

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
 )  
FARRELL SCHMIDT, ) CASE NO. BK78-0-468  
 )  
BANKRUPT )  
 )  
JOHN A. WOLF, TRUSTEE, )  
 )  
Plaintiff )  
 )  
vs. )  
 )  
FARRELL SCHMIDT, ELMER SCHMIDT, )  
LINDA SCHMIDT, SCHMIDT FARMS, )  
INC., AND BANK OF BERTRAND, )  
BERTRAND, NEBRASKA, )  
 )  
Defendants )

MEMORANDUM OPINION

In this case, the trustee seeks to reject a "real estate installment sales contract" as executory and to obtain possession of and title to the land without refunding payments already made under the contract. A motion and crossmotion for summary judgment are pending, but the parties have submitted the case on the basis of exhibits and stipulated facts and the motions are moot. Accordingly, I will render a decision on the merits.

The evidence before me indicates that Elmer Schmidt, the father of the debtor, bought the real estate in question from the debtor and his wife on or about February 17, 1976, for reasonable and adequate consideration. The sales contract provides among other things that sellers were to provide marketable title and an executed warranty deed within thirty days of the execution of the contract. The abstract of title and the deed were to be deposited with an escrow agent until final payment. The deed was executed and in the possession of the escrow agent on April 17, 1978, the date on which Farrell Schmidt, one of the sellers, filed his petition in bankruptcy.

The sales contract further provides that the escrow agent was to receive all payments and deposit them in the sellers' account. Upon final payment, the escrow agent was to deliver the warranty deed and the abstracts of title to the buyer. There is no provision in the agreement for delivery of the deed to anyone but the buyer by the escrow agent.

In the event of default, the sellers had a number of remedies available to them including acceleration of the remaining balance and foreclosure "in any manner provided by law." The contract does not provide for forfeiture of buyers' equity in the event of their default.

The contract further provides that the buyer was not to assign the contract without the written consent of the sellers. In March, 1977, Elmer Schmidt did obtain the consent of the sellers and assign the contract to Schmidt Farms, Inc., another of the defendants in this proceeding. At the same time, Elmer Schmidt executed a warranty deed granting the property to Schmidt Farms, Inc.

Both deeds were recorded on March 16, 1979. As there is no evidence in the record that the escrow agent violated the terms of its agreement, I infer from this that buyers paid for the real estate in full on or before that date.

The trustee has explicitly limited his case to a question of whether he is entitled to reject the contract under Section 70(b) of the Bankruptcy Act. If this contract may be rejected under Section 70(b), Section 63(c) of the Act provides that such rejection shall be a breach of the contract as of the date of filing the bankruptcy petition.

It should be noted that the Bankruptcy Act does not state the consequences of rejection of an executory contract by the trustee except to state that such rejection shall be a breach of the contract from the date of filing. Thus, the consequences of rejection or breach of the contract must be that the other party has all of the remedies available for breach under state law except the capacity to enforce performance of the contract. The remedy of specific performance is superseded by the trustee's power to refuse to perform. See In re New York Investors Mutual Group, Inc., 143 F.Supp. 51, 54 (S.D. N.Y. 1956).

A threshold issue is whether this contract is executory within the meaning of Section 70(b) of the Bankruptcy Act. The Eighth Circuit has adopted Professor Countryman's definition stating that under the Act, an executory contract is "'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 continue a material breach excusing the performance of the other.'" V. Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973). Northwest Airlines, Inc., v. Klinger, 563 F.2d 916, 917 (8th Cir. 1977). The court further noted that a contract in which the nonbankrupt party had fully performed and the bankrupt had not performed would not be executory within the meaning of the Act. Id. at n.2; See also Jenson v. Continental Financial Corp., 591 F.2d 477 (8th Cir. 1979). Under this definition of executory contracts, the trustee cannot prevail.

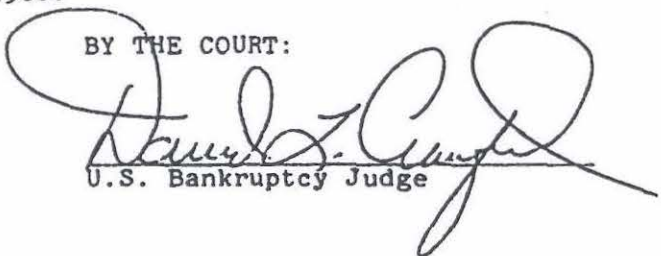
The trustee relies on a line of cases in which vendors had entered into agreements to sell real estate and then filed bankruptcy prior to executing a deed. The courts have generally held that trustees may reject such contracts and that the remedy of specific performance would not be available to the buyers despite the doctrine of equitable conversion. Gulf Petroleum v. Collazo, 316 F.2d 257 (1st Cir. 1963); In re Philadelphia Penn Worsted Co., 278 F.2d 661 (3d Cir. 1960); In re New York Investors Mutual Group, Inc., supra. Whether or not the buyer was entitled to a refund of any down payment depended on the circumstances of the case. See Gulf Petroleum v. Collazo, supra, at 261-62. Where the buyer was not entitled to a refund, he could file a general claim for damages.

Those cases are readily distinguishable from this one in that both parties to the sale had substantial duties to perform under the contract. The trustee's refusal to execute a deed, provide clear title, or otherwise perform under the contract would constitute a material breach of the contract, as would the buyer's refusal to pay the balance of the purchase price. In the case before me, the sellers had essentially completed their performance prior to the filing of the bankruptcy, and there was nothing they or the trustee could do to breach the contract except to unreasonably withhold consent to an assignment of the contract. That issue never arose and is now moot.

As the contract is not executory within the meaning of the Bankruptcy Act, the trustee's petition must be denied. A separate order is entered in accordance with the foregoing.

DATED: September 8, 1980.

BY THE COURT:

  
U.S. Bankruptcy Judge

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