

In the United States Bankruptcy Court

for the Northern District of Iowa

BOCKES BROTHERS FARMS INC.
Debtor(s).

Bankruptcy No. 93-60881KW
Chapter 11

ORDER CONCERNING DEBTOR'S PROPOSAL PROVIDING FOR CURE OR ADEQUATE ASSURANCE OF PROMPT CURE RE MARTIN PROPERTY

On July 29, 1994, the above captioned matter came on for hearing pursuant to assignment. The matter before the Court was Debtor's Proposal Providing for Cure or Adequate Assurance of Prompt Cure re Martin Property. Debtor Bockes Brothers Farms, Inc. was represented by Dan Childers. Vera Martin was represented by Tom Pepper.

Vera Martin is the seller and Debtor is the buyer under a real estate contract for the purchase of farm property known as the Plano property. Pursuant to a prior order of this Court, Debtor has filed its notice of assumption of the real estate contract under 11 U.S.C. § 365(a). Ms. Martin has requested an order compelling Debtor to provide prompt cure and adequate assurance under § 365(b). The Court's order filed June 17, 1994 directed Debtor to cure or provide adequate assurance of prompt cure by July 29, 1994.

Debtor has filed a motion seeking approval of a compromise agreement with Ag Services of America ("ASA") and Cooperative Finance Association, Inc. ("CFA"). The agreement provides for the sale of the Plano property no later than December 1, 1994 for an amount which will pay off Ms. Martin's contract and generate net equity of at least \$22,850. If the property does not sell by that date, Debtor will deed the property to ASA. Debtor anticipates that ASA will either pay off Ms. Martin or cure defaults at that time. Debtor asserts that this arrangement constitutes adequate assurance under § 365 (b).

Ms. Martin objects to the proposal. She points out that the Court has previously stated that she is entitled to prompt cure because of her special circumstances. The Court's Order filed June 17, 1994, stated that "Ms. Martin has a compelling need for the real estate contract payments to provide for her day-to-day needs." The Court has previously ordered that Ms. Martin should receive CRP proceeds of approximately \$3,000 to \$4,000 due to Debtor from the ASCS office for the Plano property as adequate assurance under § 365(b). That payment, however, has not been forthcoming.

The record establishes that the balance due on the contract is approximately \$33,000 and the property has a market value of approximately \$70,000. The total amount currently claimed as arrearages is \$23,670.16, which includes two overdue annual contract payments of \$8,171.79 each, interest on those payments at the contract rate, and attorney fees.

Ms. Martin objects to waiting until December 1, 1994 for cure of the arrearages or pay off of the contract. She states that her request for cure has already been delayed several times since the filing of Debtor's petition in May, 1993. She emphasizes her special need for the contract payments as one of

her main sources of income. Furthermore, she asserts that the possibility that the property will be deeded to ASA rather than sold by December 1, 1994 does not give her adequate assurance that the default will be cured or the contract paid off.

The Court has already set out some standards of law regarding the application of § 365(b) in its order filed June 17, 1994. Both the concepts of "adequate assurance" and "prompt cure" in § 365(b) are given definition on a case-by-case basis.

"Adequate assurance" is to be given a practical, pragmatic construction based on the circumstances of the case. In re Prime Motor Inns, Inc., 166 B.R. 993, 997 (Bankr. S.D. Fla. 1994). Assurance is adequate if performance is likely, i.e. more probable than not. Id. Regarding assurance of future performance, it is helpful to show sufficient financial backing, escrow deposit or similar forms of security. In re Gold Standard at Penn, Inc., 75 B.R. 669, 675 (Bankr. E.D. Pa. 1987). However, a mere promise may not be adequate to cure a monetary default. In re Berkshire Chem. Haulers, Inc., 20 B.R. 454, 458 (Bankr. D. Mass. 1982). The viability of a debtor's proposal and accuracy of projections will be factors for the court to consider. Id.

Likewise, Congress did not define the words "promptly cure" in § 365(b)(1)(A). Courts have held that "prompt" can mean anywhere from two weeks to five years, depending on the circumstances. See In re Whitsett, 163 B.R. 752, 755 (Bankr. E.D. Pa. 1994); In re French, 131 B.R. 138, 141 (Bankr. E.D. Mo. 1991); Gold Standard, 75 B.R. at 673. In In re Anderson, 36 B.R. 120, 126 (Bankr. D. Hawaii 1983), the court ordered that the debtor sell real estate within four months and then immediately pay off the contract or the contract would be deemed rejected. The court stated that although forfeiture is not favored, the debtor should not be allowed to reap benefits at the creditor's expense by holding property until the economy improved. Id.

There are three requirements in § 365(b) Debtor must meet in order to assume Ms. Martin's contract. They are (1) cure of default or adequate assurance of prompt cure of default, § 365(b)(1)(A), (2) adequate assurance of prompt compensation for pecuniary loss, § 365(b)(1)(B), and (3) adequate assurance of future performance of the contract, § 365(b)(1)(C). Here, Debtor has minimally met the second and third requirements. Debtor's proposal under the compromise and settlement with AGA and CFA is sufficiently probable to constitute adequate assurance of future performance. ASA's involvement appears to provide financial backing which is nonspeculative. Further, Ms. Martin's claimed pecuniary loss, consisting of attorney fees pursuant to the contract, is also covered by the settlement proposal to the extent the fees are allowable.

The Court is not convinced that a further hiatus of several months before cure of the default in contract payments constitutes prompt cure. Ms. Martin has already been forced to wait almost a year and a half without receiving contract payments. Debtor was two months in default at the time of filing its Chapter 11 petition in May, 1993. It has also failed to make the contract payment due postpetition. Ms. Martin's financial circumstances requiring her to rely on the contract payments as a main source of income for her day-to-day needs have not improved in the interim. Nor has the ASCS payment for CRP proceeds appeared.

In these circumstances, the Court believes that prompt cure requires some immediate payment. Therefore, the Court directs Debtor to pay over to Ms. Martin the amount of \$3,000 representing anticipated CRP proceeds for the property as well as the \$8,171.79 payment due postpetition on March 1, 1994. This total payment of \$11,171.79 will be considered a partial cure of existing defaults. Payment shall be made on or before August 29, 1994. This payment is necessary in order for Debtor to comply with the requirement of § 365(b)(1)(A). The remainder of the default amount shall be

remitted on or before December 1, 1994 pursuant to Debtor's proposal for adequate assurance. If the proposed settlement fails to materialize or Debtor fails to timely pay Ms. Martin the correct amount, the contract shall be deemed rejected.

WHEREFORE, Debtor's Proposal Providing for Cure or Adequate Assurance of Prompt Cure re Martin Property is SUSTAINED IN PART and OVERRULED IN PART.

FURTHER, Debtor's proposal to sell the contract property, or deed it to ASA, on or before December 1, 1994 constitutes adequate assurance of prompt compensation and of future performance under § 365(b)(1)(B) and (C).

FURTHER, in order to comply with § 365(b)(1)(A), Debtor shall pay Vera Martin \$11,171.79 on or before August 22, 1994. The remainder of the default shall be cured on or before December 1, 1994.

FURTHER, if Debtor fails to make timely payment to Ms. Martin, the real estate contract shall be deemed rejected.

SO ORDERED, this 16th day of August, 1994.

Paul J. Kilburg
U.S. Bankruptcy Judge