

11 U.S.C. § 548(a)(2)
BFP v. Resolution Trust Corp.
Reasonably Equivalent Value
Land Sale Contract Forfeiture

Trevette R. Vermillion v. Stewart and Nancy Scarbrough,
In re Vermillion.

Case No. 693-62730-psh11
Adv. No. 93-6173-psh

12/23/94

PSH

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Debtors lost real property to the defendants through a land sale contract forfeiture and brought an action in their bankruptcy under 11 U.S.C. § 548(a)(2) to recover the property. They claimed that the amount they received in the forfeiture (i.e. the cancellation of the remaining balance of the contract) was not reasonably equivalent value for their forfeited interest in the property.

The court applied the holding of BFP v. Resolution Trust Corp. to find that the forfeiture procedure conducted pursuant to state law established reasonably equivalent value as a matter of law. The court also held that the forfeiture may be voided if a court determined it was unconscionable, but that the debtors had not pleaded unconscionability.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)	
)	
TREVETTE R. VERMILLION,)	Case No. 693-62730-psh11
)	
<u>Debtor.</u>)	
)	
TREVETTE R. VERMILLION,)	
)	
Plaintiff,)	
vs.)	Adversary No. 93-6173-psh
)	
STEWART SCARBROUGH and)	
NANCY SCARBROUGH,)	
)	MEMORANDUM OPINION
<u>Defendants.</u>)	

This matter is before the court, and is ripe for decision, on the defendants' motion for summary judgment. The plaintiff, a Chapter 11 debtor-in-possession, (hereinafter "debtor") relies on 11 U.S.C. § 548(a)(2) to recover real property which he lost through a land sale contract forfeiture. The defendants have asked the court to apply the holding of BFP v. Resolution Trust Corp., ___ U.S. ___, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) to find that as a matter of law the forfeiture cannot be avoided as a fraudulent transfer under § 548.

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2 I. Facts

3 The facts are undisputed. In 1978 defendant Diane Scarbrough
4 acquired the vendee's interest in a contract of sale (hereinafter
5 the "Hilderbrand/Bridges contract") of certain real property
6 situated in Jackson County, Oregon (hereinafter the "property").
7 In 1980 she conveyed her interest in the property to herself and
8 co-defendant Stewart Scarbrough. In 1982 they conveyed their
9 interest in the Hilderbrand/Bridges contract to Michael Grassmueck
10 with Grassmueck becoming obligated to pay the contract according to
11 its terms. As part of this sale the defendants also entered into a
12 contract with Grassmueck ("Scarbrough/Grassmueck contract") whereby
13 Grassmueck agreed to pay them an additional \$47,074.05 in
14 installments with a balloon payment due on July 5, 1992. The
15 contract provided for forfeiture in case of default. In 1986
16 Grassmueck assigned his interest in both the Hilderbrand/Bridges
17 and Scarbrough/Grassmueck contracts to the debtor who assumed the
18 vendee's liability under both. In 1988 the debtor paid Hilderbrand
19 the remaining balance due on the Hilderbrand/Bridges contract.
20 Thereafter the debtor and the defendants held the only interests in
21 the property.

22 The debtor defaulted on his payments to the defendants under
23 the Scarbrough/Grassmueck contract. On November 13, 1992, they
24 recorded a declaration of forfeiture following the statutory
25 procedure mandated by ORS 93.905 et seq.. The debtor has
26 stipulated that the contract forfeiture procedure was regularly

1 conducted. At the date of the forfeiture the debtor owed the
2 defendants \$40,873.57. Under Oregon law the debtor's interest in
3 the property was extinguished on November 13, 1992, the date the
4 declaration of forfeiture was recorded. The right to possession of
5 the property vested in the defendants ten days thereafter. ORS
6 93.930. The plaintiff filed his Chapter 11 bankruptcy petition on
7 June 28, 1993.

8 II. Land Sale Contracts in Oregon

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10 When a vendor sells Oregon real estate under a land sale
11 contract she retains legal title until the contract is paid. She
12 then must execute a deed to the vendee. During the contract period
13 the vendee has possession of the property and is generally
14 obligated to pay all taxes, make repairs and maintain casualty
15 insurance on the property.

16 Three default remedies commonly used in Oregon and other
17 states upon default under a land sale contract are forfeiture,
18 strict foreclosure, and a suit in equity for specific performance
19 for the contract price.¹ The first two remedies must be included
20 in the contract to be available to the vendor. The third remedy is
21 available in all circumstances.

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¹ Other less commonly used remedies available are rescission and an action at law for past due installments. See generally, Spencer, Remedies Available Under a Land Sale Contract, 3 Willamette L.J. 164 (1965).

1 With strict foreclosure a court orders the vendee to pay the
2 amount due on the contract within a period set by the court.² If
3 the vendee is unable to pay the amount due the court confirms the
4 vendor's title to the land and orders possession of the property to
5 her. The vendee's interest in the property is terminated and past
6 installment payments made are forfeited. Alternatively, the court
7 may use its discretionary power to order a foreclosure sale.

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9 In a suit for specific performance the court orders the vendee
10 to pay the amount due on the contract which, as with strict
11 foreclosure, may be the accelerated balance due under the contract.
12 The court orders a foreclosure sale if the vendee cannot pay in the
13 time allotted by the court.

14 After any court-ordered sale under either strict foreclosure
15 or specific performance the vendor is entitled to a judgment
16 against the vendee for any unpaid balance still due on the
17 contract. The vendee or a junior lienholder may have a statutory
18 right of redemption of the property after the judicial foreclosure
19 sale.³

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21 ² If the contract provides for acceleration upon default, the
22 vendee would be required to pay the remaining balance of the land
23 sale contract. If the contract does not so provide, the vendee
would be in default only for the missed installments.

24 ³ A statutory right of redemption is a right given by statute
25 to certain parties to redeem the property after a foreclosure sale
26 by paying the foreclosure sales price to the purchaser plus, in
some instances, certain other amounts (e.g. the costs of the sale).
The Oregon Court of Appeals has held that there is **no** statutory
right of redemption after a judicial sale ordered pursuant to a
proceeding for **specific performance** of a land sale contract. EMCO
Investment, Inc. v. Vaden, 60 Or.App. 762, 655 P.2d 220 (1982);

(continued...)

1 A third default remedy available to a vendor is that of
2 forfeiture. When the vendor elects this remedy she declares the
3 contract terminated and retains the vendee's prior payments as
4 liquidated damages. ORS 93.930(2)(b). She must comply with strict
5 default notice requirements. The notice of default and an
6 affidavit of service must be recorded. ORS 93.915. The number of
7 days the vendee has to cure the default depends on the amount of
8 equity he has in the contract. In Oregon this period runs from 60
9 to 120 days. ORS 93.915(3). If the default consists of nonpayment
10 of installments due it may be cured by paying all past-due
11 installments. If the vendee cures the default within the
12 prescribed time the parties continue under the original contract as
13 if no default had occurred. The property interest of any person
14 claiming through the vendee is unaffected by any of the vendor's
15 acts on default unless he receives notice. He also may cure the
16 default. ORS 93.940. After expiration of the cure period without
17 cure the vendor must record a declaration of forfeiture in the
18 county where the property is located. This declaration is deemed
19 conclusive as to the forfeiture of all the vendee's interest in the
20 property as to any purchaser for value in good faith relying upon
21 it. ORS 93.930. If the value of the forfeited property does not
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25 (...continued)

26 Cooley v. Powers, 80 Or.App. 591, 723 P.2d 348 (1986).
Alternatively, the Supreme Court has held that there **is** a statutory
right of redemption from a **strict foreclosure** sale. Land
Associates, Inc. v. Becker, 294 Or. 308, 656 P.2d 927 (1982).

1 fully reimburse the vendor for any unpaid contract balance she may
2 not obtain a deficiency judgment from the vendee. ORS 93.935.

3 III. Section 548

4 11 U.S.C. § 548 says in relevant part:

5 (a) The trustee may avoid any transfer of an interest of
6 the debtor in property . . . that was made or incurred on
7 or within one year before the date of the filing of the
petition, if the debtor voluntarily or involuntarily--

8 . . .

9 (2) (A) received less than a reasonably
equivalent value in exchange for such transfer
10 . . .; and

11 (B) (i) was insolvent on the date that such
transfer was made . . ., or became insolvent as
12 a result of such transfer . . .;⁴

13 In order for the debtor under our facts to prevail at trial
14 under § 548(a)(2) he must establish the following elements:

15 1) that the debtor had an interest in property;

16 2) that a transfer of that interest occurred within one year
17 of the filing of the bankruptcy petition;

18 3) that the debtor was insolvent at the time of the transfer
19 or became insolvent as a result thereof; and
20

21 _____
22 ⁴ "Transfer" is defined under the Bankruptcy Code as "every
23 mode, direct or indirect, absolute or conditional, voluntary or
24 involuntary, of disposing of or parting with property or with an
25 interest in property, including retention of title as a security
26 interest and foreclosure of the debtor's equity of redemption." 11
U.S.C. § 101(54). The last phrase was added in 1984 clarifying
that foreclosure sales fall within this definition. Although
forfeiture of an interest under a land sale contract is not
specifically mentioned, this definition is broad enough, and,
particularly in light of the 1984 clarification, should be
interpreted, to include such forfeiture. "Value" is defined to
include the satisfaction of a debt. 11 U.S.C. § 548(d)(2)(A).

1 4) that the debtor received "less than a reasonably equivalent
2 value in exchange for such transfer." BFP, 114 S.Ct. at 1760
3 (citing 11 U.S.C. § 548(a)(2)).

4 The debtor argues that the forfeiture of his interest in the
5 property is avoidable because the monetary benefit he received,
6 cancellation of the unpaid balance of the Scarbrough/Grassmueck
7 contract, was not the reasonably equivalent value of his forfeited
8 interest in the property as measured by the property's fair market
9 value.

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11 IV. BFP v. Resolution Trust Corporation

12 The BFP Court rejected the proposition that "reasonably
13 equivalent value" is the equivalent of fair market value.⁵ It
14 held, rather, that "reasonably equivalent value" for property
15 foreclosed upon "is the price in fact received at the foreclosure
16 sale, so long as all the requirements of the State's foreclosure
17 law have been complied with." BFP, 114 S.Ct. at 1765. The Court
18 stated that its holding was limited to "mortgage foreclosures" of
19 real estate.⁶ However, the analysis upon which the Court rests its
20

21 ⁵ Fair market value is defined as [t]he amount at which
22 property would change hands between a willing buyer and a willing
23 seller, neither being under any compulsion to buy or sell and both
having reasonable knowledge of the relevant facts." BLACK'S LAW
DICTIONARY 537 (5th ed. 1979).

24 ⁶ BFP, 114 S.Ct. at 1761 n.3. While the Court limited its
25 holding to "mortgage foreclosures," it must also cover trust deed
foreclosures as BFP took the property subject to a deed of trust.
26 The BFP holding has recently been extended to tax foreclosure
sales. See, McGrath v. Simon, 170 B.R. 78 (Bankr. D.N.J. 1994);
T.F. Stone Companies, Inc. v. Harper, 170 B.R. 884 (Bankr. N.D.
Tex. 1994). But see, Butler v. Lejcar, 171 B.R. 321, 326 n.6

(continued...)

1 holding has equal relevance within the context of forfeitures of
2 Oregon land sale contracts.

3 The Court majority denied that "reasonably equivalent value"
4 is an unambiguous term. While agreeing that its use requires the
5 court to examine the relationship between any value received by the
6 debtor and the "worth" of the property transferred, it concluded
7 that the term gives no directive on the method for measuring that
8 "worth." BFP at 1765. After examining two methods of measurement,
9 fair market value and a reasonable forced sale price, it rejected
10 both.

11 The Court pointed out that while other sections of the
12 Bankruptcy Code use the term "fair market value", the drafters seem
13 almost consciously to have avoided using it in § 548. BFP at 1761.
14 "[I]t is generally presumed that Congress acts intentionally and
15 purposely when it includes particular language in one section of a
16 statute but omits it in another." Id. (citation omitted). Further,
17 "fair market value presumes market conditions that, by definition,
18 do not obtain in the forced-sale context, since property sold
19 within the time and manner strictures of state-prescribed
20 foreclosure is simply worth less than property sold without such
21 restrictions." BFP at 1761.

22 Nor is "reasonably equivalent value" to be equated with some
23 federally defined "reasonable" forced-sale price. "To specify a
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(...continued)
(Bankr. N.D. Ill. 1994)(in dicta stating "the rationale applied in
BFP may not be applicable with respect to tax sales in Illinois").

1 federal 'reasonable' foreclosure-sale price is to extend federal
2 bankruptcy law well beyond the traditional field of fraudulent
3 transfers, into realms of policy where it has not ventured before."
4 BFP at 1763. Historically the states have established both the law
5 of fraudulent transfers and foreclosures. Congress must provide
6 "clearer textual guidance than simply the phrase 'reasonably
7 equivalent value'" if the Bankruptcy Code is to be interpreted to
8 invade traditional state interest in the security of titles to real
9 estate. BFP at 1764.

11 V. Application of BFP to
12 Oregon Land Sale Contract Forfeitures

13 Upon receipt of a notice of default under an Oregon land sale
14 contract the vendee may market his interest in the property for a
15 limited period of time. As with property sold through foreclosure,
16 due to time and procedural constraints this interest is then worth
17 less than fair market value.

18 States traditionally have not only prescribed the law of
19 fraudulent transfers and foreclosures but also have fashioned the
20 procedures governing sale and forfeiture of real estate under land
21 sale contracts. There is common and widespread use of land sale
22 contracts in Oregon. Securing real estate titles obtained through
23 this method of conveyance is in Oregon's basic interest. Invasion
24 of this interest by applying some standard which represents a
25 "reasonable" or "fair" price for any forfeited real estate interest
26 is also unjustified.

1 This court believes that its holding has particular cogency
2 when applied in those states, such as Oregon, whose legislatures
3 and courts have taken steps to assure that a proper balance be
4 struck between the rights of the vendor and vendee under land sale
5 contracts. Prior to 1985 Oregon courts held that vendees under
6 land sale contracts had certain rights similar to those accorded
7 mortgagors. In 1979 the Oregon Supreme Court held that a
8 declaration of forfeiture under the terms of a contract providing
9 the vendor with alternative remedies is effective only if the
10 vendor first gives the vendee notice and a reasonable redemption
11 period. See, Elsasser v. Wilcox, 286 Or. 775, 781, 596 P.2d 974,
12 976 (1979). The Oregon Court of Appeals recognized in 1981 that
13 the land sale contract is something more than a simple contract,
14 calling it "primarily a security device." Braunstein v. Trotter, 54
15 Or.App. 687, 691, 635 P.2d 1379, 1381 (1981). "The vendor under
16 the contract is said to have a vendor's lien on the property." Id.
17

18 When the Oregon legislature acted in 1985 to codify the rules
19 governing contract forfeitures it balanced the rights of the vendor
20 and vendee by requiring that the vendee and others holding an
21 interest through him be given notice and an opportunity to cure the
22 default and by eliminating the possibility of a deficiency judgment
23 while giving protection from procedural defects to the vendor's
24 bona fide purchaser for value and cutting off the vendee's rights
25 in the property at the date of forfeiture.
26

1 Notice, reasonable opportunity to cure and strict adherence to
2 statutory requirements are procedural protections afforded
3 defaulting parties under mortgage and trust deed foreclosure
4 proceedings. The Oregon forfeiture procedure also includes these
5 protections. The land sale contract forfeiture statute, however,
6 unlike the former procedures, does not mandate the property's
7 sale. This court has concluded that if the forfeiture procedure
8 has been regularly conducted pursuant to state law the analysis
9 upon which the BFP holding is based applies with equal validity
10 despite the absence of a sale as a mandated step toward elimination
11 of the defaulting party's interest. During the cure period the
12 vendee is free to sell his interest in the property if he must to
13 protect the equity he has acquired. Further, BFP emphatically
14 directs that federal law, in the absence of specific statutory
15 direction otherwise, be interpreted to support state laws in areas
16 of their traditional province. Section 548(a)(2) is found to
17 contain no such direction.
18

19 Under current Oregon law a forced sale may be set aside where
20 the amount paid for the property at the sale is so grossly
21 inadequate as to shock the conscience of the court.⁷ BFP
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24 ⁷ See, Thompson v. Thompson, 233 Or. 262, 268, 378 P.2d 281,
25 284 (1963) (execution sale) (citing Ahlstrom v. Lyon, 169 Or. 629,
26 139 P.2d 219 (1942); Nodine v. Richmond, 48 Or. 527, 87 P. 775
(1906)). This court has found no Oregon cases addressing
unconscionability within the context of land sale contract
forfeitures. This equitable principal however, is equally
applicable where the debt forgiveness is grossly inadequate in
relation to the value of the property forfeited.

1 recognized this as an exception to its holding.⁸ The plaintiff
2 here has not alleged unconscionability.

3 VI. CONCLUSION

4 Absent a debt so small as to shock the conscience,
5 cancellation of the remaining debt on an Oregon land sale contract
6 through a forfeiture procedure regularly conducted pursuant to
7 state law is "reasonably equivalent value" for the debtor's
8 interest in the property within the meaning of § 548(a)(2)(A). The
9 defendants' motion for summary judgment is granted.
10

11 This Memorandum Opinion contains the court's findings of fact
12 and conclusions of law and pursuant to Bankruptcy Rule 9014, which
13 incorporates Bankruptcy Rule 7052, they will not be separately
14 stated. An order consistent herewith will be entered.

15 POLLY S. HIGDON
16 Bankruptcy Judge
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25 ⁸ "When these [foreclosure] procedures have been followed . .
26 . it is 'black letter' law that mere inadequacy of the foreclosure
sale price is no basis for setting the sale aside, though it may be
set aside . . . if the price is so low as to 'shock the conscience
or raise a presumption of fraud or unfairness'." BFP at 1763.