

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:)	
)	Chapter 13
Wayne A. Michaud,)	
)	Case No. 03-11960
Debtor)	
)	

**MEMORANDUM OPINION WITH RESPECT TO CONFIRMATION OF THE
DEBTOR'S CHAPTER 13 PLAN**

The Debtor seeks confirmation of his second amended chapter 13 plan. The only remaining objection to confirmation is interposed by Press A Dent, Inc., which takes issue with that portion of the plan seeking rejection of a certain contract between it and the Debtor. The questions presented are whether the contract is executory, and if so, whether the post-petition termination of the contract altered the Debtor's statutory rights of assumption or rejection. For the reason set forth below, the contract was executory upon the commencement of the case and therefore it was subject to assumption or rejection by the Debtor until confirmation of the chapter 13 plan. The consensual termination did not alter the Debtor's rights to assume or reject. Since the proposed rejection meets the applicable business judgment test, it will be approved and the chapter 13 plan will be confirmed.

This Memorandum Opinion constitutes my findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

BACKGROUND

The Debtor filed a petition for relief under chapter 13 on October 15, 2003. There are no controverted facts concerning the present dispute. In May of 1995 the Debtor and Press A Dent entered into two contracts: an equipment lease and an Agreement with Independent Contractor ("Agreement"). The equipment subject to the lease was returned to Press A Dent post-petition

by virtue of a consent order for relief from stay entered on June 17, 2004. Press A Dent's only objection to confirmation of the Debtor's plan arises from the proposed rejection of the Agreement.

The Agreement, among other things, permits the Debtor to use a painless dent removal process in its business and prohibits the use or disclosure of the process outside of the terms of the Agreement. The Debtor concedes that he is bound by the non-use and non-disclosure provisions of the Agreement regardless of whether the Agreement is rejected. The attempt to reject the Agreement in the plan is the first and only attempt at rejection or assumption in the case. The parties stipulate that the Agreement was terminated by the parties after bankruptcy in January of 2004.

JURISDICTION

This Court has jurisdiction over this matter as a core proceeding, and will enter final judgment pursuant to 28 U.S.C. § 157(b)(2)(L) and § 1334(b).

DISCUSSION

Although the Code does not define the term executory contract, a contract is executory when performance is due to some extent on both sides. Mason v. FBI Distribution Corp. (In re FBI Distribution Corp.), 330 F.3d 36, 40 (1st Cir. 2003)(quoting NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522 (1984)). A chapter 13 debtor may assume an executory contract if it is beneficial or reject it if it is burdensome at any time until confirmation of the plan. See 11 U.S.C. §365(d)(2) and §1322(b)(7).¹ A decision to assume or reject is measured by the business judgment test. See Eagle Ins. Co. v. Bankvest Capital Corp. (In re Bankvest Capital Corp.), 360

¹ Sections of the Bankruptcy Code, 11 U.S.C. § 101 et seq. are referred to as "§ ____."

F.3d 291, 302 (1st Cir. 2004). Under this test, a debtor's business judgment concerning the assumption or rejection of an executory contract will be accepted in the absence of a showing of bad faith or abuse of discretion. See In re G. Survivor Corp., 171 B.R. 755, 757 (Bankr. S.D.N.Y. 1994). Generally, apart from certain obligations which will remain administrative expenses, see, e.g., § 365(d)(3), a rejection will be deemed a pre-petition breach and damages, if any, from that breach and others, will be treated as a pre-bankruptcy claim. §365(g)(1). If a contract is assumed, subject to very narrow exceptions which are not applicable here, see, e.g., § 365(g)(2), (h)(2), and (i)(2), a debtor will be bound its provisions as if no bankruptcy had intervened. "Although § 365(g) does not directly set forth its effect on the priority of claims, its evident purpose is to distinguish, first, claims which are to considered merely as the prepetition claims of general creditors . . . from those assumed contracts which are to be treated as administrative expenses" In re Pearson, 90 B.R. 638, 640 (Bankr. D. N.J. 1988).

Press A Dent does not challenge the Debtor's business judgment. Rather, it argues that the Agreement is not an executory contract because, presently, there are no outstanding obligations due either party and because the Agreement had been terminated before the Debtor sought rejection under the plan.

The record is less than clear on the precise nature of any continuing obligations prior to the post-bankruptcy termination in January of 2004. But, at the very least, there was a potential for performance by both sides from the date of bankruptcy until the return of the leased equipment. That potentiality made the Agreement executory and subject to assumption or rejection until confirmation of the chapter 13 plan. The subsequent termination by consent of the parties after bankruptcy did not alter its executory nature. The termination is, however, evidence

of the intention of the contracting parties to reject their Agreement. The subsequent and timely action by the Debtor to reject the Agreement in the context of the chapter 13 plan satisfied the requirement of notice under Fed. R. Bankr. P. 6006. See In re Thinking Machines Corp., 67 F.3d 1021, 1025 (1st Cir. 1995)(holding that from the petition date forward, the debtor's property, including its interest in executory contracts, is in *custodia legis*, and the debtor's ability to assume or reject executory contracts is subject to judicial approval).

CONCLUSION

The Debtor's plan, including the rejection of the Agreement, will be confirmed. A separate order will enter.

DATED: June 17, 2005

A handwritten signature in dark ink, reading "Louis H. Kornreich". The signature is fluid and cursive, with the first name "Louis" and last name "Kornreich" clearly legible. A horizontal line is drawn beneath the signature.

Louis H. Kornreich
United States Bankruptcy Judge