

**IN THE SUPREME COURT****STATE OF NORTH DAKOTA**

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**SUPREME COURT NO. 20110122**

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Richard Bendish and Mary Bendish,

Plaintiffs-Appellees

-vs-

James Castillo, Cendak Development  
Corporation, Fort Rice Bar & Grill, Inc.,  
And the State of North Dakota acting  
through the Office of the State Tax  
Commission,

Respondents

Cendak Development Corporation and  
Fort Rice Bar & Grill, Inc.,

Appellants

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APPEAL FROM JUDGMENT ENTERED MARCH 15, 2011  
SOUTH CENTRAL JUDICIAL DISTRICT  
MORTON COUNTY CR. NO. 30-10-C-254  
THE HONORABLE SONNA M. ANDERSON, PRESIDING

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**BRIEF**

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## ABBREVIATIONS

Page - P.

Line - L.

Transcript - Tr.

Motion - Mo.

## ISSUE

[¶1] Did the trial judge err when she failed to give Cendak Development Corporation a period of redemption?

## NATURE OF THE CASE

[¶2] This case involves a lot and building in Fort Rice, North Dakota, a Contract for Deed and a Lease Purchase Agreement.

[¶3] The owners and sellers in the Contract for Deed and Lease Purchase Agreement of the lot and building are Mary Bendish and Richard Bendish (Bendish)

[¶4] The buyer in the Contract for Deed is James Castillo.

[¶5] The Lease Purchase Agreement involves Bendish, James Castillo and Cendak Development Corporation.

[¶6] Bendish served a summons and complaint on all of the above named Defendants. That summons and complaint was filed on March 22, 2010.

[¶7] Defendants Cendak Development Corporation and Fort Rice Bar & Grill on April 14, 2010 answered the complaint and counterclaimed. The counterclaim alleged the Contract for Deed had been assigned to Cendak Development Corporation, and that Bendish had agreed to the assignment and accepted payments..

[¶8] Bendish in their Reply to the Counterclaim admitted to payments from others.

[¶9] This case was tried to the District Court on November 24, 2010.

[¶10] The trial court issued a Memorandum Opinion on March 7, 2011

cancelling the contract for deed, denying Cendak Development Corporation any right to redeem the property, returning the pickup truck to Gange, and awarding statutory costs to Bendish.

[¶11] Judgment for Bendish was filed on March 15, 2011.

[¶12] Defendants Cendak Development Corporation and Fort Rice Bar & Grill Inc., filed a Motion to Reconsider on March 16, 2011.

[¶13] Bendish resisted the motion to reconsider. That motion was heard on March 31, 2011. The Court after hearing testimony and arguments of counsel denied the motion.

[¶14] Defendants Cendak Development Corporation and Fort Rice Bar & Grill Inc., filed a Notice of Appeal and an Order for Transcript on April 18, 2011.

[¶15] This matter is now before the North Dakota Supreme Court.

#### STATEMENT OF FACTS

[¶16] In 1993 Richard Bendish purchased from Albert Schoonover the following described real property: Lot F of the South half of the Northwest Quarter in Section 11, Township 135, Range 79 in Morton County. (property) Tr. P.4, L.20-25, P.5, L.1-3. On the above property Mr. Bendish built a convenience store/gas station and ran a business called the Outpost for about seven years. Tr. P.5, L.8-16.

[¶17] Mr. Bendish decided on March 1, 2003 to sell the property by Contract for Deed to James Castillo. Tr. P.5, L.16-18 (Contract for Deed Exhibit #1) App.18

[¶18] The Contract for Deed was later assigned to Todd Tecca. Mr. Tecca later

assigned the Contract for Deed back to James Castillo. Tr. P.8, L.1-17.

[¶19] After the Contract for Deed was assigned back to Mr. Castillo in 2005 Mr. Bendish testified it was never assigned again. Tr. P.9, L.8-14.

[¶20] Exhibit # 5, App. P.23 is a Lease Purchase Agreement Mr. Bendish's initials appear on that document. He signed that Lease Purchase Agreement on 12-28-06. Exhibit #5 App. P. 23 states that the arrears on the Contract for Deed were \$6,292.08 and that \$3,000.00 was paid on the arrears. Also Exhibit #5 App. P. 23 states that the monthly payments on the Lease Purchase Agreement were \$620.86. These \$620.86 monthly payments are the same amounts as the monthly payments in the Contract for Deed. Exhibit #1. Tr. P.15, L.13-25, P.16, L.1-7

[¶21] The change from \$6,200.00 to \$6,292.08 and that \$3,000 had been paid on the arrears was hand written on Exhibit #5 App. P. 23 by Mr. Bendish. Also the correction in the monthly payments from \$671.00 to \$620.86 was hand written by Mr. Bendish. Tr. P.21, L.20-23, P.23, L.17-22. These changes were initialed by Mr. Bendish, Mr. Castillo and Ivan Gange, the agent for Cendak Development Corporation (Cendak).

[¶22] On the November 24, 2010 the date of trial, Mr. Bendish testified Cendak was operating a bar and used car business out of the old Outpost building. Tr. P.19, L.8-16.

[¶23] One of the conditions in The Lease Purchase Agreement is that Cendak pay \$265.00 of the abstract fees. Exhibit #5 App. P. 23.

[¶24] The payments made by Cendak on the Contract for Deed and on the Lease

Purchase Agreement are set out in Exhibit #4 App. P.22 as follows: 1-1-2007 (\$3,000), 3-15-2007 (\$4,000), 8-27-2007 (\$2,100), 9-24-2007 (\$3,250) and 9-1-2008 (\$2,500).

[¶25] The last figure of \$2,500 was not paid in cash but was a payment made by a 2000 one ton truck. (truck) Tr. P.30, L. 5-7, P.31, L.16-17. Motor Vehicle Title Exhibit #7 App. P. 24.

[¶26] Ivan Gange testified that Richard Bendish agreed to take the truck as full payment on the property. Tr. P.66, L. 10-17.

[¶27] Mr. Bendish testified that he didn't agree that the truck would be full payment but that the truck and sixty \$100 bills would be full payment. Tr.P.33, L.3-6.

[¶28] There is also a \$1,000 payment Mr. Castillo claimed he made to Mr. Bendish. Tr. P.56, L. 10-23 Exhibit #13, App. P.25. Mr. Bendish admits its his signature on Exhibit #13, App. P. 25 but doesn't recall signing that document, talking to James Castillo, or that the \$1000.00 was a payment on the Contract for Deed.

Tr. P. 78, L. 10-22, Tr. P. 81, L.10-25, P. 82, L1-9.

[¶29] On November 24, 2010 Cendak had two business it was operating on the property and had made improvements to the land. Tr. P.70, L.2-6. The taxes were current. Tr. P.61, L.17-25, P.62, L.1-2.

[¶30] The trial court in its Memorandum Opinion App. P. 26 cancelled the Contract for Deed, didn't allow Cendak/Gange the right to redeem the property and ordered Bendish to return the pickup to Gange.

#### ARGUMENT

[¶31] These are two exhibits in the case before the court (the case) that deal with

the transfer of real property. The first is Exhibit #1 App. P.18 which is a Contract for Deed that has the purchase price for the property at Forty Thousand Four Hundred Dollars (\$40,400.00). The second is Exhibit #5 App. P. 23 which is a Lease Purchase Agreement of the property. This Lease Purchase Agreement is signed by James Castillo, Ivan Gange as the agent for Cendak and Walter Larson as a witness on 11-28-06. Richard Bendish signed the Lease Purchase Agreement on 12-28-06. When Mr. Bendish signed the Lease Purchase Agreement he made handwritten changes that changed the arrears from \$6,200.00 to \$6,292.08, and changed the monthly payments from \$671.00 to \$620.86. He also in hand writing acknowledged receiving \$3,000.00 of the arrears. The above changes in the Lease Purchase Agreement were then initialed by Mr. Bendish, Mr. Castillo and Ivan Gange.

[¶32] On 12-28-06 when Mr. Bendish signed the Lease Purchase Agreement according to the Contract for Deed there was \$7,450.32 due in 2007 and a \$3,104.30 payment due in 2008. The \$7,450.32 is the result of multiplying \$620.86 a monthly payment times 12. The \$3,104.30 is the result of multiplying \$620.86 times 5.

[¶33] When the \$6,292.09 arrears, \$7,450.32 the 2007 payment and \$3,104.30 the 2008 payment are added together the total owing on the Contract for Deed is \$16,746.70.

[¶34] Payments made by Cendak starting with January 1 of 2007 according to Exhibit #4 App. P.22 prepared by Thoms B. Bair, Bendish's attorney are: \$3,000.00, \$4,000.00, \$2,100.00, \$3,250.00 and \$2,500.00. These five figures total \$14,850.00. There is a \$1,000.00 payment Exhibit #13, App. P. 25 with Mr. Bendish's signature on it that is not on Exhibit #4. Had this \$1,000.00 been included on Exhibit #4, App. P. 22

the Bendishs would have been paid \$15,850.00.

[¶35] Whether or not a deficiency amount is owed or is not owed on the Contract for Deed was decided by what was agreed on between Mr. Bendish and Mr. Gange when a truck was delivered by Mr. Gange to Mr. Bendish. on 9-1-2008. Mr. Bendish testified he agreed to take the truck from Cendak as \$2,500.00 payment on the Contract for Deed and that \$6,000.000 was still owing on the said contract. Mr. Gange testified that Bendish agreed to take the truck as a full and final payment on the Contract.

[¶36] The trial judge never put a value on the truck but did find that:

- 1) The Contract for Deed wasn't paid in full;
- 2) That Mr. Bendish did not accept the truck as full payment on the Contract for Deed;
- 3) That Bendish had to return the truck to Gange.

[¶37] One of the questions that arose during the trial was “ how should the Lease Purchase Agreement be interpreted?” Mr. Bendish's response to that question was that the Lease Purchase Agreement is not a Contract for Deed and it doesn't assign a Contract for Deed. Cendak's response to that question was that the Lease Purchase Agreement is a Contract for Deed or an assignment of a Contract for Deed.

[¶38] A lease is defined in Black's Law Dictionary 5<sup>th</sup> Edition P. 800 as an agreement which gives rise to a relationship of landlord and tenant (real property) or lessor and lessee (real or personal property).

[¶39] Nowhere in the Lease Purchase Agreement (Exhibit #5) App. P.23 is Mr. Bendish refereed to as a landlord, Cendak referred to as a tenant, or is any payment

referred to as rent. Mr. Bendish has by the terms of the Contract for Deed (Exhibit #1), App. P. 18 transferred the land to Mr. Castillo, therefore Mr. Bendish can't rent the land and be a landlord.

[¶40] The above definition of a lease requires that the language in a Lease Purchase Agreement refers to a landlord tenant relationship and the payment of rent. Because the language in the Lease Purchase Agreement doesn't, that language is not what is required in a Lease.

[¶41] A Contract for Deed is defined in Black's Law Dictionary 5<sup>th</sup> Edition P. 294 as an agreement by a seller to deliver the deed to the property when certain conditions have been met, such as completion of payments by the purchaser. Often such contracts for deed are resold.

[¶42] In the case the language in the Lease Purchase Agreement Exhibit #5, App. P. 23 states that a seller will deliver a deed to the real property when all the payments are made. Since the language in the Lease Purchase Agreement in this case delivers real property when conditions are met, it appears that language in the Lease Purchase Agreement is that of a Contract for Deed.

[¶43] The facts that are required in contract cancellation cases that have allowed periods of redemption are set out in Liebelt vs Bender 303 NW2d 316 (ND 1981). The Liebelts have cited several contract cancellation cases in which some period of redemption was afforded. Ryan v. Bremseth, 48 N.D. 710, 186 N.W. 818 (1922); People's State Bank of Hillsboro v. Steenson, 49 N.D. 100, 190 N.W. 74 (1922); Funderburg v Young, 68 N.D. 481 N.W. 87 (1938). In each of these cases the vendees were in physical possession, had tilled or improved the land, and appeared to defend in

the cancellation action brought by the vendor.

[¶44] In the case the following facts are similar to the facts in above cases in Libelt that allowed the period of redemption.

- 1) Cendak was in possession of the property;
- 2) Cendak was running two businesses on the property;
- 3) Cendak had improved the land;
- 4) Cendak had appeared to defend the cancellation.

[¶45] Another fact that is important in the case is that one of the reasons that the trial court in its Memorandum Opinion decided against Cendak was that the trial court didn't think that Cendak had paid the taxes on the property. This fact was corrected at the motion hearing when the trial court found the taxes were owed by Mr. Castillo on another building not the one in Fort Rice, North Dakota. Mo. Tr. P.8, L.25, P.9, L.1-17. Therefore Ganges testimony stands the taxes on the property were paid. Tr. P.61, L.22-25, P.62, L.1-2.

[¶46] Liebelt supra, also states in contract cancellation cases there will be no period of redemption when the buyer has failed to make his first payment, failed to answer the complaint, failed to pay taxes on the land and has abandoned the property.

#### CONCLUSION

[¶47] The Lease Purchase Agreement (Exhibit #5), App. P. 23 because of its language is a Contract for Deed.

[¶48] The Contract for Deed Exhibit #1, App. P. 18 has a purchase price of \$40,400.00 and on page 3 of said Contract are the times, dates, and amounts of future payments.

[¶49] The following are similarities in the payments in the Contract for Deed (Exhibit #1), App. P. 18 and Lease Purchase Agreement (Exhibit #5), App. P.23

1. Future payments due on the Contract for Deed and Lease Purchase Agreement are all based on the monthly payment of \$620.86.
- 2 All payments on the Contract for Deed are treated as payment on the Lease Purchase Agreement and all payments on the Lease Purchase Agreement are treated as payment son the Contract for Deed.
3. The same amount of money pays off the Contract for Deed as pays off the Lease Purchase Agreement.

[¶50] During the trial testimony and evidence established that:

- A. At the time of trial Cendak had two businesses on the property listed in the Contract for Deed.
- B. Cendak had paid the taxes on the land.
- C. Cendak had paid by Bendish calculation \$14,850.00.
- D. Cendak believes it had paid the Contract for Deed in full.
- E. Cendak has answered Bendish Complaint and filed a Counter Claim.

[¶51] Because of the reasons set out above the trial court should have determined how much was owed by Cendak to Bendish and given Cendak a period of redemption to pay that amount. Instead the Court gave no period of redemption, cancelled the Contract for Deed, gave \$40,400.00 worth of land back to Bendish when Mr. Bendish admitted the amount owed on it was only \$6000.00, and returned the truck to Gange.

[¶52] This case should be remanded to the trial court with an order requiring the

trial court to determine what amount is owed to Bendish and give Cendak a redemption period to pay that amount.

DATED this 7th day of July, 2011.

/s/ Benjamin C. Pulkrabek

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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing documents were served electronically on the following individual on this 7th day of July, 2011.

Thomas Bair  
Attorney for Plaintiff  
tbair@bbglaw.net

/s/ Sharon Renfrow

Sharon Renfrow