

CASE NO. A08-941

State of Minnesota
In Court of Appeals

NANCY SITEK,

Plaintiff/Appellant,

vs.

MICHAEL STRIKER,

Defendant,

and

MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC.,*Intervenor/Respondent.*

RESPONDENT'S BRIEF

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STANDARD OF REVIEW

This case was tried to the court without a jury. The trial court's factual findings following a bench trial are weighed under a clearly erroneous standard of review. Matter of McGaughey, 536 N.W.2d 621, 623 (Minn. 1995), Minn. R. Civ. P. 52.01 (2008). A decision is clearly erroneous only where it lacks substantial evidentiary support or was based on a misconstruction of the law. Anda Const. Co. v. First Fed. Sav. & Loan Ass'n, Duluth, 349 N.W.2d 275, 277 (Minn. Ct. App. 1984). The clearly erroneous standard applies to factual findings based upon testimony or documentary evidence. Matter of Knops, 536 N.W.2d 616, 620 (Minn. 1995). Considerable deference is afforded to the trial court's assessment of witness credibility. Id.

STATEMENTS OF THE CASE AND FACTS

STATEMENT OF THE CASE

Appellant commenced this action in Hennepin County District Court on November 1, 2005 challenging Defendant Michael Striker's ("Striker") efforts to cancel her vendee interest in a contract for deed relating to property located in Edina, Minnesota. Appellant alleged she was an equitable mortgagor and that the cancellation notice was defective. A.12. Upon discovery of Striker's filing of bankruptcy the trial court stayed this case. Trial Court Order, April 17, 2006.

Respondent moved to intervene in March 2007. A.14. Striker had conveyed to Respondent a mortgage in 2005, which Respondent foreclosed and from which Striker never redeemed. A.14. Respondent denied Appellant held a mortgagor interest in the property and further asserted that Appellant's interest in it as a contract for deed vendee

terminated because she failed to cure her defaults or otherwise obtain injunctive relief to stay cancellation. On April 6, 2007 the trial court granted Respondent's motion and put this case on active status. A.16-17.

This case was tried to the Honorable John Holahan on January 22, 2008. A.1. Findings of Fact Conclusions of Law, and Order were issued February 21, 2008. The trial court concluded that Appellant held no equitable mortgage and that her contract for deed vendee interest had terminated. It entered judgment on March 25, 2008. A.24. Appellant moved for amended findings or a new trial on April 21, 2008. A.23. The trial court amended its Findings of Fact, Conclusions of Law, and Order to reflect that Striker did not answer or respond and thus was in default, but otherwise left its findings and legal conclusions unchanged. A.1-9. Appellant now appeals.

STATEMENT OF THE FACTS

Nancy R. Sitek ("Appellant") obtained title to property located at 5812 Dale Avenue, Edina (the "Property") in 1998 following her divorce from Michael Sitek. A.2. During that marriage she and Michael Sitek had purchased a property in Lutsen, Minnesota via contract for deed. A.8. Prior to that, Appellant had held interests in twenty six properties with her first husband, and had worked as a bookkeeper at his real estate company. Id.

In 2002 the Property was encumbered by two mortgages in the amounts of \$165,000.00 and \$50,000.00 respectively, both held by U.S. Bank. A.2. U.S. Bank foreclosed its first mortgage, and a foreclosure sale was held on April 4, 2002. Id. On October 3, 2002, one day prior to expiration of the redemption period, Appellant

transferred title in the Property to Lancaster Company, Inc. ("Lancaster"). A.3. In turn, Lancaster redeemed the Property and obtained a certificate of redemption. It also satisfied Appellant's second mortgage. Appellant then became Lancaster's tenant with an option to repurchase the Property. Id.

Appellant faced eviction from Lancaster in 2003 because she could not pay rent. A.3. She unsuccessfully sought refinancing through Wells Fargo. Appellant then negotiated with River Run Properties, LLC ("River Run") to execute a transaction that would again allow her to remain in possession of the Property (the "River Run Transaction"). A.3-A.4. Accordingly, Lancaster conveyed the Property to Appellant via warranty deed. A.4. Appellant then immediately conveyed the Property via warranty deed to River Run. Id. She also executed a contract for deed ("Contract for Deed") whereby she agreed to purchase the Property from River Run. Id. The Contract for Deed required monthly payments of \$2,265.22 per month, plus 1/12th of the yearly property taxes and insurance premiums. The total purchase price was \$281,314.82, with a balloon payment due December 31, 2005, and interest accruing at 8.5% per annum. A.4. The payments, including principal, insurance and taxes equaled \$2,700.00 per month.

In August 2003, River Run conveyed the Property to U.S. Equities of Minnesota, Inc., ("U.S. Equities") an entity Striker owned and operated. A.4. U.S. Equities thereafter conveyed a warranty deed to Striker individually in June 2004. Striker obtained a loan from Entrust Mortgage secured by a mortgage that named Respondent as the mortgagee in 2004, in the principal amount of \$360,000.00. A.4.

Striker defaulted on his payments, and Respondent foreclosed. At a foreclosure sale held on June 9, 2005, Respondent obtained a sheriff's certificate of sale for the Property. On September 6, 2005, Striker served Appellant a Notice of Cancellation of Contract for Deed ("Notice of Cancellation"). The Notice of Cancellation alleged that \$27,182.64 was owed for monthly installments of \$2,265.22 for the months of September 2004 through August 2005, and late fees of \$1,359.12 (\$113.26 per month) for late payments during the same period. Trial Court Exhibit ("Ex.") 122. On or about October 14, 2005 Striker filed bankruptcy. A.5. He did not initially identify the Contract for Deed or Appellant in the petition, but he did identify the Property by street address as being an asset. Ex. 124. Appellant alleges she communicated with bankruptcy trustee Julia Christians ("Trustee") at some point in November 2005, and that she received official notice of the bankruptcy filing in 2006. Appellant's Brief, at 7. On November 1, 2005, Appellant filed this action, alleging that the Notice of Cancellation was inaccurate and that Appellant held an interest in the Property as an equitable mortgagor, not as a contract for deed vendee. A.5. On or about March 9, 2006, the Trustee issued a notice of abandonment abandoning any interest in the Property because there was little or no equity in the Property as a result of Respondent's interest. A.6.

Striker's attorney, Larry Chiat, recorded a Notice of Cancellation of Contract for Deed, Affidavit of Service, and Affidavit of Non-Compliance ("Affidavit of Non-Compliance") on November 16, 2005. A.5. That document evidenced that Appellant had not cured the default or taken steps to redeem her interest in the Contract for Deed. Striker likewise never redeemed from Respondent's foreclosure sale. Appellant has made

no payments to Striker, Respondent, or the trial court under the Contract for Deed since at latest November or December 2004. No court order has been issued staying cancellation of the Contract for Deed.

SUMMARY OF ARGUMENT

The trial court's factual findings and conclusions of law as to the termination of the Contract for Deed and Appellant's claims to be an equitable mortgagor are unassailable. Appellant ceased making payments on the Contract for Deed in 2004, nearly four years ago. Although she commenced this action within sixty days after being served the Notice of Cancellation, she never obtained a court order enjoining the cancellation, nor did she provide adequate security pending resolution of her claims that the Contract for Deed was breached. The trial court entertained her defenses at trial. Correctly, it rejected them.

Appellant's resistance to the trial court's findings and legal conclusions falls miles short of warranting reversal or remand. The linchpin of her appeal is Striker's filing bankruptcy soon after she received the Notice of Cancellation. She claims the filing prevented her from exercising her statutory rights to avoid cancellation. In so doing, she tangles herself in faulty legal arguments relating to bankruptcy law that bear no impact on this case. The filing in no way caused her failure to respond properly to the cancellation of the Contract for Deed. Ultimately, the Trustee abandoned any interest the bankruptcy estate had in the Property. Contrary to Appellant's claims, that act occasioned no violation of bankruptcy law. And if it did, Appellant fails entirely to explain how or why the Trustee's conduct taints the trial court's findings of fact and conclusions of law. For

the reasons elaborated upon in arguments that follow, this Honorable Court should affirm the trial court's judgment.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT APPELLANT'S CONTRACT FOR DEED VENDEE INTEREST HAS BEEN CANCELLED.

Appellant's argument that the Contract for Deed never terminated focuses on the supposed impact Striker's bankruptcy filing had on cancellation instead of the cancellation standing alone or the facts that led to it. Appellant's Brief, at 4, 7. Framing the argument in this manner enables Appellant to divert attention from the fact that she ceased payments on the Contract for Deed nearly four years ago and failed to follow the statutory procedures necessary to preserve her vendee interest.

A. APPELLANT FAILED TO COMPLY WITH MINNESOTA STATUTES, SECTIONS 559.21 AND 559.211.

As required by statute, the Notice of Cancellation Appellant received on September 6, 2005 contained statutorily required language informing her of her options. It stated that if she failed to cure the default within sixty days the Contract for Deed would terminate unless:

YOU SECURE FROM A COUNTY OR DISTRICT COURT AN ORDER THAT THE TERMINATION OF THE CONTRACT BE SUSPENDED UNTIL YOUR CLAIMS OR DEFENSES ARE FINALLY DISPOSED BY TRIAL, HEARING OR SETTLEMENT. YOUR ACTION MUST SPECIFICALLY STATE THOSE FACTS AND GROUNDS THAT DEMONSTRATE YOUR CLAIMS OR DEFENSES.

IF YOU DO NOT DO ONE OR THE OTHER OF THE ABOVE THINGS WITHIN THE TIME PERIOD SPECIFIED IN THIS NOTICE, YOUR CONTRACT WILL TERMINATE AT THE END

OF THE PERIOD AND YOU WILL LOSE ALL THE MONEY YOU HAVE PAID ON THE CONTRACT; YOU WILL LOSE YOUR RIGHT TO POSSESSION OF THE PROPERTY; YOU MAY LOSE YOUR RIGHT TO ASSERT ANY CLAIMS OR DEFENSES THAT YOU MIGHT HAVE; AND YOU WILL BE EVICTED. IF YOU HAVE ANY QUESTIONS ABOUT THIS NOTICE, CONTACT AN ATTORNEY IMMEDIATELY.

Ex. 122, ¶5; see Minn. Stat. § 559.21, subd. 3 (2008). Cancellations function similar to strict foreclosures and terminate all rights between the parties. In Re Butler, 552 N.W.2d 226, 230 (Minn. 1996) (citations omitted).

Had Appellant challenged cancellation in compliance with the statutory requirements she would have been required to obtain an injunction and continue making payments.

In an action arising under or in relation to a contract for the conveyance of real estate or any interest therein, the district court, notwithstanding the service or publication pursuant to the provisions of section 559.21 of a notice of termination of the contract, has the authority at any time prior to the effective date of termination of the contract and subject to the requirements of Rule 65 of the Rules of Civil Procedure for the District Court to enter an order temporarily restraining or enjoining further proceedings to effectuate the termination of the contract.

Upon a motion for a temporary injunction, the court *shall condition the granting of the order either upon the tender to the court or vendor of installments as they become due under the contract or upon the giving of other security in a sum as the court deems proper*. Upon written application, the court may disburse from payments tendered to the court an amount the court determines necessary to insure the timely payment of property taxes, property insurance, installments of special assessments, mortgage installments, prior contract for deed installments or other similar expenses directly affecting the real estate, or for any other purpose the court deems just.

Minn. Stat. §559.211, subd. 1 (2008) (emphasis added).

The Notice of Cancellation was served on September 6, 2005. A.5. Appellant had sixty days, or until November 5, 2005, to either cure the defect or obtain a temporary restraining order enjoining cancellation. Ex. 122. She did neither. Three years have passed since she first was served with the Notice of Cancellation, yet she never has posted security, tendered monthly payments, or obtained a temporary restraining order consistent with Rule 65 of the Minnesota Rules of Civil Procedure.¹ Accordingly, Appellant failed to preserve her rights in the Contract for Deed. The trial court's findings supporting statutory cancellation of the Contract for Deed are not clearly erroneous.

B. EVEN IF THE STATUTORY CANCELLATION HAD FAILED THE CONTRACT FOR DEED STILL WOULD HAVE BEEN TERMINATED JUDICIALLY.

Appellant proclaims that because the statutory cancellation action failed it follows that the cancellation itself fails. Appellant's Brief, at 4. In so claiming, Appellant ignores the fact that the statutory language merely states a seller "*may* terminate the contract by serving a notice of cancellation." Minn. Stat. § 559.21, subd 1d. (emphasis added). A party may also initiate a judicial action to terminate a contract for deed. Covington v. Pritchett, 428 N.W.2d 121, 124 (Minn. Ct. App. 1988); Kosbau v. Dress, 400 N.W.2d 106, 108 (Minn. Ct. App. 1987). Long after the Trustee abandoned the Property, Respondent intervened judicially through the trial court's order in April 2007 alleging Appellant breached the Contract for Deed. A.17-18. Appellant received every opportunity at trial to show that the cancellation failed or that she had not breached the

¹ To grant a temporary injunction, the court must consider: 1) the relationship of the parties; 2) the relative harms that the parties will suffer if the injunction is granted or denied; 3) the likelihood of success on the merits; 4) the burdens imposed on the court; and 5) public policy concerns. Dahlberg Bros. Inc. v. Ford Motor Co., 272 Minn. 264,

Contract for Deed. Assuming *arguendo* that the statutory cancellation action Striker initiated was rendered insufficient when he filed bankruptcy, the subsequent judicial action rendered moot and cured those insufficiencies. During the entire pendency of her action, Appellant remained in possession of the Property without posting security or making monthly payments. She thus fared better than she would have had had she obtained an injunction pursuant to Minn. Stat. § 559.211. The Contract for Deed accordingly terminated, if not due to Appellant's failure to follow procedures necessary to stave off statutory cancellation, then following Respondent's judicial action.

C. APPELLANT'S CLAIMS THAT STRIKER'S FILING BANKRUPTCY WITHOUT IDENTIFYING APPELLANT OR THE CONTRACT FOR DEED IN THE PETITION FAIL.

It is beyond dispute that Appellant failed to either cure her default or obtain a temporary restraining order. In a transparent attempt to avoid this fact, Appellant fingers Striker's bankruptcy filing as the smoking gun. That effort fails.

1. Striker's filing bankruptcy during Appellant's redemption period could not have deterred Appellant from exercising her rights because she did not know of the filing until after her redemption period expired.

Appellant alleges Striker's bankruptcy filing prejudiced her because she lost the ability to either cure the default or obtain a temporary restraining order. Appellant's Brief, at 7-8. She intimates that taking such actions would have violated the automatic stay that protects bankruptcy petitioners, and thus she was dissuaded from taking either step. Her own allegations expose the infirmities of this claim. *Id.* at 7.

Appellant alleges that “as of November 5th, when she filed her suit against [Striker], [Appellant] had no idea that Striker was in bankruptcy, or she would not have filed suit in the teeth of the automatic stay.” Id. Yet November 5, 2005, the 60th day after the Notice of Cancellation was served on September 6, 2005, was the last date upon which she either could have cured the default or obtained a court order staying cancellation. Ex. 122. Appellant filed this action on November 1, 2005 and had Striker served on or about November 3, 2005. A. 15. The threat of violating the bankruptcy stay protecting Striker could not logically have deterred her from taking action within sixty days if she did know of the bankruptcy filing during that sixty day period. These acts erode the legitimacy to Appellant’s claim that she was deterred from taking legal action. A.12. To be sure, she took legal action. In failing to post security, obtain a temporary restraining order or continue making payments, Appellant did not take the type of action necessary to avoid cancellation. See Minn. Stat §§ 559.21, subd. 3, 559.211, subd. 1.

Moreover, Appellant’s “ability” to cure the breach or post security and continue making payments could ripen only if she had the financial wherewithal to take such steps in the first place. The Trustee abandoned any claim to an interest in the Property in March 2006, thereby paving the way for Appellant to cure her default or obtain a temporary restraining order. A.6. In nearly four years there is no record of her ever tendering payment or otherwise attempting to comply with the statute with respect to continued payment. Minn. Stat. §§ 559.21, subd. 3, 559.211, subd. 1. Appellant’s claims that Striker’s filing bankruptcy thwarted her efforts to comply with the statutory cancellation procedures therefore find no evidentiary support from the record.

2. Striker did not violate bankruptcy law when his attorney filed and recorded the Affidavit of Non-Compliance.

Appellant alleges Striker's attorney violated bankruptcy law by recording the Affidavit of Non-Compliance during the automatic stay that forbids collection actions against debtors after they file bankruptcy. Appellant's Brief, at 16. This claim is erroneous.

In comparing a cancellation of a contract for deed with a foreclosure of a mortgage, the Minnesota Bankruptcy Court stated that:

[o]nce the debtor is served with a contract for deed cancellation, no act remains to be done on the part of the contract for deed vendor who is cancelling the contract except waiting for the time to expire. The debtor may cure the default in the contract and thereby terminate the effect of the cancellation notice. However, no other act is necessary of the contract for deed vendor. The contract for deed vendor may wish to file the notice of cancellation of the contract for deed with the appropriate County Recorder's Office at a later date. However, this filing is not required of the contract for deed vendor in order to terminate the contract for deed vendee's interest in a contract for deed. The contract for deed interest of the Debtors was terminated by virtue of the expiration of the appropriate time under [Minn. Stat. 559.21 and 11 U.S.C. § 108].

In re Crawley, 53 B.R. 40, 43 (Bkrcty. Minn. 1985). It further noted that "under 11 U.S.C. § 363(b)(3) and 11 U.S.C. § 546(b) the "act of filing the notice of cancellation would not violate the automatic stay." Id. at 43 (citing In re Victoria Grain Co. of Minneapolis, 45 B.R. 2 (Bkrcty. Minn. 1984)). Appellant's argument that Striker's recording of the Affidavit of Non-Compliance violated the automatic stay is thus erroneous. Furthermore, the stay is designed to protect the party filing bankruptcy and its creditors. See Northwest Wholesale Lumber, Inc. v. Citadel Co., 457 N.W. 2d 244, 248 (Minn. Ct. App. 1990). The fact that Striker's own attorney filed the Affidavit of Non-

Compliance thus renders Appellant's argument groundless as Appellant was not Striker's creditor.

3. Appellant's conjecture about what the Trustee might have done is unsupported by the record and irrelevant.

Appellant claims that Striker's failure to identify the Contract for Deed in his bankruptcy petition destroys the cancellation because it deprived the Trustee of various options. Appellant's Brief, at 12-13. Appellant's musings about what the Trustee could have or might have done are irrelevant. What the Trustee did do is crystal clear: it abandoned any claim to an interest in the Property because it recognized that the "estate's only interest in the [P]roperty was a right of redemption" and further, noted that there was "little or no equity for the estate and the asset is burdensome or of inconsequential value to the estate." A.6. The Trustee's decision regarding abandonment made eminent sense.

Specifically, upon the filing of bankruptcy, a trustee enjoys the powers and rights accorded to a bona fide purchaser of real estate as determined by state law. See 11 U.S.C. § 544(a)(3). In Minnesota, a bona fide purchaser is one who gives consideration without actual, implied or constructive notice of inconsistent rights of other parties. Anderson v. Graham Inv. Co., 263 N.W.2d 382, 384 (Minn. 1984). A party has constructive notice of inconsistent rights by examining the record of title. In re Investment Sales Diversified, Inc., 49 B.R. 837, 843 (Bkrctcy. Minn. 1983); see also Minn. Stat. § 507.32 (stating that an instrument properly recorded provides notice to parties). Appellant suggests that the Trustee was ill-informed regarding the Contract for Deed. Appellant's Brief, at 12. The Trustee did not testify at all, so Appellant's argument is unsupported by the record. The Property was identified as an asset of Striker in his bankruptcy petition filed in October

2005. The Contract for Deed and warranty deed Appellant delivered to River Run were recorded in 2003, and the Affidavit of Non Compliance in November 2005. Well before the Trustee abandoned the Property, it had constructive knowledge of Appellant's erstwhile interest in the Property as well as constructive and actual knowledge of Respondent's. A.5. As their interests were recorded long before the Trustee took an interest in Striker's assets upon his bankruptcy filing, the Trustee had sufficient notice of who held interests in the Property, superior to the Trustee's.

4. The automatic stay that went into effect upon Striker filing bankruptcy would not have eliminated Appellant's obligations under Minnesota Statute.

Appellant claims the stay rendered her rights under Minn. Stat. § 559.21 void. Appellant's Brief, at 15. But Appellant never moved the trial court for an injunction or otherwise so much as purported to cure the Contract for Deed even after the trial court put this case on active status. Thus, there is no record or court ruling against which to measure Appellant's claims. Given the fact that Appellant received a trial on the merits, it makes no sense for her to argue that her rights as allowed under Minn. Stat. § 559.21 were in any way hindered. The judicial action may have duplicated the statutory cancelation, but it was a valid means of adjudicating Appellant's interest. The stay did not prevent Appellant from litigating this matter.

If Appellant truly believed the automatic stay prevented her from taking additional action, she was always free to move the bankruptcy court for permission to proceed by lifting the stay. See Fed. Bkrtcy. R. Civ. Pro. 4001 (2008). Striker's bankruptcy filing in fact may have resulted in Appellant having sixty days from the filing to obtain a

restraining order or cure the default. Appellant's Brief, at 11. But Appellant took no action within sixty days of Striker filing bankruptcy or at any point for that matter.² The fact that Appellant has had her trial, and neither the Trustee, Striker, or Respondent ever alleged Appellant violated the stay, makes her arguments in this regard unnecessary and irrelevant.

II. THE TRUSTEE'S ABANDONMENT OF ANY CLAIM TO AN INTEREST IN THE PROPERTY DID NOT EFFECT CANCELLATION OF THE CONTRACT FOR DEED.

Appellant alleges that the Trustee violated bankruptcy law by failing to cure defaults in the Contract for Deed and abandoning any claims to the Property. Appellant's Brief, at 16. As Appellant was neither a creditor nor bankruptcy petitioner, it strains logic to believe she has standing to question the actions of the Trustee. See Northwest Wholesale Lumber, 457 N.W. 2d at 248 (stating creditors and the petitioner may enforce the automatic stay). Even if Appellant had standing the Trustee certainly did not violate bankruptcy law and Appellant fails to show how such violation would in any way impact her rights.

A. SECTION 365 OF THE BANKRUPTCY CODE DOES NOT APPLY.

Appellant claims the Trustee violated 11 U.S.C. § 365. Appellant's Brief, at 16. Section 365 of the bankruptcy code states that a trustee "*may* assume or reject any executory contract or unexpired lease of the debtor" See 11 U.S.C. § 365(a)(emphasis

² Moreover, the stay does not apply where the rights of the Trustee are subject to generally applicable laws permitting perfection, maintenance or continuation of an interest under the state by commencement of an action. 11 U.S.C. § 547(1)(B)(2)(A)-(B) As Appellant's request for a restraining order would have been in response to Striker's conciliation action and designed to preserve Appellant's interest in the Property, this section may have protected her.

added), and then sets out specific parameters for it to do so. See generally, id. But section 365 is inapplicable because the contract for deed vendor merely awaits repayment while holding title as security. In re Adolphsen, 38 B.R. 780, 780 (D. Minn. 1980). The court further stated:

Appellants argue that under § 365(i) a contract for deed is executory. However, §365(i) protects a non-debtor vendee from a vendor-debtor who rejects an executory contract for the sale of real property. Moreover, a contract for deed is not a contract for the sale of real property. It is a financing arrangement for a sale which has already occurred.

Id. (emphasis added); see generally Michael Yaworsky and Paul Sullivan, eds., *Bankruptcy Desk Guide*, Part 5, Chpt. 15, 20:7, 20-19 (West 2005)(stating that many jurisdictions do not treat a contract for deed as an executory contract for purposes of analyzing section 365). The Contract for Deed would not be deemed an executory contract in this jurisdiction. Appellant's attempts to apply section 365 here therefore fail. Appellant Brief, 12-14. Its analysis is premised upon a legal interpretation that Minnesota's bankruptcy court expressly rejects.

B. EVEN IF SECTION 365 APPLIED, THE TRUSTEE ACTED LAWFULLY.

Even if section 365 applied to contract for deeds in Minnesota, Appellant's interpretation of that statute is fatally flawed. The statute states that the "trustee, subject to the court's approval, *may* assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). (emphasis added). Abandonment is not precluded. See Northwest Wholesale Lumber, Inc., 457 N.W. 2d at 248 (noting that abandonment by a trustee puts property in hands of debtor). Here, the Trustee concluded it needed to

redeem from Respondent in order to preserve the bankruptcy estate's interest in the Property. Ex. 123. It elected not to, apparently after balancing the cost of redeeming from Respondent's interest against the value of the Property. In re Sheets, 277 B.R. 298 at 306 (Bkrcty North D. Tx. 2002) (stating that the trustee's inability to demonstrate that it had bona fide purchaser status could bar an action to avoid a contract for deed). Appellant provides no persuasive reason why the Trustee acted wrongly, or why Appellant has standing to challenge the Trustee's decision in the first place.

C. THE TRUSTEE DID NOT CANCEL THE CONTRACT FOR DEED.

Further, Appellant claims that "all bankruptcy courts agree that 11 U.S.C. § 365 forbids a trustee from cancelling a recorded contract for deed 'unless the trustee cures, or provides adequate assurance that the trustee will promptly cure such default.'" Appellant's Brief, at 18. (citation omitted) The Trustee did not cancel the Contract for Deed. Striker initiated cancellation as a result of Appellant's breaches. All Striker or the Trustee had to do was await Appellant's compliance or lack thereof. See In re Crawley, 53 B.R. at 43. The Trustee had no obligation to cure Appellant's defaults. In any event, it abandoned the Property. The only conclusion that follows is that the Contract for Deed remained undisturbed as a result of bankruptcy, albeit with Appellant having failed to preserve her interest. See Northwest Wholesale Lumber, 457 N.W.2d at 241.

Appellant points to In re Sheets, 277 B.R. 298 in support of its application of section 365. Application of that case falters because Texas law deems contracts for deeds to be executory contracts. Id. at 303. This jurisdiction does not. See Part II A. In re Sheets the contract for deed was unrecorded, which allowed the trustee to claim bona fide

purchaser status. Id. at 307-308. Here, the Contract for Deed and Respondent's Mortgage were recorded. Thus, the Trustee would have confronted Appellant's interest in the Contract for Deed, if any remained, as well as Respondent's. Moreover, the Texas bankruptcy court cited provisions within section 365 that require a vendee remaining in possession to continue making payment if the trustee rejects a contract for deed. Id. at 303 (citing 11 U.S.C. 365(i)(j)). That did not happen here. In short, In re Sheets, is distinguishable factually and legally.

Appellant's arguments that the Trustee failed to comply with 11 U.S.C. § 365 fail. The Trustee's actions in no way justify reversal.

III. APPELLANT PRESENTS NO FACTS OR LEGAL AUTHORITY DEMONSTRATING THAT SHE POSSESSES AN EQUITABLE MORTGAGE IN THE PROPERTY.

The trial court's findings of fact supported entirely its conclusion that Appellant failed to meet her burden in attempting to show that she was an equitable mortgagor. Its conclusions should not be disturbed on appeal.

A. THE RIVER RUN TRANSACTION WAS ONE FOR A CONTRACT FOR DEED.

In Ministers Life and Casualty Union v. Franklin Park Towers Corp, 307 Minn. 134, 137-38, 239 N.W.2d 207, 210 (1976), the Minnesota Supreme Court stated that "a deed absolute in its form is presumed to be, and will be treated as, a conveyance unless *both parties* in fact intended a loan transaction with the deed as security only." Id. (emphasis added). The Court identified several factors that shed light upon whether a deed absolute in fact constituted an equitable mortgage.

- (i) Testimony of one party's intent is not sufficient to demonstrate that a sale was an equitable mortgage; both parties must intend to have created an equitable mortgage.
- (ii) The relevant intent must be measured at the time the conveyance occurred.
- (iii) The parties' intent must be examined in light of the parties' written memorializations of the transaction.
- (iv) The parties may bargain for any type of transaction they see fit.
- (v) The fact the document does not contain a statement that it is intended to be security instrument pursuant to Minn. Stat. § 287.03 is relevant.
- (vi) The fact that the grantor is experienced in business transactions and represented by a lawyer is material.
- (vii) Absence of any personal obligation is material in determining whether a deed was intended as a mortgage or a deed absolute.

Id. at 138-39; 239 N.W.2d at 210 (citations omitted).

1. Appellant elicited no testimony that River Run intended the Contract for Deed to be a mortgage.

Both parties must intend a deed absolute to be a mortgage transaction. First National Bank of St. Paul v. Ramier, 311 N.W.2d 502, 503 (Minn. 1981); Ministers, 307 Minn. at 138, 239 N.W.2d at 210. Appellant testified she believed she obtained mortgage financing. A.4. But she produced no testimony from River Run that it shared the same belief. No officer or employee of River Run was even called to testify. Id. Jim Hayden, who acted as a buyer's agent that found prospects for River Run, testified that in his experience River Run never gave mortgage financing. A.5. The documents River Run signed do not contain even a reference to a mortgage with Appellant. The trial court did not err in concluding that Appellant failed to show River Run intended an equitable mortgage.

Even Appellant's stated intent fails to square with the evidence. A trial court's findings regarding witness credibility deserve considerable deference. Matter of Knops,

536 N.W. 2d at 616. Appellant had held interests in twenty six properties during her first marriage. A.8. She denied this at trial initially, correcting herself only upon being shown her deposition transcript. Id. In her second marriage she purchased a property via contract for deed, and prior to the River Run Transaction, had sold the Property to Lancaster and leased it back with an option to buy. She presented no documents describing her as River Run's mortgagor. Yet she signed a warranty deed conveying her interest to River Run, and the Contract for Deed describing her as the vendee. The trial court found Appellant's credibility suspect. A.8. The evidence buttresses the trial court's skepticism. In sum, the record merely shows that Appellant claims she thought the transaction was for an equitable mortgage. That is not enough to create an equitable mortgage.

2. At the time of the River Run Transaction, all evidence points to the conclusion that River Run and Appellant intended a conveyance of a deed absolute.

The parties' intent at the time of the conveyance is the relevant consideration. Ministers, 307 Minn. at 138, 239 N.W.2d at 210 (citing St. Paul Mercury Ind. Co. v. Lyell, 216 Minn. 7, 11 N.W.2d 491 (1943)). Although Appellant testified she thought the transaction was one for mortgage financing, the written documents executed at the time the transaction was consummated belie those claims. On the very day Plaintiff signed the River Run Warranty Deed, she also executed the Contract for Deed. These documents were executed the day that the River Run Transaction occurred and, therefore, capture the parties' intent when it mattered most. Not until over two years later in November 1, 2005, days before the sixty day period from service of the Notice of Cancellation would elapse, did Appellant suddenly realize that, in fact, the River Run Transaction created an

equitable mortgage. Appellant produced no written statements or documents evidencing her intent at the time the River Run Transaction occurred. The written documents she signed show that she did not believe the River Run Transaction to be a mortgage transaction, and if she did, she apparently took no steps to correct or clarify the documents. The testimony of Striker and Jim Hayden suggested that Appellant knew she would be a contract for deed vendee. River Run's intent at the time of the River Run Transaction is laid bare and shows it did not intend a mortgage transaction.

3. The written documents executed at the time of the River Run Transaction all show a deed absolute was conveyed.

The written memorialization of the transaction is crucial to understanding the parties' intent. The absence of terms such as "debt," "security," or "mortgage" provides strong evidence that a mortgage was not intended. See Ministries, 307 Minn. at 138, 239 N.W.2d at 138 (citing Westberg v. Wilson, 185 Minn. 307, 309, 241 N.W.315, 316 (1932)). Not one document comprising the River Run Transaction contains these terms. Appellant is identified as the grantor in the River Run Warranty Deed. Ex. 114. She is identified as the contract for deed vendee in the Contract for Deed. Ex. 115. The written documents at issue all point toward the conveyance of a deed absolute because they do not contain the terms "debt," "security," or "mortgage."

4. River Run and Appellant bargained for a sale.

At the time of the River Run Transaction in 2003, Appellant had already conveyed title to Lancaster to stave off her failure to redeem from the foreclosure in 2002. A.3. According to her own testimony she had become a tenant with an option to purchase, which she could not exercise. She had already shown the wherewithal to strike a bargain

that would allow her to remain an occupant of the Property. See id. Prior to the transaction with Lancaster, Appellant contemplated engaging in a transaction with River Run according to the testimony of Jim Hayden. She declined and elected to move forward with Lancaster. She had also attempted unsuccessfully to obtain financing from Wells Fargo. Entering into the River Run Transaction, with River Run paying Lancaster for its interest in the Property, provided her with the last opportunity to remain in occupancy of the Property. The evidence demonstrates that the River Run Transaction was the product of a bargained for exchange that included a deed absolute transfer.

5. The River Run Warranty Deed and River Run Contract for Deed do not contain statutory language of Minn. Stat. § 287.03 purporting to create a security interest.

Minnesota Statute, section 287.03, states that “[n]o instrument, other than a decree of marriage dissolution or an instrument made pursuant to it, relating to real estate shall be valid as security for any debt, unless the fact that it is intended and the initial known amount of the debt are expressed in it.” The trial court found that none of the documents Appellant signed contained references to mortgage, debts, or security. A.7. Appellant makes no argument to the contrary.

6. Evidence supported finding that Appellant understood the River Run Transaction.

Appellant owned interests in twenty-six properties during her first marriage, had at points in her life been employed by a real estate company, purchased property via contracts for deed, executed mortgages, gone through foreclosure, and sold her house to Lancaster, all prior to the River Run Transaction. A.8. At trial Jim Hayden testified he had several discussions with Appellant prior to her selling the Property to Lancaster and

that she exhibited no confusion or misunderstanding. Id. The trial court, in consideration of these factors and after weighing the credibility of her testimony clearly, was well founded in finding that she understood the nature of the transaction.

7. Appellant owed no personal obligation stemming from the River Run Transaction.

The trial court found nothing within the record showing that Appellant would be liable to River Run or its successors. A.7. Appellant takes no issue with this finding. Accordingly, this factor weighs in favor of finding no equitable mortgage.

8. The River Run Transaction was not a mortgage transaction.

Viewing the River Run Transaction in its entirety shows it cannot be characterized as a mortgage transaction. Most important, none of the documents associated with the River Run Transaction show that a mortgage was intended, and no one testified that River Run thought Appellant was granting it a mortgagee interest in the Property. Appellant's interest in the Property as of July 30, 2003 was that of a contract for deed vendee, nothing more.

B. APPELLANT PRESENTS NO FACTS OR ARGUMENT THAT SHOW THE TRIAL COURT ERRED IN CONCLUDING THAT NO EQUITABLE MORTGAGE WAS CREATED.

Appellant's arguments here that an equitable mortgage exists provide affirmation to the trial court's finding of facts, albeit tacitly. Rather than challenging the trial court's factual findings or their application to the criteria courts employ to determine the existence of an equitable mortgage, Appellant instead crafts her own analytical framework and uses it to divine an equitable mortgage. Appellant's Brief, at 19-21. Her efforts fail.

1. The Contract for Deed was not mortgage financing.

The Minnesota Supreme Court has stated that a “contract for deed is a financing arrangement which allows a buyer-vendee to purchase property by borrowing the money for the purchase of the seller-vendor.” In re Butler, 552 N.W.2d at 229. Expanding on that theme, the court quoted with approval the following language:

[A] vendor’s security interest, like the interest of a purchase money mortgagee, protects the vendor’s or owner’s property rights from being appropriated by creditors of a vendee...[t]he vendor’s security interest or lien provides a critical security to a seller that is essential for an installment land sale contract to be a commercially reasonable way of selling real estate.

Id. 229-30 (quoting Butler v. Wilkinson, 740 P.2d 1244, 1256 (Utah 1987)). The court went on to note that the use of the contract for deed is statutorily recognized by the legislature of Minnesota as an alternative mechanism by which to provide financing. Id.

The River Run Transaction was memorialized as a contract for deed transaction because it was a contract for deed transaction. It is a long-standing and statutorily recognized form of alternative financing. Appellant attempted to secure traditional mortgage financing after having narrowly escaped the expiration of the redemption period, defaulting as a tenant with Lancaster, and being unable to obtain financing from Wells Fargo. A.3. The evidence shows that she was a contract for deed vendee. The trial court’s conclusion of law is well supported by the record.

An application of the Ministers Life criteria to the facts here show Appellant fails at every point to establish an equitable mortgage. Appellant claims that Striker never lived at the Property, had no interest in it prior selling it to her via the Contract for Deed, and made no improvements to the Property somehow renders the transaction not to be a

contract for deed. Appellant's Brief, at 23. The Ministers Life criteria consider none of these facts. Occupation of property rarely if ever explains entirely the underlying legal relationship between the occupant and landlords, contract for deed vendors, mortgage holders or other interest holders. If the absence of previous possession of a property affected the legal interest every real estate investor ought to be concerned. Stated simply, the facts Appellant identifies are meaningless.

Appellant also asserts that the absence of "covenant-not-to-sue language" or "anti-equitable mortgage language" shows an equitable mortgage exists. Appellant's Brief, at 26. Covenant not to sue language was unneeded, as cancellation was the only remedy identified in the Contract for Deed. Ex. 115. Striker's act in commencing statutory cancellation confirms he purported no monetary liability on Appellant's part. Given that the Contract for Deed was labeled as a contract for deed and the absence of a reference to a mortgage in any documents comprising the River Run Transaction, it would be unnecessary to incorporate anti-equitable mortgage language.

2. The cases appellant cites are distinguishable.

Appellant asserts that "when faced with transactions written up the way [Appellant's] is, courts have treated them as equitable mortgages." Appellant's Brief, at 21. She cites two cases, neither of which involve transactions similar to the one here.

a. Fearing v. Aymar

In Fearing v. Aymar,³ the putative contract for deed vendor had already obtained a money judgment against the claimed vendee. In pleadings, she had alleged she did not

³ No. A05-1568, 2006 WL 1390448 (May 26, 2006)(unpublished opinion), reproduced in Appellant's appendix.

own the property at issue, and she had recorded a mechanic's lien statement against the property identifying the vendee and not herself as the owner. A.47. Moreover, the written documents expressly stated that vendee gave a quit claim to the seller not to convey title but because the seller "[d]esired security in the event that buyer does not build a townhouse pursuant to said contract for deed." A.48 (emphasis added). The putative contract for deed vendor and her attorney testified that the quit claim deed "was not intended to immediately transfer legal title." *Id.* The *Fearing* opinion thus offers Appellant no support. Striker never claimed he did not own the Property, nor had he obtained a judgment from Appellant for money damages.

b. Wilkinson v. Ordway Group, LLC.

Appellant also cited Wilkinson v. Ordway Group, LLC,⁴ stating that in that case the fact that the transaction documents, including a contract for deed, stated that the transaction was not intended to be an equitable mortgage was sufficient to show that "what otherwise would probably have been an equitable mortgage transaction was taken out of that category." Appellant's Brief, at 25. Respondent found no such statement in the *Wilkinson* opinion in support of that conclusion. A. 43. Instead, the Court of Appeals emphasized that the contract for deed was valid and allowed the vendees to stay in the property while they sought financing. It noted that the vendees had received the benefit of the bargain, and that so too should the vendors. *Id.* That opinion supports Respondent, as Appellant bargained for the River Run Transaction.

⁴ 2007 WL 3037319, No. 07-2678 (Dist. Ct. Minn., Oct. 7, 2007)(unpublished opinion), reproduced in Appellant's appendix.

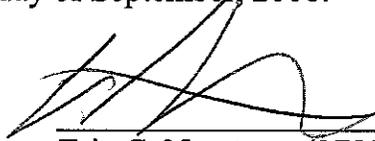
C. APPELLANT FAILED TO MEET ITS BURDEN REGARDING PROOF OF AN EQUITABLE MORTGAGE.

Appellant spends conspicuously little time focusing on the exhibits offered into evidence or the testimony elicited at the trial. Appellant's Brief, at 18-22. Appellant provides little, if any, analysis of the factors identified in Ministers Life & Cas. Union v. Franklin Park Towers Corp., 307 Minn. 134, 239 N.W.2d 207 (1976). Appellant bore the burden of proving an equitable mortgage. The trial court rightly found that Appellant failed to meet that burden.

CONCLUSION

The trial court's factual findings were not clearly erroneous. Its legal conclusion that the Contract for Deed terminated enjoys factual and legal support that Appellant is unable to question with any persuasion. The trial court's finding that no equitable mortgage exists likewise reflects well-founded legal reasoning. Accordingly, Respondent respectfully requests that the Court of Appeals affirm the trial court's findings in their entirety.

Respectfully submitted this 17th day of September, 2008.



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