AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

In Re: R.J. RUSSELL ASSOCIATES, INC.,

Debtor.

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 96-CV-6451T

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to ~~trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Appellant Moffett's appeal is denied. Judge Ninfo's Decisions and Orders dated August 29, 1996, August 30, 1996 (96-CV-6451T) and September 24, 1996 (96-CV-6452T) are affirmed in their entirety.

FILED
97 MAR 17 PM 2:21
U.S. DISTRICT COURT
W.D.N.Y. - ROCHESTER

March 17, 1997
Date

RODNEY C. EARLY
Clerk

Catherine A. Marr
CATHERINE A. MARR
(By) Deputy Clerk

6

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Moffett

Plaintiff(s)

v. 6:96-cv-06451

Remax Realty Group

Defendant(s)

PLEASE take notice of the entry of a JUDGMENT filed on 3/17/97, of which the within is a copy, and entered 3/17/97 upon the official docket in this case. (Document No. 6 .)

Dated: Rochester, New York
March 17, 1997

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO:

David MacKnight, Esq.
David L. Rasmussen, Esq.
Leonard Relin, Esq.
John R. Weider, Esq.
Colleen A. Brown, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FILED
97 MAR 17 PM 12:36
U.S. DISTRICT COURT
W.D. OF N.Y.
ROCHESTER

In Re:

R.J. RUSSELL ASSOCIATES, INC.,

Debtor.

96-CV-6451T
96-CV-6452T

DECISION and ORDER

INTRODUCTION

Appellant/creditor Mary Moffett, ("Moffett"), a former salesperson of appellee/debtor R.J. Russell Associates, Inc., ("R.J. Russell"), a real estate broker, appeals decisions of the United States Bankruptcy Court dated August 29, 1996, August 30, 1996 and September 24, 1996. Moffett argues that Bankruptcy Judge John Ninfo II incorrectly held that she is only entitled to receive payment of commissions from the bankruptcy estate as a general unsecured creditor.

For the reasons set forth below, the Bankruptcy Court's decisions are affirmed. Moffett's appeal is denied.

BACKGROUND

Appellant Sally Moffett is a former salesperson of the debtor R.J. Russell, a real estate broker. Moffett claims that she entered into two contracts with R.J. Russell, under which she agreed to assist in the sale of property in exchange for a share of the sales commission earned by R.J. Russell. The first contract, referred to as a "listing agreement", entered into between R.J. Russell and the seller of property, provides that R.J. Russell could appoint "subagents," or salespersons such as Moffett, to

assist in property sales. The listing agreement also sets forth the amount of commission R.J. Russell would receive from the seller upon securing a purchaser for the property. The second contract referred to by Moffett is the agreement entered into between R.J. Russell and herself which governed the amount of commission she would receive from R.J. Russell after closing.

On July 26, 1996, R.J. Russell filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code and stopped distributing commissions to its salespeople for sales that closed after that date. Moffett alleges that approximately 60 real estate sales have closed post-petition, representing approximately 1.2 million dollars in commissions, and that she and other salespersons similarly situated are entitled to their contract share of those commissions. It is undisputed that at the time of R.J. Russell's Chapter 11 filing, Moffett was associated with another broker and was no longer selling properties on R.J. Russell's behalf.

On August 1, 1996, R.J. Russell commenced an Adversary Proceeding, seeking a declaratory judgment determining the creditors' relative rights, interests and priorities in real estate commissions received by R.J. Russell from property sales. Bankruptcy Judge John Ninfo, II, issued a Decision and Order dated August 29, 1996, and a Corrected Decision and Order dated August 30, 1996, holding, among other things, that the listing agreements entered into between R.J. Russell and the sellers of property were not executory contracts and that, at most, R.J. Russell salespersons, including Moffett, had a general unsecured claim in

their commissions. After receiving additional briefing and submissions from the parties regarding which parties were entitled to the commissions, on September 24, 1996, Judge Ninfo issued a third Decision and Order which granted Canandaigua National Bank & Trust Company's motion for summary judgment as a secured creditor and held that Moffett and other similarly situated salespersons had only unsecured claims to commissions received by R.J. Russell after it filed for bankruptcy protection.

Moffett appeals from Bankruptcy Judge Ninfo's three decisions.

DISCUSSION

Appellant Moffett argues that the listing agreement under which R.J. Russell received commissions from property sales is an executory contract, which entitles salespersons to a percentage of the commissions. She alleges that she is entitled to payment of commissions from the bankruptcy estate as a secured creditor.

I. The Listing Agreement as an Executory Contract

The listing agreement, which is entered into between the seller of property and the broker, provides in relevant part that:

> 4. PAYMENT TO REALTOR. [The seller] will pay REALTOR a commission of 6% of the sale price of the Property as set forth in the purchase and sale contract that [the sellers] sign. . .
>
> * * *
>
> 5. AUTHORIZATION REGARDING OTHER BROKERS. [The sellers] authorize REALTOR to cooperate with other brokers, including brokers who represent buyers . . . to appoint subagents, and to divide with other licensed brokers such compensation in any manner acceptable to REALTOR, such other brokers, and [the sellers][.]

> 6. PAYMENT OF COMMISSION. . . . REALTOR has earned the commission when [the seller] is provided with a written purchase offer which meets the price and other conditions [the sellers] have set or when the purchase and sale contract becomes a binding legal commitment on the buyer, or when [the sellers] sign a written agreement to exchange the Property, or when [the sellers sign] a lease for the Property. At the closing of the sale of the Property, [the seller's] representative . . . is authorized to pay to REALTOR the commission agreed to in Paragraph 4 from the proceeds of the sale of the Property. (emphasis added).

Moffett argues that listing agreement was actually an executory contract which was not fully performed at the time R.J. Russell filed for bankruptcy. An executory contract has been defined as one,

> under which the obligations of both the bankrupt and the other party to the contract as so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.

In Re Spectrum Information Technologies, Inc., 190 B.R. 741, 746-47 (E.D.N.Y. 1996)(quoting Vern Countryman, Executory Contracts in Bankruptcy, Part I, 57 Minn. L. Rev. 439 (1973)). The commission payments which Moffett seeks were earned by R.J. Russell prior to its bankruptcy filing, when real estate Purchase and Sale Contracts were executed. When the Purchase and Sale Contracts were executed both R.J. Russell and the sellers had performed their duties under the listing agreement, leaving only the payment of a commission upon closing. The fact that a commission remained to be paid did not transform the listing agreement into an executory contract. Other courts which have addressed this issue have reached the same

conclusion. In In Re Munple, Ltd., 868 F.2d 1129, 1130 (9th Cir. 1989), a brokerage firm hired by debtor Munple to sell his land argued that a commission agreement entered into between them was an executory contract which must be assumed by Munple in bankruptcy. The Ninth Circuit disagreed and held that the commission agreement was not an executory contract because the brokerage firm had performed all acts necessary to earn its commission if and when the sale closed. The court held that:

> when a party has "substantially performed" its side of the bargain, such that the party's failure to perform further would not constitute a material breach excusing performance by the other party, a contract is not executory.

868 F.2d at 1130. The fact that the brokerage firm was arguably entitled to a commission payment upon closing did not transform the commission agreement into an executory contract. Id. at 1130-31. See also In Re Cornwall Hill Realty, Inc., 128 B.R. 378, 381 (S.D.N.Y. 1991); In Re Moskovic, 77 B.R. 421 (S.D.N.Y. 1987). Accordingly, Judge Ninfo correctly found that the listing agreement was not an executory contract to be either accepted or rejected by the bankruptcy estate.

Moffett claims that Judge Ninfo erred in not employing a "functional" analysis to determine whether the listing agreement was and executory contract. This Court disagrees. Although at least one Bankruptcy Judge in the Southern District of New York has rejected the "Countryman" test, see In Re Drexel Burnham Lambert Group, Inc., 138 B.R. 687 (S.D.N.Y. 1992), the "Countryman" test,

not the "functional" test, is the prevailing analysis used by courts to determine whether an agreement constitutes an executory contract. Further, the legislative history of the 1978 Bankruptcy Code made clear that "[a] note is not usually an executory contract if the only performance that remains is repayment. Performance on one side of the contract would have been completed and the contract is no longer executory." H.R. 95-595, 95th Cong., 1st Sess. (1977) at 347. In this case, given that the only act remaining was the payment of commissions, the Code's legislative history indicates that the listing agreements should not be considered executory contracts. Even had the listing agreement been analyzed using the "functional" test, it would not have constituted an executory contract. See R.J. Russell's Memorandum at 15-16.

II. Salesperson's Right to Receive Commissions

Moffett also argues that the listing agreement confers a right upon salespersons to receive commissions from the broker. She contends that paragraph 5 of the listing agreement, which authorizes the broker "to appoint subagents" necessarily contemplates that the subagents will be paid for their services out of the earned commissions. According to the Moffett, "[t]he agreements would be nonsensical if read to mean that salespeople can be appointed but not paid for their services." Appellant's Brief at 6.

New York law prohibits payment of commissions directly to salespersons which explains why the listing agreements do not

expressly provide for such payments. See New York Real Property Law § 442-a ("No real estate salesman . . . shall receive or demand any compensation of any kind from any person, other than a duly licensed real estate broker with whom he is associated for any work done by such salesman in . . . buying, selling . . .any real estate."). Only the agreement between R.J. Russell and each salesperson sets forth the terms under which the salesperson will be paid commissions. The "employment" agreement defined the parties' respective rights and responsibilities and, with respect to the payment of commissions, provides that:

> The division and distribution of the earned commissions which may be paid to or collected by said BROKER, shall take place as soon as practicable after collection of such commissions from the party or parties for whom the services have been performed but in no event before the transfer of title of the Real Estate in question.

Agreement ¶ 14. Clearly, the agreement did not contemplate payment of commissions to salespersons until after the closing. Judge Ninfo correctly determined that all commissions earned by R.J. Russell pre-petition were assets of the bankruptcy estate in which Moffett and other salespersons would have a general unsecured claim.

III. Fundamental Fairness

Although not expressly identified as such, Moffett argues that fundamental fairness dictates that the listing agreement be construed as an executory contract, because salespeople routinely provide additional services to guarantee a successful closing after

a purchase agreement is signed. She claims that it would be unfair to deny salespeople their earned commissions in favor of other creditors. This Court joins with Judge Ninfo in expressing sympathy for Moffett's situation. However, the issue is not whether she may have earned those payments, but the priority her claim should have relative to other creditors. Moffett clearly would prefer that the contracts be assumed by the bankruptcy estate since she would then become a secured creditor. However, neither the listing agreement nor her "employment" contract with R.J. Russell guarantee her payment as a secured creditor and, at most, she has an unsecured claim against the assets of the bankruptcy estate. See F.D.I.C. v. Colonial Realty, 966 F.2d 57 (2d Cir. 1992).

WHEREFORE, Appellant Moffett's appeal is denied. Judge Ninfo's Decisions and Orders dated August 29, 1996, August 30, 1996 (96-CV-6451T) and September 24, 1996 (96-CV-6452T) are affirmed in their entirety.

ALL OF THE ABOVE IS SO ORDERED.

Michael A. Telesca

MICHAEL A. TELESCA
United States District Judge

Dated: Rochester, New York
March 14, 1997

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Moffett

Plaintiff(s)

v. 6:96-cv-06451

Remax Realty Group

Defendant(s)

PLEASE take notice of the entry of an ORDER filed on 3/17/97, of which the within is a copy, and entered 3/17/97 upon the official docket in this case. (Document No. 5 .)

Dated: Rochester, New York
March 17, 1997

RODNEY C. EARLY, Clerk
U.S. District Court
Western District of New York
2120 U.S. Courthouse
100 State Street
Rochester, New York 14614

Enclosure
TO:

David MacKnight, Esq.
David L. Rasmussen, Esq.
Leonard Relin, Esq.
John R. Weider, Esq.
Colleen A. Brown, Esq.