STATE OF MICHIGAN

COURT OF APPEALS

GEORGE SHAMIE and TATIANA SHAMIE,

Plaintiffs-Appellees,

v

WENDELL FLYNN and MARGARET FLYNN,

Defendants-Appellants.

UNPUBLISHED
July 17, 2001

No. 217074
Wayne Circuit Court
LC No. 98-832204-CH

Before: White, P.J., Wilder and Zahra, JJ.

PER CURIAM.

Defendants appeal as of right the circuit court's order granting plaintiffs' motion for summary disposition under MCR 2.116(C)(9) in this action to quiet title brought after defendant Wendell Flynn defaulted under a land contract. The circuit court concluded that plaintiffs were not required to pursue either summary proceedings to recover possession or a foreclosure action, and could effect a forfeiture by sending the required notice. We affirm.

On October 5, 1998, plaintiffs filed a verified complaint to quiet title in a parcel of vacant land they had sold by land contract to defendant Wendell Flynn[1] on July 19, 1988. The purchase price was $90,000 with $10,000 down, and the land contract provided that defendant would pay $733.33 monthly for interest-only payments at 11% per annum, the balance by balloon payment at the end of five years, and taxes. Plaintiffs' complaint alleged that although defendant made interest payments until the spring of 1996, defendant failed to make the balloon payment due on July 19, 1993. The complaint alleged that taxes were unpaid for calendar year 1991; that at a tax sale on the property on May 3, 1994, a tax deed was issued to Equivest; and that defendant redeemed the property from the tax sale and acquired a quit claim deed from Equivest on May 10, 1996. It further alleged that on September 27, 1996, plaintiffs sent defendant a forfeiture notice by certified mail; that defendant failed to cure the default within the fifteen day period provided by the forfeiture notice, the land contract and statute; and that defendant had thus forfeited all rights and interest in the property and all monies previously paid to plaintiffs. Plaintiffs further alleged that defendant had not paid real property taxes for 1992 and that at

[1] Defendants argued below that Margaret Flynn had a dower interest in the property. The circuit court ruled to the contrary, and this issue is not raised on appeal.

another tax sale, on May 2, 1995, FUNB, custodian for CASI, Inc., purchased the property and received a tax deed. Plaintiffs alleged that they redeemed the property from the tax foreclosure purchaser and received a quit claim deed dated November 5, 1996, which was recorded. Plaintiffs' complaint alleged that they paid the 1993, 1994, 1995, 1996 taxes, and subsequent years as well. Plaintiffs alleged that defendant had paid no interest, principal or taxes since the forfeiture notice. They alleged that defendant had no legitimate claim of interest in the property, but may claim an interest by virtue of the land contract and the quit claim deed from Equivest. Plaintiffs alleged that they had a superior claim to the title of the property because of their pre-existing, fee-simple title interest, the forfeiture of defendant's interest and defendant's failure to take any action to cure the default as stated in the forfeiture notice despite the lapse of more than two years. Finally, plaintiffs alleged that the cloud of suspicion thrown on their title to the property because of defendant's terminated interest had resulted in their being unable to close the sale of said property.

Plaintiffs attached to the complaint copies of the land contract; the forfeiture notice sent to defendant Wendell Flynn dated September 27, 1996, stating that $82,933.32 was past due in principal and interest, and $7,967.88 was past due in taxes, and that the total amount due must be paid within fifteen days of the date of service; correspondence from plaintiffs' counsel to Wendell Flynn dated September 27, 1996 noting that the balloon payment was due on July 19, 1993 and was not paid, and that "since this is vacant land, summary proceedings will not be necessary to obtain possession;" a tax deed dated June 29, 1995 evidencing a tax sale for tax year 1991 to Equivest; a quit claim deed to Wendell Flynn from Equivest dated May 10, 1996; a tax deed dated September 19, 1996 evidencing a tax sale for tax year 1992 to FUNB; a quit claim deed to plaintiffs from FUNB dated November 5, 1996; correspondence from plaintiffs' counsel to the Wayne County Treasurer dated February 21, 1997, stating that plaintiffs were paying by enclosed certified check the delinquent taxes for tax years 1993, 1994, and 1995; a copy of that certified check in the amount of $5,369.87; and copies of the postal service certified mail form and receipt of that date.

Defendants' answer to plaintiffs' complaint set forth no defenses or affirmative defenses, and pleaded "no contest" to the material allegations.

Plaintiffs filed a motion for summary disposition under MCR 2.116(C))(9), arguing that defendants had not stated a valid defense or any affirmative defenses; that defendants had admitted that the property at issue was vacant land, that plaintiffs had sent a forfeiture notice dated September 27, 1996, and that defendants had not paid any interest, principal or taxes on the property since receiving the forfeiture notice more than two years before; and that defendants had failed to submit any document evidencing title interest in the property, as required by MCR 3.411. Plaintiffs' motion noted that defendant admitted breaching the land contract and argued that when a land contract is forfeited and the subject property is vacant, the "land contract seller need not invoke a judicial or statutorily created remedy to foreclose the rights of a purchaser," relying on cases including *Rothenberg v Follman,* 19 Mich App 383; 172 NW2d 845 (1969). Plaintiffs noted that the following provisions of the land contract were pertinent to their motion:

3. Seller and Purchaser Mutually Agree:

(f) That Purchaser shall have the right to possession of the land from and after the date hereof, unless otherwise herein provided, and be entitled to retain possession thereof so long as there is no default on his part in carrying out the terms and conditions hereof. *If the land is vacant or unimproved, Purchaser shall be deemed to be in constructive possession only, which possessory right shall cease and terminate after service of a Notice of Forfeiture of this Contract*. Erection of signs by Purchaser on vacant or unimproved property shall not constitute actual possession by him.

(g) That should Purchaser fail to perform this contract or any part thereof, Seller immediately after such default shall have the right to declare this contract forfeited and void, and retain whatever may have been paid hereon . . . . *A proper notice of forfeiture, giving Purchaser at least fifteen (15) days to pay any moneys required to be paid hereunder or to cure other material breaches of this contract, shall be served on Purchaser, as provided by statute, prior to institution of any proceedings to recover possession of the land.*

(i) That time shall be deemed to be of the essence of this contract. [Emphasis added.]

Defendants' answer and memorandum in opposition to plaintiffs' motion argued that plaintiffs had to proceed either with a forfeiture action in district court or a foreclosure action in circuit court in order that defendants have an opportunity to redeem. Defendants stated that although there is a common law theory of self-help forfeiture, it requires that the property have been abandoned and that plaintiffs have taken possession of it, and that those two issues were ones of fact. Defendants attached an affidavit of defendant Wendell Flynn stating that he had kept his interest in the subject property insured for public liability, kept the grass cut, and otherwise maintained the property as required by law and local ordinance. Defendants argued that even if plaintiffs had taken possession, a court of equity has the power to relieve a defaulting party from a forfeiture and to compel a sale by the land contract vendor. Defendants also stated that they "hereby tender to Plaintiffs payment in full of all principal and interest, plus any other expenses allowed under the land contract and by law in consideration of execution and delivery by Plaintiffs of a deed to Defendants pursuant to the land contract." Defendants requested that plaintiffs' motion be denied, or that the court grant plaintiffs' motion provided that they have a period of time to pay off the land contract balance.

The circuit court granted plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(9), concluding that plaintiffs were entitled to the property based on the declaration of forfeiture, and need not have filed a summary proceedings or foreclosure action:

THE COURT: [ ] Mr. Shamie and Mrs. Shamie have the right to the property and they can do it by Declaration of Forfeiture. This is vacant land. Rothenburg [sic] v Follman, 19 Mich App 383 specifically holds that if a land contract purchaser is not in physical possession of the land or possession can be recovered peacefully, the purchaser's right can be declared forfeited by the vendor without proceedings in court.

> It is also cited as authority in Michigan Real Property Law, Volume I, from the Institute of Continuing Legal Education, Chapter 16, Section 178, on Forfeiture.
>
> This is vacant land. It is easily obtainable by peaceful possession. There is also the – since the vendor can make a simple Declaration of Forfeiture and obtain the land without court proceedings, if there is a challenge to that, the proper method is to bring an action to Quiet Title in Circuit Court. Therefore, the motion is granted. Order shall be entered that . . . any claim or interest by Wendall [sic] Flynn and Margaret Flynn have been declared nonexistant [sic] or do not exist as a result of this court action.

I

We review a circuit court's determination of a motion for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). Actions to quiet title are equitable in nature and are reviewed by this Court de novo. *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998). A motion under MCR 2.116(C)(9) tests the legal sufficiency of a pleaded defense. *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730; 476 NW2d 506 (1991). The motion is tested on the pleadings alone, accepting as true all well-pleaded allegations. *Id.* The proper test is whether the defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly prevent a plaintiff from recovering. *Id.*

Defendants argue that the circuit court's allowance of self help under *Rothenberg, supra*, was erroneous because the right to redeem is statutory and may not be abridged by the courts, relying on *Gordon Grossman Building Co v Elliott*, 382 Mich 596; 171 NW2d 441 (1969). Defendants also argue that no agreement or contract between the parties can diminish a vendee's statutory right of redemption, relying on *Birznieks v Cooper*, 405 Mich 319; 273 NW2d 893 (1979). Further, they argue that *Rothenberg, supra*, is no longer applicable in light of *Gruskin v Fisher*, 405 Mich 51; 273 NW2d 893 (1979), and *Durda v Chembar Development Corp*, 95 Mich App 706; 291 NW2d 179 (1980).

We begin with a discussion of *Rothenberg, supra*, and its progeny. This Court noted in *Rothenberg*:

> The estate of a land contract purchaser does not (in contrast with a mortgage) include as one of its incidents an equity of redemption. This means that a land contract seller need not invoke a judicial or statutorily created remedy to foreclose the rights of the purchaser as must a mortgagee if he wishes to foreclose the mortgagor's equity of redemption. Typically, the seller will find it necessary to institute summary proceedings or an action for ejectment or an equitable action to foreclose the purchaser's interest so that he can obtain peaceable possession. But where the purchaser is not in physical possession of the land or possession can be recovered peaceably, as is frequently true where the property is vacant, the purchaser's rights may be declared forfeited by the seller without proceedings in court if notice of forfeiture is duly given.

> Nevertheless, a court of equity has the power to relieve the defaulting purchaser from the forfeiture and to compel specific performance by the seller when in the court's judgment to do otherwise would result in an unreasonable forfeiture. [*Rothenberg,* 19 Mich App at 387-389.]

In *Emmons v Easter,* 62 Mich App 226; 233 NW2d 239 (1975),[2] this Court rejected the argument that the defendant land contract vendors, who had repossessed through self-help, were required to foreclose by judicial action:

> Plaintiff contends that the trial judge committed reversible error by finding that plaintiff had forfeited his interest in the realty by default on his land contract and that repossession was properly accomplished. The land contract plaintiff signed contained provisions stating that time was of the essence and that, in case of default, defendant could *sua sponte* declare the contract void and plaintiff's interests in the realty forfeited without providing any notice to plaintiff. The general rule with respect to the interpretation and construction of contracts is that, if unambiguous, they are not subject to interpretation and must be enforced as written. At the time of repossession and foreclosure, plaintiff had failed to make three payments; one of those payments was overdue even with a 60-day extension for payment. Plaintiff still owed the Easters $27,000. At the time of repossession, the Easters found the store's back door open and most of plaintiff's personal property was missing. Plaintiff, himself, was not present and could not be located. Considering the contract's terms, the missed payments, the amount still unpaid, and the plaintiff's absence, we believe the trial judge reasonably found that plaintiff had defaulted on and forfeited his interest in the realty and trade chattels under the terms of the contracts. Since the findings of fact made by a trial judge will not be overturned unless clearly erroneous, *Roberts v Duddles,* 47 Mich App 601; 209 NW2d 720 (1973), GCR 1963, 517.1, we must affirm on this point.
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> Nonetheless, by relying on the then applicable [summary proceedings] statute, MCLA 600.5634; MSA 27A.5634, *plaintiff contends that the Easters were*

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[2] The facts in *Emmons, supra,* were that the plaintiffs purchased a retail store and adjoining dwelling under a land contract from the defendants in May 1968. The plaintiff made payments under the contract until September 1969, then missed a special payment, and did not pay it within the sixty day extension the defendants allowed. The plaintiff missed payments under the land contract in October and December 1969, and made the last payment in January, 1970. In late January 1970, the defendants went to the premises and discovered that plaintiff had apparently been absent for a long time. 62 Mich App at 228-229. The defendants chose to repossess by relying on the self-help terms of the land contract, then tried to serve a notice of foreclosure on plaintiff through various means, but no response was forthcoming from the plaintiff. In late February 1970, the defendants wrote the plaintiff, through the plaintiff's realtor, that there were interested buyers (also defendants in this case), but the plaintiff did not respond. The defendants sold the property in March 1970. In July 1970, the plaintiff brought suit, contending that the defendants were required to foreclose by judicial action despite the land contract's provision to the contrary. *Id.* at 229-230.

required to foreclose by judicial action despite the clear provision to the contrary in the land contract. But, *that statute did not purport to abrogate the common-law right of self-help repossession if it could be accomplished without breaching the peace pursuant to a land contract. For land contracts, the rule is best stated in Rothenberg v Follman***,** 19 Mich App 383, 387-388; 172 NW2d 845, 847-848 (1969):

[quotes *Rothenberg, supra*]

Clearly, plaintiff was not in physical possession when the realty was repossessed and his rights were declared forfeited. There was no breach of the peace here. . . . the contract, in the present case, contained an express waiver of any notice requirement. . . . . the trial judge held that plaintiff had received actual notice of foreclosure. His holding was based on the facts that the Easters used all available means to contact plaintiff regarding their intentions to foreclose, that they were evidently successful since plaintiff produced an original notice of forfeiture at trial, and that plaintiff deliberately remained incommunicado while failing to make any further payments under the land contract. We must agree with the trial judge that notice was duly given even if the Easters were not contractually bound to give it. The repossession and foreclosure on the realty was properly executed.

Of course, as plaintiff insists, a court of equity may, nonetheless, relieve plaintiff of the forfeiture and compel specific performance from the Easters. *Rothenberg, supra, Hubbell v Ohler*, 213 Mich 664; 181 NW 981 (1921). We do not believe such equity power could be appropriately exercised here. . . . [*Emmons, supra* at 231-233. Emphasis added.]

This Court in *Day v Lacchia,* 175 Mich App 363, 368; 437 NW2d 400 (1989),[3] again rejected the argument that a land contract vendor must institute judicial proceedings in order to declare a forfeiture, noting that *Rothenberg* remained applicable even though it was decided before the Legislature enacted the summary proceedings act of 1972, MCL 600.5701 *et seq.;* MSA 27A.5701 *et seq.*:

Plaintiffs contend that to recover possession of property from a defaulting land contract vendee, the vendor must either commence foreclosure proceedings in circuit court or follow the statutory procedure for regaining possession through

[3] The facts in *Day, supra,* were that, after the plaintiffs failed to make land contract payments, the defendants served the plaintiffs with a notice of default and forfeiture. The plaintiffs failed to make payment within the fifteen-day cure period, and the defendants changed the locks and posted a sign indicating that the defendants had taken possession. *Id.* The plaintiffs had left the premises vacant and did not make needed repairs despite housing code violations. *Id.* After the fifteen days on the default had passed without payment from the plaintiffs, the defendants sold the house. The plaintiffs later attempted to enter the house, but they were peaceably turned away by the new owner. *Id.* at 368-369. The plaintiffs filed suit against the defendants claiming that the defendants unlawfully dispossessed them of real property. *Id.* at 366.

summary proceedings in district court. The plaintiffs maintain that they were dispossessed of the property without resort to either of these judicial proceedings and thus the dispossession was unlawful. However, we find plaintiffs' argument to be erroneous.

[quotes from *Rothenberg, supra*]

Although the statutory provisions then in effect for summary proceedings to recover possession of land were replaced by the present statutory provisions with the enactment of 1972 PA 120, the new act did not change the existing law with respect to a land contract purchaser's right to redeem following the institution of summary proceedings. Former MCL 600.5673; MSA 27A.5673 provided that a land contract purchaser was allowed a minimum of ninety days following a judgment entitling the plaintiff to possession within which to redeem the property in the same manner as provided by current MCL 600.5744; MSA 27A.5744. Furthermore, MCL 600.5750; MSA 27A.5750 specifically provides that the remedy provided by summary proceedings is "in addition to, and not exclusive of, other remedies, either legal, equitable or statutory." [*Day, supra* at 372-373. Emphasis added.]

Defendants argue that *Rothenberg, supra,* is no longer applicable in light of *Gruskin v Fisher,* 405 Mich 51; 273 NW2d 893 (1979), and *Durda v Chembar Development Corp,* 95 Mich App 706; 291 NW2d 179 (1980). The issue and holding in *Gruskin* were:

. . . whether a land contract seller who sends notices of intent to forfeit and of forfeiture has made an irrevocable election requiring him to accept possession of the property when tendered by the purchaser in lieu of money damages for breach of the contract.

We hold that while the seller may not accept or take possession and still seek money damages, he may, even after sending notice of forfeiture, refuse tender of possession and either commence an action for money damages or for foreclosure of the land contract. [*Gruskin, supra* at 27-28.]

Defendants rely heavily on the following two passages from *Gruskin*:

Sellers no longer are at liberty immediately after forfeiture of a land contract to seize possession of premises and put purchasers out on the street. Forfeiture can be effected only upon observance of procedures which provide land contract purchasers with protections similar to, in many cases equal to or better than, those provided mortgagors.

* * *

The purchaser is protected. The seller cannot evict merely because he sent notice of forfeiture. The seller must, rather, send the notice as a condition precedent to commencement of summary proceedings. If summary proceedings are

> commenced, the purchaser may still cure the default at any time during the proceedings, and, indeed, as late as three or six months (depending upon the amount theretofore paid) after the conclusion of the proceedings. [*Gruskin, supra* at 65-66.]

This language in Gruskin can indeed be read as declaring that summary proceedings must be employed to effect a forfeiture. However, *Day, supra,* was decided after *Gruskin,* and clearly rejects the argument that *Gruskin* requires use of summary proceedings to declare a forfeiture:

> *Plaintiffs place much reliance on Gruskin v Fisher, 405 Mich 51; 273 NW2d 893 (1979), and argue that Gruskin requires use of the summary proceedings act to declare a forfeiture. We do not read Gruskin that broadly. The issue before the Court was extremely narrow, that of election of remedy. The Court did not specifically address the continued viability of the self-help remedy and, thus, we hold that in certain circumstances self help is still available and land contract vendors need not necessarily resort to the summary proceedings act. The peaceable retaking of vacant property, such as in this case, is such a circumstance.* [*Day, supra* at 374. Emphasis added.]

Defendants' argument that *Durda* states that *Rothenberg* is inapplicable goes to far; the *Durda* Court stated that *Rothenberg* "did not aid in deciding the present case." *Durda* at 710. *Durda* did not address whether a land contract vendor is required to institute summary proceedings where vacant land is involved.

Defendants' reliance on *Gordon Grossman, supra,* to support that the right to redeem is statutory and may not be abridged by the courts is misplaced. *Gordon Grossman* involved interpretation of the redemption statute in foreclosure actions, MCL 600.3140; MSA 27A.3140. In discussing that the period of redemption under that statute was set at three months, the Court stated: "We accept as a general rule that the right to redeem *under present statutes* is a legal right and can neither be enlarged nor abridged by the courts." *Id.* at 603. *Gordon Grossman* does not address the availability to land contract vendors of self help and does not control here.[4]

We agree with plaintiffs that *Day, supra,* controls the instant case and that self help is an available remedy here because of the land contract's provisions. Pursuant to the land contract, defendant Wendell Flynn was not in physical possession of the vacant land when his rights were declared forfeited in September 1996. *Day, supra* at 374. We conclude that under *Day* and *Rothenberg, supra,* plaintiffs were not required to institute summary proceedings or foreclosure proceedings under the circumstances presented here, where it is undisputed that defendant Wendell Flynn defaulted on the land contract, failed to cure the default within fifteen days after service of the notice of forfeiture in September 1996, the property was vacant, and the land

[4] Defendants' reliance on *Birznieks, supra,* is also misplaced, as that case does not address the issue before us. *Birznieks* involved a land contract default, but was brought under the summary proceedings act and involved the issue whether personal checks mailed to the plaintiffs on the last day of the time provided in the statutory provision of the act, MCL 600.5744; MSA 27A.5744, constituted timely payment under the statute. *Birznieks, supra* at 327.

contract provided that: "If the land is vacant or unimproved, Purchaser shall be deemed to be in constructive possession only, which possessory right shall cease and terminate after service of a Notice of Forfeiture of this Contract." The circuit court's reliance on *Rothenberg, supra*, is supported by *Day, supra* at 374; see also Cameron, 1 Michigan Real Property Law (2d ed), Land Contracts, §§ 16.15-16.18, pp 600-609.

In light of our discussion, we do not separately address defendant's related and overlapping argument that plaintiffs could not pursue a suit to quiet title because, under MCL 600.2932(2); MSA 27A.2932(2), they were land contract vendors attempting to recover possession and cannot, by mere pleading, support that they already recovered possession. Plaintiffs' action to quiet title was not to recover possession of the premises. Nor do we address defendants' argument that issues of fact regarding possession and abandonment remained, as the property was vacant.

Affirmed.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra