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Who Cares if It's an Executory Contract?

BY SHAUL SULTAN/ ON JANUARY 25, 2021


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On Tuesday, January 13th, 2021, the lawyers for the cast and producers from the 2012 film "Silver Linings Playbook" argued in the United States Court of Appeals for the Third Circuit that Spyglass Media Group, LLC, the group that purchased The Weinstein Company's assets, must honor the Weinstein Company's pre-bankruptcy compensation obligations.[1]The dispute is over their work-for-hire contracts and whether to consider it an executory contract or not. [2] A work-for-hire contract allows the employer to retain the copyrights to work completed by the employee or independent contractor.[3] An executory contract is when there is "a contract between a debtor and another party under which both sides still have important performance remaining." [4] If either side would seize performing the contract, then it would be a breach of contract. [5]

The bankruptcy code provides a debtor with the power to either reject or assume an executory contract. [6] The debtor must decide 60 days after filing for chapter 7 or before the reorganization confirmation in a chapter 11 case, to reject or assume the contract. When assuming an executory contract, the company has to cure or have an approved plan to cure all pre-petition defaults.[7] When a debtor fails to either assume or reject the executory contract within the correct time frame, the contract is then considered rejected.[8] When an executory contract is rejected, it results in a full-blown breach of contract. Claims for damages are treated as a pre-petition claim against the estate and are on the same level as unsecured creditors' claims. [9]

In 2018, Spyglass Media Group purchased The Weinstein Company's assets for $298 million, and the Delaware bankruptcy court allowed them to assume all of the Weinstein Group's contracts free and clear of all claims.[10] Representing Bruce Cohen, the producer of "Silver Linings Playbook," lawyer Angela Butcher "contends that [Cohen] is owed $400,000 in contingent obligations" because of his ongoing obligations to perform under the contract, making it an executory contract.[11] Cohen's lawyers claimed that reading the agreement at its face value shows "obligations of the parties in the agreement are material."[12] Ms. Butcher cited *In re General DataComm Industries Inc. v. Arcara*,[13] in which the court ruled that in bankruptcy a contract is executory when "failure of either party to complete performance would constitute a material breach excusing the performance of the other."[14]

During oral arguments, Judge Thomas Ambro asked Cohen's attorneys if they were "arguing that the contracts should be executory 'forever.'"[15] Butcher responded, "I believe that is our position, Your Honor, unless something in the future, something were to happen that would release Mr. Cohen from his remaining obligations under the contract." [16] Butcher went on further to say that "the provision pertaining to continuing compensation is perpetual." [17] Because this agreement is an executory contract, it puts Spyglass Media Group on the hook for all the payments the production company is owed.

The attorney for Spyglass Media Group, Thomas R. Califano of DLA Piper, argued that the language in the contract alone is not enough to make it an executory contract, calling it a "far cry". [18] Instead, when work on the film was performed, that was when the obligations on the contract were completed.[19] The responsibilities that remained should not be considered material when The Weinstein Company filed for bankruptcy, and therefore, Spyglass Media Group received the contract free and clear of all claims.[20]

In response to Califano's argument, Judge Ambro presented a hypothetical, testing Spyglass Media Group's attorneys to see if Spyglass Media Group would continue paying contingent compensation if Cohen were to transfer his rights of the contract to another party.[21] "Let's say that 'Silver Linings Playbook' becomes like 'It's A Wonderful Life' and it has this incredible run many years afterwards and Cohen attempts to assign the contract and his right to receive contingent compensation to X," Judge Ambro said.[22] He then asked if Spyglass Media Group would pay X the contingent compensation even if they considered such a transfer a violation of the original sale agreement.[23] Answering Judge Ambro's question, Califano said that he would have to look at the agreement's terms and did not give a definitive answer. [24]

Conclusion

The importance of whether a contract is executory or not plays a significant role in bankruptcy. If the judge reverses the lower court's decision and rules the contract between The Weinstein Company and Cohen Group to be executory, this will mean that violating the terms of an agreement can be considered a material breach. As a result, the contingent compensation that was unpaid to the Cohen group before The Weinstein Company filed for bankruptcy would be owed and the Cohen Group would be considered an unsecured creditor.

Shaul Sultan is a Second-year Law Student at the Benjamin N. Cardozo School of Law and a staff editor at the Cardozo Arts & Entertainment Law Journal. Shaul is interested in bankruptcy and tax.

1. Maria Chutchian, 'Silver Linings' Team Takes on Weinstein Bankruptcy Ruling in Appeals Court, Reuters (Jan. 13, 2021), https://www.reuters.com/article/bankruptcy-weinstein/silver-linings-team-takes-on-weinstein-bankruptcy-ruling-in-appeals-court-idUSL1N2JO3FB.
2. Id.
3. See generally Works Made for Hire, United States Copyright Office, https://www.copyright.gov/circs/circ09.pdf.
4. Bob Eisenbach, Executory Contracts — What Are They And Why Do They Matter In Bankruptcy?, Cooley: In The Red (July 18, 2006), https://bankruptcy.cooley.com/2006/07/articles/business-bankruptcy-issues/executory-contracts-what-are-they-and-why-do-they-matter-in-bankruptcy.
5. Id.
6. 11 U.S.C § 365.
7. Id.
8. Id.
9. Mark G. Douglas, Can an Executory Contract Lose Its Executoriness? "Maybe," Says the Second Circuit, Jones Day (July/August 2008), https://www.jonesday.com/en/insights/2008/08/can-an-executory-contract-lose-its-executoriness-maybe-says-the-second-circuit.
10. Chutchian, supra note 1.
11. Id.
12. Jeannie O'Sullivan, Weinstein Co. Buyer Owes Pre-Ch. 11 Profits, 3rd Circ. Told, Law360 (Jan. 13, 2021), https://www.law360.com/articles/1344479/weinstein-co-buyer-owes-pre-ch-11-profits-3rd-circ-told.
13. Gen. Datacomm Indus. v. Arcara (In re Gen. Datacomm Indus.), 407 F.3d 616 (3d Cir. 2005).
14. Id.
15. Chutchian, supra note 1.
16. Id.
17. Id.
18. O'Sullivan, supra note 12.

19. Chutchian, supra note 1.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.