

FEB 06 1995

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA J. BARON GROSHON
BY:
Deputy Clerk

In Re:

ROBERT JOSEPH BOUCHARD

Debtor.

) Case No. 94-10457
) Chapter 13
)
)
)

JUDGEMENT ENTERED ON FEB 06 1995.

ORDER

THIS MATTER is before the court on General Motors Acceptance Corporation's objection to the confirmation of the debtor's proposed Chapter 13 plan for the reason that the plan fails to satisfy §1325 and §365 of the Bankruptcy Code with regard to an installment sale contract for the purchase of a truck. For the reasons stated below, the court has concluded that the installment sale contract between the parties is not an executory contract subject to treatment under §365 of the Bankruptcy Code, and that the objection to the confirmation of the debtor's proposed plan should be denied.

The debtor entered into a contract with General Motors Acceptance Corporation (hereinafter referred to as GMAC) for the purchase of a 1994 Chevrolet pickup truck. The contract is labeled "RETAIL INSTALLMENT SALE CONTRACT, GMAC FLEXIBLE FINANCE PLAN" and includes an attached rider labeled "GMAC SMARTBUY RIDER".

The sale contract provides that:

You, the Buyer. . .may buy the vehicle. . .for cash or on credit. By signing this contract, you agree to buy the vehicle on credit under the agreements on the front and back of [the] contract. You agree to pay the Creditor the Amount Financed and Finance Charge according to the payment schedule. . . .

The contract grants the creditor a security interest in the truck and provides for repossession in the event that the buyer defaults.

GMAC contends that the "SMARTBUY RIDER" attached to the sale contract makes the contract executory. The "SMARTBUY" rider, also labeled "GMAC Flexible Finance Plan", provides the buyer with several "last payment options." The rider provides:

An instalment of \$8667.50 will be due on 1/2/97, if you make every payment on the date it is due and the Annual Percentage Rate does not change. . . . You may meet your obligation to pay the payment due at the end of the Contract term by choosing one of the following options:

1. You may pay the payment due at the end of the Contract term on its due date; or
2. You may, if you have met each of the conditions in the paragraph. . .entitled "Your Option to Sell":
 - a. sell the vehicle to the Creditor and have the Sale Price applied to the payment due at the end of the Contract term; and,
 - b. pay the Creditor any excess of the payment due at the end of the Contract term over the Sale Price; or
3. You may enter into a new written agreement with the Creditor to refinance the payment.

The contract provides that the buyer can exercise the option to sell only if he complies with all of the conditions delineated in the rider. To have an option to sell the vehicle to the creditor the buyer must first:

1. have given the Creditor at least 30 days advance written notice. . .and . . .drive the vehicle . . .to a specified place so that the Creditor may make a preliminary appraisal of the vehicle's condition;

2. have not broken any of [the] agreements under the Contract, including [the] agreement to keep the vehicle free from all liens and encumbrances other than the Creditor's lien;

3. have paid the Creditor all amounts owing under the Contract except for the amount of the payment due at the end of the Contract term;

4. deliver the vehicle to the Creditor on the due date. . . at a place designated;

5. pay the Creditor on the due date the last scheduled payment any excess of the payment due at the end of the Contract term over the Sale Price;

6. have serviced the vehicle as described in the Owner's Manual and in the Maintenance Schedule folder. . . ;
and

7. have not altered the vehicle without obtaining the prior written permission of the Creditor.

As to a buyer's option to refinance the vehicle, the rider provides that the buyer may:

enter into a new written agreement to refinance the payment due at the end of the Contract term. The monthly payments under the new agreement will be no greater than the average of [the] regular monthly payments under the Contract. . . The Annual Percentage Rate for the new agreement may be different from the rate in effect under this Contract at the time of refinancing.

GMAC contends that the buyer's options enumerated in the rider constitute remaining performance obligations that make the contract executory.

The law is clear that a contract is executory if there are performance obligations remaining on both sides. Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F.2d. 1043, 1045 (4th Cir. 1985), cert. denied, 106 S. Ct. 1285 (1986). The Fourth Circuit has adopted Professor Countryman's more

specific test under which a contract is executory if the "obligations of both the debtor and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other". Id.; Gloria Manufacturing Corp. v. International Ladies' Garment Workers' Union, 734 F.2d 1020, 1022 (4th Cir.1984) (quoting Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn.L.Rev. 439, 460 (1973)).

Applying the test here, the court finds the above arrangement is not an executory contract. Regardless of GMAC's contention that they have a duty to either repurchase the truck from the debtor or refinance the remaining balance owed, the entire transaction corresponds with the situation found in a typical secured sale agreement. The debtor has purchased the vehicle from the creditor on an installment sales basis, title has passed to the debtor, and GMAC has retained a security interest in the truck. Both of the parties have substantially completed their obligations, and all that GMAC is left with is a security interest. The debtor is obligated to pay the creditor, but the remaining obligation of one party to pay another does not make a contract executory. Lubrizol, 756 F.2d. at 1046; In re Smith Jones, Inc., 26 B.R 289, 292 (Bankr.S.D.N.Y. 1982).

Should the debtor fail to pay the final balloon payment due on the installment contract, he has several options that are outlined for him in the rider. What the parties have is a contract for the sale of a vehicle and a rider that gives the


parties the framework for a possible future agreement at the end of the contract term. The attachment of the SMARTBUY rider does not change the character of the original contract between the parties.

In addition, the court finds that the future performance obligations of the creditor are left unstated and are so unclear so as to be largely speculative or illusory. While GMAC claims that they must do one of the things enumerated in the rider, neither the contract nor the rider make any specific mention of the creditor's performance obligations should a buyer fully comply with the seven conditions that give rise to a his ability to sell or refinance the vehicle. Thus, the rider is essentially only a committment to negotiate in the future. As such, it is not sufficient to change the character fo the base contract.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is therefore ORDERED, ADJUDGED and DECREED that:

GMAC's objection to the confirmation of the debtor's plan is denied.

This the 3rd day of February, 1995.



GEORGE R. HODGES
Chief Bankruptcy Judge Presiding