

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:) Bankr. No. 18-40528
) Chapter 13
SCOTT CONLON ROSE)
SSN/ITIN xxx-xx-8894)
)
and) DECISION RE: DEBTORS'
) MOTION TO REJECT CERTAIN
APRIL YVONNE ROSE) EMPLOYMENT AGREEMENT
SSN/ITIN xxx-xx-2942)
)
Debtors.)

The matter before the Court is Debtors Scott Conlon Rose and April Yvonne Rose's Motion to Reject the Employment Agreement with Management Recruiters of Sioux Falls, LLP. This is a core proceeding under 28 U.S.C. § 157(b)(2). The Court enters these findings and conclusions pursuant to Fed.Rs.Bankr.P. 7052 and 9014(c). For the reasons discussed below, the Court will deny Debtors' motion.

I.

Debtors filed a petition for relief under chapter 13 of the bankruptcy code. On the schedule I they filed with their petition, Debtors stated Debtor Scott Rose was employed by "GPAC" and had been so employed for eight years. Debtors timely filed a proposed plan but subsequently withdrew it. Debtors have not yet filed and given notice of a modified plan.

About a month after withdrawing their plan, Debtors filed a Motion to Reject the Employment Agreement with Management Recruiters of Sioux Falls, LLP. Therein, Debtors stated Debtor Scott Rose had an employment agreement with Management Recruiters of Sioux Falls, LLP, he was no longer employed there, and he wanted to reject the employment agreement, "including [a] potential non-compete clause and all

provisions[,]" so he "may continue to pursue employment opportunities to be able to complete" a chapter 13 plan. gpac, LLP¹ timely responded. The parties eschewed an evidentiary hearing and submitted the matter on the following stipulated facts:

1. [Debtor Scott] Rose and gpac executed the Account Executive Employment Agreement ("the Agreement") dated September 23, 2010, which is attached as Exhibit 1 to Docket No. 31 (gpac's objection to [Debtors'] motion to reject executory contract).
2. [Debtor Scott] Rose voluntarily resigned his employment with gpac on January 31, 2019.
3. Some former gpac employees subject to non-competition and non-solicitation of customer covenants (like those set forth in the Agreement) have negotiated with gpac to take customers, deals, receivables, books of business, or other assets or rights with them when they leave their employment with gpac and to modify the restrictive covenants as part of that negotiation.

In their opening brief, Debtors cited several cases and argued:

[A]t the time Debtor Scott [Rose] filed his Chapter 13 Petition, the employment contract with gpac remained in full force and effect. At the time of filing the Petition, continued performance on the part of both parties was required. Even though Debtor Scott [Rose] terminated his employment post-petition, the Contract is not rejected under 365 until the Court enters an Order rejecting the Contract or a confirmed plan assumes or rejects. Debtor's plan has not been confirmed. Debtor's post-petition earnings are property of the estate under 11 U.S.C. § 1306, Udell, 18 F.3rd 403 (7th Circuit 1994). It is to Debtor's and the estate's benefit to allow the rejection of the Covenants in the Contract, along with the remaining portion of the Contract, allowing for an unrestricted rehabilitation. Gpac's [s/c] claim for damages would be

¹The parties seemingly agree gpac, LLP was formerly known as Management Recruiters of Sioux Falls, LLP. What, if anything, "gpac" stands for and the story behind its e e cummings-esque name remain a mystery.

considered a pre-petition claim in the amount determined to be the remedy for presumed breach of covenants.

In its responsive brief, gpac argued the executory nature of a contract is determined on the date of the motion, not on the petition date, so post-petition events remain relevant to a bankruptcy court's determination of whether a contract is executory. It also argued a post-petition rejection of the employment agreement would constitute a breach of the agreement and the covenant not to compete therein would remain enforceable by injunctive relief that would not be "reducible to monetary value."

In their reply brief, Debtors discussed the case law cited by gpac and argued if Debtor Scott Rose's rejection of the employment agreement constitutes a breach, gpac could be awarded monetary damages. Debtors also argued it is gpac's burden to establish monetary damages would be too difficult to estimate.

II.

With the bankruptcy court's approval, a debtor may assume or reject an executory contract. 11 U.S.C. § 365(a).

A contract is executory if performance remains due to some extent on both sides. Such an agreement represents both an asset (the debtor's right to the counterparty's future performance) and a liability (the debtor's own obligations to perform). Section 365(a) enables the debtor (or its trustee), upon entering bankruptcy, to decide whether the contract is a good deal for the estate going forward. If so, the debtor will want to assume the contract, fulfilling its obligations while benefiting from the counterparty's performance. But if not, the debtor will want to reject the contract, repudiating any further performance of its duties. The bankruptcy court will generally approve that choice, under the deferential business judgment rule.

Mission Product Holdings, Inc. v. Tempnology, LLC, ___ U.S. ___, 2019 WL 2166392, at *2 (2019) (citations and internal quotation marks omitted). If such a contract is rejected,

the rejection . . . constitutes a breach of such contract. . . . [T]he counterparty thus has a claim against the estate for damages resulting from the debtor's nonperformance. . . . But such a claim is unlikely to ever be paid in full. That is because the debtor's breach is deemed to occur immediately before the date of the filing of the bankruptcy petition, rather than on the actual post-petition rejection date. By thus giving the counterparty a pre-petition claim, Section 365(g) places that party in the same boat as the debtor's unsecured creditors, who in a typical bankruptcy may receive only cents on the dollar.

Id. at *3 (citations, internal quotation marks, and internal brackets omitted).

When determining whether a contract is executory—and thus subject to assumption or rejection—bankruptcy courts "normally" look to the petition date to assess the contract's "executoriness." *COR Route 5 Co., LLC v. The Penn Traffic Co. (In re The Penn Traffic Co.)*, 524 F.3d 373, 381 (2nd Cir. 2008). In that case, the Second Circuit Court of Appeals chose not to consider events that occurred post-petition, because it was the non-debtor party to the contract that had tendered its remaining performance post-petition. *Id.*

The cases in which the post-petition evaluation principle has been invoked to find that formerly executory contracts had lost their executory status by the time the debtor made its motion to assume or reject do not, however, provide support for the notion that a non-debtor party's unilateral post-petition actions can vitiate the executory status of a contract where the debtor has done no more than exercise its Code-granted right to enjoy "breathing space" while deciding whether to assume or reject the contract.

Id. At the same time, however, the court recognized there were circumstances in which bankruptcy courts have looked past the petition date and considered events that occurred post-petition:

[Bankruptcy] courts have looked to the impact of post-petition events where the contract expired post-petition by its terms, such that there were no longer any obligations to assume or reject, or *where the debtor itself had taken affirmative action under a contract that affected the existence of outstanding performance obligations.*

Id. at 381-82 (emphasis added) (collecting cases). Under such circumstances, the court concluded "the contract's mere executory nature as of the commencement of the proceeding—without more—will not guarantee the debtor the availability of § 365's assumption and rejection provisions." *Id.* at 383.

When deciding whether to approve a debtor's assumption or rejection of an executory contract, a bankruptcy court employs a two-part business judgment test. *Crystalin, L.L.C. v. Selma Properties, Inc. (In re Crystalin, L.L.C.)*, 293 B.R. 455, 463-64 (B.A.P. 8th Cir. 2003). The debtor must demonstrate the assumption or rejection benefits the estate. *Crystalin*, 293 B.R. at 463-65. And the bankruptcy court must find the assumption or rejection is neither manifestly unreasonable nor proposed in bad faith. *Id.*

This test is not an onerous one and does not require the bankruptcy court to place itself in the position of the trustee or debtor-in-possession and determining whether assuming the lease would be a good business decision or a bad one.

. . . .

Where the trustee's request is not manifestly unreasonable or made in bad faith, the court should normally grant

approval as long as the proposed action *appears* to enhance the debtor's estate. If the initial test is met, the bankruptcy court should not interfere with the trustee or debtor-in-possession's business judgment except upon a finding of bad faith or gross abuse of their business discretion. If Debtor cannot show a benefit to the estate, the bankruptcy court does not need to make a finding of bad faith or gross abuse of discretion.

Id. at 463-64 (internal citations, quotation marks, and brackets omitted).

III.

In this case, Debtor Scott Rose admits he "voluntarily resigned his employment with gpac on January 31, 2019." He was certainly free to do so. However, as of that date, his employment contract with gpac was terminated. He is no longer obligated to provide his services to gpac, and gpac is no longer obligated to pay him for his services. In a word, his employment contract with gpac is no longer executory. And no amount of legal legerdemain can now revive that contract, render it once again executory, or otherwise relieve him of the consequences of his decision—his voluntary and unilateral decision—to terminate it before attempting to reject it. Inasmuch as § 365 only permits a debtor to assume or reject executory contracts, Debtors may not reject Debtor Scott Rose's no-longer-executory employment contract with gpac.

In light of this conclusion, the Court does not reach the issue of whether Debtors' proposed rejection of Debtor Scott Rose's employment contract would pass muster under the business judgment test. Given the present record, however, were it necessary to decide this issue, the Court would be compelled to deny Debtors' motion on that basis as well. In their motion, Debtors indicate Debtor Scott Rose wants to "continue to pursue employment opportunities to be able to complete [a]

Chapter 13 Plan." As previously noted, the business judgment test is not onerous, but the parties' stipulated facts provide *no* basis for the Court to determine whether and how Debtors' rejecting Debtor Scott Rose's employment contract would benefit the bankruptcy estate. Under the circumstances, the Court would be in no position to say Debtors' decision is an exercise of sound business judgment.

The Court likewise does not reach the issue, raised by gpac, of whether a non-disclosure clause or a non-solicitation clause, such as those included in Debtor Scott Rose's employment contract, survives rejection of an executory contract. However, the Supreme Court's opinion in *Mission Product Holdings* leaves little, if any, room for argument:

A rejection does not terminate the contract. When it occurs, the debtor and counterparty do not go back to their pre-contract positions. Instead, the counterparty retains the rights it has received under the agreement. As after a breach, so too after a rejection, those rights survive.

Mission Product Holdings, 2019 WL 2166392, at *6.

The Court will enter an appropriate order.

Dated: June 11, 2019.

BY THE COURT:



Charles L. Nail, Jr.
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered
on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:)	Bankr. No. 18-40528
)	Chapter 13
SCOTT CONLON ROSE)	
SSN/ITIN xxx-xx-8894)	
)	ORDER DENYING DEBTORS'
and)	MOTION TO REJECT EMPLOYMENT
)	AGREEMENT WITH MANAGEMENT
APRIL YVONNE ROSE)	RECRUITERS OF SIOUX FALLS, LLP
SSN/ITIN xxx-xx-2942)	
)	
Debtors.)	

In recognition of and compliance with the decision entered this day, and for cause shown; now, therefore,

IT IS HEREBY ORDERED Debtors' Motion to Reject the Employment Agreement with Management Recruiters of Sioux Falls, LLP (doc. 29) is denied.

So ordered: June 11, 2019.

BY THE COURT:



Charles L. Nail, Jr.
Bankruptcy Judge

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