

**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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March 2, 2001

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Subject: *In re Monte and Betty Wilson,*  
Chapter 7; Bankr. No. 00-40790

Dear Trustee and Counsel:

The matter before the Court is the Motion for Abandonment filed by Tom and Patricia Shawd and the objections thereto filed by Trustee John S. Lovald and Avera Queen of Peace Hospital. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that the Motion shall be denied.

*Summary of material facts.* Monte and Betty Wilson ("Debtors") filed a Chapter 7 petition on September 15, 2000. At the time, they were the sellers of a contract for deed covering some real and personal property operated as an elderly living facility. Though Debtors did not properly include the contract on their schedules as an estate asset or an executory contract, they did acknowledge it

49

Re: Monte & Betty Wilson  
March 2, 2001  
Page 2

in their statement of financial affairs. Trustee Lovald became aware of the contract early in the case.

Under 11 U.S.C. § 365(d)(1), Trustee Lovald had until November 14, 2000 to assume or reject the contract. In the interim, he negotiated a deal with Tom and Patricia Shawd ("Shawds"), the purchasers on the contract for deed, to "cash out" or discount the contract, which had several years yet to run. The deal with the Shawds was never finalized. The Trustee's deadline to assume a contract expired without any formal action. Eventually, on December 20, 2000, the Shawds filed a motion seeking an order directing Trustee Lovald to abandon the contract back to Debtors since he had not timely assumed it. The Shawds argued that since the contract was deemed rejected under § 365(d)(1) when the Trustee failed to timely assume it, the Trustee could no longer sell or assign the contract. Citing Bankruptcy Court cases from other circuits, the Shawds also argued that a rejection of the contract "amounts to an abandonment to the debtor" and, therefore, "the estate's interest in the ... rejected executory contract ... is burdensome to the estate and is of inconsequential value and benefit to the estate."

Near this time, Avera Queen of Peace Hospital ("Hospital") made the Trustee a better offer for the bankruptcy estate's position on the contract. Eventually, through a motion filed by the Hospital on January 23, 2001, the Trustee and Hospital sought court approval of a sale to the Hospital.

Trustee Lovald and the Hospital objected to the Shawds' abandonment motion. The Shawds objected to the Hospital's sale motion. A hearing was held February 13, 2001. Appearances included those addressed above. The Court denied the Hospital's sale motion because all creditors and other parties in interest had not been served. The Shawds' abandonment motion was taken under advisement.

DISCUSSION. In *In re Richard H. and Doris K. Tiede*, Bankr. No. 95-40038, slip op. (Bankr. D.S.D. Aug. 10, 1995), this Court was faced with essentially the same issue. What are the consequences of a Chapter 7 trustee's failure to timely assume a contract for deed where the debtor is the vendor or seller on the contract? The Court held:

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.

Re: Monte & Betty Wilson  
March 2, 2001  
Page 3

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

The effect of [the trustee'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 [the trustee] 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 [the trustee'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, [the trustee] may continue to collect the payments if the purchaser chooses to continue making them.

Nothing in the Shawds' abandonment motion nor in the parties' arguments at the February 13, 2001 hearing has led the Court to a different conclusion than that which was reached in *Tiede*. Assuming the contract for deed with the Shawds in an executory

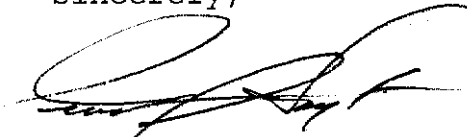
Re: Monte & Betty Wilson  
March 2, 2001  
Page 4

contract,<sup>1</sup> Trustee Lovald's failure to timely assume the contract means the contract is deemed rejected. The Shawds remain in possession of the property and have continued to make payments. They must, therefore, have elected under § 365(i) to continue with the contract. To date, they have not sought any damages occasioned by the "deemed" rejection. Consequently, there are no grounds on which to direct Trustee Lovald to abandon the contract under § 554(b). The contract is not burdensome to the estate. The contract has value and will benefit the estate.

At the February 13, 2001 hearing, related issues surrounding the Trustee's ability to sell all or part of the estate's interest in the contract for deed were discussed. If Trustee Lovald seeks approval of such a sale, then those issues can be properly addressed. They are not a part of this matter.

An order denying the Shawds' abandonment motion will be entered.

Sincerely,



Irvin N. Hoyt  
Bankruptcy Judge


INH:sh

CC: case file (docket original; copies to parties in interest)

I hereby certify that a copy of this document  
was mailed, hand delivered, or faxed this date  
to the parties on the attached service list

**MAR 05 2001**

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court, District of South Dakota

By 

**NOTICE OF ENTRY**  
Under F.R. Bankr.P. 8022(a)  
**Entered**

**MAR 05 2001**

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court  
District of South Dakota

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<sup>1</sup> Reaching a conclusion on that issue was not necessary for a resolution of the Shawds' abandonment motion.

Case: 00-40790 Form id: 122 Ntc Date: 03/05/2001 Off: 4 Page : 1  
Total notices mailed: 9

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