

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-2937

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

WARREN VIERGUTZ, AND DARHL VIERGUTZ,

PLAINTIFFS-APPELLANTS,

V.

**MARVIN KRAUT, ELLA KRAUT, CHRISTOPHER GILLING,
DDS, THERESE GILLING, AND RONALD WISNEFSKE,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waupaca County:
PHILIP M. KIRK, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

VERGERONT, J. This appeal concerns a dispute over property that was the subject of a strict foreclosure judgment against the vendee under a land contract. Warren and Darhl Viergutz appeal a summary judgment dismissing their action to restore title of the property to Marvin and Ella Kraut, vendors under the

land contract, and to enforce their (the Viergutzes') agreement with the Krauts to purchase that property. The Viergutzes contend that the trial court did not have the authority to accept an extension of the redemption period to which the Krauts and the vendee's assigns agreed. We conclude the court did have that authority, and we therefore affirm.

BACKGROUND

The Krauts were the vendors of a land contract in which Ronald Wisnefske was the vendee and resided on the property, an eighty acre farm. After Wisnefske defaulted on the land contract, the Krauts obtained a judgment of strict foreclosure against him on July 19, 1996. On September 4, 1996, the Krauts obtained a Writ of Assistance to remove Wisnefske from the land on or after September 15.

Meanwhile, the Viergutzes negotiated with the Krauts to purchase the farm. On September 12, 1996, the Krauts accepted the Viergutzes' offer to purchase with an anticipated closing on or before October 31, 1996. The offer was contingent upon:

1. All legal right, title and interest, if any, of the presently existing occupant, Ron Wisnefske, a land contract vendee, being foreclosed and terminated, as well as Mr. Wisnefske having either vacated or been removed from the premises.

In the event any of the foregoing contingencies are not timely met, after the exercise of reasonable diligence by the responsible party or parties, then this Offer shall be voidable upon written notice by either party to the other.

On September 27, 1996, Wisnefske filed a motion to reopen and vacate the foreclosure judgment. The circuit court granted the motion on

November 6, 1996, because a redemption period had not been set in the initial judgment. The court then issued a new judgment of strict foreclosure that set a one week redemption period to end on November 13.

Prior to the November 6 hearing, the Viergutzes submitted an amendment to their offer to purchase the farm to the Krauts' attorney. Under the subsection titled "Contingency," the amendment addressed the November 6 hearing and stated:

In the event that Mr. Wisnefske prevails on the motion and is successful in reopening and vacating the judgment, and further either redeems the property or files for bankruptcy protection within the time allowed for redemption, this agreement shall be null and void. In this event, buyers' earnest money shall be returned to them, and both parties shall be released from all obligations hereunder.

In the event Mr. Wisnefske prevails and is successful in having the foreclosure judgment either reopened or vacated, but subsequently fails to either redeem or file for bankruptcy protection within the time allowed for redemption, this agreement shall be binding upon the parties, and the transaction will be promptly closed with Buyers waiving the contingency that Mr. Wisnefske be removed or vacate the premises, in exchange for Sellers' assignment of all their rights and claims arising under the land contract, as well as Sellers' cooperation in facilitating Buyers' exercise of rights thereunder.

The Krauts apparently anticipated that Wisnefske or his assigns would redeem the farm and communicated this to the Viergutzes. On November 11, the Krauts' attorney sent a letter to the Viergutzes' attorney, accompanied by a return of the earnest money, that asked the Viergutzes to confirm the amended offer to purchase was void.

On November 12, one day before the end of the redemption period, Wisnefske assigned his interest in the land contract to Christopher and Therese Gilling. On that same day, the Gillings entered into a new land contract for the same property with the Krauts as the vendors and the Gillings as the vendees. In this new contract, the Gillings agreed to pay the amount required for Wisnefske's redemption in two installments: one upon the execution of the contract and one on January 2, 1997. Christopher Gilling averred (and it is undisputed) that the Gillings were prepared to and intended to make the full redemption payment on November 12, 1996, but the Krauts insisted that the amount be paid in two separate payments pursuant to a new land contract. The Gillings paid the Krauts as agreed and the Krauts transferred the property by warranty deed to the Gillings on January 9, 1997.

On December 16, 1997, the Viergutzes filed a complaint against the Krauts, the Gillings and Wisnefske, claiming that because Wisnefske and his assigns failed to pay the Krauts the full amount due for redemption prior to November 13, 1996, the Gillings had no right or title to the farm. The Viergutzes asked that their interest in the premises be declared and the court restore title to the Krauts so the Viergutzes could enforce their offer to purchase.

The Viergutzes, the Gillings and Wisnefske¹ moved for summary judgment. The circuit court granted the motions of the Gillings and Wisnefske, dismissing the action. The court concluded that, although the manner of redemption by the Gillings was not consistent with what the court had ordered in

¹ The Gillings filed a motion for summary judgment, and Wisnefske filed a motion adopting the Gillings' position.

the judgment of foreclosure, the Krauts had agreed to the modification and, therefore, “a court of equity [should not] intervene.”

DISCUSSION

The Viergutzes contend the circuit court erred in dismissing their complaint because it did not have the authority to either extend the time allowed for redemption after the redemption period had expired or to allow the vendee to satisfy redemption with a partial payment and a new land contract. The respondents² argue that the Viergutzes do not have standing to maintain this action because the amendment to the offer to purchase is not enforceable since it was never signed by the Krauts and delivered to the Viergutzes. In the alternative, the respondents argue that either the new contract between the Krauts and the Gillings was sufficient to meet the redemption requirement, or the Gillings equitably complied within the period of redemption set by the court when they attempted to make a full payment to the Krauts on November 12, 1996.

We assume without deciding that the Viergutzes do have standing, and we address the question whether the circuit court had the authority to consider the Gillings’ payments under the Kraut-Gilling land contract as satisfying the redemption requirement. We conclude that the trial court did have this authority.

When we review a summary judgment, we apply the same methodology as the trial court, and we consider the issues de novo. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). A party is

² The Krauts and Wisnefske join in the Gillings’ responsive brief.

entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. *Id.*

This action stems from Wisnefske defaulting on his land contract with the Krauts. The vendee under a land contract is regarded as the equitable owner of the land, while the vendor “has a lien upon the vendee’s equitable estate as security for payment of the purchase money according to the terms of the agreement.” *Kallenbach v. Lake Publications, Inc.*, 30 Wis.2d 647, 651, 142 N.W.2d 212, 214 (1966) (quoting 4 POMEROY, EQUITY JURISPRUDENCE § 1260 (5th ed.)). A vendee’s interest is assignable. *Milbrandt v. Huber*, 149 Wis.2d 275, 288, 440 N.W.2d 807, 811 (Ct. App. 1989). When a vendee defaults on a land contract, the vendor may seek the remedy of a judgment of strict foreclosure. *Kallenbach*, 30 Wis.2d at 652, 142 N.W.2d at 215.

As we stated in *Milbrandt*, 149 Wis.2d at 289-90, 440 N.W.2d at 812 (footnotes omitted):

An action for strict foreclosure of a land contract is an action in equity. A foreclosure judgment triggers a redemptive period, wherein the vendee may redeem his interest in the property by full payment of the balance of the contractual sum. The period of redemption is within the sound discretion of the trial court.

When a vendee does redeem the property, the judgment of foreclosure becomes null and void. *Id.* at 290, 440 N.W.2d at 812.

During the period of redemption in this case, the Gillings, as Wisnefske’s assigns, became the equitable owners of the farm and their rights to the property were superior to those of the Viergutzes, who had an offer to purchase with the Krauts that was binding only if Wisnefske or his assigns did not

redeem the farm. Therefore, the question is whether the Gillings' redemption efforts were such as to avoid the loss of their rights, as the vendee's assigns, to the property.

The Viergutzes cite *Kallenbach* and *Benkert v. Gruenewald*, 223 Wis. 44, 269 N.W. 672 (1936), for the proposition that if the vendee in a land contract subject to a strict foreclosure judgment does not pay the full amount due before the end of the redemption period set by the court, that vendee has lost all rights to the property. However, neither case involved situations where the vendor agreed to the partial payment or the extended period of redemption.

In *Kallenbach*, 30 Wis.2d at 655, 142 N.W.2d at 216, the supreme court concluded that the vendee needed to pay the "full amount due" to redeem the property, as opposed to paying only the past due installments. The Gillings do not contend that they need only pay past due installments but, rather, did pay the full amount.

In *Benkert*, the supreme court concluded that, where the vendee showed no prospect of redeeming the property, which was worth far less than the amount required for redemption, the circuit court erroneously exercised its discretion in extending the period of redemption. *Benkert*, 223 Wis. at 51, 269 N.W. at 675. The Viergutzes point to the *Benkert* court's statement: "In strict foreclosure ... the debtor must produce and pay the full amount due before expiration of the redemption period or be forever barred of any right or title to the land." *Id.* at 49, 269 N.W. at 674. However, this statement was made in the context of distinguishing a strict foreclosure from a mortgage foreclosure, where there will be a sale and an "extension of the period of redemption may be effective to protect against a sale at a depressed price." *Id.* The *Benkert* court did not

consider the issue in this case—whether the “full amount due” could be paid in two installments at the vendors’ request.

The Viergutzes also cite *Exchange Corp. v. Kuntz*, 56 Wis.2d 555, 202 N.W.2d 393 (1972), for the proposition that the circuit court did not have the authority to consider the Gillings’ redemption as valid when part of the payment was made after the redemption period set by the court had expired, and the court had not granted an extension before the expiration date. In *Exchange Corp.*, the supreme court held that, although a circuit court has the authority during the redemption period to extend the period of redemption, once that period has expired, the foreclosure becomes final without the need for any further motion or decree.³ *Id.* at 561, 202 N.W.2d at 396. On that basis, the court reversed a circuit court’s order extending the redemption period after it expired, over the vendor’s objection. The supreme court observed, however, that in appropriate

³ We note that this holding has been abrogated by § 846.30, STATS., which states:

Redemption period for land contracts. If a court finds that the purchaser under a land contract is obligated to make certain payments under that land contract, that the purchaser has failed to make the required payments and that the vendor is entitled to a judgment of strict foreclosure, the court shall set a redemption period of at least 7 working days from the date of the judgment hearing or, if there is no hearing, from the date of the entry of the judgment order. *No judgment of strict foreclosure is final until the court enters an order after the expiration of the redemption period confirming that no redemption has occurred and making the judgment of strict foreclosure absolute.*

(Emphasis added.) This statute applies to actions commenced on or after May 3, 1996. 1995 Wis. Act 250 § 3. The record does not indicate conclusively whether this action commenced after May 3, 1996, and the respondents did not argue that, under § 846.30, the judgment of strict foreclosure was not final at the close of the redemption period and the circuit court therefore retained the authority to declare whether or not the strict foreclosure was absolute. Accordingly, we decide this case on other grounds.

circumstances the circuit court may grant relief from the strict foreclosure judgment under § 806.07, STATS.⁴ *Id.* at 562, 202 N.W.2d at 397.

This case is not governed by *Exchange Corp.* Here, before the redemption period expired, the vendor and the vendee's assigns entered into the new land contract, which was, in effect, a stipulation to extend the period of redemption. Although the court did not modify the judgment of foreclosure at that time, it did so, in effect, when it later accepted the parties' stipulation—the Kraut-Gilling land contract—as a modification of the redemption period. Nothing in *Exchange Corp.* restricts the court's authority to accept the agreement of the vendor and the vendee, or its assigns, to a modification of the period of redemption before that period expires.⁵

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

⁴ The court in *Exchange Corp. v. Kuntz*, 56 Wis.2d 555, 562, 202 N.W.2d 393, 397 (1972), referred to § 269.46(1), STATS., the predecessor to § 806.07, STATS. See WISCONSIN RULES OF CIVIL PROCEDURE, 67 Wis.2d 585, 726.

⁵ The Viergutzes do not argue that the court erroneously exercised its discretion in accepting the Kraut-Gilling agreement as a modification of the redemption period, only that it did not have the authority to do so.

