Appeal No. SC No. 26373
Civil

IN THE
SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

In re:

L & L PARTNERSHIP, et. al.

Plaintiffs-Appellees,

vs.

DAVID M. FINNEMAN, CONNIE S. FINNEMAN,
ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO
DAVID M. FINNEMAN AND CONNIE S. FINNEMAN, et. al.

Defendant-Appellant (Rock Creek Farms).

ON APPEAL FROM THE
SEVENTH JUDICIAL CIRCUIT COURT
PENNINGTON COUNTY, SOUTH DAKOTA,
HONORABLE JAMES W. ANDERSON
CIRCUIT COURT JUDGE PRESIDING
Court File No. C10-316

APPELLANT'S OPENING BRIEF

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Notice of Appeal filed on June 1, 2012

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JURISDICTIONAL STATEMENT

Appellant-Defendant Rock Creek Farms Limited Partnership, hereinafter referred to as either "Rock Creek Farms" or "RCF," and Warrenn Anderson ("Anderson"), an individual and limited partner of Rock Creek Farms, appeal to this Court the Trial Court's stripping Rock Creek Farms of its statutory right to cure its predecessors-in-interest Defendants David M. Finneman's and Connie S. Finneman's ("Finnemans") breach of two contracts for deed the Finnemans entered into with Plaintiffs-Appellees L & L Partnership, a/k/a Lutz & Laidlaw Partnership ("L & L") involving approximately 9,400 acres of agricultural lands. Rock Creek Farms' Appeal is also based upon the Trial Court substituting Defendant Ann Arnoldy for Rock Creek Farms. This Appeal is further based upon the Trial Court's failure to grant Rock Creek Farms' Motion to Invalidate the Sheriff's Deed concerning these agricultural lands that was issued to Ann Arnoldy without prior notice to the landowner or Court approval. Rock Creek Farms filed its Notice of Appeal on June 1, 2012. Rec pp. 688-691.[1] Rock Creek Farms' Notice of Appeal was filed timely.

STATEMENT OF LEGAL ISSUES

Rock Creek Farms raises the following issues in this Appeal:

I. Did the Trial Court err in granting redemption rights to a stranger to the contracts for deed rather than allowing Rock Creek Farms to avail itself of its statutory right to cure its predecessors-in-interest Finnemans' default under the contracts for

[1] "Rec" refers to the record of the pleadings created by the Pennington County Clerk of Courts for this Appeal.

deeds?

The Trial Court stripped Rock Creek Farms of its right to cure its predecessors-in-interest Finnemans' default in the two contracts for deeds. The Trial Court allowed a junior lien holder, Ann Arnoldy, the right to redeem these agricultural lands from the contract for deed foreclosure. The Trial Court erred in doing so. The most relevant cases concerning this issue are:

a) *VanGorp v. Sieff*, 2001 S.D. 45, ¶14, 624 N.W.2d 712;

b) *Anderson v. Aesoph*, 2005 S.D. 56, ¶25, 697 NW 2d 25; *Scott v. Hetland*, 51 S.D. 303, 213 N.W. 732 (1927); and

c) *Heikkila v. Carver*, 378 N.W.2d 214 (S.D. 1985); Henderson, Justice (dissenting).

The most relevant statutory authority concerning this issue is:

a) SDCL § 21-50-3.

II. Did the Trial Court err in substituting Ann Arnoldy for Rock Creek Farms when she moved to be substituted for CLW?

The Trial Court substituted Ann Arnoldy for Rock Creek Farms and gave her redemption rights, even though Ann Arnoldy moved to be substituted for CLW and even though Ann Arnoldy requested that her Motion be considered post-Trial. The Trial Court did not consider Ann Arnoldy's substitution motion post-Trial. The most relevant case concerning this issue is:

a) *Ostwald v. Ostwald*, 331 N.W.2d 64 (S.D. 1983).

The most relevant statutory authority or rule of civil procedure concerning this issue is:

a) SDCL § 15-6-25(c).

III. Did the Trial Court err in denying Rock Creek Farms' Motion to Invalidate the Sheriff's Deed, which was issued without prior notice and which arose from the

foreclosure of only an equitable interest in the lands?

The Trial Court denied Rock Creek Farms' Motion to Invalidate the Sheriff's Deed, even though Rock Creek Farms had no prior notice of the issuance of the Sheriff's Deed, and even though the deed arose from the foreclosure of only an equitable interest in the lands. The most relevant cases concerning this issue are:

a) *Texas American Bank/Levelland v. Morgan, et. al.*, 733 P2d 864, 865, 105 N.M. 416 (1997); and

b) *Manufacturer's Bank & Trust Co. of St. Louis v. Lauchli*, 118 F2d 607, 610 (8th Cir 1941).

The most relevant statutory authorities concerning this issue are:

a) SDCL § 21-47-1 et. seq.;
b) SDCL § 21-50-1 et. seq.; and
c) SDCL § 21-52-1 et. seq.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

This Appeal concerns the Trial Court stripping Rock Creek Farms' of its statutory right to cure its predecessors-in-interest Finnemans' default in the two contracts for deed entered into between Finnemans and L&L. The Trial Court gave redemption rights to a stranger to the contracts for deeds. The contract for deed lands consist of approximately 9,400 acres of agricultural lands located in both Pennington and Meade counties, South Dakota. Rock Creek Farms acquired these lands from Finnemans by recorded Quit Claim Deeds.

These agricultural lands had numerous debts against them and were the subject of several separate foreclosure proceedings and two separate declaratory judgment proceedings, namely:

a) *FarmPro Services, Inc., v. David M. Finneman, et. al.*, filed in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, File No. C02-533 ("FarmPro Case");

b) *Michael Arnoldy and Ann Arnoldy v. David Finneman, et. al.*, filed in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, File No. C08-1845 ("Arnoldy Case");

c) *Rabo AgriFinance, Inc., et. al. v. David M. Finneman, et. al.*, filed in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, File No. C09-1211 ("Rabo Case");

d) *L & L Partnership, et. al. v. David M. Finneman, et. al.*, filed in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, File No. C10-316 ("L&L Case"); and

e) *David M. Finneman, et. al.* v. *L & L Partnership, et. al.,* filed in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, File No. CIV09-742 ("Finneman Dec. Action").

On March 18, 2011, Ann Arnoldy redeemed the agricultural lands from the foreclosure sale held in the Rabo Case. On May 26, 2011, the Rabo Court stripped Rock Creek Farms of its redemption rights approximately 16 months after the Court had granted Rock Creek Farms redemption rights to these agricultural lands based upon Arnoldys' Rule 60(b) Motion. On March 13, 2012, this Court dismissed Rock Creek Farms Appeal of the Rabo Court's Rule 60(b) Order stripping Rock Creek Farms of its redemption rights. This Court dismissed Rock Creek Farms' Appeal, because not all of the 42 defendants in the Rabo case, specifically including the United State of America, were given notice of the Appeal. *Rabo Agrifinance, Inc. v. Rock Creek Farms,* 2012 S.D. 20, ¶9. This Court did so even though all defendants, except for Ann Arnoldy, failed to exercise their statutory rights of redemption and were essentially non-parties, including the United State of America. Ann Arnoldy voluntarily paid the United States Government's restitutional

lien against these agricultural lands, as she promised to do. On April 24, 2012, the United States Government, through AUSA. Holmgren, filed a motion to dismiss itself from this action, because "it no longer has an interest in the property that is the subject of this litigation." Rec. pp. 559-560. Rock Creek Farms has filed a Rule 60(b) Motion in the Rabo case. The Rabo Court determined that it did not have the authority to consider Rock Creek Farms' Rule 60(b) Motion; the Rabo Court assumed that the matter would be appealed to this Court.

Trial was held in this case on July 25, 2011, on L & L's foreclosure Complaint. Prior to trial, Ann Arnoldy moved the Trial Court, ". . . pursuant to SDCL § 15-6-25(c), for the substitution of Ann Arnoldy as a party Defendant in place of CLW, which was ordered substituted for Rabo AgriFinance, Inc.. . ." Ann Arnoldy also moved that the Trial Court take judicial notice of all pleadings filed in the Rabo case. No parties objected to the Court taking judicial notice of the pleadings filed in the Rabo case, and this Motion was granted. At the commencement of the Trial, the Trial Court considered Ann Arnoldy's Motion to Substitute Parties. Attorney Schaub stated, "Rather than do another issue, I think the Court can rule on my Motion after this hearing and that would alleviate another appeal issue. . . . Rock Creek Farms' objection that the Motion is not timely is accurate, and I think the Court can take this up in a couple of days." TT p. 9, 1. 17-23.[2] The Trial Court did not consider the Motion to Substitute post-trial. Several Motions were considered post-trial, but not Ann Arnoldy's Motion to Substitute Parties.

[2] "TT" refers to the transcript of the Court Trial held on July 25, 2011, prepared by Court Reporter Cynthia M. Weichmann.

At the hearing held on Rock Creek Farms' Motion to Invalidate the Sheriff's Deed, the Trial Court denied the Motion, stated that ". . . [T]he Court is adopting the Arnoldy position in total. . . I am going to sign the proposed Findings of Fact and Conclusions of Law by Mr. Schaub." MHT p. 11, l. 1-10.[3] The Trial Court's Conclusion of Law No. 8 provides that, "Ann Arnoldy is substituted for Defendants, Rock Creek Farms Partnership, whose interest in the land has been extinguished by virtue of the decision of *Rabo v. Finnemans*, 2012 SD 20." The Trial Court signed Arnoldys' proposed Findings of Fact and Conclusions of Law in total. MHT p. 11 l. 1-10; Rec pp. 436-447 and Rec pp. 499-510. It did so even though every party appearing at trial objected to them. Rec pp. 421-429; Rec pp. 537-541; and Rec pp. 544-554.

Statement of the Facts

L&L sold certain agricultural lands located in both Meade and Pennington counties to Finnemans under two contracts for deed, dated April 29, 1996 ("1996 Contract") and a separate contract for deed, dated October 13, 1999 ("1999 Contract") consisting of approximately 9,400 acres of agricultural lands. TT pp. 12-13, l. 23-1. When the parties entered into the 1996 Contract, these agricultural lands were encumbered by a note and mortgage, signed by L&L, held by Equitable Life Insurance Society of the United States n/k/a Rabo Equitable ("Equitable") securing an indebtedness of approximately $1,700,000.00. TT p. 13, l. 3-8. Finnemans owned approximately 7,500 acres of agricultural lands in "fee." Finnemans raised crops on approximately

[3] "MHT" refers to the transcript of the Trial Court's Motions Hearing and the Court's ruling, dated April 10, 2012, prepared by Court Reporter Kathy L. Davis.

16,700 acres of land. Finnemans paid secured debts and property taxes for many years on these lands. Finnemans made a $400,000.00 down payment on the 1996 contract. TT p. 13, l. 23. Finnemans and the Receiver paid L & L $2,116, 486.05 under the 1996 Contract. Rec. p. 511. Finnemans and the Receiver paid L & L $885,573.05 under the 1999 Contract. Rec. pp. 308-310; Rec. pp. 513-514. Finnemans paid at least Three Million Dollars ($3,000,000.00) to other creditors that had a security interest in these lands as well.

Several foreclosure actions have been commenced concerning these lands, which are identified supra. Finnemans sought and found an investor, Warrenn Anderson, to preserve these agricultural lands. Anderson has invested approximately $2,500,000.00 attempting to do so. Anderson desired an ownership interest in the agricultural lands rather than a mortgage interest in the lands, so Rock Creek Farms Partnership was formed. Finnemans transferred ownership of these agricultural lands to Rock Creek Farms via recorded Quit Claim Deeds.

The first foreclosure action was the FarmPro Case. FarmPro bid $1,439,130.31 at the foreclosure sale, which was the highest bid at the sale. FarmPro assigned the Certificate of Sale to Lee Ahrlin ("Ahrlin") on May 10, 2006. On April 27, 2007, Michael Arnoldy took an assignment of a judgment of Daimler Chrysler, CIV02-534, which was worth $92,696.23, with accrued interest through April 27, 2007, for approximately $32,000.00. On May 3, 2007, Michael Arnoldy also took an assignment of a judgment of Farmers Union Oil Co., SMC04-10, which was worth $3,736.64 with

accrued interest through May 3, 2007, for an unknown amount of money. Michael Arnoldy used these judgments and paid $1,765,232.00 to redeem from Ahrlin. On May 7, 2008, Anderson's "straw man" Daniel R. Mahoney ("Mahoney") redeemed these agricultural lands by paying Michael Arnoldy $2,113,000.00, which amount included the $822,000.00 paid to extend the redemption time period for one (1) year. Anderson provided these redemption monies. On April 27, 2007, Ann Arnoldy took an assignment of a judgment of US Bancorp Equipment Finance, Inc. (US Banco), CIV05-206, which was worth $1,622,121.29 with accrued interest through April 27, 2007, for approximately $300,000.00. On April 26, 2007, Ann Arnoldy took an assignment of two judgments of Pioneer Garage, Inc. (Pioneer Garage), CIV01-5, against Finnemans, which were worth $195,101.00 with accrued interest through April 26, 2007, for approximately $70,000.00 (These judgments were later assigned to Debra Schaub, on March 18, 2011, who is apparently related to Ann Arnoldy's and Michael Arnoldy's attorney, Robert Schaub.) Ann Arnoldy used these judgments and paid $1,254,570.43 to redeem from Daniel R. Mahoney. Rock Creek Farms paid Ann Arnoldy $1,291,220.10 to redeem, as owner. Ann Arnoldy accepted these redemption monies. Ann Arnoldy and Michael Arnoldy, as siblings and joint venturers, commenced the Arnoldy Case to determine the validity of Mahoney's and Rock Creek Farms' redemption. Ann Arnoldy and Michael Arnoldy are cogs in the same machine apparently being directed and financed by an unknown third party. Rock Creek Farms was precluded from doing discovery in the Arnoldy case to determine who was financing the Arnoldys.

The property was also sold in the Rabo Case. On March 18, 2011, Ann Arnoldy

redeemed these agricultural lands from the foreclosure sale held in the Rabo Case. The Court in the Rabo Case granted Rock Creek Farms redemption rights, but stripped Rock Creek Farms of those redemption rights approximately 16 months later. Rock Creek Farms had sufficient monies to exercise its redemption rights. That Motion was denied by the Rabo Court. Instead, the Rabo Court stripped Rock Creek Farms of its redemption rights. The Trial Court stripped Rock Creek Farms of its statutory right to cure its predecessors-in-interest Finnemans' default in the 1996 Contract and the 1999 Contract and instead allowed Ann Arnoldy, a stranger to these contracts for deed, to redeem.

On June 2, 2011, the Pennington County Sheriff issued a deed conveying all of these agricultural lands to Ann Arnoldy. Michael Arnoldy is apparently either farming or leasing out these agricultural lands. Ann Arnoldy is currently practicing law with her and Michael Arnoldy's attorney, Robert Schaub; she is not a farmer.

ARGUMENT

I. Standard of Review

The Standard of Review is well settled. It is:

> This Court reviews questions of fact under the clearly erroneous standard of review." *Estate of Moncur*, 2012 S.D. 17, ¶10; citing *Weekley v. Prostrollo*, 2010 S.D. 13, 778 N.W.2d 823; *In re Regennitter*, 1999 S.D. 26, ¶11, 589 N.W.2d 920, 923). However, we review purely legal questions de novo, giving no deference to the trial court's findings. *Estate of Moncur*, 2012 S.D. 17, ¶10*;* citing *Estate of Stevenson*, 2000 S.D. 24, ¶7, 605 N.W.2d at 820 (citing *Lustig v. Lustig*, 1997 S.D. 24, ¶5, 560 N.W.2d 239, 241).

When this Standard of Review is applied here, it is clear that the Trial Court made several reversible errors.

II. The Trial Court Clearly Erred in Granting Redemption Rights to a Stranger

to the Contracts for Deed Rather than Allowing Rock Creek Farms to Avail Itself of its Statutory Right to Cure its Predecessors-in-Interest Finnemans' Default under the Contracts for Deed.

The Trial Court has ignored completely the restrictions imposed by South Dakota law upon who may cure a default in performance under a contract for deed. Our legislature, in SDCL § 21-50-3, has restricted who may cure a default in performance

under a contract for deed to only the Buyer or vendee. SDCL § 21-50-3 reads in pertinent part:

> Upon the trial of an action under this chapter **the court shall** have power to and by its judgment shall **fix the time within which the party or parties in default must comply with the terms of such contract on his or their part**, which time shall be not less than ten days from the rendition of such judgment . . . (emphasis added)

Instead of following this statutory mandate and allowing Rock Creek Farms to cure its predecessors-in-interest Finnemans' default under these contracts for deed, the Trial Court allowed a stranger to the contract, Ann Arnoldy, to redeem. Trial Court erred gravely in doing so. This statute is unambiguous; it clearly restricts who may cure a default in a contract for deed. This Court has so interpreted this statute in *Staab v. Skoglund*, 89 S.D 470, 234 N.W.2d 45 (1975). This Court stated that:

> [I]t is understandable why plaintiff should have desired not to bring an action for strict foreclosure of the contract under the provisions of SDCL 21-50 in view of the absolute statutory rights given to a contract vendee under the provisions of SDCL 21-50-3, and given this court's liberal interpretation of a contract vendee's rights. . . .

A trial court may not grant a junior lien holder the right to redeem in a contract for deed foreclosure action brought under Chapter 21-50. The right to redeem property from a foreclosure is purely statutory and "can be exercised only within the period and in the manner prescribed by law." *VanGorp v. Sieff*, 2001 S.D. 45, ¶14, 624 N.W.2d 712; citing *Dardanella Fin. Corp. v. Home Fed. Sav. & Loan*, 392 N.W.2d 834, 835 (S.D. 1986). Chapter 21-50 does not create redemption rights per se. Rather it gives the contract for

deed buyer [or assignee in this case] a right to comply with the terms of the contract; it is "cure" right. See, *Heikkila v. Carver*, 378 N.W.2d 214 (S.D. 1985); and *Prentice v. Classen*, 355 N.W.2d 352 (S.D. 1984). This Court in *BankWest v. Groseclose*, 95 SDO 442, ¶16, 535 N.W.2d 860 (S.D. 1995) did, however, say that a contract for deed buyer has a right of redemption (contract purchaser has a right to redeem within minimum ten-day period), citing, SDCL § 21-50-3. This Court has held that an assignee of a contract for deed has rights of cure/redemption when the property was conveyed to the assignee by a Quit Claim Deed. *Anderson v. Aesoph*, 2005 SD 56, ¶25, 697 NW 2d 25.

Even though Ann Arnoldy was able to redeem these lands from the Rabo foreclosure sale and thereby profit from the different redemption statutes applicable in a mortgage foreclosure action, Ann Arnoldy must now live with different statutes that are applicable in this L & L contract for deed foreclosure action. By statute, she has no redemption rights. Redemptions in contract for deed foreclosures are not governed by Chapter 21-52, but instead by Chapter 21-50. Under SDCL § 21-50-3, the Court is empowered to ". . . fix the time within which the party or parties in default must comply with the terms of such contract on his or her or their part . . ." The statute specifically contemplates that only the party obligated under the contract is entitled to prevent reversion of title by payment of the contract. Cf. *In re Carver*, 828 F.2d 463 (8th Cir. 1986) [discussing effect of judicially decreed period of redemption under SDCL § 21-50-3]. No section of Chapter 21-50 affords any lien creditor a right of redemption. That right is afforded to Rock Creek Farms alone. This statute clearly does not allow

strangers to the contract to redeem. Trial Court clearly erred in allowing Ann Arnoldy to redeem the contract for deed properties in the L & L contract for deed foreclosure action.

Trial Court erroneously allowed Ann Arnoldy, who was a stranger to the contracts for deed and who became a judgment creditor by taking an assignment of certain judgments against Rock Creek Farms predecessors-in-interest Finnemans to redeem. SDCL Chapter 21-52 [redemption from sale on execution or foreclosure] is quite clear as to its applicability. SDCL 21-52-1 provides:

> Redemption is the right to repay the amount paid for real property or any interest therein, sold on foreclosure of a real estate mortgage or on special or general execution against the property of a judgment debtor, or upon foreclosure of any lien upon such real property other than a lien for taxes or special assessment.

The vendor under a contract for deed does not hold just a lien on the property but instead "legal title to the property . . . ." *Anderson v. Aesoph,* 697 N.W.2d 25, 31, 2005 SD 56, ¶21. Thus the minimum one-year right of redemption under Chapter 21-52 does not apply to contracts for deed. If Chapter 21-52 did in fact apply to foreclosures of contracts for deed, the scope of permitted redeeming parties would be extraordinarily broad. *See* SDCL 21-52-5 ["The owner, mortgagor, judgment debtor, or successors or either, having any interest in the property sold and the holders of any lien, legal or equitable, subsequent and junior . . . ."]. But since Chapter 21-52 does not apply to a contract for deed foreclosure, neither does this broad scope of permitted redemptioners.

Instead, the sole redemption/cure right for contract for deed foreclosures is specified by, and circumscribed by, the provisions of SDCL 21-50-3, which grants a cure/redemption

right solely to the party or parties in default under the contract. So the question is what classes of parties fit within §21-50-3. Again, *Anderson,* 697 N.W.2d at 25, provides the answer to the extent the question needs to be answered in this appeal. We know that it includes the original contract vendee, any permitted voluntary assignee of that vendee and any voluntary assignee of the vendee as to which withholding of consent by the vendor would have been unreasonable [if assignment was prohibited]. Finnemans assigned the contract for deed property by quit claim deed to Rock Creek Farms and took and ownership interest in RCF in an attempt to save their farm and eventually to perform and pay off the contract for deed. *Anderson,* 697 N.W.2d at 25, involved similar facts. There the original vendee transferred the property when he went to prison. The trial court had held that the quit claim deed by the vendee to his assignee was one as to which refusal to consent was unreasonable. There would be no reason here to view it differently. Furthermore, the quit claim deed was sufficient to transfer that interest, including the right to cure/redeem. *Anderson,* 697 N.W.2d at 33, ¶25. So we know that Rock Creek Farms was the valid assignee of Finnemans' right to exercise cure rights under SDCL § 21-50-3. It certainly may be possible that under particular circumstances, a mortgagee of the vendee's interest in the property could be or become a voluntary assignee that could satisfy the *Anderson v. Aesoph,* Id.*,* standard. The vendor might have given consent to the mortgage, or the grant of the mortgage might have been an assignment about which it would be unreasonable for the vendor to object. That possibility and that issue is immaterial in this appeal, however. Whatever rights Rabo would have had under its note and mortgage are gone. The mortgage was extinguished by the Sheriff sale in the

foreclosure and it no longer exists. *Valmont Credit Corp v. McIlravey*, 371 N.W.2d 797 (S.D. 1985); citing *State ex. rel. Hale v. McGee*, 38 S.D. 257, 160 N.W. 1009 (1917) and SDCL § 21-47-19. Additionally, interest does not accrue on the extinguished mortgage/note after the Sheriff sale. *Valmont Credit Corp,* 371 N.W.2d at 797. See also *Schleuter Co., Inc. v. Sevigny,* 564 N.W.2d 309, 1997 SD 68 [contract vendee paying vendor's mortgage cannot use extinguished mortgage to trump judgment creditors of vendor].

Involuntary judgment creditors stand on entirely different footing, however—actually no footing. It would turn the express language of §21-50-3 on its head and pervert this Court's holding in *Anderson v. Aesoph* to argue that an involuntary judgment creditor, foreclosing or otherwise, would have the same cure/redemption rights as the original contract vendee or his assignee. This would be particularly applicable in view of the vendor's fervent objections. And certainly, foreclosure of an involuntary judgment lien cannot convert the lien into some status recognized by the vendor, the contract for deed, §21-50-3 or *Anderson, supra*. Whatever rights an involuntary judgment creditor may acquire via a sheriff's deed, it does not bring the creditor any closer to having cure/redemption rights under the contract for deed statute.

These contract for deed lands were not sold as a result of a foreclosure of a real estate mortgage. No sale was held whatsoever. Trial Court has failed to distinguish between the two separate and distinct foreclosure proceedings allowing a judgment creditor and a stranger to the contract to redeem. Trial Court clearly erred in doing so. This error constitutes a reversible error requiring that Trial Court's decision be vacated

and the matter remanded to the Trial Court.

III. The Trial Court Failed to Follow this Court's Procedural Rules in Substituting Ann Arnoldy for Rock Creek Farms.

The Trial Court erred in substituting Ann Arnoldy for Rock Creek Farms. SDCL § 15-6-25 prescribes the circumstance under which a party may be substituted for another party. The pertinent portion of this Court's procedural rule reads:

> In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in

SDRCP 25(c). This rule is inapplicable here, because Rock Creek Farms did not transfer its ownership interest in these lands and because the Sheriff's Deed issued is invalid for the reasons delineated infra. This rule is also inapplicable here because Ann Arnoldy sought to be substituted for CLW rather than Rock Creek Farms. Rec pp 188-190. Moreover, when Rock Creek Farms resisted Ann Arnoldy's Motion for Substitution, Ann Arnoldy requested that her Motion be considered post trial when the Trial Court queried Ann Arnoldy if she was going to move to have Rock Creek Farms not participate at Trial if her Motion was granted. TT p. 9, l. 12-23. Ann Arnoldy never set her Motion for Substitution of Parties for a hearing post-Trial. Ann Arnoldy merely added a Conclusion of Law, which the Trial Court did not make at trial or during a motions hearing, to her proposed findings. The Trial Court adopted Ann Arnoldys' position and her proposed Findings of Fact and Conclusions of Law in total. MHT p. 11 l. 1-10; Rec. pp. 436-447;

and Rec. pp. 499-510. It did so even though all of the other parties objected to her proposed Findings of Fact and Conclusions of Law. Rec. pp. 421-429; Rec. pp. 537-541; and Rec. pp. 544-554. The Trial Court clearly erred in doing so.

The rationale behind this Court's SDRCP 25(c) is to insure that the action is brought in by the real party in interest. If issues are raised prior to commencement of trial, the issue is addressed under SDRCP 17(a); if the transfer occurs after the commencement of the case, it is governed by SDCRP 25(c). See, *Ostwald v. Ostwald*, 331 N.W.2d 64 (S.D. 1983); 3B Moore's Federal Practice P25.08, at 25-77, 25-78 (2d. ed. 1948). Rock Creek Farms is the real party in interest with standing. As discussed supra, Rock Creek Farms is the only party that may cure its predecessor-in-interest Finnemans' default under the two contracts for deed. Rock Creek Farms was ready, willing, and able to do so prior to the Trial Court's stripping it of that right and rather giving it to a stranger to the contract, Ann Arnoldy. Rock Creek Farms has invested several million dollars in the property to save the farmer's substantial equity therein.

Rock Creek Farms did not transfer its interest in these agricultural lands. The Pennington County Sheriff issued a Sheriff's Deed, apparently without the advice of its counsel and without Court approval. When the Sheriff's Deed was issued the five separate actions identified supra were all pending in the Circuit Courts of Pennington County. Ann Arnoldy did not seek approval from any of these Courts prior to her requesting the Sheriff to issue a Sheriff's Deed conveying these agricultural lands to Ann Arnoldy. In doing so, Ann Arnoldy and the Sheriff violated Rock Creek Farms' due process rights.

IV. The Trial Court Erred in Denying Rock Creek Farms' Motion to Invalidate the Sheriff's Deed, Which Was Issued Without Prior Notice and Which Arose from the Foreclosure of Only an Equitable Interest in the Lands.

The Sheriff's Deed concerning these agricultural lands was issued without prior notice to the landowner Rock Creek Farms and without approval of any court. Due process is one of the most fundamental rights granted by our State and Federal Constitutions. The Arnoldys' violated the basic requirements of due process of law. The Court in *Wain v. Todd County Sch. Dist., 2005* DSD 17, noted that the U.S. Supreme Court has described the root requirement of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest**.**" Citing *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971).

In *Fuentes v. Shevin,* 407 U.S. 67 (1972), the U.S. Supreme Court held that "For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner**.**" (Citations omitted).

This Court has stated:

> Under the Fourteenth Amendment to the United States Constitution, as well as Article VI, § 2 of the South Dakota Constitution, "no person shall be deprived of life, liberty, or property without due process of the law." Due process guarantees that notice and the right to be heard are granted in

> a "meaningful time and in a meaningful manner." *Hollander v. Douglas Co.*, 2000 S.D. 159, ¶17, 620 N.W.2d 181, 186 (citations omitted). Such guarantees are fundamental.

City of Pierre v. Blackwell, 2001 S.D. 127, ¶13-14, 635 N.W.2d 581. This Court applied due process rights to a dog in *City of Pierre, Id.* Here, the Trial Court deprived Rock Creek Farms of its cure rights in contract for deed lands worth approximately $7,000,000.00. The Trial Court clearly erred in doing so.

Ann Arnoldy obtained the Sheriff's Deed because she redeemed the property from the foreclosure sale in the Rabo case. When Finnemans granted mortgages to Rabo, Finnemans did not own the contract for deed lands; they only had an equitable interest in the contract for deed lands. This Court has ruled, "[i]n a contract for deed, the installment vendor maintains legal title to the property while the vendee holds equitable title and has the right to use and possession of the property." *Anderson*, 2005 S.D. at 56, ¶21. It is a fundamental principal of property law that a grantor can only give that which he owns. *Texas American Bank/Levelland v. Morgan, et. al.*, 733 P2d 864, 865, 105 N.M. 416 (1997). The *Texas American Bank* court held further that:

> Haliburton, being a joint tenant, was not free to execute a mortgage which would encompass a greater interest in the property than he owned himself. It stands to reason, therefore, that the mortgage which Haliburton executed could not encumber Morgan's (the other joint tenant) interest in the property.

Texas American Bank, 733 P2d at 864, 865 (citations omitted). Here, Finnemans could only mortgage what they owned, which was an equitable interest in the contract for deed lands. Finnemans' interest in these lands were foreclosed upon by the Trial Court.

Finnemans could not encumber L & L's ownership interest in the contract for deed lands, only their equitable interest in these lands. The Eighth Circuit Court of Appeals has stated that:

> . . . it is the general rule that although the buyer cannot convey or encumber property possessed under a conditional sale contract in such manner as to defeat the title retained in the seller, yet he does acquire an interest, which has been variously described, in the property and he may, without consent of the seller, sell, mortgage or give away such interest prior to forfeiture under the contract—subject, of course, to the seller's rights therein.

Manufacturer's Bank & Trust Co. of St. Louis v. Lauchli, 118 F2d 607, 610 (8th Cir 1941) (citations omitted). Ann Arnoldy's Sheriff's Deed is dependent upon Finnemans' ownership interest in the contract for deed lands. Finnemans' equitable interest in the contract for deed lands was extinguished when the Trial Court and the Rabo Court entered their judgment of foreclosure.

Precluding Ann Arnoldy from redeeming or acquiring a greater interest in land than she is entitled to receive will work no great injustice upon either her or L&L. L&L will gets its contract balance paid with attorney's fees or it will get the property back. Ann Arnoldy already has a Sheriff's Deed to over 7,000 acres of deeded land; 3,000 acres of these lands are located adjacent to the Rapid City Airport and thus have value far beyond the value of agricultural land. Ann Arnoldy obtained the Sheriff's Deed at a cost equal to a small fraction of the property's value. Even though she paid the United States of America to keep her Sheriff's Deed to the deeded land, she has no room to complain because she volunteered to make that payment while under no legal obligation to do so.

Trial Court clearly erred in failing to invalidate the secret Sheriff's Deed for the reasons stated herein. This Court should therefore remand this case to the Trial Court with instructions to invalidate the Sheriff's Deed and grant Rock Creek Farms its statutory right to cure its predecessors-in-interest Finnemans' default under the contracts for deed.

CONCLUSION

The Trial Court committed a grave error by not allowing Rock Creek Farms to cure its predecessors-in-interest Finnemans' default in the contracts for deed, because only RCF has the statutory cure rights. The Trial Court erroneously allowed Ann Arnoldy a stranger to the contracts for deed, to redeem. The Trial Court compounded its error by substituting Ann Arnoldy for Rock Creek Farms, even though in its Motion for Substitution, Ann Arnoldy only requested to be substituted for CLW. Moreover, Ann Arnoldy requested that her Motion be considered post trial when Rock Creek Farms resisted the Motion. The Trial Court never considered the Motion post trial. The Trial Court compounded its error further by failing to invalidate the secret Sheriff's Deed, which was issued without prior notice to the landowner and without Court approval. The secret Sheriff's Deed should also have been invalidated, because the Rabo foreclosure action only foreclosed Finnemans' equitable interest in these lands.

REQUEST FOR ORAL ARGUMENTS

Rock Creek Farms respectfully requests that oral arguments be held in this appeal**.**

CERTIFICATION OF VOLUME LIMITATIONS

The undersigned counsel certifies that this brief was prepared using a Corel-

WordPerfect -Version 10 - word processing software. This brief complies with the type-volume limitations imposed by SDCL § 15-26A-66(b)(2). Rock Creek Farms Opening Brief contains 5,117 words and 26,027 characters. The above-mentioned word processing system was used to count the number of words and characters in this brief.

Dated this _____ day of August 2012.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing **Appellant Rock Creek Farms' Opening Brief** in the above-entitled action, upon the person(s) herein next designated, all on the date below shown, by United States mail, electronically transmitted, or faxed, at Rapid City, South Dakota, to-wit:

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Dated this _____ day of August 2012.

_____
Brian L. Utzman

APPENDIX

Appeal No. SC No. 26373
Civil

IN THE
SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

In re:

L & L PARTNERSHIP, et. al.

Plaintiffs-Appellees,

vs.

DAVID M. FINNEMAN, CONNIE S. FINNEMAN,
ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO
DAVID M. FINNEMAN AND CONNIE S. FINNEMAN, et. al.

Defendant-Appellant (Rock Creek Farms).

ON APPEAL FROM THE
SEVENTH JUDICIAL CIRCUIT COURT
PENNINGTON COUNTY, SOUTH DAKOTA,
HONORABLE JAMES W. ANDERSON
CIRCUIT COURT JUDGE PRESIDING
Court File No. C10-316

APPELLANT'S APPENDIX

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Notice of Appeal filed on June 1, 2012

APPENDIX

STATE OF SOUTH DAKOTA	:	IN CIRCUIT COURT
	:SS	
COUNTY OF PENNINGTON	:	SEVENTH JUDICIAL CIRCUIT
L&L PARTNERSHIP, a/k/a LUTZ AND LAIDLAW PARTNERSHIP, a/k/a LUTZ-LAIDLAW PARTNERSHIP, MARVIN LUTZ, GENERAL PARTNER, Plaintiffs, vs. DAVID M. FINNEMAN, et al. Defendants.		File No. 10-316 **Judgment of Foreclosure**

The Court having heretofore entered its Findings of Fact, and Conclusions of Law granting Plaintiffs its Complaint against all of the parties, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. David Finneman, Connie S. Finneman (Finnemans) and their assign, Rock Creek Farms Partnership (Rock Creek), are in default of the payment of the obligations due, and performance of the covenants and agreements, set forth in certain unrecorded Contract for Deed between L&L Partnership, f/d/a Lutz-Laidlaw Partnership and dated April 23, 1996, notice of which is given by a Short Form Contract for Deed dated April 29, 1996 and recorded in the office of the Meade County Register of deeds on May 31, 1996 in Book 493 on pages 174 et seq. (1996 CFD);

2. David Finneman, Connie S. Finneman and their assign, Rock Creek Farms Partnership, are in default of the payment of the obligations due, and performance of the covenants and agreements, set forth in certain Contract for Deed between L&L Partnership, f/d/a Lutz-Laidlaw Partnership and dated October 13, 1999 and recorded in the office of the Pennington County Register of deeds on October 13, 1999 in Book 81 on pages 1925 et seq. (1999 CFD);

3. Ann Arnoldy is the successor to the interest of Finnemans and its assign, Rock Creek, to the 1996 CFD.

4. Ann Arnoldy succeeded to the interest of Finnemans and its assign, Rock Creek, to the 1999 CFD, except 199.08 acres, which is described as Lot 4, and the Southeast Quarter of Section Thirty, Township One North, Range Twelve East of the BHM, Pennington County, South Dakota (199.08 acres).

5. By virtue of such default there is due and owing unto Plaintiff principal and interest of $568,441.48 on the 1996 Contract for Deed as of July 13, 2011. Ann Arnoldy has the sole right to redeem all of the real estate described in the 1996 CFD. Additionally, interest accrues at the rate of $168.20 for each day after July 13, 2011. The total

APP. No. 1

owed, as of April 12, 2012 is $612,341.68. After April 12, 2012, interest accrues on $612,341.68 at the judgment rate of 10% per annum.

6. By virtue of such default there is due and owing unto Plaintiff principal and interest on the 1999 Contract for Deed. Ann Arnoldy has the sole right to redeem all of the real estate described in the 1999 CFD, except 199.08 acres, by paying L&L $153,762.31, which includes interest accrued through April 12, 2012, which is thirty (30) days after the Supreme Court dismissed Rock Creek's and Finnemans' appeals in Rabo AgriFinance, Inc. v. Rock Creek Farms Partnership, 2012 SD 20 (Rabo Appeal). After April 12, 2012, interest accrues on $153,762.31plus costs at the judgment rate of 10% per annum.

7. By virtue of such default there is due $76,000 for attorney fees; also additional attorney fees and cost for this action, which must to be submitted by a Bill of Costs pursuant to the statutes for recovery of costs. These attorney fees and costs were incurred as a result of Finnemans and their Rock Creek Partnership's default. The default arose before Ann Arnoldy became the equitable owner of the 1996 and 1999 CFDs, thus the Finnemans must pay these amounts in addition to their share of the 1999 CFD balance.

8. By virtue of such default David M. Finneman and Connie S. Finneman and any of the previously identified interested parties in the Findings of Fact #45, may redeem 199.08 acres of the 1999 CFD, which is described as Lot 4 and the Southeast Quarter of Section Thirty, Township One North, Range Twelve East of the BHM, Pennington County, South Dakota by paying L&L $14,806.02, which includes interest accrued through April 12, 2012, which day is thirty (30) days after the Supreme Court dismissed Rock Creek's and Finnemans' appeals in Rabo AgriFinance, Inc. v. Rock Creek Farms Partnership, 2012 SD 20 (Rabo Appeal), plus attorney fees of $76,000 for a subtotal of $90,806.02. Additionally, David M. Finneman and Connie S. Finneman and any of the previously described interested parties must pay costs included in a Bill of Costs timely filed. After April 12, 2012, interest accrues on $90,806.02 plus costs at the judgment rate of 10% per annum.

9. By virtue of such default, if David M. Finneman and Connie S. Finneman and any of the previously described interested parties in Finding # 45, fail to redeem the 199.08 acres within ten days after notice of entry of the Judgement of Foreclosure, any rights they assert against said property shall be forever barred and foreclosed, and Ann Arnoldy may redeem the property by paying $90,806.02 plus costs to be taxed, plus interest accruing thereon after April 12, 2012 at the judgment rate of 10% per annum by no later than seventeen days after notice of entry of the Judgement of Foreclosure. If she fails to redeem the 199.08 acres, any rights she asserts against the 199.08 shall be forever barred and foreclosed.

10. By virtue of the default of the defendants Finnemans and RCF, Plaintiffs are entitled to foreclose its Contract for Deed subject only to the redemptive rights set forth herein.

11. Absent redemption as set forth herein, all right, title and interest of all parties hereto shall be foreclosed and extinguished, and Plaintiffs shall be fully reinvested with title to the real property legally described as:

Township 4 North, Range 12 East of the Black Hills Meridian, Meade County, South Dakota:

Section 13: S ½ S ½; S ½ N ½; N ½ S ½;
Section 14: All;
Section 15: All;
Section 22: All;
Section 23: All;
Section 24: All;
Section 25: N ½; N ½ S ½; S ½ SE ¼; and

Township 4 North, Range 13 East of the Black Hills Meridian, Meade County, South Dakota:

Section 16: W ½ E ½ E ½ NE ¼;
W ½ E ½ NW ¼;
W ½ NE ¼;
W ½;
W ½ SE ¼;
NE ¼ SE ¼;
N ½ SE ¼ SE ¼;
W ½ SW ¼ SE ¼ SE ¼;

Section 17: N ½;

Section 18: E ½; and SW ¼;

Section 21: W ½ NE ¼;
W ½ E ½ E ½ NE ¼;
W ½ E ½ NE ¼;
E ½ NW ¼;
E ½ SW ¼;
E ½ W ½ NW ¼;
E ½ W ½ SW 1/4;
W 1/2 SW ¼ SW ¼;
S ½ S ½ W ½ NW ¼ SW ¼;
E ½ SE ¼;
E ½ E ½ E ½ W ½ SE ¼;

Section 29: SW ¼;

Section 30: W 1/2 and SE ¼; and

Section 32: NW ¼.

Township 1 North, Range 12 East of the Black Hills Meridian, Pennington County, South Dakota:

Section 30: Lots 3 and 4; E ½; and E ½ SW ¼.
Section 31: All.

Township 1 South, Range 12 East of the Black Hills Meridian, Pennington County, South Dakota:

Section 5: All; a/k/a Lots 1, 2, 3 and 4; and S ½.

Township 1 North, Range 13 East of the Black Hills Meridian, Pennington County, South Dakota:

Section 17: E ½; and NW ¼ NW ¼.
Section 18: E ½ E ½.
Section 19: NE ¼.

12. Ann Arnoldy is substituted for the defendants, Rock Creek Farms Partnership, whose interest in the land has been extinguished by virtue of the the issuance of the sheriff's deed and the decision of *Rabo v. Finnemans*, 2012 SD 20.

13. Simultaneous upon payment of the redemption amounts, the Plaintiffs shall execute and deliver a warranty deed to the redeeming party; and deliver a Satisfaction of Mortgage from Laidlaw Family Partnership that is recorded in Meade County on November 13, 1997 in Book 69, Page 5370.

14. As there is no dispute as to default under the 1996 and 1999 Contracts for Deed, and because SDCL 21-50-3 sets the time for compliance with the Contract for Deed (Redemption) to commence upon rendition of the Court's judgment, this Judgment shall constitute a final Judgment of Foreclosure not subject to stay of execution pursuant to SDCL 15-6-60(a).

Dated this 19 day of April 2012.

BY THE COURT:

By _____
James W. Anderson
Circuit Court Judge

ATTEST:
Ranae Truman, Clerk

By _____
Deputy

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

APR 2 6 2012

RANAE L. TRUMAN
Clerk of Courts, Pennington County

By _____ Deputy

Pennington County, SD
FILED
IN CIRCUIT COURT

APR 2 3 2012

Ranae Truman, Clerk of Courts

By _____ Deputy

10:00am

STATE OF SOUTH DAKOTA	:	IN CIRCUIT COURT
	:SS	
COUNTY OF PENNINGTON	:	SEVENTH JUDICIAL CIRCUIT

L&L PARTNERSHIP, a/k/a LUTZ AND LAIDLAW PARTNERSHIP, a/k/a LUTZ-LAIDLAW PARTNERSHIP, MARVIN LUTZ, GENERAL PARTNER,

Plaintiffs,

vs.

DAVID M. FINNEMAN; CONNIE S. FINNEMAN; ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO DAVID M. FINNEMAN AND CONNIE S. FINNEMAN; TOM J. WIPF; JOHNNY JAY WIPF d/b/a WIPF FARMS; JOANN WIPF; RABO AGRIFINANCE, INC., f/k/a AG SERVICES OF AMERICA, INC. and RABO AGSERVICES, INC.; SHEEHAN MACK SALES AND EQUIPMENT, INC.; MICHAEL ARNOLDY; ANN ARNOLDY; FARM CAPTIAL COMPANY, LLC., DANIEL R. MAHONEY; PORTFOLIO RECOVERY ASSOCIATES, PRA III LLC; PFISTER HYBRID CORN CO.; KAUP SEED & FERTILIZER, INC.; JOYCE M. WOLKEN; CHARLES W. WOLKEN; STAN ANDERSON; DENNIS ANDERSON; KENT KJERSTAD; U.S. BANCORP EQUIPMENT FINANCE, INC.; KENCO INC., d/b/a WARNE CHEMCIAL & EQUIPMENT COMPANY; DOUG KROEPLIN AG SERVICES, INC.; CREDICO, INC., d/b/a CREDIT COLLECTIONS BUREAU; SCOT D. EISENBRAUN; MELODY EISENBRAUN; BART CHENEY; HAL OBERLANDER; KEI OBERLANDER; RAY S. OLSEN; PATRICK X. TRASK; ROSE MARY TRASK; PENNINGTON COUNTY, SOUTH DAKOTA; MEADE COUNTY, SOUTH DAKOTA; AND THE UNITED STATES OF AMERICA,

Defendants.

File No. 10-316

Findings of Fact
&
Conclusions of Law

The above-entitled matter was tried before the Hon. James W. Anderson at the Pennington County Courthouse, Rapid City, Pennington County, South Dakota, on July 25, 2011.

The trial was pursuant to the Complaint by Plaintiffs requesting foreclosure of two contracts for deed.

Plaintiffs (L&L) personally appeared through its partner, Marvin D. Lutz, and its counsel John H. Mairose, of Rapid City; Defendants, David M. Finneman and Connie M. Finneman, (Finnemans) appeared and through their counsel James P. Hurley of Bangs, McCullen, Butler, Foye & Simmons; Rock Creek Farms Partnership (Rock Creek) appeared through its counsel Brian L. Utzman of Smoot and Utzman, PC, and James P. Hurley; and Ann Arnoldy personally appeared and through her counsel Robert R. Schaub of Sundall, Schaub & Fox, PC;

The Plaintiffs, L&L, and the Defendants, Finnemans, Rock Creek Farms Partnership, and Ann Arnoldy, filed briefs with the Court before trial.

Testifying during the trial for Plaintiffs were Marvin D. Lutz and Phil Zacher, CPA; testifying for David M. Finneman and Rock Creek Farms Partnership were David M. Finneman and Paul J. Thorstenson, CPA; testifying for Ann Arnoldy was Steven Kocer, CPA; and separate evidentiary exhibits were introduced by the parties hereto.

The Court having heard the testimony and considered all evidence and exhibits presented, and being fully knowledgeable in the records, files and premises herein, and based upon the entire original record in this matter, and being otherwise fully informed on matters pertinent hereto, and upon good cause, now makes the following:

FINDINGS OF FACT

1. The Court has jurisdiction of the parties and subject matter of these proceedings.
2. At issue are two contracts for deed ("CFD") between David and Connie Finneman as buyers (collectively, "Finnemans") and the Plaintiffs, L&L Partnership, a/k/a Lutz and Laidlaw Partnership, a/k/a Lutz-Laidlaw Partnership, Marvin Lutz, general partner, as sellers ("L&L").
3. The first CFD was executed in 1996 for real estate in Meade County (1996 CFD), and was for $1,800,000, with $1,400,000 amortized until 2010. The Meade County land is described in Exhibit B to the Complaint; in Plaintiffs' Trial Exhibit 1; and is as follows:

   Township 4 North, Range 12 East of the Black Hills Meridian, Meade County, South Dakota:

   Section 13: S ½ S ½; S ½ N ½; N ½ S ½;
   Section 14: All;
   Section 15: All;
   Section 22: All;
   Section 23: All;
   Section 24: All;
   Section 25: N ½; N ½ S ½; S ½ SE ¼; and

Township 4 North, Range 13 East of the Black Hills Meridian, Meade County, South Dakota:

Section 16: W ½ E ½ E ½ NE ¼;
W ½ E ½ NW ¼;
W ½ NE ¼;
W ½;
W ½ SE ¼;
NE ¼ SE ¼;
N ½ SE ¼ SE ¼;
W ½ SW ¼ SE ¼ SE ¼;

Section 17: N ½;

Section 18: E ½; and SW ¼;

Section 21: W ½ NE ¼;
W ½ E ½ E ½ NE ¼;
W ½ E ½ NE ¼;
E ½ NW ¼;
E ½ SW ¼;
E ½ W ½ NW ¼;
E ½ W ½ SW 1/4;
W 1/2 SW ¼ SW ¼;
S ½ S ½ W ½ NW ¼ SW ¼;
E ½ SE ¼;
E ½ E ½ E ½ W ½ SE ¼;

Section 29: SW ¼;

Section 30: W 1/2 and SE ¼; and

Section 32: NW ¼.

4. When the parties entered into the 1996 Contract, the real estate was encumbered by a note and mortgage to Equitable Life Assurance Society of the United States, n/k/a Rabo Equitable (the "Equitable Mortgage"), securing an indebtedness of $1,700,000. Walter R. Laidlaw and Marvin D. Lutz, and their respective spouses signed the mortgage, both individually and as the partners of L&L. The 1996 Contract provides that L&L is obligated to make the mortgage payments to Equitable. The 1996 Contract provides further that Finnemans' payments would be made directly to Equitable. The 1996 Contract did not obligate Finnemans to be responsible for the January 2010 balloon payment owed to Equitable under the Equitable mortgage. Either Robert Laidlaw (a former partner of L&L) or L&L paid off the Equitable mortgage.

5. The 1996 CFD provided that the $1,800 transfer fee obligation of the sellers would be deducted from the final payment owed by the buyers.

6. The 1996 CFD had an unusual provision. The land in the 1996 CFD was subject to the Equitable mortgage, yet its principal balance at the time of the CFD was $249,000 more than the $1,400,000 that Finnemans were obligated to pay L&L.

7. The 1996 CFD handled this problem by requiring L&L to continue to pay Equitable on the $249,000 portion. L&L continued to pay on that portion, but every L&L payment to Equitable was late and some were significantly late.

8. Finnemans occasionally made their payments to Equitable late. When Finnemans made a late payment, they paid the late charges imposed by Equitable. Finnemans never received a default notice from either Equitable or L&L. Marvin D. Lutz signed documents acknowledging and certifying that Finnemans were current in their obligation under their Contracts for Deed from 2002 through 2006.

9. The second CFD was executed in 1999 for 2,266.55 acres of real estate in Pennington County (1999 CFD) and was for $600,000. As part of the $600,000 consideration, Finnemans agreed to pay $240,000 plus interest to Equitable over the remaining life of its mortgage. The Pennington County land is described in Exhibit A to the Complaint; in Plaintiffs' Trial Exhibit 2; and is as follows:

   Township 1 North, Range 12 East of the Black Hills Meridian, Pennington County, South Dakota:

   Section 30: Lots 3 and 4; E ½; and E ½ SW ¼.
   Section 31: All.

   Township 1 South, Range 12 East of the Black Hills Meridian, Pennington County, South Dakota:

   Section 5: All; a/k/a Lots 1, 2, 3 and 4; and S ½.

   Township 1 North, Range 13 East of the Black Hills Meridian, Pennington County, South Dakota:

   Section 17: E ½; and NW ¼ NW ¼.
   Section 18: E ½ E ½.
   Section 19: NE ¼.

10. The 1996 CFD provides for an initial interest rate of 9.6% per year, which changed to 8.1% on January 1, 2000, and to 5.8% on January 1, 2005. In the event payment was delinquent ten days or more, the 1996 CFD provides for a late fee (default interest) at 5% above the normal interest rate. L&L claims the 5% late fee applies to the entire contract balance—not just to the late payment.

11. The 1999 CFD provides for interest at a rate of 8%, but doesn't have a default interest rate, or, for that matter, any provision relating to payment default.

12. The 1999 Contract required Finnemans to timely pay the semi-annual mortgage payments owed to Equitable. The 1999 Contract did not provide for an increase in the interest rate or any other penalties if a payment was not made timely. The 1999

Contract did not require Finnemans to pay the balloon payment contained in the Equitable mortgage. Finnemans were only required to pay the semi-annual mortgage payments.

13. The 1999 CFD provided that the $600 transfer fee obligation of the sellers and reimbursement of $3,500 for title insurance cost would be deducted from the final payment owed by the buyers.

14. Although Finnemans and later their assignee, Rock Creek, were habitually late in making payments, the required payments were eventually made until 2008 on the 1999 CFD and until 2010 on the 1996 CFD—when Rock Creek failed to make the required payments.

15. According to a statement signed on October 16, 2006 by Marvin D. Lutz, as general partner of L&L, all payments required by the CFDs had been made and the CFDs were not in default. The 2006 statement reconfirmed similar annual signed statements from 2002 through 2005 that both CFDs were current and not in default.

16. Foreclosure on both contracts was started in 2010 with L&L claiming that Finnemans and Rock Creek as their successor owed over $400,000 in default penalties, dating back as far as 15 years to 1996.

17. L&L claimed that more than $1,600,000 is owed on the 1996 contract—over $200,000 higher than the original $1,400,000 balance—despite more than two million in payments.

18. Significantly, L&L claims penalties of $183,092.02 in the three years prior to entering into the second CFD with Finnemans, but L&L didn't alert Finnemans of this claim.

19. $183,092.02 of L&L's penalty claim arose during the same time it was always late paying Equitable.

20. Because of L&L's claim that payments were late and that it applied them to penalties instead of principal, and with the compounding effect of interest, L&L claims almost one-million dollars more than what the former owner, Finnemans, their assignee, Rock Creek, and the present owner, Ann Arnoldy, claim is owed.

21. L&L clearly waived its rights to collect default interest because it provided Finnemans with a number of statements, the most recent in 2006, asserting that as of the date therein, all payments required under the CFDs had been paid and neither CFD was in default. Finnemans relied upon those statements to their disadvantage.

22. L&L's waiver is confirmed by the fact that L&L didn't report any default interest or penalty as income on its tax returns. Instead, L&L applied the payments to principal and normal interest.

23. According to L&L's tax records, the principal balances on the CFDs are substantially lower than and inconsistent with what it now claims in this foreclosure.

24. L&L's income tax returns were signed and filed with the IRS under penalties of perjury certifying: Under penalties of perjury, I declare that I have examined this

return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than general partner or limited liability company member) is based on all information of which preparer has any knowledge.

25. Additionally, the CPA who prepared L&L's income tax returns, Mr. Zacher, confirmed in his accounting worksheets that L&L never claimed or recognized a late penalty or default interest until sometime in 2009 in anticipation of this lawsuit.

26. The 1996 CFD provided for default interest or a late payment penalty in the event Finnemans failed to make their payments as required under the contract. Although Finnemans failed to make timely payments, L&L gave five written notifications to Finnemans, with the latest on October 16, 2006 that all payments under both CFDs had been made and the CFDs were not in default.

27. As party to the CFDs, L&L possessed the right and had full knowledge of its right to request payment of the default interest. Yet, L&L issued written statements inconsistent with its right and effectively waived its right to collect penalty interest that accrued up to October 16, 2006.

28. This Court also interprets the 1996 Contract to require penalty interest only on that portion of the default and only for the duration of the default, rather than on the entire principal balance owed under the Contract for the duration of the default.

29. Rock Creek Farms expert, Paul Thorstenson, analyzed and amortized all of the payments made by both L&L and Finnemans. Paul Thorstenson prepared a report and an updated report, which were tendered and admitted into evidence. Arnoldy's expert, Mr. Kocer, analyzed and amortized all of the payments made by both L&L and Finnemans under the 1996 Contract. Mr. Kocer's amortization schedule was tendered and admitted into evidence.

30. Plaintiffs' CPA, Phil Zacher, testified that he prepared Exhibit 16 for the 1999 CFD and Exhibit 26 for the 1996 CFD, but he didn't include the Wipf payment of $83,600 made around March 2001 or allocate it between the 1996 and 1999 CFDs.

31. Rock Creek's CPA, Paul Thorstenson, testified that he included the $83,600 payment by Wipf to Equitable and allocated the payment between the 1996 and 1999 CFDs.

32. Paul Thorstenson testified that he verified that the payments shown on his amortization schedules had been made on the 1996 and 1999 CFDs.

33. Marvin Lutz testified that he loaned Johnny Wipf the $83,600 to make payment to Equitable around March 2001.

34. David Finneman testified that the March 2001 payment to Equitable made by Wipf was part of a lease condition Wipf had with Finnemans and Wipf was required to pay it.

35. Accordingly, the Court finds the $83,600 payment should be applied to the 1996 CFD as shown on Mr. Kocer's amortization schedule and on the 1999 CFD as shown on Mr. Thorstenson's amortization schedule.

36. Finnemans assigned all of their interest in the land subject to the 1996 and 1999 CFDs to Rock Creek Farms, a South Dakota Partnership, except 199.08 acres in the 1999 CFD, which is described as Lot 4, and the Southeast Quarter of Section Thirty, Township One North, Range Twelve East of the BHM, Pennington County, South Dakota (199.08 acres).

37. All of Finnemans' and Rock Creek's interest in the real estate subject to the 1996 and 1999 CFDS, except the 199.08 acres, was sold at a Sheriff's Sale in the Rabo Foreclosure.

38. Ann Arnoldy (Ann) redeemed from the assignee of the Sheriff's Certificate of Sale and received a Certificate of Redemption.

39. No one redeemed from Ann and a Sheriff's Deed was issued to Ann foreclosing Finnemans' and Rock Creek's interest in the land, which included all of the 1996 and 1999 CFDs land, except the 199.08 acres.

40. Finnemans and Rock Creek appealed Judge Delaney's Order that prevented them from redeeming from the Rabo foreclosure sale. The South Dakota Supreme Court dismissed their appeals on March 14, 2012. Consequently, Ann Arnoldy is the sole equitable owner of the land in these proceedings, except the 199.08 acres.

41. Rock Creek Farms interest in the Meade and Pennington Counties land was foreclosed by Rabo, and it has no ownership interest in the 1996 or 1999 CFD real estate.

42. Steven Kocer, CPA, testified that he prepared an amortization schedule on the 1996 CFD, Exhibit 103 using the payments shown by L & L's CPA, except that he showed an additional payment of $83,600 (the Wipf payment on 3/2/2001), which was allocated between the 1996 and 1999 contracts. This was the same method and amounts Rock Creek's CPA used.

43. The United States of America's one-million dollar conviction lien will been paid by Ann Arnoldy within ten days of Ann's redemption of these contract for deeds.

44. Finnemans breached both the 1996 Contract and the 1999 Contract by failing to make payments after the balloon date. Finnemans' interest in the real estate is therefore foreclosed, subject to Ann Arnoldy's redemption rights in all of the real estate described in the 1996 and 1999 CFDs, except 199.08 acres in the 1999 CFD, which is described as Lot 4 and the Southeast Quarter of Section Thirty, Township One North, Range Twelve East of the BHM, Pennington County, South Dakota, which David M. Finneman and Connie S. Finneman have a right of redemption as well as any other interested party in the 199.08 acres.

45. No other party has an interest in the real estate described in the 1996 and 1999 CFDS except that the following parties have a right to redeem the 199.08 acres in the 1999 CFD described as: Lot 4 and the Southeast Quarter of Section Thirty, Township One North, Range Twelve East of the BHM, Pennington County, South Dakota, namely:

a. Daniel R. Mahoney, whose last known address is 730 200th Avenue NW, Appleton, Minnesota 56208 as assignee of the Kenco, Inc. Judgment against David Finneman in the amount of $622,558.84, which was filed on May 7, 2008 and the Doug Kroeplin Ag Services, Inc. Judgment against David Finneman in the amount of $264,731,59, which was filed on May 7, 2008;

b. Portfolio Recovery Associates, LLC, a/k/a PRA III, LLC, whose last known address is 120 Corporate Boulevard, Norfolk, VA 23502, wherein it had a judgment against Dave Finneman and Connie Finneman in the amount of $29,020.59, plus costs of $65.50 and interest. The judgment in Civ 02-1324 was filed on March 9, 2004 ;

c. Joyce M. Wolken and Charles W. Wolken, husband and wife, whose last known address is 15949 Pioneer Road, New Underwood, South Dakota 57761;

d. Debra Schaub of 118 S Sanborn, Chamberlain, SD 57325, as assignee of the Pioneer Garage, Inc. judgment in 34CIV050000-01. The judgment was entered in the action Pioneer Garage, Inc. vs. David Finneman on May 13, 2003 in the 6th Circuit, Hyde County, and transcribed to Pennington County on August 5, 2003;

e. Credico, Inc., d/b/a Credit Collections Bureau, whose last known address 410 Sheridan Lake Road, Rapid City, South Dakota;

f. All other defendants have failed to answer or appear and their interest in all of the real estate subject to this foreclosure is forever barred.

46. The Court accepts the calculations of Steven Kocer, CPA and finds that the Plaintiffs are due on the 1996 CFD $568,441.48, as of July 13, 2011, with interest accruing thereafter at the rate of $168.20 per day until the Judgment is entered, as shown by the amortization schedule, attached as Exhibit A. The interest accrued from July 13, 2011 through April 12, 2012 is $43,900.20 as shown by the attached Exhibit 2. The total amount necessary to redeem the 1996 Contract as of April 12, 2012, is $612,341.68, less the transfer fee of $1,800 for a net total of $610,541.68.

47. The Court accepts the calculations of Paul Thorstenson, CPA, and finds that the Plaintiffs are due $163,326.19 on the 1999 CFD as of July 25, 2011, with interest accruing thereafter at the rate of $35.704 per day until the Judgment is entered, as shown by the amortization schedule, attached as Exhibit B. The interest accrued from July 25, 2011 to April 12, 2012 is $9,343.15, as shown by the attached Exhibit 3. The total amount as of April 12, 2012 is $172,668.34 less the transfer fee of $600 and reimbursement for title insurance of $3,500 for a net total of $168,568.34.

48. Ann Arnoldy is the equitable owner of the real estate described in the 1996 CFD. To redeem her interest in the 1996 CFD, she must pay 100% of the net total owed to

L&L or $610,541.68 on April 12, 2012 and $168.20 per diem thereafter until she redeems.

49. Ann Arnoldy is the equitable owner of 2,067.47 of the 2,266.55 acres, or 91.2166 percent of the total acres in the 1999 CFD. To redeem her interest in the 1999 CFD, she must pay 91.2166% of the net total owed to L&L or $153,762.31. (91.2166% of $168,568.34).

50. David M. Finneman and Connie S. Finneman are the equitable owners of 199.08 acres of the 2,266.55 acres, or 8.7834 percent of the total acres in the 1999 CFD. To redeem their interest in the 1999 CFD, they must pay 8.7834% of the net total owed to L&L or $14,806.02 (8.7834 % of $168,568.34) and costs as detailed in the Conclusions of Law.

51. Ann Arnoldy was prevented from redeeming the 1996 CFD and her interest in the 1999 CFD because of Rock Creek's and Finnemans' appeals, which have been dismissed by the SD Supreme Court. As a result of Finnemans' and Rock Creek's actions, Ann Arnoldy incurred additional interest expense of $34,929.11 for the time-period July 25, 2011 through April 12, 2012, and over $40,000 for June 1, 2011 through April 12, 2012, which calculations are shown on Exhibit 4, which is attached and incorporated herein.

52. Ann Arnoldy also incurred significant attorney fees because Finnemans and Rock Creek wrongfully continued to claim to be the owners with the right redeem both the 1996 and 1999 CFDs.

53. The Plaintiff has incurred attorney fees of $76,000 outside of this foreclosure and additional attorney fees and costs for this foreclosure action.

54. The Plaintiff, Marvin Lutz, has mortgaged his interest to his partner, Laidlaw. The mortgage must be satisfied contemporaneously upon satisfaction of the foreclosure judgment.

55. If any of these Findings of Fact are more appropriately a Conclusion of Law, they should be treated as such.

NOW, and from the foregoing FINDINGS OF FACT the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter of these proceedings.
2. The Court takes Judicial Notice of all pleadings and orders entered in the related foreclosure action, Rabo AgriFinance, Inc., et. al. v. David M. Finneman, et al., filed in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, File No. C09-1211 (Rabo).
3. Finnemans and their assignee, Rock Creek Farms, are in default of the 1996 and 1999 CFDs.

4. The additional interest of five percent for late payments on the 1996 CFD is applied only on the late payment and not on the remaining CFD balance.

5. South Dakota law is well settled that "contractual rights and remedies may be modified or waived by subsequent conduct." *Hofeldt v. Mehling,* 658 NW2d 783, (SD 2003)) (citing *Moe v. John Deere Co.,* 516 NW2d 332, 335 (SD 1994)). "[M]odification of a written contract may be effected either through subsequent conduct or oral agreements." *Moe*, 516 NW2d at 336 (quoting *Nat. Bank of Alaska v J.B.L. & K of Alaska, Inc.*, 546 P2d 579, 586-86 (Alaska 1976)). Similarly, "[a] waiver of a contractual right occurs 'where one in possession of any [contractual] right . . . and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it[.]'" *A-G-E Corporation v. State,* 719 NW2d 780, 787 (SD 2006) (quoting *Western Cas. And Sur. Co. v. Am. Nat. Fire Ins. Co.,* 318 NW2d 126, 128 (SD 1982)). L&L's failure to demand penalty interest at the time Finneman defaulted on his payments is similar to the inaction on the part of the plaintiff in *Padilla.* Here, however, not only was L&L inactive in demanding penalty interest, it acted inconsistently by affirming that all payments were made on both CFDs as of October 16, 2006. This statement effectively dissolved any right to implement default interest on late payments prior to October 16, 2006.

6. South Dakota law provides a six-year statute of limitations for causes of actions arising out of contracts. SDCL 15-2-13(1). L&L's cause of action against Finneman for failure to pay default interest arose at the time the right to collect default interest accrued, which for the most part was six years ago or longer. Accordingly, any demand for default interest more than six years after it accrued is untimely, and therefore extinguished.

7. The plaintiffs are estopped from claiming default interest on the entire contract balance. Finnemans, Rock Creek and their assigns detrimentally relied upon the statements, including one made as of October 16, 2006 that they were not in default.

8. Ann Arnoldy is substituted for the defendants, Rock Creek Farms Partnership, whose interest in the land has been extinguished by virtue of the decision of *Rabo v. Finnemans*, 2012 SD 20.

9. Finnemans/Rock Creek Farms' interests in the 1996 and 1999 CFDs are hereby foreclosed, subject to the redemption rights of Ann Arnoldy and the Finnemans as provided for herein.

10. Because all other Defendants' interests in the 1996 and 1999 CFDs were foreclosed in the Rabo foreclosure, their rights in the real estate are also foreclosed to the 1996 CFD land and all of the 1999 CFD land except the 199.08 acres.

11. Ann Arnoldy has sole redemption rights in all of the real estate except 199.08 acres of the 1999 CFD, which is described as Lot 4 and the Southeast Quarter of Section

Thirty, Township One North, Range Twelve East of the BHM, Pennington County, South Dakota.

12. David M. Finneman and Connie S. Finneman have redemption rights in only 199.08 acres of the 1999 CFD, which is described as Lot 4 and the Southeast Quarter of Section Thirty, Township One North, Range Twelve East of the BHM, Pennington County, South Dakota.

13. Ann Arnoldy may redeem all of the real estate described in the 1996 CFD by paying L&L $610,541.68, which includes interest accrued through April 12, 2012, which is thirty (30) days after the Supreme Court dismissed Rock Creek's and Finnemans' appeals in Rabo AgriFinance, Inc. v. Rock Creek Farms Partnership, 2012 SD 20 (Rabo Appeal). After April 12, 2012, interest accrues on $610,541.68 at the judgment rate of 10% per annum.

14. Ann Arnoldy may redeem all of the real estate described in the 1999 CFD, except 199.08 acres, by paying L&L $153,762.31, which includes interest accrued through April 12, 2012, which is thirty (30) days after the Supreme Court dismissed Rock Creek's and Finnemans' appeals in Rabo AgriFinance, Inc. v. Rock Creek Farms Partnership, 2012 SD 20 (Rabo Appeal). After April 12, 2012, interest accrues on $153,762.31at the judgment rate of 10% per annum.

15. The Court allows to Plaintiffs attorney fees of $76,000 as expenses; also additional attorney fees and cost for this action, which must be submitted by a Bill of Costs pursuant to the statutes for recovery of costs. These attorney fees and costs were incurred as a result of Finnemans' and their Rock Creek Partnership's default. The default arose before Ann Arnoldy became the equitable owner of the 1996 and 1999 CFDs, thus under this Court's equitable powers of adjustment, the Finnemans must pay these amounts in addition the their share of the 1999 CFD balance.

16. David M. Finneman and Connie S. Finneman and any of the previously described interest parties may redeem 199.08 acres of the 1999 CFD, which is described as Lot 4 and the Southeast Quarter of Section Thirty, Township One North, Range Twelve East of the BHM, Pennington County, South Dakota by paying L&L $14,806.02, which includes interest accrued through April 12, 2012, which day is thirty (30) days after the Supreme Court dismissed Rock Creek's and Finnemans' appeals in Rabo AgriFinance, Inc. v. Rock Creek Farms Partnership, 2012 SD 20 (Rabo Appeal), plus attorney fees of $76,000 for a subtotal of $90,806.02. Additionally, David M. Finneman and Connie S. Finneman and any of the previously described interested parties must pay costs included in a Bill of Costs timely filed. After April 12, 2012, interest accrues on $90,806.02 plus costs at the judgment rate of 10% per annum.

17. If David M. Finneman and Connie S. Finneman and any of the previously described interested parties in Finding # 45, fail to redeem the 199.08 acres within ten days after notice of entry of the Judgement of Foreclosure, any rights they assert against said

property shall be forever barred and foreclosed, and Ann Arnoldy may redeem the property by paying $90,806.02 plus costs to be taxed, plus interest accruing thereon after April 12, 2012 at the judgment rate of 10% per annum by no later than seventeen days after notice of entry of the Judgement of Foreclosure. If she fails to redeem the 199.08 acres, any rights she asserts against the 199.08 shall be forever barred and foreclosed.

18. Under this Court's equitable powers to avoid the unjust result to the Plaintiffs of being left with only 199.08 acres of isolated land that is part of a larger tract of land (if the land isn't redeemed by Finnemans or any interested party), Ann Arnoldy shall have the right to redeem the 199.08 acres but such subordinate right must be exercised by no later than seventeen days after notice of entry of the Judgement of Foreclosure.

19. The Plaintiff, Marvin Lutz, has mortgaged his interest to his partner, Laidlaw. The mortgage must be satisfied contemporaneously upon satisfaction of the foreclosure judgment.

20. Upon payment of the redemption amounts, the Plaintiffs shall execute a warranty deed to the redeeming party.

21. If no one redeems the real estate, as provided for herein, ownership of that land shall revert fully to L&L.

22. If any of these Conclusions of Law are more appropriately a Finding of Fact, they should be treated as such.

Adopted the 10th day of April, 2012

BY THE COURT:

By _____
James W. Anderson
Circuit Court Judge

ATTEST:
Ranae Truman, Clerk

By _____
Deputy

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

JUN 06 2012

RANAE L. TRUMAN
Clerk of Courts, Pennington County

By _____ Deputy

Pennington County, SD
FILED
IN CIRCUIT COURT

APR 10 2012

Ranae Truman, Clerk of Courts

By _____ Deputy

CONTRACT FOR DEED 1996 L[illegible] LOAN DATED 3/1/1996
Loan Balance Based on Assessed P[illegible]y on January 23, 2008,
Interest of 5.8% PLUS 5.0% Penalty ([illegible].8% effective Interest) AFTER January 1, 2010
Interest Based on Actual Days

Days	DATE	Interest Rate	Interest & Deferred Int.	Aggregate Deferred Interest	Net Interest Charged	PAYMENT	Assessed Penalty Added To Balance	Principal	REMAINING BALANCE
	3/1/1996								$ 1,400,000.00
133	7/12/1996	9.60%	48,973.15	-	48,973.15	77,231.00	-	28,257.85	1,371,742.15
0	7/12/1996	9.60%	-	-	-	-	-	-	1,371,742.15
27	8/8/1996	9.60%	9,741.25	9,274.38	466.87	466.87	-	-	1,371,742.15
167	1/22/1997	9.60%	69,525.80	4,525.80	65,000.00	65,000.00	-	-	1,371,742.15
0	1/22/1997	9.60%	4,525.80	4,525.80	-	-	-	-	1,371,742.15
58	3/21/1997	9.60%	25,451.45	25,451.45	-	-	-	-	1,371,742.15
0	3/21/1997	9.60%	25,451.45	-	25,451.45	27,939.81	-	2,488.36	1,369,253.79
188	9/25/1997	9.60%	67,704.91	-	67,704.91	93,100.85	-	25,395.94	1,343,857.85
0	9/25/1997	9.60%	-	-	-	-	-	-	1,343,857.85
203	4/16/1998	9.60%	71,750.96	-	71,750.96	92,534.35	-	20,783.39	1,323,074.46
0	4/16/1998	9.60%	-	-	-	-	-	-	1,323,074.46
63	6/18/1998	9.60%	21,923.16	-	21,923.16	49,397.42	-	27,474.26	1,295,600.21
34	7/22/1998	9.60%	11,585.86	-	11,585.86	38,000.00	-	26,414.14	1,269,186.07
152	12/21/1998	9.60%	50,739.62	50,310.73	428.89	428.89	-	-	1,269,186.07
127	4/27/1999	9.60%	92,705.03	-	92,705.03	102,889.00	-	10,183.97	1,259,002.09
0	4/27/1999	9.60%	-	-	-	-	-	-	1,259,002.09
162	10/6/1999	9.60%	53,643.84	-	53,643.84	84,796.83	-	31,152.99	1,227,849.10
0	10/6/1999	9.60%	-	-	-	-	-	-	1,227,849.10
87	1/1/2000	9.60%	28,095.88	28,095.88	-	-	-	-	1,227,849.10
3	1/4/2000	8.10%	28,913.32	-	28,913.32	80,402.15	-	51,488.83	1,176,360.27
27	1/31/2000	8.10%	7,048.49	7,048.49	-	-	-	-	1,176,360.27
185	8/3/2000	8.10%	55,343.72	-	55,343.72	71,127.91	-	15,784.19	1,160,576.09
0	8/3/2000	8.10%	-	-	-	-	-	-	1,160,576.09
211	3/2/2001	8.10%	54,343.58	-	54,343.58	69,955.66	-	15,612.08	1,144,964.00
0	3/2/2001	8.10%	-	-	-	-	-	-	1,144,964.00
90	5/31/2001	8.10%	22,867.91	21,821.92	1,045.99	1,045.99	-	-	1,144,964.00
53	7/23/2001	8.10%	35,288.58	-	35,288.58	69,453.83	-	34,165.25	1,110,798.75
0	7/23/2001	8.10%	-	-	-	-	-	-	1,110,798.75
164	1/3/2002	8.10%	40,426.99	-	40,426.99	67,552.26	-	27,125.27	1,083,673.48
3	1/6/2002	8.10%	721.46	-	721.46	2,336.46	-	1,615.00	1,082,058.48
176	7/1/2002	8.10%	42,262.54	-	42,262.54	64,515.96	-	22,253.42	1,059,805.06
186	1/3/2003	8.10%	43,745.27	-	43,745.27	65,988.23	-	22,242.96	1,037,562.10
180	7/2/2003	8.10%	41,445.63	-	41,445.63	65,124.03	-	23,678.40	1,013,883.70
191	1/9/2004	8.10%	42,974.78	-	42,974.78	64,259.84	-	21,285.06	992,598.64
206	8/2/2004	8.10%	45,376.71	-	45,376.71	64,314.29	-	18,937.58	973,661.06
0	8/2/2004	8.10%	-	-	-	-	-	-	973,661.06
152	1/1/2005	8.10%	32,843.05	32,843.05	-	-	-	-	973,661.06
9	1/10/2005	5.80%	34,235.52	-	34,235.52	61,922.48	-	27,686.96	945,974.10
21	1/31/2005	5.80%	3,156.70	2,953.90	202.80	202.80	-	-	945,974.10
1	2/1/2005	5.80%	3,104.22	2,505.21	599.01	599.01	-	-	945,974.10
120	6/1/2005	5.80%	20,543.51	-	20,543.51	51,671.80	-	31,128.29	914,845.82
216	1/3/2006	5.80%	31,400.52	7,221.73	24,178.79	24,178.79	-	-	914,845.82
2	1/5/2006	5.80%	7,512.47	-	7,512.47	23,962.17	-	16,449.70	898,396.12
177	7/1/2006	5.80%	25,268.31	-	25,268.31	48,971.47	-	23,703.16	874,692.96
187	1/4/2007	5.80%	25,991.56	-	25,991.56	48,359.55	-	22,367.99	852,324.97
186	7/9/2007	5.80%	25,191.46	-	25,191.46	47,855.33	-	22,663.87	829,661.10
198	1/23/2008	5.80%	26,103.64	-	26,103.64	47,121.94	-	21,018.30	808,642.80
0	1/23/2008	5.80%	-	-	-	-	2,356.10	-	810,998.90
161	7/2/2008	5.80%	20,748.24	-	20,748.24	46,503.13	-	25,754.89	785,244.01
187	1/5/2009	5.80%	23,333.58	-	23,333.58	45,604.84	-	22,271.26	762,972.75
186	~~7/10/2009~~	5.80%	~~22,550.55~~	-	22,550.55	~~55,671.00~~	-	~~33,120.45~~	~~729,852.29~~
175	1/1/2010	5.80%	~~20,295.89~~	~~20,295.89~~	-	-	-	-	~~729,852.29~~
118	4/29/2010	10.80%	~~45,778.74~~	-	~~45,778.74~~	62,759.25	-	~~16,960.51~~	~~712,871.78~~
188	11/3/2010	10.80%	~~39,655.20~~	-	~~39,655.20~~	72,947.17	-	~~33,291.97~~	~~679,579.81~~
125	3/8/2011	10.80%	~~25,135.14~~	-	~~25,135.14~~	80,808.39	-	~~55,673.25~~	~~623,906.56~~
127	7/13/2011	10.80%	~~23,445.21~~	-	~~23,445.21~~	88,571.50	-	~~65,126.29~~	~~558,780.28~~
aily Interest Accrual		$	~~165.34~~ after 7-13-2011						
OTALS					~~1,281,996.43~~	~~2,125,572.25~~		~~843,575.82~~	

EXHIBIT A

Finneman South Land 1999

Rate Period ..... : Annual

Nominal Annual Rate .... : 8.000 %

CASH FLOW DATA

	Event	Date	Amount	Number	Period	End Date
1	Loan	05/01/1999	582,400.00	1		
2	Payment	10/01/1999	47,000.00	1		
3	Payment	10/06/1999	16,539.00	1		
4	Payment	01/03/2000	32,163.82	1		
5	Payment	01/04/2000	15,681.85	1		
6	Payment	08/03/2000	13,872.98	1		
7	Payment	10/05/2000	47,000.00	1		
8	Payment	03/02/2001	13,644.34	1		
9	Payment	05/15/2001	54,964.00	1		
10	Payment	05/31/2001	204.01	1		
11	Payment	07/23/2001	13,546.41	1		
12	Payment	01/03/2002	13,175.57	1		
13	Payment	01/06/2002	455.71	1		
14	Payment	07/01/2002	12,583.37	1		
15	Payment	07/17/2002	42,000.00	1		
16	Payment	10/18/2002	5,000.00	1		
17	Payment	01/03/2003	12,870.52	1		
18	Payment	05/06/2003	47,000.00	1		
19	Payment	07/02/2003	12,701.97	1		
20	Payment	01/09/2004	12,533.41	1		
21	Payment	08/02/2004	12,544.03	1		
22	Payment	11/04/2004	47,000.00	1		
23	Payment	01/10/2005	12,077.52	1		
24	Payment	01/31/2005	39.55	1		
25	Payment	02/01/2005	116.83	1		
26	Payment	06/01/2005	10,078.20	1		
27	Payment	10/05/2005	47,000.00	1		
28	Payment	01/03/2006	4,715.90	1		
29	Payment	01/05/2006	4,673.64	1		
30	Payment	07/01/2006	9,551.53	1		
31	Payment	09/26/2006	47,000.00	1		
32	Payment	01/04/2007	9,432.18	1		
33	Payment	07/09/2007	9,333.83	1		
34	Payment	01/23/2008	9,190.79	1		
35	Payment	07/02/2008	9,070.10	1		
36	Payment	01/05/2009	8,894.89	1		
37	Payment	07/13/2009	9,086.05	1		
38	Payment	04/29/2010	12,240.73	1		
39	Payment	11/03/2010	14,227.81	1		
40	Payment	03/08/2011	15,761.09	1		
41	Payment	07/13/2011	17,275.23	1		
42	Payment	07/25/2011	163,326.19	1		

→ 2 ACHIEVED DID NOT REFLECT THIS WIRE PAYMENT

AMORTIZATION SCHEDULE - U.S. Rule (no compounding)

EXHIBIT B p.1

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Finneman South Land

	Date	Payment	Interest Accrued	Interest Paid	Principal Paid	Balance Due Interest	Balance Due Principal	Balance Due Total
Loan	05/01/1999		0.00	0.00	0.00	0.00	582,400.00	582,400.00
1	10/01/1999	47,000.00	19,530.35	19,530.35	27,469.65	0.00	554,930.35	554,930.35
2	10/06/1999	16,539.00	608.14	608.14	15,930.86	0.00	538,999.49	538,999.49
1999 Totals		63,539.00	20,138.49	20,138.49	43,400.51			
3	01/03/2000	32,163.82	10,514.18	10,514.18	21,649.64	0.00	517,349.85	517,349.85
4	01/04/2000	15,681.85	113.39	113.39	15,568.46	0.00	501,781.39	501,781.39
5	08/03/2000	13,872.98	23,315.65	13,872.98	0.00	9,442.67	501,781.39	511,224.06
6	10/05/2000	47,000.00	6,928.71	16,371.38	30,628.62	0.00	471,152.77	471,152.77
2000 Totals		108,718.65	40,871.93	40,871.93	67,846.72			
7	03/02/2001	13,644.34	15,283.42	13,644.34	0.00	1,639.08	471,152.77	472,791.85
8	05/15/2001	54,964.00	7,641.71	9,280.79	45,683.21	0.00	425,469.56	425,469.56
9	05/31/2001	204.01	1,492.06	204.01	0.00	1,288.05	425,469.56	426,757.61
10	07/23/2001	13,546.41	4,942.44	6,230.49	7,315.92	0.00	418,153.64	418,153.64
2001 Totals		82,358.76	29,359.63	29,359.63	52,999.13			
11	01/03/2002	13,175.57	15,030.62	13,175.57	0.00	1,855.05	418,153.64	420,008.69
12	01/06/2002	455.71	274.95	455.71	0.00	1,674.29	418,153.64	419,827.93
13	07/01/2002	12,583.37	16,130.42	12,583.37	0.00	5,221.34	418,153.64	423,374.98
14	07/17/2002	42,000.00	1,466.40	6,687.74	35,312.26	0.00	382,841.38	382,841.38
15	10/18/2002	5,000.00	7,803.67	5,000.00	0.00	2,803.67	382,841.38	385,645.05
2002 Totals		73,214.65	40,706.06	37,902.39	35,312.26			
16	01/03/2003	12,870.52	6,461.10	9,264.77	3,605.75	0.00	379,235.63	379,235.63
17	05/06/2003	47,000.00	10,223.78	10,223.78	36,776.22	0.00	342,459.41	342,459.41
18	07/02/2003	12,701.97	4,278.40	4,278.40	8,423.57	0.00	334,035.84	334,035.84
2003 Totals		72,572.49	20,963.28	23,766.95	48,805.54			
19	01/09/2004	12,533.41	13,983.75	12,533.41	0.00	1,450.34	334,035.84	335,486.18
20	08/02/2004	12,544.03	15,081.95	12,544.03	0.00	3,988.26	334,035.84	338,024.10
21	11/04/2004	47,000.00	6,882.05	10,870.31	36,129.69	0.00	297,906.15	297,906.15
2004 Totals		72,077.44	35,947.75	35,947.75	36,129.69			
22	01/10/2005	12,077.52	4,374.73	4,374.73	7,702.79	0.00	290,203.36	290,203.36
23	01/31/2005	39.55	1,335.73	39.55	0.00	1,296.18	290,203.36	291,499.54
24	02/01/2005	116.83	63.61	116.83	0.00	1,242.96	290,203.36	291,446.32
25	06/01/2005	10,078.20	7,632.75	8,875.71	1,202.49	0.00	289,000.87	289,000.87
26	10/05/2005	47,000.00	7,981.17	7,981.17	39,018.83	0.00	249,982.04	249,982.04
2005 Totals		69,312.10	21,387.99	21,387.99	47,924.11			
27	01/03/2006	4,715.90	4,931.15	4,715.90	0.00	215.25	249,982.04	250,197.29
28	01/05/2006	4,673.64	109.58	324.83	4,348.81	0.00	245,633.23	245,633.23
29	07/01/2006	9,551.53	9,529.22	9,529.22	22.31	0.00	245,610.92	245,610.92
30	09/26/2006	47,000.00	4,683.43	4,683.43	42,316.57	0.00	203,294.35	203,294.35
2006 Totals		65,941.07	19,253.38	19,253.38	46,687.69			
31	01/04/2007	9,432.18	4,455.77	4,455.77	4,976.41	0.00	198,317.94	198,317.94
32	07/09/2007	9,333.83	8,084.85	8,084.85	1,248.98	0.00	197,068.96	197,068.96
2007 Totals		18,766.01	12,540.62	12,540.62	6,225.39			
33	01/23/2008	9,190.79	8,552.25	8,552.25	638.54	0.00	196,430.42	196,430.42

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Finneman South Land

	Date	Payment	Interest Accrued	Interest Paid	Principal Paid	Balance Due Interest	Balance Due Principal	Total
34	07/02/2008	9,070.10	6,931.57	6,931.57	2,138.53	0.00	194,291.89	194,291.89
2008 Totals		18,260.89	15,483.82	15,483.82	2,777.07			
35	01/05/2009	8,894.89	7,963.31	7,963.31	931.58	0.00	193,360.31	193,360.31
36	07/13/2009	9,086.05	8,009.88	8,009.88	1,076.17	0.00	192,284.14	192,284.14
2009 Totals		17,980.94	15,973.19	15,973.19	2,007.75			
37	04/29/2010	12,240.73	12,221.90	12,221.90	18.83	0.00	192,265.31	192,265.31
38	11/03/2010	14,227.81	7,922.38	7,922.38	6,305.43	0.00	185,959.88	185,959.88
2010 Totals		26,468.54	20,144.28	20,144.28	6,324.26			
39	03/08/2011	15,761.09	5,094.79	5,094.79	10,666.30	0.00	175,293.58	175,293.58
40	07/13/2011	17,275.23	4,879.40	4,879.40	12,395.83	0.00	162,897.75	162,897.75
41	07/25/2011	163,326.19	428.44	428.44	162,897.75	0.00	0.00	0.00
2011 Totals		196,362.51	10,402.63	10,402.63	185,959.88			
Grand Totals		885,573.05	303,173.05	303,173.05	582,400.00			

EXHIBIT B p.3

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STATE OF SOUTH DAKOTA)
) IN CIRCUIT COURT
COUNTY OF PENNINGTON) SEVENTH JUDICIAL CIRCUIT
FILE NO. 10-316

L & L PARTNERSHIP, a/k/a LUTZ AND LAIDLAW PARTNERSHIP, a/k/a LUTZ-LAIDLAW PARTNERSHIP, MARVIN LUTZ, GENERAL PARTNER,

Plaintiff,

vs.

DAVID M. FINNEMAN; CONNIE S. FINNEMAN; ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO DAVID M. FINNEMAN AND CONNIE S. FINNEMAN; TOM J. WIPF; AMY WIPF; JOHNNY J. WIPF dba WIPF FARMS; JOANN WIPF; RABO AGRIFINANCE, INC., fka AG SERVICES OF AMERICA, INC.; and RABO AGSERVICES, INC., SHEEHAN MACK SALES AND EQUIPMENT, INC.; MICHAEL ARNOLDY; ANN ARNOLDY; FARM CAPITAL COMPANY, LLC, DANIEL R. MAHONEY; PORTFOLIO RECOVERY ASSOCIATES, PRA III LLC; PFISTER HYBRID CORN CO.; KAUP SEED & FERTILIZER, INC.; JOYCE M. WOLKEN; CHARLES W. WOLKEN; STAN ANDERSON; DENNIS ANDERSON; KENT KJERSTAD; U.S. BANCORP EQUIPMENT FINANCE, INC.; KENCO INC., dba WARNE CHEMICAL & EQUIPMENT COMPANY; DOUG KROEPLIN AG SERVICES, INC.; CREDICO, INC., dba CREDIT COLLECTIONS BUREAU; SCOT D. EISENBRAUN; MELODY EISENBRAUN; BART CHENEY, HAL OBERLANDER, KEI

Transcript of:

COURT TRIAL

CYNTHIA M. WEICHMANN, RPR

App. No. 3

THE COURT: Rob, do you want to address that?

MR. SCHAUB: Your Honor, the Arnoldys will be harmed. Rock Creek has no assets. The interest rate is 10.5 percent, which is substantially higher than market rate. They have no ability to make Arnoldys whole if this is continued and, therefore, we oppose a continuance.

THE COURT: Does L & L have anything to say on this?

MR. MAIROSE: We just generally oppose a continuance, Your Honor.

THE COURT: Before I rule on that, let's talk about the Arnoldys' motion to substitute parties. Mr. Schaub, tell me what your next thing is going to be if I grant that motion. Are you going to move to have the Rock Creek people not participate?

MR. SCHAUB: Rather than do another issue, I think the Court can rule on my motion after this hearing and that would alleviate another appeal issue since we seem to generate countless ones and so, therefore, Rock Creek's objection that the motion is not timely is accurate and I think the Court can take this up in a couple days.

THE COURT: There's also a motion to quash subpoenas. Do you want to address that further,

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 26373

L & L PARTNERSHIP, et al,

Plaintiffs/Appellees,

vs.

DAVID M. FINNEMAN; CONNIE S. FINNEMAN; ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO DAVID FINNEMAN AND CONNIE S. FINNEMAN, et al,

Defendants/Appellants/Appellees.

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota

The Honorable James W. Anderson, Presiding Judge

REPLY BRIEF OF APPELLEES MICHAEL ARNOLDY AND ANN ARNOLDY

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Notice of Appeal filed June 4, 2012

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PRELIMINARY STATEMENT

Cites to the Record in the Clerk's Index for this case will be in the format of: (LR __). Cites to the Record for *Rabo Agrifinance v. Finneman et al.,* Pennington County No. 09-1211, will be in the format of: (RR __). Cites to the Record for *Arnoldy v. Mahoney,* Pennington County No. 08-1845, will be in the format of: (AMR __). Citations to Rock Creek's appellate brief will be in the format of: (RCAB __). Citations to the Finnemans' appellate brief will be in the format of: (FAB __).

STATEMENT OF THE ISSUES

1. **Whether Ann Arnoldy redeemed the property as a transferee of Rock Creek Farms.**

The circuit court held that Ann Arnoldy was substituted for Rock Creek Farms in the foreclosure of the L&L contracts for deed and that she could pay off the balance due under the contracts and take full title to the contract for deed property.

Anderson v. Aesoph, 2005 SD 56, 697 N.W.2d 25

First Federal Savings & Loan Ass'n of Rapid City v. Wick, 332 N.W.2d 860 (S.D. 1982)

SDCL § 44-8-1.1

2. **Whether the Circuit Court erred in denying the Rock Creek/Finneman motion to vacate the sheriff's deed.**

The circuit court denied the motion by Rock Creek and the Finnemans to vacate the sheriff's deed that was issued as a result of the Rabo judgment.

Carlisle v. United States, 517 U.S. 416 (1996)

Hoverstad v. First Nat. Bank and Trust Co., 74 N.W.2d 48 (S.D. 1955)

SDCL § 21-47-24

3. **Whether the Circuit Court erred in substituting Ann Arnoldy for Rock Creek Farms.**

The circuit court held that Ann Arnoldy was substituted for Rock Creek Farms in the foreclosure of the L&L contracts for deed.

Bamerilease Capital Corp. v. Nearburg, 958 F.2d 150 (6th Cir. 1992)

Luxliner P.L. Export Co. v. RDI/Luxliner, Inc., 13 F.3d 69 (3d Cir. 1993)

Tri-State Co. of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991)

STATEMENT OF THE CASE

L&L Partnership entered into two contracts for deed with David and Connie Finneman. The Finnemans transferred their interest in the property to Rock Creek Farms, a partnership they had formed with an investor. In 2011, L&L foreclosed on the contracts for deed. A separate mortgage foreclosure action had transferred the Finneman/Rock Creek interest in the contract for

deed property to Ann Arnoldy. The court held that Ann Arnoldy had been substituted for Rock Creek, and that she had the right to pay off the contracts and take full title. Rock Creek and the Finnemans appeal.

STATEMENT OF FACTS

This appeal is part of an ongoing dispute between Appellants David and Connie Finneman and Rock Creek Farms, and Appellees Ann Arnoldy and Michael Arnoldy concerning the ownership of 16,700 acres of farmland in Pennington and Meade Counties. To date, this dispute has encompassed four separate circuit court actions and five appeals, three of which are still pending.

This particular appeal concerns land that David and Connie Finneman (Finnemans) purchased via contract for deed from L&L Partnership. Ann Arnoldy became the equitable owner of all the contract for deed land covered by the Rabo foreclosure. Finnemans and their successor in interest, Rock Creek Farms, claim that their interest in the entire contract for deed property somehow survived the numerous foreclosure actions, giving them the right to pay off the contracts and take full title to the property.

The full history of this case is complicated; a full recital of the facts is necessary due to certain omissions and mischaracterizations in the Rock Creek and Finneman briefs. The Finnemans owned roughly 16,700 acres of land. 9,200 of these acres were purchased via contract for deed from L&L

Partnership. The first contract for deed, dated April 29, 1996, was for 6,950 acres; the second, dated October 13, 1999, was for 2,250 acres. FFCL ¶¶ 3, 9. The Finnemans encumbered their interest in the property, including all but two hundred acres of the contract for deed land, with two mortgages, one to Rabo Agrifinance, and an inferior mortgage to FarmPro.

FarmPro foreclosed on its mortgage in 2000. *Arnoldy v. Mahoney,* 2010 SD 89 ¶ 2, 791 N.W.2d 645, 649. Michael Arnoldy and Ann Arnoldy, a brother and sister who own a farming venture, were interested in adding the land to their operation.[1] They purchased a number of judgments and redeemed the land as creditors. *Id.* A Finneman associate, Daniel Mahoney, redeemed the land from Michael Arnoldy under two judgments that the Arnoldys believed were fraudulent.[2] *Id*. at ¶ 4, 791 N.W.2d at 649. Ann Arnoldy redeemed from Mahoney. *Id*. at ¶ 5, 791 N.W.2d at 649-50. Rock Creek/Finnemans then purported to exercise the owner's right of redemption. *Id.* This owner's redemption was untimely but for the claimed redemption by Mahoney. *Id.*

[1] Putting aside the question of the relevance of Rock Creek/Finnemans' insinuations, there is no mystery third party backing this litigation. The Arnoldys are, and have always been, merely a brother and sister interested in the farmland for their own use.

[2] Finnemans/Rock Creek assert that Mahoney paid Michael Arnoldy $2,113,000. This is incorrect. Finnemans/Rock Creek paid $822,000 to extend the redemption period, and Mahoney paid $1,291,000 in his attempted redemption from Michael Arnoldy.

The Arnoldys filed a declaratory judgment action based on the fraud surrounding the Mahoney redemption. (Pennington County Civ. No. 08-1845) (AMR 2). After reviewing the contents of the files, the circuit court determined that the judgments Mahoney had used to redeem were fraudulent and orally granted summary judgment in favor of the Arnoldys on November 20, 2009. (AMR 1399).

Meanwhile, Rabo foreclosed on its mortgage. (Pennington County Civ. No. 09-1211, Judge Delaney presiding; hereinafter, "Rabo case"). In its pleadings, Rabo asserted that the Finnemans had waived the owner's final right of redemption in a previous modification to the loan. (R.R. No. 34 at 10, ¶ 82). Rabo's complaint asked the court to enter an order waiving all redemption rights held by the Finnemans and Rock Creek Farms. (R.R. No. 34 at 19).

Rabo moved for judgment on the pleadings in the Rabo case on November 9, 2009. (*See generally* R.R. No. 110). The Arnoldys did not oppose the motion, because it was consistent with their position in these proceedings and they did not dispute the validity of Rabo's lien. Judge Delaney granted Rabo's motion for judgment on the pleadings in the Rabo case on January 15, 2010. (R.R. No. 155). While the order stated that Rabo's motion for judgment on the pleadings would be granted "in all respects" (R.R. No. 155), the corresponding judgment stated that Rock Creek had the owner's

right of redemption. (R.R. No. 156 at 6, ¶ 10). Judge Delaney was never informed that the judgment was contrary to the pleadings it purported to adopt. (App. at 13; R.R. No. 227).

On December 1, 2010, this Court reversed the court's grant of summary judgment in No. 08-1845 due to inadequate notice to the defendants of what portions of their attorney-client files would be used against them. *Arnoldy* ¶ 34, 791 N.W.2d at 657. Rock Creek/Finnemans then moved for summary judgment in No. 08-1845 , arguing that the language concerning redemption rights in the judgment from the Rabo foreclosure was res judicata on who owned the property. (AMR. 1525). The new judge who had since been assigned to No. 08-1845 agreed and granted the motion. (AMR. 1728). The Arnoldys appealed that judgment to this Court and filed a Rule 60(b) motion in the Rabo foreclosure.

On May 26, 2011, the court in the Rabo case granted the Rule 60(b) motion, stating that "the judgment of foreclosure, insofar as it resurrects a right of redemption contractually waived and clearly contrary to the pleadings (complaint and answer), [was] improvidently and erroneously entered." (hereinafter, "Rabo judgment") (R.R. 227). The court in the Rabo case entered a new judgment, granting the right of redemption to the Arnoldys. Rock Creek/Finnemans filed a number of motions attacking the judgment and

appealed it to this Court. Ann Arnoldy received a sheriff's deed to the property covered by the Rabo foreclosure, including the contract for deed land, on June 2, 2011.

The proceedings in the L&L foreclosure commenced in March of 2010. (LR 1). Ann Arnoldy initially sought to be substituted for Rabo; however, this was prior to the resolution of the Rock Creek/Finneman appeal of the Rabo judgment. The L&L case went to trial on July 25, 2011.

At the conclusion of trial, the trial court ruled that redemption would be made after this Court's decision in the appeal of the Rabo judgment – in effect conceding that the determination of who had the right to pay the contract balances and take legal title to the contract for deed land was to be decided in the Rabo case. Trial Transcript 180:25-181:2. In September of 2011, Rock Creek/Finnemans moved for possession of the land and rents, arguing that the L&L trial court had awarded them redemption rights at the trial. (LR 314). The motion was denied. (LR 535).

The Rock Creek/Finneman appeal of the Rabo judgment was dismissed on March 14, 2012.[3] *See Rabo Agrifinance, Inc. v. Rock Creek Farms,* 2012 SD 20, 813 N.W.2d 122. Ann Arnoldy paid off the Finnemans' conviction lien

[3] Both Rock Creek and the Finnemans have since filed their own successive 60(b) motions in No. 08-1211. These motions were denied, and Rock Creek and the Finnemans have indicated that they will appeal this denial as well.

which, with interest, totaled $1,246,246. Rock Creek and the Finnemans moved the L&L court for cancellation of the sheriff's deed issued as a result of the foreclosure in the Rabo case. (LR 367). These motions were denied on April 10, 2012. (LR 686-87). At the same hearing on April 10, the trial court adopted Arnoldys' findings of fact and conclusions of law, and held that Ann Arnoldy had the right to pay off the contract for deed and take full title to the land. (LR 499).

ARGUMENT

The Rock Creek/Finneman position on appeal is simple: they refuse to accept the fact that, due to the Rabo judgment, Rock Creek and the Finnemans have lost their interest in the land that was subject to the Rabo mortgage. This position is not tenable.

The court in the Rabo case granted the Arnoldys the owner's right of redemption for all of the property that was subject to the Rabo foreclosure, including the equitable title to the contract for deed land and the corresponding right to pay off the contract for deed. Ann Arnoldy exercised this right, redeemed the property from the Rabo foreclosure, and obtained a sheriff's deed. The trial court recognized this interest after Rock Creek and the Finnemans lost their appeal of the Rabo judgment, and held that Ann Arnoldy had taken Rock Creek's place with respect to the contracts for deed.

All of the Rock Creek/Finnneman arguments on appeal are either in denial of the Rabo judgment or attacks on its validity. However, the implications are clear: Ann Arnoldy is the owner of the equitable interest in the contract for deed property that had been mortgaged to Rabo. Therefore, she is the only party with the right to pay off the contract for deed and take full title. Rock Creek and the Finnemans should not be allowed to ignore the Rabo judgment or collaterally attack it in this case.

I. Ann Arnoldy was not a stranger to the contract

Rock Creek and the Finnemans assert that Rock Creek was the only entity with the right to cure the default under the contract for deed, and that Ann Arnoldy, as a junior lienholder, could not redeem the contract for deed land from foreclosure under Chapter 21-50. However, Ann Arnoldy was not a stranger to the contract, and she was not redeeming as a junior lienholder. Ann Arnoldy had assumed Rock Creek's position as owner of the equitable title to the contract for deed land and therefore had the right to pay off the contract for deed and receive full title. In fact, the judgment of foreclosure specifically states that "Ann Arnoldy is substituted for the defendants, Rock Creek Farms Partnership, whose interest in the land has been extinguished by virtue of the issuance of the sheriff's deed and the decision of *Rabo v. Finneman,* 2012 SD 20." LR 555

Rock Creek/Finnemans' argument that Ann Arnoldy could not redeem the contract for deed land from L&L is based on the unstated and unsupported assumption that, somehow, the Rock Creek/Finneman interest in the contract for deed land was able to survive the court's holding in the Rabo case that the Arnoldys were the owners of the property that had been subject to the Rabo mortgage. There is no basis in either law or fact for this conclusion. Rock Creek/Finnemans mortgaged their interest in the contract for deed land, along with their interest in the rest of the property, and they lost this interest in the Rabo case.

Ann Arnoldy became the owner of the equitable interest in the contract for deed land in the Rabo case; her position at the time of redemption was the one that Rock Creek claims for itself: the buyer under the contract for deed. By the time of the final order in this case, it was Ann Arnoldy, not Rock Creek or the Finnemans, who owned the equitable interest in the contract for deed land. Ann Arnoldy assumed Rock Creek's right to redeem under § 21-50-3 when the equitable interest in the contract for deed land was transferred to her by the court in the Rabo case.

A. Rock Creek/Finnemans mortgaged their equitable interest in the contract for deed land

Rock Creek/Finnemans could and did mortgage their interest in the contract for deed land. "Any interest in real property which is capable of being transferred may be mortgaged." SDCL § 44-8-1.1. A buyer of property on a contract for deed holds equitable title to the property and has the right to use and possession of the property. *Anderson v. Aesoph,* 2005 SD 56 ¶ 21, 697 N.W.2d 25, 31. This equitable title is an interest in the real property in question. *First Federal Sav. & Loan Ass'n of Rapid City v. Wick,* 332 N.W.2d 860, 862 (S.D. 1982) (holding that, by entering into a contract for deed, a mortgagor had transferred a part of or an interest in real property). It is freely transferrable unless the contract says otherwise. *Anderson.* at ¶ 21, 697 N.W.2d 31. Therefore, it is possible to mortgage the equitable interest in a contract for deed. *See, e.g., Hartman v. Wood,* 436 N.W.2d 854, 855-56 (S.D. 1989); *Federal Land Bank of Omaha v. Carlson,* 411 N.W.2d 415, 416 (S.D. 1987).

It is clear from the record in the Rabo proceeding that the contract for deed land was included in the foreclosure. The attachments to Rabo's Complaint, which are copies of mortgage documents signed by the Finnemans, contain descriptions of the land covered by the 1996 and 1999 contracts for

deed. R.R. No. 34. The documents denoting the sheriff's sale of the property specifically list the contract for deed lands. RR 174-175. Rock Creek and the Finnemans have no principled basis upon which to deny that their equitable interest was mortgaged to Rabo.

B. Ann Arnoldy became the owner of all the land covered by the Rabo mortgage

A contract for deed does not insulate a buyer from the consequences of the debts he incurs on his interest in the property. If Rock Creek/Finnemans could mortgage the equitable interest in the contract for deed land, they could also lose it. This is precisely what happened here. Ann Arnoldy exercised the owner's right of redemption granted to her by the court in the Rabo case and took over Rock Creek's interest in the property, including the contract for deed land. When Ann Arnoldy redeemed in the L&L foreclosure, it was as a transferee of Rock Creek's interest, not as a judgment creditor.

Rock Creek and the Finnemans concede that Ann Arnoldy is the owner of the other 7,500 acres that were part of the Rabo foreclosure. RCAB 19; FAB 20. However, they persist in claiming that the contract for deed land remains the property of Rock Creek. These claims are totally unsupported.

Rock Creek states that the "contract for deed lands were not sold as a result of the foreclosure of a real estate mortgage. No sale was held

whatsoever." RCAB 14. This is false. The Rock Creek/Finneman interest in the contract for deed land, subject to L&L's interest, was sold at the foreclosure sale and eventually redeemed by Ann Arnoldy. RR 174-175.

The other explanation that Rock Creek and the Finnemans offer for why the Rabo redemption did not reach the equitable interest in the contract for deed land is that the equitable title was "extinguished" by the Rabo foreclosure. They do not, however, offer any explanation of how or why this might occur, much less how their rights to the property somehow reappear at the time of the L&L foreclosure, or how it is possible to mortgage an asset that disappears as soon as it is foreclosed upon. Nor do they cite any case law in support of this proposition. The better, and indeed the only, explanation for what happened to Rock Creek's equitable title in the Rabo foreclosure action is that it was transferred to Ann Arnoldy.

C. The right of redemption vested in Ann Arnoldy

It would appear that Rock Creek and the Finnemans are asserting that they had a right to redeem the contract for deed property that was not transferred to Ann Arnoldy, despite the fact that they lost their equitable title in the Rabo foreclosure. FAB 13; RAB 11. This argument is unsupported, and is nothing more than an attempt to escape liability on their debts while gaining clear title to the contract for deed land.

1. The right to redeem may be involuntarily transferred

Rock Creek and the Finnemans argue that the right to pay off a contract for deed and take full title to the land cannot be transferred in a foreclosure action. However, nothing in SDCL § 21-50 or *Anderson* states that only a voluntary transferee can assume a buyer's interests under a contract for deed.

Rock Creek and the Finnemans claim that SDCL § 21-50-3's statement that the court can "fix the time within which the party or parties in default must comply with the terms of such contract on his or her part" means that only Rock Creek, as the Finnemans' transferee, can redeem. RAB 10-11; FAB 12-13. Presumably, the argument is that the term "party or parties in default" means "the buyer under the contract for deed, or the buyer's voluntary transferee." How Rock Creek and the Finnemans reached this conclusion is far from clear. They cannot be arguing that only the buyer can be in default because only the buyer is named in the contract for deed; if that were the case, Rock Creek, as Finnemans' assignee, could not have a right of redemption. Moreover, as *Anderson* confirms, the right of redemption is transferrable. 2005 SD ¶ 25, 697 N.W.2d 25, 33.

Perhaps Rock Creek and the Finnemans mean to argue that Rock Creek is within the scope of the statute because it took the Finnemans' place with respect to the contract for deed. This makes some sense, as any party who

assumed the Finnemans' interest is obligated under the contract because they take subject to L&L's interest in the property. However, the same would be true of Ann Arnoldy. Indeed, the Arnoldys have never argued otherwise; the contract for deed property was sold at the Rabo foreclosure sale subject to L&L's interest, and Ann Arnoldy tendered the money due to L&L. The Rock Creek/Finneman argument on the allegedly clear language of SDCL § 21-50-3 fails on its own terms.

While *Anderson* does, in fact, hold that an assignee of the original vendor can redeem from a contract for deed foreclosure, the opinion in no way limits redemption to voluntary transferees. *Anderson* merely establishes that the right to redeem may be transferred by quitclaim deed. ¶ 25, 697 N.W.2d at 33. Rock Creek fails to explain what portion of this holding would be "perverted" by allowing redemption by a transferee who had taken over the contract for deed buyer's interest through foreclosure of an inferior mortgage. RCAB 14.

To the extent that Rock Creek's argument is based on L&L's lack of consent to the mortgage, it is erroneous. The sellers in *Anderson* did not consent to the quitclaim deed. ¶ 11, 697 N.W.2d at 29. Moreover, the record shows that L&L never consented to the transfer from Finnemans to Rock Creek, any more than it consented to the mortgage. The issue of consent would

be between L&L and Ann Arnoldy, not Rock Creek and the Ann Arnoldy, and it was not raised at trial. Neither the law nor the record supports the contention that the right to redeem cannot be involuntarily transferred.

2. The right to redeem is part of the equitable title

As both Rock Creek and the Finnemans point out repeatedly, the right of redemption accrues to the contract for deed buyer or the buyer's transferee – in short, to the person who has equitable title to the property. When Rock Creek/Finnemans lost their equitable interest, they also lost their right to redeem.

Rock Creek/Finnemans appear to believe that they had a right of redemption that was somehow separate from their equitable interest in the property – in short, that they lost the equitable title to Ann Arnoldy but retained the right to redeem and therefore the ultimate right to the land. This is plainly wrong. As has been previously stated, <u>any</u> interest in real property can be mortgaged. SDCL § 44-8-1.1.

Rock Creek and the Finnemans fail to point to any language in the Rabo mortgage that exempts the right to redeem from the mortgage. The mortgage documents signed by the Finnemans merely state that the Finnemans are mortgaging the properties; they do not exempt particular rights in those

properties. The only conclusion that can be drawn from these facts is that the Finnemans mortgaged their L&L redemption rights to Rabo.

Moreover, the right to redeem is not severable from the equitable title. Since a right of redemption is the right to pay off the contract and take full title, it cannot be divorced from the equitable title to the contract property in the situation where the equitable title is involuntarily transferred. Without the right to redeem, the equitable title is no title at all, particularly where the transferee may be foreclosed upon for the transferor's default.

If the Rock Creek/Finneman position were accepted, it would mean that a mortgagor could hold out its equitable title in land as bait to a lender, take the loan money, default on the loan, and then swoop back in after the foreclosure to take full title to the collateral simply by paying off the contract for deed. This would force the lender or any other party who received equitable title during the foreclosure to swallow the mortgagor's debts. Given the plain language of SDCL § 44-8-1.1, which allows the mortgage of <u>any</u> transferrable interest in real property, such a result can hardly be written off under the general maxim of buyer (or lender) beware.

Rock Creek's interest did not disappear at the time of the Rabo foreclosure, only to magically reappear when it was time to make a redemption in the contract for deed proceeding. When the Rabo court transferred the Rock

Creek/Finneman equitable interest in the contract for deed property to the Arnoldys, it also transferred the right to redeem.

3. Rock Creek and the Finnemans are using the right to redeem to escape liability for their debts

If anyone is confusing mortgages and contracts for deed and owners and creditors, it is Rock Creek and the Finnemans, not the trial court. While it is true that a creditor who comes out of a mortgage foreclosure with title to the property is able to strip away all junior liens, there is no such leniency for the mortgagor. A mortgagor's redemption means that all of the junior liens stay attached to the property. Rock Creek and the Finnemans, however, are claiming that, if they are allowed to redeem from the contract for deed foreclosure, they will have the property free and clear, regardless of the fact that the Rabo mortgage and all the liens below it were only removed from the title because Ann Arnoldy, not Rock Creek or the Finnemans, paid off the mortgage. If Rock Creek were allowed to obtain title to the land by paying off only the contract for deed, it would escape millions of dollars in mortgages and judgments. This is an absurd result that has no basis in either law or equity.

II. The trial court did not err in denying the motion to invalidate the sheriff's deed

Rock Creek and the Finnemans claim the trial court erred in denying their motion to invalidate the June 2, 2011 sheriff's deed because it was issued without notice, in violation of their due process rights. RCAB 17; FAB 17. There are a number of issues with this argument. First, Rock Creek and the Finnemans are claiming to have been deprived of a property interest that was not transferred by the deed and was never theirs at all. Secondly, Rock Creek and the Finnemans had ample notice of and numerous opportunities to contest the deprivation of their equitable interest in the contract for deed land. Finally, the Rabo case was the proper place to raise concerns with Ann Arnoldy's ownership interest.

A. Rock Creek and the Finnemans received due process

"Procedural due process protects certain substantial rights, such as life, liberty, and property, that cannot be deprived except in accord with constitutionally adequate procedures. Procedural due process is flexible, and requires only such procedural protections as the particular situation demands." *Esling v. Krambeck,* 2003 SD 59 ¶ 16, 663 N.W.2d 671, 678. To establish a procedural due process violation, a party must demonstrate 1) a protected property or liberty interest; and 2) that he or she was deprived of that interest

without due process of law. *Daily v. City of Sioux Falls,* 2011 SD 48 ¶ 14, 802 N.W.2d 905, 911.

Rock Creek and the Finnemans fail to establish a procedural due process violation. To the extent that Rock Creek and the Finnemans claim a deprivation of the legal title to the contract for deed land, no such deprivation occurred, and they would not have had standing to contest it if it had. While Rock Creek/Finnemans held the equitable title to the contract for deed land prior to the Rabo foreclosure, they were not deprived of this interest without due process of law.

1. The claim based on the alleged deprivation of legal title fails

Rock Creek and the Finnemans claim that the deed was a deprivation of legal title to the contract for deed land. This is patently false. A sheriff's deed only grants to the holder title to whatever interest that the mortgagor had in the premises. SDCL § 21-47-24 states that the deed "shall vest in the purchaser, or other party entitled thereto, the same estate that was vested in the mortgagor at the time of the execution and delivery of the mortgage, or at any time thereafter." (emphasis added).

Since Rock Creek/Finnemans only had equitable title to the contract for deed land, the very nature of a sheriff's deed means that L&L's interest

remained unaffected. The notice of sale in the Rabo proceeding specifically stated that the sale was of Finnemans' interest in the land, subject to L&L's superior interest in the contract for deed acres. Indeed, L&L received the amount it was due under the contract when Ann Arnoldy tendered payment.

Moreover, Rock Creek and the Finnemans cannot assert a due process violation for the alleged deprivation of the legal title to the contract for deed land. As both Rock Creek and the Finnemans note, they only had equitable title to the contract for deed land; even if the sheriff's deed purported to reach the legal title, any alleged deprivation would not affect Rock Creek or the Finnemans. Since Rock Creek and the Finnemans had no protected property interest in the legal title, they could not have been deprived of it without due process of law. Any due process claim based on the legal title to the contract for deed property must fail.

2. The transfer of equitable title to Ann Arnoldy did not violate Rock Creek's or the Finnemans' due process rights

To the extent that their argument implicates the equitable interest in the contract for deed land, Rock Creek and the Finnemans were afforded due process prior to the deprivation. The problem with Rock Creek/Finnemans' "secret deed" argument is that it focuses on the issuance of the sheriff's deed rather than the judgment that authorized it. The deed did not come into

existence *ex nihilo*; Ann Arnoldy obtained it only as a consequence of the Rabo judgment, which specifically states that the Arnoldys are to receive a deed. RR 229. Ann Arnoldy did nothing secret or illegal in obtaining the deed. She was simply carrying out a course of action that the Rabo judgment entitled her to complete.

By the time the deed was issued and filed, Judge Delaney's decision concerning its appropriateness had already been made, and any alleged deprivation had already occurred. In short, the question is whether Rock Creek and the Finnemans had notice of the proceedings on the Arnoldys' 60(b) motion and the ability to raise their arguments therein, not whether they had chance to attack the deed once the Court had ordered it to be issued.

There is no question that Rock Creek and the Finnemans had notice of the Arnoldys' motion and numerous opportunities to present their side of the story. They made filings in opposition to the Arnoldys' 60(b) motion and had a chance to argue their position to the Rabo court. Rock Creek filed a motion for reconsideration and a 60(b) motion prior to its appeal. Both the Finnemans and Rock Creek appealed the May 26, 2011 decision. Their concern is not with the lack of opportunity and notice but with the fact that they lost. However, procedural due process guarantees only an adequate procedure, not a

particular result. Rock Creek and the Finnemans were not deprived of due process merely because the outcome was not in their favor.

Nor is it relevant that the appeal of the Rabo judgment was dismissed on procedural grounds. Due process does not insulate litigants from procedural errors. *See, e.g., Carlisle v. United States,* 517 U.S. 416, 429 (1996) (no due process violation when district court did not grant untimely postverdict motion for judgment of acquittal); *Zetino v. Holder,* 622 F.3d 1007, 1013-14 (6th Cir. 2007) (no due process violation when alien was unable to fully present case due to late filing of brief); *He Ping Zheng v. U.S. Department of Justice,* 185 Fed. Appx. 62, 63 (2d Cir. 2006) (no due process violation for refusing to accept into evidence documents that were untimely presented or lacked certification). There is no due process violation when an appellant's procedural error results in the dismissal of an appeal. *Van Duyse v. Israel,* 486 F.Supp. 1382 (E.D. Wis. 1980) (no due process violation when petitioner's appeal was dismissed due to petitioner's failure to serve notice on the district attorney).

In sum, Rock Creek and the Finnemans had numerous opportunities to contest Judge Delaney's decision to grant redemption rights to the Arnoldys. Their lack of success, whether on the merits or due to procedural errors, does

not negate this fact. Rock Creek and the Finnemans received due process; they are merely unhappy with the result.

3. There was no "secret deed"

Even if the Rock Creek/Finneman argument concerning the alleged secret deed were more than an attempt to draw attention from the numerous chances they had to contest the Arnoldys' 60(b) motion in the Rabo case, it would fail. Ann Arnoldy bypassed no process in obtaining the sheriff's deed, and did nothing to hide it from the world.

Rock Creek/Finnemans cite to no statute mandating a hearing before the issuance of a sheriff's deed. This is unsurprising. The issuance of a sheriff's deed is a non-discretionary ministerial act. 30 Am. Jur. 2d § 484. The deed must be issued when a party who is entitled to the deed requests it. SDCL § 21-47-24. In short, there is no room for a hearing prior to the issuance of the deed; the decision on whether the requesting party is entitled to it has already been made.

Moreover, the deed itself was far from secret. Ann Arnoldy recorded it with the Pennington County Register of Deeds on the same day it was issued. It is a fundamental rule that public recordation is notice to the world. *Rhomberg v. Bender,* 134 N.W. 805, 806 (S.D. 1912). Rock Creek and the

Finnemans had notice of the deed and there was no impropriety in its issuance. The appellants' insinuations of misconduct should be disregarded.

B. The motion to vacate the sheriff's deed was a collateral attack on a final judgment

Rock Creek and the Finnemans made the curious move of attempting to vacate the sheriff's deed issued as a result of the Rabo foreclosure in the L&L case. Again, the June 2, 2011 deed was merely the consequence of the Rabo court's decision to award redemption rights to the Arnoldys. In other words, an attack on the sheriff's deed is an attack on the Rabo judgment.

Rock Creek and the Finnemans did not allege that the judgment was obtained by fraud, or that a jurisdictional defect rendered it void. Instead, their only arguments have been that the Rabo court erred in granting the owner's right of redemption to the Arnoldys. Even if the Rabo judgment were erroneous, Rock Creek and the Finnemans would not be entitled to make a collateral attack on it in the L&L proceeding. Once a court has issued a judgment, it is subject to revision only upon appeal or in a proceeding that constitutes a direct attack. *Bollinger v. Eldredge,* 524 N.W.2d 118, 122 (S.D. 1994). Therefore, the only proper place to raise any claims of error was in the Rabo proceeding. Restatement (First) of Judgments § 11 cmt. b. ("A judgment which although erroneous is valid is not subject to collateral attack…, although

it may be open to direct attack by further proceedings in the original action or by independent proceedings in equity.") The reason for such a rule reflects the balance between finality and justice:

> "In dealing with attempts to impeach judgments a court is confronted with conflicting policies. On the one hand, there is the need that litigation come to an end and that confidence be maintained in the finality and integrity of the judgments of our courts. On the other hand, there is the imperative demand that justice be done. A course must be charted with both of these social ends in view. It is our conclusion that one policy requires us to limit collateral attack to those vices which are destructive of validity; the ends of justice will be adequately served by the several direct remedies available to a litigant." *Hoverstad v. First Nat. Bank and Trust Co.,* 74 N.W.2d 48, 52 (S.D. 1955).

There is no question that the motion to vacate the sheriff's deed was meant to undo decisions made in the Rabo case. In fact, Rock Creek/Finnemans' main arguments for vacating the deed, both in circuit court and on this appeal, are attacks on the Rabo judgment.

Rock Creek and the Finnemans have made myriad attempts to vacate the Rabo judgment, both in the original proceeding and elsewhere. These attacks have intensified after their appeal in the Rabo case was dismissed. Since that time, Rock Creek and the Finnemans have filed several 60(b) motions in the Rabo proceeding, all of which were denied. They filed the motion to vacate in the L&L proceeding, and are now trying to raise the same arguments on appeal. The motion to vacate and this appeal are nothing more than an attempt to get this Court to reconsider its decision in *Rabo v. Finneman*. The circuit court did not err in denying the motion to vacate the sheriff's deed.

III. Reversal is not warranted under Rule 25(c)

Rock Creek and the Finnemans argue that the judgment should be reversed because the trial court failed to follow the proper procedures for the substitution of parties. However, their vague allegations of error do not include any act that was outside of the trial court's broad discretion under Rule 25(c). Moreover, even if the trial court had erred, there was no resulting prejudice to Rock Creek and the Finnemans.

A. The trial court did not abuse its discretion in handling Ann Arnoldy's motion for substitution

Substitution of parties is a matter within the discretion of the trial court. SDCL § 15-6-25(c) ("In case of any transfer of interest, the action may be

continued by or against the original party…) (emphasis added); *Bamerilease Capital Corp. v. Nearburg,* 958 F.2d 150, 153 (6th Cir. 1992). It is a procedural device designed to facilitate the conduct of a case and does not alter the substantive rights of parties. *Luxliner P.L. Export Co. v. RDI/Luxliner, Inc.,* 13 F.3d 69, 71-72 (3d Cir. 1993). In other words, the outcome of a motion for substitution does not change the outcome of the case.

"The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred. The action may be continued by or against the original party, and the judgment will be binding on the successor in interest even though the successor in interest is not named. An order of joinder is merely a discretionary determination by the trial court that the transferee's presence would facilitate the conduct of the litigation." 7C Charles Alan Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1958 (3d Ed. 2007)*; North Dakota Mineral Interests, Inc. v. Berger,* 509 N.W.2d 251, 255 (N.D. 1993). *See also Barger v. City of Cartersville,* 348 F.3d 1289, 1292-93 (11th Cir. 2003) (holding that, although the bankruptcy trustee was the real party in interest for plaintiff's discrimination claim, Rule 25 dictated that the action could be continued in the name of the plaintiff and the trustee could simply take her place, regardless of the fact that the trial court never directed substitution).

These considerations also mean that there are few time limits on a motion for substitution. "Although substitution is usually effected during the course of litigation, substitution has been upheld even after litigation has ended as long as the transfer of interest occurred during the pendency of the case." *Luxliner,* 13 F.3d at 71. *See, e.g, Barger,* 348 F.3d at 1292-93 (transferee substituted on appeal); *Bamerilease Capital Corp.,* 958 F.2d at 153-54 (transferee substituted after settlement of case).

Given the discretionary nature of the rule and the automatically continuance of the lawsuit against Rock Creek in the absence of a decision, the trial court did not err in its handling of Ann Arnoldy's motion. Again, the grant of a 25(c) motion is merely a decision by the trial court that the inclusion of the transferee will facilitate the litigation. 7C Charles Alan Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1958 (3d Ed. 2007). Since Ann Arnoldy was already named as a defendant in the L&L action, the trial court did not abuse its discretion by holding off on the motion; Ann Arnoldy was already involved in the case, and making a nominal change would not have affected the conduct of the litigation.

Nor may Finnemans and Rock Creek prevail because the court did not hold a hearing. The discretionary nature of Rule 25(c) and the automatic continuation of the lawsuit against the original party mean that the rule "does

not easily lend itself to contested motions practice." *Luxliner,* 13 F.3d at 72. In fact, Rule 25(c) does not even specify a method for deciding the motion or a standard for determining when a hearing is necessary. *Id.*

B. Rock Creek and the Finnemans were not prejudiced

Even if the trial court had erred in its handling of the substitution issue, Rock Creek and the Finnemans are not entitled to the relief they seek. Procedural error only necessitates reversal when it had an effect on the final result and adversely affected the rights of the party assigning the error. *Tri-State Co. of Minnesota v. Bollinger,* 476 N.W.2d 697, 700 (S.D. 1991) (reversing grant of summary judgment when court had erroneously concluded that response to motion for summary judgment was untimely filed). Rock Creek and the Finnemans have failed to show prejudice.

The Rock Creek/Finneman prejudice argument appears to be that the trial court's failure to hold a hearing on the motion for substitution caused them to lose the right to redeem the contract for deed land. This is not the case. The Finnemans had no right to redeem because they had transferred their interest to Rock Creek. Rock Creek had no right to redeem because its interest in the land was transferred to Ann Arnoldy as a result of the Rabo foreclosure. This decision was made in the Rabo suit, and nothing that happened in the L&L foreclosure could change it. Regardless of the nature of Ann Arnoldy's

substitution filings and what the court did in response, Rock Creek had already lost the right to redeem. Rock Creek and the Finnemans were not adversely affected, and reversal on procedural grounds would be improper.

CONCLUSION

Ann Arnoldy, not Rock Creek or the Finnemans, was the owner of the equitable interest in the contract for deed property after the Rabo foreclosure. The trial court did not err in denying Rock Creek's attacks on the Rabo judgment and allowing Ann Arnoldy to redeem the property in this action. The judgment below should be affirmed.

Dated at Sioux Falls, South Dakota, this _____ day of October, 2012.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

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IN THE
SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 26373

L & L PARTNERSHIP, et al.

vs.

DAVID M. FINNEMAN, CONNIE S. FINNEMAN,
ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO
DAVID M. FINNEMAN AND CONNIE S. FINNEMAN, et al

Plaintiff-Appellee (L & L Partnership).

ON APPEAL FROM THE
SEVENTH JUDICIAL CIRCUIT COURT
PENNINGTON COUNTY, SOUTH DAKOTA,
HONORABLE JAMES W. ANDERSON
CIRCUIT COURT JUDGE PRESIDING
Court File No. C10-316

APPELLEE'S OPENING BRIEF

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Notice of Appeal filed on June 1, 2012

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PRELIMINARY STATEMENT

References in this brief to the trial transcript shall be "TTp. __". References to the Register of Actions shall be "Rec. ___". References to the appendix shall be "Appendix.___" and references to the trial exhibits shall be "Ex. ___".

JURISDICTIONAL STATEMENT

Judgment of Foreclosure was entered on April 19, 2012, and filed with the Pennington County Clerk on April 23, 2012. Notice of Entry of Judgment of Foreclosure was dated May 4, 2012. Notice of Appeal, dated June 1, 2012, was filed by Appellant Rock Creek Farms, Appeal #26373. Notice of Appeal dated June 4, 2012 was filed by David M. and Connie S. Finneman, Appeal #26374.

Appellee, L & L Partnership filed its Notice of Review on June 20, 2012 in both appeals.

STATEMENT OF LEGAL ISSUES

L & L Partnership raises the following issues:

I. Did the Trial Court award adequate damages to Seller, L & L Partnership, under its two contracts for Deed?

The Trial Court failed to include in its judgment all sums due to L & L according to the contract terms.

Relevant authorities:

Estate of Moncur, 2012 S.D. 17 ¶ 10

II. Did the Trial Court improperly modify the contracts by bifurcating performance of the contracts among vendees and their claimed successors in interest?

The Trial Court's judgment imposed obligations on L & L to issue deeds to parties outside the contract and to collect damages from several potential redemptioners.

Relevant authorities:

Kroeplin Farms General Partnership v. Heartland Crop Insurance, 430 F.3d 906, 911 (8th Cir. 2005)

Hartman v. Wood, 436 N.W. 2d 854 (S.D. 1989)

SDCL 21-50-3

III. Did the Trial Court err in ordering equitable adjustment of damages and redemption rights among vendees and their claimed successors in interest?

The Trial Court shifted responsibility for payment of damages among vendees and their successors in interest without hearing evidence on the issue and changed the Seller's rights.

Relevant authorities:

Schultz v. Jibben, 513 N.W.2d 923 (S.D. 1994)

Pam Oil, Inc. v. Travex International Corp., 336 N.W.2d 672, 674 (S.D. 1982)

SDCL 21-50-3

STATEMENT OF THE CASE AND FACTS

Statement of the Case

Plaintiff L & L Partnership filed suit against David M. Finneman and Connie S. Finneman, their successor in interest, Rock Creek Farms, and a host of junior lien holders, to foreclose on two real estate contracts for deed. (Rec. P. 3). L & L sought damages for non-payment and other defaults and to foreclose on the two contracts, subject to the buyer's right of redemption under SDCL § 21-50-3.

Trial to the Court was had in the Seventh Circuit, Pennington County, with the Honorable James W. Anderson, Circuit Judge presiding, on July 25, 2011. The action was defended by three parties asserting an interest in the contract for deed lands as vendees, or buyers: David M. and Connie S. Finneman, original vendees, Rock Creek Farms, a Partnership to whom they had conveyed their interest, and Ann Arnoldy, holder of s Sheriff's Deed on most of the affected real property. (Rec. 188).

The Trial Court stated its decision in open court at the conclusion of the evidence. The Trial Court delayed entry of Findings of Fact and Conclusions of Law and Judgment of Foreclosure until resolution of the pending appeal in Rabo Agrifinance, Inc., vs. Finnemans, et al, 2012 S.D. 20.

A Final Judgment was entered on April 19, 2012, along with Findings of Fact and Conclusions of Law. (Rec. 555, 499). The Court's Judgment of Foreclosure provided that there was due the sum of $612,341.68 on the 1996 contract for deed. The Judgment also provided that Ann Arnoldy had the sole right to redeem the contract by payment of that amount.

On the 1999 contract for deed the judgment provided that there was due the sum of $153,762.31 on all the land described in the contract, less 199.08 acres and that Ann Arnoldy had the sole right of redemption.

David and Connie Finneman could redeem the remaining 199.08 acres by payment of $14,806.02, plus additional damages for attorney's fees and costs passed on to L & L of $76,000.00, for a total of $90,806.02. All costs and attorney fees subsequently ordered by the Court would also be taxed against Finneman's and their 199.08 acres as

well. The Judgment also provided that other parties, including Ann Arnoldy could redeem this portion of the contract lands as well, in the event Finnemans failed to do so.

Statement of Facts

In 1996, L & L Partnership owned, approximately, 7,200 acres of farm land in Meade County and about 2,200 acres in Pennington County. T.T. p 12, 13. Both farms were subject to a mortgage in favor of The Equitable Life Insurance Company, with an approximate balance of $1,700,000.00. Exhibit 1, TTp. 13. L & L sold the Meade County land to Finnemans in April 1996 for $1,800,000.00, payable $400,000.00 down and $1,400,000.00 on payments with a variable rate of interest. The contract acknowledged the prior mortgage to Equitable. Exhibit. 1. Paragraph 32. An escrow with First Western Bank in Wall, South Dakota, was establilshed for payment and deposit of a Warranty Deed. Exhibit 1, paragraph 21.

The payments to be made by Finnemans were to flow to Equitable and L & L made the payments on that portion of the Equitable Note that was allocated to the Pennington County land. TT p. 16. In October of 1999, L & L sold the 2,200 acres in Pennington County to the Finnemans on contract for deed. Exhibit 2. The purchase price was $600,000.00 with $17,600.00 down and the remaining $582,400.00 paid in installments with interest fixed at 8%. At paragraph 2g. of this contract the Finnemans were required to additionally "timely pay" to Equitable the semi annual mortgage payments due under its note and mortgages. Thus, between the two contracts, Finnemans payments were to cover the Equitable obligation, and more. TTp 20.

Both contracts contained provisions for the protection of the Seller by

indemnification for any costs or attorneys fees incurred by the Seller from Finnemans use or misuse of the land or legal actions to which Seller could be made a party. Over time, Finnemans caused to be placed against the contract lands, a host of voluntary and involuntary liens, mortgage and judgments, all without prior consent of L & L. TTp 23. Finnemans also conveyed their interests in the lands to Rock Creek Farms Partnership, without L & L's consent. TTp. 23.

Appellant's Brief in this case identifies the following actions brought against Finnemans, which also involved Equitable and L & L as parties in interest and resulted in both Equitable and L & L incurring legal expenses: Farm Pro Services, Inc. vs. David M. Finneman, et al., Seventh Circuit, Pennington County File No. C-02-533, a sale of Finneman's lands by execution on a judgment; Rabo Agri Finance, Inc., et al v. David M. Finneman, et al, Seventh Circuit, Pennington County, File No. C09-1211, a mortgage foreclosure action. This "Rabo" action was judicially noticed by the Trial Court in the present case. TTp. 6. Additionally, Finneman's began a declaratory judgment action against L & L to determine the balances due under the two contracts; David M. Finneman, et al. v. L & L Partnership, et al., Seventh Circuit, Pennington County, File No. CIV. 09-742, which case has effectively been abandoned.

The "Rabo" foreclosure action resulted in a foreclosure judgment against several thousand acres of Finneman land, including Finnemans interest in the L & L contract for deed lands, which Finnemans mortgaged to Rabo. Appendix. p 1-6. This judgment was subject to the prior interests of L & L, Equitable and the mortgage lien of Laidlaw Family Partnership, the latter being filed against the L & L Pennington County contract lands and

identified in the contract. When Finnemans mortgaged their interests in the L & L contract for deed lands to Rabo, the legal descriptions of these lands in the Rabo Mortgage, apparently, described all but 199.08 acres of the 1999 Pennington County contract lands.

The balance due on the 1996 contract came due January 1, 2010. TTp 42. This coincided with the balloon payment due Equitable by L & L on the underlying note and mortgage. TTp 42. Because the 1999 contract required Finneman to "timely pay to The Equitable Life Assurance Society of the United States the amount of the semi-annual mortgage payments attributable to the above-described property and due to Equitable according to the terms of the promissory note secured by Equitable's mortgage on the subject property..." the 1999 contract ballooned as well. Exhibit 2, paragraph 2g. (emphasis added). Thereafter, L & L commenced this foreclosure action against Finnemans, Rock Creek Farms and all junior encumbrancers as described in the complaint.

At trial, testimony from the parties to the contracts indicated that there was a history of late payments, TTp. 58, default notices, TTp. 26-29, and an ongoing unresolved dispute governing the status of Finnemans' payments, accrued default interest and the allocation of payments under each of the two contracts. TTp. 86.

The underlying Equitable note and mortgage, being due and payable was sold by Equitable to CLW Financial. TTp. 43. L & L then paid off that note, through Bob Laidlaw, original partner, to the tune of $1,166,930.89. TTp 43. Of that amount, $76,466.95 was set forth as attorney fees and costs incurred by Equitable and CLW from

Finnemans' prior legal proceedings, which were passed on to L & L. Exhibit 17, not admitted into evidence, was specifically referenced by the Court when it issued its ruling on damages. TTp 170, 180; Appendix pages 7-10. Marvin Lutz of L & L also testified that he had incurred other legal fees with Attorney Curt Jensen in the amount of $1,289.42 concerning Finneman's prior defaults. TTp 47-49, Exhibit 19.

The Court heard testimony from the accountants for L & L, Arnoldy and Rock Creek Farms/Finneman. Beginning in 1999, Finnemans'obligations under the contracts were to make the semi annual payments to Equitable on the underlying note and mortgage against the two farms as well as an annual payment from the 1999 contract of $47,000.00. The accountants allocated the payments to Equitable 83.679% on the 1996 contract and 16.321% on the 1999 contract. TTp. 91. Some of the payments made to L & L came not from Finnemans but from a receiver in the Rabo foreclosure case. TTp. 93. These payments were also allocated against the two contracts at the same percentage. TTp. 93. The significant difference between L & L's calculations by CPA Phil Zacher and Finneman's calculations by CPA Paul Thorstenson was that L & L's calculations did not include a payment of $83,600.00 that L & L testified was not paid by Finnemans. TTp. 139-140. The Court permitted CPA Thorstenson to correct and amend his calculations post trial, resulting in a determination that, as of the date of trial, July 25, 2011, there was due on the 1996 contract, $605,540.77 and on the 1999 contract $163,326.19, for a total of $768,866.96. Rec. 301. Arnoldy's accountant, CPA Steve Kocr testified to different calculations and did not submit an accounting on the 1999 contract. TTp. 165. CPA Kocr's Exhibit 103 was prepared, on counsel's advice, without assessing a late

payment penalty prior to January 2008. TTp. 162. No explanation was provided why this was done and no comparable calculations for the 1999 contract could be compared.

The Trial Court entered Findings of Fact that went beyond the evidence presented at trial. Specifically, the Court found that because Finnemans/Rock Creek's interest in the contract for deed lands had been lost to Ann Arnoldy in the Rabo foreclosure case, that all junior liens that had attached to the contract for deed lands were foreclosed as well. Findings of Fact 44 and 45. The Rabo foreclosure judgment states that it is subject to the prior interests of L & L in the contract for deed lands. Appendix pages 1-6. The Court further found that in the 1999 contract, Finneman retained an interest in 199.08 acres, that remained subject to several judgment claims. The Court did not hear evidence on equitable adjustment but, nevertheless, concluded that only Finneman's interest in the 199.08 acres would be subject to L & L's damage claim of $76,000.00 plus in attorney fees, absolving Arnoldy of any responsibility for this damage claim despite her apparent standing as Finnemans/Rock Creek Farms, successor in interest. Additionally, the Court concluded that a right to redeem the 199.08 acres portion of the 1999 contract inurred to Arnoldy and others, as junior lien holders and not just to Finnemans/Rock Creek Farms as the Contract vendees. The Court's bi-furcation of the 1999 contract obligations among various interested parties required L & L to issue different deeds to different parties in direct conflict with the contract terms.

The Court's Findings and Conclusions allowed for the redemption of the 1996 contract without payment of additional damages proved at trial or L & L's later application for costs and attorney fees. The Court's Findings and Conclusions permitted

special status to Arnoldy to redeem the entire 1996 contract and most of the land in the 1999 contract without being responsible for costs, attorney fees or additional damages. Under the Court's Judgment, L & L is required to issue a new deed to Arnoldy, though the original is in escrow, and to do so upon tender of payment without attorney fees, costs or other damages.

ARGUMENT

I. Standard of Review

This Court reviews questions of fact under the clearly erroneous standard of review. Estate of Moncur, 2012 S.D. 17 ¶ 10; citing Weekley v. Prostrollo 2010 S.D. 13, 778 N.W.2d 823; In re Ragennitter, 1999 S.D. 26 ¶ 11, 589 N.W. 2d 920, 923. Findings of Fact may not be set aside unless clearly erroneous SDCL 15-6-52(a). "The interpretation of a contract is a question of law, which is reviewed de novo." Kernburner, LLC v. MitchHart Mfg., Inc. 2009 S.D. 33 ¶ 7, 765 N.W.2d 740, 742 (quoting, Arch v. Mid-Dakota Rural Water Sys., 2008 S.D. 122 ¶ 7, 75 N.W. 2d 280, 282).

II. The Trial Court's award of damages failed to include all sums properly due and owing under the contracts for deed.

The Trial Court heard the testimony of three accountants regarding the balances due under the two contracts. Each expert, beginning in 1999 when both contracts were in force, properly allocated the buyer's payments that were being made directly to Equitable 83.679% against the 1996 interest and 16.321% against the 1999 contract. TTp.92. The only substantial differences between Finneman/Rock Creek Farms CPA and L & L's CPA were as to whether the buyers should get credit for a payment of

$83,600.00. Tp. 96. L & L's expert tendered exhibits 16 and 26 showing his calculations and testified, they were substantially the same as the report from Finneman/Rock Creek Farms CPA. L & L's CPA did not give Finneman/Rock Creek Farms credit for a disputed payment of $83,600.00. Finneman's/Rock Creek Farm's CPA included the $83,600.00 payment and brought his calculations up to date with a revised report to the Court dated August 4, 2011. Rec. 301. Absent the $83,600 disputed payment, CPA Thorstensen and CPA Zacher applied identical methodology and calculations. L & L concedes on the $83,600.00 issue and accepts the calculations of CPA Thorstenson that the amounts due on the 1996 contract, as of July 25, 2011, is $605,540.77 and on the 1999 contract $163,320.19.

CPA Kocr, testifying for Arnoldy, produced trial exhibit 103 on the 1996 contract but no similar calculation on the 1999 contract. Nor did he have an opinion on the balance of the 1999 contract. Given that both contracts require that due credit be given between them for buyer's payments on The Equitable note and mortgage, it is impossible to determine if CPA Kocr's calculations are correct. More importantly, Kocr testified that, on the advice of counsel, he did not calculate the required penalty interest prior to January 2008. TTp. 162. This is contrary to the contract language as properly considered by Thorstenson and Zacher and totally arbitrary. Furthermore, Kocr offered no testimony justifying this discrepancy. Instead, Kocr's testimony was that he may have applied a payment differently from Thorstensen as between the two contracts but couldn't be sure because he did not have a completed analysis of the 1999 contract payments.

"Q All right. So you're aware that there was a payment shown on Mr.

Thorstenson's amortization schedule for January 31st of 2000 and you took that out of yours. Right?

A. Correct.

Q And did you apply that payment for that date against your--whatever estimate you would have come up with on the 1999 contract?

A I would believe so. I'm not--I don't have my 1999 schedule here right now.

Q All right.

A –because its incomplete."

TTp. 165. The Court's finding that CPA Kocr's estimate of the balance due under the 1999 contract was clearly erroneous given the more complete, accurate and probative results obtained by Thorstenson and also Zacher, absent the $83,600.00 payment dispute.

Marvin Lutz, testifying for L & L established that L & L and for Bob Laidlaw, his partner paid $1,166,930.89 to CLW Financial, the successor in interest to The Equitable on the note and mortgage encumbering the two properties. Of that amount, the Court ruled from the bench at the conclusion of the evidence that L & L would be entitled to recover that portion of that amount that was the attorneys fees as set forth in trial Exhibit 17: "I'm going to allow attorneys fees as the $76,000.00 plus . . .." TTp. 180. The Court was referring to the demonstrative portion of Exhibit 17 showing $76,466.95, as attorneys fees and interest passed on to L & L by The Equitable and CLW. App. 2. The Court's Findings of Fact #53, however, misstates this figure as $76,000.00. This finding is inconsistent with the Trial Court's ruling from the bench and is, therefore, clearly erroneous.

Mr. Lutz, on behalf of L & L also testified that he had incurred additional attorney fees and expenses related to prior defaults of the Finnemans through his then attorney, Curt Jensen of Rapid City. Exhibit 19 established those damages as $1,284.42. TTp 47-49. Both the $76,466.95 and $1,284.42 are recoverable sums as damages pursuant to paragraph 19 and 24 of the 1996 contract and paragraph 12 and 19 of the 1999 contract. The Court's failure to find that L & L was entitled to recover these sums was clearly erroneous.

III. **The Trial Court improperly modified the contracts by allocating performance of the contracts among competing vendees, permitted multiple redemption rights and requiring L & L to issue different deeds to different parties without full compensation.**

At trial, Finnemans, Rock Creek Farms and Ann Arnoldy all claimed an interest in the contract for deed lands, Finnemans as original buyers, Rock Creek Farms by virtue of an unauthorized quit claim deed from Finnemans, and Arnoldy, as holder of a sheriff's deed arising from the Rabo foreclosure action. If Arnoldy is deemed the owner of the vendee's interest under these two contracts for deed then that interest was obtained by operation of law, in effect, an involuntary assignment from Finnemans. Real property may be transferred either "by operation of law, or by an instrument in writing . . ." SDCL § 43-25-1. See, Anderson v. Aesoph, 2005 S.D. 56 ¶ 22, 697 N.W.2d 25. Anderson v. Aesoph reiterated the general principle that a transfer of property by deed

transfers all legal interest of the buyer to the assignee. Id. It follows then that a sheriff's deed accomplishes the same. This means that, as an assignee of the vendee's interest, she "stands in the same shoes as the assignor." Kroeplin Farms General Partnership v. Heartland Crop Insurance, 430 F.3d 906, 911 (8th Cir. 2005), quoting, In Re Estate of Wurster, 409 N.W.2d 363, 366 (S.D. 1987) (Wuest, C.J. dissenting). "An assignee can obtain no greater rights than the assignor had at the time of the assignment." 430 F.3d 906 at 911. The assignee merely stands in the shoes of the assignor. Collection Center, Inc. v. Bydal, 795 N.W.2d 667, 672, 2011 ND 63 ¶ 15 (N.D. 2011). Notwithstanding these fundamental principles, the Trial Court's Findings of Fact, Conclusions of Law and Judgment of Foreclosure contain substantial errors and confer special status to Arnoldy contrary to law. These errors may be summarized as follows:

1. That the Rabo foreclosure judgment extinguished all junior liens and encumbrances against the contract for deed lands;

2. That Arnoldy has the sole right to redeem the contracts free and clear of junior liens and without payment of attorneys fees or costs as allowed by the Court;

3. That judgment creditors have a right to redeem a portion of the 1999 contract for deed;

4. That Finnemans retain a redeemable interest in 199.08 acres so long as they pay 100% of the attorneys fees and costs of the foreclosure action as well as damages incurred by L & L of $76,000.00 plus;

5. That Arnoldy has a secondary right to redeem the 199.08 acres not conveyed in her sheriff's deed;

6. That the Court may exercise equitable adjustment of the parties to that contract despite the repeal of SDCL § 21-50-2;

7. That L & L be required to accept redemption of portions of the contract

lands from parties other than vendees, only some of which need pay attorney fees and costs, and to issue new deeds in accordance with their respective redemptions;

8. That L & L referee the redemption rights of the multiple parties set forth in Finding of Fact 45.

The Rabo foreclosure judgment, having the effect of extinguishing junior liens upon the expiration of redemption, specifically recognized the superior legal title of L & L in the contract for deed lands. That judgment excepted any legal effect on the L & L lands such that any of Finneman's creditors whose liens attached to Finneman's equitable interest in the lands retained their liens thereon.

If Arnoldy acquired the same and no greater rights to Finneman's interest in the contract for deed lands, she takes subject to these junior encumbrances. The tail goes with the hide.

The contract for deed may not be reformed to tailor the desires of the various claimants to the vendees' interest. In Hartman v. Wood, 436 N.W. 2d 854 (S.D. 1989) this court determined that an assignee from a contract for deed vendee may not, upon performance of the contract, compel a new deed from the seller where an original deed has already been deposited in escrow. 436 N.W. 2d at 856. Instead, upon performance the seller need only comply with his obligations under a contract by issuing a deed to the contract seller. That deed relates back to the time of conveyance and subsequent transfers are thereby validated. Since the contracts are in Finneman's names as buyers and recorded as such, it is to the subsequent transferee's benefit to establish the chain of title.

The remedy of a quiet title action is available to Arnoldy to cure any resulting perceived

title defects. The Trial Court's judgment that a deed be issued to Arnoldy or any other redemptioner is a mistake of law and clear error. 436 N.W. 2d at 857. See, also, O'Brien v. R-J Development Corp., 387 N.W.2d 521, 528 (S.D. 1986) (where Court held that trial courts are not empowered to sua sponte revise contracts).

The Court's finding that judgment creditors have a right to redeem on Finneman's 199.08 acres is contrary to SDCl 21-50-3, which affords a redemption right only to the contract vendee. This finding is clearly erroneous and, if a conclusion of law, a mistake of law. The consequence of this holding is that the contract seller, to his detriment, could receive multiple tenders of performance all at once. This is an improper modification of the contract terms. Again, the contract for deed seller can insist upon performance before he is obligated to convey title. The bifurcation of the 1999 contract with part performance potentially arising from several different parties defeats the contract terms. The balance of each contract must be paid as a whole.

Arnoldy takes the good with the bad as an assignee. The Court's finding that she may redeem the contracts by paying principal and interest only is contrary to contract law and provides her with a windfall at sellers expense. See, Conclusions of Law #13 and #14.

IV. **The trial court committed reversible error in employing equitable adjustment of the rights of the contracting parties**.

This matter was tried to the Court on July 25, 2011. Due to the pending appeal on Rabo Agrifinance, Inc., v. Finnemans, et. al., 2012 S.D. 20, which would have bearing on whether Arnoldy's sheriffs deed would stand, findings and conclusions were not

submitted until April 2012. Arnoldy's proposed Findings of Fact, Conclusions of Law and Judgment of Foreclosure were adopted by the trial court, without modification, and over the objections of the other parties. Rec. 537. Arnoldy's findings and conclusions included an affidavit from Ann Arnoldy, essentially adding testimony and argument that equitable adjustment favors allowing her to redeem the contracts while being excused from paying additional damages or taxable costs. The trial court's adoption of these findings and conclusions resulted in the following equitable adjustments to the parties' rights in the contracts:

a) Allowing Arnoldy to redeem the 1996 and 1999 contracts without payment of any attorney fees, costs or additional damages;

b) Assessing against Finnemans/Rock Creek Farms 100% of the additional damages awarded by the court plus taxable attorney fees and costs, to be later approved by the court;

c) Permitting Arnoldy a right to redeem on 199.08 acres in the 1999 contract though she was not a party to the contract.

The trial court may not employ equitable adjustment remedies in determining the rights of the parties in a contract for deed foreclosure action. Schultz v. Jibben, 513 N.W.2d 923 (S.D. 1994). The statutory remedy of equitable adjustment was repealed July 1, 1992. The court's conclusions of law 11 through 18 as well as the findings upon which they were based, are contrary to law and clear error. The court chopped up the contracts and allowed competing vendees to perform at different levels with burdensome consequences to some as well as the seller. "The court cannot make a contract for the

parties that they did not make themselves as a compromise for any other purpose." Pam Oil, Inc. v. Travex International Corp., 336 N.W.2d 672, 674 (S.D. 1982), citing, Knapp v. Breeding, 77 SD 551, 553, 95 N.W.2d 535, 537 (1959). "Trial courts are not empowered to sua sponte revise contracts, when not petitioned to do so by any of the parties." O'Brien v. R-J Development Corp., 387 N.W.2d 521, 528 (S.D. 1986). The trial court's equitable adjustment of the parties rights to the contracts, post trial on the affidavit of Arnoldy, improperly revised and rewrote the contracts to the sellers detriment and prejudiced the rights of all the trial participants.

CONCLUSION

Though the trial court was correct in ordering judgment of foreclosure of the contracts, it's findings and conclusions, as well as the judgment itself, contained substantial errors of fact and law. This case should be reversed and remanded for entry of new findings of fact and conclusions of law correcting the errors shown.

Dated this 3rd day of October 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4) counsel for appellee states that the foregoing Brief is typed in proportionately spaced type face in Times New Roman 12 point font using WordPerfect 2009. The word processor used to prepare this Brief indicated that there is a total of 4,525 words in the body of the Brief.

_____

JOHN H. MAIROSE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served fifteen (15) copies of the foregoing **Appellee L & L Partnership's Opening Brief** in the above-entitled action, upon the person herein next designated on the date below shown, by United States mail, electronically transmitted, hand delivered, or faxed, at Rapid City, South Dakota, to-wit:

Ms. Shirley Jameson-Fergel, Clerk
Off ice of the Clerk of the Supreme Court
South Dakota Supreme Court
500 East Capitol Avenue
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and two correct copies of **Appellee L & L Partnership's Opening Brief** was provided by United States mail, postage paid, to:

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Dated this 3rd day of October 2012.

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IN THE
SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 26363

L & L PARTNERSHIP, et al.

vs.

DAVID M. FINNEMAN, CONNIE S. FINNEMAN,
ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO
DAVID M. FINNEMAN AND CONNIE S. FINNEMAN, et al

Plaintiff-Appellee (L & L Partnership).

ON APPEAL FROM THE
SEVENTH JUDICIAL CIRCUIT COURT
PENNINGTON COUNTY, SOUTH DAKOTA,
HONORABLE JAMES W. ANDERSON
CIRCUIT COURT JUDGE PRESIDING
Court File No. C10-316

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Notice of Appeal filed on June 1, 2012

APPENDIX

STATE OF SOUTH DAKOTA)
) SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

Civil No. 09-1211

RABO AGRIFINANCE, INC. FKA AG SERVICES OF AMERICA, INC. AND RABO AGSERVICES, INC.,

Plaintiff,

v.

DAVID M. FINNEMAN; CONNIE S. FINNEMAN; ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO DAVID M. FINNEMAN AND CONNIE S. FINNEMAN, DBA AIRPORT FARMS; FARM CREDIT SERVICES OF AMERICA FKA FARM CREDIT SERVICES OF THE MIDLANDS, FCLA; BLACK HILLS FEDERAL CREDIT UNION; LUTZ/LAIDLAW PARTNERSHIP; AXA EQUITABLE LIFE INSURANCE COMPANY; LAIDLAW FAMILY PARTNERSHIP; TOM J. WIPF; AMY WIPF; JOHNNY JAY WIPF, DBA WIPF FARMS; JOANN WIPF; CEN-DAK LEASING OF NORTH DAKOTA, INC; SHEEHAN MACK SALES AND EQUIPMENT, INC.; MICHAEL ARNOLDY; ANN ARNOLDY; FARM CAPITAL COMPANY, LLC; DANIEL R. MAHONEY; PORTFOLIO RECOVERY ASSOCIATES, LLC; PFISTER HYBRID CORN CO.; KAUP SEED & FERTILIZER, INC.; JOYCE M. WOLKEN; CHARLES W. WOLKEN; STAN ANDERSON; DENNIS ANDERSON; KENT KJERSTAD; WILLIAM J. HUBER; KENDA K. HUBER; YU BLU SNI, LLC; U.S. BANCORP EQUIPMENT FINANCE, INC.; KENCO INC. DBA WARNE CHEMICAL & EQUIPMENT COMPANY, INC.; DOUG KROEPLIN AG SERVICES, INC; CREDICO, INC. DBA CREDIT COLLECTIONS BUREAU; SCOT D. EISENBRAUN; MELODY EISENBRAUN; BART CHENEY; HAL OBERLANDER, KEI OBERLANDER; RAY S. OLSEN; PATRICK X. TRASK; ROSE MARY TRASK; PENNINGTON

JUDGMENT AND DECREE OF FORECLOSURE

COUNTY, SOUTH DAKOTA; MEADE COUNTY,
SOUTH DAKOTA; AND THE
UNITED STATES OF AMERICA,

Defendants.

The Court having this day granted Plaintiff's Motion for Judgment on the Pleadings, and for cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Plaintiff shall have and recover judgment on the promissory notes attached to Plaintiff's Complaint from Defendant Note Makers in the sum of Two Million Four Hundred Thirty-Three Thousand Two Hundred Eight and 56/100ths Dollars ($2,433,208.56) plus interest to the date of this Judgment in the amount of Eight Hundred Thirty-Eight Thousand Three Hundred Sixteen and 64/100ths Dollars ($838,316.64) for a total of Three Million Two Hundred Seventy-One Thousand Five Hundred Twenty-five and 20/100ths Dollars ($3,271,525.20).

2. Plaintiff has incurred costs, disbursements and attorney's fees in this action accruing from October 13, 2004 through the present in the amount of One Hundred Twenty Thousand Six Hundred Ninety-Two and 90/100ths Dollars ($120,692.90), which shall be included in the Judgment amount hereof.

3. Interest shall accrue after this Judgment on the Mortgage debt at the rate of 12% per annum to the date of the Sheriff's sale. There shall be added to the amount of this Judgment all sums reasonably expended by Plaintiff for the protection of its interests in, or for protection and preservation of, the Mortgaged Property, and all other amounts

allowed by law, including without limitation, attorney fees, excepting only to the extent such amounts are already included in the amount of this Judgment.

4. The amount owed Plaintiff as above-described is secured by certain Collateral Real Estate Mortgages, copies of which are attached to Plaintiff's Complaint as Exhibits C, E, G and I (the "Mortgages") upon the following described real property in Pennington County, South Dakota and Meade County, South Dakota as set forth and attached to Plaintiff's Complaint as Exhibits L, M, N, O, P and Q (the "Mortgaged Property") and attached hereto, which Mortgages are valid and lawful liens and mortgages upon the Mortgaged Property enforceable according to their terms.

5. The Mortgaged Property shall be sold at public auction in the manner prescribed by SDCL Chapter 21-47 and 15-19 by the Sheriff of Pennington County, South Dakota, subject only to the following:

(a) Real estate taxes remaining unpaid which may constitute a lien thereon;

(b) Defendant Farm Credit Services Mortgage executed by David M. Finneman and Connie S. Finneman to Farm Credit to secure indebtedness of Seven Hundred Thousand Dollars ($700,000.00) dated December 14, 1993 and recorded in Meade County on December 28, 1993 in Book 470, pp. 800-802 and recorded in Pennington County on January 3, 1994 in Book 53, Page 4169. Said lien is superior to Rabo's interests only with regard to the property set forth as (Exhibit L and Q) attached hereto.

(c) Defendant Lutz/Laidlaw Partnership's lien against the real property herein, by virtue of its ownership of the property set forth in Exhibits M, N, and O attached hereto, which was sold to David M. and Connie S. Finneman on a contract for deed dated April 23, 1996.

(d) Defendant Equitable's Mortgage executed by Lutz/Laidlaw Partnership to Equitable to secure indebtedness of One Million Seven Hundred Thousand

Dollars ($1,700,000) dated March 16, 1995 and recorded in Pennington County on March 16, 1995 in Book 58, p. 645. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibits M and N) attached hereto.

(e) Defendant Equitable's Mortgage executed by Lutz Laidlaw Partnership to the Equitable Life Assurance Society of the United States to secure indebtedness of One Million Seven Hundred Thousand Dollars ($1,700,000) recorded in Meade County on March 16, 1995 in Book 481, Page 709-714. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibit O) attached hereto.

(f) Defendant Laidlaw Family Partnership's Mortgage executed by Lutz Laidlaw Partnership, a South Dakota general partnership, to Laidlaw Family Partnership, a California Limited Partnership, to secure an indebtedness of One Million Two Hundred Twenty Thousand Dollars ($1,220,000) dated November 13, 1997, recorded in Pennington County on November 13, 1997 in Book 69, p. 5370. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibits M and N) attached hereto.

(g) Defendant Black Hills Federal Credit Union's Mortgage executed by David M. Finneman and Connie S. Finneman to Black Hills Federal Credit Union to secure an indebtedness of One Hundred Eight Thousand Dollars ($108,000) dated April 7, 1998 recorded in Pennington County, South Dakota on April 10, 1998 in Book 72, p. 3425. Said lien is superior to Rabo's interests only with regard to the property set forth in (Exhibit P) attached hereto.

With the above-described sole exceptions, the rights of Plaintiff in and to the Mortgaged Property by virtue of the Mortgages are prior and superior to the claims, liens, encumbrances and interests of any other party hereto.

6. The Mortgaged Property consists of several separate and distinct parcels and shall be sold at public auction by the Sheriff of Pennington County in parcels. It being expressly determined by the Court that the provisions of SDCL 15-19-11 are applicable, so that parcels in Meade and Pennington Counties may be sold by the Sheriff of

Pennington County. Pursuant to SDCL 15-19-15, Defendant Rock Creek Farms may, by written notice served on the Sheriff or other person making such sales, before the time of such sales, or personally at the time and place of sale, direct the order in which such parcels of the Mortgaged Property shall be sold, and the Sheriff or such other person making the sale shall offer the parcels accordingly. In the event, however, such designation is not made pursuant to SDCL 15-19-15, Plaintiff shall determine and designate the order in which the parcels are sold at such public auction.

7. Plaintiff may be a purchaser at the Sheriff's sale of any or all of the parcels by bidding at such sale for each parcel all or a portion of the debt secured by the Mortgages; provided, however, that the sum of Plaintiff's bids for all parcels shall not be less than the amount of this Judgment, together with interest accrued to the date of such sale.

8. Upon completion of the foregoing Sheriff's sale, the debt secured by the Mortgages shall be deemed fully paid and satisfied; provided, however, that, pursuant to SDCL 21-47-17, neither this Judgment nor such Sheriff's sale shall be considered a satisfaction of the assignment of rents agreement under the Mortgages.

9. The proceeds of the Sheriff's sale shall be applied in the order set forth in applicable statutes.

10. All Defendants, except those hereby adjudged to have superior interests, liens or encumbrances as described in ¶5 above, are hereby barred and foreclosed from any estate, interest, lien or other claim upon the Mortgaged Property, excepting only their statutory rights of redemption, it being adjudged and determined hereby that such

Defendants' rights of redemption are governed by SDCL Chapter 21-52, and, in the case of the United States of America, under 28 U.S.C. §2410. In particular, and notwithstanding any contrary or other provisions of the Mortgage or any related agreements, Defendant Rock Creek Farms is determined and adjudged to have the owner's right of redemption for a period of one year and other redemption rights under SDCL Chapter 21-52.

11. Plaintiff shall have the right hereafter to determine whether the receiver shall continue under previous Order of the Court or shall be terminated. In any event, as to any parcel purchased at the Sheriff's sale other than by Plaintiff, such receivership shall be terminated as to such parcel, and Defendant Rock Creek Farms shall be entitled to possession of such parcel and the rents, issues and profits therefrom until expiration of all periods of redemption.

Dated: 15 Jan, 2010

BY THE COURT:

By _____
Circuit Court Judge

ATTEST:
Ranae Truman, Clerk

By _____
Deputy Clerk

(SEAL)

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

JAN 15 2010

RANAE L. TRUMAN
Clerk of Courts, Pennington County

By _____ Deputy

1:30pm
Pennington County, SD
FILED
IN CIRCUIT COURT
JAN 15 2010
Ranae Truman, Clerk of Courts

_____ Deputy

L & L VS. FINNEMANS, ET AL

PLAINTIFF'S EXHIBIT 17

Attorneys Fees & Costs Incurred by AXA Equitable	$44,896.94
Attorneys Fees & Costs Incurred by CLW FINANCIAL	$25,623.20
	$70,520.14
INTEREST PAYABLE AT 10.8% @ $20.866 PER DAY, 10/13/10 - 7/25/11, 285 DAYS	$5,946.81
	$76,466.95

CLW FINANCIAL, LLC
Equitable Note/Mortgage Balance

Payoff Figure as of 10/13/10

	Amount
Principal Balance Due at Maturity on 1/1/10 (see assignment)	$960,508.00
Delinquent Interest on Unpaid Installments Prior to Maturity (see assignment)	$45,716.53
Attorney's Fees and Costs Incurred by AXA Equitable (see assignment)	$44,896.94
Claim Subtotal	$1,051,121.47
Default Interest 1/1/10-10/13/10 (10.8% - $315.336441/day)	$90,186.22
Attorney's Fees and Costs Incurred to Date by CLW Financial	$25,623.20
TOTAL CLAIM AS OF 10/13/10	$1,166,930.89

REPORT: MLS042R
DATE : 04/08/10

Rabo AgriFinance
NATIONAL SERVICE CENTER
STATEMENT OF ACCOUNT SUMMARY
AS OF 04/13/10

Borrower's Name LUTZ-LAIDLAW PARTNERSHIP
County MEADE
State SD
Loan No. F-19715700

LOAN DATA:

Interest Rate	5.8000%
Default Interest Rate	10.8000%
Most Recent Installment Due Date	01/01/10
Date Interest Paid Through	07/01/09
Scheduled Maturity	01/01/10
Statement issued in connection with	Payoff

This statement reflects all monies owed through the statement date. Unpaid invoices and costs of which the lender has yet to receive an invoice are not included in this statement. Interest calculations are based on a 30/360 basis.

ITEM	AMOUNT	PER DIEM INTEREST
Principal Balance Owed at Statement date	960,508.00	
* Total Interest Portion of Delinquent Installments	27,854.73	
Accrued interest at 5.8000% from 01/01/10 to 04/13/10	15,784.35	154.74851
* Additional Interest on Delinquent Installments	14,459.55	141.76031
Outstanding Payables	3,895.50	
* Recoverable Advances		
Amounts Advanced	13,696.33	
Interest on Amounts Advanced	4,797.96	4.10890
	TOTAL AMOUNT OWED	**PER DIEM INTEREST**
AMOUNTS OWED CALCULATED TO: 04/13/10	1,040,996.42	300.61772

LOCAL COUNSEL TO ADD UNBILLED AND ESTIMATED LEGAL FEES

+ 32,002 see atty fee

8 1077,00

Default interest 115,776
Agrmt 96-48
CM - 57,889

Prepared by wilsonk
Date Prepared 04/08/10
Verified by

* Per Attached Schedules

BANKS, JOHNSON, KAPPELMAN & BECKER, PLLC

ATTORNEYS & COUNSELORS AT LAW

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731 ST. JOSEPH STREET, SECOND FLOOR
P.O. BOX 9007
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TELEPHONE: (605) 341-2400
FACSIMILE: (605) 342-3616

RONALD WILLIAM BANKS
(1931-2007)

GARY G. COLBATH, SR.
(1944-1999)

October 12, 2010

SENT VIA EMAIL
Mr. John H. Mairose
2640 Jackson Blvd., #3
Rapid City, SD 57702

Re: Laidlaw/CLW Financial

Dear John:

In response to your phone message from yesterday afternoon, I am writing to you to provide a payoff for the Equitable note and mortgage acquired by CLW Financial this past May. In that regard, **the payoff is One Million One Hundred Sixty-six Thousand Nine Hundred Thirty Dollars and Eighty-nine Cents ($1,166,930.89) as of the close of business on October 13, 2010.** After that, interest accumulates at the rate of $315.34 per day. See attached.

This is a payoff calculation and not an assignment. We will execute and deliver an appropriate satisfaction and release within Five (5) business days of the date that the payoff draft clears the bank and we have received unconditional funds. As it relates to the litigation known as *Lutz and Laidlaw v. Finneman, et. al.*, Civ. No. 10-316, nothing further will be required. I anticipated that your clients might pay off the mortgage so the October 4, 2010, Order signed by Judge Kern provides for the substitution of parties but does not join the foreclosure of the Equitable mortgage. We have until November 4, 2010, to join that claim with an appropriate pleading if necessary. Obviously, if the mortgage is paid by that time, there will be no claim to join.

If you have any questions, let me know.

Thank you.

Sincerely yours,

Barton R. Banks

Enclosure
cc: Client

Appeal No. SC No. 26373
Civil

IN THE
SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

In re:

L & L PARTNERSHIP, et. al.

Plaintiffs-Appellees,

vs.

DAVID M. FINNEMAN, CONNIE S. FINNEMAN,
ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO
DAVID M. FINNEMAN AND CONNIE S. FINNEMAN, et. al.

DEFENDANT-APPELLANT ROCK CREEK FARMS

ON APPEAL FROM THE
SEVENTH JUDICIAL CIRCUIT COURT
PENNINGTON COUNTY, SOUTH DAKOTA,
HONORABLE JAMES W. ANDERSON
CIRCUIT COURT JUDGE PRESIDING
Court File No. C10-316

REPLY BRIEF OF ROCK CREEK FARMS

Brian L. Utzman
Smoot & Utzman, P.C.
Attorney for Rock Creek Farms and Warrenn Anderson, individually and as a Limited Partner of Rock Creek Farms
PO Box 899
Rapid City, SD 57709-0899

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PO Box 2498 Sioux Falls, SD 57101-2498

Notice of Appeal filed on June 1, 2012

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PRELIMINARY STATEMENT

After payment and complete satisfaction of their Judgments, Arnoldys asks this Court to rewrite a statute so that they can obtain a multi-million dollar windfall. And the pathway toward that suggested end is not even the road they asked the Circuit Court to traverse. For the most fundamental of reasons, as shown below, the Court should not accept that invitation.1

RESPONSE TO ARNOLDYS' STATEMENT OF THE CASE AND FACTS

Rock Creek Farms takes issue with numerous assertions set out in Arnoldys Statement of the Case and Statement of the Facts. Among other things, and contrary to what Arnoldys imply:

- The Rabo Foreclosure did not transfer RCF's statutory post-foreclosure cure rights in the Contract for Deed lands to Ann Arnoldy;

- The Rabo 60(b) Order did not authorize issuance of a Sheriff's Deed before all appeals were concluded; and

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1 Appellant-Defendant Rock Creek Farms, a South Dakota Limited Liability Partnership, is referred to as either Rock Creek Farms or RCF submit this Reply Brief. Other citations are as follows: the Trial Court in this case will be to the L&L Court; the Clerk's Register of Action in this Appeal will be designated as RA; the transcripts of the trial held in the L&L Court will be designated as TT. The transcript of the Motions hearing and Court s Ruling in this case, created by Court Reporter Kathy L. Davis, held on April 10, 2012, will be designated as T- MtnHrg. The record in *RaboAgrifinance, Inc. v. David M. Finneman* case, filed in the Circuit Court, Seventh Judicial Circuit, Pennington County, South Dakota, File No. C09-1211 (Rabo Case or Rabo Court) will be designated as Rabo Rec. The record in *FarmPro Services, Inc., v. David M. Finneman, et. al.* case, filed in the Circuit Court, Seventh Judicial Circuit, Pennington County, South Dakota, File No. C02-533, (*FarmPro* Case or *FarmPro* Court) will be designated as FarmPro Rec. The records in the *Michael Arnoldy and Ann Arnoldy v. Daniel Mahoney, et. al*. case, filed in the Circuit Court, Seventh Judicial Circuit, Pennington County, South Dakota, File No. C08-1845 (A/M Case or A/M Court), will be designated as A/M Rec. Defendants-Appellees Michael and Ann Arnoldys (Arnoldys) Appellee Brief will be A. App. Brief.

- The L&L Court did not predicate its decision on what happened on the Rabo appeal or otherwise relinquish the determination of who would exercise cure rights under the Contract for Deed action.

Instead, the L&L Court determined that the redemption time period would expire 30 days after this Court decided the Rabo case, but did not specify who had the right to redeem under the Contract for Deed. TT pp.180-181, l.25-2. RCF requested that its cure rights not terminate until after the Rabo appeal was decided, because it could not possibly find buyers for these lands to enable it to exercise its cure rights while the Rabo appeal was pending. On the other hand, Arnoldys did not request cure rights in their oral argument to the L&L Court. TT pp.175-176, l.9-18.

The L&L Court requested that Arnoldys counsel prepare proposed Findings of Fact and Conclusions of Law because . . . you remember. TT p.181, l.3-6. Arnoldys proceeded to grant Ann Arnoldy cure rights that they did not ask for and to substitute Ann Arnoldy for RCF, even though she had originally moved only to be substituted for CLW Financial, LLC. The L&L Court merely signed Arnoldys proposed Findings of Fact and Conclusions of Law in its entirety, including a provision substituting Ann Arnoldy for Rock Creek Farms. L&L T-MtnHrg, p.11, l.9-10. L&L and RCF objected to Arnoldys proposed Findings of Fact and Conclusions of Law and proposed their own Findings of Fact and Conclusions of Law. *See* RA 482; 537; 547.

ARGUMENT

The L&L Court erred in two interconnected ways in finding that Ann Arnoldy, not RCF, was entitled to exercise statutory cure rights in this contract for deed foreclosure. First, it

misinterpreted the statute that defines those cure rights and concluded erroneously that the post-foreclosure right to cure *could* be involuntarily transferred to Ann Arnoldy on account of a separate foreclosure action on a mortgage junior to these contracts for deed. Second, it misinterpreted the effect of the Rabo foreclosure and Ann Arnoldy's redemption thereof as a junior lienholder. Rabo did not claim or prove a deficiency before entry of judgment. In accepting the Sheriff's Deed, Arnoldys' judgments were fully satisfied; and therefore they cannot claim to succeed to any further interest in the contracts for deed.

I. The Cure Rights Under Chapter 21-50 Require Contractual Privity.

Arnoldys maintain that issuance of the Sheriff's Deed accorded Ann Arnoldy the equitable interest in the contracts for deed, relying on SDCL § 21-47-24. Arnoldys' position cannot be reconciled with the plain language of the statute that governs post-foreclosure cure rights in the contract-for-deed context. The provisions of Chapter 21-50, and in particular, SDCL § 21-50-3, do not provide a means by which any party not in contractual privity may avail itself of those cure rights. The contract for deed foreclosure redemption right [the cure right] is contained wholly and solely within SDCL § 21-50-3 and limits that right to be exercised by ". . . the party or parties in default . . . ." Arnoldys' wish that the cure right include "or the vendee's mortgage, assignee of the mortgagee, mortgage foreclosure sheriff's sale's purchaser, judgment creditor, mortgage foreclosure redemptioner or sheriff's deed holder" is an invention finding no source in the actual words of the statute or in any other provision of Chapter 21-50.

To identify the parties with cure rights, i.e. those in default under the contract for deed, the Court need look no further than the L&L Complaint. It states: "No personal claim is made by Plaintiff against any Defendants, except Defendants Rock Creek Farms, and David and Connie Finneman." So, under the L&L Complaint, RCF and the Finnemans are "parties in default" to the contract. Consequently, each is endowed with the statutory "cure right" to forestall foreclosure.

The explicit, unqualified language of SDCL § 21-50-3 contemplates that only the party obligated under the contract for deed is entitled to prevent reversion of title by payment of the contract. That language must be given effect as written.2 The Legislature said what it meant and meant what it said in concluding that the right to cure the default is exclusive to the "party or parties in default." Accordingly, there is no basis under SDCL § 21-50-3 to look beyond the four corners of the contract to determine who has "cure rights" under the contracts.

This analysis is consistent with other provisions in our foreclosure statutes that distinguish between parties who face foreclosure and third parties who have security interests in the property to be foreclosed upon. Nonetheless, there is no basis to look beyond Chapter 21-50 to determine which party may redeem. The distinct chapters governing mortgage foreclosure – SDCL Chapters 21-47 through -49 – are "independent and complete unto themselves," *Phipps v. First Federal Sav. & Loan Ass'n of Beresford*,

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2*See Discover Bank v. Stanley*, 2008 SD 111, ¶15, 757 N.W.2d 756, 761 ("The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used.") (internal quotation marks and citation omitted).

438 N.W.2d 814, 817 (S.D. 1989). It follows that the protections afforded to a debtor in one type of foreclosure proceeding may be absent in another.3 Chapter 21-50, which address the foreclosure on a contract for deed, is likewise independent and complete unto itself.

Statutory redemption rights afforded to a vendee or its permitted assignee under a contract for deed are distinct from statutory redemption rights that may be available to an owner or judgment creditor in other foreclosure proceedings. *Compare* SDCL § 21-50-3 *with, e.g.,* §§ 21-49-33 through 36, & §§ 21-52-5, -14, -16. This distinction is embodied in the statutory scheme that the Legislature created, but also reflects the inherent difference between a judgment creditor and a vendee. *Republic Bank of Chicago v. Lichosyt*, 736 N.W.2d 153, 167 (Wisc. App. 2007) ("a judgment lienholder does not have an interest that is comparable to that of a land contract vendee or its assignee").

No section of Chapter 21-50 affords any lien creditor or mortgagee a right of redemption, and consequently no such right exists. Arnoldys were not party to either contract for deed, were not in privity with any party to either contract for deed, and had no rights under either contract for deed. It is well-established that it is not "within the province of the courts to enlarge or restrict the statutory right of redemption." *VanGorp*, 2001 SD 45, ¶14, 624 N.W.2d at 715 [quoting *Dardanella Fin. Corp. v. Home Fed. Sav. & Loan*, 392 N.W.2d 834, 835 (S.D. 1986)]. As this Court has previously stated:

> The right of redemption may be exercised only by those persons **named in the statute,** in the manner, within the time, and upon the conditions therein provided. It is not within the province of the courts to enlarge or restrict the statutory right of redemption.

3 *See also VanGorp v. Sieff*, 2001 SD 45, ¶¶ 9-10, 624 N.W.2d 712, 714-15.

Rist v. Hartvigsen, 70 S.D. 571, 19 N.W.2d 830 (1945). Rather, a statutory redemption right "'can be exercised only within the period and in the manner prescribed by law.'" *Id.* (quoting *Dardanella Fin. Corp.*, 392 N.W.2d at 835). Further, a trial court is not empowered to recalibrate the rights of the parties or to revise contracts *sua sponte* based on its own estimation of what ought to be done. *See O'Brien v. R-J Development Corp.*, 287 N.W.2d 521, 528 (S.D. 1986).

The "cure" rights under SDCL § 21-50-3 were exclusive to RCF, as plainly evident from the language thereof. The L&L Court resorted to a sort of alchemy when it created a right of redemption in Ann Arnoldy that is not recognized under the statutory scheme the Legislature created under SDCL Chapter 21-50. Ann Arnoldy had no right to redeem the property from L&L foreclosure; Judge Anderson erred as a matter of law in concluding otherwise.

Arnoldys trumpet loudly about the supposed unfairness to mortgagees who make loans and seek security by encumbering the mortgagor's equitable interest under a contract for deed. But the mortgagee of an equitable interest under a contract for deed is always at heightened risk by virtue of being junior to the vendor's lien, which is why lenders rarely lend on only an equitable interest in property. Here, Rabo could have viewed the mortgage on Finnemans' equitable interest in the contracts for deed land as a "throw in," because the value of the "fee" lands was sufficient to secure the mortgage. Arnoldys' reference to "buyer beware" is exactly correct – it is the nature of the interest being encumbered that necessarily exposes the lien holder (whether as judgment creditor or mortgagee) to some risk. Outsiders, strangers, to a contract for deed need to be cognizant

of the singular nature of a contract for deed and the statutory limitation of cure rights. A trial court may not resurrect a mortgagee's junior interest or create a redemption right out of whole cloth on equitable grounds. It is well-established that it is not "within the province of the courts to enlarge or restrict the statutory right of redemption." *VanGorp*, 2001 SD 45, ¶14, 624 N.W.2d at 715 [quoting *Dardanella Fin. Corp. v. Home Fed. Sav. & Loan*, 392 N.W.2d 834, 835 (S.D. 1986)]. This is why Ann Arnoldy may only secure title to the 7,500 deeded (fee) acres under the Rabo foreclosure, the value of which is more than sufficient as a matter of equity to satisfy her judgment and compensate her for the amount that she expended to redeem.

II. The Rabo Foreclosure Did Not Vest Ann Arnoldy as a Judgment Creditor with RCF's Contractual Right to Cure.

At the time of the entry of the Rabo foreclosure judgment, this action was an entirely separate proceeding and the two were not consolidated in any way. The rights of the respective parties as to the contracts for deed were determinable in the L&L action, not in the Rabo foreclosure. While Arnoldys' claim that the combination of SDCL § 44-8-1.1 and SDCL § 21-47-24 vests Ann Arnoldy with RCF's cure right, the particular and peculiar circumstances of these two cases auger against that claim.

It should first be noted that SDCL § 21-47-24 vests the sheriff's deed holder with certain title to "the premises." That term obviously makes reference to the physical real property itself and not to any statutory or contractual rights that are governed by a wholly separate proceeding. Even if SDCL § 21-47-24 could grant more than the statute says under the right set of circumstances, they do not exist in this case.

SDCL § 44-1-8 provides:

> All contracts for forfeiture of property subject to a lien and satisfaction of the obligation secured thereby and all contracts in restraint of the right of redemption from a lien are void.

This statute had no relevance for a very long time, because the Rabo foreclosure judgment protected RCF's redemption rights and consequently its cure right under the contracts for deed being foreclosed in this action.

The landscape totally changed when 16 months after entry of the Rabo foreclosure judgment, the Rabo Court stripped RCF of its redemption rights. Now Arnoldys claim that this Order also had the effect of stripping RCF of its cure rights in this action. Essentially they argue that Ann Arnoldy has succeeded to the right to enforce a forfeiture—and there is no doubt that their argument works a forfeiture. So what Ann Arnoldy really inherited under SDCL § 21-47-24 is the theoretical right to enforce an illegal forfeiture that violates South Dakota law, one imposed completely involuntarily. No authority should be needed for the proposition that assignment of an illegal forfeiture does not make it legal.

In *Anderson v. Aesoph,* 2005 S.D. 56, 697 N.W.2d 25, this Court recognized that the right to cure under SDCL § 21-50-3 was assignable by a voluntary quit claim deed. This Court in *Anderson*, Id. p. 56, also affirmed the trial court invalidating a contract for deed provision waiving redemption rights. This Court has never held that the right to cure can be involuntarily transferred to a judgment creditor via SDCL § 21-47-21. Given the undeniable forfeiture under the remarkable facts before the Court, it should not do so here.

III. Allowing Ann Arnoldy as a Judgment Creditor to be Substituted to take Rock Creek Farms' Cure Rights Would Work an Inequitable Forfeiture.

A contract for deed provision requiring that a vendee forfeit its interest upon default has been held to be an illegal forfeiture and therefore invalid. *See BankWest, N.A. v. Groseclose,* 95 SD 442, ¶18, 535 N.W.2d 860, 864-865 (S.D. 1995). The arguments made in Arnoldys' brief work the same result here. Even though Ann Arnoldy has received property with a value more than sufficient to satisfy her judgment and compensate her for the amount that she expended to redeem, she seeks a remedy that requires the "party or parties in default" to forfeit the substantial equity acquired in the contracts for deed properties. Such an inequitable forfeiture should not be countenanced by this Court.

Arnoldys fail to distinguish between an involuntary and voluntary transfer of redemption rights. RCF has not argued that a mortgagor or contract vendee may not be assign, or transfer, its redemption or cure rights. What RCF does argue is that redemption rights and cure rights cannot be mortgaged or otherwise transferred involuntarily. Arnoldys cite only SDCL § 44-8-1.1 as authority for mortgaging or involuntarily transferring redemption rights. SDCL 44-8-1.1 defines what property interests may be mortgaged. This statute does not allow an involuntary transfer of redemption rights. Our Legislature has done much to protect redemption and cure rights. Redemption rights cannot be taken away contractually. SDCL 44-1-8. Under SDCL § 21-52-7, "[t]he owner, . . . shall at all times have the final right to redeem." Statutes must be read in harmony. *Secretary of State Nelson v. Promising Future, Inc.,* 2008 S.D. 130, ¶5, 759 N.W.2d 551. Restricting SDCL 44-8-1.1 to defining what property interests may be mortgaged, rather than defining redemption rights achieves this result.

The facts in *Anderson,* 2005 S.D. at 56, drive its application here to support RCF's cure right. The transfer of the redemption rights was done voluntarily. In *Anderson,* Id., p. 56, this Court affirmed a trial court's determination that a contract for deed provision eliminating redemption rights was invalid. Allowing redemption rights to be mortgaged is the functional equivalent of an involuntary transfer. If this Court allows a mortgagor or contract vendee to mortgage, or otherwise contract away, his redemption, or cure rights, soon all mortgage documents will require that said rights be transferred to the mortgagee and all contract for deeds will require that cure rights be surrendered to the contract for deed vendee. This would be a monumental shift in current redemption law. This would also have a devastating effect on property owners.

Arnoldys cite *Anderson,* 2005 SD at 56. There the Court held that the SDCL § 21-50-3 cure right could be transferred by quit claim deed [Finneman to RCF, in other words]. But the factual context defines the holding. *State v. Eagle,* 835 N.W.2d 886, 2013 S.D. 60; *Beaulieu v. Birdsbill,* 815 N.W.2d 569, 2012 S.D. 45; *Fin-Ag, Inc. v. Feldman Bros.,* 740 N.W.2d 857, 2007 S.D. 105; *State v. Cummings,* 679 N.W.2d 484, 2004 S.D. 56. The contract vendee went to prison and his brother sought to save the farm by taking the quit claim deed. The Court approved the deed to avoid the forfeiture. Here there is no such mandate for equity favoring Ann Arnoldy. She is a judgment creditor who was paid in full by the Rabo foreclosure of the 7,500 acres of "fee" lands. Indeed, it is RCF who is in the very position the Court protected in *Anderson,* 2005 SD at 56.

IV. The Rabo Foreclosure Proceeding Completely Satisfied Ann Arnoldy's Judgment Lien.

In a mortgage foreclosure action, only redemption by the mortgagor restores liens on the property. *See Rist v. Andersen,* 19 N.W.2d 833 (S.D. 1945); SDCL § 21-52-24. That did not happen in the Rabo foreclosure. Nor did Rabo request or approve the right to a deficiency. The sheriff's sale in the Rabo foreclosure constituted a full satisfaction of all Rabo's interests. SDCL § 21-47-17. Expiration of the period of redemption eliminated the lien of all other creditors. SDCL § 21-47-24. In their proposed order submitted to the Rabo Court granting Rule 60(b) relief, Arnoldys proposed that the Court expressly order Ann Arnoldy's present entitlement to a Sheriff's Deed; a copy of Arnoldys' proposed order is attached as Appendix No. 1. The Court expressly denied her that relief and postponed her right to a deed. Appendix No. 1. Instead of appealing to this Court, Ann Arnoldy simply did without notice what the Rabo Court denied her, i.e. obtained and recorded a Sheriff's Deed. This was done prior to the L&L trial without any permission or order of the L&L Court and in complete derogation of RCF's statutory cure right under Chapter 21-50. Ironically, Ann Arnoldy seeks to use her unauthorized, illegal deed to create Rock Creek Farms' forfeiture. The L&L Court should not have allowed Ann Arnoldy to usurp its own authority and control over the property subject of the proceeding before it.

Equity will be done by preserving RCF's cure rights. RCF has tendered, and will pay, the amount the L&L Court determined necessary to cure its predecessors-in-interest default in these two contracts for deed. Ann Arnoldy will receive Finnemans' 7,500 acres of "fee" land. Arnoldys' judgment liens on these lands are gone under the doctrine of merger of title. See, *Perry v. Perry*, 53 S.D. 585, 221 N.W. 674 (1928). Arnoldys will be prevented

from receiving a colossal windfall if this Court preserves RCF's cure rights.

V. The L&L Court Erred in Substituting Ann Arnoldy for RCF Under SDCRP 25(c).

Arnoldys state correctly that SDCRP 25(c) is a procedural device designed to facilitate the conduct of a case; it is not intended to alter the substantive rights of the parties. *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71-72 (C.A.3 1993). The L&L Court did not apply this rule in this manner or with this effect. The L&L Court applied SDCRP 25(c) in a manner which had a tremendous impact on RCF's substantive rights and which prejudiced it immensely. SDCRP 25(c) is designed to apply to voluntary transfers where the prior party had no remaining interest in the litigation. See, *Teegardin v. Noillim Enterprise, Inc.*, 385 N.W.2d 106 (S.D. 1986). In *Teegardin,* Id. p. 106, this Court reversed the trial court's dismissal of a case under SDRCP 25(c), because the prior litigant had an actual interest in the controversy. The purpose of this rule is to insure that the case includes the real parties in interest. See, *Ostwald v. Ostwald,* 331 N.W.2d 64 (S.D. 1983). As indicated supra, Ann Arnoldy sought to be substituted for non-party CLW. Ann Arnoldy morphed her motion for substitution into her being substituted for RCF; the L&L Court erred in allowing this. This improper substitution has had a tremendous impact on RCF's substantive rights, because the L&L Court determined that the right to cure also transferred from RCF to Ann Arnoldy. In *Luxliner P.L. Export, Co.,* 13 F.3d at 69, 71-72*,* the Third Circuit Court of Appeals applied FRCP 25(c) to the corporate context where one corporation became the successor to another corporation by merger. The *Luxliner* court, Id. pp. 71-72*,* refused to apply FRCP 25(c) if doing so would deprive the original litigant of a property interest. The *Luxliner* court, Id.

pp. 71-72, reasoned that due process was required before a party could be deprived of a property interest, which requires notice and opportunity to be heard. The *Luxliner* court, Id., pp. 71-72,, cited *Matthew v. Eldridge*, 424 U.S. 319, 332-333, 96 S.Ct. 893, 901-902, 47 L.Ed.2d 18 (1976). The *Luxliner* court, Id., pp. 71-72, properly protected the original litigant's property interest. The L&L Court erred in not protecting RCF's cure rights which are a substantial property interest. The L&L Court compounded its error by not holding a hearing on Ann Arnoldy's motion to be substituted for CLW, who was not a party to the L&L case. The *Tri-State Co. of Minnesota v. Bolinger*, 476 NW2d 697, 700 (SD 1991) is inapposite here, because the L&L Court's actions adversely affected RCF's property rights.

Arnoldys make the unseemly claim that RCF was not prejudiced when it was deprived of its redemption and cure rights. As discussed in greater detail supra, only RCF had the right to cure its predecessors' (Finnemans') default in the contracts for deed. SDCL § 21-50-3 empowers only the party in default to exercise cure rights. RCF's cure rights are precisely what remained after the Rabo and L&L foreclosure, not by magic as Arnoldys suggests, but by legislative fiat. SDCL § 21-50-3. Contrary to Arnoldys' contention, the Rabo suit did not make the L&L suit irrelevant, nor did the Rabo Court deprive Rock Creek Farms of its cure rights in the Contracts for Deed lands. Also contrary to Arnoldys' contention, RCF was prejudiced by L&L Court substituting Ann Arnoldy for RCF. Without citing any factual or legal support in the record, Arnoldys argue that outcome of the motion for substitution did not change the outcome of the L&L case. Nothing could be further from the truth. If this Court affirms the L&L Court's transfer of

RCF's cure rights to Ann Arnoldy, RCF will be left with nothing even though it has invested Millions of Dollars to preserve these agricultural lands and Ann Arnoldy will have received a multi-Million Dollar windfall.

Since the deeded lands were never subject to the L&L court's jurisdiction and were never the subject of the contract for deed action and since any possibility of appeal of further proceedings in the Rabo foreclosure are gone forever, RCF does not challenge Ann Arnoldy's Sheriff's Deed to the deeded (fee) land. But it works no injustice for this Court to determine that as a judgment creditor Ann Arnoldy is entitled only to a satisfaction of the amount of her judgment and to further conclude that her seizure of the L&L land is an illegal forfeiture beyond what is needed to satisfy her Judgment and the amount she expended to redeem.

CONCLUSION

For all the reasons above-stated and those stated in its initial brief, Rock Creek Farms respectfully requests that this Court reverse the judgment of the Circuit Court and remand this case to permit Rock Creek Farms to exercise its cure rights under SDCL § 21-50-3 free of Arnoldys' satisfied judgments and all other mortgages, liens and claims that were satisfied in the Rabo foreclosure action.

REQUEST FOR ORAL ARGUMENTS

Rock Creek Farms requests that oral arguments be allowed.

CERTIFICATION OF VOLUME LIMITATIONS

The undersigned counsel certifies that this brief was prepared using MS Word.

This brief complies with the type-volume limitations imposed by SDCL □ 15-26A-66(b)(2). Rock Creek Farms□ Reply Brief contains 4,179 words and 21,062 characters. The above-mentioned word processing system was used to count the number of words and characters in this brief.

Dated this _____ day of October, 2013.

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BY: _____
Brian L. Utzman

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing **Appellant Rock Creek Farms Reply Brief** in the above-entitled action, upon the person(s) herein next designated, all on the date below shown, by United States mail, electronically transmitted, or faxed, at Rapid City, South Dakota, to-wit:

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Dated this _____ day of October, 2013.

_____

Brian L. Utzman

APPENDIX

APPENDIX

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

RABO AGRIFINANCE, INC., f/k/a AG SERVICES OF AMERICA, INC. and RABO AGSERVICES, INC.,

Plaintiffs,

vs.

DAVID M. FINNEMAN; CONNIE S. FINNEMAN; ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO DAVID M. FINNEMAN AND CONNIE S. FINNEMAN, d/b/a AIRPORT FARMS; FARM CREDIT SERVICES OF AMERICA, f/k/a FARM CREDIT SERVICES OF THE MIDLANDS FCLA; BLACK HILLS FEDERAL CREDIT UNION; LUTZ/LAIDLAW PARTNERSHIP; AXA EQUITABLE LIFE INSURANCE COMPANY; LAIDLAW FAMILY PARTNERSHIP; TOM WIPF; AMY WIPF; JOHNNY JAY WIPF, d/b/a WIPF FARMS; JOANN WIPF; CEN-DAK LEASING OF NORTH DAKOTA, INC.; SHEEHAN MACK SALES AND EQUIPMENT, INC.; MICHAEL ARNOLDY; ANN ARNOLDY; FARM CAPITAL COMPANY, LLC; DANIEL R. MAHONEY; PORTFOLIO RECOVERY ASSOCIATES, LLC; PFISTER HYBRID CORN CO.;

Civ. No. 09-121

ORDER ON ROCK CREEK FARMS' MOTIONS

App No. 1

KAUP SEED & FERTILIZER, INC.; JOYCE M. WOLKEN; CHARLES W WOLKEN; STAN ANDERSON; DENNIS ANDERSON; KENT KJERSTAD; WILLIAM J. HUBER; KENDA K. HUBER; YU BLU SNI, LLC; U.S. BANCORP EQUIPMENT FINANCE, INC.; KENCO INC., d/b/a WARNE CHEMICAL & EQUIPMENT COMPANY, INC.; DOUG KROEPLIN AG SERVICES, INC.; CREDICO, INC., d/b/a CREDIT COLLECTIONS BUREAU; SCOT D. EISENBRAUN; MELODY EISENBRAUN; BART CHENEY; HAL OBERLANDER; KEI OBERLANDER; RAY S. OLSEN; PATRICK X. TRASK; ROSE MARY TRASK; PENNINGTON COUNTY, SOUTH DAKOTA; MEADE COUNTY, SOUTH DAKOTA; AND THE UNITED STATES OF AMERICA,

Defendants.

The Court having heard and considered the following Motions (together "Rock Creek Farms' Motions"):

(i) Rock Creek Farms' Motion to Determine Redemption Amounts, to Approve Purchase, Provide for Satisfaction of Judgments and Liens, to Appoint Referee and to Terminate Receivership and to Shorten Time for Hearing dated May 18, 2011;

(ii) Defendant Rock Creek Farms' Motion for Reconsideration dated May 27, 2011;

(iii) Defendant Rock Creek Farms' Motion for New Trial, for Relief from Judgment, for Stay of these Proceedings or Alternatively for a Temporary Restraining Order dated June 1, 2011;

(iv) Defendant Rock Creek Farms' Motion to Set Aside Sheriff's Deed dated June 7, 2011; and

The Court having considered the briefs, affidavits, arguments of counsel and all other files and proceedings herein; and now therefore:

IT IS HEREBY ORDERED AS FOLLOWS:

1. Except as described below, Rock Creek Farms' Motions shall be and hereby are in all respects denied.

2. Any sheriff's deed issued in this foreclosure proceeding shall be subject to Rock Creek Farms' rights of appeal in the event a notice of appeal is filed, and no such person, assignee or transferee of such person may be considered a bona fide purchaser unless and until the Court's rulings on the parties' various motions are affirmed by the South Dakota Supreme Court; provided, however, that this Order shall not itself bar the holder of any sheriff's deed, assignee, transferee or lessee from taking possession of the property subject of this action during the pendency of such appeal.

Dated: , 2011

BY THE COURT:

By
Circuit Court Judge

ATTEST:
Ranae Truman, Clerk

By
Deputy

(SEAL)

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this

RANAE L. TRUMAN
Clerk of Courts, Pennington County

By Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 26373; 26390

L&L PARTNERSHIP a/k/a LUTZ AND LAIDLAW PARTNERSHIP a/k/a LUTZ-LAIDLAW PARTNERSHIP, MARVIN LUTZ, GENERAL PARTNER,

Plaintiffs/Appellees,

vs.

ROCK CREEK FARMS,

Defendant/Appellant

and

DAVID M. FINNEMAN, CONNIE S. FINNEMAN, TOM J. WIPF, JOHNNY JAY WIPF d/b/a WIPF FARMS, JOANN WIPF, et al,

Defendants.

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota

The Honorable James W. Anderson, Presiding Judge

SUPPLEMENTAL APPENDIX

INDEX TO SUPPLEMENTAL APPENDIX

STATE OF SOUTH DAKOTA) : SS COUNTY OF PENNINGTON)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
RABO AGRIFINANCE, INC., f/k/a AG SERVICES OF AMERICA, INC. and RABO AGSERVICES, INC., Plaintiffs, vs. DAVID M. FINNEMAN; CONNIE S. FINNEMAN; ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO DAVID M. FINNEMAN AND CONNIE S. FINNEMAN, d/b/a AIRPORT FARMS; FARM CREDIT SERVICES OF AMERICA, f/k/a FARM CREDIT SERVICES OF THE MIDLANDS FCLA; BLACK HILLS FEDERAL CREDIT UNION; LUTZ/LAIDLAW PARTNERSHIP; AXA EQUITABLE LIFE INSURANCE COMPANY; LAIDLAW FAMILY PARTNERSHIP; TOM J. WIPF; AMY WIPF; JOHNNY JAY WIPF, d/b/a WIPF FARMS; JOANN WIPF; CEN-DAK LEASING OF NORTH DAKOTA, INC.; SHEEHAN MACK SALES AND EQUIPMENT, INC.; MICHAEL ARNOLDY; ANN ARNOLDY; FARM CAPITAL COMPANY, LLC; DANIEL R. MAHONEY; PORTFOLIO RECOVERY ASSOCIATES, LLC; PFISTER HYBRID CORN CO.;	Civ. No. 09-1211 DEFENDANT ROCK CREEK FARMS' MOTION TO SET ASIDE SHERIFF'S DEED

KAUP SEED & FERTILIZER, INC.; JOYCE M. WOLKEN; CHARLES W. WOLKEN; STAN ANDERSON; DENNIS ANDERSON; KENT KJERSTAD; WILLIAM J. HUBER; KENDA K. HUBER; YU BLU SNI, LLC; U.S. BANCORP EQUIPMENT FINANCE, INC.; KENCO INC., d/b/a WARNE CHEMICAL & EQUIPMENT COMPANY, INC.; DOUG KROEPLIN AG SERVICES, INC.; CREDICO, INC., d/b/a CREDIT COLLECTIONS BUREAU; SCOT D. EISENBRAUN; MELODY EISENBRAUN; BART CHENEY; HAL OBERLANDER; KEI OBERLANDER; RAY S. OLSEN; PATRICK X. TRASK; ROSE MARY TRASK; PENNINGTON COUNTY, SOUTH DAKOTA; MEADE COUNTY, SOUTH DAKOTA; AND THE UNITED STATES OF AMERICA,

Defendants.

Defendant Rock Creek Farms respectfully moves the Court for an Order setting aside the Sheriff's Deed represented by attorney Robert R. Schaub to have been obtained. In support of this Motion, Rock Creek Farms refers the Court to all files and proceedings herein, but particularly Defendant Rock Creek Farms' Motion for New Trial, for Relief from Judgment, for Stay of Proceedings or Alternatively for a Temporary Restraining Order, and supporting papers.

In further support of this Motion, Rock Creek Farms refers the Court to the Affidavit of Steven W. Sanford submitted herewith, which establishes the existence of an agreement that Rock Creek Farms have the owner's redemption right which the Court's Order has prevented Rock Creek Farms from exercising.

Dated: June 7, 2011

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--and--

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By _____
Steven W. Sanford
Attorneys for Rock Creek Farms

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) SS.
COUNTY OF PENNINGTON) SEVENTH JUDICIAL DISTRICT

****

RABO AGRIFINANCIAL, ET AL) TRANSCRIPT
)
Plaintiffs,) OF
)
V.) MOTION HEARING
)
ROCK CREEK FARMS,)
DAVID FINNEMAN, ET AL,)
) CIV 09-1211
Defendants.)

****

PROCEEDINGS: The above-entitled matter commenced on the 11th day of July, 2011, at the Pennington County Courthouse, Rapid City, South Dakota.

BEFORE: The Honorable John J. Delaney

****

TINA RAE PRUSS, OFFICIAL COURT REPORTER

of that discussion.

So, Mr. Schaub?

MR. SCHAUB: The Federal Government will be paid when the appeals are decided. That's what the order said. And that's -- Ann was entitled to a Sheriff's deed because there was no redemption.

THE COURT: And what's the appeal period? What's the talk on that? I don't understand it so talk to me.

MR. UTZMAN: When's it due?

THE COURT: Yeah.

MR. UTZMAN: The 13th. Wednesday, I believe.

MR. SANFORD: That's when the notice of appeal will be filed.

THE COURT: And the point -- still -- so you are asking me to set aside the sheriff's deed?

MR. UTZMAN: Well, the order says that the sheriff's deed would issue -- and I am paraphrasing because I don't have it in front of me --

THE COURT: When the government was paid and the appeal --

MR. UTZMAN: -- after the appeals were decided and after the government lien was paid, but that didn't happen.

MR. SCHAUB: I don't recall the order saying that at all. It said that the government --

THE COURT: Can't be -- that can't be too hard to sort out.

MR. SCHAUB: I believe it says the government will be paid once the appeal -- all appeals have been decided.

THE COURT: Judgment and decree of foreclosure is partially vacated upon the condition that the U.S. Government's $1 million conviction lien against David M. Finneman and Connie Finneman be set aside after Ann Arnoldy or Michael Arnoldy receive a deed for foreclosed land from the Sheriff of Pennington; and after all appeals from this order have been fully determined.

Now, have we received the sheriff's deed?

MR. SCHAUB: Yes.

THE COURT: And you are going to file a notice of appeal, Mr. Utzman? Mr. Sanford? Somebody, I assume?

MR. UTZMAN: That's the plan.

MR. SANFORD: Yes.

THE COURT: Right.

So, it would appear that under the language of that, that the appeals from the order need to go

forward, right?

MR. SCHAUB: Yes.

And if they don't appeal, then we pay.

THE COURT: Yeah.

If they appeal, then -- so -- I mean, I'm struggling to see why I need do anything.

If you win the appeal, what happens?

MR. UTZMAN: We may not have land any more because the sheriff's deed has issued.

THE COURT: Is there a *lis pendence* of some sort?

MR. UTZMAN: Well, that was the plan.

But as I read the court order, it was requiring the appeal time period run before a sheriff's deed was issued.

THE COURT: It doesn't say that. That's not what the language says. It doesn't say it will issue after that's done. It says the -- it is partially vacated and it refers to the opening -- opening words.

But the appeal is done, and I am assuming any taker in interest is on notice, I would assume, of pending litigation.

Somebody disagree with that? That Arnoldys can transfer to a bona fide purchaser who takes free and clear of any claims?

STATE OF SOUTH DAKOTA)SS COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
RABO AGRIFINANCE, INC., f/k/a AG SERVICES OF AMERICA, INC. and RABO AGSERVICES, INC., Plaintiffs, vs. DAVID M. FINNEMAN; CONNIE S. FINNEMAN; ROCK CREEK FARMS, CHAD FINNEMAN, ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO DAVID M. FINNEMAN AND CONNIE S. FINNEMAN, d/b/a AIRPORT FARMS; FARM CREDIT SERVICES OF AMERICA f/k/a FARM CREDIT SERVICES OF THE MIDLANDS FCLA; BLACK HILLS FEDERAL CREDIT UNION; LUTZ/LAIDLAW PARTNERSHIP; AXA EQUITABLE LIFE INSURANCE COMPANY; LAIDLAW FAMILY PARTNERSHIP; TOM J. WIPF; AMY WIPF; JOHNNY JAY WIPF d/b/a WIPF FARMS; JOANN WIPF; CEN-DAK LEASING OF NORTH DAKOTA, INC.; SHEEHAN MACK SALES AND EQUIPMENT, INC.; MICHAEL ARNOLDY; ANN ARNOLDY; FARM CAPITAL COMPANY, LLC; DANIEL R.MAHONEY; PORTFOLIO RECOVERY ASSOCIATES, LLC; PFISTER HYBRID CORN CO.; KAUP SEED & FERTILIZER, INC.; JOYCE M. WOLKEN; CHARLES W. WOLKEN; STAN ANDERSON; DENNIS ANDERSON; KENT KJERSTAD; WILLIAM J. HUBER; KENDA K. HUBER; YU BLU SNI, LLC.; U.S. BANCORP EQUIPMENT FINANCE, INC.; KENCO INC., d/b/a WARNE CHEMICAL & EQUIPMENT COMPANY, INC.; DOUG KROEPLIN AG SERVICES, INC.; CREDICO, INC. d/b/a CREDIT COLLECTIONS	)	File No. C09-1211 **APPELLANT ROCK CREEK FARMS' NOTICE OF APPEAL**

BUREAU; SCOT D. EISENBRAUN; MELODY EISENBRAUN; BART CHENEY; HAL OBERLANDER, KEI OBERLANDER; RAY S. OLSEN; PATRICK X. TRASK; ROSE MARY TRASK; PENNINGTON COUNTY, SOUTH DAKOTA; MEADE COUNTY, SOUTH DAKOTA; AND THE UNITED STATES OF AMERICA,

Defendants.

TO: PARTIES AND THEIR COUNSEL OF RECORD

Please take notice that Defendant Rock Creek Farms ("Rock Creek Farms" or "RCF"), by and through its counsel Steven W. Sanford, Cadwell, Sanford, Deibert & Garry, LLP, and Brian L. Utzman, Smoot & Utzman, P.C., appeal under SDCL § 15-26A-3, the Trial Court's Order Partially Vacating Judgment and Decree of Foreclosure and Order Granting Motion for Judgment on the Pleadings, dated May 26, 2011. Notice of Entry of Judgment was served upon RCF on June 13, 2011. RCF also appeals the Trial Court's denial of its Motion to Determine Redemption Amounts, to Approve Purchase, Provide for Satisfaction of Judgments and Liens, and to Appoint Referee and to Terminate Receivership, dated May 18, 2011. RCF also appeals the Trial Court's denial of its Motion to Set Aside Sheriff's Deed, dated June 7, 2001. This appeal is made on this date to the Supreme Court of the state of South Dakota.

Dated this 12th day of July, 2011.

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By _____
Brian L. Utzman
Attorneys for Rock Creek Farms

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing **Appellant Rock Creek Farms' Notice of Appeal** in the above-entitled action, upon the person(s) herein next designated, all on the date below shown, by United States mail, electronically transmitted, hand delivered, or faxed, at Rapid City, South Dakota, to-wit:

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Dated this 7th day of July, 2011.

Brian L. Utzman

STATE OF SOUTH DAKOT A)
)SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

File No. C09-1211

RABO AGRIFINANCE, INC., f/k/a AG SERVICES OF AMERICA, INC. and RABO AGSERVICES, INC.,

Plaintiffs,

vs.

DAVID M. FINNEMAN; CONNIE S. FINNEMAN; ROCK CREEK FARMS, CHAD FINNEMAN, ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO DAVID M. FINNEMAN AND CONNIE S. FINNEMAN, d/b/a AIRPORT FARMS; FARM CREDIT SERVICES OF AMERICA f/k/a FARM CREDIT SERVICES OF THE MIDLANDS FCLA; BLACK HILLS FEDERAL CREDIT UNION; LUTZ/LAIDLAW PARTNERSHIP; AXA EQUITABLE LIFE INSURANCE COMPANY; LAIDLAW FAMILY PARTNERSHIP; TOM J. WIPF; AMY WIPF; JOHNNY JAY WIPF d/b/a WIPF FARMS; JOANN WIPF; CEN-DAK LEASING OF NORTH DAKOTA, INC.; SHEEHAN MACK SALES AND EQUIPMENT, INC.; MICHAEL ARNOLDY; ANN ARNOLDY; FARM CAPITAL COMPANY, LLC; DANIEL R.MAHONEY; PORTFOLIO RECOVERY ASSOCIATES, LLC; PFISTER HYBRID CORN CO.; KAUP SEED & FERTILIZER, INC.; JOYCE M. WOLKEN; CHARLES W. WOLKEN; STAN ANDERSON; DENNIS ANDERSON; KENT KJERSTAD; WILLIAM J. HUBER; KENDA K. HUBER; YU BLU SNI, LLC.; U.S. BANCORP EQUIPMENT FINANCE, INC.; KENCO INC., d/b/a WARNE CHEMICAL & EQUIPMENT COMPANY, INC.; DOUG KROEPLIN AG SERVICES, INC.; CREDICO, INC. d/b/a CREDIT COLLECTIONS

APPELLANTS DAVID M. FINNEMAN AND CONNIE S. FINNEMAN'S NOTICE OF APPEAL

BUREAU; SCOT D. EISENBRAUN; MELODY EISENBRAUN; BART CHENEY; HAL OBERLANDER, KEI OBERLANDER; RAY S. OLSEN; PATRICK X. TRASK; ROSE MARY TRASK; PENNINGTON COUNTY, SOUTH DAKOTA; MEADE COUNTY, SOUTH DAKOTA; AND THE UNITED STATES OF AMERICA,

Defendants.

TO: PARTIES AND THEIR COUNSEL OF RECORD

Please take notice that Defendants David M. Finneman and Connie S. Finneman (the Finnemans), by and through their counsel, appeal under SDCL 15-26A-3 the Trial Court's Order Partially Vacating Judgment and Decree of Foreclosure and Order Granting Motion for Judgment on the Pleadings dated May 26, 2011. Notice of Entry of Judgment was served upon the Finnemans on June 13, 2011. The Finnemans also appeal the Trial Court's denial of the Motion to Determine Redemption Amounts, to Approve Purchase, Provide for Satisfaction of Judgments and Liens, to Appoint Referee, and to Terminate Receivership, dated May 18, 2011. The Finnemans also appeal the Trial Court's denial of its Motion to Set Aside Sheriff's Deed, dated June 7, 2001. This appeal is made on this date to the Supreme Court of the state of South Dakota.

Dated this 13 day of July, 2011.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing **Appellants David M. Finneman and Connie S. Finneman's Notice of Appeal** in the above-entitled action, upon the person(s) herein next designated, all on the date below shown, by United States mail at Rapid City, South Dakota, to-wit:

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which address is the last address of the addressee known to the subscriber.

Dated this 13 day of July, 2011.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY: James P. Hurley
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Arnoldys' Reply to Finnemans' Rule 60(b) Motion R 1737, pp 3, 4, 15 & 16 Filed July 11, 2012.

Rock Creek moved to reconsider and filed its first Rule 60(b) motion. Judge Delaney denied both motions and stated:

> 2. I am trying to avoid unpleasant bluntness. In the absence of evidence of an agreed restoration of the waived right of redemption, the provision restoring that right was placed into a proposed judgment with no warning, discussion or explanation to me or anyone else that this was an agreed modification of the facts pleaded and acknowledged. I am frankly not accustomed to that. No notice, formal or informal, of an agreement to do so was given to any of the other defendants or interested parties to this lawsuit – at least none to my knowledge. In those circumstances, a request for a judgment on the pleadings cannot, in my opinion, and should not, in my opinion, grant rights or benefits contrary to the pleadings. The judgment I unwittingly signed 18 months ago did that. It should not have done that.
>
> 3. At hearing after hearing, Finnemans/RCF appeared devious, if not outright dishonest. In hearing after hearing, Finnemans/RCF appeared to prefer to cloud their actions with smoke and mirrors even when there was no reason to do so. Assuming the waiver could have been removed or revoked, and I know of no reason off the top of my head that RABO and Finnemans/RCF could not have done so, it is beyond my ken [sic] as to why they would choose to do so in secret. R 1445.

The Sheriff's sale was held April 12, 2010, and the redemption period ended on June 1, 2011. At no time during the 400+ day redemption period did Rock Creek or Finnemans pay the sheriff any part of the nearly four million dollars required to redeem. Moreover, Rock Creek and Finnemans didn't take any of the other required steps to redeem including serving a Notice of Redemption upon the Sheriff.

It wasn't kept secret that the sheriff's deed would issue immediately after the June 1st redemption deadline. In fact, on June 1, 2011 one of Rock Creek's attorneys requested Judge Delaney to immediately rule upon its Motions for New Trial, Relief from Judgment (under Rule 60(b)), Order Staying Proceedings (without posting a bond) and a Temporary Restraining Order. Rock Creek warned that the redemption deadline was June 1st under the original judgment. See **Ex. 1**. Rock Creek specifically requested in paragraph 3 that Arnoldys be restrained from obtaining a sheriff's deed, and in

paragraph 4 requested the "staying [of] the Arnoldys' right to obtain a sheriff's deed...."

Arnoldys object to Finnemans' factual statements. They are inaccurate. Moreover, under the statutes, rules of ethics and case law, an attorney is prohibited from testifying or making misstatements when he is at the same time representing a party.[2] Some of Finnemans' inaccurate statements are discussed below:

- On page 3. Finnemans erroneously claim: "Arnoldys tried to slip in paragraph 2 for the Court to approve the holder of any sheriff's deed (the Arnoldys) taking possession of all the property." But Arnoldys' attorney didn't prepare the order—instead, Rock Creek's attorney did. **Ex. 2.** Finnemans didn't object to the proposed order, however Arnoldys did. **Ex. 3.**
- There is no proof, other than testimony by Finnemans' attorney, that Rock Creek had a binding agreement to sell the land as claimed at page 2.
- There is no proof, other than testimony by Finnemans' attorney, that Finnemans paid $2,722,026 to L&L as stated at page 20. A substantial portion of the payments to L&L were made by tenants or by a receiver because Finnemans either were in prison or their land was being foreclosed. See, L&L trial transcript.
- There is no proof, other than testimony by Finnemans' attorney, of the inflated land values claimed at page 21.
- At page 22, there is no proof, other than testimony by Finnemans' attorney, that Finneman paid L&L the amount Judge Anderson determined to be owed to L&L.

Arnoldys object to Finnemans' lack of civility, especially the following incorrect and inflammatory statements:

- Page 3: "The secret deed resulted from some separate arrangement between the Arnoldys and the sheriff that was kept secret from this Court..."
- Page 5: "Arnoldys will reap huge unearned windfall profits worth millions of dollars from their underhanded fraudulent secret conduct and abuse of the judicial system."
- Page 6: "Arnoldys boldly went behind the back of the Judges in the three cases, and cavalierly ignored the due process rights of the parties in the land."

[2] SDCL 19-1-3; RPC 1.10; and *Rumpza v. Donalar Enterprises, Inc.*, 581 NW2d 517, 1998 SD 79.

This would undoubtedly come as a surprise to Rabo. In fact, the January 15, 2010 judgment, to which Finnemans claim they wish to revert, states that all the land is to be sold at public auction, with the L & L lien remaining on the contract for deed property. Quite simply, any buyer would receive the land subject to the L & L lien, just as it would be subject to any other prior mortgages. There is no confusion here other than what Finnemans attempt to create through their brief.

In any event, Finnemans are estopped from asserting that the orders, judgments, and sheriff's deed issued earlier in this case do not apply to the contract for deed land. "Under the doctrine of judicial estoppel the party is bound by his judicial declarations and may not contradict them in a subsequent proceeding involving the same issues and parties." *Table Steaks v. First Premier Bank, N.A.*, 2002 SD 105 ¶ 33, 650 N.W.2d 829, 837. "Judicial estoppel cannot be reduced to an equation, but courts will generally consider the following elements in deciding whether to apply the doctrine: the later position must be clearly inconsistent with the earlier one; the earlier position was judicially accepted, creating the risk of inconsistent legal determinations; and the party taking the inconsistent position would derive an unfair advantage or impose an unfair detriment to the opponent if not estopped." *Webb v. Webb*, 2012 SD 41 ¶ 8, quoting *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 2005 SD 82 ¶ 34, 700 N.W.2d 729, 737-38. Nor does the admission need to be made in open court; a statement in a party's brief is binding on that party as a judicial admission. *Truhe v. Turnac Group, L.L.C.*, 1999 SD 118 ¶ 5, 599 N.W.2d 378, 379 n. 3; *Tuttle v. Tuttle*, 399 N.W.2d 876, 877 n. 2 (S.D. 1987).

Finnemans went through the entire Rabo foreclosure, the FarmPro foreclosure, the *Arnoldy v. Mahoney* proceedings, and their opposition to Arnoldys' 60(b) motion in this matter asserting that the Rabo foreclosure applied to all of the land. In fact, in *Arnoldy v. Mahoney*, Finnemans claimed the Rabo foreclosure was res judicata on the ownership of the entire property. Finnemans are now estopped from changing their

position and arguing that the Rabo foreclosure does not reach the contract for deed land.

Finnemans also cite no case authority and ignore *Anderson v. Aesoph*, 2005 SD 56, 697 NW2d 25, which clearly controls. The Supreme Court noted that an equitable interest in a contract for deed could be conveyed by operation of law, i.e., a judgment or deed. It said: "Real property must be transferred either 'by operation of law, or by an instrument in writing, subscribed by the party disposing of the same [.]' SDCL 43–25–1." *Id.* at ¶ 22. Clearly, Finnemans/Rock Creek's interest to the land was conveyed to Ann by operation of law: by the Rabo corrected judgment, and by an instrument in writing—the Sheriff's deed.

7. Ann timely complied with Judge Delaney's May 26, 2011 order and paid Finnemans' conviction liens in full.

Finnemans claim that the deed to Ann is invalid because she didn't pay off Finnemans' conviction lien until after the dismissal of the appeal. This argument is absurd. Judge Anderson rejected this argument in the L&L foreclosure. The United States is the only party that has an interest in the timing of the payment. Significantly, it never complained about how quickly it received the payment—especially since its lien was drawing interest until Ann paid $1,246,246 on April 23rd. This amount was over a million dollars more than what Finnemans and their partners were trying to settle it for—by not being above-board with the Government. Moreover, the Rabo Order didn't require payment until all appeals from the Order became final. The Supreme Court's decision became final 21 days after its decision when neither Finnemans nor Rock Creek pursued a petition for rehearing—although Rock Creek and Finnemans have now questioned its finality by filing Rule 60(b) motions.

There is no prejudice to Finnemans; no matter when the payment was made, Finnemans have received the benefit of having their million-dollar debt to the

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
		File No. _____
RABO AGRIFINANCE, INC., fka AG SERVICES OF AMERICA, INC. and RABO AGSERVICES, INC.,	)	
Plaintiff,	)	
vs.	)	**COMPLAINT**
DAVID M. FINNEMAN; CONNIE S. FINNEMAN; ROCK CREEK FARMS, SUCCESSORS IN INTEREST TO DAVID M. FINNEMAN AND CONNIE S. FINNEMAN, dba AIRPORT FARMS; FARM CREDIT SERVICES OF AMERICA fka FARM CREDIT SERVICES OF THE MIDLANDS FCLA; BLACK HILLS FEDERAL CREDIT UNION; LUTZ/LAIDLAW PARTNERSHIP; AXA EQUITABLE LIFE INSURANCE COMPANY; LAIDLAW FAMILY PARTNERSHIP; TOM J. WIPF; AMY WIPF; JOHNNY JAY WIPF dba WIPF FARMS; JOANN WIPF; CEN-DAK LEASING OF NORTH DAKOTA, INC.; SHEEHAN MACK SALES AND EQUIPMENT, INC.; MICHAEL ARNOLDY; ANN ARNOLDY; FARM CAPITAL COMPANY, LLC, DANIEL R. MAHONEY; PORTFOLIO RECOVERY ASSOCIATES, LLC; PFISTER HYBRID CORN CO.; KAUP SEED & FERTILIZER, INC.; JOYCE M. WOLKEN; CHARLES W. WOLKEN; STAN ANDERSON; DENNIS ANDERSON; KENT KJERSTAD; WILLIAM J. HUBER; KENDA K. HUBER; YU BLU SNI, LLC,; U.S. BANCORP EQUIPMENT FINANCE, INC.; KENCO INC., dba WARNE CHEMICAL & EQUIPMENT COMPANY, INC.; DOUG KROEPLIN AG SERVICES, INC.; CREDICO, INC.	)	

claims a lien against the real property described herein by virtue of said unpaid real estate taxes, a lien now due and payable and delinquent.

139. The real property taxes due and payable for the year 2008 and payable in the year 2009, plus penalty and interest, remain unpaid and defendant Meade County claims a lien against the real property described herein by virtue of said unpaid real estate taxes, a lien now due and payable, but not yet delinquent.

140. Plaintiff has listed all persons or entities having an interest or stake in, claim to or lien on encumbrances upon the premises as set forth in the policy of title insurance drafted by First American Title Insurance Company (Exhibit R). If there are any other persons or entities whatsoever that have any interest or stake in, claim to, or lien or encumbrances upon the premises other than the defendants named, they are unknown at the time of the commencement of this action.

141. Plaintiff has had to employ legal counsel to commence and prosecute this action. Plaintiff further demands reasonable attorney fees and expenses for such action, pursuant to the terms of the Collateral Real Estate Mortgages (Exhibits C, E, G and I) to be determined by the Court and allowed as a part of the judgment in this action.

142. Plaintiff is informed and believes, and on that basis alleges that the fair and reasonable value of the mortgaged premises may be less than the sum due Plaintiff by reason of said note and mortgage and Plaintiff may be entitled to a deficiency judgment against Defendant Rock Creek Farms.

143. No other action or proceeding has been brought or is pending at law, equity or otherwise for the recovery of the indebtedness secured by the note.

WHEREFORE, Plaintiff demands judgment against Defendants, and each of them, as follows:

1. For Judgment against Defendant Rock Creek Farms, successor in interest to David M. Finneman and Connie S. Finneman in the amount of the total principal, interest and costs through June 12, 2009, in the amount of Two Million Four Hundred Thirty-Three Thousand Two Hundred Eight and 56/100ths Dollars ($2,433,208.56), together with accrued interest to June 12, 2009 in the amount of Six Hundred Sixty-Three Thousand Nine Hundred Thirty-Six and 64/100ths Dollars ($663,936.64), with said interest accruing daily at the rate of $811.07 per day together with costs and disbursements, including attorney fees.

2. That all the Mortgages attached hereto as exhibits be adjudicated and declared to be lawful liens and valid Mortgages upon the concerned real property, and superior to all interests or claims except those set forth above and that the mortgages to be foreclosed upon pursuant to SDCL §21-47 and SDCL §21-49.

3. For such sums are now or hereafter shall become due for unpaid taxes and other expenses necessarily incurred for the preservation of the mortgaged premises plus interest on the

STATE OF SOUTH DAKOTA : :SS COUNTY OF PENNINGTON :	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
RABO AGRIFINANCE INC, et al. Plaintiffs, vs. DAVID M. FINNEMAN, et al. Defendants.	Civ. No. 09-1211 **Order Partially Vacating Judgment and Decree of Foreclosure and Order Granting Motion for Judgment on the Pleadings**

The Court having this day granted Arnoldys Motion to Partially Vacate Judgment and Decree of Foreclosure and Order Granting Motion for Judgment on the Pleadings, and for cause shown;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The last sentence in paragraph 10 of the Judgment and Decree of Foreclosure is hereby stricken and vacated and is replaced with the following: Defendants David M. Finneman and Connie S. Finneman and Rock Creek Farms, successor in interest to David M. Finneman and Connie S. Finneman, are determined and adjudged to have waived all redemption rights under SDCL Chapter 21-52, pursuant to the terms of the loan restructure agreement (Rabo's Complaint, Exhibit K) and pursuant to the terms of the Stipulation as to Dismissal of Counterclaims Filed by Rock Creek Farms, David M. Finneman and Connie S. Finneman dated December 7, 2009 and Order Enforcing Stipulation as to Dismissal of the Counterclaims.
2. Added as the last sentence in paragraph 10 of the Judgment and Decree of Foreclosure is the following sentence: Michael Arnoldy is determined

and adjudged to have the owner's right of redemption for a period of one year under SDCL Chapter 21-52.

3. The words, "in the form submitted by Plaintiff" that appear on page two of the Order Granting Motion for Judgment on the Pleadings are hereby stricken and vacated.
4. The words, "in the form submitted" that appear on page three of the Order Granting Motion for Judgment on the Pleadings are hereby stricken and vacated.
5. The prior Judgment and Decree of Foreclosure and Order Granting Motion for Judgment on the Pleadings are attached and indicate the words that have been stricken and vacated.
6. The Judgment and Decree of Foreclosure is partially vacated upon the condition that the US Government's one-million dollar conviction lien against David M. Finneman and Connie Finneman be satisfied after Ann Arnoldy or Michael Arnoldy receive a deed to the foreclosed land from the Sheriff of Pennington County and after all appeals from this Order have been fully determined.

Dated at Rapid City, South Dakota, this 26 day of May, 2011

BY THE COURT:

(SEAL OF COURT)

Circuit Court Judge

ATTEST:
Ranae Truman, Clerk

by _____
Deputy

State of South Dakota } Seventh Judicial
County of Pennington } Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on record in my office this
JUN - 7 2011
RANAE L. TRUMAN
Clerk of Courts, Pennington County
By _____ Deputy

Pennington County, SD
FILED
IN CIRCUIT COURT
MAY 26 2011 9:35 AM
Ranae Truman, Clerk of Courts
By _____ Deputy

STATE OF SOUTH DAKOTA) :ss COUNTY OF PENNINGTON)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT

FARMPRO SERVICES, INC., Plaintiff, v. DAVID FINNEMAN, CONNIE FINNEMAN, and CHAD FINNEMAN, Defendants.	CIV. 02-533 RESPONSE TO MOTION OF ROCK CREEK FARMS TO REQUIRE DEPOSIT OF FUNDS IN COURT REGISTRY

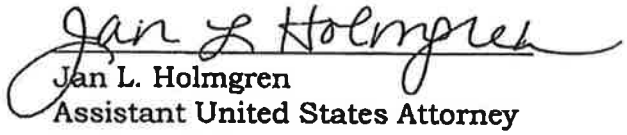
The United States, by and through counsel, Assistant United States Attorney Jan L. Holmgren, objects to Defendant's motion to require deposit of funds into the Court's registry because it may have an impact on the payment of the government's federal criminal restitution judgment in the Rabo foreclosure case.

Now that South Dakota Supreme Court dismissed the appeal of David and Connie Finneman and Rock Creek Farms in Rabo AgriFinance Inc. v. Rock Creek Farms, # 26092 (dated March 14, 2012), the United States is entitled by judgment to payment in full of its restitution lien, which secured the criminal judgment for fraud committed by David and Connie Finneman against the federal Farm Service Agency. The money that Rock Creek Farms seeks to place in the court's registry could facilitate the payment of the government's lien.

It would not be an abuse of the court's discretion to deny Rock Creek Farm's motion for this reason, or for the reason that the record conduct of the Finnemans and Rock Creek Farms in attempting to strip the government's lien should bar it from the equitable relief being sought.

Dated this the 23rd day of March, 2012.

BRENDAN V. JOHNSON
UNITED STATES ATTORNEY



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