

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PROCTOR & ASSOCIATES, INC.,

Plaintiff-Appellant,

and

DAN PROCTOR and DIANE PROCTOR,

Plaintiffs-Appellants,

v

HARRIET VAN RENKEN, also known as Harriet  
Van Reken, and STANLEY VAN RENKEN, also  
known as Stanley Van Reken,

Defendants-Appellees.

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UNPUBLISHED

December 9, 1997

No. 198329

Oakland Circuit Court

LC No. 95-508851-CH

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Plaintiffs appeal by right from an order granting defendants' motion for summary disposition. We affirm. This case concerns a land contract covering a parcel of residential property. Defendants are the title holders to the property. Plaintiffs purchased the property on a land contract and subsequently assigned their interest in the contract to Proctor & Associates, Inc., a business entity incorporated by plaintiff Dan Proctor. In 1994, following a dispute over contract payments, defendants started land contract forfeiture proceedings in district court and subsequently seized possession of the property. Plaintiffs subsequently filed suit to quiet title to the property, to recover damages for trespass, and to compel specific performance of the contract. After determining that plaintiffs were in default on the contract payments and that their interest in the land contract had been legally terminated with service of notice of forfeiture, the court granted defendant's motion for summary disposition.

On appeal, plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition and that reversal is required because there existed a genuine issue of material fact. Plaintiffs assert that there was a dispute regarding which party was in legal possession of the property, arguing

that defendants' actions in retaking possession constituted trespass. Plaintiffs also argue that service of notice of forfeiture does not constitute ground for retaking possession because it does not allow a party the right to redeem and that defendants should instead have pursued summary proceedings. We disagree.

Under Michigan law, defendants were justified in serving a notice of forfeiture and then repossessing the property without resorting to summary proceedings. Generally, the language in a land contract (if unambiguous) is not subject to interpretation and must be enforced as written. *Britton v John Hancock Mutual Life Ins Co*, 30 Mich App 566; 186 NW2d 781 (1971). Paragraphs 3 (e) and (f) of the land contract at issue in this case give defendants the express right to repossess the property, upon default, without resorting to a judicial or statutorily created remedy to foreclose plaintiffs' rights. The Supreme Court has held that where a right to declare a forfeiture in the event of a default is part of the contract, such contract creates an immediate right of possession-- even absent a valid summary proceeding. *Crenshaw v Granet*, 237 Mich 367, 369; 211 NW2d 636 (1927). Since the estate of a land contract purchaser does not include, as one of its incidents, an equity of redemption, a land contract seller does not need to invoke a judicial or statutory remedy to foreclose the rights of a purchaser. *Nash v State Land Office Bd*, 333 Mich 149; 52 NW2d 639 (1952); *Rothenberg v Follman*, 19 Mich App 383, 387-388; 172 NW2d 845 (1969).

Plaintiffs' next argument is that the trial court erred in finding that the one-year limitation period in MCL 600.5868; MSA 27A.5868 precludes a claim for wrongful possession and trespass in a land contract forfeiture matter. Plaintiffs did not commence this action until one year after defendants retook possession of the property. Defendants claimed that such delay precluded plaintiffs from claiming that they were in the actual possession of the property as of the date when defendants retook possession. The trial court agreed with defendants, finding that plaintiffs were "precluded from asserting that they were rightfully in possession or wrongfully dispossessed from the property."

MCL 600.5868; MSA 27A.5868 provides:

No person shall be deemed to have been in possession of any lands, within the meaning of this chapter merely by reason of having made an entry thereon, unless he continues in open and peaceable possession of the premises for at least 1 year next after such entry, or unless an action is commenced upon such entry and seisin, within 1 year after he is ousted or dispossessed of the premises.

Plaintiffs assert that this statute concerns adverse possession and does not apply to actions in specific performance or trespass. Plaintiffs assert that the proper limitations period is found in MCL 600.5807; MSA 27A.5807, which provides for a six-year period in actions involving contract and specific performance, and MCL 600.5801; MSA 27A.5801(4), which provides for a fifteen-year period in actions alleging trespass. While plaintiffs are correct in their assertion that this provision applies to cases involving adverse possession, the plain language of the statute would not appear to preclude the trial court's interpretation of the statute to include cases where property has been repossessed by the record title holder. Further, neither defendants nor the trial court interpret this section as one of limitation that would bar the bringing of this action. Rather, the basis of the trial court's holding is merely that, *where*

*certain circumstances exist*, the statute creates a presumption with regard to the factual issue of whether a party was in the possession of real property. However, where a party has waited for more than one year to challenge another party who has dispossessed them of their property-- as in the instant case-- such circumstances no longer exist and the party is no longer able to avail itself of this presumption.

Plaintiffs' next argument is that the trial court erred in determining that the house was "vacant." Paragraph 3(e) of the land contract states that if the premises are "vacant [or unimproved]" the purchaser's possessory right shall terminate after service of a notice of forfeiture.<sup>1</sup> Plaintiffs interpret the term "vacant" to mean that the property must be abandoned, unclaimed and unoccupied. Defendants argue that the terms "vacant" and "unoccupied" are interchangeable, and that the contract clause was applicable because the house was unoccupied at the time of repossession.

While we agree with plaintiffs that the term "vacant" must be distinguished from the term "unoccupied", and therefore is not interchangeable, we nonetheless conclude that the trial court's decision should be affirmed on the basis of the facts. First, it is undisputed that the house was unoccupied at the time of repossession and that plaintiffs were not living there. Second, there is no evidence in the record that plaintiffs had made any repairs or improvements to the house or that such repairs or improvements were ongoing at the time that defendants repossessed the property. Third, plaintiffs had no personal property on the premises at the time of repossession.<sup>2</sup> Fourth, not only did plaintiffs have no personal property on the premises, but the premises were entirely physically empty. Given these facts, we conclude that the property was vacant as a matter of law.<sup>3</sup>

The next argument raised by plaintiffs is that the trial court erred in not granting their equitable request for specific performance. According to plaintiffs, since Michigan statutes provide a minimum of ninety days within which a party may pay the balance due on a land contract following summary proceedings, MCL 600.5744; MSA 27A.5744, plaintiffs should have been able to cure any alleged default within six months even though defendants chose not to complete summary proceedings in this case. We disagree. Plaintiffs are not entitled to specific performance based on the land contract, Michigan statute, or principles of equity. Although the land contract expressly provided that the purchaser would have fifteen days after service of the notice of forfeiture in which to cure any default, plaintiffs chose not to do so. It is undisputed that plaintiffs failed to make the contract payments on time, that defendants served plaintiffs with a valid notice of forfeiture, and that plaintiffs refused thereafter to pay the money owed under the contract. This Court must enforce the language of the contract as written. *Britton, supra* at 566. Similarly, plaintiffs have no statutory right to cure the forfeiture. As discussed above, defendants were not legally obligated to engage in summary proceedings under Michigan statute. Finally, plaintiffs were not entitled to specific performance based on principles of equity. Plaintiffs were delinquent on their contract payments and made no effort to cure the default by offering proper legal tender. There is no evidence of mitigating circumstances such as fraud or unavoidable delay. Given that there is a substantial balance left owing on the contract, we conclude that the trial court's decision was appropriate under the circumstances.

Plaintiffs next argue that tender was attempted, but that defendants wrongfully insisted that tender include a mortgage amount still owed on the property. Plaintiffs thus ask this Court to allow them

to make legal tender at this time and to abate any interest on the land contract subsequent to their offer to cure the default. Our review of the record supports the trial court's conclusion that plaintiffs were in default on the contract and that they were not entitled to specific performance. Plaintiffs admit that they never offered or made physical tender in the amount of the full balance due on the contract. Since there is no evidence indicating that defendants would have refused to accept payment in full, we find that there is no basis for specific performance or for abatement of interest.

The final question for our resolution concerns whether defendants' retaking of possession by self-help constituted a trespass and whether plaintiffs are therefore entitled to damages, including the rental value of the property and compensation for other incidents of possession during the period of wrongful possession. As discussed above, we agree with the trial court that defendants were entitled to take possession of the property due to plaintiffs' indisputable failure to make payments and their resulting default on the land contract. The trial court correctly found that since the property was vacant and unimproved at the time that defendants entered and repossessed the property, plaintiffs were only in constructive possession of the property and defendants were lawfully entitled to retake possession. Defendants' right to do so is based on language in the land contract as well as on Michigan law and we find no public policy impediments to such language.

Affirmed.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman

<sup>1</sup> Because we hold that the trial court did not err as a matter of law in finding that the premises were "vacant", it is unnecessary for us to address the issue of whether the premises were "unimproved".

<sup>2</sup> We do not believe that the presence of a lockbox on the premises alters this analysis. Paragraph 3(g) of the land contract specifically provides that the "erection of signs" does not constitute actual possession by the vendees. We characterize a lockbox as being analogous to a sign, specifically a real estate "for sale" sign.

<sup>3</sup> Plaintiffs have offered no evidence here that the instant premises are "vacant" but that such vacancy is factually consistent with a seasonal or other periodic use of the premises. Nor have plaintiffs offered any evidence that the premises have, in fact, been utilized in a seasonal or other periodic manner.