' because the tenant could have created a month-to-month tenancy under Vermont law by tendering rent." Cross-Motion, 7. This is a mischaracterization of the *Stoltz* ruling. The Second Circuit deemed the lease unexpired because "*until* the landlord obtains a writ of possession [warrant of eviction], a tenant who has lost possession may nonetheless regain entry by curing the default." *Stoltz*, 197 F.3d at 631 (citing *Couture v. Burlington Hous. Auth. (In re Couture)*, 225 B.R. 58, 63 (D. Vt. 1998)) (emphasis added). Thus, the holding in *Stoltz* did not hinge upon a hypothetical ability to create a month-to-month tenancy under Vermont law. Moreover, while the *Stoltz* court expressly found it unnecessary to decide the issue, its holding suggests that under Vermont law, a writ of possession—or warrant of eviction—issued prepetition would result in the expiration of a lease. Finally, *Stoltz* is factually distinguishable in that it involved a residential lease in a chapter 13

---

who remains in possession postpetition after the issuance of a prepetition warrant of eviction has an equitable possessory interest sufficient to trigger the automatic stay. *Id.* at 2. Citing to *P.J. Clarke's*, the *Sweet N Sour* court conditioned the application of the stay upon the debtor's timely payment of postpetition rent under section 365(d)(3) of the Code and the debtor's commencement of a proceeding in state court to vacate the warrant of eviction. *Id.* at 5. Under *P.J. Clarke's*, the court found that "a lease may be considered to be unexpired for purposes of performing postpetition obligations pursuant to section 365(d)(3) if it was terminated prior to the petition but could be reinstated under state law." *Id.* at *4. Counsel for Super Nova requests that this Court follow *Sweet N Sour* by holding that the Lease may be considered "unexpired" for purposes of the Code notwithstanding its prepetition termination. The Court agrees that in certain circumstances, like those in *P.J. Clarke's* and *Sweet N Sour*, a debtor's obligations under section 365(d)(3) may remain in effect, despite a prepetition termination of a lease. However, as discussed, the circumstances here are completely different from those in *P.J. Clarke's*, and are also similarly distinguishable from those in *Sweet N Sour*. Unlike the debtor in *Sweet N Sour*, the Debtor here: did not contest the issuance of the prepetition warrant of eviction or the postpetition Lift Stay Motion; is not seeking to reorganize under chapter 11; was not in actual physical possession of the Premises doing business as of the Petition Date; and was not seeking to assume the Lease. Accordingly, *P.J. Clarke's* and *Sweet N Sour* do not support Super Nova's position.

.

case, where a warrant of eviction was not issued prepetition. Accordingly, *Stoltz* does not lend support to Super Nova's claim under section 365(d)(3) of the Code.

### III. Super Nova's Cross-Motion for Leave to Amend is Not Well-Grounded

Accompanying Super Nova's response to the Trustee's Summary Judgment Motion is its Cross-Motion seeking approval to amend the Expense Motion to include, as an alternative basis for relief, an administrative expense claim pursuant to section 503(b)(1)(A) of the Code on the grounds that the Debtor was a holdover tenant under New York law. Under section 503(b)(1)(A) of the Code, an award of an administrative expense would require a showing by the movant that it provided an actual benefit to the estate. 11 U.S.C. § 503(b)(1)(A) (providing for the allowance as an administrative expense the "actual, necessary costs and expenses of preserving the estate"). Here the movant demonstrates the exact opposite of beneficial preservation activity. Even if it were made timely, the Cross-Motion is unworthy on the merits.[8]

Nevertheless, the Court will review the Cross-Motion under Rule 15. Permission to amend a pleading is governed by Rule 15, made applicable herein by Bankruptcy Rule 7015, which provides that "a party may amend its pleading . . . [with] the court's leave." FED. R. CIV. P. 15. "Although Rule 15(a) . . . provides that leave to amend 'shall be freely given when justice so requires,' it is within the sound discretion of the district court to grant or deny leave to

[8] The record reflects that a claim under section 503(b)(1)(A) of the Code is dubious, at best. It is well settled that claims for "administrative expense priority should be narrowly construed to include only those creditors that perform services that are actual and necessary to preserve the bankrupt estate or that enable it to maintain its business." *In re CIS Corp.*, 142 B.R. 640, 642 (S.D.N.Y. 1992) (citations omitted). Although it remains unclear, there are serious questions concerning whether the property left at the Premises was of any meaningful value, which is relevant in determining the benefit to the estate. *See, e.g., In re Mainstream Access, Inc.*, 134 B.R. 743, 750 (Bankr. S.D.N.Y. 1991) (denying administrative expenses where property remaining in premises following expiration of a lease brought no value to the estate). Indeed, Salvatore Olivo, a representative from GEM Auction Corporation, stated in his deposition that "there was no need to change the locks [as] [t]here were no assets on the premises that really needed to be secured." Olivo Dep., 13:10–13; *see also* Cross-Mot., Ex. D., Ex. 2 ("The office furniture and computer equipment is of minimal value."). In addition, and as discussed more fully above, it appears from the record that the estate did not derive any benefit from actual physical possession of the Premises. *See supra*, note 6.

amend." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (citing FED. R. CIV. P. 15).[9]

Courts in this Circuit have denied leave to amend under Rule 15 when a party is guilty of laches. *See, e.g., Wheeler v. West India S.S. Co.*, 205 F.2d 354 (2d Cir. 1953) (holding that "refusal to permit the addition of a third claim more than three years after the complaint was filed was clearly justified on the ground of laches"); *Perez v. Chutick & Sudakoff*, 50 F.R.D. 1, 3 (S.D.N.Y. 1970) ("[P]laintiff has been guilty of inexcusable laches in failing to make a timely motion to include a warranty claim"); *Tarbert v. Ingraham Co.*, 190 F. Supp. 402, 404 (D. Conn. 1960) (holding that denying leave to amend under Rule 15 would be justifiable on the ground of laches). Laches is defined as "[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed in asserting the claim, when that delay has prejudiced the party against whom relief is sought." *In re Candidus*, 327 B.R. 112, 122 (Bankr. E.D.N.Y. 2005) (quoting *Black's Law Dictionary* 891 (8th ed. 2004)). In this Circuit, three elements must be shown to successfully assert a laches defense: (1) the moving party delayed asserting the claim despite the opportunity to do so; (2) the non-moving party lacked knowledge that the claim might be asserted; and (3) the non-moving party would be prejudiced if the claim were permitted to go forward. *In re Gucci*, 197 Fed. Appx. 58, 60 (2d Cir. 2006) (citing *Rapf v. Suffolk County*, 755 F.2d 282, 292 (2d Cir. 1985)).

In light of its inexcusable delay in moving to add a 503(b)(1)(A) claim, Super Nova is guilty of laches, and its request to amend under Rule 15 is accordingly denied. With respect to

[9] The Trustee argues in his reply to the Cross-Motion that Bankruptcy Rule 9014, which governs contested matters, specifically excludes Bankruptcy Rule 7015 from contested matters. That is, Super Nova is precluded from amending its Expense Motion under Bankruptcy Rule 7015, which generally applies in adversary proceedings. On this point, the Trustee's argument is not entirely correct. Generally, "Bankruptcy Rule 9014 permits a court, at its discretion, to extend Rule 7015 to contested matters as well as adversary proceedings." *In re Stavriotis*, 977 F.2d 1202, 1204 (7th Cir. 1992); *see also In re Spiegel, Inc.*, 337 B.R. 821, 824 (Bankr. S.D.N.Y. 2006). Thus, this Court may, at its discretion, apply Bankruptcy Rule 7015 to the instant Cross-Motion.

element (1), Super Nova has had ample opportunity during the pendency of the Expense Motion to bring an additional claim pursuant to section 503(b)(1)(A) of the Code. Only now, after the filing of the Trustee's Summary Judgment Motion and extensive discovery, does it raise a 503(b)(1)(A) issue. Moreover, as to element (2), the Trustee could not have anticipated that an additional claim would be asserted at this late stage in the litigation. Super Nova had fifteen months to assert an additional claim, but it failed to do so.[10] The Trustee even hinted at this potential claim in its objection to the Expense Motion, filed over one year ago.[11] As a result of Super Nova's inaction, there was little reason for the Trustee to believe that an additional claim for relief would be brought so late in the litigation timeline. Finally, satisfying element (3), the allowance of this claim would be prejudicial to the Trustee and to the estate. A new claim would raise an additional issue concerning the extent to which the estate derived a benefit, if any, from the Trustee's purported possessory interest in the Premises. In addition, a new claim would force the estate to incur further litigation expenses.

Indeed, courts have held that sitting on a potential claim until the filing of a summary judgment motion, as Super Nova does now, is reason alone to deny leave to amend. *See, e.g.*, *McCarthy*, 482 F.3d at 200–01 (denying plaintiff retirees' motion to amend following the close of discovery, after the defendant filed for summary judgment, and approximately two years after the filing of the complaint); *Gordon v. Terry*, 684 F.2d 736 (11th Cir. 1982) (holding that it was

[10] Simon W. Reiff, counsel to Super Nova, now declares that at the November 17, 2009 pretrial conference he represented to the Court that if the Trustee moved for summary judgment, Super Nova would cross-move for leave to amend the Expense Motion to include a claim under section 503(b) of the Code. Supp. Decl. of Simon W. Reiff, ¶ 5. This self-serving declaration is neither binding on the Court or the Trustee, nor is it a justification for the Court to consider a dubiously raised new matter.

[11] Additionally, it appears that at the time Super Nova filed the Expense Motion, it was aware of the difference between a claim under section 365(d)(3) and one under section 503(b) of the Code. Mem. of Law in Supp. of Expense Mot., 13 (Docket No. 39) ("[Section 365(d) of the Code], *unlike § 503(b)*, which requires notice and a hearing prior to payment of administrative expenses, mandates that the Trustee 'timely perform' Debtor's obligations.") (emphasis added).

not an abuse of discretion to refuse to grant plaintiff leave to amend where plaintiff sought to add an additional claim years after filing the original complaint and one day before the district court was to hold a hearing on the defendants' summary judgment motions).

Accordingly, to allow Super Nova to proceed with a 503(b)(1)(A) claim would be to turn a blind eye to the applicability of laches. Super Nova's delay in asserting this claim would likely result in supplemental discovery and briefing, thereby prolonging the dispute. Given the late stage of this litigation, this would impose undue cost and delay on the administration of the estate.

## CONCLUSION

For the reasons set forth above, the Summary Judgment Motion is hereby GRANTED, and the Cross-Motion is hereby DENIED.

**IT IS SO ORDERED.**

Dated: New York, New York
July 13, 2010

/s/ Burton R. Lifland
The Honorable Burton R. Lifland
United States Bankruptcy Judge