United States Bankruptcy Court
Western District of Wisconsin

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In re Thomas S. DeVries and Joan L. DeVries, Debtors
Bankruptcy Case No. 89-01870-7

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

July 22, 1991

Galen W. Pittman, for the debtors.
Christa A. Reisterer, for the United States, Agricultural Stabilization and Conservation Service, Commodity Credit Corporation.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

This matter comes before the Court on the debtors' motion to reopen their bankruptcy case. The debtors are Thomas S. and Joan L. DeVries and they are represented by Galen W. Pittman. The United States, Agricultural Stabilization and Conservation Service, Commodity Credit Corporation (hereinafter ASCS/CCC), has filed an objection to the debtors' motion. The ASCS/CCC is represented by Christa A. Reisterer.

The debtors seek to reopen their bankruptcy to enforce a Conservation Reserve Program (hereinafter CRP) contract that they allege was "arbitrarily and capriciously terminated against the debtor by reasons of the Chapter 7 Bankruptcy filing." Debtors' Application to Reopen Case at 1. Specifically, the debtors allege that the ASCS/CCC's termination of their CRP contract constitutes discriminatory treatment under § 525 of the Bankruptcy Code.

The debtors had two CRP contracts with the ASCS/CCC; contract #527 was approved on May 3, 1988, and contract #770 was approved on September 8, 1989. The debtors filed bankruptcy on July 28, 1989, and included the CRP payments on their list of assets and claimed an exemption on them. The trustee, Randi L. Osberg, filed a no-asset report with this Court on September 5, 1989. On October 30, 1989, the Trempealeau County ASCS Committee informed the debtors that, pursuant to § 365 of the Bankruptcy Code, contract #527 was cancelled. Since contract #770 was approved post-petition, it remained in effect.

Section 365(d)(1), the relevant provision here, provides that unless the trustee assumes or rejects an executory contract of the debtor within 60 days after the order for relief, then such contract is deemed rejected. See 11 U.S.C. § 365(d)(1) (West 1991). The county committee informed the debtors that, since more than 60 days had passed since their order for relief and the trustee had neither assumed nor rejected the CRP contract, it was deemed rejected. The trustee had declined to assume the

contract because the debtors had claimed the CRP payments under it as exempt and the estate therefore had no interest in those payments. After receiving notice of the cancellation of contract #527, the debtors, through their attorney, attempted to have the trustee assume that contract and assign it over to them. The debtors accordingly filed a motion to reopen the case on December 18, 1989. This motion proved to be unnecessary, however, since the case had not yet been closed. The trustee ultimately objected to the proposed arrangement, apparently because of his potential liability.

The debtors then appealed the decision cancelling contract #527 to the county and state ASCS committees and ultimately to the National Deputy Administrator of the ASCS. On November 2, 1990, the Deputy Administrator upheld the state committee's termination decision. The debtors now seek recourse before this Court.

Turning to the motion to reopen currently before the Court, 11 U.S.C. § 350(b), the provision providing for reopening, states:

> (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

Since the debtors are seeking to recover approximately $16,300 in CRP payments allegedly due them, their motion is based on the language "to accord relief to the debtor" of § 350(b). As noted, the debtors allege discrimination pursuant to 11 U.S.C. § 525(a). That section provides in relevant part:

> (a) [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

11 U.S.C. § 525(a) (West 1991).

As an initial proposition, the ASCS/CCC asserts that § 525(a) does not apply to CRP contracts. It cites Elter v. Great Lakes Higher Education Corp. (In re Elter), 95 B.R. 618 (Bankr. E.D. Wis. 1989) in support of this assertion. In In re Elter, the court held that guaranteed student loans are not government "grants" within the meaning of 11 U.S.C. § 525(a). 95 B.R. at 622. In so holding the Elter court stated:

> Even with a broad construction, the court cannot, by liberal interpretation, expand the scope of a statute beyond the words contained in it [citations omitted]. These decisions, and the court's decision in this case, are consistent with the principle of ejusdem generis, which is that a general term following a specific list can apply only to things similar to the list [citations omitted]. The specific list in 11 U.S.C. § 525(a) refers to privileges of citizens to exercise their livelihood, such as obtaining building permits, state contracts or liquor licenses, or to the exercise of personal freedom, such as driving a car [citations omitted]. These rights preserve the debtor's fresh start; but the

mandatory granting of a student loan after discharge would give the debtor a running start, well ahead of those who had never declared bankruptcy.

95 B.R. at 622.

This Court finds the ASCS/CCC's arguments and its reliance on In re Elter unconvincing. Elter involved an extension of credit (a student loan), while the present case involves a government contract under the Conservation Reserve Program. Such contracts are today very much a part of the exercise of the livelihood of farming. As such they are analogous to the examples of "building permits, state contracts, or liquor licenses" contained in the language from In re Elter cited above. A CRP contract could in fact be considered a "state contract" in a broad sense of that expression. See Debtors' Reply Memorandum of Law in Support of Application to Reopen Case at 3.

The legislative history to § 525, moreover, explicitly states that the enumeration of various forms of discrimination is not exhaustive. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 367 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978). See generally 3 Collier on Bankruptcy para. 525.02 at pp. 525-4, 525-5. The language in the legislative history indicates that § 525(a) is to be broadly construed. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 367 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 81 (1978).

In addition, several courts have implicitly held that ASCS/CCC programs or CRP contracts are within the parameters of § 525(a). See In re Lech, 80 B.R. 1001 (Bankr. D. Neb. 1987); Kotter v. U.S. Dep't of Agriculture (In re Kotter), 58 B.R. 118 (Bankr. C.D. Ill. 1986).

By holding that § 525(a) is potentially applicable to CRP contracts like the one at issue here, moreover, the Court is not "mandating" the acceptance of the debtors into the CRP program; nor is it granting the debtors a "running start" as compared to a "fresh start." See In re Elter, 95 B.R. 618, 622 (Bankr. E.D. Wis. 1989). This Court is merely declining to deny the debtors' motion on the threshold issue of whether the anti-discrimination provision of § 525(a) can apply to the denial of a CRP contract. Whether discrimination pursuant to § 525(a) actually occurred remains to be established.

On the basis of the aforementioned legislative history and judicial precedent, the Court holds that § 525(a) can apply to the denial of a CRP contract by the ASCS/CCC.

As its second argument in opposition to the motion to reopen, the ASCS/CCC asserts that the debtors' memorandum "[i]n no way supports a showing that a governmental unit discriminated against them `solely' on the basis of the bankruptcy." ASCS/CCC's Memorandum in Opposition to Application to Reopen Bankruptcy at 1 (emphasis added). § 525(a) explicitly requires that the discrimination be "solely because such bankrupt or debtor is or has been a debtor under this title . . . ." 11 U.S.C. §525(a) (West 1991) (emphasis added).

In response, the debtors assert that "[t]he CRP contracts are not executory in nature as the ASCS committee claims, thus, the contract termination was discriminatory." Debtors' Memorandum of Law in Support of Application to Reopen Case at 5. The debtors cite In re Lundell Farms, 86 B.R. 582 (Bankr. W.D. Wis. 1988) for the proposition that CRP contracts are not executory. By alleging that the contract was not executory, the debtors assert that it therefore could not be rejected pursuant

to § 365(d)(1), since that provision only applies to executory contracts. In raising § 365 as a defense to the debtors' discrimination claim, on the other hand, the ASCS/CCC implicitly asserts that the cancelled CRP contract was indeed executory.

In support of the assertion that the cancellation was because of their bankruptcy, the debtors introduced at the hearing various internal ASCS/CCC documents concerning the CRP contract at issue. Several of these documents contain handwritten notations such as "CRP-1 Terminated Due to Bankruptcy" or "Cancelled Due to Bankruptcy." See, e.g., Debtors' Exhibits 11, 12, and 13. The debtors contend this evidence is sufficient to establish a colorable claim under 11 U.S.C. § 525(a) and thus warrant a reopening of their bankruptcy case.

The Court has considered the arguments of the parties, the evidence presented at the hearing, and the admitted exhibits and concludes that the debtors' § 525(a) claim must fail.

First, the Court is not persuaded by the facially direct language contained in the cited ASCS/CCC documents that the contract was terminated "due to bankruptcy." Other documents submitted by the debtors reveal that the ASCS/CCC terminated the CRP contract on the advice of its Office of General Counsel. See Debtors' Exhibit #20 (various internal memoranda of ASCS/CCC). James Hannula and Kathy Lee of the Trempealeau County ASCS office testified at the hearing that the ASCS/CCC based its termination of the CRP contract on its belief that the contract was executory, it was not assumed by the trustee within 60 days of the order for relief, and it therefore was rejected and terminated pursuant to 11 U.S.C. § 365(d)(1). Various internal memoranda of the ASCS/CCC introduced as evidence supported this testimony. See Debtors' Exhibit #20.

Second, there exists a great amount of confusion among the courts and commentators about the operation of 11 U.S.C. § 365 and the consequences of a rejection under that provision. See generally Andrew, Executory Contracts in Bankruptcy: Understanding "Rejection", 59 Colo. L. Rev. 845 (1988); Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439 (1973); Countryman, Executory Contracts in Bankruptcy: Part II, 58 Minn L. Rev. 479 (1974). Given this confusion, and after examining the language of § 365(d)(1), the Court finds the position taken by the ASCS/CCC not unreasonable. The ASCS/CCC was in effect acting under color of federal law -- namely its interpretation of § 365(d)(1) of the Bankruptcy Code. Given this fact, the debtors' allegation that they were discriminated against solely because of their bankruptcy must fail. The mere fact that the ASCS/CCC was acting at least in part under color of federal law in the Bankruptcy Code precludes a finding that it discriminated against the debtors solely because of their bankruptcy.

Third, in their Complaint to Reinstate CRP Contract, the debtors seem to allege that because the ASCS/CCC's action pursuant to § 365 was made possible by their filing bankruptcy (thus bringing all the provisions of the Bankruptcy Code, including § 365, into play), that action (the termination of the CRP contract) was done solely because of the Chapter 7 Bankruptcy. See Debtors' Complaint to Reinstate CRP Contract at 2. If this is what the debtors are indeed asserting, then they are in error. Under that reasoning, any action taken pursuant to any provision of the Bankruptcy Code could be found to have been done "solely because of the bankruptcy" filing, since filing is a prerequisite to the applicability of the Bankruptcy Code provisions. Filing a bankruptcy petition brings significant procedural and substantive safeguards into being for both debtors and creditors. It would be anomalous for this Court to effectively penalize a creditor for acting under a reasonable interpretation of one of

those safeguards (§ 365) on the basis of a provision requiring a finding of discrimination solely because of a bankruptcy filing.

Fourth, the debtors' reliance on In re Lundell Farms is not convincing here. Although the court in that case did find the CRP contracts at issue were not executory, that case did not involve §§ 365 or 525. First, the Lundell Farms court's finding of executory status was for purposes of establishing a "mutual debt" pursuant to 11 U.S.C. § 553 -- the setoff provision. See In re Lundell Farms, 86 B.R. 582, 584-88 (Bankr. W.D. Wis. 1988). Second, Lundell Farms held that the CRP contract at issue there was not executory only in regard to the payment due the debtor from the government for one year. See Lundell Farms, 86 B.R. at 588 ("Thus, neither the price support nor the CRP contracts were executory, at least insofar as they provided the right to receive the payments which CCC seeks to set off." (emphasis added)). The court in that case was able to single out an individual payment under the CRP contract and examine its executory status because it was only that payment that the government sought to set off. Third, the validity of the CRP contract involved in Lundell Farms was not at issue; the Chapter 11 debtor had apparently assumed the contract.

In the present case, however, the validity of the entire CRP contract is at issue. Since setoff of a single payment under the contract is not involved here, this Court cannot separately consider the two individual annual payments the debtors seek to recover. Thus, Lundell Farms is factually distinguishable. Other cases considering CRP payments for setoff purposes, furthermore, have found CRP contracts to be executory. See, e.g., United States of America, Small Business Administration v. J. W. Gore (In re Gore), 124 B.R. 75, 77-78 (Bankr. E.D. Ark. 1990); In re Ratliff, 79 B.R. 930, 933 (Bankr. D. Colo. 1987).

As to the issue of executory status, this Court believes that when rejection of a contract pursuant to § 365(d)(1) is at issue, executoriness is of secondary importance. See Andrew, Executory Contracts in Bankruptcy: Understanding "Rejection", 59 Colo. L. Rev. 845, 887-90 (1988). Nevertheless, this Court does find the CRP contract at issue here to be "executory" for purposes of 11 U.S.C. § 365(d)(1). "For a contract to be executory, material performance must remain due on both sides, and the contract is no longer executory if performance on one side is completed." In re Gore, 124 B.R. 75, 77 (Bankr. E.D. Ark. 1990) citing with approval 2 Collier on Bankruptcy para. 365.02 (15th ed. 1990). The debtors argue here that "[t]he only substantial performance left was payment [by the government to the debtors]." Debtors' Memorandum of Law at 6. This argument fails, however, because the debtors are only focusing on one year's payment under a ten-year contract. As noted, the rejection of the entire CRP contract is at issue here and the Court cannot create ten one-year contracts out of one ten-year contract. When the CRP contract is examined in its entirety, it is clearly executory -- since material performance remains due on both sides. The debtors are obligated to implement a conservation plan by withholding the set-aside acreage from production and providing a vegetative cover to control erosion. See In re Gore, 124 B.R. at 77, citing 7 C.F.R. § 704.12(a)(2)-(8) (l990); In re Lundell Farms, 86 B.R. 582, 584 (Bankr. W.D. Wis. 1988) ("The farmer is barred from harvesting any crops from the land or utilizing it for grazing purposes [and] must plant cover and eradicate noxious weeds."). In addition, the debtors are required to report annually as to their compliance with the acreage, land use, production, and other program requirements. See In re Gore, 124 B.R. at 7, citing 7 C.F.R. § 718.6(a) (1990). The regulations further provide that if the debtors default on their obligations, they forfeit all rights to further CRP payments and must refund those already received. See In re Gore, 124 B.R. at 77, citing 7 C.F.R. § 704.22(a)(1)-(2)

(1990). As indicated, all of these obligations are to be adhered to for a period of ten years. (The contract at issue here was in its second year at the time of debtors' filing.) The government for its part is obligated to monitor compliance with the program and make the annual payments. Thus the CRP contract at issue here is clearly "executory" for purposes of 11 U.S.C. § 365.

As an executory contract, it had to be assumed or rejected within 60 days of the order for relief or it would be deemed rejected. See 11 U.S.C. § 365(d)(1) (West 1991). The evidence revealed that the trustee did not assume the CRP contract within 60 days of July 28, 1989, and it was therefore rejected. Although the debtors undertook efforts to have the trustee assume the contract and then assign it over to them, apparently with the support of the ASCS office (See Debtors' Statement of the Case at 1), there is no evidence to indicate that these efforts occurred within the statutory sixty-day period. In addition, the trustee ultimately rejected this arrangement. The debtors were thus frustrated in their efforts to keep the contract alive, since the power to assume or reject an executory contract in a Chapter 7 case is solely the trustee's, not the debtors'. See In re Miller, 103 B.R. 353, 354 (Bankr D.D.C. 1989); Carrico v. Tompkins, 95 B.R. 722, 724 (Bankr. 9th Cir. 1989). Having been frustrated in their efforts, the debtors then began their lengthy appeal process through the various levels of the ASCS/CCC. These efforts ended with the denial of their appeal at the national level in November of 1990.

What happened to the debtors in this case is most unfortunate, but the Court can find no statutory remedy to alleviate their loss. The statutory breach of the debtors of 11 U.S.C. § 365(g)(1) is unavoidable. The operation of § 365 of the Bankruptcy Code in this case served to effectively deny the debtors an exemption to which they otherwise would have been entitled. The trustee did not assume the contract because it did not benefit the estate -- since the debtors claimed the CRP payments as exempt. The government, even though it at one point supported the debtors' efforts to keep the contract alive, felt compelled by the terms of 11 U.S.C. § 365 to treat it as rejected and thus terminated. The Court notes as an aside here that a contract rejected pursuant to 11 U.S.C. § 365 is not necessarily extinguished. Persuasive authority exists for the proposition that such a contract remains in effect between the debtor and the other party; the effect of "rejection" is merely that the bankruptcy estate chooses not to become a party to it. See, e.g., In re Miller, 103 B.R. 353, 354 (Bankr. D.D.C. 1989); Blue Barn Associates v. Picnic 'n Chicken, Inc. (In re Picnic 'n Chicken, Inc.), 58 B.R. 523, 525-26 (Bankr. S.D. Cal. 1986); Andrew, Executory Contracts in Bankruptcy: Understanding "Rejection", 59 Colo L. Rev. 845 passim (1988).

This point does not salvage the debtors' case however, since the CRP contract was indeed executory, the sixty-day period of § 365(d)(1) ran without the contract being assumed, and the statutory breach by the debtors of § 365(g)(1) thus took effect. Given the debtors' "breach," the contract's terms allowed the government to terminate it. The harsh result of this case could possibly be avoided in the future if the trustee abandons the asset and the debtor(s) then moves the court within 60 days of the order for relief for permission to assume the contract. If all parties assent, this could arguably help other debtors facing a similar dilemma. Whether this procedure would ultimately survive judicial scrutiny is another issue and one not currently before this Court.

On the basis of the aforementioned arguments, the testimony presented by the parties at the hearing, and the documents admitted as evidence in this matter, the Court holds that the debtors have not established a colorable claim under § 525 of the Bankruptcy Code sufficient to warrant reopening of the case on that basis.

Accordingly, the debtors' motion to reopen based on 11 U.S.C. § 525 is denied.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.