

STATE OF MINNESOTA

IN COURT OF APPEALS

District Court File No. 07-CV-05-16637

Court of Appeals File No. A08-0941

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Nancy R. Sitek,

Appellant,

vs.

Michael Striker, Defendant, and  
Mortgage Electronic Registration Systems,  
Inc., Intervenor,

Respondents.

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APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE LEGAL ISSUE INVOLVED

- I. BECAUSE MERS' CANCELLATION OF NANCY SITEK'S VENDEE INTEREST IN THE SUBJECT PROPERTY DEPENDS UPON MICHAEL STRIKER'S SUCCESSFUL CANCELLATION OF THAT INTEREST, AND BECAUSE MICHAEL STRIKER FILED BANKRUPTCY PRIOR TO THE COMPLETION OF HIS CANCELLATION ACTION, HAS MS. SITEK'S VENDEE INTEREST BEEN CANCELLED AND DOES SHE HAVE HER EQUITABLE INTEREST IN THE SUBJECT PROPERTY BEEN VOIDED?

The District Court Held: In the AFFIRMATIVE.

MOST APPOSITE STATUTES:

11 U.S.C. § 362

11 U.S.C. § 365

Minn. Stat. § 559.21

Minn. Stat. § 559.211

MOST APPOSITE CASES:

*Miller v. Snedeker*, 101 N.W.2d 213 (Minn. 1980)

*Egge v. Depositors Ins. Co.*, WL 2703137 (Minn. App. 2007)

*Fearing v. Aymar*, WL 130448 (Minn. App. 2006)

- II. DID THE TRUSTEE'S FAILURE TO TAKE ANY ACTION TO ASSERT HER RIGHTS UNDER THE CONTRACT FOR DEED EFFECT AN ABANDONMENT OF ANY CANCELLATION RIGHTS SHE (AND MERS) MAY HAVE HAD WITH RESPECT TO IT?

The District Court Held: In the NEGATIVE.

MOST APPOSITE STATUTES:

11 U.S.C. 362

11 U.S.C. § 541

MOST APPOSITE CASES:

*Turoff v. Sheets*, 277 B.R. 293 (B.R. Tex. 2002)

*In re Webber Lumber & Supply Co.*, 134 B.R. 76 (Bankr. D.

Mass.)

III. DID MS. SITEK'S CONTRACT WITH RIVER RUN, AND  
HENCE WITH MR. STRIKER, CREATE AN EQUITABLE  
MORTGAGE WHICH COULD NOT HAVE BEEN CANCELLED  
BY CONTRACT-FOR-DEED CANCELLATION?

The District Court Answered: In the NEGATIVE.

MOST APPOSITE STATUTE:

Minn.Stat. § 559.211

MOST APPOSITE CASES:

*Fearing v. Aymar*, WL 130448 (Minn. App. 2006)

*Ministers Life & Casualty Union v. Franklin Park Towers  
Corp.*, 239 N.W.2d 207 (Minn. 1976)

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## STATEMENT OF THE CASE AND FACTS

The statement of the case and the facts of the case are somewhat interdependent, because filing dates constitute one of the important set of facts upon which this lawsuit turns. The "bare-bones" facts of the lawsuit will be set out first, and then the procedural and substantive facts deemed crucial to the resolution of the appeal will be detailed.

On or about November 1<sup>st</sup>, 2005, Nancy Sitek served Michael Striker with this lawsuit, which sought to enjoin the cancellation of contract for deed by Mr. Striker (A-10). She filed her suit in District Court, Hennepin County, on November 1<sup>st</sup> 2005 (A-12). Mr. Striker, who was in bankruptcy at the time, filed no answer. On April 6<sup>th</sup>, 2007, Mortgage Electronic Registration System ("MERS") was permitted to intervene and served an answer (A-14). Trial was held before the Court on January 22<sup>nd</sup>, 2008 (A-1). On February 20<sup>th</sup>, 2008, the Court issued findings and entered judgment (A-1). On March 19<sup>th</sup>, 2008, Ms. Plaintiff moved for a new trial, which was in essence denied on May 2<sup>nd</sup>, 2008 (23). This appeal followed on June 3<sup>rd</sup>, 2008 (A-35).

As of the date of filing of this lawsuit on November 5<sup>th</sup>, 2005, Ms. Sitek owned an interest (what interest she owned is part of the dispute) in property located at 5812 Dale Avenue South, Edina, Minnesota, described as follows:

Lot 4, and the North 20' of Lot 5, all in Block 3,  
Codes Highview Park, Hennepin County, Minnesota.

(A-28)

Ms. Sitek obtained the property in fee as a result of her marriage dissolution order (A-28). In order to prevent foreclosure, Ms. Sitek made several transactions, including one whereby she executed a Warranty Deed to the property to River Run, Inc., and River Run executed a contract for deed to Ms. Sitek for the same property (A-30). River Run then conveyed its interest in the property to U.S. Equities which conveyed the same to Michael Striker (A-31). Mr. Striker conveyed his legal interest to Entrust Mortgage, Inc., which conveyed the same to intervenor MERS (A-31). MERS foreclosed Mr. Striker's mortgage by sheriff's sale on or about June 9<sup>th</sup>, 2005 (A-31).

On September 6, 2005, Ms. Sitek was served with a cancellation of the Striker contract for deed (A-32). On October 14<sup>th</sup>, 2005, Mr. Striker filed a chapter 7 bankruptcy action (A-34). The bankruptcy trustee was not informed of the bankruptcy action, and neither the property nor the cancellation action was listed on the petition for bankruptcy relief. On or about Nov. 1<sup>st</sup>, 2005, Ms. Sitek served Mr. Striker with an action to enjoin his cancellation of contract for deed, and on Nov. 1<sup>st</sup>, 2005, not knowing of Striker's bankruptcy filing, she filed her action with the District Court in Hennepin County (A-10). On November 16<sup>th</sup>, 2005, without permission of the bankruptcy court, Mr. Striker filed his Affidavit of Failure to Comply with Notice (A-34). On

March 29<sup>th</sup>, 2006, the bankruptcy trustee abandoned her interest in the property (A-34). On June 8<sup>th</sup>, 2006, Mr. Striker's redemption rights were extinguished, and MERS became fee simple owners of the property.

## ARGUMENT

### I.

BECAUSE MERS' CANCELLATION OF NANCY SITEK'S VENDEE INTEREST IN THE SUBJECT PROPERTY DEPENDS UPON MICHAEL STRIKER'S SUCCESSFUL CANCELLATION OF THAT INTEREST, AND BECAUSE MICHAEL STRIKER FILED BANKRUPTCY PRIOR TO THE COMPLETION OF HIS CANCELLATION ACTION, MS. SITEK'S VENDEE INTEREST HAS NOT BEEN CANCELLED AND SHE RETAINS AN EQUITABLE INTEREST IN THE SUBJECT PROPERTY.

As of September 14<sup>th</sup>, 2005, Nancy Sitek owned a vendee's interest in what was labeled on its face a contract for deed. At that time, defendant Michael Striker owned a vendor's interest in the contract for deed; although his fee title to the underlying property had been acquired at a sheriff's sale by MERS, his redemption period had not run, and under the doctrine of *W.T. Bailey Lumber Co. v. Hendrickson*, 240 N.W. 666 (Minn. 1932), the contract vendor retains the exclusive right to cancel a contract for deed unless or until the period for his redemption of the underlying fee has run its course. Under then-existing law, Ms. Sitek had until November 13<sup>th</sup>, 2005 to cure the defaults noted in the notice of cancellation. Unfortunately, Mr. Striker filed bankruptcy on October 14<sup>th</sup>, 2005 and did not inform Ms. Sitek that he had so filed. He also did not list the subject property

as an asset of the estate and did not inform the bankruptcy or MERS that he had filed for bankruptcy protection. As a result, Ms. Sitek brought an action to enjoin the cancellation of the contract for deed, which action was ineffective because there was, unbeknownst to Sitek, her attorney, or MERS, an automatic stay of any action against Mr. Striker then in effect. As a result, Ms. Sitek was legally unable to hold a hearing to determine if the cancellation action could be enjoined. As a result, Mr. Striker's cancellation action failed.

Michael Striker's cancellation action failed, because contract cancellations are strictly construed against the vendor, and Michael Striker's action in filing bankruptcy before the end of Ms. Sitek's redemption period and failing to inform the trustee or Ms. Sitek of either Ms. Sitek's interest or the cancellation action against her voided the cancellation. Because MERS' claim that Ms. Sitek's vendee interest has been cancelled must stand or fall by the claim that Mr. Striker's cancellation action was effective, MERS' claim that Ms. Sitek's interest has been extinguished must fail as well.

Contract cancellation actions are strictly construed, and the right to rescind belongs to the party who is himself without fault. As the Bankruptcy Court said *In re Edina Development Co.*, 370 B.R. 894 (B. Minn. 2007):

Minn.Stat. § 559.21 prescribes the form and content of a notice of cancellation of contract for deed, in some

detail. As a general precept, the Minnesota state courts require a canceling vendor to "closely adhere" to the statute's requirements for form and content, consistent with the policy of strict construction. *Hoffman v. Halter*, 417 N.W.2d at 750.

However, the courts have held that the existence of some discrepancies in a notice of cancellation need not render it "fatally defective" as to its content. Ultimately, the question is whether the vendee was prejudiced by the inaccuracy. *Conley v. Downing*, 321 N.W.2d at 39. The recitation of an incorrect date for the deadline for cure is a "major" discrepancy, which "renders a cancellation notice ineffective." *Karim v. Werner*, 333 N.W.2d 877, 879 (Minn.1983). See also *Conley v. Downing*, 321 N.W.2d at 39. On the other hand, an error in the stated amount of a fee statutorily prescribed as a part of the cure may not render a notice of cancellation fatally defective on its face. *Conley v. Downing*, 321 N.W.2d at 39-40 (statement of vendor's statutorily-recoverable attorney fees in an amount greater than allowable under statute did not render notice of cancellation fatally defective); *Karim v. Werner*, 333 N.W.2d at 879 (ditto); *Valletta v. Recksiedler*, 355 N.W.2d 314, 317 (Minn.Ct.App.1984) (inclusion of costs of service of prior notice of cancellation not so improper as to render current notice fatally defective); *Hjelm v. Bergman*, 275 N.W.2d 568, 571 (Minn.1978) (failure to specify monetary amount in line-entry for costs of service did not render notice defective on face). Misstatements of the amount of monetary default under the terms of a contract for deed-and even omissions of the amount-have been held not to vitiate a notice of cancellation, on the thought that the "vendee is presumed to know the contract terms and is not prejudiced if the amount is not stated or is stated incorrectly." *Conley v. Downing*, 321 N.W.2d at 39. See also *Hoffman v. Halter*, 417 N.W.2d at 750-751 (failure to note amount of delinquent real estate taxes not fatal to notice of cancellation, as vendees "should be presumed to have known of the real estate taxes owed since they agreed in the contract for deed to pay all such taxes").

(*Id.* at 900, 901)

The Minnesota courts have gone even farther than the federal

courts, holding that if the contract vendor takes some action which prejudices the ability of a contract vendee to cure the default, the cancellation action must fail. In *Miller v. Snedeker*, 101 N.W.2d 213 (Minn. 1980), the Minnesota Supreme Court held that even though the vendor has sufficient grounds for rescission, if the vendor has committed some act which improperly prejudices the vendee in her ability to pay, the right to cancel is lost. As the Court said in *Miller*:

This court in *Mason v. Edward Thompson Co.*, 94 Minn. 472, 474, 103 N.W. 507, stated the rule as follows:

'\* \* \* the law is well settled that the right to rescind on the ground of failure of performance belongs to the party who is himself without fault. Even though he has sufficient grounds for rescission, if he has done some act which justifies the other party in refusing or delaying performance, or has failed to perform his own part of the contract, the right to rescind does not exist.'

(*Id.* at 225)

Where the vendor acts in a manner which tends to prevent performance, prejudice results to the vendee, and the vendor cannot claim default unless he has afforded the vendee a reasonable opportunity to perform. *Craigmile v. Sorenson*, 80 N.W.2d 45 (1956). As the *Craigmile* Court put it:

Where the vendors in a contract for deed reserve the right to approve insurance placed on buildings on the premises, they must exercise the right to approve in good faith in such a manner as to permit the vendees to comply with the contract. Where they act in such a manner as to prevent performance, they cannot claim a default until they have afforded the vendees a reasonable opportunity to perform. In 3 Williston,

*Contracts* (Rev.ed.) s 677, we find the following statement:

(*Id.* at 292)

Here, Mr. Striker's bankruptcy filing itself, not to speak of his failure to indicate in his bankruptcy petitions either Ms. Sitek's vendee interest in the contract for deed nor the fact that he was in the process of cancelling that contract for deed at the time he filed bankruptcy nullified that cancellation action. First, the filing itself prejudiced Ms. Sitek. Ms. Sitek lost the ability to pay off the contract for deed by paying Mr. Striker, because Mr. Striker lost his vendor's rights to the trustee in bankruptcy when he filed for protection. See 11 U.S.C. § 362. To be sure, Ms. Sitek might have been able to prevent cancellation by paying off the bankruptcy trustee, but as of November 5<sup>th</sup>, when she filed her suit against Mr. Striker, Ms. Sitek had no idea that Striker was in bankruptcy, or she would not have filed her suit in the teeth of the automatic stay. Ms. Sitek never did receive formal notice of the bankruptcy until February, 2006; she heard rumors of the bankruptcy filing shortly after November 5<sup>th</sup>, 2005, when she called the trustee, but by that time it was effectively too late to prevent cancellation.

More importantly, the bankruptcy filing prevented Ms. Sitek from bringing a motion to enjoin the cancellation. Minn. Stat. § 559.211 states:

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 Courts to enter an order temporarily restraining or enjoining further proceedings to effectuate the termination of the contract....

Mr. Striker's bankruptcy filing deprived Ms. Sitek of her right to bring such an action, and rendered her lawsuit ineffective, because seeking a temporary restraining order would have violated the provision of Mr. Striker's automatic stay.

Second, Mr. Striker's action in failing to include that information was a wrongful act which prejudiced Ms. Sitek's rights. 11 U.S.C. § 554 requires the debtor to list and disclose all his assets, liabilities, and legal actions to the trustee and the bankruptcy court. A vendee interest is a liability and a notice of cancellation of contract for deed is a legal action. Hence, by failing to disclose these matters, Mr. Striker was in violation of the bankruptcy code. As the Minnesota Court noted in *Anderson v. H-Window Co.*, 1999 WL 88953 (Minn.App. 1999):

Delay in filing Suit II was a direct result of Anderson's failure to proceed properly. If Suit I had been scheduled, the trustee could have promptly evaluated the claims and abandoned them to him, as she eventually did. See 11 U.S.C. § 554(a) (1994) (permitting trustee to abandon property that is burdensome to estate or of inconsequential value and benefit to estate). Furthermore, Anderson's bankruptcy estate was closed within four months after he filed for bankruptcy. If his claims had been scheduled, they

would have been abandoned by operation of law, even without the trustee's action. See *Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir.1991) (stating that, for property to be abandoned by operation of law pursuant to 11 U.S.C. § 554(c) (1990), debtor must formally schedule property before close of case).

(*Id.* at 4; A-53)

Mr. Striker's failure to list Ms. Sitek's vendee interest or his cancellation action on his bankruptcy petition was a material breach of his duties as a contract vendor and substantially prejudiced both Ms. Sitek and the trustee with respect to their respective interests in the Edina property. As noted, the bankruptcy filing itself effectively destroyed Ms. Sitek's action to enjoin the cancellation of contract for deed because the bankruptcy filing stayed her District Court action to do so under 11 U.S.C. 362, and there was thus no reasonable possibility that Ms. Sitek's action to enjoin the cancellation action could have been brought before the 60 day redemption period expired.

Moreover, 11 U.S.C. § 108 appears to extend the redemption rights of landowners undergoing foreclosure or cancellation by sixty days, and probably would have extended Ms. Sitek's redemption rights if the trustee had known of the cancellation action. But she did not, and therefore neither Ms. Sitek nor the trustee could have taken advantage of that statute. As the Eighth Circuit put it in *Johnson v. First Nat. Bank of Montevideo*, 719 F.2d 270 (C.A.8, Minn. 1983):

Given our conclusion that the bankruptcy court lacked authority under either § 105(a) or § 362(a), to stay indefinitely the expiration of the statutory period of redemption, it becomes apparent that the only extension of time available to the debtors was that provided by the express terms of § 108(b). Since their petition in bankruptcy was filed on October 8, 1981, some three weeks prior to the expiration of the one-year statutory period of redemption, the debtors had sixty days from the former date, or until December 8, 1981, within which to redeem the mortgaged property. That sixty-day period having passed without the debtors redeeming the property, full title vested automatically in First National in accordance with Minnesota law.

(*Id.* at 278)

The crucial effect of informing the bankruptcy trustee and the bankruptcy court of all a debtor's interests and actions was pointed out by the Minnesota Court of Appeals in *EGGE v. Depositors Ins. Co.* 2007 WL 2703137 (Minn. App. 2007), where the Court of Appeals recognized an important bi-product of the *H-Window* decision, namely where the debtor did list the asset on her bankruptcy petition, the filing would have extended the statute of limitations:

Generally, section 362 has been interpreted as staying actions brought against the debtor, rather than actions commenced by the debtor. See *Victor Foods, Inc. v. Crossroads Econ. Dev.*, 977 F.2d 1224, 1227 (8th Cir.1992). But appellant Chanda Egge, as debtor, was not permitted to initiate an action; once property or an interest in property is made a part of the bankruptcy estate, the trustee alone has the power to initiate actions or claims on behalf of the bankruptcy estate. 11 U.S.C.A. § 541 (West 2004). In addition, once a bankruptcy petition is filed, all interested parties, including the debtor, trustee, and creditors, are given at least 20 days' notice of the meeting of creditors. Fed. R. Bankr.P.2002(a). The meeting of the creditors must occur "[w]ithin a reasonable time after

the order for relief," a time deliberately indefinite. 11 U.S.C.A. § 341(a) (West 2004); see also *In re Brown Transp. Truckload, Inc.*, 161 B.R. 735, 738 (Bankr.N.D.Ga.1993). Until the debtor appears at the meeting of creditors and submits to an examination, only limited action can occur, because the examination of the debtor serves to develop the facts and circumstances that bear on the question of discharge. See 11 U.S.C.A. § 343 (West 2004); *Sigman v. United States*, 320 F.2d 176, 178 (9th Cir.1963).

During this period of time, between filing of the bankruptcy petition and meeting of the creditors, the debtor may not pursue a claim and the trustee's actions are constrained by the notice requirements. In effect, this may operate as a statutory prohibition within the meaning of Minn.Stat. § 541.15(a)(4), tolling the limitations period.

Given the short period of time between the end of the contractual limitations period on May 17, 2006, and the personal service accomplished on June 22, 2006, a period of 29 days, and the lack of information in the record about the length of time between filing of the bankruptcy petition and the meeting of creditors, and what consideration, if any, the trustee gave to this claim, we conclude that the Crow Wing County District Court erred by dismissing appellants' complaint under Minn. R. Civ. P. 12.02 as beyond the contractual limitations period. We therefore remand this matter to the district court for further proceedings.

(*Id.* at 3; A-39)

If Mr. Striker had notified the bankruptcy trustee that he had commenced a cancellation action against Ms. Sitek, then Ms. Sitek would have had an additional 60 days from the date of the bankruptcy filing to cure the default. The trustee would also have had up to sixty days to determine whether or not to assume Mr. Striker's vendor's interest in the Sitek contract for deed and either cancel Ms. Sitek's interest or make a deal with her

which would restructure the contract for deed. See 11 U.S.C. § 365, which provides, in part:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 365 provides, in relevant part:

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee--

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default....

It is worth noting that trustees are lawyers and are usually learned in real estate law. If the trustee had known about all of Mr. Striker's transactions - for example, if Mr. Striker's bankruptcy petition had informed the trustee that Striker had a vendee's interest in the Sitek property, that MERS had foreclosed on Striker's (*prima facie*) legal interest in that property, that Striker still had time to redeem that legal interest in that property, and that so did Ms. Sitek - that trustee would have had several rational options available to her:

1. She could have paid off MERS and continued the cancellation action. If Ms. Sitek had not paid her off after the sixty day period of redemption extension under 11 U.S.C. § 108, the trustee would have owned the property in fee. Then she could have tried to sell it

on behalf of the estate.

2. She could have paid off MERS and attempted to negotiate with Ms. Sitek for an amended contract for deed (or a mortgage, or a lease, or any other arrangement where Ms. Sitek may have paid the estate some money), or MERS could have sought relief from the automatic stay to bring a new cancellation action against Ms. Sitek or negotiate with her.<sup>1</sup>

3. She could have provided adequate protection for MERS, Striker, and Sitek, and then made an agreement with Sitek to either extend, sell, or re-cancel Ms. Sitek's contract for deed.

4. She could have abandoned the cancellation action against Ms. Sitek, undoubtedly in return for some consideration from Ms. Sitek.<sup>2</sup>

5. She could have sold or abandoned Striker's vendee interest to MERS and thus permitted MERS to proceed with a cancellation action against Ms. Sitek, which would have meant either giving Ms. Sitek sixty days to cure the default, or shortening the sixty day extension of 11 U.S.C. § 108 upon Ms. Sitek's agreement.

6. She could have negotiated with Mr. Striker, Ms. Sitek,

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<sup>1</sup>A good discussion of this possibility appears in *Haukos Farms*, 68 B.R. 428 (B.R. Minn. 1986), where the Court discusses favorably the use of a relief motion where there is a defaulted contract for deed outstanding at the time of a bankruptcy filing.

<sup>2</sup>This conclusion involves consideration of *W.T. Bailey Lumber Co. v. Hendrickson*, 185 Minn. 251, 240 N.W. 666 (Minn. 1932) which indicates that the vendor "owns" the right to cancel (or not cancel) the vendee's interest right up to the date his right of redemption expires, and 11 U.S.C. § 541, which indicates that the trustee "owns" what had formerly been Mr. Striker's vendor's interest as of the date of Mr. Striker's bankruptcy filing. If the trustee had known about Mr. Striker's cancellation action, she could have dismissed the cancellation action, and upon receipt of proper consideration from Ms. Sitek would probably have done so.

and MERS for a resolution of the entire matter.<sup>3</sup>

But because Striker did not list Ms. Sitek's vendee interest on his bankruptcy petition, nor the fact that he had commenced a cancellation action which was still active, the trustee could do none of these things. Hence, Striker's failure to list these matters on his bankruptcy petition constituted a material breach of his obligations as contract vendor, and hence his cancellation action against Ms. Sitek failed even if the bankruptcy filing did not of itself automatically void the cancellation action. Because Mr. Striker's cancellation failed as of the time he filed his improper bankruptcy petition, the cancellation action never accrued to the benefit of the trustee in bankruptcy, and was never completed. Since there were no subsequent actions by either the trustee or MERS to cancel Ms. Sitek's contract for deed<sup>4</sup>, her contract for deed has never been cancelled.

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<sup>3</sup>MERS argues that Ms. Sitek has paid nothing on her contract for deed for the last several years and is not deserving of any sympathy. But three points need to be made before this argument is accepted: (a) She would have been unwise paying anyone any money here in the absence an agreement, because her status as owner was in doubt and she could have been "throwing the money down a rathole" if she made payments to anyone; (b) While she might not have been able to make the payments on her contract for deed in accordance with its terms, she had equity in the house which she might have been able to take out either in cash or in exchange for an extension on her contract; and (c) She could have made an agreement with the trustee for a new contract for deed or long-term lease with better terms than in her Striker contract.

<sup>4</sup>If it was a contract for deed at all. Obviously, in Part III of this memorandum, she argues that it was not a contract for deed at all, but an equitable mortgage, and if it was an

It should be noted that under *Miller, supra*, it is not necessary that the misconduct which negatively impacts the vendee's rights absolutely prevent performance. It is sufficient if it substantially prejudices them. When Ms. Sitek found out about Mr. Striker's bankruptcy on or about November 10<sup>th</sup>, she might have brought an action in the bankruptcy court to lift the automatic stay, brought an action in the District Court, Hennepin County, to obtain a temporary restraining order against the cancellation action, and had it heard, all before November 15<sup>th</sup>. As the Court of Appeals can imagine, it would have taken a miracle to accomplish all of this in five days. As the quoted passage from *Egge, supra*, indicates, even the potential for prejudice resulting from a bankruptcy filing warrants reversal. Moreover, *Miller, supra*, makes it clear that even minor problems with the vendor's action may void the cancellation:

While the merits of the title objections had but slight relevancy, nevertheless the furnishing of the abstract of title, certified to date by the Title Insurance Company, to plaintiff on August 13, 1956, and plaintiff's failure to furnish defendants with a written examination stating title objections pursuant to the terms of the contract does have relevancy as does the fact that plaintiff had the abstract examined by his attorney and advised defendants that the title was 'okay.'

(*Id.* at 16)

Here, Mr. Striker's actions cannot be characterized as minor

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equitable mortgage, it could not be cancelled by a cancellation action at all, but only by foreclosure.

misconduct. He defied federal law by not informing the trustee of Ms. Sitek's interest. He defaulted on his obligations as a debtor by not informing the trustee of the lawsuit to enjoin the cancellation. His attorney violated the automatic stay by filing the certificate of completion of cancellation. All these actions, and in fact any one of them, prejudiced Ms. Sitek's rights to enjoin the cancellation or to make an arrangement with the trustee to protect her vendees interest. The cancellation action failed, and hence, so must MERS' demands to defeat Ms. Sitek's interests.

## II.

THE TRUSTEE'S FAILURE TO TAKE ANY ACTION TO ASSERT HER RIGHTS UNDER THE CONTRACT FOR DEED WORKED AN ABANDONMENT OF ANY CANCELLATION RIGHTS SHE MAY HAVE HAD WITH RESPECT TO IT.

Even if the trustee succeeded to the rights of Mr. Striker to cancel the contract for deed, she could not do so unless she either cured the default in the contract for deed or made arrangements with Ms. Sitek to proceed with the cancellation action. 11 U.S.C. § 365. Because the trustee did neither, she could neither bring a cancellation action herself nor avail herself of the benefits of mr. striker's cancellation action.

Ordinarily, the trustee succeeds to any rights the debtor may have in non-exempt property as of the time that debtor files a bankruptcy petition. 11 U.S.C. § 541 states, in part:

(a) The commencement of a case under section 301, 302,

or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c) (2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

Thus, if the trustee had succeeded to Striker's interest in the contract for deed cancellation action at all<sup>5</sup>, the trustee succeeded to Mr. Striker's vendor's cancellation action and interest in the Sitek property as of the date Mr. Striker filed for bankruptcy protection. But 11 U.S.C. 365 adds provisions with respect to the trustee's obligations in property subject to defaulted executory contracts which protect third party debtors (here, Ms. Sitek). In particular, § 365 forbids a trustee from avoiding a recorded (or, as here, Torrens) contract for deed. As the Texas Bankruptcy Court put it in *Turoff v. Sheets*<sup>6</sup>, 277 B.R. 293 (B.R. Tex. 2002):

There are two distinct line of cases regarding the interaction (or lack thereof) of § 544 and § 365. One line of cases holds that both sections are not mutually exclusive, but instead work hand in hand to determine the rights of the debtor/trustee and the purchaser under executory contracts for the sale of real property. The other line of cases holds that § 365's specific provisions override the general rights under § 544 and delineate the sole and exclusive rights and

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<sup>5</sup>And of court in Part I of this memorandum, Ms. Sitek argues that she did not, because the cancellation action failed as of the date Striker filed the petition without noting the cancellation action.

<sup>6</sup>*Turoff* contains a really good analysis of the workings and effect of 11 U.S.C. 365.

remedies of the parties.

*In re Webber Lumber & Supply Co.*), 134 B.R. 76, 79-80 (Bankr.D.Mass.), the court states that

[t]here is no conflict among the statutes. Section 365(h) and (i) prohibit the rejection of the property interest of a lessee or purchaser in possession. These subsections are based on upon the proposition that rejection, which merely involves a debtor declining to assume a contractual obligation, should not be used to terminate property interests. Section 544(a), on the other hand, has as its express purpose the avoidance of property interests. The statutes supplement each other rather than conflict. All that was necessary to escape § 544(a) was a recording of the lease or a notice of the lease. The Debtor's agreement not to do so was fatal.

(*Id.* At 305)

*Turoff* is a complex case, and it is not clear whether Minnesota would adopt the *Turoff* rule or the more liberal position of the Third Circuit set out in *McCannon v. Marston*, 679 F.2d 13 (3<sup>rd</sup> Cir. 1982). But it does not matter whether Minnesota adopts the *Turoff* line of cases or the *McCannon* line of cases, because 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..." and Ms. Sitek's contract was recorded. The trustee took no such action (probably because she did not even know of the vendee interest, or at least not know about it in time to do much about it).

But whether she was prevented from doing so or simply decided not to does not matter. She did not comply with 11

U.S.C. 365, and so she could not have cancelled Ms. Sitek's contract for deed nor continued the cancellation action begun by Mr. Striker. Hence, even if she did succeed to Mr. Striker's cancellation action, by failing to comply with 11 U.S.C. 365, she failed to complete it and the cancellation action (if it were still alive after bankruptcy was filed) failed then.

### III.

MS. SITEK'S CONTRACT WITH RIVER RUN, AND HENCE WITH MR. STRIKER, WAS LEGALLY AN EQUITABLE MORTGAGE, AND HENCE COULD NOT HAVE BEEN CANCELLED BY CONTRACT-FOR-DEED CANCELLATION.

The underlying nature of the transaction between River Run and Ms. Sitek (and hence between Mr. Striker and Ms. Sitek) was that River Run would advance money to pay off Ms. Sitek's arrangement with Lancaster, and Ms. Sitek would pay off River Run for advancing that money within a year upon pain of losing her house to River Run. This sort of transaction has long been held to constitute an equitable mortgage under Minnesota law absent language explicitly indicating that such a transaction is not to be construed to be an equitable mortgage.

The transaction between Ms. Sitek and River Run (and assigned to Mr. Striker) is one which is becoming rather common in Minnesota land law, and is so far has a legal status which is neither fish nor fowl. Typically, a homeowner owes a bank or a contract for deed vendor a large amount of money and the mortgage or contract for deed goes into default. The homeowner's income

is insufficient to service the debt, and the homeowner lacks sufficient credit to refinance his obligation in a traditional way (as, for example, by taking out another mortgage). However, the homeowner does have a good deal of equity in his property.

Enter a person or entity who, depending upon taste, could be called either a white knight or an equity-stripper. Let us use the neutral term "speculator." The speculator finds a distressed loan, usually by looking at cancellation and foreclosure notices in the newspapers, and offers to buy off the homeowner's mortgagee or vendor for the redemption price plus a large chunk of the homeowner's equity. Because the homeowner is about to lose his property, he is likely to enter into such an agreement. Because the speculator wants to obtain a large amount of money (and because he has taken a rather large risk, at least during a "down market") he does not lend money directly to the homeowner, but instead takes a deed to the property and gives back a contract for deed to the homeowner. The contract calls for a large lump sum payment to be made in a relatively short period of time. This gives the homeowner some "breathing room" and the speculator some assurance that he will shortly either realize a large profit or obtain some land worth considerably more than his initial investment. Depending upon one's politics (i.e. whether one is a "progressive" or a "libertarian"), the speculator's role is either disgusting or socially useful.

However one wishes to judge such transactions morally, there is undoubtedly a need for some sort of arrangement which is neither true note-and-mortgage transaction nor a true contract-for-deed arrangement and which permits a homeowner to realize some of the value of his equity without the harsh consequences of foreclosure or cancellation. The trouble is that Minnesota law does not recognize such a "third type" of transaction, and hence neither the legislature nor the courts have developed a means of allowing them while regulating their more exploitative tendencies. Until the legislature does so, the courts and contracting parties are left with the law of equitable mortgage to deal with them.

In general, when faced with transactions written up the way Ms. Sitek's is, courts have treated them as equitable mortgages. This is such a transaction. Consider in this regard *Fearing v. Aymar*, WL 130448 (Minn. App. 2006). There, the vendor company brought action to quiet title as against purchaser of real property and its president after vendor's president executed a quitclaim deed from purchaser for the same property, which deed was to be executed in the event of a breach of purchase and deed agreement by purchaser, and vendor's president received a final damage award for breach of contract for deed in a prior action. The Court of Appeals held that the transaction was in effect an equitable mortgage, even though in law it was a contract for deed

transaction, saying:

Where a deed absolute on its face is in fact given as security, it constitutes an equitable mortgage. *Ministers Life & Cas. Union v. Franklin Park Towers Corp.*, 307 Minn. 134, 138, 239 N.W.2d 207, 210 (1976). For example, an equitable mortgage exists when the borrower deeds property to the lender in exchange for a loan. *Ministers Life & Cas. Union v. Franklin Park Towers Corp.*, 307 Minn. 134, 138, 239 N.W.2d 207, 210 (1976). But "a transaction will not be construed as an equitable mortgage unless both parties intended to enter into a mortgage agreement." *Id.* Courts must consider the "written memorials of the transaction and the attendant facts and circumstances" and ascertain intent at the time of the conveyance. *Ministers Life*, 307 Minn. at 138, 239 N.W.2d at 210.

Here, the plain language of the real-estate documents establishes that the parties intended the quitclaim deed to serve as security in the transaction. The May 4, 2001 agreement between Progressive, as seller, and Transaction, as buyer, states that "Seller desires security in the event Buyer does not build a townhouse pursuant to said Contract for Deed." See *id.* (stating that courts place great weight on the written memorials of the transaction and implying that terms such as "security" are evidence of intent to create an equitable mortgage). That agreement further states that Transaction would give Progressive a quitclaim deed for Lot 13, but that Progressive would not file that deed unless Transaction defaulted in its obligation under various provisions of the contract for deed, including the construction provisions. The construction provisions provide that Transaction would build Progressive a house on Lot 13 and that Transaction would sell the house to appellant. Thus, the language of the documents shows that the parties did not intend that Transaction would sell the house to appellant via the quitclaim deed. Instead, Transaction would sell the house to appellant after completing construction. And the quitclaim deed only served as security in the event that Transaction did not build appellant's home according to the terms and conditions in the contract for deed.

(*Id.* at 3; A-49)

Here, the nature of the transaction makes it clear that the quit claim deed given by Ms. Sitek was to serve as security for the transaction. First, Ms. Sitek continued to live in her house as if nothing had happened. Mr. Striker did nothing with the property, such as rent it out, collect rents and profits, live in the building, or even go upon the land except to deliver a cancellation notice. Second, River Run and Mr. Striker never had any interest in the property other than this transaction. That is, unlike the usual contract for deed situation, they did not own the property prior to a sale to a purchaser and then agree to self-finance a sale. Rather, they purchased the property specifically for the purpose of entering into an agreement with Ms. Sitek to let her stay on the property in exchange for a large portion of the equity she had in the house. By contrast, the typical contract for deed situation involves a vendor who has owned the land for some period of time, decides to sell it, and self-finances the sale.

Third, the nature of the transaction was, in all essentials, like a mortgage with a high rate of interest. The object of a banker or other mortgagee is to make its money by paying out money to a borrower, and receiving money back from that borrower with interest. The contract for deed vendor's object, by contrast, is to sell his land, hopefully at a profit, and collect interest as an incidental benefit of the sale. River Run's

object, as reflected in the documents in the Court's possession, is much closer to the former. If the transaction had succeeded according to its terms (and it must be presumed that what both parties intended the transaction to succeed rather than to fail), Ms. Sitek would live in her house continuously, would live in her house after the transaction was completed with full title in her name, and River Run and Mr. Striker would receive their payout back plus what was in effect a large amount of interest for their risk.

This is a loan transaction within the meaning of the equitable mortgage doctrine. To be sure, Mr. Striker testified that he did not make a loan to Ms. Sitek. But it is the reality of the transaction that governs, not Mr. Striker's denomination of it. As the Court said in *Fearing, supra*:

Appellant further argues that the quitclaim deed is not an equitable mortgage because equitable mortgages must involve security on a loan transaction. But "[a] mortgage is a security for something to be paid or performed." *Buse v. Page*, 32 Minn. 111, 114, 19 N.W. 736, 737 (1884) (emphasis added). See *Dennis v. Swanson*, 176 Minn. 267, 271, 223 N.W. 288, 290 (1929) (citing *Buse* while discussing equitable mortgages). Thus, a mortgage may not necessarily involve a monetary loan.

(*Id.* at 4; A-50)

While Courts regularly construe transactions such as the instant one as equitable mortgages, there is one major exception, namely, the transaction where the parties explicitly agree that the warranty-deed-with-contract-for-deed back is not an equitable

mortgage. Such a case was presented in *Wilkinson v. Ordway Group, LLC*, 2007 WL 3037319 (D. Minn. 2007). In that case, the transaction provided, in writing that "[t]he reconveyance arrangement was "not an equitable mortgage." The Court held that this language was sufficient to determine that what otherwise would probably have been an equitable mortgage transaction was taken out of the category of equitable mortgages, saying:

The provisions in the extension are classic examples of clearly written contractual language that is enforceable because it is supported by consideration and evinces a bargained-for exchange. See *Somora v. Marriott Corp.*, 812 F.Supp. 917, 921 (D.Minn.1993) (Doty, J.) (stating that under Minnesota law court must presume that parties to release "intend what is expressed in a signed writing," and that writing's clarity is among relevant criteria); *Deli v. Hasselmo*, 542 N.W.2d 649, 656 (Minn.Ct.App.1996) (defining consideration). The contract-for-deed extension is a valid contract, and the Wilkinsons provide no authority indicating that § 325N.15 applies to invalidate such an extension. The contract permitted the Wilkinsons to stay in their home while they attempted to find the means to make the balloon payment, and as part of the quid pro quo the Smiths received assurances that the Wilkinsons would not sue them or claim an equitable mortgage. The Wilkinsons enjoyed the benefit of the bargain, and now the Smiths are entitled to theirs.<sup>7</sup>

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<sup>7</sup>Note another feature of *Wilkinson* which applies more forcefully to Part I of this memorandum. The homeowners argued that they were entitled to relief from eviction because of their right to bring an action to stay enforcement of the contract for deed cancellation. The Court rejected this because they had not brought such an action: "The Smiths, meanwhile, argue that the Wilkinsons are not entitled to a stay because they failed to seek relief under Minnesota statutes governing contracts for deed-specifically, Minn.Stat. § 559.211, which authorizes a court to enjoin contract termination proceedings 'any time prior to the effective date of termination of the contract.' By contrast, Ms. Sitek brought a § 559.211 action, and was prevented from

(*Id.* at 2; A-43)

The River Run/Striker documents had neither the covenant-not-to-sue language nor the anti-equitable mortgage language. Thus, they did not avail themselves of the means courts have adopted to prevent the sort of result Ms. Sitek seeks here.

It is hard to see how Mr. Striker is entitled to much sympathy. He structured a transaction that would have netted him a profit of about \$100,000. He chose to file bankruptcy before he was in a position to realize it. Then he took an action - filing without mentioning the Sitek loan - which would have netted him a large amount of money had Ms. Sitek been foolish enough to pay him off on her default. Mr. Striker paid his money and took his chances. He failed. His transaction should be construed for the equitable mortgage that the Minnesota cases say it was.

#### CONCLUSION

Because Mr. Striker filed bankruptcy without informing the trustee or Ms. Sitek of the filing, and did so before the redemption period on the cancellation action had expired, his action was wrongful and materially prejudiced Ms. Sitek's rights. Hence, the cancellation was void. Because MERS took no action to cancel the contract for deed itself (why, heaven only knows), it

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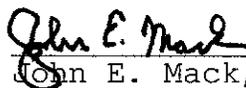
following through with I only because Mr. Striker filed bankruptcy and failed to include his cancellation action in his petition.

has no greater right to rely on the cancellation than Mr. Striker did, and Ms. Sitek's vendee interest remains in place.

Indeed, although Ms. Sitek retains at least her vendee interest, she has more than that - she has a fee interest in the property subject to an equitable mortgage. Appellant believes that the Court of Appeals has sufficient information before it to declare the River Run transaction to be an equitable mortgage. If it does not, however, the matter should be remanded to the District Court to find further facts to determine whether such an equitable mortgage was created. If the Court of Appeals disagrees with this analysis, however, it has more than sufficient information before it to determine that Ms. Sitek's contract for deed remains in place, and if MERS wishes to have it cancelled, it will have to do so itself.

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