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Landlord and Tenant-Contracts-Bankruptcy

LANDLORD AND TENANT—CONTRACTS—BANRUPTCY AS ANTICIPATORY BREACH—On Jan. 5, 1927, a contract was entered into between Robert M. Catts and the Merchants' and Manufacturers' Exchange, parties of the first part, and Melian Pavia, claimant, party of the second part, whereby the latter agreed to pay the former $10,600,000 for the sale of certain leasehold premises to be acquired by the former; $125,000 on account of the purchase price was paid by claimant. On Feb. 3, 1927 Catts and the Merchants' and Manufacturers' Exchange was adjudicated bankrupts and trustees were appointed for their estates. On August 2, 1927, Pavia filed with the referee in bankruptcy proofs of claims against the trustees of the respective estates, setting forth the above contract, the payment of the $125,000, the failure of the bankrupts to acquire title to the property and convey it to claimant, and the election of claimant to rescind the agreement and recover the $125,000 with interest. The referee allowed the claim, and the matter comes before this court on a petition to review the referee's order HELD: Order of the referee affirmed. In re Catts. *In re Merchants' and Manufacturers' Exchange of New York, Claim of Pavia.* Dist. Ct. S. D., N. Y., June 25, 1929, 33 Fed. (2d) 963.

There being no existing res in the bankrupts' possession when the agreement was made, this was an executory contract which bound them to acquire the land in the future and transfer it to claimant. *Cincinnati, etc.*

R. Co. v. McKeen, 64 F. 36; *Farrington v. Tennessee*, 95 U. S. 679. Where there has been a renunciation of an executory contract by one party, the other party has a right to elect between the following remedies: (1) to rescind the contract and pursue the remedies based upon such rescission; *United Press Ass'n. v. National Newspaper Ass'n.*, 237 F. 547; (2) To treat the contract as still binding and wait until the time arrives for its performance, and at such time to bring an action for breach; *New Brunswick, etc. R. Co. v. Wheeler*, 12 F. 377; (3) To treat the renunciation as an immediate breach and sue at once for any damages which he may have sustained. *Weld v. Victory Mfg. Co.*, 205 F. 770; *Golden Cycle Min. Co. v. Rapson Coal Co.*, 188 F. 179. The court in this case apparently treats the claimant's election to rescind as an election to proceed under the last remedy above named. Disablement from performance of contract is a breach thereof. *Roehm v. Horst*, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953. Bankruptcy is a complete disablement; *Re Swift*, 112 F. 315; *Re Pettingill*, 137 F. 143; *Re Neff*, 157 F. 57; *Re Duquesne Light Co.*, 176 F. 785; and hence constitutes a material breach of the executory contract. *Conway v. White*, 292 F. 837; *Roehm v. Horst, supra; Central Trust Co. v. Chicago Auditorium Ass'n.*, 240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811, L. R. A. 1917B 580; *In Re Portage Rubber Co.*, 296 F. 289. The promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach; *Roehm v. Horst, supra; O'Neill v. Supreme Council*, 70 N. J. L. 410; *Central Trust Co. v. Chicago Auditorium, supra; In re Portage Rubber Co., supra;* subject, however, in this case to the right of the trustees in bankruptcy either to assume or renounce performance of the contract within a reasonable time, said contract passing by operation of law as part of the bankrupts' estate to the trustees. *Sparhawk v. Yerkes*, 142 U. S. 1, 35 L. Ed. 915; *Sessions v. Romaika*, 145 U. S. 29, 36 L. Ed. 909; *Gazlay v. Williams*, 210 U. S. 41, 52 L. Ed. 980, 28 S. Ct. 687. Eighteen months having elapsed without an assumption of the contract, the trustees must be held to have renounced any right with respect thereto. Claims, to be provable, must exist at the time of the filing of the petition in bankruptcy, those arising later being neither provable nor discharged. *Zavelo v. Reeves*, 227 U. S. 625, 33 S. Ct. 365, 57 L. Ed. 676; *Moulton v. Coburn*, 131 F. 201; *Re Roth*, 31 L. R. A. (N. S.) 270, 181 F. 667; *Colman Co. v. Withoft*, 195 F. 250. Hence, to sustain the position that bankruptcy operates as a breach of contract giving to the solvent party a provable claim, it must be held that not the adjudication in bankruptcy, but the petition is the breach. For this reason some courts have distinguished between a voluntary and an involuntary bankruptcy, holding that where involuntary proceedings are instituted, they do not constitute such a breach as to authorize proof of damages. *In re Inman and Co.*, 175 F. 312; *In re Imperial Brewing Co.*, 143 F. 579. It is easier to regard a voluntary petition in bankruptcy as a repudiation than the filing by a creditor of such a petition, it being difficult to see how a debtor's contracts can be repudiated by his creditor; especially when the petition might not be sustained and followed by an adjudication of bankruptcy. Williston on Contracts, sec. 1327. It has been held, however, that adjudication is an essential element of the existence of an anticipatory breach of the contract, but that when

such adjudication is made, the breach must be related back to the time of the filing of the petition. *In re Portage Rubber Co., supra; In re Swift, supra.* Despite the above authorities, the apparent weight of authority is that involuntary as well as voluntary bankruptcy constitutes an anticipatory breach giving rise to provable claims on the ground that bankruptcy proceedings, however instituted, are but the natural and legal consequence of something done or omitted to be done by the bankrupt in violation of his implied engagement to maintain ability to perform. *Central Trust Co. v. Chicago Auditorium, supra; Penn. Steel Co. v. N. Y. City R. Co.*, 198 F. 721; *Heyward v. Goldsmith*, 269 F. 946; *Re Swift*, 112 F. 315; *Re Stern*, 116 F. 604; *Re Pettingill, supra.* It is submitted that the privilege of the trustees to assume the contract, if they so desire, cannot be reconciled with the theory that bankruptcy, whether involuntary or voluntary, is a breach of the contract, since on sound principle the trustees can have no greater rights than the bankrupt, and if there has been repudiation or material breach, it seems impossible to deny the solvent party the right to refuse to proceed with the contract even though the trustee in bankruptcy subsequently desires to adopt it. Williston on Contracts, Sec. 1327.

K. J. M.