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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2224**

Sharon Nelson, et al.,
Respondents,

vs.

Viola Engbarth Manion,
Appellant.

**Filed November 18, 2008
Reversed and remanded
Stoneburner, Judge**

Murray County District Court
File No. 51CV07173

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Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant, a contract-for-deed vendor, challenges the district court's grant of summary judgment for specific performance of the contract to respondents, assignees of the contract-for-deed vendees. The district court granted specific performance despite the

contract vendees' violation of a valid consent-to-transfer clause in the contract for deed. Because the district court erred by holding that vendor's failure to pursue statutory cancellation of the contract for deed entitled respondents to summary judgment, we reverse and remand.

FACTS

In 1964, Alfred Engbarth (now deceased) and appellant Viola Engbarth Manion (vendor), husband and wife, sold 400 acres of land in Pipestone County to John and Georgianna Engbarth (vendees), (both now deceased), on a contract for deed. The contract provided for accelerated payment of the contract balance at any time without penalty and contained a consent-to-transfer clause requiring the vendors' written permission for any assignment of vendees' interest in the contract. The contract also contained a forfeiture clause stating that on vendees' failure to comply with any terms of the contract, the vendors could, on written notice, declare the contract cancelled and the rights of the vendees terminated.

In mid-1997, vendees executed a quit-claim deed to the property to their children, respondents, reserving a life estate in the vendees. It is not clear when vendor learned of the transfer, but a 2004 letter from vendor's attorney to vendee Georgianna Engbarth and one of her daughters sought accelerated payment of the contract balance and acknowledged the 1997 assignment of the vendees' fee interest in the land to their children, stating: "therefore the warranty deed in fulfillment of the contract will convey title to the nine children subject to Georgianna's life estate interest." Vendor accepted all payments under the contract for deed from its inception through March 2006. Vendor

returned the March 1, 2007 payment. Respondents' attempts to pay off the contract were rejected by the vendor.

In May 2007 respondents brought an action for specific performance. Vendor answered, asserting that the vendees were in default. Respondents moved for summary judgment. Vendor opposed summary judgment asserting that respondents are not the proper party to enforce the contract and that vendees breached the contract by conveying an interest in the property to respondents in 1997 without vendors' written permission, "affect[ing] a cancellation of the Contract for Deed in an action properly initiated. . . ."

The district court granted summary judgment to respondents, noting that vendor was aware of the breach at least as of November 2004 but never cancelled the contract "in the manner required by law." In its memorandum accompanying the order for summary judgment, the district court noted that the vendees' breach of the contract generally, as vendor argued, "affects a cancellation of the Contract for Deed in an action properly initiated by the actual parties to the contract or their estates." But the district court concluded that because the contract could have been paid off at any time without penalty and because vendor never moved to cancel the contract, cancellation would be "procedurally inappropriate" due to the protections afforded to respondents under Minn. Stat. § 559.21 (2006). The district court concluded that because vendor demanded full payment after the transfer rather than cancelling the contract, vendor failed to effectively cancel the contract and respondents are entitled to specific performance. This appeal followed.

DECISION

“On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). In this case, vendor asserts that the district court misapplied the law by holding that her failure to initiate statutory contract cancellation under Minn. Stat. § 559.21, coupled with the prepayment provision in the contract, barred vendor from raising the vendees’ breach of the consent-to-transfer clause as a defense to respondents’ action for specific performance.

Vendor argues that statutory cancellation is not the exclusive remedy for contract sellers and that vendor is entitled to judicial cancellation of the contract.¹ Respondents counter that vendor did not seek judicial cancellation of the contract at the district court and that the issue of judicial cancellation is raised for the first time on appeal and is, therefore, not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that generally this court will not decide issues that were not considered by the district court). We conclude that the issue of vendor’s right to cancel the contract was sufficiently asserted in the answer.

The fact that vendor has not yet sought statutory or judicial cancellation of the contract may give rise to a finding of waiver or laches, but does not make summary judgment on respondents’ specific performance action appropriate because laches and

¹ Vendor does not argue on appeal that respondents are not the appropriate parties to pursue specific performance.

waiver involve questions of fact not appropriate for summary judgment. *See State ex rel. Hatch v. Allina Health System*, 679 N.W.2d 400 (Minn. App. 2004) (stating that “weighing of the facts is improper in the context of a motion for summary judgment”). *See also Fedie v. Mid-Century Ins. Co.*, 631 N.W.2d 815, 819 (Minn. App. 2001) (noting that “[w]aiver of a contractual right to arbitration is ordinarily a question of fact”), *Harr v. City of Edina*, 541 N.W.2d 603, 606 (Minn. App. 1996) (stating that “[a]pplication of the doctrine of laches depends on a factual determination in each case”).

In this case, the district court misstated the law by implicitly holding that vendor’s exclusive remedy for vendees’ acknowledged breach of the contract for deed was statutory cancellation. *See O’Meara v. Olson*, 414 N.W.2d 563, 567 (Minn. App. 1987) (rejecting the argument that Minn. Stat. § 559.21 has preempted cancellation by judicial action, and noting that cancellation by judicial action “affords the vendee a full hearing on the merits in open court”). Because vendor’s failure to seek statutory cancellation of the contract is not the exclusive remedy for vendees’ violation of the valid consent-to-transfer clause, the district court erred by granting summary judgment to respondents.

Reversed and remanded.