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Installment Land Contract -- Mortgage Or Contract?

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INSTALLMENT LAND CONTRACT—MORTGAGE OR CONTRACT?

The plaintiff was the purchaser of a parcel of real estate from the defendant under an installment land contract.[1] The agreement provided that, upon the purchaser's default, the seller was entitled to terminate the contract, retake the land, and retain the money received. After making payments for a period of five or six years, the purchaser defaulted. The seller made demand for the delinquent payments, but the purchaser did not respond. Following a four-year period of mutual silence, the purchaser demanded a deed, tendering the entire unpaid balance of the purchase price plus interest due.[2] The seller refused to accept the sum tendered, claiming a breach of contract and forfeiture under its terms.[3] The purchaser then brought an action for specific performance on the theory that the contract had made him the equitable owner of the land and, as such, he was entitled to an opportunity to redeem.[4] The seller counterclaimed to remove the contract as a cloud on the title, relying on its contractual right to declare a forfeiture.[5] The trial court held for the purchaser, stating that the relationship of the parties was analogous to that of purchase money mortgagor and mortgagee, the instrument merely representing security for the purchaser's performance of the contract. On interlocutory appeal to the District Court of Appeal, Second District, *held,* affirmed: Under a specifically enforceable installment land contract, where the seller has received part of the purchase price and where he has given the purchaser possession of the land with the benefits and burdens of ownership, the seller and purchaser are in the same position as purchase money mortgagor and morgagee. The seller cannot unilaterally and

1. The terms "installment land contract," "land sales contract," "agreement for deed," and "contract for deed" will be used interchangeably herein.

After giving a ten percent down payment with the balance of the purchase price payable in monthly installments over approximately ten years, the purchaser recorded the contract. Recordation is significant because it bars the claims of any subsequent bona fide purchasers from the seller. Moyer v. Clark, 72 So.2d 905 (Fla. 1954); Rabinowitz v. Keefer, 100 Fla. 1723, 132 So. 297 (1931); Carolina Portland Cement Co. v. Roper, 68 Fla. 299, 67 So. 115 (1914); Feinberg v. Stearns, 56 Fla. 279, 47 So. 797 (1908); Stockton v. National Bank of Jacksonville, 45 Fla. 590, 34 So. 897 (1903).

2. Under the terms of the contract, the purchaser was entitled to a deed only upon payment of all installments plus interest.

3. The court noted that the record did not indicate whether or not the seller had given the purchaser notice of election to terminate with a reasonable opportunity to cure the default. H & L Land Co. v. Warner, 258 So.2d 293, 295 (Fla. 2d Dist. 1972).

4. The purchaser argued: (1) that the seller merely held the legal title to the land as security for the unpaid balance of the purchase price; (2) that the purchaser's equitable title under the contract could not be unilaterally and summarily extinguished by a declaration of forfeiture; (3) that such unilateral action would deprive the purchaser of an opportunity to redeem; and (4) that the seller had a proper remedy in foreclosure. *Id.*

5. In the court's view, the net effect of the seller's action would allow the seller to retain the down payment plus the monthly installments paid over a period of more than five years, while at the same time recovering all of the land sold. *Id.*

summarily extinguish a defaulting purchaser's equitable title. *H & L Land Co. v. Warner,* 258 So.2d 293 (Fla. 2d Dist. 1972).[6]

Traditionally, the Florida courts have recognized contractual rights under an agreement for deed. Thus they have permitted a forfeiture of the purchaser's payments where the contract has so provided.[7] In *Stoneman v. Peninsula Land Co.*,[8] the seller brought an action to quiet title and the purchaser counterclaimed for specific performance. The District Court of Appeal, Second District, recognized the seller's right to terminate the contract and to declare a forfeiture in accordance with the terms of the agreement. The court in *Warner,* however, held *Stoneman* distinguishable on the grounds that in the latter case the purchaser had failed to either tender or perform material requirements relating to property improvements, although he was the party seeking to specifically enforce. Such requirements, the court reasoned, represented an important part of the consideration for the contract, a factor not present in *Warner.*[9]

Mid-State Investment Corp. v. O'Steen,[10] represented a departure from the tradition of allowing a forfeiture of the purchaser's payments under contractual terms. In *Mid-State,* the purchasers assigned their deed to the defendant, an investment corporation, taking back an unrecorded contract for deed. A long line of cases have held that a deed absolute on its face is a mortgage when executed to secure the payment of money.[11] The court, therefore, could have construed the "assignment" in the first instance as a mortgage. Instead, the District Court of Appeal, First District, construed the contract for deed as a mortgage as defined by Florida Statutes section 697.01 (1971).[12] Thus, *Mid-State* was the first

6. The court made the specific assumption that the purchaser either took possession of the property or had the right to do so. *Id.* at 294.

7. Goldfarb v. Robertson, 82 So.2d 504 (Fla. 1955); Burke v. Wallace, 98 Fla. 604, 124 So. 30 (1929); Realty Securities Corp. v. Johnson, 93 Fla. 46, 111 So. 532 (1927). In one earlier case, the Supreme Court of Florida ordered the seller to do equity by returning all sums in excess of damages resulting from the breach. Taylor v. Rawlins, 90 Fla. 621, 106 So. 424 (1925).

8. 124 So.2d 760 (Fla. 2d Dist. 1960).

9. 258 So.2d at 296.

10. 133 So.2d 455 (Fla. 1st Dist.), *cert. denied,* 136 So.2d 349 (Fla. 1961).

11. Thomas v. Thomas, 96 So.2d 771 (Fla. 1957); Markell v. Hilpert, 140 Fla. 842, 192 So. 392 (1939); Stovall v. Stokes, 94 Fla. 717, 115 So. 828 (1927); Connor v. Connor, 59 Fla. 467, 52 So. 727 (1910); First Nat'l Bank v. Ashmead, 33 Fla. 416, 14 So. 886 (1894); Walls v. Endel, 20 Fla. 86 (1883); Wiggins v. Morrison, 242 So.2d 184 (Fla. 2d Dist. 1970); Blackwelder v. D'Ercole Enterprises, Inc., 148 So.2d 721 (Fla. 3d Dist. 1963); Jones v. White, 144 So.2d 1 (Fla. 2d Dist. 1962); McLendon v. Davis, 131 So.2d 765 (Fla. 3d Dist. 1961); Kinney v. Mosher, 100 So.2d 644 (Fla. 1st Dist. 1958); Erstling v. Trinity Wesleyan Methodist Church, 100 So.2d 74 (Fla. 3d Dist. 1958).

12. FLA. STAT. § 697.01 (1971) provides:

697.01 Instruments deemed mortgages

(1) All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third

Florida case to hold that the purchaser under an agreement for deed had an "equity of redemption."

> [T]he contract before us was clearly intended to secure the payment of money and must be deemed and held to be a mortgage, subject to the same rules of foreclosure and to the same regulations, restraints, and forms as are prescribed in relation to mortgages, to use the words of the statute. This being so, the defendant had only a naked legal title as security for the indebtedness, [and] had no legal right to repossess the real or personal property . . . .[13]

The court in *Warner* expressly agreed with the ruling of *Mid-State* and held it applicable to *Warner*. The seller nonetheless claimed that *Mid-State* was not controlling. The essence of the seller's argument hinged upon the distinction that in *Mid-State* the installment seller was merely one who had financed the purchase from a third party—thus involving an actual loan of money—while *Warner* involved a direct sale from the installment seller to the buyer, with no actual passing of money. The court, however, refused to give any import to such distinction.[14]

By way of dictum in *Huguley v. Hall*,[15] the Supreme Court of Florida has previously acknowledged that a defaulting purchaser under a contract for deed is entitled to an "equity of redemption." The *Huguley* court, however, upheld a judgment for rescission and termination of the agreement, finding that the purchasers had abandoned the "equity of redemption" by failing to affirmatively assert it.[16]

After noting both the difficulty in resolving the issue and the lack of uniformity in previous decisions, the court in *Warner* found several salient points on which it based its decision: (1) that the seller wanted to retake the land while retaining the down payment as well as the payments made over a five-year period; (2) that the pur-

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person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

(2) Provided, however, that no such conveyance shall be deemed or held to be a mortgage, as against a bona fide purchaser or mortgagee, for value without notice, holding under the grantee.

13. Mid-State Investment Corp. v. O'Steen, 133 So.2d 455, 457 (Fla. 1st Dist. 1961).

14. 258 So.2d at 296.

15. 157 So.2d 417 (Fla. 1963).

16. In Crouch v. Williams, 179 So.2d 117 (Fla. 1st Dist. 1965), the District Court of Appeal, First District, attempted to preclude a seller from retaining any sums in excess of actual damages. The Supreme Court of Florida, however, rejected the First District's ruling because it was in conflict with some of the supreme court's decisions where it had unequivocally held that a defaulting purchaser is not entitled to recover from the seller any sums paid in part performance of an executory contract. Williams v. Crouch, 186 So.2d 491 (Fla. 1966). The court in *Warner* distinguished that line of cases on the theory that they had involved a defaulting purchaser who sought to recover amounts already paid to a non-defaulting seller rather than one who sought to pay amounts owed. 258 So.2d at 296.

chaser's rights to enter the land with all the benefits and burdens of ownership were similar to the rights of a purchase money mortgagor; (3) that the agreement for deed was a security instrument subject to a documentary stamp tax both as a conveyance and as a written obligation to pay money, and also subject to an intangible tax as a money obligation secured by a real property lien; (4) that Florida recognizes the doctrine of equitable conversion, whereby the purchaser under a purchase and sale contract becomes the equitable owner of the land and the seller holds the legal title as security for the purchaser's performance;[17] (5) that *Mid-State* had allowed an "equity of redemption" pursuant to Florida Statutes section 697.01 (1971); and (6) that the dictum in *Huguley* seemed to permit an "equity of redemption" under an agreement for deed.[18]

Nonetheless the court expressly qualified its holding to apply only to installment land contracts which are specifically enforceable and under which the buyer has the right to possession or the benefits and burdens of ownership.[19] In addition, the court stated that it was not deciding the recovery rights of a defaulting purchaser who fails to tender full performance and who is willing to trade his equity of redemption for a return of all or part of the installments paid.[20]

In view of these considerations, the decision seems justified. The court seems to have approached the question by alluding to the nature of the instrument, analogizing it to a mortgage. The holding of the court, however, seems to imply that where a specifically enforceable land sales contract is involved, foreclosure is the seller's sole remedy against a defaulting purchaser:

> With respect to rights, remedies, and safeguards, we believe that there should not be substantial differences based solely upon whether the buyer's obligation to pay the deferred portion of the sale price is evidenced and secured by an installment land contract or by a purchase money mortgage. In the absence of statutory direction to the contrary, we seek by our holding *to afford well-established safeguards to an installment*

17. On this point the *Warner* court cited a decision of the District Court of Appeal, First District, wherein the court allowed a purchaser to claim an equity of redemption under a purchase and sale contract, in order to obtain the benefit of condemnation proceedings. *Id.* at 295, *citing* Arko Enterprises, Inc. v. Wood, 185 So.2d 734 (Fla. 1st Dist. 1966).

18. 258 So.2d at 295-96.

19. 258 So.2d at 296. Stated otherwise, the court explicitly excluded from the operation of its ruling: (1) sales contracts which are not specifically enforceable; (2) contracts under which the buyer does not have the right to possession or other benefits and burdens of ownership; (3) short term real estate contracts, commonly known as deposit receipt contracts, entered into in preparation for the closing of a real estate transaction; and (4) purchase options.

20. *Id.*

buyer and to allow an installment seller a reasonable and traditional remedy.[21]

The contract for deed has been recognized as an important tool for increasing the flexibility of real estate financing. The purchaser generally purchases with very little equity while the seller avoids the problems and expenses that may be involved in foreclosing a mortgage. In the writer's view, the advantages of this type of instrument may be eliminated if the implication of the holding in *Warner* is followed in the future.

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21. *Id.* (emphasis added).