



**IT IS ORDERED as set forth below:**

**Date: August 30, 2011**

A handwritten signature in black ink, reading "Paul W. Bonapfel", is written over a horizontal line.

**Paul W. Bonapfel  
U.S. Bankruptcy Court Judge**

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ROME DIVISION**

<b>IN RE:</b>	:	
<b>DRY CREEK FARMS, LLC,</b>	:	<b>Case No. 09-43118-pwb</b>
	:	
<b>Debtor.</b>	:	<b>Chapter 11</b>
	:	

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**ORDER ON MOTION TO SET TIME FOR ASSUMPTION  
OR REJECTION OF EXECUTORY CONTRACT**

**AND**

**NOTICE OF STATUS CONFERENCE**

In November 2005, the debtor in this Chapter 11 case, Dry Creek Farms, LLC ("Dry Creek"), agreed to purchase a chicken farm in Polk County, Georgia from Eddie and Angela Kitchens (the "Kitchenses") pursuant to an Installment Sale Contract.<sup>1</sup> The contract provided

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<sup>1</sup>A copy of the Installment Sale Contract is attached to the Amended Motion to Set Specified Period of Time In Which the Trustee Must Assume or Reject an Executory Contract. [189].

for a purchase price of \$ 1.5 million, payable in two installments totaling \$200,000 in 2005 and ten annual installments thereafter, beginning on December 1, 2006 and ending on December 1, 2017. Dry Creek took possession upon execution of the contract, but was not entitled to a warranty deed from the Kitchenses until the completion of the installment payments.<sup>2</sup>

Since Dry Creek filed this Chapter 11 case on August 3, 2009, the payments due for 2009 and 2010 have not been paid, although the Kitchenses have received some payments during the course of the case from the operation of the chicken farm. The chicken farm may have a value significantly greater than the remaining payments due under the contract.

In December 2010, the court approved the appointment of a Chapter 11 Trustee (the “Trustee”). [145]. Thereafter, the Kitchenses filed a motion requesting the court to set a time within which the Trustee must assume or reject the Installment Sale Contract, as an executory contract, under 11 U.S.C. § 365(d)(2). [188, 189]. The Trustee asserts that the Installment Sale Contract is a security instrument under which the Kitchenses retain legal title to secure payment of a debt. As such, the Trustee concludes, it is not an executory contract that is subject to the provisions of 11 U.S.C. § 365.

At a hearing held on May 11, 2011, the Trustee and the Kitchenses agreed for the Court to determine the applicability of § 365 on the basis of the undisputed material facts with regard to this issue that are in the record.

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<sup>2</sup>Dry Creek also had the option of paying off existing encumbrances and deducting the amounts paid from the purchase price. Upon payment of all encumbrances, Dry Creek could obtain a warranty deed from the Kitchenses and would execute a promissory note in favor of the Kitchenses, secured by the property, for the balance due, with the same payment terms.

Having carefully considered the positions of the parties,<sup>3</sup> the Court denies the Kitchenses' motion for reasons set forth below. The Court will, however, set a status conference in this case pursuant to 11 U.S.C. § 105(d) to consider: a schedule for the filing and prosecution of a plan; the manner in which the Trustee proposes to deal with the Kitchenses' rights under the Installment Sale Contract, either through a plan involving continued operation of the chicken farm or through its sale; and any other matters concerning this case that any party in interest desires to bring to the attention of the Court.

The question of whether a contract is executory for purposes of the Bankruptcy Code is a question of federal bankruptcy law, but Georgia law governs the contractual and property rights of the parties. *See, e.g., Terrell v. Albaugh (In re Terrell)*, 892 F.2d 469, 471-472 (6<sup>th</sup> Cir. 1989); *In re Streets and Beard Farm Partnership*, 882 F.2d 233, 235 (7<sup>th</sup> Cir. 1989). Georgia law also applies to the rights and remedies of the parties upon the Debtor's breach of the contract, which under 11 U.S.C. § 365(g) is the consequence if the Installment Sale Contract is executory and the Trustee does not or cannot assume it and, therefore, it is rejected.

Because the Bankruptcy Code does not define executory contract, many courts have looked to Professor Vern Countryman's seminal discussion of the issue in a 1973 law review article.<sup>4</sup> Under the so-called "Countryman definition," an executory contract is a contract under which the obligation of both the debtor 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

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<sup>3</sup>Brief in Support of Trustee's Opposition to Motion [194]; Response to Trustee's Opposition to Motion [195].

<sup>4</sup>Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973).

the performance of the other. *See, e.g., Unsecured Creditors Comm. v. Southmark Corp. (In re Robert Helms Construction and Development Co.)*, 139 F.3d 702, 705 (9th Cir. 1998); *Terrell v. Albaugh (In re Terrell)*, 892 F.2d 469 (6th Cir. 1989); *In re Streets & Beard Farm Partnership*, 882 F.2d 233, 235 (7th Cir. 1989); *Knutson v. Klinger (In re Knutson)*, 563 F.2d 916 (8th Cir. 1977).

Courts have disagreed as to whether, under the Countryman approach, an installment sale contract such as the one at issue here is executory. One view is that a seller's obligation to convey title upon the completion of payments is "a mere formality and does not represent the kind of significant legal obligation that would render the contract executory. . . ." *E.g., Streets & Beard*, 882 F.2d at 235. The opposite view is that an installment sale contract is executory because the seller's obligation to convey title upon the completion of payments is a material obligation. *E.g., Terrell*, 892 F.2d at 472.

The Eleventh Circuit, however, takes a different approach to determination of whether a contract is executory that makes it unnecessary to choose between these two views. In *Sipes v. Atlantic Gulf Communities Corp. (In re General Dev. Corp.)*, 84 F.3d 1364 (11th Cir. 1996), the court adopted a "functional approach" under which "the question of whether a contract is executory is determined by the benefits that assumption or rejection would produce for the estate." *Id.* at 1375.

Under the somewhat result-oriented functional approach, it appears that the Installment Sale Contract would not be treated as executory because the estate cannot benefit from

assumption or rejection.<sup>5</sup>

But as the discussion below makes clear, it is unnecessary to decide this question, either. Whether the contract is executory, and if so, whether it is assumed or rejected, makes no difference in view of the rights and remedies that the parties have with regard to the Installment Sale Contract under Georgia law. Even if the Installment Sale Contract is executory and the Trustee does not assume it, the estate will have an interest in the property, and the Kitchenses will have a claim with which a chapter 11 plan may deal.

Under Georgia law, a seller of real property under an installment land sale contract has three options upon the purchaser's breach of its obligations: (1) sue on the contract for damages and subject the land to levy and sale to collect the judgment; (2) rescind the contract and bring an action for ejectment; or (3) if the property is vacant, re-enter and take possession. *E.g.*, *Watkins v. Maddox Med. Assocs.*, 270 Ga. 404, 405, 509 S.E.2d 614 (1998); *Douglas v. Vourtsanis*, 203 Ga. 64, 65, 45 S.E. 2d 203 (1947); *Wheeler v. Layman Found.*, 188 Ga. 267, 270-71, 3 S.E.2d 645 (1939); *Dukes v. Baugh*, 91 Ga. 33, 16 S.E. 219 (1892); *McDaniel v. Gray & Co.*, 69 Ga. 433 (1882).

Because the property is not vacant, the Kitchenses have only two remedies, and they must commence a legal proceeding to enforce their rights. Their first option is to sue on the

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<sup>5</sup>In the Chapter 13 context, Georgia bankruptcy courts have applied the “functional approach” in concluding that an installment land sale contract is an executory contract that a debtor can assume under a plan. *Gaffney v. D.B. McRae & Co. (In re Gaffney)*, 1998 WL 34066142 (Bankr. S.D. Ga. 1998); *In re Nix*, 1997 WL 33419263 (Bankr. S.D. Ga. 1997). The rulings permitted the debtors to cure defaults and retain their properties. The courts did not extensively discuss the rights of the sellers and the debtors under state law, but it would appear that the debtors in those cases could have cured defaults under the contracts and retained their rights in plans that provided for the “curing or waiving of any default,” as 11 U.S.C. § 1322(b)(3) permits.

contract, obtain a judgment for the balance due under the contract, and subject the property to the judgment lien through levy and sale. *Wheeler v. Layman Found.*, 188 Ga. 267, 270, 3 S.E.2d 645 (1939); *McDaniel v. Gray & Co.*, 69 Ga. 433 (1882). The result of such a proceeding is, of course, the same result that occurs when a lender exercises a power of sale in a security deed due to a borrower's default, except that the latter does not require judicial process.

The Kitchenses' second option is to rescind the contract, which also requires a judicial proceeding. *See Douglas v. Vourtsanis*, 203 Ga. 64, 65, 45 S.E. 2d 203 (1947); *Lytle v. Scottish Am. Mortgage Co.*, 122 Ga. 458, 50 S.E. 402, 405 (1905); *Crowell v. Williams*, 273 Ga. App. 676, 679, 615 S.E.2d 797 (2005). The rescission remedy relieves the seller of the obligation to convey title and thus permits the seller to obtain full ownership of the property. *See Lytle v. Scottish Am. Mortgage Co.*, 122 Ga. 458, 50 S.E. 402, 405 (1905); *Crowell v. Williams*, 273 Ga. App. 676, 678-79, 615 S.E.2d 797 (2005).

Because rescission is an equitable remedy that contemplates restoration of the parties to their original positions, the purchaser is entitled to restitution from the seller for amounts the purchaser has paid under the contract and any improvements the purchaser has made. *E.g., Lytle v. Scottish Am. Mortgage Co.*, 122 Ga. 458, 50 S.E. 402 (1905); *Crowell v. Williams*, 273 Ga. App. 676, 677-78, 615 S.E.2d 797 (2005); *Goss v. Finger*, 28 Ga. App. 410, 111 S.E. 212 (1922). This means that the seller must account to the purchaser for amounts that the purchaser paid plus the value of improvements to the property, less damages incurred by the seller on account of the breach and less the rental value of the property during the time that the purchaser was in possession.

The Installment Sale Contract purports to eliminate Dry Creek's restitution rights. It

provides, upon default of the purchaser: that amounts paid to the seller shall be credited to the reasonable rental value of the property and that the purchaser shall not be entitled to any refund or rebate of any amounts paid (§ 8(d)); that the purchaser shall forfeit all rights to the property or its possession (§8(b)) and that the seller shall have an immediate right to take possession of the property (§8(c)); and that the seller retain the down payment as liquidated damages (§8(f)). Whether these provisions are an unenforceable forfeiture or penalty is for another day. *See, e.g., Southeastern Land Fund, Inc. v. Real EstateWorld, Inc.*, 237 Ga. 230, 227 S.E. 2d 340 (1976); *Lytle v. Scottish American Mortgage Co.*, 122 Ga. 458, 50 S.E. 402 (1905). The point here is that, to obtain possession of the chicken farm under the contract, they will have to file an action for rescission, in which any such disputes will be resolved.

Georgia courts have observed that the rights of the parties under an installment land sale contract are substantively equivalent to those under a bond for title. *E.g., Lytle v. Scottish American Mortgage Co.*, 122 Ga. 458, 50 S.E. 402 (1905); *Southern Land & Cattle Co. v. Simmons*, 202 Ga. App. 734, 415 S.E.2d 329 (1992); *Williamsen v. Thigpin (In re Thigpin)*, Case No. 99-43468 (Bankr. N.D. Ga. Doc. No. 16, January 10, 2001). *See also Wheeler v. Layman Foundation*, 188 Ga. 267, 3 S.E.2d 645 (1939); *Ray v. Pease*, 97 Ga. 618, 25 S.E. 360 (1895); *Caldwell v. Hand*, 149 Ga. 589, 101 S.E. 582 (1919); *Crowell v. Williams*, 273 Ga. App. 676, 615 S.E.2d 797 (2005). Thus, the purchaser has possessory and equitable interests in the property. *E.g., Chilivis v. Tumlin Woods Realty Associates, Inc.*, 250 Ga. 179, 297 S.E.2d 4 (1982); *Crowell*, 273 Ga. App. at 678-79; Daniel F. Hinkel, *Pindar's Georgia Real Estate Law and Procedure* § 20-70 (6th ed. 2011).

Although Georgia courts have not specifically addressed the issue, it is clear that,

regardless of whether a seller elects to sue on the contract and sell the property or seek rescission, the purchaser may tender the balance of the purchase price due and obtain legal title to the property at any time before the execution sale of the property (because the purchaser can satisfy the judgment) or the entry of a decree for rescission of the contract (because rescission is an equitable remedy, equity abhors a forfeiture, and equity will therefore permit a redemption). *See In re Kingsmore*, 295 B.R. 812, 818-19 (Bankr. D.S.C. 2002); *Adams v. Prescott (In re Prescott)*, 285 B.R. 763, 766-67 (Bankr. S.D. Ga. 2001) (discussing contract terms in a bond for title).

To summarize, Georgia law, provides that the seller under an installment land sale contract, upon default of the purchaser, has the right to collect the balance of the purchase price through levy and sale of the property or to obtain possession of the property through an action for rescission (with the corresponding obligation of restitution), subject to the right of the purchaser to redeem it. In either event, the seller has the same substantive rights as the holder of a deed to secure debt: the right to collect the amount due or subject the property to the payment of that amount.

These rights of a seller under an installment land sale contract constitute a “claim” within the definition of 11 U.S.C. § 101(5):

The term “claim” means --

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy



is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

The right of a seller under an installment land sale contract to obtain a judgment is a “right to payment,” and the seller’s right to the equitable remedy of rescission “gives rise to a right to payment,” as discussed above. Thus, the seller has a claim. Because the seller has an interest in property to secure the claim, the seller has a secured claim. 11 U.S.C. § 506(a).

A Chapter 11 plan may modify the rights of the holder of a secured claim, 11 U.S.C. § 1123(b)(5), over the objection of the holder of the claim, if the plan meets the so-called “cram-down” requirements of 11 U.S.C. § 1129(b)(2)(A) and all requirements for confirmation in 11 U.S.C. § 1129(a) except the creditor’s acceptance of the plan. In general, “cram-down” requires that the creditor receive payments with a value equal to the value of the property that secures its claim. 11 U.S.C. § 1129(b)(2)(A)(i)(i), (II).<sup>6</sup> If the property is worth more than the amount due, therefore, the creditor must receive payment of its debt in full, with interest.

Applying the principles just discussed to the issues here, it is clear that whether the Installment Sale Contract is an executory contract does not matter. As explained below, even if it is an executory contract and the Trustee rejects it, the Kitchenses have a secured claim that a plan can deal with.

If the Installment Sale Contract is an executory contract, and if the Trustee cannot, or does not, assume it, rejection occurs. The effect of rejection is a breach of contract. 11

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<sup>6</sup>Alternatively, a plan may meet the “cram-down” requirement if it provides for the sale of the property and payment of the secured claim from the proceeds, 11 U.S.C. § 1129(b)(2)(A)(ii), or if it provides for the creditor realize the “indubitable equivalent” of its claim. 11 U.S.C. § 1129(b)(2)(A)(iii).

U.S.C. § 365(g).

The Kitchenses upon breach under the principles of Georgia law discussed above have the right to collect the amount due from the property and the debtor. The breach of the Installment Sale Contract does not eliminate the Debtor's (and, therefore, the estate's, *see* 11 U.S.C. § 541(a)(1)), possessory and equitable rights in the property, and breach alone does not result in the vesting of all legal, equitable, and possessory rights in the Kitchenses. The Kitchenses must pursue their remedies as set forth above, each of which results, under Georgia law, in a claim in this case for the amount due. The Trustee (or any other party in interest, *see* 11 U.S.C. § 1121(c)(1)) may deal with the claim in a plan by paying the amount due over time, with interest.

Again, all of this occurs even if the Installment Sale Contract is executory and even if the Trustee rejects it. Consequently, the Court need not decide whether the contract is executory, and establishing a time for the Trustee to assume or reject it would be a needless act.

For the foregoing reasons, the Court will deny the Kitchenses' request to set a time for the Trustee to assume or reject the Installment Sale Contract. Nevertheless, because the Kitchenses are entitled at this stage of this case to progress toward a plan for a legally proper treatment of their claim, the sale of the chicken farm, or relief from the automatic stay, the Court will schedule a status conference to consider scheduling and other matters relating to this case.

IT IS, THEREFORE, HEREBY ORDERED AND ADJUDGED as follows:

1. The Motion to Set a Specified Period of Time in Which the Trustee Must Assume or Reject an Executory Contract is **DENIED**.

2. Pursuant to 11 U.S.C. § 105(d), the Court will conduct a status conference in this case on **September 21, 2011**, at **9:25 a.m.** in Courtroom 342, U.S. Courthouse, 600 East First Street,

Rome, Georgia, to consider, among other matters that any party in interest brings to the attention of the court: a schedule for the filing and prosecution of a plan and the manner in which the Trustee proposes to deal with the Kitchenses' rights under the Installment Sale Contract, either through a plan involving continued operation of the chicken farm or through its sale.

**[End of Order]**

Distribution List

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