

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20110122

Richard Bendish and Mary Bendish, Plaintiffs and Appellees

v.

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

On appeal from the judgment entered March 15, 2011
Morton County District Court
Civil No. 30-10-C0254

Brief of Appellees Richard Bendish and Mary BendishThomas B. Bair (ID #04263)
BAIR LAW FIRM
210 First Avenue NW,
P.O. Box 100
Mandan, North Dakota 58554-0100
(701) 663-6568
Attorneys for the Appellees

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Statement of the Issue

[¶1] Does a person with no interest in a real estate title, whether through conveyance, lien or otherwise, have the right to redeem from the cancellation of a contract for deed?

Statement of the Case

[¶2] This is an equitable action brought by Bendish to cancel a contract for deed. Castillo and the State of North Dakota did not contest the cancellation. The trial court found that Cendak and Fort Rice Bar & Grill had no right to redeem from the cancellation. Cendak and Fort Rice Bar & Grill have appealed.

Statement of Facts

[¶3] Bendish owned real property in Fort Rice, ND. (Tr. at 4:20-24). On that property he operated a convenience store named the Outpost. (Tr. at 5:13-16). On March 1, 2003, Bendish agreed to sell the property to Castillo by contract for deed. (Tr. at 5:17-19 and App. 18). The contract was recorded in the Morton County Recorder's Office. (App. 20). Later the contract was assigned to Tecca. (Tr. at 8:2-7). Bendish agreed to the assignment by signing the document. (Tr. at 8:8-11). It was notarized and recorded. (Appellee App.1) In February 2005, the contract was assigned back to Castillo. (Tr. at 8:16-25 and Tr. at 9:1-10). Bendish agreed and again, it was recorded. (Appellee App. 3). Both assignments contain the words "hereby sells, transfers, sets over, confirms and assigns". (Appellee App. 1 and 3).

[¶4] The contract for deed called for monthly payments. (Tr. At 13:1-4 and App. 18). The payments have been in default since before to January 1, 2005. (Tr. at 11:16-18). The payments have been erratic and in default since that time. (Tr. at 12:12-14 and App. 22).

[¶5] On December 28, 2006, Castillo met with Bendish. (Tr. at 20:12-13). Castillo claimed to be in danger of losing his liquor license because of the contract for deed arrearages. (Tr. at 20:14-25 and Tr. at 21:1-16). At the meeting, Castillo produced a document for Bendish's signature. (Tr. at 21:11-14 and App. 23). This document called for the delinquent payments to be brought current. (Tr. at 23:19-25 and App. 23). Bendish wanted Castillo's business to succeed and agreed to accommodate Castillo. (Tr. at 22:15-22). He signed the document. (Tr. 22:2-3). It was not notarized. (Tr. at 22:7-8). The document says "Whereas, Castillo wants to assign said Contract to Cendak". (App. 23). It also says "When Castillo is paid in full, Castillo will have clean Title/Deed to property." (App 23). Bendish did not consider this to be an assignment of the contract for deed. (Tr. at 22:23-25).

[¶6] Although the document required the delinquencies to be brought current, they they never were. (Tr. at 23:23-24). The document required monthly payments (Tr. 24:15-18 and App. 23). Monthly payments were never made. (Tr. at 24:15:23). The document required insurance on the building. (Tr. 25:4-6 and App. 23). Proof of insurance was never provided to Bendish. (Tr. at 25:9-10).

Standard of Review

[¶7] In actions for the cancellation of a contract for deed, the matter of redemption is

left to the discretion of the trial court. Bender v. Liebelt, 303 N.W.2d 316, 319 (N.D. 1981). A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, or if its decision is not the product of a rational mental process. This Court does not overturn the trial court's decision merely because it is not the one it may have made if it were deciding the issue. Gepner v. Fujicolor Processing, Inc., 2001 ND 207, ¶13; 637 N.W.2d 681, 658.

Argument

1. The Trial Court properly cancelled the contract for deed without granting a right to redeem to persons with no interest in the title to real property.

[¶8] In North Dakota there are two methods to cancel a contract for deed. The first is cancellation by notice set forth in N.D. Cent. Code Chapter 32-18. The second method is by equitable action. Straub v. Lessman, 403 N.W.2d 5, 7 (N.D. 1987). Bendish chose to cancel by action. Land contract cancellations are akin to quiet title actions. To extinguish an adverse interest in real property, these procedures require notice to those parties whose adverse interests appear in the office of the recorder, auditor or clerk of court in the county in which the property is located. N.D. Cent. Code § 32-17-06 and N.D. Cent. Code § 32-18-01. Parties in possession (usually tenants) are generally included to determine their rights, if any.

[¶9] When it is determined that a contract is in default and cancellation by action is in order, there is no required redemption period. Bender v. Liebelt, 303 N.W.2d 316, 319 (N.D. 1981). In cancellations by notice, those with a right to redeem include the vendee or his assign. N.D. Cent. Code § 32-18-04. By analogy, after execution

sales, those with a right to redeem include the judgment debtor, his successors in interest, his mortgagees and others with liens, including statutory liens such as judgments. NDCC § 28-24-01. Cendak has none of these interests. The trial court determined that it is not Castillo's assignee. It is not a mortgagee of Castillo's interest. It has no lien, voluntary or otherwise against Castillo's interests. The trial court properly determined that Cendak had no right of redemption.

a. The vendee's interest in the contract was not assigned to Cendak.

[¶10] Bendish was Castillo's predecessor in the business located on the real property and was interested in its success. So, when Castillo told him of the impending loss of the liquor license for the establishment, he accommodated Castillo and signed an agreement which allowed Castillo to keep the license. The trial court found that the document signed by Bendish was not an assignment of Castillo's interests to Cendak. Several years earlier, when Castillo had assigned his interests in the contract to Tecca, the document used at that time included the standard wording of 'hereby sells, transfers, sets over, confirms and assigns'. North Dakota Title Standard 11-03 states that a transfer of a vendee's interest in a contract for deed must meet the statutory requisites, including words of conveyance. (NDTS 11-03: "The vendor and vendee under an executory contract for deed each has an interest in the real property which is capable of conveyance, and transfers thereof must meet the statutory requisites, including words of conveyance"). See also Simonson v. Wenzel, 147 N.W. 804, 806 (ND 1914). The document at issue in this case contains no operative words similar to those found in the prior assignments by

Castillo. It merely contains the language “wants to assign”. It also states that if Castillo is paid in full by Cendak, “Castillo will have clean Title/Deed to property”, which indicates that no immediate assignment was contemplated.

[¶11] The document therefore has no granting clause or words which manifest an intention by Castillo to make a present conveyance to Cendak. It merely implies that such a conveyance might be made sometime in the future. This is not a conveyance of an interest in real property. 50 Am.Jur.2d Deeds § 13 (2002) (“In order to transfer title, an instrument must contain apt words of grant which manifest the grantor’s intent to make a present conveyance of the land by his deed as distinguished from an intention to convey it at some future time”; “The absence of words of conveyance cannot be supplied, and if no words importing a grant can be found in the deed it is void...”). The trial court properly determined that there was not an assignment of Castillo’s interests in the contract for deed to Cendak

b. Cendak breached its agreement with the vendee.

[¶12] The agreement between Castillo and Cendak required that the contract arrears be cured. They never were. It required that monthly payments be made to Bendish. They never were. It required Cendak provide insurance for the building, there has never been proof of that. The trial court properly found that Cendak failed to comply with the majority of the terms of the agreement.

c. Cendak has no right to redeem.

[¶13] Cendak has no interests of record in the title to this property. It has no interests to be found in the recorder's, auditor's or clerk's offices of Morton County. It is not Castillo's assignee or successor.

[¶14] The trial court found that there had been no assignment of the contract for deed to Cendak. It also determined that Cendak had failed to comply with the terms of its agreement with Castillo. Based on these findings, it did not abuse its discretion by not granting the right of redemption to Cendak.

Conclusion

[¶15] For the reasons stated, Bendish respectfully asks the Court to affirm the District Court's decision.

Dated this 5th day of August, 2011.

/s/ Thomas B. Bair
Thomas B. Bair (ID #04263)
BAIR LAW FIRM
210 First Avenue NW,
P.O. Box 100
Mandan, North Dakota 58554-0100
(701) 663-6568
Attorneys for the Appellees

CERTIFICATE OF SERVICE

A true and correct copy of the **Brief of Appellees Richard Bendish and Mary Bendish** and **Appellee Appendix** were served electronically on the following individual on this 5th day of August, 2011.

Benjamin C. Pulkrabek
Attorney for Appellant
pulkrabek@lawyer.com

/s/ Thomas B. Bair
Thomas B. Bair (ID #04263)
BAIR LAW FIRM
210 First Avenue NW,
P.O. Box 100
Mandan, North Dakota 58554-0100
(701) 663-6568
Attorneys for the Appellees