IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

CHARLES A. FULLFORD and MILDRED V. FULLFORD, Plaintiffs, v. JOHN D. RAWLS and JOAN RAWLS, Defendants and Third-Party Plaintiffs, v. CHARLES HUSBANDS, Third-Party Defendant.	CIVIL NO. 974/1982 ACTION FOR DAMAGES AND DECLARATORY RELIEF

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PETERSEN, Judge

MEMORANDUM OPINION AND ORDER

June 19, 1984

In this action for damages and declaratory relief, the plaintiffs have filed a supplementary motion for summary judgment on the issue of termination of a land sale contract, pursuant to Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Territorial Court of the Virgin Islands by 5 V.I.C. App. IV R. 7 (1982). The defendants oppose the supplementary motion and have filed a cross-claim for summary judgment seeking restitution. For the reasons set forth below, partial summary judgment must be granted in favor of the plaintiffs and the defendants' cross-motion for summary judgment must be denied.

FACTS

On June 25, 1979, the plaintiffs and the defendants executed a contract for the sale and purchase of residential real property located in St. Croix, U.S. Virgin Islands. After the contract was executed, the plaintiffs orally agreed to give possession of the property to the defendants and to permit them to rent the premises for profit. The defendants have not tendered to the plaintiffs the monthly installment payments due under paragraph two (2) of the contract, which provides that time is of essence, since June, 1982. This Court recently granted the defendants' motion to escrow all monthly installment payments due pending the outcome of this litigation.

On September 13, 1982, the plaintiffs sent written notice of their intention to terminate the contract to the defendants at their California residence (570 Melrose Avenue, San Francisco, California) by registered mail, return receipt requested. The notice stated that the contract would be terminated unless the defendants tendered payments due within sixty days, as required by the contract. The letter was returned to the plaintiffs "unclaimed". On October 20, 1982, the plaintiffs, through counsel, sent to the defendants by first class mail at the defendants' California residence written notice of their intention to terminate the contract, together with a copy of the complaint. During this same month, the plaintiffs obtained possession of the property by acquiring the keys to the premises from the defendants' rental agents.

On November 9, 1982, the plaintiffs, through counsel, forwarded to the defendants at their California residence, by first class mail, a copy of the complaint, a copy of this Court's order allowing service by publication, a copy of the notice to be published and an acceptance of service of process form. Service of process was accepted by the defendants on November 26, 1982. On December 21, 1982, sixty-two days after mailing their October 20, 1982, letter, the plaintiffs, through counsel, sent to the defendants at their California residence and to the defendants' counsel written notice terminating the contract.

The defendants then moved for summary judgment, alleging that they had never received any of the written termination notices from the plaintiffs. On February 7, 1983, the plaintiffs, through counsel, once again sent to the defendants at their California residence, by registered mail, return receipt requested, written notice terminating the contract. In the same letter, the plaintiffs alternatively gave the defendants written notice of their intention to terminate, in the event that the Court found their prior notice of intention to terminate inadequate. Shortly thereafter, the plaintiffs filed a cross-motion for summary judgment. The February 7, 1983, letter was eventually returned to the plaintiffs "unclaimed."

The defendants filed a counterclaim against the plaintiffs on March 30, 1983, seeking rescission and restitution on the grounds that the plaintiffs unlawfully repossessed the premises in October, 1982. On April 12, 1983, the plaintiffs, through counsel, sent to the defendants at their California residence, by registered mail, return receipt requested, written notice terminating the contract. The plaintiffs then filed a supplementary motion for summary judgment, which was opposed by the defendants. Both parties' summary judgment motions were denied.

Subsequently, the plaintiffs asked this Court to reconsider its denial of their motion for summary judgment. This Court denied the motion. On August 23, 1983, the plaintiffs' agent hand-delivered to the defendants' California residence, through counsel, written notice of their intention to terminate the contract in sixty days. On November 20, 1983, another agent for the plaintiffs hand-delivered to the defendants' California residence, through counsel, written notice terminating the contract.

On the basis of these two hand-delivered notices, the plaintiffs moved again for summary judgment. The defendants filed a cross-motion for summary judgment, claiming that the plaintiffs' allegedly unlawful repossession of the property in October, 1982, terminated the contract. Shortly thereafter, the defendants filed a motion for default, which was denied.

DISCUSSION

A. NOTICE OF INTENTION TO TERMINATE AND NOTICE OF TERMINATION

It is well-settled that competent parties may incorporate forfeiture provisions for nonpayment into a land sale contract. Kelley v. Germania Savings and Loan

Association, 192 N.E.2d 813, 816, 28 Ill.2d 591 (Ill. 1963); Lovins v. Kelley, 166 N.E.2d 69, 71, 19 Ill.2d 25 (Ill. 1960). These provisions often specify the method of notice required for termination of the contract. However, a forfeiture will not be allowed unless notice of termination is clear, positive and unequivocal, Thermokinetic Corp. v. Allen, 493 P.2d 508, 512, 16 Ariz. App. 341 (Ariz. Ct. App. 1972); see also Lovins v. Kelley, supra, and exercised in the manner expressly provided for in the contract. Rader v. Taylor, 333 P.2d 480, 486, 134 Mt. 419 (Mont. 1958); McWithy v. Heart River School District No. 22, 32 N.W.2d 886, 889, 75 N.D. 744 (N.D. 1948); Crow v. Southern Natural Gas Co., 210 So.2d 596, 601 (La. Ct. App. 1968).

Paragraph five (5) of the contract provides that should the buyers default in the payment of any installments due, then the sellers may either specifically enforce the contract for the full price or terminate the agreement by written notice and retain the payments made as liquidated damages. To terminate the agreement under paragraph five (5) the sellers must

> first give sixty (60) days' written notice of their intention so to do and Buyers in that period may remedy their default by making the payments due.

The defendants have not tendered to the plaintiffs the monthly installment payments due under paragraph two (2) of the contract since June, 1982. 1/ In accordance with the default provisions of the contract, the plaintiffs have made several efforts since September 13, 1982, to serve the defendants with written notice of their intention to terminate the contract. To date, the defendants deny receipt of any of the registered or the first class mail notices sent to them by the plaintiffs.

Trying to prove notice, the plaintiffs argued in their motion to reconsider the denial of summary judgment that sufficient notice of their intention to terminate was given by either (a) their sending and the defendants' receiving a copy of the complaint together with a court summons, or (b) by the receipt by counsel for the defendants of the plaintiffs' written intention to terminate. This Court denied the motion for reconsideration, ruling that this form of notice was not, as a matter of law, effective on its face.

Subsequent to this ruling, the plaintiffs again attempted to serve valid written notice by having their agent

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1/ Even assuming, for the purposes of argument, that the escrowing by the defendants of all installment payments due since October, 1982, with this Court constitutes payment to the plaintiffs, as the defendants argue, the record reveals that the plaintiffs have not received installment payments due since June, 1982. Therefore, the default would still not be completely cured.

hand-deliver to the defendants' California residence on August 23, 1983, written notice, through counsel, of their intention to terminate the contract in sixty days for failure to make payments due. Ninety-Nine days later on November 20, 1983, another agent of the plaintiffs hand-delivered to the same address written notice, through counsel, terminating the contract.

Although the defendants deny receipt of these hand-delivered notices, this Court holds that sufficient written notice of termination has been given to the defendants by the plaintiffs. The written notices are clear, positive and unequivocal in their intention to terminate the contract. The fact that the August 23, 1983, notice provides that the plaintiffs intend to terminate in sixty days, but termination notice was not given until ninety-nine days had expired, is inconsequential. The record shows that the defendants failed to cure within sixty days, as required by paragraph five (5) of the contract, upon receiving notice of intention to terminate. The thirty-nine day delay by the plaintiffs in serving notice of termination upon the defendants neither prejudices the defendants nor contravenes the provisions of paragraph five (5).

On the question of effective notice, the Court finds that the plaintiffs have made every effort to serve written notice on the defendants short of a physical confrontation. This Court is now satisfied that the defendants refused to accept service of written notice from the plaintiffs. The defendants' motions for summary judgment and default, and responses to interrogatories, indicate that they have known since 1982 that the plaintiffs were attempting to comply with the notice requirement of paragraph five (5).

With respect to the two hand-delivered notices, it is apparent that the place of delivery was, in fact, the defendants' residence. In her January 12, 1984, response to the plaintiffs' first set of interrogatories, defendant Joan Rawls admits that, at least until April, 1983, 570 Melrose Avenue, San Francisco, California was the defendants' residence. Moreover, a January 24, 1983, affidavit of the defendants' and a January 10, 1983, affidavit of the defendants' attorney specifies that 570 Melrose Avenue is the residence of the defendants. Finally, the defendants do not allege in their cross-motion for summary judgment that 570 Melrose Avenue was not their residence address on August 23, 1983 and November 20, 1983.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Recognizing that summary judgment is a drastic remedy, and viewing the evidence in the light most favorable to the party opposing the motion, Continental Insurance Co. v. Bodie, 682 F.2d 436, 438 (3d Cir. 1982), this Court finds that the defendants have failed to cure their default within sixty days of the plaintiffs August 23, 1983, notice of intention to terminate. Accordingly, notice of termination having been served on the defendants in accordance with paragraph five (5) of the contract, partial summary judgment must be granted in favor of the plaintiffs.

B. REPOSSESSION OF THE PROPERTY

The defendants claim a contract right to possession and further contend that the plaintiffs' repossession of the property in October, 1982, constituted a rescission of the contract. The plaintiffs deny that the defendants have a contract right to possession and argue that their repossession with the authorization of the defendants' rental agent was lawful because the premises had been "abandoned" by the defendants.

The Court first notes that the references by the defendants to unlawful "self-help" are misplaced in that this is not a landlord-tenant action. The contract, which by its terms constitutes the entirety of the agreement between the parties, is silent on the question of possession. Absent an express or implied provision in an executory land sale contract, the vendee has no right of possession. Nuquist v. Bauscher, 227 P.2d 83, 86 (Idaho 1951); Rourke v. Cloud, 398 So.2d 57, 59 (La. App. 1981); Wilson v. Sanchez, 254 P.2d 594, 597, 116 Cal. App.2d 670 (Cal. App. 1953). However, a vendee who enters into possession with the assent of the vendor does have the legal right to remain in possession but only "so long as he performs with the fidelity of the obligation imposed by the stipulations of the contract and those which flow from the relation subsisting between the vendor and vendee." Murphy v. Sills, 268 So.2d 296, 311 (Tex. App. 1953).

In order for this Court to find that the plaintiffs have rescinded the land sale contract there must be clear and convincing proof of their intent to repudiate the contract. Schumacher v. McDonald, 320 N.W.2d 640, 643 (Iowa. App. 1982). Although the unlawful repossession of property by a vendor is ordinarily considered to be an act of rescission, there is an exception to this rule where there is evidence of an intent to uphold the contract. Id. An attempt to invoke the forfeiture provisions of a contract is an attempt to enforce and thus uphold, not to repudiate, the contract. Id. In Schumacher, the Court held that there was no rescission by a vendor who had repossessed business property by changing the door locks in circumstances where the business had been only sporadically open, utility bills were unpaid, causing an absence of nighttime security lighting, and several acts of vandalism had occurred. In addition, the Court pointed out that no request for repossession had been made by the vendee during the period of time he was given to cure his default.

Because the land sale contract in the case at bar is an integrated one, any right of possession which may have vested in the defendants must be either an implied provision of the contract or the result of a subsequent oral agreement. The defendants argue that possession "was clearly bargained for and vital to the purchase agreement." The plaintiffs contend that possession was not part of the integrated contract but resulted only from a subsequent kindness on their part in permitting the defendants to rent the property for profit. The fact of possession by the defendants might imply the existence of a possessory right emanating from the land sale contract. On the other hand, the defendants have never asked the plaintiffs to return the property, claiming a possessory right.

Parol evidence is admissible to establish any fact that does not vary, alter or contradict the terms of a written contract or the legal effect of the terms used. <u>Walker and</u>

LaBerge Co. v. First National Bank of Boston, 146 S.E.2d 239, 243-244, 206 Va. 683 (Va. 1966). As a disputed issue of material fact remains on the question of whether or not the land sale contract gives the defendants a possessory right, further evidence is required. Parol evidence on the issue of possessory right will not vary, alter or contradict the terms of the land sale contract or their legal effect. Such evidence is therefore admissible.

On the matter of repossession, the plaintiffs repossessed the property after they had attempted to serve written notice of their intention to terminate the contract because of the defendants' default. The plaintiffs allege that repossession was necessary because the premises were "in an abandoned state." The "furnishings and building"(sic) are alleged to have been damaged and "the downstairs of the building" is said to have been "unlocked". In addition, the rain allegedly "blowing through open windows" is said to have caused "extensive dampness and mildew." The defendants deny that the premises were abandoned, arguing that any damage to the property consists of "ordinary wear and tear after three years of use."

Accordingly, as genuine issues of material fact remain on the questions of possessory right and abandonment, the defendants' motion for summary judgment must be denied.

Eileen R. Petersen
EILEEN R. PETERSEN
Judge