

In the United States Bankruptcy Court

for the Northern District of Iowa

RICHARD P. COCHRAN and JOYCE A.
COCHRAN
Debtors.

Bankruptcy No. 92-12082LC

Chapter 12

ORDER RE: MOTION TO ASSUME EXECUTORY CONTRACT and MOTION FOR SALE FREE AND CLEAR OF LIENS

The matters before the court are the motions filed by Richard P. Cochran and Joyce A. Cochran to assume an executory contract and for sale of real estate free and clear of liens. Hearing was held March 11, 1993 in Cedar Rapids, Iowa. The court now issues its findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(N).

FINDINGS OF FACT

On August 26, 1991, the Cochrans entered into a real estate contract to purchase farm land from Elmer and Kathleen Eggert (EGGERTS). The purchase price for the property was \$165,000.00. The Cochrans paid \$8,250.00 of the purchase price at the time of executing the contract. The balance was to be paid as follows:

\$17,825.00 to be paid March 1, 1992, said sum to include principal and also interest at 9.5% for Six months on the unpaid balance. Remaining sum to be paid in semi-annual payments of \$10,600.00 beginning with September 1, 1992 and continuing on each March 1 and September 1 thereafter until fully paid. Payments to include interest computed at 9.5% on the unpaid balance. Each payment will be applied first to interest and the balance to principal.

The Cochrans paid the \$17,825.00 due on March 1, 1992; however, they failed to make the September 1, 1992 payment for \$10,600.00. On November 13, 1992, the Cochrans filed a chapter 12 bankruptcy petition. The Cochrans listed the real estate contract with the Eggerts as an executory contract in their bankruptcy schedules.

On January 21, 1993, the Eggerts filed a motion to compel the Cochrans to assume or reject the real estate contract. On February 23, 1993, the Cochrans filed a motion to assume the executory contract styled "Debtors' Assumption of Contract." On February 23, 1993, the Cochrans also filed their motion for sale of the real estate free and clear of liens pursuant to Bankruptcy Code § 1206.

The Cochrans have obtained court approval to employ a realtor. They have accepted an offer to buy the real estate subject to court approval. The purchase price of the proposed sale is greater than the unpaid balance of the contract owed to the Eggerts. The Cochrans have equity in the property.

DISCUSSION

The Cochrans seek to assume the real estate contract and pay the remaining balance in full through sale of the property with the Eggerts' lien to be paid from the proceeds of the sale. The Eggerts object to the assumption and sale on two grounds. First, they argue that only the trustee, and not the debtor-in-possession, is authorized to sell property under Bankruptcy Code § 1206. Second, Bankruptcy Code § 365 requires that a debtor may not modify any of the terms of an assumed executory contract. The Eggerts argue that paying the contract balance in full is an impermissible modification.

Bankruptcy Code § 1206 authorizes the "trustee" to sell farmland free and clear of liens, with the liens attaching to the proceeds of the sale. Code § 1203 gives a debtor-in-possession all the powers of a Chapter 11 trustee, which includes the power of sale under § 363(f). The authorization to sell under § 1206 is in addition to that granted in § 363(f). 11 U.S.C. § 1206. The reference to "trustee" in § 1206 includes the debtor-in-possession. In re Brileya, 108 B.R. 444, 447 (Bankr. Vt. 1989). The Chapter 12 debtor-in-possession may sell property under § 1206, subject to consent of the standing trustee. Id. The trustee has been served with notice of the Cochrans' motion to sell the property and has not objected. Therefore, the Cochrans have authority to sell property under § 1206. The court notes that since the Cochrans have equity in the property, they would also have authority to sell the farmland under § § 363(f)(3) and 1203. See 5 Collier on Bankruptcy 1206.01.

For purposes of Iowa real estate law, a contract for sale of real estate operates as an equitable conversion. The purchaser becomes the equitable owner of the real estate, and the vendor holds legal title merely as security for payment of the purchase price. In re Scanlan, 80 B.R. 131, 133 (Bankr. S.D. Iowa 1987) (citations omitted). However, for purposes of treatment under Bankruptcy Code § 365, a real estate contract in Iowa is an executory contract. Brown v. First National Bank in Lenox, 844 F.2d 580 (8th Cir. 1988). If the Cochrans elect to assume the executory contract, they must assume the entire contract and accept the contract's burdens as well as its benefits. In re SteelShip, 576 F.2d 128 (8th Cir. 1978); United States Dept. of the Air Force v. Carolina Parachute Corp., 907 F.2d 1469 (4th Cir. 1990). They may not change the contract rate of interest or otherwise modify the payment terms as can be done with a mortgage. In re Indvik, Bankr. No. 87-00264M, slip op. (Bankr. N.D. Iowa, April 23, 1987); In re Coffman, 104 B.R. 958 (Bankr. S.D. Ind. 1988).

Eggerts claim that paying the balance of the real estate contract in full is a modification of the terms of the contract in violation of § 365, citing Lett v. Grummer, 300 N.W.2d 147 (Iowa 1981), as support for this position. In Lett v. Grummer, bad feeling developed between the real estate vendor and the purchaser. The property was worth approximately \$300,000, and the unpaid balance was \$16,000.00. The vendor sought to forfeit the real estate contract on a fairly trivial ground. The purchaser deposited the balance owing under the contract with the court and demanded a deed. The Iowa Supreme Court said that the vendor "cannot be compelled to take the money until it is due." Id. at 150. The case dealt primarily with whether the vendor had the right to forfeit the contract. The court neither stated nor discussed the terms of the contract at issue.

The authorities cited for the rule in Lett v. Grummer appear to involve contracts for performance on specified dates or after a specified period of time. Anderson v. Haskell, 45 Iowa 45, 47 (1876); Annotation, "Right of Purchaser under Land Contract to Anticipate Time of Payment Fixed by Contract," 17 A.L.R. 866 (1922). The parties to the contracts had a mutual obligation to perform the contract at a particular time fixed in the contract. These authorities indicate that one rationale for the rule was to prevent a purchaser from forcing the vendor into default in order to rescind the contract.

In Anderson v. Haskell, the contract provided that the purchase money would be paid on "specified dates." The purchaser failed to make the first installment "at the time stipulated in the contract." The purchaser argued that he had offered to pay before the due date but did not pay because the vendors did not have the bond for deed ready for delivery. The court stated that the vendor need not accept the payment before it is due; therefore, the purchaser could not declare the vendor in default and rescind the contract.

In Hanson v. Fox, 155 Cal. 106, 99 P. 489 (1909), discussed in the annotation, 17 A.L.R. 866, 867-68, the vendor had agreed to convey title 35 months after execution of the contract. The court said that the purchaser had no greater right to pay the full purchase price before the fixed time than the vendor did to demand the purchase price in full before it was due. Hanson v. Fox also involved a vendee attempting to pay early in order to put the vendor in default and rescind the contract. The court in Lett v. Grummer stated it was merely following a well-established common law rule. It is not clear that the rule could be expanded to allow a vendor to refuse early satisfaction of the debt regardless of the terms of the contract.

A vendor who has bargained for the right to hold a contract as an investment could not be compelled to accept cash payment in full if that would deprive the vendor of the benefit of the bargain. Goetz v. Hubbell, 266 N.W. 836 (N.D. 1936). The Eggerts argue that the real estate contract was structured to be paid by deferred payments in order to take advantage of income tax provisions relating to installment sales.

In In re Raby, 139 B.R. 833 (Bankr. N.D. Ohio 1991), the debtors were purchasers under a land installment contract. The trustee proposed to assume the contract and sell the property for \$50,000.00; the fair market value of the property was approximately \$30,000.00. The debtors objected to the contract assumption on the ground, among others, that the contract contained a clause prohibiting prepayment of the principal. The court approved the trustee's assumption of the contract, finding that the vendor would receive the benefit of her bargain and there would be a benefit for the estate.

In Raby, the court approved the contract assumption, despite an indication that the vendor had bargained specifically for deferred payments. In the Eggerts' case, however, the terms of the contract do not indicate that the Eggerts bargained for the right not to accept payment in full. The terms of the contract do not specify payment over a certain number of years or months, or for a certain number of payments. Installments on the purchase price are to be made "until fully paid." The terms allow the interpretation that payment in full could be made in a lump sum. The contract does not indicate a date certain when it is to be paid in full. The Eggerts are to give a warranty deed "[u]pon payment of all sums owing . . . by virtue of this contract," (Contract, 9) without reference to payment of a last installment or to a specific date. There is no clause either allowing or prohibiting prepayment. There is no term indicating that income tax considerations are paramount.

The court concludes that, viewing the terms of the contract, the Eggerts did not specifically bargain for the right to deferred payments. The contract indicates just as well that the right to make deferred payments was bargained for the benefit of the Cochrans. For the purposes of Bankruptcy Code § 365, it is not a modification of the Eggerts' contract for the Cochrans to pay it in full.

The Cochrans have provided adequate assurance that the default under the contract will be cured from proceeds of the sale, satisfying the requirement of § 365(b)(1)(A). They propose to pay the contract in full at the contract rate of 9.5 per cent. The Eggerts do not object to the purchase price of the proposed sale. The Cochrans indicate that the proposed sale price will be sufficient to pay the debt to the Eggerts in full, all real estate taxes and the real estate sales commission. The sale will allow the

Cochrans to use their equity in the property to assist their reorganization. The court concludes that the assumption of the contract and sale of the property will provide a benefit for the estate.

ORDER

IT IS ORDERED that the Motion to Assume Executory Contract is granted.

IT IS FURTHER ORDERED that the Motion for Sale Free and Clear of Liens is granted.

SO ORDERED ON THIS 30th DAY OF MARCH, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order by U. S. mail to: William K. Shafer, Steven Gill, Carol Dunbar, and U. S. Trustee.