

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEBRASKA

**FILED**  
DISTRICT OF NEBRASKA  
AT \_\_\_\_\_ M  
AUG 29 1983  
William L. Olson, Clerk  
By \_\_\_\_\_ Deputy

IN THE MATTER OF )  
MAHLOCH FARMS, INC., )  
Debtor. )  
JERRY PRACHEIL, )  
Appellant, )  
v. )  
MAHLOCH FARMS, INC., )  
Appellee. )

CV. 82-0-518

BK. 82-669 & 670

MEMORANDUM AND ORDER

This action is presently before the Court on appeal from an order of the United States Bankruptcy Court for the District of Nebraska, entered on August 2, 1982. The appellant, Jerry M. Pracheil (hereafter appellant), appeals the bankruptcy court's order overruling his objection to the debtor's petition for leave to assume an executory contract and authorizing the debtor to assume the executory contract. The Court has heard oral argument, has reviewed the briefs of the respective parties and the authorities cited therein, and the entire record submitted on appeal, and concludes that the bankruptcy court's disposition of this matter should be affirmed.

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1. The Honorable David L. Crawford, Bankruptcy Judge, presiding.

The facts are these. On March 6, 1982, appellant agreed to purchase a 266-acre tract of land owned by the debtor, Mahloch Farms, Inc., for \$413,000. The appellant has farmed this land on a crop-share basis for several years. The documents evidencing the agreement were the Offer to Purchase duly signed and authorized by the appellant and the Acceptance of the Offer duly signed and authorized by Harvey Mahloch. The standard form Offer to Purchase utilized by the parties included a clause in which the appellant agreed to "close said purchase on or before the 6th day of April, 1982." The appellant made a \$6,000 earnest money deposit which resulted in a balance of \$407,000 to be paid in cash at the time of the delivery of the deed. Also on March 6, 1982, appellant entered into a second purchase agreement whereby he agreed to sell a certain tract of land to Marvin E. Kasl for \$312,000. Mahloch Farms was not a party to this second agreement.

Apparently neither the appellant nor the debtor pressed for closing in early April, and on April 9, 1982, the debtor filed his petition for relief under Chapter XI of the Bankruptcy Code. On June 25, 1982, the debtor-in-possession filed a petition for leave to assume an executory contract in the bankruptcy court. The executory contract which the debtor sought to assume and retain was the real estate contract previously referred to between the appellant and the debtor. The appellant filed written objections to the debtor's petition. First, the appellant challenged the bankruptcy court's jurisdiction over the matter in light

of *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 102 S.Ct. 2858 (1982). Appellant's second argument was that no agreement existed because there had been no closing on April 6, 1982. Third, the appellant contended that the breach of the appellant-debtor contract frustrated the sale of appellant's land to the third party Kasl. At a hearing on August 2, 1982, the bankruptcy court considered the arguments of the appellant and debtor and found that it was in the best interests of the estate to assume the executory contract for the sale of the land between the appellant and the debtor. The bankruptcy court then entered an order overruling appellant's objections, approving the debtor's petition and directing the debtor to assume such contract pursuant to 11 U.S.C. § 365. Thereafter, the appellant filed this timely appeal.

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Resolution of this appeal involves two issues. The Court must first consider whether it was proper for the bankruptcy court to construe the purchase agreement in question as an executory contract. Second, the Court must examine whether it was correct for the bankruptcy court to grant leave to the debtor to assume and retain the contract with the appellant.

On appeal, the bankruptcy judge's findings of fact are "entitled to stand unless clearly erroneous." However, with respect to the initial question at issue in this appeal, which is one that involved the consideration of a mixed question of law and fact, the clearly erroneous rule is not

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2. The appellant also raises a jurisdictional issue based on the Supreme Court's holding in *Northern Pipeline* which this Court finds has no merit.

applicable. *In re American Beef Packers, Inc.*, 457 F.Supp. 313, 314 (D.Neb. 1978). A broader scope of review must be undertaken because mixed questions of fact and law cannot be approved without this Court's independent determination of the law. *In re Werth*, 443 F.Supp. 738, 739 (D.Kan. 1977), *citing Stafos v. Jarvis*, 477 F.2d 369, 372 (10th Cir.), *cert. denied*, 414 U.S. 944 (1973).

The appellant contends that the bankruptcy court improperly construed the contract in question as an executory contract subject to the bankruptcy code's provisions for assumption or rejection. Appellant maintains that because there was no closing on April 6, 1982, and that the parties had agreed to close on that date, the contract was cancelled prior to the commencement of the bankruptcy proceedings. The bankruptcy court by its decision implicitly found the agreement to be an executory contract and the Court agrees with this determination.

Section 365 of the Code permits a bankruptcy trustee or debtor-in-possession to assume or reject an executory contract "subject to court approval." 11 U.S.C. § 365. The term "executory contract" is not statutorily defined. However, the Eighth Circuit Court of Appeals has adopted the following definition of an executory contract in the context of the Bankruptcy Act:

'a contract under which the obligations of both the bankrupt and the other party to the contract are so unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.' V. Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn.L.Rev. 439, 460 (1973). See also V. Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 Minn.L.Rev. 749, (1974).

*Northwest Airlines, Inc. v. Klinger*, 563 F.2d 916, 917 (8th Cir. 1977);  
*Jenson v. Continental Financial Corp.*, 591 F.2d 477, 481 (8th Cir. 1979).

Therefore, a contract is executory when the contractual obligations of the bankrupt and the other contracting party remain at least partially and materially unperformed at bankruptcy. *In re American Magnesium Co.*, 488 F.2d 147 (5th Cir. 1974); *In re Universal Medical Services, Inc.*, 325 F.Supp. 890 (E.D.Pa. 1971), *aff'd*, 460 F.2d 524 (3d Cir. 1972).

Applying this definition to the facts of this case and the contract provisions, the Court finds no error in the bankruptcy court's decision that this was an executory contract. Under the agreement for the purchase and sale of the land, the appellant has yet to furnish the amount of the purchase price above his \$6,000 deposit and the debtor has yet to transfer title. Some performance remains due on both sides. *See, e.g., McCannon v. Marston*, 679 F.2d 13, 18 (3d Cir. 1982). The contract has not expired by its own terms, nor was it terminated prior to the commencement of the bankruptcy proceedings.<sup>3</sup> This is not a case where it can be argued that the debtor was in material breach resulting in a default when the parties did not close on April 6, 1982.<sup>4</sup>

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3. Appellant made no attempt to formally terminate the contract other than filing written objections when the debtor petitioned to assume the contract in the bankruptcy court. *See In re New Media Injax, Inc.*, 19 B.R. 199 (Bkrctcy. Fla. 1982).

4. Since the parties were to exchange performance at the same time, the debtor's duty to deliver marketable title was a concurrent condition with the duty of the appellant to tender the balance of the payment. In order for a vendee to put a vendor in default, he must make a conditional tender of the price. *See McFadden v. Wilder*, 429 P.2d 694 (Ariz.Ct.App. 1967). Until a party has at least made such an offer, however, the other party is under no duty to perform, and if both parties fail to make such an offer, neither party's failure is a breach. Restatement 2d, Contracts, § 238, p. 224.

Neither party pressed for closing on April 6, 1982, and the Court will not infer that time was of the essence in view of the conduct of the parties. There was no express provision in the contract that time was of the essence or that the failure to perform on the closing date resulted in a default. Further, in *Dowd Grain Co. v. Pflug, et al.*, 193 Neb. 483, 227 N.W.2d 610 (1975), the Nebraska Supreme Court held as follows:

In the ordinary contract for the sale of real estate, time is not of the essence unless so provided in the agreement itself or is clearly manifested by the agreement construed in light of the surrounding circumstances. Where time is not of the essence, performance must be within a reasonable time. *Langán v. Thummel*, 24 Neb. 265, 38 N.W. 782; *Klapka v. Shrauger*, 135 Neb. 354, 281 N.W. 612; *Schommer v. Bergfield*, 178 Neb. 140, 132 N.W.2d 345.

*Id.* at 486, 227 N.W.2d at 612. The debtor is now offering to perform and under the circumstances, the Court agrees with the bankruptcy court that there is an executory contract in existence for the debtor to assume.

Next the Court must review the propriety of the bankruptcy court's determination to grant leave to the debtor to assume the executory contract. The appellant argues that because the contract between the appellant and the debtor was in actuality part of a three-way transaction involving the appellant's sale of a different parcel of land to a third party, the

bankruptcy court cannot direct the debtor-in-possession to assume the contract. The Court is not persuaded by the position proffered by the appellant.

The bankruptcy court is empowered to direct the trustee or debtor-in-possession to assume or reject an executory contract. 11 U.S.C. § 365. The question of whether a particular contract ought to be assumed or rejected is left to the bankruptcy court based on a determination of what would be beneficial to the estate. See *Matter of Steel Ship Corp.*, 576 F.2d 128 (8th Cir. 1978). In the instant appeal, the bankruptcy court found that assumption of this contract would be good for the debtor, and this Court cannot say that this determination is an abuse of discretion or clearly erroneous. Only the executory contract between the appellant and the debtor was before the bankruptcy court and the Code clearly empowers the bankruptcy court to direct a debtor to assume a contract and tender performance.

Accordingly, based on the foregoing, the Court concludes that the bankruptcy court's August 2, 1982, decision to overrule the appellant's objections and to grant the debtor's petition for leave to assume an executory contract must be affirmed in all respects.

IT IS SO ORDERED.

BY THE COURT:



JUDGE, UNITED STATES DISTRICT COURT