

STATE OF MICHIGAN
COURT OF APPEALS

LAMBERTON GROUP, INC.,

Plaintiff-Appellant,

v

J.S. REALTY, INC., and VERSATILE CAPITAL
CORPORATION,

Defendants-Appellees.

UNPUBLISHED

May 30, 2000

No. 216457

Kent Circuit Court

LC No. 98-006558-AV

Before: Doctoroff, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiff Lamberton Group, Inc., appeals by leave granted from the circuit court order vacating a writ of restitution entered by the district court and remanding the case for determination of a new redemption date. We reverse.

This case arises from defendant J.S. Realty's default of its obligations to plaintiff under a land contract for the sale of a mobile home park. A judgment of possession, effective March 10, 1998, was entered in plaintiff's favor in the amount of \$409,639.89. Following defendants' failure to tender the judgment amount within the ninety-day redemption period provided by law, the district court entered a writ of restitution on June 15, 1998. On appeal, the circuit court vacated the district court's writ of restitution, concluding that two exceptions to the tender requirement were applicable.

On appeal, plaintiff argues that the circuit court erroneously concluded that exceptions to the tender requirement apply in this case and that, consequently, the district court should have forgiven defendants' failure to tender the judgment amount within the redemption period. When reviewing equitable actions, this Court reviews the lower court's decision de novo; however, the lower court's findings of fact in support of the equitable decision rendered are reviewed for clear error. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). A trial court's findings are considered clearly erroneous where this Court is left with a definite and firm conviction that a mistake has been made. *LaFond v Rumler*, 226 Mich App 447, 450; 574 NW2d 40 (1997).

The equitable right of redemption is governed by MCL 600.5744(6); MSA 27A.5744(6), which provides as follows:

When the judgment for possession is for nonpayment of money due under a tenancy or for nonpayment of moneys required to be paid under or any other material breach of an executory contract for purchase of the premises, the writ of restitution shall not issue if, within the time provided, the amount as stated in the judgment, together with the taxed costs, is paid to the plaintiff and other material breaches of an executory contract for purchase of the premises are cured.

MCL 600.5744(3); MSA 27A.5744(3) provides a redemption period of ninety days for vendees in default in cases such as this, in which less than fifty percent of the purchase price has been paid.

Here, an amount of \$450,000 was placed in an escrow account on the last day of the redemption period. In *Flynn v Korneffel*, 451 Mich 186, 189; 547 NW2d 249 (1996), a case factually similar to this case, our Supreme Court held that “in order to effectuate the right of redemption, the full amount, not merely an offer, must be tendered without qualification or condition. . . . [P]lacement of the judgment amount in escrow [is] merely an offer to redeem the property.” Defendants concede that they failed to tender the redemption amount within the statutory period. However, defendants contend that the circuit court correctly held that two exceptions to the tender requirement applied in this case.

The first exception applied by the circuit court was the futility exception. In *Karakas v Dost*, 67 Mich App 161, 167; 240 NW2d 743 (1976), this Court ruled that a formal tender is not necessary where a vendor, by his words or acts, has shown that tender would not be accepted.

The circuit court found that the futility exception applied because plaintiff’s words or acts indicated that tender of the judgment amount would not be accepted if offered by defendants. After carefully reviewing the record, we conclude that the circuit court clearly erred. Rather, plaintiff’s demand for \$527,026.66, an amount in excess of the judgment of possession, was made in response to defendants’ inquiry about the amount plaintiff would accept in exchange for a warranty deed to the property. The amount to exchange for a warranty deed is not necessarily the same as the amount necessary to redeem the property.

Indeed, on May 28, 1998, plaintiff sent defendants a letter indicating that the “redemption amount to avoid District Court forfeiture is \$420,057.17 through May 30, 1998 (\$409,639.89 judgment amount plus 82 days of interest at \$127.04 per day).” This amount was entirely consistent with the district court’s judgment of possession. Plaintiff’s letter also stated, “[P]er your request, I am preparing a total payoff letter so as to advise what, in our view, is required to be done for your client to discharge his obligations in full under the land contract and receive a warranty deed.” A letter by plaintiff dated the following day stated that plaintiff had “arrived at a payoff amount of \$527,026.66 as of June 1, 1998.” Subsequent negotiations between the parties focused on defendant J.S. Realty obtaining the warranty deed for the property.

Plaintiff's demands and negotiations regarding a payoff balance were not improper and the demands do not impel the application of the futility exception to the tender requirement for redemption. "[A] seller may pursue alternative remedies until a writ of restitution has been entered, even after a judgment of possession has been entered." *Wilson v Taylor*, 457 Mich 232, 241; 577 NW2d 100 (1998). The negotiations between the parties regarding the amount necessary for defendant J.S. Realty to obtain the warranty deed to the property does not constitute proof that plaintiff would not have accepted the judgment amount to redeem the property if defendants had made the tender. Thus, the circuit court erred in applying the futility exception in this case.

A second exception permits a trial court to decline to issue a writ of restitution, even where there has not been a redemption by timely payment or timely tender of payment, if some "unusual circumstances" exist which warrant effectuating a redemption. *Flynn, supra* at 199, n 25. To successfully invoke this exception, the circumstances must be very unusual and must appeal to the conscience of the court. *Id.* at 206; *Gordon Grossman Bldg Co v Elliott*, 382 Mich 596, 603-604; 171 NW2d 441 (1969).

The circuit court, relying on *Wilson, supra*, found that the facts in the instant case satisfied the unusual circumstances test because plaintiff knew or should have known that its demand for an amount in excess of the judgment of possession was contrary to law. In addition, the circuit court found the circumstances were unlikely to be repeated often because of the clear holding in *Wilson*.

We conclude that the circuit court misapplied the holding in *Wilson*. In that case, our Supreme Court held that a defendant is not required to pay an amount in excess of the judgment of possession to preclude an entry of a writ of restitution. See *id.* at 245-246. Here, however, plaintiff was not seeking an amount in excess of the judgment of possession for defendants to avoid district court forfeiture. Rather, plaintiff was negotiating an amount necessary for defendants to pay for the delivery of a warranty deed to the property. Therefore, we find that the unusual circumstances exception does not apply.

Because defendants failed to satisfy the tender requirement of MCL 600.5744(6); MSA 27A.5744(6), and no exceptions to the requirement apply, we conclude that the district court properly issued a writ of restitution in this case. Accordingly, we reverse the order of the circuit court and reinstate the writ of restitution.

Reversed.

/s/ Martin M. Doctoroff

/s/ David H. Sawyer

/s/ Mark J. Cavanagh