

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
ROOM 211  
FEDERAL BUILDING AND U.S. POST OFFICE  
225 SOUTH PIERRE STREET  
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT  
BANKRUPTCY JUDGE

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August 9, 1995

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Trustee Rick A. Yarnall  
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Subject: ***In re Richard H. and Doris K. Tiede,***  
Chapter 7; Bankr. No. 95-40038

Dear Counsel:

The matters before the Court are two legal issues raised regarding Trustee Yarnall's objections to Debtors' claimed exempt property. These are core matters under 28 U.S.C. § 157(b)(2). This letter decision and subsequent order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As discussed below, the Court concludes that Debtors may not claim exempt under South Dakota's homestead laws the contract for deed payments from a farm quarter that was quit claimed to them. The Court further concludes that the Trustee's failure to assume the contract for deed on the farm quarter did not result in an abandonment of the contract for deed payments to Debtors.

EXEMPTION OF CONTRACT FOR DEED PAYMENTS FROM FARM QUARTER

*Summary of Facts.* In their schedules filed January 24, 1995, Debtors claimed exempt a homestead described as the North 71 feet of Lots 11 and 12, Block 2, Neuhisel Addition to Parkston, Hutchinson County, South Dakota. Trustee Yarnall objected on March 22, 1995 on the grounds that Debtors' claimed exempt personal property exceeded the allowance under S.D.C.L. § 43-45-4. The Trustee filed a supplemental objection on March 27, 1995 on the grounds that Debtors were impermissibly claiming exempt proceeds from the sale of a quarter section of some farm land described as the southeast quarter of 22-99-61, Hutchinson County, South Dakota, and using those proceeds to pay for their current homestead.

A hearing was held April 25, 1995. Debtors stated they would amend their schedules and an evidentiary hearing was scheduled for May 24, 1995.<sup>1</sup>

On May 16, 1995, Debtors filed an amended schedule of exempt property. Therein, they claimed exempt under the homestead laws of South Dakota both the home in Parkston and the quarter section.

Debtors filed a brief in support of their claimed exempt property on May 16, 1995. Debtors' brief and Debtor Richard Tiede's affidavit and attachments thereto establish the following:

1. Debtor Richard Tiede was born and raised on the family farm described as the SE $\frac{1}{4}$  of 22-99-61 in Hutchinson County. His father died in 1971 and his will left the place to Richard, Richard's mother, and Richard's brother. The will was never probated.

2. Debtor Richard Tiede married and he and his wife continued to reside on the farm quarter until 1976. Richard's mother executed a contract for deed to sell the farm quarter. With the proceeds, Debtors and Richard's mother purchased and moved into a home in Parkston.

3. In 1988, Richard's mother quit claimed her interest in the Parkston home and her remaining interest in the farm quarter to Debtors.

4. In 1988, Debtors lost the Parkston home to foreclosure.

5. In 1989, Debtors purchased another home in Parkston on a contract for deed. This is the home they declared exempt on their original schedules.

6. Debtors are using the contract for deed payments from the farm quarter to make the contract for deed payments on the home in Parkston.

7. Assuming the payments are current, at the time Debtors filed their petition, the remaining balance due on the farm quarter contract for deed was approximately \$7,500.00 (\$2,500.00 due on March 1 of 1995, 1996, and 1997).

Debtors argue that under S.D.C.L. § 43-31-1 they never abandoned the farm quarter as their homestead but only left it in 1976 due to family and job circumstances. They further argue that their continuing reinvestment of the farm quarter contract for deed payments into a new homestead is expressly permitted by S.D.C.L. § 43-45-3(2) and *In re Pierce*, 50 B.R. 718, 720 (Bankr. D.S.D. 1985) (Ecker, J.).

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<sup>1</sup>The hearing was originally scheduled for May 24, 1995 but was rescheduled to May 22, 1995 to accommodate the parties.

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A continued hearing on the Trustee's objection to the claimed exemptions was held May 22, 1995. Trustee Yarnall was given until June 22, 1995 to file a brief in response to Debtors' brief. A hearing was to be rescheduled only if needed.

Trustee Yarnall filed his brief on June 23, 1995. He argues that Debtors never had a homestead interest in the farm quarter and, therefore, cannot declare the contract for deed payments from the farm quarter exempt under South Dakota's homestead laws.

*Discussion.* Debtors may not declare exempt under South Dakota's homestead laws any remaining interest in the farm quarter. First, the farm quarter was never Debtors' homestead. A party must have an ownership interest in a residence for it to qualify as a homestead. S.D.C.L. § 43-31-2. Debtors did not acquire an ownership interest in the farm quarter until after they had made the first home in Parkston their homestead. Even assuming that contract for deed payments received over time are exempt if applied toward a new homestead, Debtors never had a homestead interest in the farm that could be preserved and transferred to the second home in Parkston under S.D.C.L. § 43-45-3. Whatever homestead interest Richard's mother had in the farm quarter, if any, when she quit claimed the land to Debtors, did not pass to Debtors as an incident to the land. *Bailly v. Farmers State Bank*, 150 N.W. 942, 944 (S.D. 1915). See also S.D.C.L. § 43-31-13 (preservation of homestead for surviving spouse and minor children).

Second, the facts -- as stated by Debtors -- support the conclusion that the farm quarter was abandoned as a homestead when Richard's mother sold it and they all left. There was no evidence that they ever intended to return. The first home in Parkston became their homestead. The farm quarter did not regain a homestead status when the first home was lost by foreclosure because Debtors did not return to the farm. See *Yellowhair v. Pratt*, 169 N.W. 515, 516-17 (S.D. 1918); *Botsford Lumber Co. v. Clouse*, 257 N.W. 106 (S.D. 1934).

While the facts of this case lead to an unfortunate result for Debtors, the law does not permit any other conclusion.

#### TIMELY ACCEPTANCE OF THE CONTRACT FOR DEED ON THE FARM QUARTER.

*Summary of Facts.* Debtors' original schedule of real property disclosed that they were purchasing a homestead in Parkston on a contract for deed and that they were selling another quarter on a contract for deed. The quarter was described as a "Former homestead." Debtors' original schedules did not declare exempt any interest in the farm quarter. Debtors' original schedules also did

not disclose the contract for deed on the farm quarter as an executory contract on schedule G. Debtors indicated on their statement of intentions that they intended to affirm the contract for deed on their Parkston home.

Debtors amended their schedules on May 16, 1995. On the amended schedule of real property, Debtors described their interest in the farm quarter as "proceeds from sale of prior homestead." On their amended schedule of exempt property, Debtors included their interest in the farm quarter and cited South Dakota's homestead laws in support of that exemption. Debtors did not amend their schedule of executory contracts and unexpired leases to include the farm quarter contract for deed. Debtors again indicated in their amended statement of intentions that they intended to affirm the contract for deed on their Parkston home.

Trustee Yarnall has not accepted or rejected either executory contract. Debtors argue that the Trustee's failure to assume the contract for deed on the farm quarter within sixty days after the order for relief resulted in an abandonment of the payments to Debtors. Debtors rely on *In re Reed*, 94 B.R. 48 (Bankr. E.D.Pa. 1988), wherein the trustee failed to assume a lease of an apartment. The court there held the rejection removed the leased premises from the estate and returned it to the debtors with the same rights and remedies provided under non bankruptcy law.

Trustee Yarnall argues that since Debtors failed to properly schedule and disclose the contract for deed on the farm quarter, the payments Debtors receive from it should remain estate property. The Trustee distinguishes the cases cited by Debtors on the basis that their cited cases all involved leases of residential real property where the debtor was the lessee. Finally, Trustee Yarnall argues that even if the farm quarter contract is deemed rejected, the payments remain property of the estate.

*Discussion.* A contract for deed for the sale of real property is an executory contract. *Speck v. First National Bank of Sioux Falls (In re Speck)*, 798 F.2d 279, 280 (8th Cir. 1986); see also *Cameron v. Pfaff Plumbing & Heating, Inc.*, 966 F.2d 414, 416 n.1 (8th Cir. 1992). Under 11 U.S.C. § 365 (d)(1), a Chapter 7 trustee has sixty days after the order for relief to assume or reject an executory contract or an unexpired lease of residential real property. If it is not timely assumed, it is deemed rejected.

Here, Trustee Yarnall did not accept timely the contract for deed regarding the sale of the farm quarter. Therefore, it is deemed rejected.

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The effect of Trustee Yarnall's rejection is limited by 11 U.S.C. §§ 365(i) and 365(j). Those sections provide that if the trustee rejects an executory contract for the sale of real property, the purchaser may treat the contract as terminated and retain a lien for the recovery of the purchase price paid or, if the purchaser is in possession, the purchaser may remain in possession, continue to make the payments, and offset any damages. See *Ruble v. Pogue (In re Pogue)*, 130 B.R. 297, 299-300 (Bankr. E.D. Mo. 1990). If the purchaser completes the payments, the trustee shall then deliver the title as provided by § 365(i)(2)(B). *Id.* (cites therein). These sections show a legislative intent that certain expectations of parties to real property transactions are to be protected although this protection does not benefit the bankruptcy estate. *Upland/Euclid, Ltd. v. Grace Restaurant Co. (In re Upland/Euclid, Ltd.)*, 56 B.R. 250, 253(9th BAP 1985).

Since the contract for deed on the farm quarter is deemed rejected, the purchaser now has the option of whether to treat the contract as terminated or, if he is in possession, he may continue to pay Trustee Yarnall and receive title.

There is no indication in § 365 that a rejection of an executory contract for real property constitutes an abandonment of the property to the debtor. Property is not deemed abandoned until the case is closed. 11 U.S.C. § 554(c). Consequently, the Court concludes that Trustee Yarnall's failure to accept timely the contract for deed on the farm property does not remove the contract for deed or the payments from the estate and revest them with Debtors. Although the contract is deemed rejected, Trustee Yarnall may continue to collect the payments if the purchaser chooses to continue making them.

Trustee Yarnall shall prepare an order consistent with these findings and conclusions. Counsel shall confer and advise the Court whether an evidentiary hearing is needed to resolve the other issues raised by the Trustee's objections to Debtors' claimed exempt property.

Sincerely,

Irvin N. Hoyt  
Chief Bankruptcy Judge

INH:sh

CC: Bankruptcy Clerk  
United States Trustee