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Specific Performance of Land Contracts in North Dakota

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SPECIFIC PERFORMANCE OF LAND CONTRACTS IN NORTH DAKOTA

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IN VIEW of the broad provisions of the Revised Code of North Dakota which have abolished deficiency judgments in proceedings for the foreclosure of real estate mortgages and land contracts and in other actions, the question has arisen whether those provisions have not also abrogated the jurisdiction of the court to grant specific performance of a land contract against the vendee at the suit of the vendor. There is apparently no such general belief but the question has been raised sufficiently to merit a brief discussion of the matter.

The significance of this question becomes apparent when we consider another provision of the Code, § 32-0408, which is generally recognized as having established the doctrine of mutuality of remedy in this state. It would of course follow that if the law of this state does not permit a land contract to be specifically enforced against the vendee, the remedy of specific performance against the vendor is likewise not available to the vendee. In other words, the courts would be without jurisdiction to decree specific performance of such contracts in favor of either the vendor or the vendee.

One of the sections of the Code which we have under consideration is § 32-1906. It prescribes what the judgment shall contain in an action for the foreclosure of a real estate mortgage or the cancellation or the foreclosure of a land contract, and further provides:

> "The court under no circumstances shall have power to render a deficiency judgment for any sum whatever against the mortgagor or purchaser or the successor in interest of either."

The following section, § 32-1907, provides:

> "Neither before nor after the rendition of a judgment for the foreclosure of a real estate mortgage or for the cancellation or foreclosure of a land contract made after July 1, 1937, shall the mortgagee or vendor, or the successor in interest of either, be authorized or permitted to bring any action in any court in this state for the recovery of any part of the debt secured by the mortgage or contract so foreclosed. It is the intent of this section that no deficiency judgment shall be rendered upon any note, mortgage, or contract given since July 1, 1937, to secure the payment of money loaned upon real estate or to secure the purchase price of real estate, and in case of default

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> the holder of a real estate mortgage or land contract shall be entitled only to a foreclosure of the mortgage or the cancelation or foreclosure of the contract."

It has been contended that the language employed in the section last quoted is sufficiently broad to prohibit the bringing of an action to specifically enforce a land contract against the vendee, and in support of that contention we are particularly referred to the last part which reads:

> ". . . and in case of default the holder of a real estate mortgage or land contract shall be entitled only to a foreclosure of the mortgage or the cancellation or foreclosure of the contract."

It may be possible that that and other language found in the section when considered apart from the context could be construed to substantiate such a proposition, but when viewed in connection with the rest of the section a construction of that nature is hardly tenable. The intent of the section is clearly and unequivocally stated, that is, to prevent the rendition of any deficiency judgment in the cases and under the conditions specified. It would seem impossible to discover therein an intent to prohibit specific performance of a land contract against the vendee.

A consideration of the history of legislation is often helpful in reaching a proper construction of a statute. Prior to 1933 we find that mortgage foreclosure proceedings in this state were similar to those in many other jurisdictions. As was said in *Burrows v. Paulson*, 64 N. D. 557, 561, 254 N.W. 471, 474 (1934):

> ". . . Originally a proceeding to foreclose a mortgage was strictly in rem. No personal judgment could be rendered therein for the deficiency."

After stating the reason therefor the court said further, however, that a change had been generally made by statute or rule of court permitting a personal judgment for a deficiency in a foreclosure action against the mortgagor.

N. D. Comp. Laws § 8100 (1913), in addition to authorizing the court to render judgment against the mortgagor for the amount of the mortgage debt then due and to decree a sale of the mortgaged premises, also provided that "the court may direct the issuing of an execution for the balance that may remain unsatisfied after applying the proceeds of such sale."

In *Bull v. Smith*, 45 N. D. 613, 178 N. W. 426 (1919), and again in *Bull v. Smith*, 49 N. D. 337, 191 N. W. 624 (1922), the right of a mortgagee to a personal judgment against the mortgagor for the entire amount due was recognized, and the court said in the latter

case that the practice was to apply the proceeds of the sale of the premises in satisfaction of the judgment, and that the original judgment then stood as a deficiency judgment for the balance of the debt remaining unsatisfied.

N. D. Comp. Laws § 8100 (1913) was amended by N. D. Laws 1933, c. 155, by deleting therefrom the provision quoted above which authorized the court to direct the issuance of an execution for the balance of the judgment remaining unsatisfied after sale of the mortgaged premises. The 1933 amendment also added, among other things, the following provisions:

> ". . . and the court shall have no power to render a deficiency judgment. Nothing herein shall be construed to postpone or affect any remedy the creditor may have against the party personally liable for the mortgage debt other than the mortgagors and their grantees."

The apparent purpose of the act was of course to prohibit the rendition of a deficiency judgment against a mortgagor or his grantee in mortgage foreclosure proceedings. In *Burrows v. Paulson supra,* it was held that the effect of c. 155, N. D. Laws 1933, was to deprive the court of the power "to enter a deficiency judgment as an incident to a foreclosure," but that where there are two contracts, such as a note and a mortgage contract, as there usually are, the effect of the act was "to relegate a mortgagee foreclosing to an action at law to recover any deficiency remaining after a sale of the mortgaged property and the application of the proceeds on the mortgage debt." The court further explained: "For, though the distinction between actions at law and suits in equity has been abolished, ... this is a change in form rather than of substance and the distinction between legal and equitable rights and remedies remains." In other words, the case decided that the amendment did not prohibit the mortgagee from obtaining a deficiency judgment in another action. In the *Burrows* case the court referred to other sections of the Compiled Laws of 1913 governing foreclosure proceedings which were not affected by the 1933 amendment and which, it was pointed out, permitted a mortgagee to sue first at law on the indebtedness and subsequently to foreclose the security if the judgment obtained in the first action was not satisfied. The court then reasons: "We cannot believe the legislature intended to penalize him for reversing this procedure so if he foreclose his mortgage first and a deficiency results he cannot proceed at law to collect by suit, judgment, and execution, and must suffer the loss."

Such was the law as to deficiency judgments until enactment of N. D. Laws c. 159, 1937, which was not simply an amendment of § 8100, but was, as stated in the title:

> "An Act relating to the foreclosure of real estate mortgages and land contracts, providing what the judgment and decree shall contain, and prohibit any deficiency judgments."

Section 1 of the act is substantially the same as Section 8100, N. D. Laws 1913, as amended, except that it includes land contracts and the provision prohibiting deficiency judgments is stated somewhat more emphatically as follows:

> ". . . and the Court shall under no circumstances have power to render a deficiency judgment for any sum whatever."

Sections 2 and 3 were new, and they read as follows:

> § 3. Other Suits Prohibited. That neither before nor after the rendition of the judgment and decree herein provided for, shall the mortgagor or contract holder, or their successors in interest, be authorized or permitted to bring any action in any Court in this State for the recovery of any part of the debt secured by said mortgage or contract so foreclosed.
>
> "§ 3. Intent. Interpretation. It is the intent of the legislature to provide by this Act that hereafter there shall be no deficiency judgments rendered upon notes, mortgages, or contracts given to secure the payment of money loaned upon real estate or given to secure the purchase price of real estate, and in case of default the holder of a real estate mortgage or land contract shall only be entitled to a foreclosure or a cancellation of the mortgage or contract and no Court shall place any other construction upon this Act."

Section 4 contained a saving clause and Section 5 repealed all acts or parts of acts in conflict therewith.

It would seem quite apparent that the enactment of the 1937 statute was prompted by the decision in *Burrows v. Paulson, supra,* that the 1933 act did not prohibit the rendition of all deficiency judgments. It is not at all unlikely that the later act was passed to effectuate the result which might have been intended by the 1933 statute but which was not thereby attained. In any event the language employed in the 1937 act leaves no doubt as to the intention of the legislature in enacting that statute. Both in the title of the act and in Section 3 the intention is clearly expressed, which is to prohibit any and all deficiency judgments.

On the other hand, neither in the history of this legislation nor in the act itself is there found any evidence of an intention on the part of the legislature to take from the vendor in a land contract the right to enforce it specifically against the vendee. The provisions

of N. D. Laws 1937, c. 159, were substantially reenacted by N. D. Rev. Code §§ 32-1906 and 32-1907 (1943). We find some changes in those sections but nothing to indicate any intention to broaden the scope or effect of the 1937 act.

There is an even more persuasive reason for the conclusion that the provisions in question do not bar the remedy of specific performance against the vendee. N. D. Const. § 61 provides that "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." A similar provision is found in practically all the constitutions of the several states. The phraseology is sometimes different; instead of the word "bill", as used in the North Dakota constitution, we find the words "law", "statute", or "act." Likewise, in other constitutions the word "object" is used rather than "subject." In general, the words "law", "statute", "act", and "bill" as used in such constitutional provisions, have been held to be synonymous. "Object" and "subject" have likewise been given the same meaning. 1 SUTHERLAND STATUTORY CONSTRUCTION 284-285 (3d ed. 1943).

It should probably be stated here parenthetically, as held in *Daly v. Beery*, 45 N. D. 287, 178 N. W. 104 (1920) that Section 61 applies only to acts passed by the legislature and that it "has no reference to the initiative and referendum."

The manifest purpose of this constitutional provision is to prevent surprise, or fraud, in the legislature by means of provisions in bills of which the titles give no intimation. CRAWFORD, STATUTORY CONSTRUCTION 134 (1940). It has been generally held, however, that this requirement should be liberally construed to sustain the validity of both the title and the act. In passing on the provision, the Supreme Court of this state said in *State v. Burr*, 16 N.D. 581, 587, 113 N.W. 705, 708 (1907)

> "The title should be liberally, and not technically, construed. The construction should be reasonable. Conflict with the constitutional provision must appear clear and palpable, and, in case of doubt as to whether the subject is expressed in the title, the law will be upheld. . . If the subjects in the law are germane or reasonably connected with the subject expressed in the title, the constitutional requirement is sufficiently met. The provision is mandatory on the courts and on the legislature."

Referring again to the title of Chapter 159, N.D. Laws 1937, the subject to the bill as therein stated is foreclosure of real estate mortgages and land contracts, indicating also the inclusion of pro-

visions in the bill as to what the judgment and decree shall contain and to prohibit any deficiency judgment. The words "specific performance" do not appear in the title, nor is there expressed therein anything which indicates a provision in the body of the act dealing with the matter of specific performance of land contracts or any remedy of the parties thereto other than foreclosure or actions to obtain a deficiency judgment. Nor can it be asserted that a provision prohibiting specific performance of a land contract against the vendee is "germane or reasonably connected with the subject expressed in the title," which in this case is foreclosure of real estate mortgages and land contracts. Foreclosure of a land contract and a suit for specific performance thereof are distinctly different remedies. One is not auxiliary to the other, nor can it be said that it is necessary to prohibit specific performance against the vendee in order to effectuate the expressed object of the act. To construe the act as embodying such a further prohibition would require a holding that the act embraces a subject not expressed in the title. Under Section 61 of the constitution such objectionable portion of the act would be invalid.

We accordingly conclude that the broader meaning and effect sometimes attributed to Chapter 159 N.D. Laws 1937, and the corresponding provisions of the Revised Code cannot be sustained. Very few cases involving specific performance of a land contract against the vendee have come before the Supreme Court of this state for decision. At least one such case, *Funk v. Baird,* 70 N.D. 396, 295 N.W.87, decided in 1940, came after the enactment of the 1937 statute. The question here under discussion was not raised in that case. Whether it was because of a generally accepted opinion that the act had no effect upon the vendor's right to specific performance, or whether it was because the contract was entered into prior to the effective date of the act, is merely a matter of conjecture.

Having concluded that the scope of the provisions in question extends only to prohibiting all deficiency judgments both in foreclosure proceedings and in separate suits, it follows that the remedy of specific performance is still available to the vendor. Lack of mutuality of remedy because of those particular provisions of the Code cannot therefore be asserted, and the remedy of specific performance is accordingly likewise available to the vendee.

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