

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

MICHAEL DOTY, et al.,	:	O P I N I O N
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2017-T-0029
WILLIAM POTTEIGER, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Newton Falls Municipal Court, Case No. 16 CVG 00173.

Judgment: Reversed and remanded.

Sergey O. Rumyantsev and Douglas J. Neuman, Neuman Law Office, LLC, 761 North Cedar Avenue, #1, Niles, OH 44446 (For Plaintiffs-Appellants).

William Potteiger and Shawna Potteiger, pro se, P.O. Box 91, Newton Falls, OH 44444 (Defendants-Appellees).

DIANE V. GRENDELL, J.

{¶1} Plaintiffs-appellants, Michael Doty and Kelly M. Doty, appeal the judgment of the Newton Falls Municipal Court, awarding damages for the breach of a land installment contract against defendants-appellees, William Potteiger and Shawna Potteiger, and ordering the amount awarded to be deducted from the initial payment under the contract with the remaining balance to be refunded to the Potteigers. The issue before this court is whether the vendor in a land installment contract governed by R.C. Chapter 5313 is entitled to retain the initial deposit on the contract after electing to

forfeit the agreement and seek restitution. For the following reasons, we reverse the judgment of the court below.

{¶2} On December 16, 2016, the Dotys filed a Complaint (Forfeiture of Land Contract) against the Potteigers in the Newton Falls Municipal Court. The Complaint alleged that, on or about August 25, 2016, the Dotys entered into a land installment contract with William Potteiger for the purchase of property located at 2271 Robinwood Boulevard, in Newton Falls, and that Shawna had an interest in the subject premises by virtue of dower. Upon execution of the contract, the Potteigers took possession of the premises. The Potteigers defaulted on the contract by failing to pay the installments due for the months of September through December 2016.

{¶3} The Complaint sought the following relief: a declaration that the land installment contract is forfeit; a writ of restitution; and judgment for the fair rental value of the premises (against William only) and for damages beyond normal wear and tear and for costs.

{¶4} On January 19, 2017, the municipal court issued a writ of restitution for the recovery of the premises.

{¶5} On January 20, 2017, the municipal court ordered the land installment contract forfeited and cancelled.

{¶6} On February 22, 2017, a hearing was held on damages.

{¶7} On March 3, 2017, the municipal court rendered judgment on damages.¹

In relevant part, the court ruled as follows:

[T]he parties entered into a land installment contract whereby the Plaintiffs were selling the Defendants the subject property for the sum of \$78,000.00; the Defendants paid a deposit of \$7,000.00 and

1. Judgment was modified on March 6, 2017, by a Journal Entry Nunc pro Tunc.

were to make payments of \$561.73 per month for a period of three years at which time they were to pay the entire remaining balance and complete the property transfer. The contract was entered into on August 25, 2016, the payments were to begin September 1, 2016; the Defendants were also responsible for the property taxes, insurance, and all maintenance and repairs. * * * [T]he Defendants * * * paid the \$7,000.00 down payment. However, no further monthly payments were made nor taxes paid after the initial down payment.

* * *

Subsequently, in the present case, the Plaintiff [sic] asked for five months of rent; the contract specified \$561.73 per month * * *. The Plaintiff also requested the property taxes, prorated for the time that the Defendants lived at the premises, i.e. August 15 through January 30, at \$695.50 and finally, Plaintiff submitted evidence of damages to the carpet in the amount of \$500.00 and \$20.00 to replace the locks. Plaintiffs also asked for postage and bank fees for returned checks, totaling \$62.47. Based upon the evidence, there is no question that Plaintiffs are entitled to those damages.

* * *

The issue not addressed is the application of the \$7,000.00 deposit to the amount claimed and whether a refund is in order. * * * Based on the lack of provision in the contract [regarding the deposit], the provisions set forth in R.C. 5313.10 and 5321.16, and the case law cited [herein], this Court finds that the Plaintiffs are entitled to * * * a grand total of \$4,086.62. That amount, plus court costs of \$184.07 should be deducted from the \$7,000.00 and the balance of \$2,729.31 is to be refunded to the Defendants.

{¶8} On March 29, 2017, the Dotys filed a Notice of Appeal. On appeal, they raise the following assignment of error:

{¶9} “[1.] The trial court committed prejudicial error in ordering a refund of the down payment made pursuant to a land installment contract.”

{¶10} The issue presented for review, whether the vendor in a land installment contract which has been forfeited is entitled to keep the initial payment in excess of the statutory damages allowed by R.C. 5313.10, is a question of law. Therefore, this court

applies the de novo standard of review. *Hayward v. Summa Health Sys./Akron City Hosp.*, 139 Ohio St.3d 238, 2014-Ohio-1913, 11 N.E.3d 243, ¶ 23; *Officer of Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979) (“[a]s to questions of law, [a reviewing] court has complete, independent power of review[;] [l]egal issues are accordingly subject to more intensive examination than are factual questions”).

{¶11} Residential land installment contracts² are governed by R.C. Chapter 5313. *A & J Homes, Inc. v. Green*, 8th Dist. Cuyahoga No. 101416, 2015-Ohio-1290, ¶ 12; *P.M.D. Land Co. v. Warner Realty, Inc.*, 11th Dist. Trumbull No. 2009-T-0021, 2009-Ohio-6704, ¶ 37.

{¶12} In the event that the vendee defaults under a residential land installment contract, “R.C. 5313 sets forth the exclusive remedies available to the vendor.” *Casto v. Prokop*, 11th Dist. Trumbull No. 93-T-4853, 1995 WL 407217, *2 (June 9, 1995). Depending on the circumstances, “the vendor may recover possession of his property * * * by use of a proceeding for foreclosure and judicial sale of the foreclosed property,” or, as the Dotys did herein, “the vendor may bring an action for forfeiture of the vendee’s rights in the land installment contract and for restitution of his property.” R.C. 5313.07 and 5313.08.

The election of the vendor to terminate the land installment contract by an action under section 5313.07 or 5313.08 of the Revised Code is an exclusive remedy which bars further action on the contract unless the vendee has paid an amount less than the fair rental

2. R.C. 5313.01(A): “Land installment contract’ means an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee’s obligation. Option contracts for the purchase of real property are not land installment contracts.”

value plus deterioration or destruction of the property occasioned by the vendee's use. In such case the vendor may recover the difference between the amount paid by the vendee on the contract and the fair rental value of the property plus an amount for the deterioration or destruction of the property occasioned by the vendee's use.

R.C. 5313.10.

{¶13} “The forfeiture action * * * is a purely statutory action, which did not exist at common law, devised to solve problems previously existing in the event of a vendee's default, in restoring to the vendor the equitable title and right to possession which had passed to the vendee upon the execution of a land installment contract. To a major degree the statute does not purport to supercede or rescind the general substantive principles of law previously existing as to these contracts and merely provided remedies for enforcement by either the vendee or the vendor, as the case might be.” *Shriver v. Grabenstetter*, 3d Dist. Seneca No. 13-87-13, 1988 WL 53868, *4 (May 18, 1998).

{¶14} The substantive principles of law previously existing provided: “Where the seller and purchaser under a land contract have agreed that, upon failure of the latter to pay installments of the purchase price, the contract should be forfeited and payments made retained by the seller as stipulated damages, and the purchaser is unable or unwilling to pay the remaining installments as agreed, the vendor is entitled, subject to the foregoing qualification, to bring an action quieting his title and rescinding the contract, without tendering back the payments made.” *Norpac Realty Co. v. Schackne*, 107 Ohio St. 425, 140 N.E. 480 (1923), syllabus.

{¶15} The Dotys argue: “The down payment is a condition of the contract, and it was effective to reduce the overall purchase price of the property. There is no language in the contract that would contemplate the return of the down payment under any

circumstances. Therefore, Appellants are entitled to keep the down payment and to receive possession of the premises, while the Appellees get the benefit of the use and enjoyment of the property until the Writ of Execution is executed.” Appellants’ brief at 8.

{¶16} The Dotys’ argument has merit with respect to their retention of the initial \$7,000 payment.

{¶17} The statute is clear that “[t]he election of the vendor to terminate the land installment contract by an action under section 5313.07 or 5313.08 of the Revised Code is an exclusive remedy which bars further action on the contract unless the vendee has paid an amount less than the fair rental value plus deterioration or destruction of the property occasioned by the vendee’s use.” R.C. 5313.10.

{¶18} In the present case, the Potteigers’ initial payment **was not** less than the fair rental value plus deterioration or destruction. Accordingly, the Dotys’ election to terminate the contract under Section 5313.08 was their exclusive remedy and further action on the contract was barred. *Howard v. Temple*, 172 Ohio App.3d 21, 2007-Ohio-3074, 872 N.E.2d 1260, ¶ 12 (4th Dist.) (“when ‘the vendor of a land installment contract brings an action under R.C. 5313.08 for forfeiture for vendee’s default under the contract, the vendor has elected an exclusive remedy which prohibits further action except to recover any amount paid by the vendee which is less than the fair rental value plus any deterioration or destruction of the property occasioned by the vendee’s use’”) (citation omitted). Under the principles of law set forth in *Norpac Realty*, however, the Dotys were entitled to retain the initial payment made by the Potteigers. *Norpac Realty*, 107 Ohio St. 425, 140 N.E. 480, at syllabus.

{¶19} Since the Dotys had already received an amount from the Potteigers in excess of what they would have received under R.C. 5313.10, they were not entitled to further damages under that section. The Complaint should have been dismissed following the issuance of the writ of restitution.

{¶20} The sole assignment of error is with merit to the extent indicated above.

{¶21} For the foregoing reasons, the judgment of the Newton Falls Municipal Court, awarding the Dotys damages in the amount of \$4,086.62 plus court costs and ordering the refund of the remaining balance, is reversed and this case is remanded. On remand, the trial court is instructed to enter an order allowing the Dotys to retain the deposit of \$7,000 as their sole remedy. Costs to be taxed against the parties equally.

CYNTHIA WESTCOTT RICE, P.J.,

TIMOTHY P. CANNON, J.,

concur.