STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF A N T R I M

ALLEN R. WOLF, B. AMANDA GARVER,
Plaintiffs/Counter-Defendants,

File No. 90-5152-CK
vs HON. PHILIP E. RODGERS

WILLIAM C. NIEDERMAN,
Defendant/Counter-Plaintiff.

Michael J. Turkelson (P25621)
Attorney for Plaintiffs

Daniel M. Boone (P26992)
Attorney for Defendant

DECISION AND ORDER

Plaintiffs and Counter-Defendants (hereinafter referred to collectively as Wolf) and Defendant and Counter-Plaintiff (hereinafter referred to as Niederman) entered into a lease/purchase agreement for certain real property located in Antrim County in the latter part of 1986. The purchase agreement (Plaintiffs' Exhibit One) is dated December 31, 1986. It envisioned that Niederman would purchase the property from Wolf and complete a closing within 365 days or both the lease and the right to purchase the property would terminate and Niederman's payments would be forfeited on December 31, 1987.

It is undisputed that the purchase was not consummated. Niederman continued to lease the property on a month-to-month basis, and Wolf ultimately served a notice to quit on him. Niederman responded to the notice to quit with a counter-claim for specific performance. Thereafter, the case was removed to Circuit Court and a trial on the merits concluded on February 14, 1991. In accordance with the Court's direction, the parties have subsequently filed proposed findings of fact and conclusions of law. The Court will now make its findings. MCR 2.517.

For reasons that will be further delineated in the pages ahead, a judgment may be entered on the Wolfs' complaint for possession and damages and Niederman's counter-complaint is dismissed with prejudice.

Although the parties focused on the December 31, 1986, purchase agreement (Plaintiffs' Exhibit One) and the two purchase

options available thereunder, the matter was tried before this Court at a time when Niederman's options were to tender a cash payment in full satisfaction of the purchase price or surrender possession. He has done neither. Despite efforts to arrange financing to purchase this property over the last four years, Niederman has been consistently unsuccessful in his efforts to do so. While Niederman argues that he has other real estate which could be sold to raise cash, Niederman's failure to do so in the past and the nature, condition and location of the property fails to offer any reasonable assurance that he would be able to do so in the future. Niederman is not entitled to specific performance.

Having determined that Niederman is not entitled to specific performance, the remaining issues are Wolfs' claim for possession and damages. While the parties agree that the purchase was not completed by December 31, 1987, and that Niederman held over on a month-to-month basis thereafter, they do not agree upon the amount of the monthly rental and, as part and parcel of this disagreement, they dispute the responsibility to purchase certain insurance for the premises.

It is Wolfs' position that when Niederman was unable to complete the purchase transaction within the year contemplated by the parties' original purchase agreement (Plaintiffs' Exhibit One) an extension of the agreement was negotiated. This extension (Plaintiffs' Exhibit Two) was agreed upon after Niederman failed to make a $5,000.00 payment which was due on September 1, 1987. In consideration for waiving Niederman's default, the $5,000.00 payment was accepted on October 5, 1987, together with an $800.00 late fee, and Niederman agreed to provide proof of insurance if he were to close pursuant to Option B (Land Contract Assumption). The new deadline became January 1, 1988. Defendant's statute of frauds objection rings hollow in view of the benefit Defendant derived from this extension, the parties' reliance on it, and the subsequent course of conduct between them.

The parties agree that the Defendant was never able to obtain mortgage financing for this purchase. Niederman testified that he made extensive and exhaustive efforts to acquire such financing and was never able to do so. Thus, Option A (Cash to Mortgage) was never exercised in the past and there was no evidence offered at the trial to indicate that Niederman has any hopes of doing so in the future.

Option B (Land Contract Assumption) was also disputed. While the parties disagree as to whether or not Option B required the original land contract vendee (Schuss Mountain, Inc.) to release the Wolfs from liability on the land contract, it is clear that no written document evidencing any discussion of a land contract assumption was executed by Schuss Mountain until Mr. Terry Schieber's letter of April 27, 1989. (Defendant's Exhibit D). On that date, Mr. Schieber acknowledged Schuss Mountain's preexisting obligation to allow its land contract vendors (Wolf) to assign their interest to Niederman. However, as President and Chief Operating Officer of Schuss Mountain, Mr. Schieber described Schuss Mountain's unwillingness to release Wolf from liability.

Defendant's Exhibit D is dated several months after the amended deadline to complete the purchase transaction and is of only tangential relevance to this litigation, given that the underlying land contract between Schuss Mountain and Wolf required a balloon payment in the spring of 1990. This balloon payment was timely made by Wolf and no corresponding cash sum was tendered by Niederman at any time thereafter.

It is this Court's conclusion that by its terms the underlying land contract between Schuss Mountain and Wolf allowed Wolf to assign their interest in the land contract to a third party, subject to their continuing liability to the land contract vendor. There was no need to obtain the land contract vendor's approval of the assignment for any reason other than to obtain a complete release of Wolfs' liability thereunder. Neither Wolf nor Niederman made any effort to obtain this approval in 1987 or 1988 .

Niederman argues that the requirement of Schuss Mountain releasing Wolf from liability on the underlying land contract is ambiguous and, since that portion of the purchase agreement was drafted by Wolf, the Court should strictly construe it against him. There was no testimony that Niederman reviewed the underlying land contract. Therefore, there is no basis to charge Niederman with the knowledge that the requirement of total release would be the only logical reason to seek Schuss Mountain's approval of the land contract assignment. However, this should be of little solace to Niederman since, under any set of circumstances, he was required to satisfy the balloon payment in the spring of 1990. Wolf made this payment and, as noted above, Niederman has failed to tender these funds as a condition precedent to the specific performance which he seeks. It is an ancient maxim of the law that he who seeks equity must himself

act equitably in the same transaction.

Following the end of 1987 with Niederman not having completed the purchase of the property, Wolf wrote to him on January 8, 1988. (Defendant's Exhibit C). Wolf indicated that a land contract assumption would no longer be considered but that he was extending the time for completing a mortgage purchase of the property to January 3, 1989. However, there was an additional condition. In addition to the $700.00 per month rent which Niederman had paid to Wolf during 1987, Niederman would now have to pay an additional $225.25 per month for insurance. Niederman agreed to this provision and in fact made those payments through October of 1989.

In the same letter, (Defendant's Exhibit C) Wolf also advised Niederman that he would forward the title documents to him upon notification that mortgage approval had been received. Niederman testified that he was actively seeking such financing. Correspondence was authored by Niederman to Wolf on June 4, 1988 (Plaintiffs' Exhibit 6) wherein Niederman acknowledged his disappointment at not being able to secure a mortgage commitment.

Niederman was never successful in obtaining mortgage financing and the parties continued in their relationship with Niederman making his payments sporadically but always bringing his monthly rent current with the payment of applicable late charges and interest. Ultimately, a notice to quit was served on him by the Wolfs on July 29, 1989, requiring that he vacate the premises by August 31, 1989.

Niederman tendered rental payments for September and October of 1989, which sums were ultimately deposited in a Court-ordered escrow account. Niederman was to deposit funds in the account at the monthly rate set forth in the original purchase agreement until the time of trial; i.e., $700.00 a month. Pursuant to that Order, and for the period November, 1989, through February, 1991, the Defendant made deposits totaling $5,100.00. The total Court-ordered rental obligation for the same period was $11,200.00.

Niederman argues that rather than being deficient in his payments, he actually had a credit balance at the time of trial due to improper charges for insurance made by Wolf beginning with January, 1988. The Court must reject this argument. At the end of 1987, the lease terminated and Niederman's right to purchase the property also terminated. Niederman was not in a position to

complete his purchase of the property, and his argument that the failure to provide him with title work prevented the closing from taking place in a timely fashion is simply not supported by the evidence.

Rather, not being able to perform in 1987, Niederman negotiated with Wolf for an extension of time. By agreeing to the extension of time and by not forfeiting Niederman's 1987 payments, which Wolf had a right to do, Wolf was in a position to re-negotiate the terms of possession. The requirement by Wolf that Niederman pay the actual costs of insurance was lawful and agreed to by Niederman. There was no credible evidence introduced at the trial to suggest that the amount was unreasonable, paid under protest, or not used for insurance purposes. To the contrary, the court file reflects a stipulated payment from the escrow account of $3,335.92 for insurance, an amount consistent with the payments required of Niederman.

It is the Court's conclusion, then, that Niederman was obligated to pay Wolf rent (including insurance costs) in the amount of $925.25 for the period beginning January, 1988, and continuing through the date possession is surrendered. As of February 28, 1991, the Defendant's rental obligation for September, 1989, through February, 1991, equals $16,654.50. Lorelei Warren testified that Niederman made contributions to the Court-ordered excrow account in the amount of $7,759.25, leaving a balance due as of February 28, 1991, equal to $8,895.25. Contractual late fees and interest for this same period on the over-due rent equal $1,143.00 and continue to accrue at the daily rate of $29.85. As of February 28, 1991, Niederman owes Wolf $10,038.25 with late fees and interest accruing at $29.85 per diem. Niederman is also obligated to pay Wolf rent at the monthly rate of $925.25 per month until possession is actually surrendered, together with applicable late fees and interest.

Based upon the foregoing discussion, it is the Court's determination that Wolf is entitled to a writ of restitution for possession of the premises and that Niederman must vacate the same no later than midnight on May 31, 1991. Wolf is further entitled to a judgment against Niederman in the amount of $10,038.25, together with late fees through the date of possession at the daily rate of $29.85, any unpaid rent for the months of March, April, and May, 1991, plus applicable late fees and interest, statutory interest on the judgment, and taxable costs.

Wolf has also made a claim for damages made to the premises. Those damages were described by Wolf at the time of trial and included rotting boards in the exterior deck, roof shingles missing and damaged, lack of exterior paint, water damage to ceilings, as well as damage to light fixtures. Wolf also described handrails that were missing, punctures in paneling and the ceiling, the removal of bedroom doors and a 2 X 4 frame wall that had been added in an upstairs bedroom with drywall on only one side and which was not painted.

Based upon Wolf's previous work experience and maintenance on other properties he owns, he estimated the repairs at $4,000.00 to $5,000.00. The damage was not disputed, no contrary evidence was introduced, and the Court finds repair costs associated with the damages as described in the amount of $4,000.00 to be reasonable. A judgment in Wolf's favor and against Niederman in this amount may also be entered together with statutory interest thereon and an award of taxable costs.

Finally, for the reasons discussed above, Niederman' counter-complaint is dismissed with prejudice.

A Judgment in the usual form for practice before this Court and consistent with this Decision and Order should be submitted to the Court for signature within the next ten days.

IT IS SO ORDERED.

HON. PHILIP E. RODGERS, Jr.
Circuit Judge
Dated: 5/28/91