(Cite as: 1991 WL 133412 (Bankr.D.Vt.))

In re SUMMIT VENTURES, et al., Mt. Ascutney Associates, et al., Debtor,

Bankruptcy No. 90-00213.

United States Bankruptcy Court. D. Vermont.

March 4, 1991.

D. Wolinsky, Saxer, Anderson, Wolinsky & Sunshine, Burlington, Vermont, for debtor, Mt. Ascutney Associates (Ascutney).

T. Maikoff, Rutland, Vermont, for Michael R. Harrison and Jeannette Harrison (Harrison).

MEMORANDUM OF DECISION ON MOTION TO COMPEL ASCUTNEY TO ASSUME OR REJECT AN

EXECUTORY CONTRACT

FRANCIS G. CONRAD, Bankruptcy Judge.

***1** This contested matter [FN1] is before us on Harrison's motion for an order requiring Ascutney to assume or reject an executory contract. Ascutney opposes Harrison's motion. This court holds that because the executory portion of the contract collapsed by its own terms pre-petition, the motion to compel Ascutney to assume or reject the executory contract is moot. Moreover, because Ascutney failed to assume or reject the non-residential lease portion within 60 days of filing the petition, the non-residential lease is deemed rejected. 11 USC § 365(d)(4). Consequently, the motion is denied.

FINDINGS OF FACT

On March 24, 1989 Harrison purchased a condominium unit from Ascutney and simultaneously leased it back to Ascutney. Ascutney received exclusive occupancy rights including the right to sublet, in exchange for a $3,000 monthly rental payment. If the condominium unit was sold, the lease payments were to cease. Furthermore, Ascutney guaranteed that it would either purchase or resell the property by November 24, 1989 upon condition that Harrison list the property exclusively with Ascutney's real estate division. The parties have not told us if Harrison has listed the property with Ascutney, but we assume Harrison has done so. Unfortunately, Ascutney made no rental payments to Harrison nor has

Ascutney resold or purchased the condominium.

Ascutney filed its Petition under Chapter 11 of the Bankruptcy Code on April 27, 1990. On December 14, 1990 we heard argument on Harrison's motion to compel assumption or rejection of the contract and reserved decision pending briefs of counsel.

ISSUES PRESENTED

There are two issues presented. The first is whether the contract for purchase of the condominium is an "executory contract" within the meaning of § 365 of the Bankruptcy Code. We hold that it is not. The second is whether the lease is a residential or non-residential lease. We hold that it is a non-residential lease. It is deemed rejected in this matter because 11 USC § 365(d)(4) provides that non-residential leases must be assumed or rejected within 60 days of the bankrupts filing unless the time to assume or reject is extended.

I. THERE IS NOTHING LEFT FOR ASCUTNEY TO ASSUME OR REJECT BECAUSE NO EXECUTORY CONTRACT EXISTED ON THE DATE ASCUTNEY FILED ITS BANKRUPTCY PETITION.

The Bankruptcy Code does not exp-essly define the term "executory contract." [FN2] The legislative history of 11 USC § 365 reveals, "there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides." H.R.Rep. No. 595, 95th Cong., 1st Sess. 347 (1977); S.Rep. No.989, 95th Cong., 2d Sess. 58, reprinted in 1978 U.S.Code Cong. & Admin.News 5787, 5844, 6303. Many Courts have embraced Professor Countryman's definition of executory contract that states "(A) contract under which the obligation of both the bankrupt and the other party to the contract is so far clearly unperformed that failure of either to complete performance would constitute a material breach excusing the performance of the other." Countryman, Executory Contracts in Bankruptcy: Part I., 57 Minn.L.Rev. 439, 469 (1973), See, e.g., Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F2d 1043, 1045 (4th Cir.1985), cert. denied, Lubrizol Enterprises Inc. v. Canfield, 475 U.S. 1057, 106 S.Ct 1285 (1986); In re Knutson, 563 F.2d 916 (8th Cir.1977).

***2** Applying the Countryman definition to a contract requires a two step inquiry. First, it must be ascertained whether either party has any unperformed obligations under the contract at the time the bankruptcy petition was filed. Second, if both parties have unperformed obligations under the contract, would failure to perform those obligations constitute a material breach of the contract. In re Leefers, 101 B.R. 24, 25 (C.D.Ill.1989).

At the time the bankruptcy petition was filed, neither party had any unperformed obligations remaining on the contract because the contract collapsed by its own terms on November 24, 1989.

The holding is supported by Addendum A, Provision 6 of the agreement between the parties that provides, "... If the buyer [Harrison] does not execute a sales agreement at a price and time frame stated in Provision 5, Ascutney's obligation with regard to Provision 5 shall cease...." Ascutney was obligated, under Provision 5, to either sell the condominium or repurchase the condominium on by November 24, 1989. Accordingly, because Ascutney neither purchased nor resold the condominium by November 24, 1989 and Harrison did not execute a sales agreement on or before November 24, 1989, the repurchase part of the contract ceased to exist. Consequently, there is nothing left for Ascutney to assume or reject.

II. THE NON-RESIDENTIAL LEASE IS DEEMED REJECTED BECAUSE ASCUTNEY FAILED TO ASSUME OR REJECT IT WITHIN 60 DAYS OF THE ORDER FOR RELIEF.

The next issue requires a determination of whether the lease is residential or nonresidential. We find that it is a nonresidential lease because the use of the property was commercial in nature and was never intended to be used as a residence. In the case of Sonora Convalescent Hospital, Inc., 69 BR 134 (Bkrtcy.E.D.Cal.1986), the Court found that the lease of a convalescent hospital was a nonresidential lease, even though patients resided there, because the purpose of the lease was commercial.

It is clear that the lease contemplated a commercial use of the property. Both the Wilsons and the debtor expected the debtor would utilize the property to establish a convalescent home, which would take care of patients on a paying basis. This is a commercial use of the property, despite the fact that patients actually do reside on the property, and warrants a non-residential classification of the property. Accordingly, the court must apply section 365(d)(4) in determining if the lease has been rejected.

Id., at 136 (Emphasis in original). See, e.g., Condominium Administrative Services, Inc., 55 BR 792 (Bkrtcy.M.D.Fla.1985).

Similarly, the agreement between Harrison and Ascutney was for a condominium in which Harrison does not reside. The whole character of the agreement between the parties was commercial in nature. In substance, Harrison invested $23,026 [FN3] in a condominium and was guaranteed a 63.6% return within eight months. Harrison's promised return was represented almost entirely by the rent payments received over the eight months the condominium was listed on the market. Indeed, the purchase price of the condominium paid by Harrison was nearly equal to the guaranteed repurchase or resale price. Unfortunately, Harrison has not received any payments, yet Ascutney has maintained exclusive occupancy. Thus, we hold under the facts that the agreement is a non- residential lease.

***3** 11 USC § 365(d)(4) of the Bankruptcy Code provides in relevant part:

In a case under any chapter of this title, if the trustee [here, the debtor in possession under

11 USC § 1107] does not assume or reject an unexpired lease of nonresidential property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor....

This statute, in our view, states a clear intention on the part of Congress to protect lessors and lessees of non-residential real estate from delay and uncertainty regarding assumption or rejection of non-residential leases in bankruptcy. This intent is manifested by the statutory requirement that the trustee assume or reject an unexpired non-residential lease within 60 days after the Order for relief, or it is deemed rejected.

Here, Ascutney has failed to assume or reject the non-residential lease within 60 days after the Order for relief. Consequently, the non-residential lease is deemed rejected.

An appropriate order has been entered.

FN1. We have jurisdiction to hear this matter under 28 USC § 1334(b). This is a core matter under 28 USC 157(b)(2)(A). This memorandum of decision constitutes findings of fact and conclusions of law under Federal Rules of Civil Procedure 52, as made applicable by Rules of Practice and Procedure in Bankruptcy Rule 7052.

FN2. Whether a contract is executory within the meaning of the Bankruptcy Code is a question of Federal law. In re Wegner, 839 F.2d 533, 536 (9th Cir.1988). It is only after the term is defined that State law comes into play to determine the relationship of the parties. This approach is premised on the view that:

There is no need to look at state law for the meaning of "executory contract." As Professor Countryman observed, there was no need for a statutory definition of executory contract under the former Bankruptcy Act, because the courts "seem to have experienced little difficulty in fashioning a definition of executory contract that is both workable and consistent with the .. polic[ies] of the .. Bankruptcy Act dealing with contracts." (quoting Countryman, Executory Contracts in Bankruptcy: Part II, 58 Minn.L. Rev. 479, 563 (1974)). Perhaps because the federal courts had fashioned a definition of executory contracts, the drafters of the new Bankruptcy Code found it unnecessary to define the term.

In re Alexander, 670 F.2d 885, 888 (9th Cir.1982) (quoting Countryman, Executory Contracts in Bankruptcy: Part II, 58 Minn.L.Rev. 479, 563 (1974)).

FN3. This sum represents the down payment on the condominium.

1991 WL 133412 (Bankr.D.Vt.)

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