

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

PLASTIC RECYCLING, INC.

Debtor.

Bankruptcy No. 96-43157M

Chapter 11

Contested No. 2123

DECISION RE: MOTION FOR RELIEF FROM STAY and MOTION TO COMPEL ASSUMPTION OR REJECTION

In this contested matter proceeding, Iowa Land and Building Company (Iowa Land) moves the court to compel the debtor to determine whether to assume or to reject an executory contract for deed. It asks that debtor be compelled to file a motion to assume or reject within 30 days. Alternatively, Iowa Land requests relief from the automatic stay so that it may forfeit debtor's buyer's interest in the same contract.

Notice of the motion was served on the 20 largest unsecured creditors as well as those creditors filing general requests for notices. Only the debtor resists. At the preliminary hearing, the parties requested final hearing by phone. The hearing was held May 29, 1997. Larry S. Eide appeared for the debtor, Plastic Recycling, Inc. Steven J. Pace appeared for Iowa Land. Present during the hearing were Jim Wills and Jeff Rosencrants of Iowa Land.

Debtor filed its chapter 11 case on December 9, 1996. It recycles used plastics into new plastic products. Debtor conducts its manufacturing operations on 10 acres of land located in Iowa Falls. This real estate was the subject of a 1986 contract for deed between Iowa Land and Hammer's, Inc. The latter assigned its purchaser's interest to debtor in 1988.

The contract required monthly payments of \$3,223.82 until August 1, 1992 when the principal balance of \$247,251 would become fully due (Exhibit A).

In July 1993, debtor and Iowa Land agreed to an extension of the "balloon payment date" to October 1993 if the debtor fulfilled certain conditions (Exhibit A). These included continued payment of the monthly payments. In November 1993, debtor executed a further amendment to extend to February 1995 the due date for the balloon payment. The monthly payments were to continue, and debtor was to make monthly escrow payments of \$850 for taxes.

Iowa Land says that debtor did not fulfill the obligations necessary to the extensions, and that it considers the balloon date to have been in 1992. Debtor and Iowa Land have continued discussions to resolve the debtor's default.

It is undisputed that the property has a fair market value less than the balance due under the contract. Since filing bankruptcy, the debtor has paid Iowa Land monthly payments of \$3,223 for December, January and April. It did not make monthly payments in February, March or May.

There is a dispute over whether the casualty insurance on the building has lapsed. I find the evidence insufficient to make a finding on that issue.

There is a dispute over whether debtor failed to make a post-petition real estate tax payment. Jim Wills with Iowa Land was present during the phone hearing. He stated that Iowa Land paid post-petition real estate taxes of about \$9,000. Counsel for debtor was not aware the taxes were not paid by the debtor. There was no one besides Eide present at the hearing for debtor.

The problem here is that no acceptable evidence was offered on the point. The parties requested the final hearing be held by phone. It was expected that there would be no factual disputes. The issue of unpaid post-petition real estate taxes surfaced at the final hearing. Debtor's failure to pay was not admitted by debtor's counsel. Jim Wills was not called and sworn as a witness. He offered the information on a disputed point but not in the form of sworn testimony. This is an example how a phone hearing, although convenient, fails to provide the type of hearing necessary to prove disputed facts. The evidence is insufficient for me to find that debtor has failed to pay post-petition real estate taxes.

I take judicial notice that no plan has been filed, and debtor's exclusive period for filing a plan has expired.

DISCUSSION

Iowa Land seeks one of two remedies. First, it asks that the court require the debtor either to assume or to reject the contract within 30 days from the date of the motion, which was filed April 11. Alternatively, meaning if the first remedy is not granted, Iowa Land asks that the court grant relief from the automatic stay to permit it to forfeit the contract.

Relief from the Automatic Stay

The court may grant Iowa Land relief from the automatic stay on a showing of cause, including the lack of adequate protection, or on a finding that the debtor has no equity in the property and that the property is "not necessary for an effective reorganization." 11 U.S.C. 362(d)(2). The burden is on debtor to show "that the property is essential for an effective reorganization *that is in prospect*." This means ". . . that there must be 'a reasonable possibility of a successful reorganization within a reasonable time.'" United Sav. Ass'n. of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 108 S.Ct. 626, 632 (1988).

The parties agree the debtor has no equity in the property. Debtor has offered no proof that an effective reorganization is in prospect. Also, whether debtor can reorganize may well depend on whether debtor can keep its factory location, but there was no evidence on this point. Debtor has not effectively resisted the motion for relief. This may be so because it focuses on the primary relief requested by Iowa Land, and relief from the stay is necessary only if the motion to compel assumption or rejection is not granted.

Motion to Compel Assumption or Rejection

Debtor does not resist completely Iowa Land's motion to compel assumption or rejection. Generally, a debtor has until confirmation of a plan to assume or reject an executory contract. 11 U.S.C. 365(d)(2). However, a party to the contract can request that the debtor be ordered to assume or reject at an earlier time. Id. Upon such request, the court may, in its discretion, grant such motion and determine a reasonable time in which the debtor must make its election. In the Matter of Dunes Casino Hotel, 63 B.R. 939, 949 (D. N.J. 1986). In determining a reasonable time period, the court might consider the nature of the interests, the balance of harm to each party, the benefits to be achieved, the safeguards available to the parties, and the rehabilitative purposes of chapter 11. Id.

The dispute here centers not on whether the motion should be granted, but on how much time should be afforded the debtor. Iowa Land wants the debtor to file an election within 30 days of the motion's filing date. This is unrealistic and impractical. The motion was filed April 11 and was combined with an alternative motion for relief from the stay. A preliminary hearing which was held May 13. At the preliminary hearing, the court set the final hearing for May 29 and ordered Iowa Land to serve additional parties with its motion and a notice of hearing. The matter was not delayed, as only 48 days passed from filing to final hearing. Granting Iowa Land's request would require an immediate decision from debtor, and I do not consider "immediately" to be a reasonable amount of time.

Debtor asks for 60 days, but it does not say whether that time should be measured from the date of the motion, the date of its resistance (May 27) or the date of my order. Also, as I recall, debtor was requesting more than 30 days when the matter was discussed at the preliminary hearing on May 13. Debtor has known since April 11 that if the motion were granted and it sought to assume, it would have to pay the contract balance in full. Since April 11, alternative financing was a known and perhaps the only option.

I find that debtor should have to and including July 10, 1997 to file its motion to assume or to reject the contract with Iowa Land. Also by that date, debtor shall serve the motion with notice of its filing, a bar date for objections and a hearing date and time. The bar date for objections shall be July 25, 1997. The hearing on the motion shall be at 1:30 P.M., July 30, 1997 in the U.S. Bankruptcy Courtroom, Second Floor, United States Post Office, 211 North Delaware, Mason City, Iowa. The debtor shall serve the notice and motion on Iowa Land, the U.S. Trustee, the 20 largest unsecured creditors and on any entity who has filed a request for notices in the case.

If the debtor fails to file a motion to assume or reject the contract by July 10, 1997, an order granting the motion for relief from stay will enter. If a motion to assume is timely filed but not granted, or if a motion to reject is filed and granted, the court will grant Iowa Land's motion for relief from stay.

I determine that July 10 provides a reasonable time by considering the debtor's resistance and request for 60 days, the time that has passed since the filing of Iowa Land's motion, that debtor has not paid monthly payments each month since the filing of the case, that the debtor has no equity in the property, and that debtor has introduced no evidence that a reorganization is in prospect.

IT IS ORDERED that debtor shall have to and including July 10, 1997 to file a motion to assume or reject its contract for deed with Iowa Land and Building Company. It shall serve the motion with notice of its filing, a bar date for objections and a hearing date on Iowa Land, the U.S. Trustee, the 20 largest unsecured creditors and on any entity that has filed a request for notices in this case. The bar date of objections to the motion will be July 25, 1997. The hearing on the motion will be July 30, 1997 at 1:30 P.M., U.S. Bankruptcy Courtroom, Second Floor, U.S. Post Office, 211 North Delaware, Mason City, Iowa.

IT IS FURTHER ORDERED that if debtor fails to file a motion to assume or reject by July 10, 1997, an order will enter granting Iowa Land relief from the automatic stay to permit it to forfeit the contract. If debtor files a motion to assume that is not granted or a motion to reject that is granted, an order will enter granting Iowa Land relief from the automatic stay to permit it to forfeit the contract. If a motion to assume is granted, the motion for relief will be denied.

SO ORDERED THIS 11th DAY OF JUNE 1997.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order by U.S. mail to: Larry Eide, Steven Pace, 2002 List and U.S. Trustee.