

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

In re:

Case No. 6:05-bk-13356-ABB  
Chapter 7

HUEH-CHING LOWRY,

Debtor.

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**ORDER**

This matter came before the Court on the Amended Motion for Relief from the Automatic Stay<sup>1</sup> (“Motion”) filed by Seven R. J’Meier and Amina L. J’Meier (collectively, the “Movants”), and the Debtor’s Response to Amended Motion for Relief from the Automatic Stay (“Debtor’s Response”)<sup>2</sup> filed by Hueh-Ching Lowry, the Debtor herein (the “Debtor”). An evidentiary hearing was held on February 6, 2006. The Movants were granted leave to file a reply to the Debtor’s Response and they timely filed a Rebuttal to Debtor’s Response.<sup>3</sup> After reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises, the Court makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

The Debtor owns real property located at 14337 Sports Club way, Orlando, Florida 32837 (the “Property”). She entered into a Contract for Sale and Purchase (“Contract”) with the Movants on or about May 13, 2005 for the sale of the Property to the Movants for \$340,000.<sup>4</sup> The Contract provides for remedies in the event that either party fails to perform.<sup>5</sup> If the Seller/Debtor “fails, neglects or refuses to perform” the Contract, the Movants “may seek specific performance or elect to receive the return of their deposit(s) without thereby waiving any action for damages resulting from Seller’s breach.”<sup>6</sup> Closing was to occur on June 27, 2005. The Contract did not close and the Movants instituted a suit against the Debtor in state court in Orange County, Florida seeking specific performance of the Contract. The

Movants contend the Debtor breached the Contract by failing to close. No judgment was entered in the state court action.

The Debtor instituted this Chapter 7 bankruptcy case on October 10, 2005 (the “Petition Date”),<sup>7</sup> thereby staying the state court action. She claims the Property as exempt in Schedule C pursuant to the homestead exemption of Florida Constitution, Article X, Section 4(a)(1). No objection to the claim of exemption was filed and the deadline for filing objections has passed. The Property is exempt pursuant to the Florida homestead exemption. The Debtor did not disclose the existence of the Contract in her Schedules.<sup>8</sup> She, however, listed the Movants as creditors in Schedule F holding an unsecured claim in an “unknown” amount for a “5/05 Lawsuit” and disclosed the state court lawsuit in her Statement of Financial Affairs describing the proceeding as “Breach of Contract.”<sup>9</sup> The Movants filed a Notice of Appearance early in the case.<sup>10</sup>

The Chapter 7 Trustee, Robert E. Thomas, Esquire (“Trustee”), filed a Report of No Distribution declaring this case to be a no asset case. The Trustee had an affirmative duty to promptly investigate this case and determine whether executory contracts existed. He had notice of the potential existence of an executory contract through the Debtor’s disclosure of the lawsuit in her Statement of Financial Affairs, the inclusion of the Movants in Schedule F and the Movants’ appearance in this case. The Trustee did not request the sixty-day period for assuming or rejecting executory contracts be extended. The sixty-day executory contract assumption or rejection period has expired. The Contract has been rejected.

The Debtor was granted a discharge on February 3, 2006 without objection.<sup>11</sup> All claims held by the Movants against the Debtor, including a rejection damages claim, were discharged. The Debtor remains in possession of the Property. The Movants have never been in possession of the Property. Material obligations of both the Movants and the Debtor remain to be performed pursuant to the Contract. The Movants seek authority to return to state court to obtain an order enforcing the terms of the Contract. The Movants have failed to establish sufficient cause to grant the relief they seek.

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<sup>1</sup> Doc. No. 15.

<sup>2</sup> Doc. No. 19.

<sup>3</sup> Doc. No. 23.

<sup>4</sup> Doc. No. 11, Exhibit A.

<sup>5</sup> Id. at ¶S. Failure of Performance.

<sup>6</sup> Id.

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<sup>7</sup> An order for relief issued on the Petition Date.

<sup>8</sup> Doc. No. 1; she lists “None” in Schedule G for executory contracts.

<sup>9</sup> Doc. No. 1.

<sup>10</sup> Doc. No. 6.

<sup>11</sup> Doc. No. 20.

## CONCLUSIONS OF LAW

Section 365 of the Bankruptcy Code governs executory contracts and unexpired leases. Subsection 365(a) authorizes a trustee, subject to court approval, to “assume or reject any executory contract or unexpired lease of the debtor.” A Chapter 7 trustee must take action within sixty days of the petition date:

In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.<sup>12</sup>

A Chapter 7 Trustee has an affirmative duty to promptly investigate a debtor’s financial affairs, including determining whether executory contracts or unexpired leases exist.<sup>13</sup> Failure to assume an executory contract, even if the contract was unexpired, results in rejection of the executory contract by operation of § 365(d)(1).<sup>14</sup>

The Bankruptcy Code does not define the terms “executory contract” or “executory.” The majority of courts have adopted the definition of “executory contract” penned by Professor Vern Countryman, known as the Countryman definition: “A contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.”<sup>15</sup>

Some bankruptcy courts in the Eleventh Circuit have rejected the Countryman definition and utilize a “functional approach” to executory contracts. The functional approach looks at the benefits that assumption or rejection would produce for the estate. The Eleventh Circuit Court of Appeals has not explicitly adopted either definition, but appears to have endorsed the functional

definition in In re General Dev. Corp., 84 F.3d 1364 (11th Cir. 1996), in which it upheld the bankruptcy court’s application of the functional approach in finding a real estate lease to be executory.<sup>16</sup>

The Contract constitutes an executory contract of residential real property of the Debtor whether the Countryman or the functional approach definition is applied. The Contract is an executory contract pursuant to the Countryman definition because material obligations remain to be performed on both sides of the Contract. The material obligations include closing on the Contract, tendering the purchase price and delivering a deed. The Contract is executory pursuant to the functional approach because the Contract is burdensome and rejection of the Contract benefits the estate. Finding the Contract to be executory is in accord with determinations made by other courts addressing real property sales contracts. Most courts have found a contract to be executory where the debtor is the seller of real property.<sup>17</sup>

The Trustee did not assume or reject the Contract within sixty days after the order for relief. The Contract has been rejected in its entirety by operation of law pursuant to 11 U.S.C. § 365(d)(1). The entire Contract, including the specific performance remedies provisions, are unenforceable.<sup>18</sup> Allowing a specific performance claim to survive the rejection of the Contract would render the § 365 rejection provisions meaningless.<sup>19</sup>

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<sup>16</sup> It is important to note that it appears the Eleventh Circuit Court of Appeals did not adopt the “functional approach” as the exclusive definition of an executory contract. The Court stated that application of the functional approach was appropriate “in this case.” In re General Dev. Corp., 84 F.3d at 1375. Such statement would seem to mean that the applicability of the functional approach must be determined on a case by case basis. *See also* In re Martin Toolmakers, Inc., 796 F.2d 1435, 1439 (11th Cir. 1986) (discussing in dicta that in analyzing an executory contract issue you must work backward “proceeding from an examination of the purposes rejection is expected to accomplish. . . .”)

<sup>17</sup> In re General Dev. Corp., 84 F.3d at 1371.

<sup>18</sup> In re Kelley, Case No. 01-27345-BKC-RBR, 2001 Bankr. LEXIS 2182 (Bankr. S.D. Fla. November 29, 2001) (finding a real property sales contract to be executory under both the Countryman and functional approach definition and deeming moot the movant’s motion for relief from stay seeking authority to pursue a specific performance action against the debtors in state court after the contract was rejected); In re Hamilton Roe Int’l, Inc., 162 B.R. 590, 596 (Bankr. M.D. Fla. 1993).

<sup>19</sup> *See* Lubrizol Enters., Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043, 1048 (4th Cir. 1985) (“allowing specific performance would obviously undercut the core

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<sup>12</sup> 11 U.S.C. § 365(d)(1) (2005).

<sup>13</sup> Cheadle v. Appleatchee Riders Ass’n (In re Lovitt), 757 F.2d 1035, 1040-41 (9th Cir. 1985), *cert. denied*, 474 U.S. 849, 106 S. Ct. 145, 88 L. Ed. 2d 120 (1985).

<sup>14</sup> 11 U.S.C. § 365(d)(1) (2005); Cheadle v. Appleatchee Riders Ass’n (In re Lovitt), 757 F.2d at 1040.

<sup>15</sup> 3 COLLIER ON BANKRUPTCY ¶365.01, at 365-17 n. 1 (15th ed. rev. 2005).

The Debtor's failure to list the Contract in her Schedules does not alter this result because the Trustee could have discovered the existence of the Contract through review of the Debtor's bankruptcy papers and examination of the Debtor or the Movants, who entered their appearance in the case before the sixty-day assumption/rejection period expired.<sup>20</sup> The estate would gain no benefit from assumption of the Contract even if it could be assumed. The Property is fully exempt pursuant to Florida Constitution, Article X, Section 4(a)(1) and, thus, it is not subject to administration by the Trustee.

The rejection of an executory contract constitutes a breach occurring immediately prior to the petition date and the non-debtor party is entitled to a claim for rejection damages pursuant to 11 U.S.C. § 502(g).<sup>21</sup> A general unsecured claim for rejection damages arose in favor of the Movants upon rejection of the Contract pursuant to 11 U.S.C. § 502(g). Such claim was discharged upon the entry of the Debtor's discharge order pursuant to 11 U.S.C. § 727(b).

The automatic stay arose upon the Debtor's filing for bankruptcy protection pursuant to 11 U.S.C. § 362(a). The Movants seek relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1), which provides:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest.<sup>22</sup>

The Movants request relief from the automatic stay in order to return to the state court to seek an order compelling the Debtor to close on the Contract. The Contract is unenforceable. It was rejected in its entirety pursuant to 11 U.S.C. § 365(d)(1). The rejection damages claim that arose in favor of the

Movants by virtue of the rejection was discharged pursuant to 11 U.S.C. § 727(b). The Movants have failed to establish sufficient cause to warrant the lifting of the automatic stay pursuant to 11 U.S.C. § 365(d)(1).

Accordingly, it is

**ORDERED, ADJUDGED and DECREED** that the Movants' Motion is hereby **DENIED**.

Dated this 4<sup>th</sup> day of April, 2006.

/s/ Arthur B. Briskman  
ARTHUR B. BRISKMAN  
United States Bankruptcy Court

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purpose of rejection under § 365(a), and that consequence cannot therefore be read into congressional intent.") (N.B. Congress overruled the Lubrizol court's holding with regard to § 365(n), but otherwise its analysis of § 365 remains sound.)

<sup>20</sup> Cheadle v. Appleatchee Riders Ass'n (In re Lovitt), 757 F.2d at 1040-41 (9th Cir. 1985).

<sup>21</sup> 11 U.S.C. § 365(g) (2005); 11 U.S.C. § 502 (2005); 3 COLLIER ON BANKRUPTCY ¶365.09[1], at 365-81.

<sup>22</sup> 11 U.S.C. § 365(d)(1).