

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

S-Tek 1, LLC,
a New Mexico limited liability company.

No. 20-12241-j11

**ORDER REGARDING MOTION TO REJECT SETTLEMENT AGREEMENT
BETWEEN S-TEK 1, LLC AND DENNIS SMIGIEL AS AN EXECUTORY
CONTRACT AND SETTING STATUS CONFERENCE**

S-Tek 1, LLC (“S-Tek”) filed a Motion to Reject Settlement Agreement between S-Tek 1, LLC and Dennis Smigiel as an Executory Contract and Clarify Extent of Debtor’s Obligations Thereunder (“Motion to Reject Settlement Agreement” – [Doc. 112](#)). Dennis Smigiel opposes the Motion to Reject Settlement Agreement, asserting that the Settlement Agreement and Release in Full (“Settlement Agreement”) is not subject to rejection because it is not executory. *See* Objection to Debtor’s Motion to Reject Settlement between S-Tek 1, LLC and Dennis Smigiel as an Executory Contract (“Objection” – [Doc. 118](#)). Alternatively, S-Tek contends that the Settlement Agreement is unenforceable because it contains a provision that is contrary to public policy. Finally, S-Tek requests the Court to clarify S-Tek’s obligations under the Settlement Agreement if the Court determines that the Settlement Agreement is executory and not unenforceable.

Even if the Settlement Agreement is executory, the Court concludes as a matter of law that rejection of the Settlement Agreement will not allow S-Tek to continue to assert its claims against Mr. Smigiel. The Court also concludes that the provision S-Tek contends is contrary to public policy is severable from the Settlement Agreement and thus does not render the entire the Settlement Agreement unenforceable. In light of these partial rulings, the Court will

set a status conference to determine whether S-Tek still wishes to prosecute the Motion to Reject Settlement Agreement.

PROCEDURAL HISTORY AND FACTS¹

In 2018 S-Tek entered into an agreement to purchase the assets of Surv-Tek, Inc. (“Surv-Tek”). Dennis Smigiel served as the listing broker for the sellers in the transaction and facilitated the transaction. In July of 2019, S-Tek filed a lawsuit against Surv-Tek and others, styled *S-Tek 1, LLC v. Surv-Tek, Inc., et al.*, as case number D-202-CV-2019-05359 (the “State Court Action”) alleging that misrepresentations were made to S-Tek in connection with the transaction which caused S-Tek damages. S-Tek later amended its complaint to name Mr. Smigiel as a co-defendant but did not specify the amount of damages against Mr. Smigiel. The amended complaint asserts that “Defendants, including Dennis Smigiel, breached their duty to disclose information on how the business operated that was owed to the Plaintiff, the Plaintiff had a right to rely on the misinformation, and the Plaintiff sustained damages.” *See* Joint Stipulation, ¶ 4.

In October of 2020, Mr. Smigiel filed a motion in the State Court Action seeking to dismiss S-Tek’s claims against him. Thereafter the parties participated in mediation which resulted in the Settlement Agreement between S-Tek, Randy Asselin, Christopher B. Castillo and Kymberlee Castillo (the “S-Tek parties”) and Mr. Smigiel and Keller Williams (the “Smigiel parties”), executed on November 11, 2020. Under the Settlement Agreement, the Smigiel parties agreed to pay \$30,000 to S-Tek, and the S-Tek parties agreed to release all

¹ The parties filed a Joint Stipulation as to Procedure and Facts Regarding Debtor’s Motion to Reject Settlement Agreement Between S-Tek 1, LLC and Dennis Smigiel as Executory Contract and Clarify Extent of Debtor’s Obligations Thereunder [Doc 112] and Smigiel’s Objection to Debtor’s Motion to Reject Settlement Agreement between S-Tek 1, LLC and Dennis Smigiel as Executory Contract [Doc 118] (“Joint Stipulation” – [Doc. 135](#)). The Joint Stipulation identifies stipulated facts upon which the Court relies in this Opinion.

claims against the Smigiel parties including all claims that were asserted or could have been asserted in the State Court Action. *See* Settlement Agreement, ¶¶ 2 and 5. Paragraph 2 of the Settlement Agreement, labeled Release, provides, in relevant part, that the S-Tek parties

hereby fully and finally release acquit and forever discharge Smigiel . . . of and from all liability, claims, demands, and causes of action . . . that have arisen up to the date of execution of this Agreement, or which may arise hereafter including but not limited to all claims that S-Tek [parties] have asserted or could have asserted in the [State Court Action]

Settlement Agreement, ¶ 2.

Paragraph 3 of the Settlement Agreement, labeled Release of Future Injuries and Damages, provides that “all such unknown claims for damages against Smigiel, are forever foreclosed, released, and dismissed with prejudice.” Settlement Agreement, ¶ 3.

The Settlement Agreement also contains, among other provisions,

(1) a provision requiring dismissal of the claims that were raised or could have been raised against Mr. Smigiel in the State Court Action with prejudice (¶ 1);

(2) a confidentiality and non-disparagement provision (¶ 4);

(3) a provision requiring the S-Tek parties not to file a complaint with the Realtor’s Association or the New Mexico Real Estate Commission (¶ 7);

(4) indemnification provisions requiring the S-Tek parties to indemnify the Smigiel parties from a) any tax consequences from payment of the settlement amount (¶ 11), b) “any loss, claim, expense, demand or cause of action . . . by any person or entity of a . . . claim or claims connected with the subject matter of” the State Court Action and the payment of the settlement amount (¶ 12), and c) a claim brought by any other party to the State Court Action relating to the State Court Action and the transaction (¶ 12); and

(5) a severability provision (¶15).

The severability provision of the Settlement Agreement provides:

If any provision of this Agreement, or the application thereof, is held invalid, any such invalidity shall not affect other provisions or applications of this Agreement.

Settlement Agreement, ¶ 15.

The Payments provision of the Settlement Agreement provides:

Upon receipt of payment of the Settlement Funds, all dismissals releases, indemnities, promises, covenants, and agreements described in this Agreement shall become final, binding, and fully effective, according to the terms of this Agreement.

Settlement Agreement, ¶ 5.

Mr. Smigiel paid the \$30,000 settlement amount to S-Tek on December 2, 2020. Later that day, S-Tek filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. S-Tek removed the State Court Action to this Court on December 20, 2020, initiating Adversary Proceeding No. 20-1074-j.

On December 28, 2020, S-Tek filed a Motion to Approve Settlement Agreement Between S-Tek 1, LLC and Dennis Smigiel (“Motion to Approve Settlement Agreement” – [Doc. 53](#)) in S-Tek’s bankruptcy case. The parties through counsel agreed that “we will not deem attachment of the [Settlement] Agreement to the Motion to Approve [Settlement Agreement] as a breach of the confidentiality provision.” *See* Joint Stipulation, ¶ 12.

On request of Mr. Smigiel filed March 11, 2021 ([Doc. 103](#)), the Court set a status conference on the Motion to Approve Settlement Agreement on March 31, 2021. *See* [Doc. 104](#). S-Tek withdrew the Motion to Approve Settlement Agreement on March 26, 2021 ([Doc. 109](#)) and filed the Motion to Reject the Settlement Agreement on March 30, 2021 ([Doc. 112](#)), the day before the scheduled status conference on the Motion to Approve Settlement Agreement.

The Court held a preliminary hearing on the Motion to Reject Settlement Agreement on April 29, 2021 and the parties argued the motion. At the hearing held April 29, 2021, the parties requested the Court to rule on the Motion to Reject Settlement Agreement on stipulated facts without a hearing. The Court entered an Order Resulting from the Hearing

held April 29, 2021 (“Order” – [Doc. 121](#)) which directed the parties to file the Joint Stipulation requesting the Court to decide the Motion to Reject Settlement Agreement on stipulated facts without an evidentiary hearing. The Order fixed a deadline for the parties to file simultaneous briefs on the issue of whether the provision in the Settlement Agreement prohibiting S-Tek from filing a complaint with the New Mexico Real Estate Commission (“NMREC”) is unenforceable as a violation of public policy, and fixed a deadline for optional briefing regarding the jurisdiction and authority of the NMREC to make a ruling that could affect the indemnification obligations in the Settlement Agreement. *Id.* S-Tek and Mr. Smigiel filed briefs addressing these issues. *See* Docs. 146, 147, 148, and 154.²

DISCUSSION

A. Even if the Court Presumes the Settlement Agreement is Executory, Rejection of the Settlement Agreement only Relieves the Debtor of Future Obligations; it does Not Unwind Transactions Already Completed under the Settlement Agreement

The parties contest whether the Settlement Agreement is executory.³ If the Settlement Agreement is executory and subject to rejection, S-Tek requests the Court to determine that S-

² In light of the Court’s partial ruling, the Court need not address the parties’ arguments regarding S-Tek’s indemnification obligations.

³ The Tenth Circuit applies the Countryman definition to determine whether a contract is executory. *In re Baird*, [567 F.3d 1207, 1211](#) (10th Cir. 2009) (“We . . . formally adopt the Countryman definition . . .”). Under the Countryman definition, the Court “looks to whether ‘the obligation of both the bankrupt and the other party are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.’” *Baird*, [567 F.3d at 1210](#) (quoting Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L.Rev. 439, 460 (1973)). Mr. Smigiel contends that the Settlement Agreement is not executory because he has completed all material obligations under the Settlement Agreement. Debtor counters that the Settlement Agreement is executory because of the Debtor’s significant future indemnification obligations and the parties’ mutual non-disparagement obligations. For a contract to be executory, *both* parties must have remaining material obligations. *See In re Sproverlook, LLC*, [551 B.R. 481, 484](#) (Bankr. D.N.M. 2016) (the test to determine whether a contract is executory “is consistent with § 365’s legislative history, which states that the term executory contracts ‘generally includes contracts on which performance remains due to some extent on both sides.’”) (quoting H.R.Rep.No. 595, 95th Cong., 1st Sess. 347 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 58 (1987); and U.S. Code Cong. & Admin. News 1978, pp. 5787, 5844, 6303); *In re Busetta-Silvia*, [308 B.R. 537, 540](#) (Bankr. D.N.M.

Tek may continue to assert its claims against Mr. Smigiel in the removed State Court Action. It is not clear whether the Settlement Agreement is executory.⁴ However, even if the Court presumes that the Settlement Agreement is executory and subject to rejection, rejection will not allow S-Tek to continue to assert its claims against Mr. Smigiel.

In *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S.Ct. 1652, 1661 (2019), the Supreme Court held that “[r]ejection of a contract—any contract—in bankruptcy operates not as a rescission but as a breach.” Rejection as breach of the contract, “does not eliminate rights the contract had already conferred on the non-breaching party.” *Id.* at 1659. Nor does rejection “‘vaporize’ the counterparty’s rights.” *Id.* (quoting *In re Tempnology, LLC*, 559 B.R. 809, 822 (1st Cir. BAP 2016)). Consequently, rejection of an executory contract “cannot rescind rights that the contract previously granted.” *Id.* at 1666.

The same holds true for rejection of settlement agreements. *See, e.g., Simmons Cap. Advisors, Ltd. v. Bachinski (In re Bachinski)*, 393 B.R. 522, 545 (Bankr. S.D. Ohio 2008) (rejection of a settlement agreement “would not reverse a property transfer made in accordance with the agreement prior to its rejection. Thus, rejection of the Settlement Agreement would not have the effect of unwinding the transfer of the . . . Property.”); *In re Peralta Food Corp.*, No. 07-16508-BKC-AJC, 2008 WL 190503, at *7 (Bankr. S.D. Fla. Jan.

2004) (a contract is executory where “material performance remains due on both sides.”) (citing *United States v. Myers (In re Myers)*, 362 F.3d 667, 673 (10th Cir. 2004)).

⁴ The Settlement Agreement contains a non-disparagement provision requiring the S-Tek parties and the Smigiel parties “not make any negative or disparaging comment or publication with respect to one another or the Subject Transaction[,] and “specifically precludes any oral or written statements, online posting, social media postings, and any and all other publication of disparaging comments or remarks.” Settlement Agreement, ¶ 4. Courts do not agree whether a contract with mutual non-disparagement obligations is executory. *Compare, Ready Productions, Inc. v. Jarvis (In re Jarvis)*, No. 04-10806-JMD, 2005 WL 758805, at *3 (Bankr. D.N.H. March 28, 2005) (non-disparagement clauses are not sufficiently material to establish that a contract is executory) with *In re Cho*, 581 B.R. 452, 465-66 (Bankr. D.Md. 2018) (non-disparagement provisions in settlement agreement were sufficiently material that the agreement constituted an executory contract).

18, 2008) (“Debtor will not be able to recover the funds being held in the registry of the court . . . because rejection of the Settlement Agreement does not cancel, repudiate, or rescind the Settlement Agreement.”); *In re TM Vill., Ltd.*, No. 18-32770-BJH, 2019 WL 1004532, at *8 (Bankr. N.D. Tex. Feb. 28, 2019) (“[R]ejection of the Settlement Agreement will not undo the Debtor’s prepetition transfer of the Condominium Units . . .”).

Here, Mr. Smigiel paid the settlement amount to S-Tek under the Settlement Agreement pre-petition. The Settlement Agreement provides that, “[u]pon receipt of payment of the Settlement Funds, all dismissals, releases, indemnities, promises, covenants, and agreements described in this Agreement shall become final, binding, and fully effective, according to the terms of this Agreement.” Settlement Agreement, ¶ 5. Thus, S-Tek’s release of its claims against Mr. Smigiel in the State Court Action was complete upon S-Tek’s receipt of the \$30,000 from Mr. Smigiel. This is so even though no dismissal order had been entered in the State Court Action before S-Tek filed its voluntary bankruptcy petition. Under *Tempnology*, and other cases that have “consistently . . . held that rejection of an executory contract does not unwind transactions that already have been consummated—or void property rights that already have been obtained—under the contract prior to rejection[.]” *Bachinski*, 393 B.R. at 544, rejection of the Settlement Agreement will not undo the releases that already became effective pre-petition upon S-Tek’s receipt of the settlement funds from Mr. Smigiel. Rejection of the Settlement Agreement will not allow S-Tek to resume its claims against Mr. Smigiel because Mr. Smigiel retains the rights he already received under the Settlement Agreement prior to S-Tek’s attempted rejection. “[T]he debtor and counterparty do not go back to their pre-contract positions.” *Tempnology*, 139 S.Ct. at 1662.

Rejection of the Settlement Agreement would relieve S-Tek only from performing its obligations under the settlement agreement that have not yet been performed. *Id.* (After rejection “the debtor can stop performing its remaining obligations under the agreement.”). S-Tek’s future obligations under the Settlement Agreement may be sufficiently burdensome that it may still want to reject it. But in light of S-Tek’s request to continue its claims against Mr. Smigiel upon rejection of the Settlement Agreement and the Court’s determination that rejection will not accomplish that result, the Court will set a status conference to determine whether S-Tek wants to pursue its Motion to Reject Settlement Agreement.

B. The Provision Requiring S-Tek Not to File a Complaint with the New Mexico Real Estate Commission Does not Render the Entire Settlement Agreement Void as Against Public Policy

S-Tek alternatively argues that the Settlement Agreement is unenforceable because the provision prohibiting S-Tek from filing a complaint with the Realtor’s Association or the New Mexico Real Estate Commission is contrary to public policy. That provision provides:

S-Tek [parties] agree and acknowledge that none of them has initiated and that none of them will initiate any administrative or professional association complaint or proceeding against any of the licensed brokers or brokerage firms who were parties to the Litigation, including but not limited to any complaint to a Realtor’s Association or the New Mexico Real Estate Commission.

Settlement Agreement, ¶ 7.

S-Tek first points out that “agreements for pecuniary considerations to control . . . the regular administration of justice . . . are void as against public policy”

Providence Tool Co. v. Norris, 69 U.S. 45, 56, 17 L.Ed. 868 (1864). S-Tek then relies by analogy on Ethical Consideration 7-21 of the ABA Model Code of Professional Responsibility, which provides that “[t]hreatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion

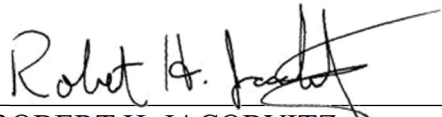
of . . . [the civil adjudicative] process” Model Code of Prof’l Responsibility EC 7-21 (Am. Bar Ass’n 1980). S-Tek reasons further that this Ethical Consideration should apply to regulatory agencies, like the NMREC. Mr. Smigiel counters that New Mexico “has a strong public policy of freedom of contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals[.]” *Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶ 20, [134 N.M. 341, 348, 76 P.3d 1098, 1105](#) (quoting *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, [108 N.M. 467, 471, 775 P.2d 233, 237](#) (1989)), and that the Ethical Consideration S-Tek relies upon concerns threats of *criminal* process whereas the NMREC has no role in any criminal process.

The Court need not decide whether the provision that prohibits S-Tek from initiating any administrative or professional association complaint or proceeding against the Smigiel parties with the Realtor’s Association or the NMREC violates public policy because, even if it did, it would not render the entire Settlement Agreement unenforceable. The Settlement Agreement has a severability provision. Under the severability provision, the invalidity of any provision in the Settlement Agreement does “not affect other provisions or applications of this Agreement.” Settlement Agreement, ¶ 15. The Settlement Agreement’s enforceability is thus not dependent on the validity of the provision prohibiting S-Tek from initiating a complaint with the Realtor’s Association or the NMREC.

WHEREFORE, IT IS ORDERED:

1. The Settlement Agreement is not unenforceable on the ground that it contravenes public policy;

2. Even if the Court were to determine that the Settlement Agreement is executory and were to grant S-Tek's Motion to Reject Settlement Agreement, S-Tek cannot continue to assert its claims against Mr. Smigiel in the removed State Court Action;
3. The Court will hold a status conference on the Motion to Reject Settlement Agreement on **July 21, 2021 at 10:00 a.m.** in the Gila Courtroom, 5th Floor, Pete V. Domenici United States Courthouse, 333 Lomas Blvd. NW, Albuquerque, New Mexico. Parties/counsel may appear at the status conference by telephone by making arrangements with chambers (505-600-4650 or jacobvitzstaff@nmb.uscourts.gov) at least one business day prior to the scheduled status conference.


ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: July 12, 2021

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