IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1754

Summary Calendar

IN THE MATTER OF: DON RAY DIXON
and DANA DENE DIXON,

Debtors.

DALE WOOTTON,

Appellant,

v.

YOUNG FAMILY TRUST,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas
3:92 CV 323 R

(March 25, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Dale Wootton, bankruptcy trustee for the estate of Don and Dana Dixon, appeals from the district court's affirmance of the bankruptcy court's judgment in favor of the Young Family Trust.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Finding no error committed by the lower courts, we affirm.

I.

In 1986, A. Peter Young, a long-time executive with Rolls Royce, Ltd., residing in California, retired. Anticipating his retirement from Rolls Royce, Young entered into employment agreements with Don Dixon and one of Dixon's companies, Symbolic Cars of La Jolla, Inc. ("Symbolic Cars"). Young's agreement with Dixon provided for Young's right to equity participation in car dealerships that were directly or indirectly owned by Dixon. Young's agreement with Symbolic Cars specifically included a stock option provision, whereby Young could purchase an eight percent interest in Symbolic Cars by purchasing eight percent of all outstanding shares. The clause provided that Young could finance the stock purchase by offering a non-recourse promissory note and security agreement in which the stock was pledged as security.

Contemporaneous with his retirement from Rolls Royce, Young exercised his stock option and tendered the required promissory note and security agreement to Dixon. In February 1987, the original option agreement was modified into an agreement whereby Young would purchase eight percent of Dixon's outstanding shares in Sterling Motor Company ("Sterling") -- a subsidiary corporation of Symbolic Cars -- in place of receiving stock in

Symbolic.[1] Young provided a promissory note and security agreement executed in favor of Dixon personally. Immediately thereafter, before the eighty shares were delivered, Young agreed to permit Dixon to pledge Young's share of the stock to a financial institution as part of Dixon's agreement to sell off part of Sterling to a third party. Ultimately, however, the pledged stock was returned to Dixon.

It is undisputed that: i) Dixon's eighty shares of outstanding stock were never assigned to Young, ii) no dividends on the stock were ever paid to Young, and iii) no payments were ever made by Young to Dixon or any of his automotive companies under the terms of the promissory note that was executed by Young.

Dixon and his wife became insolvent and declared bankruptcy in 1988. Dale Wootton was appointed bankruptcy trustee. In October 1988, Wootton sold all shares of Dixon's stock in Sterling for $1,600,000. On May 16, 1991, Young[2] filed a Motion for Payment of Sale Proceeds by Co-Owner, requesting his pro-rata share of the sale proceeds, or $196,222. Pursuant to 11 U.S.C. § 157(o), the bankruptcy court conducted a hearing concerning

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[1] That purchase agreement provided that, "Dixon hereby . . . agrees that 80 shares of common stock of Sterling owned by Dixon shall be assigned and transferred . . . to Young . . . . Within five days of the date hereof, Dixon shall deliver an assignment of such shares to Young." Under the agreement, Dixon was required simply to direct Sterling to issue Young a new certificate for 80 shares, as Dixon's certificate was for all of Dixon's 650 shares in Sterling.

[2] Young has since died. The Young Family Trust has been substituted as the appellee.

Young's claim to the $196,222. The bankruptcy court rejected Wootton's contention that he could, as bankruptcy trustee, reject the stock option agreement as an "executory" contract pursuant 11 U.S.C. § 365(a). Although the court recognized that an unexercised stock option is an "executory" contract within the meaning of § 365(a), see Matter of Jackson Brewing Co., 567 F.2d 618 (5th Cir. 1978), the bankruptcy court agreed with Young's claim that the stock option contract had been substantially performed under California law, which governed the stock option contract and employment agreements. All that remained to be done at that time that the Dixons declared bankruptcy was the clerical act of reissuing the stock certificate upon transfer from Dixon to Young and payment of the promissory note by Young. Furthermore, primarily citing legislative history to the Bankruptcy Code, the bankruptcy court held that a promissory note is not an "executory" contract within the meaning of § 365(a). Thus, the court ordered Wootton to pay Young $121,365.86, which represented the amount of the sales proceeds and pre-judgment interest minus the amount Young owed the estate on the promissory note.

On appeal to the district court, Wootton again argued that he was entitled to reject the stock option agreement as an "executory" contract. Adopting essentially the same reasoning as the bankruptcy court, the district court affirmed Young's judgment against Wootton.

II.

On appeal to this court, Wootton again argues that he has a right to reject Young and Dixon's purchase agreement as an "executory" contract under 11 U.S.C. § 365(a). In particular, Wootton argues that this court should adopt a "functional" definition of the term "executory" as used in § 365(a), as opposed to the traditional "Countryman" definition.[3] Such a "functional" definition, Wootton concedes, has only been adopted by a minority of courts. See Sharon Steel Corp. v. National Fuel & Gas Distr. Corp., 872 F.2d 36, 39 (3d Cir. 1989) (noting that the "Countryman" definition has been adopted by a majority of courts). This court has never expressly adopted either definition, although we observe that the United States Supreme Court appears to have adopted a definition akin to Countryman's. See National Labor Relations Board v. Bildisco & Bildisco, 465 U.S. 513, 522 n.6 (1984).

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[3] The namesake of the "Countryman" definition is Professor Countryman. See Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973). Professor Countryman defined "executory" as meaning a bilateral agreement under which the obligations of both the bankrupt and the other contracting party remain so far unperformed that failure of either to make complete performance would constitute "material" breach excusing performance of the other.

The minority "functional" definition has been advanced primarily in academic circles. See, e.g., Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227 (1989); see also In re Drexel Burnham Lambert Group, Inc., 358 B.R. 687, 707-08 (Bankr. S.D.N.Y. 1992). Rather than announcing a uniformly accepted "functional" definition -- such as the succinct "Countryman" definition -- commentators such as Westbrook simply have stated that whether a contract is "executory" should not be a talismanic precondition for court approval of rejection by a trustee. Wootton appears to argue that a "functional" definition of "executory" should consider the economic reality of a contractual situation.

Wootton's argument that Young and Dixon's purchase agreement was "functionally" executory is as follows: Wootton contends that although Young technically exercised his right to purchase Dixon's stock, in effect he still had an "option" even after proffering a promissory note and security agreement. Wootton's argument is premised on the fact that the promissory note that Young executed was non-recourse and the security agreement simply provided that the stock was to be the only collateral. Wootton also points to the undisputed fact that Young planned on paying off the promissory note with dividends from the stock. Thus, Wootton argues, because Young could have simply breached the promissory note if it appeared that dividends on the stock were not adequate to cover the amount of repayment, the arrangement was still a financial contingency similar to a stock option -- whereby Young had nothing to lose but the original consideration he provided for the option. Because it was the equivalent of an unexercised stock option, Wootton concludes, it was an executory contract under the law of this circuit. See Matter of Jackson Brewing Co., supra.

Although we do not doubt that, in certain cases, a "functional" or "substance-over-form" definition might be appropriate,[4] we believe that this case is hardly the one in which to adopt such a definition of "executory." Although in some larger sense Young still had the "option" to actually own

[4] See Bildisco, 465 U.S. at 527 ("The Bankruptcy Court is a court of equity, and in [fashioning remedies] it is in very real sense balancing the equities" of those before the court.).

the stock outright, free of any encumbrance, unlike the case of a true stock option, he had -- under California law -- equitable title to the outstanding stock.[5] Simply because the stock certificate had not been formally issued to Young upon transfer of Dixon's certificate is of no moment under state law. See, e.g., Federal Employees Distributing Co. v. Franchise Tax Board, 260 Cal. App.2d 937, 945 (Cal.App. 1968); Crane Valley Land Co. v. Bank of America, 182 Cal.App.2d 166, 173 (Cal.Dist.Ct.App. 1960); Mindenberg v. Carmel Film Productions, 132 Cal.App.2d 598, 608-09 (Cal.Dist.Ct.App. 1955). Moreover, in Young's case, unlike cases such as Crane and Mindenberg where the stock has never been formally issued, Young's stock had been already issued at the time Dixon breached the purchase agreement, albeit in a single certificate for all 650 shares of Dixon's stock in Sterling. The issuance of a certificate for Young's eighty shares was simply a book-keeping formality.

Thus, all that actually remained, besides this bookkeeping change, was Young's payment of the promissory note. Because a promissory note is not an "executory" contract within the meaning of § 365(a), see Lubrizol Enterprises, Inc. v. Richmond Metal Finishers Inc., 756 F.2d 1043, 1046 (4th Cir. 1985) (citing legislative history of Bankruptcy Code), we agree with Young's

[5] The Bankruptcy Code expressly provides that a legal (as opposed to an equitable) interest in property possessed by a debtor at the time bankruptcy is declared remains only a legal interest possessed by the bankruptcy estate. See 11 U.S.C. § 541(d).

estate that it is entitled to the sales proceeds minus the amount the amount Young owed on the promissory note.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.