

**ORDERED.**

**Dated: January 31, 2023**

  
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Grace E. Robson  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
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In re	)	
	)	
Kissimmee Condos Partnership, LLC,	)	Case No. 6:22-bk-00994-GER
	)	Chapter 11
Debtor.	)	
_____	)	

**ORDER (1) DETERMINING PURCHASE CONTRACT  
IS AN EXECUTORY CONTRACT AND APPROVING REJECTION,  
(2) DETERMINING PRIORITY OF SOPHTWOOD, LLC'S REJECTION CLAIM,  
(3) SETTING BRIEFING SCHEDULE, AND (4) SETTING STATUS CONFERENCE**

This case came before the Court for entry of an appropriate order. The Court, having reviewed the relevant pleadings, the record, and relevant precedent,<sup>1</sup> **FINDS, ORDERS, AND ADJUDGES** as follows:

**RELEVANT FACTS**

1. On March 21, 2022 (the "Petition Date"), Kissimmee Condos Partnership, LLC (the "Debtor") filed a voluntary petition under chapter 11 of the Bankruptcy Code.<sup>2</sup>

<sup>1</sup> See *Sipes v. Atl. Gulf Cmty. Corp. (In re Gen. Dev. Corp.)*, 84 F.3d 1364 (11th Cir. 1996).

<sup>2</sup> Doc. No. 1. All "Doc. No." citations refer to pleadings filed in Case No. 6:22-bk-00994-GER unless otherwise noted.

2. On or about May 22, 2018, the Debtor and Sophtwood, LLC (“Sophtwood”) entered into a purchase and sale contract (the “Purchase Contract”) with respect to real property having the address of 1801 Houston Street, Kissimmee, Florida (the “Property”).<sup>3</sup>

3. Prior to the Petition Date, Sophtwood paid the entire purchase price of \$200,000 to the Debtor.

4. As of the Petition Date, the Debtor did not deliver title to Sophtwood.

5. On or about February 22, 2019, the Debtor borrowed \$8,700,000 from Darren L. Bradham (“Bradham”), evidenced by a promissory note, which was secured by all of the assets of the Debtor pursuant to the terms of a mortgage, assignment of leases and rents, and security agreement, which secured claim was perfected by the recording of the mortgage, assignment of rents and leases on February 26, 2019 in the public records of Osceola County, Florida, as well as the filing of a UCC-1 financing statement with the Florida Secretary of State on May 11, 2021.<sup>4</sup>

6. On September 7, 2022, the Debtor filed *Debtor’s Objection to Allowance of Claim of Sophtwood, LLC* (the “Objection to Claim”),<sup>5</sup> seeking to disallow Sophtwood’s claim in its entirety.

7. On October 3, 2022, Sophtwood filed a *Complaint*,<sup>6</sup> commencing Adversary Proceeding No. 6:22-ap-00076-GER (the “Adversary Proceeding”), seeking a determination that it has an equitable lien with priority over Bradham’s lien.

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<sup>3</sup> The address referenced on the contract was 1751 Houston Street, Kissimmee, Florida but was subsequently changed to 1801 Houston Street pursuant to the First Amendment to Amended and Restated Declaration of Condominium dated June 15, 2021.

<sup>4</sup> See Proof of Claim No. 83.

<sup>5</sup> Doc. No. 165.

<sup>6</sup> *Sophtwood, LLC v. Kissimmee Condos P’Ship*, Adv. No. 6:22-ap-00076-GER, Doc. No. 1.

8. The Court subsequently entered the *Order Consolidating Debtor's Objection to Allowance of Claim of Sophtwood, LLC with Adversary Proceeding* in the Adversary Proceeding,<sup>7</sup> and consolidated the Objection to Claim with the Adversary Proceeding for all purposes.

9. The Debtor filed its *Amended Plan of Reorganization for Kissimmee Condos Partnerships, LLC* (the "Plan"),<sup>8</sup> and on December 21, 2022, the Court entered the *Order (1) Approving Amended Disclosure Statement, (2) Confirming Amended Plan of Reorganization, as Modified, Submitted by Kissimmee Condos Partnership, LLC, (3) Setting Deadlines, and (4) Setting Hearing* (the "Confirmation Order").<sup>9</sup>

10. The Confirmation Order provides:

To expedite determination of the Sophtwood Allowed Secured Claim, the parties have agreed as follows: (a) any party in interest, with standing, who is taking a position on: (i) the executory nature of the purchase and sale agreement with Sophtwood (the "Purchase Contract"), (ii) the priority of any lien asserted by Sophtwood; and/or (iii) the entitlement to attorneys' fees and other consequential damages arising from the rejection of the Purchase Contract, shall file a memorandum in support of, or in opposition to, such issues by January 9, 2023 . . . . If the Court rules that the Purchase Contract was executory, the parties will then coordinate an evidentiary hearing on the contested factual issues implicit in (i) through (iii) herein. To the extent the Court allows Sophtwood a late, unsecured claim, or otherwise allows Sophtwood an unsecured claim for rejection damages, Sophtwood will be included in Class 4 and treated as a Class 4 Creditor. However, to the extent the Court finds that Sophtwood holds an equitable lien and determines that the equitable lien is superior to Classes 1 through 3, then Debtor, as adequate protection for the sale of the Finished Units to Bradham, grants Sophtwood a lien, subordinate only to the Exit Loan, on all of the real property other than the Finished Units to the extent of \$200,000 plus interest, from the Effective Date until paid, at twelve percent (12%).<sup>10</sup>

11. On January 9, 2023, Sophtwood filed the *Memorandum in Support of Sophtwood's Treatment as a Priority and Unsecured Creditor in the Debtor's Amended Chapter 11 Plan*.<sup>11</sup>

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<sup>7</sup> *Sophtwood, LLC v. Kissimmee Condos P'Ship*, Adv. No. 6:22-ap-00076-GER, Doc. No. 10.

<sup>8</sup> Doc. No. 227.

<sup>9</sup> Doc. No. 257.

<sup>10</sup> Doc. No. 257 at 3.

<sup>11</sup> Doc. No. 259.

12. On January 13, 2023, Mark Filburn (“Filburn”) filed the *Memorandum of Law Addressing the Issues Set Forth in the Court Order Dated December 21, 2022 as to the Sophtwood Claim*.<sup>12</sup>

13. Both Sophtwood and Filburn agree that the Purchase Contract is an executory contract.<sup>13</sup>

## **DISCUSSION**

### **I. The Purchase Contract is an Executory Contract, Capable of Rejection**

Pursuant to Section 365(a) of the Bankruptcy Code,<sup>14</sup> a trustee<sup>15</sup> may reject an executory contract of the debtor. The Bankruptcy Code does not define “executory contract.” A common starting point to analyze whether a contract is executory is to determine whether performance is due to some extent on both sides.<sup>16</sup>

There is no dispute that Sophtwood paid the full purchase price of \$200,000 and that the Debtor failed to deliver title. Therefore, the Debtor is the only party with any material obligation due under the Purchase Contract as of the Petition Date. So it would seem that the Purchase Contract is not an executory contract.<sup>17</sup> However, in *In re General Development Corp.*, the Eleventh Circuit adopted a district court’s opinion concluding that “[e]ven though there may be material obligations outstanding on the part of only one of the parties to the contract, it may nevertheless be deemed executory under the functional approach if its assumptional rejection

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<sup>12</sup> Doc. No. 265.

<sup>13</sup> See Doc. No. 259 at 9; Doc. No. 265 at 5.

<sup>14</sup> All references to the Bankruptcy Code refer to 11 U.S.C. § 101, *et. seq.*

<sup>15</sup> Pursuant to 11 U.S.C. § 1107, the debtor-in-possession has the powers of a chapter 11 trustee.

<sup>16</sup> See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984).

<sup>17</sup> See, e.g., *In re RLR Celestial Homes, Inc.*, 108 B.R. 36, 44 (Bankr. S.D.N.Y. 1989) (citing *Mitchell v. Streets (In re Streets & Beard Farm P’ship)*, 882 F.2d 233 (7th Cir. 1989)) (“Generally, the performance due on both sides must be significant. If the only remaining obligation on the part of a seller of real estate who holds legal title in trust for the purchaser is to deliver legal title upon the completion of the contract is not executory because the delivery of legal title is a mere formality.”).

would ultimately benefit the estate and its creditors.”<sup>18</sup> Therefore, Eleventh Circuit precedent recognizes the “functional approach” to analyze whether a contract is executory.<sup>19</sup> Under the functional approach, a Court can work backwards and examine whether the purpose of rejection can be accomplished.

As noted above, Sophtwood and Filburn agree that the Purchase Contract is an executory contract. The Court concludes that because there would be a benefit to the estate and its creditors to reject the Purchase Contract, the Purchase Contract is an executory contract. Further, while the Debtor did not file a motion seeking to approve the rejection of the Purchase Contract, based on the Debtor’s position regarding Sophtwood’s rights during the case, its failure to assume the Purchase Contract prior to confirmation, and Sophtwood’s treatment in the Plan,<sup>20</sup> the Debtor has rejected the Purchase Contract, which rejection is approved by the Court.

## **II. Sophtwood is Entitled to a Lien for the Purchase Price Pursuant to 11 U.S.C. § 365(j), Subordinate to Prior Liens**

Since the Purchase Contract relates to the purchase of real property from the Debtor, Sophtwood is entitled to a lien on the interest of the Debtor in the Property in the amount of the purchase price it paid.<sup>21</sup> Here, it is undisputed that Sophtwood paid the full purchase price of \$200,000. Therefore, based on the Debtor’s rejection of the Purchase Contract, Sophtwood is entitled to, and is awarded, a lien in the amount of \$200,000 on all of the Debtor’s real property other than the Finished Units (as defined in the Plan).

Since the rejection of an executory contract constitutes a breach of the contract immediately before the date of the filing of the petition,<sup>22</sup> Sophtwood’s lien is effective as of

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<sup>18</sup> *In re Gen. Dev. Corp.*, 84 F.3d at 1374 (quoting *Arrow Air v. Port Auth. of N.Y. & N.J. (In re Arrow Air, Inc.)*, 60 B.R. 117, 121-22 (Bankr. S.D. Fla. 1986)).

<sup>19</sup> *Id.* at 1375.

<sup>20</sup> See Article V of the Plan, Doc. No. 227 at 22.

<sup>21</sup> 11 U.S.C. § 365(j).

<sup>22</sup> 11 U.S.C. § 365(g).

immediately before the filing of the petition. As a result, Sophtwood's lien is inferior to the liens of Darren L. Bradham (Class 1), the Osceola County Tax Collector (Class 2), and Jordan Homes, LLC (Class 3). This is because the lien arising from Section 365(j) "does not alter the otherwise applicable priorities among secured creditors,"<sup>23</sup> whose liens are prior in time to Sophtwood. In addition, Sophtwood's lien is inferior to the Exit Loan in favor of Sunrise Bank, which loan is to be secured by a first priority mortgage lien on all of the Debtor's assets.<sup>24</sup> This result would be the same if the Court awarded Sophtwood an equitable lien because, under Florida law, equitable liens are subject to the rights of prior liens.<sup>25</sup>

### **III. Sophtwood is Entitled to a General Unsecured Claim for Other Damages**

The rejection of an executory contract constitutes a breach of the contract immediately before the date of the filing of the petition,<sup>26</sup> and any claim for damages resulting from the rejection is allowed as if the claim arose before the filing of the petition.<sup>27</sup> Since Sophtwood's lien under Section 365(j) is limited to the amount it paid towards the purchase price, the balance of Sophtwood's rejection claim will be allowed as a general unsecured claim. Sophtwood does not contest that any damages over and above the purchase price are afforded general unsecured status.<sup>28</sup>

Sophtwood requests a general unsecured rejection damage claim consisting of: (i) \$110,000, representing the difference between the purchase price paid by Sophtwood and the

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<sup>23</sup> *In re Ecoventure Wiggins Pass, Ltd.*, 419 B.R. 875, 882 (Bankr. M.D. Fla. 2009) (quoting *Aetna Bank v. Dvorak*, 176 B.R. 160, 163-64 (N.D. Ill. 1994)).

<sup>24</sup> See Article VII.C. of the Confirmation Order, Doc. No. 257 at 4.

<sup>25</sup> *White v. Weatherford (In re Abrass)*, 268 B.R. 665, 684 (Bankr. M.D. Fla. 2001) (string citing cases) ("The law is well settled in Florida that rights of valid lienholders, without notice, are superior to the rights of the holder of an equitable lien."). Sophtwood made general allegations "upon information and belief" that Bradham had notice of the Purchase Contract; however, those allegations were denied by the Debtor. See *Sophtwood, LLC v. Kissimmee Condos P'Ship*, Adv. No. 6:22-ap-00076-GER, Doc. Nos. 1, 8.

<sup>26</sup> 11 U.S.C. § 365(g).

<sup>27</sup> 11 U.S.C. § 502(g).

<sup>28</sup> Doc. No. 259 at 11-12.

amount paid by Bradham for the Property,<sup>29</sup> (ii) \$2,300 per month for twelve months (i.e., \$27,600) representing lease payments that Bradham is allegedly receiving from the Property, and (iii) attorneys' fees and costs.

“Under Florida law, damages for breach of contract must place the non-breaching party in the same financial position as he would have occupied had the contract been performed.”<sup>30</sup> The Court finds it is appropriate to award attorneys' fees and costs as part of Sophtwood's rejection damage claim. However, the Court would like the parties to provide additional briefing on whether the other damages requested by Sophtwood are appropriate under Florida law.

Based on the foregoing, the Court **ORDERS**:

1. The Purchase Contract is an executory contract within the meaning of 11 U.S.C. § 365.
2. Sophtwood is entitled to a lien on all of the Debtor's real property other than the Finished Units (as defined in the Plan) in the amount of \$200,000 in accordance with 11 U.S.C. § 365(j), with such lien effective as of immediately before the Petition Date, and subordinate to the liens held by Darren L. Bradham (Class 1), the Osceola County Tax Collector (Class 2), Jordan Homes, LLC (Class 3), and Sunrise Bank.
3. Sophtwood is awarded reasonable attorneys' fees and costs as part of its rejection damage claim in accordance with 11 U.S.C. § 502(g), with the amounts to be determined by the Court.

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<sup>29</sup> Under the Plan, the Property was sold to Bradham for an amount equal to \$310,000 through a reduction in Bradham's allowed secured claim.

<sup>30</sup> *In re Waldron*, 36 B.R. 633, 642 (Bankr. S.D. Fla. 1984) (quoting *Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714 (Fla. 3d DCA 1972)).

4. Sophtwood shall file a supplemental memorandum of law on its entitlement to consequential damages no later than **February 15, 2023**. Such supplemental memorandum shall not exceed 10 pages in length.

5. The Debtor, Bradham, and Filburn may file a response memorandum regarding Sophtwood's request for consequential damages no later than **14 days** from the date Sophtwood files its supplemental memorandum. Such response memorandum shall not exceed 10 pages in length.

6. The Court will conduct a hearing to consider argument on Sophtwood's entitlement to the other damages it requests on **March 7, 2023 at 10:00 a.m.** at the United States Bankruptcy Court, Sixth Floor, Courtroom D, 400 West Washington Street, Orlando, Florida 32801. At this hearing, the Court will also schedule an evidentiary hearing, if necessary, to fix the amount of the rejection damages awarded to Sophtwood.

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Carmen Contreras-Martinez is directed to serve a copy of this order on interested parties who are non-CM/ECF users and file a proof of service within three days of its entry.