

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 23, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP821

Cir. Ct. No. 2008CV88

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

TERESA S. UMBACH,

PLAINTIFF-RESPONDENT,

V.

THE RUSTIC, INC., C/O REGISTERED AGENT, DENNIS NEUENDORF,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vilas County:
NEAL A. NIELSEN III, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The Rustic, Inc., appeals from a summary judgment of foreclosure on a land contract. The Rustic raises three issues on appeal: (1) the circuit court failed to properly determine what constituted a default in payment under the land contract; (2) the court erred by finding a substantial

default and granting foreclosure;¹ and (3) it was inequitable to grant foreclosure. We reject the Rustic's arguments and affirm.

¶2 The Rustic purchased an ongoing bar and restaurant business with commercial real estate owned by Teresa Umbach.² Among other things, the form land contract required a payment on the 4th day of each month and also required The Rustic to pay when due the real estate taxes assessed on the property. The land contract contained an express provision making time of the essence. The contract also contained a payment acceleration provision.

¶3 Umbach brought an action for foreclosure, alleging The Rustic defaulted in its monthly payments and also failed to timely pay real estate taxes. The circuit court subsequently granted Umbach's motion for summary judgment of strict foreclosure. The court found there were substantial breaches of the land contract by The Rustic and granted a five-month redemption period. The court denied a motion for reconsideration. The Rustic failed to redeem the land contract and this appeal follows.

¶4 An action for strict foreclosure of a land contract is an action in equity. *Coraci v. Noack*, 61 Wis. 2d 183, 189-90, 212 N.W.2d 164 (1973). The nature of the remedy of strict foreclosure was discussed in *Kallenbach v. Lake Publications Inc.*, 30 Wis. 2d 647, 142 N.W.2d 212 (1966). The purpose of such an equitable action is to terminate any presently existing right on the part of the

¹ The Rustic uses the phrase "abuse of discretion." We have not utilized that term since 1992. See *Allstate Ins. Co. v. Konicki*, 186 Wis. 2d 140, 149 n.3, 519 N.W.2d 723 (Ct. App. 1994).

² The land contract vendors were David and Teresa Umbach, LLC. Following the death of David Umbach, the land contract was assigned to Teresa.

purchaser to perform the land contract and to confirm the legal title of the vendor by foreclosing the equitable interest the purchaser has in the property. *See Coraci*, 61 Wis. 2d at 190. A period of redemption is within the sound discretion of the circuit court. *Id.*

¶5 The Rustic argues, “Before the Circuit Court could find that there was any breach of the Land Contract, the Court should have first determined exactly what constituted a ‘default.’” The Rustic contends a hearing is necessary to determine the parties’ intent concerning when the monthly payments were due. The Rustic notes its affidavit in opposition to summary judgment states its sole shareholder understood that he had to mail payments by the 19th of each month.

¶6 The Rustic’s argument ignores the land contract’s unambiguous language, which specified the 4th day of the month as the due date for payment. The contract further provided that in the event of a default which continued for a period of fifteen days following the specified due date, the vendor was entitled to require immediate payment in full upon written notice.³

¶7 The Rustic does not claim that each of its payments was made by the 4th of each month, nor even that each of its payments was made by the 19th of each month. Furthermore, The Rustic conceded in the circuit court that it paid real estate taxes untimely. Under the express terms of the land contract, The Rustic was therefore in default.

³ The Rustic also alleges there is a question whether a payment is “made” when it is mailed or when it is received. This perceived distinction is immaterial as The Rustic’s payments were late under either measure.

¶8 The land contract contained a specific provision making time of the essence. That provision was reinforced by correspondence dated February 15, 2008, wherein Umbach stated, “I have continuously had to call and request loan payments from you. These monthly payments have been chronically late. ... To avoid future legal action against you payments will have to be received by the due date.” After The Rustic’s failure to make payment on the March 4, 2008 due date, and the failure to cure within fifteen days thereafter, Umbach provided notice the unpaid balance was due and owing. The Rustic failed to pay that balance.

¶9 The Rustic insists Umbach “waived any defects in payment that occurred before March 1, 2008.”⁴ According to The Rustic:

When Ward handed that check to Umbach on February 29, 2008, he informed Umbach that The Rustic was hiring a new business manager and also arranging additional capital. He told Umbach that the February and March payments would be late, but thereafter, The Rustic would be back on track with timely payments. Umbach accepted the February 29, 2008 check and did not object to the late payment.

¶10 We need not determine whether Umbach waived the right to timely February and March payments because The Rustic overlooks its failure to pay the 2006 property taxes until March 31, 2008.⁵ The Rustic’s waiver argument is unpersuasive. The Rustic’s actions constituted a substantial breach of the terms of the land contract.

⁴ We note The Rustic argued in the circuit court that Umbach waived any breach of the land contract before February 15, 2008.

⁵ The Rustic claims it did not receive the February 15 letter until after the February 29 discussion with Umbach. Regardless, on March 4, 2008, Umbach’s attorney sent a certified letter to The Rustic demanding the real estate taxes be paid within fifteen days. The Rustic did not pay the real estate taxes until March 31, 2008.

¶11 The Rustic nevertheless argues, “[T]here was no harm to Ms. Umbach, because the tax was paid before the three years required for a County sale for delinquent real estate taxes.” We disagree. As the circuit court correctly observed:

If I accept your theory [concerning harm to the vendor], that means that a person can perpetually run just short of three years late on payment of taxes, because we all know that there is no risk of foreclosure by the County until three years have elapsed. That the person can run every single month fifteen days, or more, late because as long as the payment is prior to the time that the parties are in court, what’s the harm? The party has no obligation to insure the premises, because as long as that’s procured before the judge grants a foreclosure, and the place hasn’t burned down, there has been no harm.

¶12 The Rustic also contends it was inequitable to grant foreclosure. Relying upon *Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 382, 254 N.W.2d 463 (1977), The Rustic argues the deficiencies were corrected by the time the strict foreclosure action was commenced, and for that reason alone the circuit court erred by granting foreclosure. However, The Rustic interprets *Pleasure Time* too broadly. In that case, our supreme court recognized that foreclosure required the circuit court to balance the equities to determine if foreclosure was merited. *See id.* at 383. While the *Pleasure Time* circuit court in its discretion found foreclosure was not merited because the deficiencies in that case were substantially corrected, the circuit court in the present case concluded otherwise. As the court stated:

At some point the vendor, just like a landlord or anyone else, would get sick and tired of putting up with conduct that doesn’t comply with the terms of the contract. I understand Ms. Umbach’s frustration.

¶13 Equity requires equal solicitude for the vendor and the vendee. *Kallenbach*, 30 Wis. 2d at 658. “Courts attempt to do equity in a foreclosure by manipulating the time given for redemption, rather than by permitting a reinstatement upon the mere payment of the arrearage” *Id.* at 657. Here, the balancing of the equities led the circuit court to conclude that it was not going to force Umbach into the position of “having to honor out the remainder of the contract” in light of The Rustic’s “frustrat[ing] pattern of defaults.” The court recognized The Rustic’s significant equities by granting a relatively long redemption period of five months. *See id.* at 657-58. The record supports the court’s exercise of discretion.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2007-08).

