

**NOT DESIGNATED FOR PUBLICATION**

**STELLA & REGINALD  
WINFIELD**

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**NO. 2004-CA-1670**

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**COURT OF APPEAL**

**VERSUS**

\*

**FOURTH CIRCUIT**

**FULTON COMMUNITY  
CORPORATION**

\*

**STATE OF LOUISIANA**

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**APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2004-8003, DIVISION "M-7"  
Honorable Paula A. Brown, Judge Pro Tempore**

\* \* \* \* \*

**Judge Patricia Rivet Murray**

\* \* \* \* \*

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Roland L. Belsome)

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**AFFIRMED AND  
REMANDED**

This is an action for injunctive relief. For the reasons that follow, we affirm the trial court's judgments granting injunctive relief to the plaintiffs, Stella and Reginald Winfield, and rejecting the counter request for injunctive relief by the defendant, Fulton Community Corporation ("Fulton").

**FACTUAL AND PROCEDURAL BACKGROUND**

On June 20, 2003, the Winfields entered into a bond for deed contract with Fulton to sell an apartment complex located in New Orleans, Louisiana. Under the terms of the bond for deed contract, Fulton made a \$100,000 down payment and agreed to make thirty-six monthly payments due on the twenty-first of each month. According to the bond for deed contract, the amount of the monthly payment was \$6,013 "[p]lus any state, local or other assessment, and any increase or decrease in the required escrow payment for taxes and/or insurance should payment amount change."

The bond for deed contract provided that in the event of a default the Winfields had the right to have the contract cancelled in accord with La. R.S.

9:2945, which requires the mailing of a forty-five day notice of default.

Pursuant to the contract and statute, the Winfields, as owners, would have the right to cancel the contract if Fulton failed to cure the default within the forty-five day period.

In September 2003, Fulton, as the Winfields correctly noted, started a pattern of making the monthly payment late. As a result, Escrow Services, Inc. (“ESI”), the company retained to administer the bond for deed contract, began sending Fulton notices of default. The pertinent notice of default at issue in this case is the March 2, 2004 notice. The certified mail receipt reflects that this notice was accepted by Fulton’s president, Robert Brinson, on March 9, 2004. Because Fulton failed to cure this default within the forty-five day period, the Winfields executed a cancellation of the bond for deed contract on April 22, 2004. On that same date, the Winfields filed the cancellation of the bond for deed contract with the custodian of notarial records for Orleans Parish as required by La. R.S. 9:2945. In that cancellation document, the Winfields represent that “Purchaser [Fulton] has failed to pay the February 2004 installment nor subsequent installments” and that “more than 45 days have elapsed from the mailing of the notice of

default.”

On May 28, 2004, the Winfields filed a temporary restraining order (“TRO”), seeking to prohibit Fulton from collecting rent or performing any management function in connection with the apartment complex. They alleged that despite notice of the cancellation of the bond for deed contract Fulton had refused to vacate the premises and was attempting to collect rent and to exercise management and ownership of the apartment complex. They further alleged that they were in eminent danger of suffering irreparable harm if Fulton was not restrained from further collection efforts because they were now responsible for servicing the mortgage on the property.

At noon on June 7, 2004, the trial court granted the TRO. On June 11, 2004, Fulton filed a Rule to Dissolve the TRO, to grant Preliminary Injunction against the Winfields, and for damages. Fulton represented that it had paid “each and every monthly payment timely” and that the TRO should be dissolved. Fulton further requested that a preliminary injunction be issued prohibiting the Winfields from further interfering with its performance under the bond for deed contract. In its memorandum in support of this rule, Fulton contended that the Winfields had misrepresented

that it failed to pay the monthly payment due under the bond for deed contract. In its supplemental memorandum, Fulton alleged that the forty-five day notice (the March 2, 2004 letter) specified that the February 21, 2004 payment was not paid; however, Fulton contended that it made this February payment of \$6,415.86 on February 20, 2004. According to Fulton, “[t]his is crucial, since it is the payment (or the alleged lack thereof) that was the whole basis for the Plaintiffs alleged Cancellation of the Bond for Deed.”

At the June 17, 2004 hearing on Fulton’s rule, the trial court denied Fulton’s request to dissolve the TRO, request for a preliminary injunction against the Winfields, and request for damages. The court further maintained the TRO and continued it for an additional ten days to June 25, 2004. The court still further ordered that pursuant to the agreement of the parties Fulton would vacate the property within thirty days (by July 17, 2004). Finally, the court reserved Fulton’s right “to institute further proceedings to determine what, if any, reimbursement it is entitled to collect as a result of the cancellation of the Bond for Deed.” The court signed a written judgment reflecting these rulings on July 2, 2004.

On June 25, 2004, a hearing was held on the Winfield’s motion for

permanent injunction. The trial court converted the TRO (which it issued on June 7<sup>th</sup> and extended on June 17<sup>th</sup>) to a permanent injunction prohibiting, enjoining, and restraining Fulton from collecting any rent, performing any managerial duties or altering the subject property. The court also set October 22, 2004 as the date for the trial to determine the amounts owed to Fulton as a result of the failed Bond for Deed. On July 2, 2004, the court signed a written judgment reflecting these ruling.

On June 28, 2004, Fulton filed a Motion for Determination of Refund Due, asserting that such refund must occur before the transfer of the property to the Winfields and citing in support *Farthing v. Neely*, 129 So. 2d 224 (La. App. 3<sup>rd</sup> Cir. 1961). Also on June 28, 2004, Fulton filed a Motion for New Trial from the trial court's judgment denying its rule to dissolve the TRO and its judgment converting the TRO to a permanent injunction. In support, Fulton contended that the Winfields misrepresented that it failed to pay the monthly payments called for under the bond for deed contract and that "each monthly payment has been made as evidenced by the Escrow Funding letter of February 20<sup>th</sup> and the payment of March 18<sup>th</sup>." On July 1, 2004, the trial court denied that motion.

From the trial court's two written judgments rendered on July 2, 2004, Fulton appeals.

### **DISCUSSION**

The principal argument raised on this appeal is whether the Winfields had the right to cancel the bond for deed contract. If so, then the trial court's grant of injunctive relief is correct.

The proper procedure for cancellation of a bond for deed contract is set forth in La. R.S. 9:2945, which provides:

If the buyer under a bond for deed contract shall fail to make the payments in accordance with its terms and conditions, the seller, at his option, may have the bond for deed cancelled by proper registry in the conveyance records, provided he has first caused the escrow agent to serve notice upon the buyer, by registered or certified mail, return receipt requested, at his last known address, that unless payment is made as provided in the bond for deed within forty-five days from the mailing date of the notice, the bond for deed shall be cancelled.

La. R.S. 9:2945.

The record establishes that the Winfields had the right to cancel the bond for deed contract. It contains copies of the bond for deed contract, the cancellation of the bond for deed contract, and a notice of default addressed to Fulton dated March 2, 2004, along with a postal receipt evidencing that the letter was mailed by certified mail, return receipt requested. The Winfields thus presented sufficient evidence that the statutory requirements

for cancellation of a bond for deed were met. At that point, the burden shifted to Fulton to demonstrate that it either did not default on the bond for deed or that it satisfied the default within forty-five days of the mailing of the notice of default, which would have been no later than April 16, 2004. *See Bennett v. Hughes*, 2003-1727 (La. App. 4 Cir. 5/26/04), 876 So. 2d 862, writ denied, 2004-1599 (La. 6/30/04), 877 So. 2d 122.

Fulton argues that the Winfields did not have the right to cancel the contract because it not only made the February 2004 monthly payment, but also made ten other monthly payments. Fulton further argues that the Notice of Cancellation of Bond for Deed Contract was obtained based on the Winfield's misrepresentation that Fulton failed to make the required February 2004 monthly payment. This argument, which Fulton asserted in the trial court multiple times, is belied by the record. The payment Fulton made on February 20, 2004 of \$6,415.86 was for the January 21<sup>st</sup> monthly payment that was past due. This fact is documented by the last paragraph of the March 2, 2004 notice of default (forty-five day letter), which reads:

The previous Notice of Default, dated February 2, 2004, remains in full force and effect. You must pay the balance of \$482.91 on or before March 18, 2004, to cure the previous Notice of Default, and you must pay an additional \$6,848.77 by April 16, 2004 to cure this Notice of Default. Failure to make such payment may result in cancellation of the Bond for Deed.

The record also contains three additional letters from ESI that likewise



document the fact Fulton failed to pay the February 21<sup>st</sup> monthly payment.

The record thus reveals that Fulton failed to rebut the Winfield's case establishing they had the right to cancel the bond for deed contract. The record thus supports the trial court's implicit finding that the Winfields had the right to cancel the bond for deed contract. As the Winfield's had the right to cancel the bond for deed, they likewise had the right to obtain injunctive relief against Fulton precluding it from "collecting any rent, performing any managerial duties, or alternating [sic] the subject property in any way."

Fulton's other assignments of error relate to its alternative argument that even if the bond for deed contract was properly cancelled, it was entitled to an accounting and reimbursement for the amounts it paid to the Winfields. The trial court in its judgment expressly reserved Fulton's right to seek such reimbursement. We further note that on July 29, 2004, the Winfields filed a cross motion for setoff and reimbursement. As the Winfields point out, they are entitled to assert a claim for reasonable rent during Fulton's period of occupancy. These conflicting claims have not been tried; thus, the record does not contain the evidence needed to resolve them. These claims must be resolved at a trial on remand.

**DECREE**

For the forgoing reasons, the judgments of the trial court are affirmed.  
This case is remanded for further proceedings consistent with this opinion.

**AFFIRMED AND REMANDED**