

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
 OLSON BROTHERS MANUFACTURING) CASE NO. BK80-2674
 COMPANY,)
)
 DEBTOR) A81-365
)
 ROBERT F. STAHL, JR., Trustee,)
)
 Plaintiff)
)
 vs.)
)
 G. P. ENTERPRISES, INC., a)
 Nebraska corporation,)
)
 Defendant)

MEMORANDUM

In this action by the trustee, Robert F. Stahl, Jr., to collect monies due and owing for goods sold and delivered, the court is asked to determine the executory nature of a distributorship agreement between Olson Brothers Mfg. (Olson Brothers), debtor, and G. P. Enterprises, Inc., (GP), the defendant. At pretrial conference, the parties agreed, in addition to the statements in the order on pretrial conference, that the allegations of the plaintiff's complaint were true and would entitle the plaintiff to judgment but for the defenses raised by the defendant in its answer, order on pretrial conference, and in its subsequent timely motion for summary judgment.

Prior to Olson Brothers Chapter 11 petition filing on December 10, 1980, the parties entered into an exclusive-area distributorship agreement pursuant to which GP placed five orders for steel tubing with Olson Brothers. The orders were placed between July 23 and November 11, 1980. On December 17, seven days after the Chapter 11 petition, two of the orders were shipped by Olson Brothers to GP. A third and final shipment was made on February 11, 1980. The total owing on these three shipments, less credits for the unreceived orders is \$15,208.18. GP agrees that the amount claimed by the plaintiff is accurate. However, GP argues that the contract is executory, that the debtor failed to notify GP of its reorganization and began, post-petition, filling GP's orders. GP claims entitlement to a setoff by virtue of Olson Brothers' breach of the distributorship agreement. GP argues that the contract was exclusive, yet the debtor sold its product to others, causing lost profits at a minimum of \$3,560. Orders placed but not filled produced further lost

profits estimated by GP to amount to at least \$28,274.73.

If the contract is executory, a further determination of the issue of damages and other issues of separate executory contracts and their breach must be made. I reserved that decision for subsequent trial, if necessary. If the document is not an executory contract, GP's motion will be denied and, because of its stipulation to all the allegations in the trustee's complaint, no issue will remain.

The contract at hand is a long-term "Distributorship Agreement" in effect by its terms through 1985 and containing a distributor's renewal option extending the agreement until 1988. The document grants to the defendant an exclusive distributorship in a four state area which area could be expanded based upon the defendant's increased sales. In the first year, GP was to sell a minimum of \$800,000 worth of Olson Brothers steel tubing. In years two through five, GP was to sell \$1.25 million per year. Provisions in the contract are made for a percentage discounting by cash payment or credits to the distributor in proportion to sales volume. GP agreed to keep working capital on hand sufficient to conform to its contractual obligation. Contingencies were also made for possible default by GP pursuant to which Olson Brothers had the power to cancel or delay shipments.

The generally recognized definition, and the one adopted by this 8th Circuit in In re Knutson, 536 F.2d 916 (8th Cir., 1977), of an executory contract in bankruptcy proceedings is provided by Professor Countryman,

A contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.

Countryman, Executory Contracts in Bankruptcy, 57 Minn. L. Rev. 439, 460 (1973).

See also, Nicola v. Peters, 208 Neb. 439, 444; 308 N.W. 771, 776 (1981). Some performance must remain due on both sides. H. Rep. No. 95-595, 95th Cong. (1st Sess.) 347.

At the time of filing, a valid and enforceable distributorship contract existed between Olson Brothers and GP. In reliance upon the contract terms, GP had placed orders for Olson Brothers products. GP was obligated to obtain a certain sales volume and thus place further orders and Olson Brothers was required to respect its grant of exclusivity and to produce pipe to fill orders by GP.

The plaintiff urges that no executory contract can exist because there is no specific obligation for Olson Brothers to supply the tubing to GP and that the minimum sales volume represents sales to third parties rather than the establishment of production quotas for Olson Brothers benefit. I construe certain of the contract sections as being directly in conflict with this position:

A) The Manufacturer agrees that it will not make tubing for others in the named territory [Neb., Kansas, Iowa, Colorado] either for direct sale or for delivery through other entities, except for direct sales by Manufacturer to its local customers or to Manufacturer's irrigation distributors.

B) The Manufacturer hereby agrees to extend the territory herein defined to any states or national accounts. . .which Distributor is able to sell. . .

C) The Distributor shall purchase the mechanical tubing and related products from the Manufacturer F.O.B. its plant at Atkinson, Nebraska, at prices scheduled in the Manufacturer's 'distributor price'. . .[discounting provisions follow which allow 2% discount for prompt payment and additional discounts of 1% for payments to Olson Brothers of over 1.5 million; an additional .5% for payments over 2 million.] All purchases with payment thereafter [March 31st of the calendar year] by Distributor above the minimum volume from the Manufacturer during said twelve-month shall be discounted at the rate designated off distributor price.

13) The Distributor agrees not to represent or compete against the Manufacturer on any tubing lines which the Manufacturer is producing or offers to produce. . .

14) Distributor shall in the first twelve months have a sales volume of \$800,000 and \$1,250,000 for each year thereafter. . .

In view of the cited contract terms and others within the document, I conclude that the agreement envisioned that GP would be the sole non-house sales entity in the four-state region for what appeared to be a burgeoning industry and that it was the intent of the parties that GP sell and Olson Brothers furnish sufficient tubing to yield sales at the minimum level set forth in paragraph 14 of the contract.

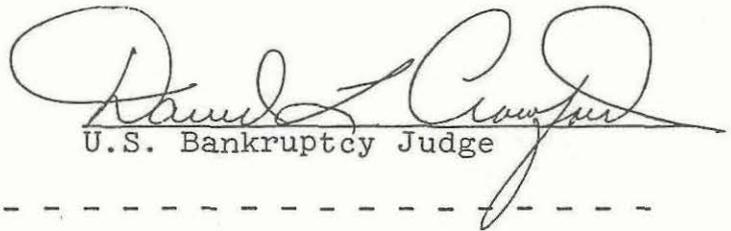
In the instant case, GP had placed an order for goods as part of its obligation to sell a minimum value of Olson Brothers' products. GP became at the time of placing that order obligated to pay for the goods. Olson Brothers had the duty to provide the ordered products as well as to supply sufficient quantities of steel tubing to net from sales the minimum value required under the contract for that year. Clearly, neither party as of the petition date had received any benefit under the contract and

both had incurred substantial duties to perform at a future date, the failure of which would constitute a material breach of the agreement.

Accordingly, I find the Distributorship Agreement between Olson Brothers and GP to be executory in nature and subject to the trustee's duty to either assume or reject.^{1/} Defendant's motion for summary judgment is sustained. In accordance with the terms of the "Supplemental Order on Pretrial Conference" entered in this adversary proceeding on November 10, 1981, issues of damage and issues of separate executory contracts and their breach are scheduled for progression by separate order entered herewith.

DATED: March 29, 1982.

BY THE COURT:


U.S. Bankruptcy Judge

^{1/} This determination is not at odds with the Debtor's "Amendment to Schedule of Executory Contracts" executed on April 30, 1981, which characterizes the contract as executory.

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