

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

RONNIE ROBINSON,

Case Number 99-10190

Debtor.

Chapter 13

**MEMORANDUM OPINION AND ORDER RE
MOTION TO LIFT AUTOMATIC STAY FILED BY GRAHAM BALCH**

The Court conducted a hearing on Graham Balch's Motion to Lift the Automatic Stay on March 4, 1999. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The facts in this case are undisputed. On May 15, 1998, the debtor, Ronnie Robinson, ("Robinson"), entered into a Lands Sales Contract with the movant, Graham Balch, ("Balch") for the purchase of a mobile home and lot in Hardin County, Tennessee. The contract called for fifty-nine (59) monthly payments in the amount of \$135.28 to begin on July 1, 1998. According to the terms of the contract, the payments were due on the first of each month. The contract also required Robinson to pay the real estate taxes on the property and to obtain property insurance for the land.

Paragraph six of the contract contained the following provision:

DEFAULT. Default shall constitute the Purchaser's failure to make said payment by the 1st of each month, the time of said payments being of the essence. Default may further constitute the Purchaser's breach of any of the covenants herein and, then the Seller shall, at his election, be discharged from all further obligations hereunder, time being of the essence of this agreement; and in case of such default the Purchaser hereby agrees upon demand by Seller quietly and peacefully to surrender to the Seller possession of the premises and every part thereof, . . .

By letter dated December 12, 1998, Balch notified Robinson that he was terminating the contract based on Robinson's failure to make the December payment on the land and the fact that Robinson's prior payments had not been made in a timely matter. The letter requested that Robinson vacate the property no later than January 12, 1999. On December 30, 1998, Balch's attorney sent Robinson a letter informing him that Balch had elected to terminate the contract and demanding Robinson vacate the

property in accordance with Balch's December 12th letter.

On January 19, 1999, Robinson filed the instant chapter 13 case. On Schedule D of his petition, Robinson listed Balch as a secured creditor with a claim of \$13,754.58. In his proposed chapter 13 plan, Robinson included Balch as a home mortgage creditor and proposed to pay him \$148.00/month.¹ Displeased with this treatment, Balch filed a motion to lift the automatic stay on February 8, 1999, in which Balch requested the court to find that the contract had been properly terminated pre-petition. The debtor contends that the land sales contract is an executory contract which may be assumed under § 365 of the Bankruptcy Code.

II. CONCLUSIONS OF LAW

The Bankruptcy Code does not define the term "executory contract." The legislative history states that the term "generally includes contracts on which performance remains due to some extent on both sides." S. Rep.No. 989, 95th Cong., 2d Sess. 58, reprinted in 1978 U.S.C.C.A.N. 5787, 5844. Based on this legislative history, the majority of courts faced with determining what qualifies as an executory contract has adopted the "Countryman Test." Professor Countryman defined an executory contract as:

a contract under which the obligation 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.

Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973).

Courts have held that a contract is no longer executory if it has either been validly terminated pre-petition or breached by the debtor pre-petition. *In re C & S Grain Co., Inc.*, 47 F.3d 233, 237 (7th Cir. 1995); *See also, In re Murtishi*, 55 B.R. 564, 567 (N.D.Ill. 1985) ("when the debtor has not only failed to perform but has breached the contract pre-petition with the result that the other party has no further duty to perform, . . . the contract is no longer executory for purposes of section 365"); *In re Jones*, 118 B.R. 395, 397 (Bankr. D.S.C. 1989) ("An executory contract or lease validly terminated prior to the institution of bankruptcy proceedings is not resurrected by the filing of the petition in bankruptcy.").

In the case at bar, Balch validly terminated the land sales contract with Robinson with his letter of December 12, 1998. Such letter requested Robinson to vacate the premises no later than January 12, 1998. Robinson was again informed of this termination when Balch's attorney sent his letter of

¹The plan proposed to pay \$136.00/month towards the on-going payment and \$12.00/month towards the arrearage.

December 30, 1998. The instant chapter 13 case was not filed until January 19, 1999—some thirty-seven days after Balch terminated the contract. As a result, the Court finds that the land sales contract at issue was validly terminated pre-petition and cannot be assumed as an executory contract under § 365. The Court further finds that due to the pre-petition termination, the land sales contract is not property of the estate. As a result, the automatic stay offers the debtor no protection with regard to the Hardin County property. Balch may proceed with any state court remedies he deems necessary with regard to the property.

III. ORDER

It is therefore **ORDERED** that the Motion to Lift Stay Filed by Graham Balch is **DENIED**.
IT IS SO ORDERED.

By the Court,

G. HARVEY BOSWELL
United States Bankruptcy Court

Date: April 1, 1999