

STATE OF MICHIGAN
COURT OF APPEALS

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

UNPUBLISHED
November 29, 2011

Plaintiff-Appellant,

v

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

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

Defendants-Appellees.

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

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