IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
STATE TITLE SERVICES, INC.,	)	CASE NO. BK02-40210
	)	
Debtor(s).	)	CH. 7

ORDER

Hearing was held in Lincoln, Nebraska, on April 20, 2005, on the trustee's objection to claim of Investors Title Insurance Company (Fil. #829) and resistance by Investors Title Insurance Company (Fil. #857). Robert Becker appeared for the Chapter 7 Trustee, and T. Randall Wright appeared for Investors Title Insurance Company.

Investors Title Insurance Company ("Investors") issues title insurance policies. Pre-petition, it had a contract with State Title Services, Inc. ("STS"), which acted as Investors' agent in underwriting and processing title insurance policies. Upon the death of STS's president and the subsequent discovery of financial mismanagement concerning the company's escrow funds, Investors stepped in to complete pending real estate transactions. In so doing, Investors provided money to cover shortfalls in escrow accounts.

Investors has filed a claim for approximately $536,000 to recover those expenditures, based on an indemnification clause in the parties' Issuing Agent Contract. The trustee objects to certain portions of the claim, asserting that the Issuing Agent Contract terminated automatically upon the filing of the bankruptcy petition, so no duty of indemnification survives.

Investors argues that the contract is an executory contract under 11 U.S.C. § 365 and, because the trustee did not timely assume it, the estate is subject to an unsecured claim for damages for breach of contract. The trustee argues that he is statutorily prohibited from assuming such a contract under the Nebraska Title Insurance Agent Act, specifically Neb. Rev. Stat. § 44-19,109, so it cannot be an executory contract.

Under § 365(c), the trustee may not assume or assign any executory contract of the debtor if "applicable law excuses a

party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor . . .; and such party does not consent to such assumption or assignment[.]" § 365(c)(1).

In this case, "applicable law" is Neb. Rev. Stat. § 44-19,109(1), which states that "a title insurer shall not contract with any person to act in the capacity of a title insurance agent with respect to risks located in this state unless the person is a licensed title insurance agent in this state pursuant to the Insurance Producers Licensing Act."

On that basis, Investors was prohibited from contracting with the trustee on behalf of State Title, so the trustee could not have assumed the contract, nor could Investors have consented to such an assumption.

Nebraska law governs the agreement. It is the law of Nebraska that when the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties, are not in dispute, the proper construction of such a contract is a question of law. Mecham v. Colby, 156 Neb. 386, 397, 56 N.W.2d 299, 304-05 (1953); Meyers v. Frohm Holdings, Inc., 211 Neb. 329, 333, 318 N.W.2d 716, 719 (1982); Spittler v. Nicola, 239 Neb. 972, 978, 479 N.W.2d 803, 808 (1992).

Whether a contract is ambiguous is a question of law to be determined by the trial court. ACTONet, Ltd. v. Allou Health & Beauty Care, 219 F.3d 836, 843 (8th Cir. 2000), *cited with approval in* Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1040 (8th Cir. 2000). In the Nebraska Public Power District v. MidAmerican Energy Company case, the Eighth Circuit Court of Appeals performed an exhaustive review of Nebraska contract case law. The court outlined general principles of Nebraska law with regard to construction of a contract. Those principles are summarized, without additional citation, as follows:

> 1. The terms of the contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
>
> 2. A contract must be interpreted to give effect to the parties' intent at the time the contract was

> drafted.
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> 3. The contract must be construed as a whole, and if possible, effect must be given to every part thereof.
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> 4. A party may not pick and choose those portions that favor its positions.
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> 5. In reading a contract for ambiguity, the specific governs the general.
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> 6. In determining whether a contract is ambiguous, under Nebraska law, a court may look to course of performance evidence.
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> 7. When so read, a contract is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
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> 8. A court must determine the meaning of an unambiguous contract without resort to extrinsic evidence. However, if the contract is ambiguous — that is, if it may objectively be understood in more than one way — then extrinsic evidence is admissible.

234 F.3d at 1040-41.

With that summary of the applicable law with regard to interpretation of a contract and the right of a party to assume or reject an executory contract, it is appropriate to discuss whether, on the date the bankruptcy petition was filed, January 27, 2002, the contract between the debtor STS and Investors was an executory contract. The Bankruptcy Code does not define the term "executory contract." The Eighth Circuit Court of Appeals long ago defined an executory contract as:

> "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."

Cameron v. Pfaff Plumbing & Heating, Inc., 966 F.2d 414, 416 (8th Cir. 1992) (quoting Jenson v. Continental Fin'l Corp., 591

F.2d 477, 481 (8th Cir. 1979) (citing Countryman, 57 Minn. L. Rev. at 460, and quoting Northwest Airlines, Inc. v. Klinger, 563 F.2d 916, 917 (8th Cir. 1977))).

In Cameron, the Eighth Circuit Court of Appeals, citing legislative history of Section 365 and NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522 n.6 (1984), concluded that the standard definition of "executory contract," as quoted above, is the equivalent of the determination in Bildisco that the term "generally includes contracts on which performance remains due to some extent on both sides." S. Rep. No. 95-989, at 58 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5844.

The contract in question is entitled "Issuing Agency Contract," which was entered into on May 18, 1994, between Investors (referred to within the contract as "Insurer") and STS (referred to within the contract as "Agent"). The contract provides for the authority and duties of the Agent, including an obligation of indemnification by the Agent, and the duties of the Insurer; compensation of the Agent; liability of the Insurer; the manner in which claims must be handled; the treatment of the Agent if there was a shortage in the Agent's accounts of funds entrusted to the Agent by others; provision for audits of accounts; and termination of the contract.

Many of the provisions anticipate an ongoing relationship and performance of some of the activities authorized by the contract even after its termination. For example, at section 1 on page 1 of the contract, the Agent is authorized to prepare and solicit applications for binders and policies of title insurance; draft interim binders obligating the Insurer to issue policies; and draft on printed forms furnished by the Insurer, counter-sign, and deliver the policies. The authority of the Agent identified in section 1 of the contract certainly would cease as of the termination of the contract. In other words, if the contract is terminated, the Agent no longer has the authority to issue policies or even solicit policies on behalf of the Insurer.

On the other hand, section 3 of the contract, defining duties of the Agent, includes duties which the Agent would be required to fulfill even after termination of the contract. For example, paragraph C of that section of the contract requires, "The Agent must preserve in his possession all supporting documents which enable him to issue a binder or policy including affidavits, lien waivers, searches, and work sheets. Title to

same shall vest in the Insurer on issuance of the policy." Termination of the contract would likely occur at a time when one or more policies were in the process of being issued, but not completely issued. The Agent would be required under the terms of the contract to preserve the documentation for the benefit of the Insurer until the Insurer completed the issuance of the policy.

Similarly, paragraph E of that section requires the Agent to "collect, or see to the collection from the parties responsible therefore, all charges of the Insurer, and, as between the Agent and the Insurer, each such charge shall be deemed to have been received by the Agent at the time of delivery of the policy." This paragraph, along with paragraph F, which requires the Agent to remit all premiums to the Insurer on a monthly basis, requires the Agent to perform under the terms of the contract even after the contract is terminated, assuming that some policies were being processed at the time of termination.

Paragraph G under the section provides,

> In the event a claim is filed against the Insurer under any binder or policy issued by the Agent, the Agent, if requested to do so, shall furnish the Insurer, without cost to it, such abstract and other information as is necessary to enable the Insurer to consider the claim and the basis therefor. . . .

In this circumstance, it would appear that the Agent has continuing obligations to cooperate with the Insurer concerning claims, whether such claims were filed with the Insurer prior to the termination of the contract or following the termination of the contract.

Paragraph H of the section requires the Agent to safeguard, as property of the Insurer, all forms and supplies furnished by the Insurer and, upon termination, to deliver such forms, supplies, and records of the Insurer to the Insurer. Clearly, this is a post-termination obligation of the Agent under the terms of the contract.

Section 8 of the contract, concerning claims, requires the Agent, if a claim against the Insurer is filed with the Agent, to immediately make a written report to the Insurer and to render all reasonable assistance to the Insurer in

investigating, adjusting or contesting a claim. That section also requires the Agent to notify the Insurer of any suit or rumored claim that comes to the Agent's attention where it concerns title insurance by the Insurer through the Agent. These obligations continue beyond termination of the contract.

Section 10 of the contract, concerning audits of accounts, permits the Insurer to inspect, make copies of and audit any and all records of the Agent at any reasonable time, which relate to title insurance or to any matter affecting the contract, particularly including records pertaining to escrow accounts, underwriting practices, title examinations, searches, title reports, policy accountability and premiums for title insurance and similar contracts. To enable the Insurer to obtain information about the listed subject matters of an audit authorized by this section of the contract, the Insurer would necessarily need to perform the audit after termination of the contract. This section impliedly requires that such audits be permitted after termination of the contract and requires the agent to provide such documents necessary for the audit function.

Finally, with regard to items which require performance by the Agent on a continuing basis, is the indemnification obligation of the Agent as outlined and defined in Section 4 of the contract. This section is not limited to the pre-termination time period. It requires the Agent to indemnify the Insurer for all loss, cost or damage which the Insurer may sustain or become liable for on account of failure of the Agent to comply with the terms of the agreement; improper closing of a transaction involving the issuance of a commitment, policy or insured closing service letter; failure of any commitment or policy issued by the Agent to correctly describe the property, reflect the condition of title resulting from errors and omissions in Agent's abstracting or record search of the title, or reflect an appropriate requirement or exception as to any lien, claim, encumbrance or other defect known to the Agent. Each of the items which would trigger the indemnification obligation of the Agent would occur pre-termination, and may even be the cause of termination of the contract. It follows that the Agent would have a continuing duty to perform the act of indemnification post-termination. If termination of the contract meant that the Agent was relieved of the Agent's indemnification obligations, the Insurer would have no remedy for those items that triggered the indemnification obligation in the first place.

Upon termination of the contract, the Insurer has continuing obligations also. It must complete the processing of the title insurance policies for which application had been made and for which binders or commitments had been authorized. It must deal with the insured and be liable for all losses, damages, expenses and costs arising out of claims covered by and based upon title insurance policies and binders issued under terms of the contract. Section 7 of the contract defines such liability.

The contract, at section 11, provides for its termination. Either party may terminate the contract by giving the other party at least sixty days' prior written notice. The contract can also be terminated by either party upon any material breach of the contract, after written notice and failure to cure within a specified time period. The Insurer has a right to terminate the contract if there is a change of ownership or management in the agency. The contract is not transferable or assignable by either party without the written consent of the other. Finally, paragraph 11 provides that the contract

> shall be automatically terminated upon either party hereto being adjudicated a bankrupt, voluntarily or involuntarily, or upon filing by or against either party hereto of a petition under the provisions of The Bankruptcy Act (or the amendment or revisions thereto) and entry by the Court of an Order finding said petition properly filed, or upon the appointment of a receiver for any part of the property of either party hereto when the petition or bill of complaint upon which said appointment is made alleges the insolvency of that party.

After the death of the Agent's owner, the Agent filed a Chapter 7 bankruptcy petition on January 27, 2002. Pursuant to paragraph 11 of the contract, the contract terminated on that date. Although the Insurer argues that the automatic termination provision is rendered ineffective by 11 U.S.C. § 365(e)(1), the question of whether the Insurer has a valid claim against the bankruptcy estate under the indemnification clause of the contract does not depend upon the protection arguably provided the Insurer under 11 U.S.C. § 365(e)(1). That issue can be decided without referring to either Section 365(e)(1) or (2), which provides an exception to Section 365(e)(1).

The trustee argues that the Insurer has no claim for any costs or damages it incurred after the bankruptcy petition was

filed, because the filing of the bankruptcy petition terminated the contract and eliminated all obligations of the Agent or the Insurer under the contract. To accept such construction of the contract would require a nullification of all of the ongoing obligations of both the Agent and the Insurer, which, as discussed above, exist notwithstanding "termination" of the contract.

Termination of the contract, pursuant to any of the provisions in paragraph 11, means that the Agent is no longer authorized to represent the Insurer, solicit applications for insurance, accept applications, issue binders or commitments or collect premiums for new policies. Termination of the contract does not mean that the Agent no longer has an obligation to turn over property of the Insurer to the Insurer; to turn over premiums received for title policies issued or in process; to provide access to books and records of the Agent for audit purposes; to provide information concerning claims to the Insurer; and ultimately, termination certainly does not exonerate the Agent for indemnification of the Insurer for the loss, cost or damage caused by the Agent, as defined in paragraph 4 of the contract. Each of the above-listed items are continuing obligations of the Agent, even after termination under any provision of section 11.

The trustee suggests that because the Agent's state license was terminated two days prior to the bankruptcy case being filed, such termination of the license somehow also terminates the contract. No evidence has been presented that the state license was terminated prior to the petition date. In addition, even if it was, no evidence has been presented concerning what impact cancellation of a state license has upon continuing obligations under a written contract between the Agent and the Insurer. It may well be that the license was terminated and that such termination results in the Agent being prohibited by state law from performing those portions of the Agent's duties identified in section 1 of the contract concerning preparation and solicitation of applications for binders and policies of insurance, drafting such policies and delivering such policies. It is unlikely that cancellation of the state license affects any other provision of the contract document.

It is the position of the trustee that because state law prohibits a person or entity that does not have a state insurance license from being in the business of procuring insurance applications and delivering insurance policies, the

trustee could not have assumed the contract. It follows, according to the trustee, that the trustee's inability to assume such a contract means that the contract could not be an executory contract. However, the fact that the trustee could not assume the rights, duties and obligations under an insurance agency contract does not mean that the contract itself could not be executory. Many executory contracts, that is, contracts with performance still due from both sides on the date of the petition, are executory, although not assumable. See, e.g., United States v. TechDyn Sys. Corp. (In re TechDyn Sys. Corp.), 235 B.R. 857, 860 (Bankr. E.D. Va. 1999), and cases cited therein.

In conclusion, I find that the "Issuing Agency Contract" executed on May 18, 1994, by and between Investors as "Insurer" and STS as "Agent" was, on the petition date, an executory contract. The contract was rejected as a matter of law sixty days after the bankruptcy petition was filed. Investors performed, post termination, pursuant to its obligations under the contract and has a claim for damages against the bankruptcy estate.

The only issue presented in this contested matter was whether Investors has a claim based upon the contract rejection. No issue concerning the amount of the claim was presented. Therefore, I conclude that Investors does have a claim based upon rejection of the executory contract. Issues regarding the amount of the claim, if there are such issues, shall await another day.

IT IS ORDERED that the Chapter 7 trustee's objection to claim (Fil. #829) is denied.

DATED: May 26, 2005

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*Robert Becker
T. Randall Wright
United States Trustee

* Movant is responsible for giving notice of this order to all other parties not

listed above if required by rule or statute.