

Halling v Rouse

2013 NY Slip Op 32929(U)

November 18, 2013

Sup Ct, Wayne County

Docket Number: 74059/2012

Judge: John B. Nesbitt

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

SHANNON HALLING,,
Petitioner,
-vs-

Proceeding I
Index No. 74059

MARY ROUSE,
Respondent,

MARY ROUSE,
Plaintiff,
-vs-

Action II
Index No. 74766

DAVID HALLING, SHANNON HALLING
and WILLIAM HALLING,
Defendants,

2012

APPEARANCES: J. Mark Krause, Esq.
*Attorney for Respondent in Proceeding I
and Plaintiff in Action II*

William Halling, *Pro Se*
Defendant in Action II

David Halling, *Pro Se*
*Petitioner in Proceeding I and
Defendant in Action II*

Shannon Halling, *Pro Se*
*Petitioner in Proceeding I and
Defendant in Action II*

MEMORANDUM - DECISION

John B. Nesbitt, J.

I. INTRODUCTION

Shall the warrant of eviction issued by the Sodus Town Court directing the removal of Mary Rouse from the premises known as 5319 Route 14 now be executed? This is the issue directly presented by the motions before the Court. The Hallings move to dismiss Rouse's appeal from that local court order, freeing the County Sheriff from the stay pending appeal preventing him from

executing the warrant and restoring possession of the premises to the Hallings. Rouse opposes the motion and cross-moves for a preliminary injunction preventing her removal from the premises in the context of her own action seeking declaratory relief and specific performance vindicating her rights under an installment purchase agreement (land contract) concerning the premises. In its August 28, 2013, memorandum decision, this Court ordered an evidentiary hearing on the Rouse application for a preliminary injunction given multiple disputes as to the relevant material facts pivotal to resolution of the motions. That hearing was held on October 22nd and October 25th, with all parties present. Based upon the record developed at that hearing, as well as the prior pleadings and affidavits submitted in this matter, the Court renders the following decision on the immediate issues now before it.

II. THE PROPERTY AT ISSUE: CONTRACTS AND CONVEYANCES

Every first year law student learns the “basic tenet of property law - that title or ownership of real property is not a ‘yes or no’ proposition, but entails a multitude of rights in the property owner, a “bundle of sticks” if you will, where any one “stick” may be traded, sold, seized by eminent domain, or assigned to another party, while not divesting the ‘owner’ of their true title” (*LT Propco, LLC v Carousel Center Co, LLP*, 20 Misc.3d 1124(A) 6 (Sup.Ct., Onondaga Co. 2008). This “bundle of sticks” metaphor finds particular heuristic value in this case as will be evident as discussion proceeds. At the outset, it is necessary to set out the relevant transactions and their legal significance.

A. 2006 Deed from Community Bank to William Halling.

The first transaction culminates in warranty deed of Community Bank, N.A., to William Halling, recorded June 1, 2006, in the Wayne County Clerk’s Office as Instrument No. R9072445. The reported acquisition price reflected in transfer tax is \$145,000. The property transferred was 5319 Route 14, Town of Sodus, consisting of approximately forty acres of improved realty. Contemporaneously therewith, William Halling granted a purchase money mortgage to National City Mortgage in the amount of \$130,500. So far as the present record reveals, the warranty deed to William Halling conveyed title in “fee simple absolute” as classified in N.Y. Estate, Powers and Trusts Law (EPTL) §6-1.1, which “is the greatest interest that can be given away; it includes title, the right of possession and the right to use for any purpose, and it cannot be defeated by a condition or limitation” (Practice Commentaries, 17B McKinney’s Consolidated Laws of NY, EPTL 6-1.1 at

p. 6 [citations omitted]). Incidents of fee simple title include not only the right of dominion, but the “right of alienation,” which long ago was declared “fundamental,” and “subject only to such restrictions and limitations in its exercise as the constitution may prescribe, either in express terms or by clear and necessary implication; or to such restrictions as the legislature, acting within its constitutional powers, may deem proper to impose for the public good” (*Parish v Rogers*, 20 App Div 279, 281 (4th Dept 1897)).¹

**B. 2007 Installment Purchase Agreement (Land Contract):
William Halling, as Contract Vendor, and
Mary Rouse/Gary Carter, as Contract Vendees.**

William Halling, Gary Carter, and Mary Rouse entered into a written contract dated July 28, 2007, for the sale and purchase of the 5319 Route 14 property, approximately fourteen months after William Halling acquired the same. The agreement was not professionally prepared. The contract is a “fill-in-the -blank” form William Halling acquired from the Internet. The contract is entitled “Land Contract Variable Payments.” William Halling is styled “Seller” and Gary Carter and Mary Rouse are styled “Buyer.”

Paragraph 1 of the contract provides that “the Seller agrees to sell, and the Buyer agrees to buy, in accordance with the terms and conditions of this Agreement, the following described real property know as 5319 Route 14, Sodus, N.Y.” together with all improvements and fixtures. Section 2 of the contract reads in pertinent part as follows, with the italicized words being handwriting inserted into the printed form:

2. Buyer hereby agrees to pay for said property the sum of *\$156,000* plus the amount of any materials, taxes, insurance, or other expenses paid by the seller, with interest from date [sic] as follows:

¹ 1 Rasch, Real Property Law and Practice §§ 28 and 38 (1962, as supplemented) state in pertinent part.

§28 Incidents of Ownership. - The concept of ownership of real property can be better understood by a consideration of the qualities inherent therein, that is, the incidents of ownership. These are tenure and title, seisin and possession, privity, and alienability.

§38 Alienability.- One of the essential incidents of the ownership of real property is its alienability or transferability. This includes the right to dispose of the property in any lawful manner which the owner deems fit. A fee simple estate and a restraint upon its alienation cannot in their nature coexist...

1. The sum of \$1.00 shall be paid upon execution of this contract, the receipt of which is hereby acknowledged by Seller.
- 1st*
128,906.50 2. The Buyer shall pay the balance of purchase price as calculated above, which equals \$1374.56 1st 150.00 2nd with interest *includes* [sic] from date [sic] at the rate of 6.875% per year on the unpaid balance until paid. The said principal and interest shall be payable at above Seller address, or at such other place as the Seller may designate in writing, in monthly installments to start at
- 2nd*
27,093.50 _____ for the first year (12 months). Monthly payments to commence on 1st day of Aug., 2007, and to be paid on the first day of each month thereafter until the principal and interest are fully paid, except that the final payment of principal and interest, if not sooner paid, shall be due and payable on the first day of _____, 20__.

Section 9 states that:

9. Buyer shall pay and be responsible for the payment of all taxes and assessments from escrowed in mortgage payment due and payable in _____ X _____. There is no proration of taxes, buyer having assumed liability for paying these taxes as part of this transaction.²

Section 3 entitles Buyer to a deed when Buyer completes the contract:

3. When the Buyer has paid the full purchase price as set forth above, with interest due in the manner and at the time as required by the terms and conditions required of the Buyer by the terms and conditions of this Contract, Seller agrees to convey the above described property to the Buyer by Deed of General Warranty, with releases of dower, if any, or by such other Deed as is available when the Seller is legally unable to deliver a Deed of General Warranty. Such Deed shall be sufficient to convey title to Buyer free from encumbrances except those set forth in this Agreement or arising through any acts of the Buyer, and except restrictions imposed by zoning ordinances, or restrictions, reservations, and easements of record, if any.

Section 12 sets out the Seller's remedies in the event of default:

² Section 9 probably should be read in conjunction with the penultimate paragraph of section 2, which reads:

In addition to payments of principal and interest hereunder, Buyer shall pay Seller, monthly, amounts sufficient to fund an escrow account for taxes and insurance which presently equal \$ _____ per month. The total monthly payment required as of the closing date therefore is \$ _____. At such time as the escrow payments must be increased or decreased to cover taxes and insurance, Seller shall notify Buyer and Buyer's monthly installments shall be adjusted accordingly. Payments made by Buyer shall be applied first to escrow, second to interest and the balance to principal. Principal may be prepaid at any time, without charge or penalty.

12. If any installment payment is not paid when due, or if the Buyer fails to perform any of the covenants and agreements of this Agreement as stipulated, or [sic][and?] within thirty (30) days after receiving written notice of default thereof the Buyer has not corrected such default, the unpaid balance shall become due at the option of the Seller, or the Seller may initiate forfeiture of the Buyer's interest and retain all installment payments and [sic][as?] liquidated damages for the Buyer's nonperformance and may retake possession of the property, all as provided by law.

Section 7 provides that the Seller agrees to deliver possession of the property to Buyer "at once." It is undisputed that Carter and Rouse took possession of the property on or about the signing of the contract.

An issue that has been raised is the failure of the contract to be notarized and recorded in the County Clerk's Office. Indeed, section 8 of the contract contemplates that the Buyer will cause the contract to be recorded. The fact that the contract was neither notarized nor recorded does not make it invalid or unenforceable as a matter of law. The New York Statute of Frauds in this area – General Obligations Law §5-703 provides that a contract for the sale of an interest in real property must be in writing and subscribed by the party to be charged or by his lawfully authorized agent. It does not require that a land contract (nor a deed for that matter) be acknowledged before a notary. Further, it is not required that a deed or land contract be recorded in order to be effective, although recording is a near universal practice.

"[A] purchaser need not record his contract to purchase real property, either during the executory period of the contract, or after it is fully executed. It is only if the benefit of the protection of the recording act is sought by him that recording is necessary" (1 Rasch, Property Law and Practice §965 p. 609 [1962])

"As a practical matter, the basic purpose of the recording acts is to prevent a grantor from selling or conveying the same property more than once" (Real Estate Titles 17 [1984]). The effect of a failure to record is well-settled:

"Every executory contract for the sale, purchase or exchange of real property not recorded as required by section 294 of the Real Property Law shall be void as against any person who subsequently purchases or acquires by exchange, or contracts to purchase or acquire by exchange, the same real property or any portion thereof, ... in good faith and for a valuable consideration, from the same vendor or assignors, his distributees or devisees, and whose conveyance, contract or assignment is first duly recorded, and shall be void as against the lien upon said real property or any portion thereof arising from payments made upon execution of or pursuant to the terms of a

contract with the same vendor, his distributees or devisees, if such contract is made in good faith and is first duly recorded” (1 Rasch, Real Property Law and Practice §965 p. 608 [1962]); 92 NY Jur., Records and Recording §119 [2004])

The relevance (or not) of the failure to record the land contract comes into play when considering the next transaction by William Halling, as well as the summary proceedings to evict Ms. Rouse in the Sodus Town Court. At this juncture, however, it is enough to note that the land contract is not defeated as a matter of law simply because it was not acknowledged before a notary or recorded in the County Clerk’s Office. So too, the contract was not written to be strictly personal between William Halling and his buyers, so to discharge their respective obligations thereunder upon transfer and/or assignment of their respective interests in either the contract or the underlying property. Section 19 states that the agreement “shall be binding on and shall inure to the benefit of the heirs, executors, administrators, successors, and assigns of the parties herein.”

**C. 2008 Deed From William Halling to Shannon V. Halling,
David R. Halling, and William Halling.**

By warranty deed dated August 28, 2008, and recorded September 11, 2008, in the Wayne County Clerk’s Office, William Halling conveyed the 5319 Route 14 property to the following grantees specifying their respective interests:

Shannon V. Halling and David R. Halling residing at 315 Princeton Road, Webster, New York 14580, as tenants in common, each owning an undivided one-half interest and William Halling as owner of a life estate.

The deed states that the conveyance is made subject to “easements, covenants, and restrictions of record” and that “[t]he life estate reserved to the Grantee William Halling shall be at no cost to him.” There is no mention of the land contract or the outstanding mortgage(s) upon the property.

As indicated above, “an unrecorded deed, mortgage, lease, or other instrument affecting the title to land is valid as between the parties thereto ...” (92 NY Jur., Records and Recording §119 [2004]). Clearly, then, William Halling continued to be bound by the land contract in his capacity as a life tenant of the property. Whether Shannon and David Halling are so bound depends upon their status as bonafide purchasers “in good faith and for a valuable consideration” within the meaning of Real Property Law §291 without notice of the land contract, actual or constructive (*see* 91 NY Jur., Real Property Sales and Exchanges §156 [2004]) [“Generally, a prior equitable right is cut off

by the subsequent acquisition of the legal title by an innocent third party for value, without notice of the preexisting equity.”]). Shannon and David are the children of William Halling and were teenagers at the time of their father’s transfer of the property to them. There is no evidence that either Shannon or David had actual notice of the land contract until proceedings in early 2012 when Ms. Rouse disclosed the contract to their attorney in the Sodus Town Court.³ The attorney disclaimed any knowledge of the land contract. According to David’s testimony, he regarded Ms. Rouse as a “squatter.” It appears that neither Shannon or David paid any consideration for the property (no transfer tax assessed) and that neither had anything to do with the properties’ finances or had any dealings with Ms. Rouse, those being conducted by William Halling, the life tenant and contract vendor. Indeed, so far as the record reveals, the Halling children were titled owners in name only, never having exercised any of the rights and responsibilities of property ownership or interests therein, their father having continued to receive the installments under the contract and paying the mortgage on the property. These facts certainly undercut any claim that they were bonafide purchasers of the property for valuable consideration.

III. 2012 SUMMARY PROCEEDINGS BEFORE THE SODUS TOWN COURT

By petition dated and verified January, 2012, Shannon Halling commenced summary proceedings against Mary Rouse alleging in the first paragraph of her petition:

1. Respondent Mary Rouse is the tenant of said premises [5319 Route 14] who entered in possession thereof under an oral month to month rental agreement made on or about sometime in 2007 between respondent and the landlord (landlord’s predecessor), for the term of month to month and continued therein under the terms of the original agreement, the last month commencing on December 1, 2011, and ending on December 31, 2011, at the rental of \$1,642.76 for each month payable on the 1st day of each month.

The petition further alleged that written notice of termination and written notice to quit were served upon Rouse on November 26, 2011, and that she continued in possession of the premises without permission, and the \$1,6442.76 rent for December had not been paid. The petition concluded with

³ The Halling children may have had constructive notice, however, due to the possession of the premises by Ms. Rouse. “Possession of real estate is a fact putting all persons on notice of the existence of any right which the person in possession is able to establish” (91 NY Jur., Real Property Sales and Exchanges §160 [2004])

a request for final judgment “awarding possession of the premises to the petitioner-landlord; issuance of a warrant to remove respondent from possession thereof; judgment for rent in arrears against respondent-tenant for \$1,642.76; fair value of use and occupancy; interest from January 18, 2012; costs and disbursements.”

On the return date on January 18, 2012, before the Town Justice, the Court opened the matter by noting that at issue was a petition seeking to recover possession of real property allegedly occupied by Ms. Rouse pursuant to a month-to-month tenancy that terminated December 31, 2011, by virtue of written notice to that effect, purportedly effected by substituted service in November. Ms. Rouse strenuously opposed the petition stating that she had “ a land contract that was signed with Bill Halling back in 2007, that was a fifteen year contract, for the purchase of the property.” She further stated that “sometime after 2007, Bill signed the property over to his son and daughter after he made the contract out with us.” She also said that she did not receive the notice allegedly served in November by substituted service, and that, in any event, she was now current if not ahead in payments at the time the notice was allegedly served, and now only owed December and January, which she was prepared to pay then and there. She further stated that she did not receive the Notice of Petition and Petition notwithstanding the affidavit of service filed with the Court.

The attorney for the petitioner stated that he had not seen the land contract upon which Ms. Rouse was relying, but dismissed the same, stating that it was with William Halling, not his children, David and Shannon, who were now the owners. The attorney further stated that the land contract was not notarized or recorded in the County Clerk’s Office and therefore was not “proper.” The Court stated that it was its understanding “that anytime there is a lapse in rent a land contract is null and void.” As such, said the Court, petitioners have the “right to recover their property because it is a month to month tenancy.” Further, the Court stated that “once [the property] was turned over to a different party .. you do not have a relationship with [the prior owner] for rent or anything else.” The Court went on to indicate that the present owners were not bound by the land contract, were thus entitled to possession, and that any remedy by Ms. Rouse for breach of the land contract by William Halling for transferring of the property could only be found in a separate action by Ms Rouse against William Halling. Having so dispatched the land contract, the Court found the petition and affidavit of service sufficient to issue a warrant of eviction. The Court informed Ms Rouse that any rights she

may have under the land contract would have to be vindicated by the County Court. The Judge said that “his hands are tied, because the titled people are [William Halling’s children] not [William Halling]. The agreement you [Rouse] had with [William Halling] is gone ... There is nothing I can do except issue a warrant of eviction.” If the present owners - the Halling children - did not sign an agreement otherwise, “it’s a month-to month basis with whomever owns the property. There’s nothing I can do about that any different.” The Halling children “are looking to recover real property, they have a right to have their property back, they are the registered owners.”

Based upon what is in the present record regarding the Town Court proceedings, it appears there was no evidentiary hearing upon the merits of the petition. None of the Hallings were present, and their attorney had no personal knowledge of the facts. At a minimum, when Ms. Rouse disputed service of the predicate notices, a hearing should have been held on that issue alone. An affidavit of service cannot substitute for a hearing where the fact of service is contested. In such cases, proper service is generally established by a witness who is subject to cross-examination. The opposing party has the right to present contrary evidence. No witnesses in support of the petition were presented, no sworn testimony taken, and sharp issues of fact arose by virtue of Ms. Rouse’s oral response to the petition.

IV. LAND CONTRACT - SUBSTANTIVE LEGAL PRINCIPLES

The role of land contracts has been aptly described as follows:

The installment land contract has a special role in real estate practice. It is, as one court has explained, the ‘poor man’s mortgage.’ Installment contracts are commonly signed by purchasers who lack the equity and the credit rating to obtain traditional mortgage financing. When a vendor can rely on a forfeiture clause and know that she can recover her property without the delays and costs of foreclosure, she will often sell with a lower down payment, and to a purchaser who cannot satisfy the loan criteria of traditional mortgage lenders. In addition, closing costs are often minimal under installment contracts. With no deed delivered until all the payments are made, purchasers usually forgo title searches. With no outside lender, a purchaser need not pay loan origination fees or await loan processing. Without the cautious, demanding presence of an outside lending institution, purchasers often avoid the time and expense (as well as the protections) of property inspections and appraisals. For a purchaser with only a little money to invest, however, the installment land contract can provide the only possible method for purchasing real estate.” (Freyfogle, *Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures*, 1988 Duke L.J. 609, 611)(citations omitted)

In earlier times, the courts' treatment of defaulting purchasers was somewhat draconian:

Courts enforced forfeiture clauses with few questions asked, except perhaps when a forfeiture was shocking in amount or otherwise grossly unfair. A vendor with an enforceable forfeiture clause could declare a default and forfeiture when a purchaser missed a payment. After the declaration, the vendor could recover his property and retain all of the purchaser's payments" (*Id.* at 609)

In modern times, "several states have undertaken to protect defaulting purchasers by requiring vendors to foreclose installment contracts as if they were mortgages ...New York courts have adopted a nearly identical approach." (*Id.* at 631, 633). New York law on this subject has been stated as follows:

"An equitable mortgage has been defined as a transaction that has the intent but not the form of a mortgage and that a court will enforce in equity to the same extent as a mortgage... The quantum of a purchaser's equity under an installment contract for the sale of land, which provides for absolute forfeiture on any default, may require that the transaction be deemed an equitable mortgage. One of the factors to be considered, in determining whether the transaction will be deemed an equitable mortgage, is whether the installment payments of interest and principal are structured like a conventional mortgage, with provisions for late charges and escrow payments. However, if the purchaser's equity is minimal, that there have been no significant improvements insulating the seller from impairment of security, a court will not be reluctant to conform a forfeiture and grant relief by way of ejection. Indeed, an installment contract providing for forfeiture has been held not to constitute an equitable mortgage where the purchaser had paid 23% of the purchase price prior to default.

The burden of establishing both the existence and the validity of an equitable mortgage on land rests on the person seeking to enforce it" (77 NY Jur., Mortgages and Deeds of Trust §20 [2003]).[footnotes omitted]).

In cases of equitable mortgages (also called equitable liens), the courts allow remedies in the event of payment default.

"The law is firmly settled that if a purchaser of land by executory contract defaults in payments, the vendor may pursue the equitable remedy of 'foreclosure of the contract,' The equitable lien is a legal invention to protect persons who have parted with possession of realty without security" (17 Carmody-Wait2d, Foreclosure of Land Contracts §98:1 [1998, as supplemented])

"The courts of equity, to preserve better the rights of the parties, have imposed peculiar characteristics on land contracts, particularly where the purchaser has possession. The equitable remedies available arise from those characteristics. Thus, on the execution of a contract for realty, the purchaser acquires an equitable

title, and the vendor holds the legal title in trust for the purchaser and has an equitable lien for the payment of the purchase price” (Id. at §98:3)

“ A vendor has the concurrent right to enforce the lien by means of a foreclosure action and to bring an action at law for the purchase price of the property. The existence of these two remedies is a function of the fact that an action at law might be ineffectual if the purchaser is unable to render pecuniary compensation, thus rendering equitable relief the only effective remedy because the lien is established.

Upon the execution of a contract, an interest in real property comes into existence by operation of law, superseding the terms of the contract.”

Generally, a vendor cannot recover possession of the property by summary proceedings, even where the contract of purchase provides that on default the vendor may treat the purchaser as a tenant holding over without permission. A vendor under a land contract cannot maintain a summary dispossess proceeding against a purchaser for failure to pay installments due; rather, the vendor’s remedy is an action against the purchaser for the unpaid installments.

A summary proceeding is available to dispossess a purchaser who retains possession after default only if expressly authorized by statute. A summary proceeding may be maintained where a purchaser, under a contract of sale, the performance of which is to be completed within 90 days after its execution, being in possession of all or part of the contract of sale, remains in possession without permission of the vendor” (Id. at 98:6)

It is also true, that “a vendee under a land contract in foreclosure ... is entitled to possession until foreclosure is completed” (*Duke v Werbalowsky*, 115 AD2d 947 [4th Dept 1985]).

V. DISCUSSION AND DECISION

It is clear to this Court that the written agreement between William Halling and Rouse/Carter dated July 28, 2007, is a land contract. It is titled “Land Contract Variable Payments” and has all the indicia of a land contract, albeit very poorly drafted.” The preamble does state that “[t]his agreement is a lease option where the buyers may return the house to the seller at any time after five years.” However, there is no other language in the agreement even remotely describing a lease arrangement or any option. The Court reads this language as conferring a right upon the Buyer to cancel the agreement after five years. So too, the recitation in the hold over petition to the Sodus Town Court and repeated in that court’s warrant of eviction that the parties entered into a oral month-to-month tenancy “sometime” in 2007 is manifestly incorrect. Carter/Rouse took possession under a written agreement in 2007 regardless of how one wishes to characterize their agreement.

The issue raised by the Hallings that creates a genuine issue of fact, in this Court's view, is whether Rouse abandoned or waived any rights she may have had under the contract and consented to retain possession under an oral month-to-month tenancy with the Hallings. William Halling testified at the hearing before this Court on October 22nd that "the contract was cancelled in 2009" and "we all walked away from it, and they [Rouse/Carter] agreed to pay only my mortgage" This agreement to cancel "was verbal" and without written documentation. Mr. Halling testified that

"[i]t was done because her and Gary Carter were splitting up, and they were having financial problems. They were at that time - I have to look at my records, four or five months behind." Thus, "I talked to them about transferring from a Land Contract to just taking the property and leasing the property, and paying my mortgage payment. That was the agreement we had, where she was going to pay my mortgage payment." Mr. Halling further explained: "We had an agreement that she would pay my mortgage payment, okay, because I was in Arizona, and I said that's all I want - I want to make sure the mortgage is covered and if and when you decide to purchase, we could discuss my equity. That's why Mary Rouse's checks, and I should say Carter's checks match my mortgage payment dollar for dollar, penny for penny. They don't match the Contract ... They match my mortgage payment."⁴

Mr. Halling further testified that under the land contract Rouse was to make the mortgage payment plus \$150 per month "equity" payment; that is, an amount to make up the difference between the mortgage and the purchase price. After the lease agreement supplanting the land contract, Rouse stopped making the equity payments. Mr. Halling also testified that his deposit records confirm that the equity payments ceased when the parties agreed to forget the land contract and go to the lease arrangement.

In response, Mary Rouse testified that the discussions testified to by Mr. Halling never happened, and that she never agreed to any lease arrangement, and that Mr. Halling was inaccurate regarding the payments he received from her, substantially understating them.

⁴ Mr. Halling testified similarly later in the hearing:

William Halling: I'm not denying that this Land Contract was, at once in force.

The Court: But at one point, if I understand your testimony, was that Carter and Rouse got significantly behind in their payments. You had a discussion with them; and at that point, is like, well, let's forget the Land Contract . You can stay on as Tenants and just pay me the amount of the mortgage. Is that your testimony?

William Halling: I had that agreement with Mary, because Carter was already gone.

If Mr. Hallings' testimony is to be credited, there is a triable issue here:

§176 Abandonment of contract.

Generally, abandonment of a contract need not be express but may be inferred from the conduct of the parties and the attendant circumstances. A contract will be treated as abandoned when one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior... An abandonment of a contract by mutual consent is effective to discharge its obligations, even when a new contract containing one or more of the same terms is simultaneously entered into"(91 NY Jur., Real Property Sales and Exchanges §176 [2004]).

Given the state of the record, the Court deems that circumstances warrant continuation of the stay pending appeal as well as a preliminary injunction barring Mary Rouse's removal from the premises pending final determination of these matters,⁵ conditioned upon the same terms and conditions heretofore imposed by the Court as well as the stipulated timely payment to Halling in the requisite amount agreed to by Rouse in open court on October 22nd.⁶

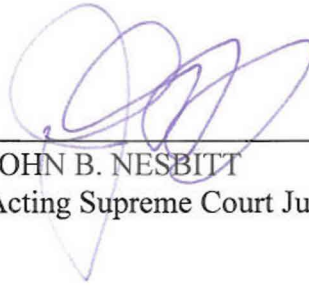
Counsel for Ms. Rouse will submit a proposed order consistent with this decision upon notice to the other parties. The Court will schedule a further court appearance to settle upon a scheduling order and a final trial date. The Court requests that the parties consult upon a date that would meet their respective schedules and communicate the same to the Court. The Court would also ask the

⁵ The Court credits Ms. Rouse's testimony that without possession of the property and the income derived from the horse boarding business conducted thereon, she will be unable to make the payments due upon the land contract.

⁶ William Halling and Mary Rouse, through her attorney, agreed that, pending resolution of this matter, that Rouse pay to Halling promptly on the first of the month exactly "what his mortgage payment is." If that is done, then Mr. Halling stated that "I have no problem with this proceeding going forward, but I'm not going forward as a deficit to me unless she is off the property." Mr. Krause then state, "for the record, your Honor, the [Bank] notice we received says that, as of [November] 1st, the amount due is \$1,989.36. I becomes \$2,006.51 if not received by the 15th. ... So on the 1st, my client has to tender \$1,989.36." The Court then asked Mr. Halling if "that is all right," to which he responded "that's fine ... and that well continue continue on the 1st of every month until this proceeding is completed," to which Mr. Krause responded "yes." Mr. Halling added that "I don't have a problem as long as my original ...commitment is met, and as I've asserted, my original commtment was, she was going to pay - that she would pay my mortgage ... [then] I don't have a problem. Mr. Krause then stated "if it goes up, your Honor, we don't need to come back. If Mr. Halling just provides me with a notice from the [bank], I will direct my client to make the appropriate adjustments, and I'm putting that on the record. So, he [Halling] needn't make application to the Court."

parties to consider stipulating as to the correct amortization schedule that would pertain to the land contract as it was originally prepared,⁷ that being without prejudice to the claim that the contract was mutually rescinded and/or materially breached, warranting judgment to that effect, and appropriate declaratory and equitable relief. So too, the parties should consider, if they can, stipulating as to the amounts and dates of payments made to Mr. Halling.

Dated: November 18, 2013
Lyons, New York



JOHN B. NESBITT
Acting Supreme Court Justice

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WAYNE COUNTY
SUPREME AND COUNTY COURT

⁷ Ms. Rouse testified that it worked out to a fifteen year term, while Mr. Halling testified that it was a thirty year term.