

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
BLUM'S OF SAN FRANCISCO, INC.,)	CASE NO. BK82-2223
and VILLAGER FOODS, INC.,)	BK82-2224
)	
DEBTORS)	A83-320
)	
John F. Akin, Trustee,)	
)	
Plaintiff)	
)	
vs.)	
)	
House of Bauer Chocolats,)	
Inc.,)	
)	
Defendant)	

MEMORANDUM

This matter comes on for the Court's consideration upon the defendant's motion for summary judgment. The issues raised are whether or not the contract, which the trustee has moved to assume, is executory and whether, if the contract is executory, it can be in part assumed and in part rejected.

The facts as presented indicate that the debtor, Blum's of San Francisco, Inc., and Villager Foods, Inc., (Blum's) represent the seller and defendant, House of Bauer Chocolats, Inc., (Bauer Chocolats) is the buyer under an agreement to purchase entered into on November 16, 1982. The petitions of the debtors Blum's and Villager were filed as voluntary Chapter 11's on December 22, 1982, and were subsequently converted to Chapter 7 liquidation proceedings on March 31st, 1983.

The contract itself calls for the sale and purchase of essentially four kinds of property, namely, equipment, real estate, inventory, and intangibles. Upon the signing of the contract, title and possession to all of the property was conveyed to the defendant by bills of sale and assignment and assignments of contracts for deed. The contract included quarterly payments and option provisions were established separately for each of the four types of property being conveyed. Intangibles were to be paid on a quarterly basis; no option provision was involved with this type of property. The real estate, having been conveyed to the buyer, was to be paid in quarterly installments or was to be reconveyed to the sellers at the defendant Bauer Chocolats' option. The method of treatment for the equipment under the contract was to be one of four options: either quarterly payments, reconveyance to the seller, payment on a cash price per unit, or a combination of the second and third

alternatives which would allow the buyer to return any portion of the equipment to the seller and pay cash price per unit for the balance of the equipment. It is unnecessary to consider the inventory portion of the agreement as mutual obligations on the part of both buyer and seller had been completely fulfilled as of the petition date.

In the past, this Court has maintained the position that in order for a contract to be executory in nature, there must remain as of the petition date performance due from both parties to the contract. In general, this Court's case law has followed Professor Countryman's definition of executory contracts [Countryman, Executory Contracts in Bankruptcy, 57 Minn. L. Rev. 439 (1973)]; In Re Knutson, 536 F.2d 916 (8th Cir., 1977); and Nicola vs. Peters, 208 Neb. 439; 308 N.W. 771 (1981). This Court addressed the issue most recently in the matter of Shada Truck Leasing, Inc., 31 B.R. 97 (D. Neb. 1983). In that case, an installment sales contract had been entered into between the debtor and its seller, delivery of all the goods pursuant to the contract had been accomplished. The only remaining obligation was the buyer's duty to pay under the terms of the contract and the seller's duty, contingent at best, to perform warranty maintenance work if such maintenance were required. That contract was held to be not executory.

The Shada situation is analogous to the case currently before the Court. In this case, although the buyer is given several purchase options, all of those alternatives are available pursuant to the specific terms of the contract entered into between the parties. The seller has made delivery and turned over title to all the properties in question. The buyer in this instance need only pay or perform its equivalence, which, in some cases, could involve return of the property to the seller. Nevertheless, in its most basic terms, the seller's performance has been completely fulfilled and the only performance remaining due and owing by the buyer is to make payment. I, therefore, find that the contract cannot be held to be executory in nature as there is no performance remaining due on each side.

The seller points to the provisions of contract requiring it to preserve records relating to the purchased asset, collect receivables, clear all encumbrances, and make payments of principal and interest on the mortgages as they become due as substantial obligations on its part. In essence, these arrangements are nothing more than steps necessary to insure transfer of title to the buyer. While the arrangement may be somewhat unusual in that title has passed, yet the seller is making mortgage payments, it seems to me that the contract is, practically, a sale subject to a mortgage whereby the seller remains liable for mortgage payments if the buyer defaults. Similarly, the particular covenant not to compete, cannot be said to be executory. I decline to address the enforceability of a covenant of non-competition for five years where the geographical area is limited only by the United States borders.

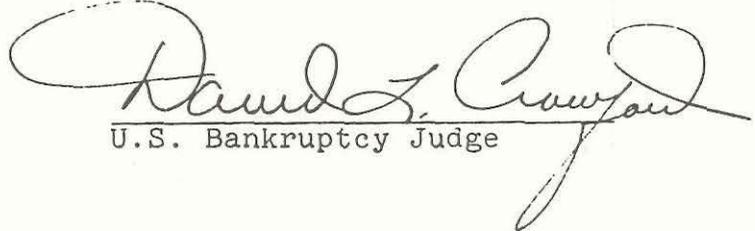
Given, however, the extremely generalized nature of the covenant, I find it too insubstantial to render a contract executory. Further, the argument of the plaintiff that the buyer's ability to exercise options to return the properties creates a resulting obligation on the seller's part to accept the property and that that obligation is a substantial one must, in my opinion, also fail. The contract in this case cannot be held to be executory in nature.

It is unnecessary, therefore, for me to determine whether the contract may be partially assumed and partially rejected.

The defendant's, House of Bauer Chocolats, Inc., motion for summary judgment is sustained.

DATED:.. March 29, 1984.

BY THE COURT:


U.S. Bankruptcy Judge

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