STATE OF MICHIGAN

COURT OF APPEALS

GREGG MAYES, Personal Representative of the Estate of WALTER MAYES,

Plaintiff-Appellant,

V

LEONARD CHARLES MATTHEWS IV, KATINA KAY MATTHEWS, and LISA J. SMITH-ADDISS,

Defendants-Appellees.

UNPUBLISHED
November 29, 2011

No. 298355
Ingham Circuit Court
LC No. 09-001221-CH

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals the trial court's order that granted summary disposition to defendants. The court dismissed plaintiff's complaint for foreclosure on the ground that the parties' land contract only provided for forfeiture as a remedy. Plaintiff argues that the contract does not limit his remedies and that foreclosure is available as a remedy for breach of a land contract regardless of whether it is specifically mentioned in the contract. For the reasons set forth below, we reverse and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

In 2005, decedent Walter Mayes entered into a land contract with Leonard and Katina Matthews for the sale of Mayes's property. Under the contract, Mayes received a down payment of $2,500 and the Matthewses agreed to pay $1,000 per month toward the total purchase price of $85,000, with the balance of the contract due by November 3, 2007. The contract also included the following default provision:

> If purchaser defaults . . . seller may give purchaser or the person holding possession under him written notice of forfeiture of this contract in the manner prescribed by law. If the default is not cured within such time as is permitted by law, said contract shall be forfeited to seller, all payments made on said contract shall belong to seller as stipulated damages for breach of said contract and purchaser and all persons holding possession under him shall be liable to be removed from possession of the premises in any manner provided by law.

The Matthewses stopped making payments on the contract in October 2006. In December 2006, the Matthewses assigned their interest to Lisa Smith-Addiss, who also failed to make her payments.

In July 2009, Mayes notified Smith-Addiss and the Matthewses by letter that the land contract was in arrears. The letter listed the numerous missed payments and stated that defendants must pay the total amount due under the contract within 15 days or Mayes would initiate foreclosure proceedings. Thereafter, Mayes filed his complaint for foreclosure.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). They argued that because the contract did not specify foreclosure as a remedy, Mayes could not foreclose as a result of their default. The trial court agreed with defendants and granted their motion for summary disposition.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). When reviewing a motion under 2.116(C)(10), we consider "the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551–52; 739 NW2d 313 (2007). A motion for summary disposition under MCR 2.116(C)(10) may be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Campbell v Human Services Dep't*, 286 Mich App 230, 235; 780 NW2d 586 (2009).

III. ANALYSIS

In Michigan, a binding contract for the sale of land need not specify the remedies for default. Rather, the only material terms that must be stated in a land contract are a description of the property, the parties, the consideration (the amount and time of installment payments) and the rate of interest. *Zurcher v Herveat*, 238 Mich App 267, 290-291; 605 NW2d 329 (2000). Further, if a purchaser defaults on his payments under a land contract, the seller "is allowed an election of remedies." Michigan Civil Jurisprudence, Vendors and Purchasers, § 53, p 67; *Wilson v Taylor*, 457 Mich 232, 241; 577 NW2d 100 (1998); see also MCR 3.410. Indeed, "[i]t has been said that nearly a dozen remedies traditionally have been available to foreclose on land contracts." *Tidwell v Dasher*, 152 Mich App 379, 386; 393 NW2d 644 (1986). These traditional remedies include the right to foreclose in the manner initiated by plaintiff here, a remedy which has never been required to be specified in the land contract.

If the seller chooses to bring a forfeiture action in court and prevails, he receives "full possession of the premises" and can do as he pleases with the property. MCL 600.5744(1). He cannot, however, pursue the buyer for any deficiency: "[A] judgment for possession after forfeiture of an executory contract for the purchase of premises shall merge and bar any claim for money payments due or in arrears under the contract at the time of trial." MCL 600.5750. Foreclosure is a different remedy:

> In a foreclosure action under Michigan law, "the court has the power to order a sale of the premises which are the subject of the . . . land contract, or of

> that part of the premises which is sufficient to discharge the amount due on the . . . land contract plus costs." MCL 600.3115. The proceeds of the court-ordered foreclosure sale are applied toward paying down the debt, and the defendant-buyer can keep any surplus that might remain. MCL 600.3135(1). . . . [I]f a foreclosure sale is insufficient to cover the entirety of the debt, "the clerk of the court shall issue execution for the amount of the deficiency" against either the defendant, MCL 600.3150, or against any other party liable for the deficiency, MCL 600.3160. Thus, when a seller chooses to pursue foreclosure, the plaintiff-seller can keep neither the property nor any surplus from the court-ordered sale, but the defendant, as well as the guarantor, remains liable for any deficiency that remains after the sale of the property. *See* MCL 600.3160; *United States v Leslie*, 421 F2d 763, 766 (CA 6, 1970). [*Mazur v Young*, 507 F3d 1013, 1017 (CA 6, 2007).]

Thus, foreclosure differs from forfeiture because, if the seller prevails in a foreclosure action, the property must be sold—unlike a successful forfeiture action, which allows the seller to keep the property if he chooses.

Foreclosure also differs from forfeiture with regard to notice. In Michigan, forfeiture may only be used by the seller as a remedy for default if "the terms of the contract expressly provide for termination or forfeiture, or give the vendor the right to declare a forfeiture." MCL 600.5726. Foreclosure has no such parallel requirement—no legal authority requires foreclosure to be specifically mentioned in the contract to preserve it as a seller's remedy. Accordingly, the failure to specify foreclosure as a remedy in the land contract did not prevent plaintiff from initiating a foreclosure action against defendants.

Further, notice of forfeiture does not limit a seller's remedies. After their default, Mayes sent a letter to defendants that amounted to a notice of forfeiture. In the letter, Mayes identified the property, the payment terms under the land contract, the dates on which defendants failed to pay, and stated the past due balance, plus interest, taxes, insurance and other fees. As also required by MCL 600.5728, Mayes further stated that "the total amount due must be paid within 15 days from the date the notice was received." In *Gruskin v Fisher*, 405 Mich 51; 273 NW2d 893 (1979), our Supreme Court held that a notice of forfeiture does not bar a plaintiff from seeking alternative remedies, including foreclosure. Accordingly, plaintiff did not forfeit a right to foreclose simply by preserving a right to pursue forfeiture as required by statute.

Because forfeiture is required by statute to be included in the contract while foreclosure is not, this also undermines the trial court's reliance on the maxim *expression unius est exclsio alterius* ("the expression of one thing is the exclusion of another"), in finding that forfeiture is plaintiff's sole remedy. Because the forfeiture provision had to be included to keep the option of seeking forfeiture under the summary procedures act viable, and because no similar requirement

exists for preserving the right to foreclose,[1] the trial court's reliance on this interpretive rule is misplaced.

Under MCL 600.3101, Michigan courts have jurisdiction to "foreclose mortgages of real estate and land contracts." Foreclosure has also long been a common law remedy for breach of a land contract and the statute merely supplements that right. See *Wilson*, 457 Mich at 241-242; *Dawe v Dr. Reuven Bar-Levav & Associates, P.C.*, 485 Mich 20, 28; 780 NW2d 272, (2010) ("The common law remains in force until modified.") Thus, pursuant to statute and common law, a seller may bring an action for foreclosure as a remedy for breach of a land contract, regardless whether it is cited as a remedy in the contract itself. Again, the contract here does not limit the remedies to forfeiture, it simply preserves forfeiture as a remedy as required by MCL 600.5726. Furthermore, the fact that the contract includes a provision that specifically mentions forfeiture does not mean that the seller intended to limit his remedy to forfeiture. There is no language in the contract stating that forfeiture is the only remedy, nor is there any language in the contract barring foreclosure as a remedy. Moreover, preserving the right of forfeiture by writing it into the contract cannot be construed as waiving the statutory right to foreclosure, much less waiving a right to common law foreclosure. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374; 666 NW2d 251 (2003) ("a waiver is a voluntary and intentional abandonment of a known right.")

For these reasons, we hold that the trial court erred when it construed the reservation of forfeiture as a rejection of all other remedies. The trial court should not have granted summary disposition to plaintiffs on this ground and, therefore, we reverse.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Pat M. Donofrio

[1] Defendant Smith-Addiss cites *In re Carr*, 52 BR 250, 251 (Bankr ED Mich, 1985) in support of the assertion that "the remedy of foreclosure is available 'if the contract permits.'" This is a misreading of *In re Carr*. The context of the quoted language is as follows: "If the contract permits it, upon the default of the purchaser the seller will usually first accelerate the balance due and then bring suit in the Circuit Court requesting a judgment confirming the accelerated balance and ordering the sale of the property to satisfy the judgment." *Id*. at 251, citing *Gruskin*, 405 Mich at 63 n 6. Consistent with *Gruskin*, *In re Carr* holds that a vendor may *accelerate the balance due* if the land contract so provides.

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JANSEN, J. (*concurring*).

I fully concur in the majority opinion and agree with the majority's conclusion that the remedy of foreclosure was available to plaintiff despite the fact that it was not specifically mentioned in the land contract. See MCL 600.3101; MCR 3.410(A). I write separately to point out that although the land contract at issue in this case does not contain an acceleration clause, the circuit court on remand may nonetheless decree the entire amount of $94,519.49 due and owing.

As correctly explained by the majority, if a land contract vendee defaults on his or her payments, the land contract vendor is allowed an election of remedies and may choose, among other things, to pursue either forfeiture or foreclosure.[1] *Wilson v Taylor*, 457 Mich 232, 241-242; 577 NW2d 100 (1998); *Sindlinger v Paul*, 428 Mich 161, 164; 404 NW2d 212 (1987). When a land contract vendor elects to pursue the remedy of forfeiture and prevails, he or she recovers full possession of the premises and may keep any payments that have been made by the vendee through that time. MCL 600.5726; 1 Cameron, Michigan Real Property Law (3d ed), § 16.15, p 619; see also *Corrigan v Aetna Life & Cas*, 140 Mich App 467, 475-476; 364 NW2d 728 (1985). However, a land contract vendor who elects to pursue the remedy of forfeiture may not thereafter pursue the vendee for any deficiency or sue the vendee for any money due under

[1] Of course, a land contract vendor may only pursue the remedy of forfeiture if it is expressly permitted by the terms of the land contract. MCL 600.5726.

the contract. MCL 600.5750; *Durda v Chembar Dev Corp*, 95 Mich App 706, 712-713; 291 NW2d 179 (1980); see also *Chicago Boulevard Land Co v Apartment Garages*, 245 Mich 448, 450; 222 NW 697 (1929). "It has long been settled that a valid notice of forfeiture terminates any right to bring an action on the contract." *Hayes v Kent Real Estate Co*, 44 Mich App 196, 197; 205 NW2d 52 (1972).

In contrast, when a land contract vendor elects to pursue the remedy of foreclosure, the vendor does not recover possession of the property. Instead, as with other types of foreclosure, the property is sold by the court and the proceeds of the sale are used to pay down the balance remaining due on the land contract. *Stewart v Isbell*, 155 Mich App 65, 81; 399 NW2d 440 (1986); see also MCL 600.3115; *Mazur v Young*, 507 F3d 1013, 1017 (CA 6, 2007). If these sale proceeds are insufficient to pay off the entirety of the debt, "the clerk of the court shall issue execution for the amount of the deficiency . . . ." MCL 600.3150; see also *Stewart*, 155 Mich App at 81. Thus, although the land contract vendor may not retain any surplus from the court-ordered sale, he or she may pursue the land contract vendee for any deficiency remaining due. See *Mazur*, 507 F3d at 1017.

The remedy of foreclosure "is generally, though not necessarily, accompanied by an acceleration of the balance due on the land contract." Cameron, § 16.19, p 628. If a land contract contains an acceleration clause, the court may decree the full contract price due upon the vendee's default and may apply the proceeds of the foreclosure sale to satisfy the entire amount due under the contract. See *Bedford v Tetzlaff*, 338 Mich 102, 103, 107; 61 NW2d 60 (1953); *Dumas v Helm*, 15 Mich App 148, 152; 166 NW2d 306 (1968). But it does not follow that the court may only foreclose a land contract if it contains an acceleration clause. It is well settled that a land contract may be foreclosed even if it does not contain an acceleration clause. *Lutz v Dutmer*, 286 Mich 467, 488; 282 NW 431 (1938); *McClure v Edward J Meyer Southfield Woods Corp*, 254 Mich 686, 687; 236 NW 907 (1931). In the absence of an acceleration clause, the court generally has no authority to accelerate the future payments due under the contract. *Lutz*, 286 Mich at 488; *Carpenter v Smith*, 147 Mich App 560, 564; 383 NW2d 248 (1985). However, the court may decree as due any past due amounts that have not yet been paid at the time the action is commenced. *Cady v Taggart*, 223 Mich 191, 195; 193 NW 848 (1923) (explaining that, in the absence of an acceleration clause, the proceeds from the court-ordered foreclosure sale are to be used "to satisfy the amount past due on the contract" rather than "to satisfy payments to become due in the future").

In this case, plaintiff chose to elect the remedy of foreclosure rather than forfeiture. On remand, the circuit court must honor this election. Although the land contract at issue in the present case does not contain an acceleration clause, the present foreclosure action was not commenced until *after* the entire amount of $94,519.49 was already past due. Although claims for payment under an installment land contract accrue as each installment falls due, MCL 600.5836, this action was commenced well within six years of the first missed installment payment, MCL 600.5807(8).

Because the entire contract amount of $94,519.49 was *already* due and owing at the time this action was filed, there were necessarily no future payments to accelerate and the absence of an acceleration clause is irrelevant. On remand, the circuit court should decree the entire unpaid sum of $94,519.49 due, order the property sold, and apply the sale proceeds to satisfy the full

indebtedness of $94,519.49. See *Cady*, 223 Mich at 195. If the sale proceeds are insufficient to satisfy this entire debt, plaintiff may then have judgment against the land contract vendees in the amount of any deficiency. MCL 600.3150; see also *Stewart*, 155 Mich App at 81.

/s/ Kathleen Jansen