UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
ROBERT BERNARD TEMME,	)	BK NO. 78-L-244
	)	
Bankrupt,	)	
	)	
ROBERT BERNARD TEMME,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
RALPH WHITWER and IRMA WHITWER, husband and wife,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

The debtor in this Chapter Xl proceeding seeks to restrain the defendants from foreclosing an estate purchase contract. In addition, the debtor wants a declaratory judgment stating that he may assign his interest in the real estate to a third party. The defendants resist both requests on the grounds that the debtor is in default and the contract between the debtor and defendants may not be assigned by the debtor without the consent of the defendants.

The facts of the matter are as follows. On March 21, 1977, the debtor entered into a contract to purchase a parcel of agricultural real estate from Ralph and Irma Whitwer for $128,000.00. Virtually all of the purchase price was to be paid back in ten annual installments, commencing on March 1, 1978. Due to the small downpayment made by the debtor, the contract required the debtor to grant a security interest in growing crops annually for four years commencing in March, 1977. The security interest was to be given at the time the annual payment was made. A bank was designated as the escrow agent to hold the deed and abstract of title until final payment. The debtor was to make all payments directly to the sellers. The contract was to be nonassignable by either party without consent of the other.

In the event that any payment due under the contract was more than thirty days late, the sellers had the option to declare the entire balance due and payable. If no payment was made, the sellers could foreclose. There is no provision in the contract for remedies in the event of any other type of default. In addition, the contract does not provide that time is of the essence in making payments, nor does it provide that acceptance of a late payment may be made without waiving ant default.

This Chapter XI proceeding commenced in 1978. On March 5, 1980, the debtor filed a plan of arrangement which I confirmed on July 11, 1980. An integral part of the plan of arrangement was to sell the real estate in question. Pursuant to this plan, the debtor entered into a purchase agreement on April 10, 1980, to sell the real estate for $224,000.00 subject to the Whitwer contract. $124,000.00 will be paid prior to or at the closing. The remaining $100,000 is to be paid over eight years with interest at 5 3/4%. Payments are to be made to the debtor, who will then continue to make payments to the Whitwers as they become due. The $124,000.00 will finance the plan of arrangement.

Meanwhile, the debtor received a letter from the Whitwers dated April 2, 1980, declaring the entire balance due and payable because of a default in the contract. The letter stated that sellers would foreclose unless the entire amount was paid within ten days. This proceeding followed.

The sellers allege two defaults both of which I find to have occurred. The March, 1980, payment was mailed on March 31, 1980, more than thirty days late. Payment was for the full amount due plus a penalty of $477.40. On April 21, 1980, the check was endorsed by both sellers, presented for payment, and honored. The second default was that the debtor never gave the sellers the security interest in growing crops, although the record is silent as to whether there are actually any growing crops on the real estate. The debtor has testified that nothing was said to him about this default until April 1, 1980, and that testimony in uncontroverted.

Assuming that the defaults under the contract were sufficient to entitle the sellers to accelerate the balance due, the sellers have nevertheless waived the right to take such action by accepting payment. In Nebraska, a party who knows of a breach of contract is held to have waived the breach by accepting money in performance of the contract. Randall v. Erdman, 194 Neb. 390,231 N.W.2d 689 (1975). This conclusion is reinforced by the fact that the payment included a substantial penalty not provided for in the written agreement between the parties.

There is authority to suggest that clauses prohibiting assignment of a contract are invalid in bankruptcy proceedings regardless of the type of contract involved. 4A Collier on Bankruptcy, para 70.43 (8) at 535 (14th ed., 1978). However, I need not decide that issue as the Nebraska Supreme Court has in strikingly similar circumstances held such a clause to be unenforceable. Martin v. Baxter, 198 Neb. 640, 254 N.W.2d 420 (1977); see also Riffey v. Schulke, 193 Neb. 317,227 N.W.2d 4 (1975). I hold that the debtor may assign the contract without tendering the remaining balance due under the contract to the sellers.

I hereby approve the proposed assignment, subject to a condition which I consider necessary to adequately protect both the Whitwers and the assignee. The proposal that the assignee pay the debtor who will then make the annual payments to the Whitwers is inadequate considering that the debtor will no longer have any interest in the land to protect and that the debtor now lives in Canada. The assignee should arrange to pay the Whitwers directly and remit whatever is left to the debtors.

A separate order is entered in accordance with the foregoing.

DATED: August 11th, 1980.

BY THE COURT:

U.S. Bankruptcy Judge

Copies mailed to each of the following:

Mark L. Laughlin, Attorney, 1400 One First Nat'l. Center, Omaha, Ne., 68102

Vince Kirby, Attorney, Box 308, Norfolk, NE., 68701