

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of Case No. 87-2795-D
HAROLD F. UNTERNAHRER, Chapter 12
Debtor.

MEMORANDUM OF DECISION AND ORDER

On January 22, 1988, a telephonic hearing was held on creditor Federal Land Bank of Omaha's (hereinafter "FLB") motion for relief from stay and request for adequate protection, and resistance thereto by Debtor. Thomas L. Burke appeared on behalf of FLB, and Marlyn S. Jensen appeared on behalf of Debtor. Also appearing was Anita L. Shodeen, Chapter 12 Trustee. At the close of said hearing, FLB was ordered to amend its motion for relief on or before January 27, 1988. Debtor was ordered to respond to amended motion on or before February 3, 1988. Both parties have met their respective deadline and the court considers the matter fully submitted. Upon the amended motion the court is now considering FLB's motion for relief from automatic stay or motion to require Debtor to accept or reject an executory contract.

This is a core proceeding pursuant to 28 U.S.C. section 157 (b) (2) (G). The court having heard the arguments of counsel and having reviewed the file now enters its findings and conclusions.

FINDINGS OF FACT

1. Debtor filed his Chapter 12 petition on November 12, 1987.

2. On March 27, 1986, FLB received a sheriff's deed conveying to FLB certain farm real estate located in Washington County, Iowa, upon which FLB had foreclosed in the Iowa District Court for Washington County.

3. On July 22, 1987, FLB sold said real estate to Twin Oaks Trust on a real estate contract for \$70,000, the terms of which were \$5,000 down and the \$65,000 balance due in full on or before September 1, 1987.

4. On August 24, 1987, Debtor, as trustee for Twin Oaks Trust, sent to FLB a \$65,000 "certified draft" along with a transmittal letter. This "certified draft" or "sight draft" was signed by Debtor and drawn upon "Common Title Bond and Trust" which showed a typed-in address of "Sacramento Inn-Way #119 Sacramento, CA 95815."

5. On September 1, 1987, a representative of FLB returned the draft to Debtor with a letter explaining that FLB did not recognize the draft as an acceptable form of payment. FLB advised Debtor that an acceptable form of payment would be a certified check, cashier's check, cash, or money order drawn on a recognized financial institution. In the same letter, the FLB representative notified Debtor that unless payment in a proper form was made to FLB by

September 11, 1987, FLB would consider Debtor to be in default on the real estate contract. Further, default beyond that point would result in FLB having Debtor forcibly removed from the property.

6. Debtor did not make proper payment by September 11, 1987, and became in default.

7. After Debtor defaulted, FLB proceeded with a forcible entry and detainer action in the Iowa District Court for Washington County to have Debtor removed from the property. The hearing on this matter was set for November 12, 1987, the same day Debtor filed this Chapter 12 proceeding which stayed said hearing.

8. On November 11, 1987, one day before Debtor filed his Chapter 12 petition, the real estate contract between FLB and Twin Oaks Trust was assigned by Twin Oaks Trust to Debtor.

9. Debtor remains in default on the real estate contract.

DISCUSSION

Under Iowa law, a contract for the sale of real estate is an executory contract and must be assumed or rejected by the debtor according to the requirements of the Bankruptcy Code. See In re Brown, No. 87-808-A, unpublished op. (S.D. Iowa January 5, 1988); Matter of Scanlan, 80 B.R. 131 (Bankr.S.D. Iowa 1987); In re Hill, No. 86-115, unpublished op. (N.D. Iowa January 14, 1987). As a result, Debtor's

contract in the case at bar is an executory contract which must be assumed or rejected.

Bankruptcy Code section 365 deals with executory contracts, and provides in relevant part:

(d)(2) In a case under Chapter 9, 11, 12, or 13..., the trustee may assume or reject an executory contract.., of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract.. .may order the trustee to determine within a specified period of time whether to assume or reject such contract....

11 U.S.C. §365(d)(2). As a debtor in possession pursuant to section 1203, Debtor has the power to assume or reject his executory contract.

In the case at bar, FLB prayed that the court either lift stay or order Debtor to accept or reject the contract. Because the real estate contract in question is an executory contract, Debtor normally could assume or reject it at any time before confirmation of his plan. However, since FLB is a party to the contract and has requested the court to act, the court will order debtor to determine within a specified period of time whether to assume or reject the contract.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the court concludes the real estate contract between FLB and Debtor is an executory contract and must be assumed or rejected by Debtor.

IT IS ACCORDINGLY ORDERED, that Debtor must assume or reject the contract within 20 days of notice of this order.

FURTHER, Debtor shall file an amended plan within 10 days after an assumption or rejection of the contract.

FURTHER, Federal Land Bank of Omaha's motion for relief from automatic stay, as amended, is overruled.

Dated this 30th day of March, 1988.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE