IN SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30867

RAND WILLIAMS and GAYLA WILLIAMS,

Appellants,

vs.

JOHN CARLTON D/B/A J&L FLOORING,

AND

J&L FLOORING, LLC, a South Dakota Limited Liability Company

Appellee,

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE HEIDI LINNGREN

NOTICE OF APPEAL FILED OCTOBER 9, 2024

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The Order appealed from, attached hereto as Appendix 1, was dated and filed September 10, 2024. Appellants timely filed their Notice of Appeal on October, 9, 2024. If not contained in the Appendix, references to the record will be designated as "SR" for Settled Record in accordance with the Chronological Index provided by the Clerk of Courts. References to the Appendix will be designated as "Appx." This Court has jurisdiction over this appeal under SDCL § 15-26A-3.

STATEMENT OF THE LEGAL ISSUES

1. Whether "per annum" interest, as provided for in the Contract for Deed is compound or simple interest?

The circuit court held it to be simple interest.

- *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, 731 N.W.2d 184
- *Wieland v. Loon*, 79 S.D. 608, 116 N.W.2d 391 (1962)
- *Hovey v. Edmison*, 3 Dak. 449, 460, 22 N.W. 594,
- *Tsiolis v. Hatterscheidt*, 85 S.D. 568, 187 N.W.2d 104 (1971)
- SDCL § 53-4-5
- SDCL § 2-14-2(4).

2. Whether there shall be a one-year redemption period where no foreclosure was granted or ordered?

The circuit court ordered a one-year redemption period, but made no ruling as to foreclosure.

- *L&L P'ship v. Rock Creek Farms*, 2014 S.D. 9, 843 N.W.2d 697
- *VanGorp v. Seiff*, 2001 S.D. 45, 621 N.W.2d 712
- SDCL § 21-50-1
- SDCL § 21-52-11

3. Whether interest shall be held in abeyance as of the date Defendant proposed to sell the property?

The circuit court held in the affirmative.

- *Anderson v. Aesoph*, 2005 S.D. 56, 697 NW2d 25
- *Adrian v. McKinnie*, 2004 SD 84, 684 NW2d 91
- SDCL § 20-5-18

4. Whether Plaintiff shall be awarded attorney fees for a foreclosure proceeding?

The circuit court held in the negative.

- SDCL § 21-50-1
- SDCL § 21-50-4

STATEMENT OF THE CASE

This case was brought in the Seventh Judicial Circuit Court, Pennington County, South Dakota, before the Honorable Heidi Linngren. Appellants filed a complaint against Appellees for breach of contract and foreclosure on or about September 13, 2023. The circuit court entered an Order on Motions to Determine Amount Remaining Due Under the Contract for Deed and the Length of the Redemption Period (the "Order").

On June 18, 2024, the circuit court heard legal arguments from the parties on the Plaintiffs' motion for evidentiary hearing for foreclosure and Defendant's motion to enforce a settlement agreement and for declaratory action. The circuit court then ordered the parties to submit briefs on the issues of law presented. On September 10, 2024, the circuit court ordered that Defendants owed a total of $257,234 to Plaintiffs, including $138,000 in simple interest on top of the $110,000 remaining principal amount under the contract for deed ("CFD"), and $9,234 in property taxes paid by Plaintiffs. The circuit

court further ordered that Defendants shall have a one-year redemption period from the date of the Order to satisfy the CFD. Finally, the circuit court denied Plaintiffs' request for attorney fees and ordered that interest accumulated from the time Defendants first proposed selling the property and the date of the Order be held in abeyance.

STATEMENT OF THE FACTS

On May 2, 2012, the parties entered into a contract for deed ("CFD") for the sale and purchase of real property located at 1901 5th Street, Rapid City, South Dakota (the "Property"). SR 46-47; Appx. A000004-05. The parties agreed upon the following per the terms of the CFD:

1. The principal purchase price was $120,000.
2. Defendants made a down payment of principal in the amount of $10,000.
3. The remaining principal financed under the CFD was $110,000 and Defendant was to make interest only payments until such time as he made a final payment for the principal balance as follows:
    a. Interest only payment of $500 per month for the first year (6/1/2012 to 5/13/2013); and
    b. Interest at 12% per annum to accrue beginning on July 1, 2013, with interest only payments of $1,100 per month until the final payment was issued.

Id. Upon the signing of the CFD and the down payment of $10,000 made by Defendants and received by Plaintiffs, Defendants took possession of the Property on May 2, 2012. SR 5. Plaintiffs signed a warranty deed granting their interest in the Property to John Carlton on May 1, 2012. *Id.* However, the deed was never delivered to Defendant, nor

recorded with the Pennington County Register of Deeds Office, and Plaintiffs still retain possession of the warranty deed. *Id.*

At the time of the agreement, Plaintiffs agreed to pay the current taxes due as of May 12, 2012, and Plaintiffs continued to pay the annual property taxes. SR 6. Defendants have not paid the property tax from 2019, payable in 2020, to the present, resulting in Plaintiffs being required to pay $9,234 in property taxes from such time. SR 156. Defendants have conceded that they failed to pay the required property taxes, and that such amount shall be added to the payoff amount to be determined under the terms of the CFD. SR 184. Defendants have also caused Plaintiffs to pay fines levied by the City of Rapid City for cleanup fees for the removal of debris from the property on numerous occasions and has not reimbursed Plaintiffs for these fees. SR 6. Defendant has caused Plaintiff to pay $572.00 in fines levied by the City of Rapid City. SR 50-53.

After Defendants paid, and Plaintiffs received, the down payment of $10,000, Defendants subsequently made two payments in the amount of $1,000 each, totaling $2,000. SR 6. The last payment made by Defendants was in May 2015—meaning that Defendants have been in default under the CFD for over nine years. SR 48. Aside from the two payments of $1,000, Defendants have failed to make the monthly payments required by the CFD. SR 6. Plaintiffs initially provided notice of default to Defendants on June 19, 2017, by providing a letter outlining Defendants' failure to make payments as required by the CFD. SR 27. Despite the notice of default, Defendants failed to cure the default and have continuously failed to make payments required under the CFD through the present. SR 6. Plaintiffs' counsel sent another notice of default of the CFD to

Defendants on March 15, 2023. SR 85. Once again, after receiving the notice of default, Defendants failed to cure their default of the CFD. SR 6.

Plaintiffs first learned that Defendants had listed the property for sale with Dave Olson in October 2023. SR 129; Appx. A000032. After speaking with Defendants' commercial realtor, Dave Olson, between March 23 and April 12, 2024, Plaintiffs learned that there were no offers from any would-be purchasers. *Id.* Defendants requested a settlement which would allow them to sell the property and escrow the funds in order to pay off the amount due under the CFD. SR 89-90; Appx. A000038-39. Plaintiffs' counsel indicated that Plaintiffs may be agreeable to a sale of the property, provided that the sale price be more than the amounts being claimed to be due and owing under the CFD by Plaintiffs. *Id.* Defendants then drafted a proposed stipulation to allow for the sale of the property. *Id.* After Plaintiffs reviewed the proposed stipulation, Plaintiffs expressed concerns that were not resolvable by stipulation, and therefore, Plaintiffs rejected the proposed stipulation for the sale of the property. SR 92; Appx. A000041.

STANDARD OF REVIEW

This Court "will not set aside a trial court's findings of fact unless they are clearly erroneous. A Trial court's finding is clearly erroneous if, after reviewing the entire evidence, we are left with the definite and firm conviction that a mistake has been made." *Estate of Fischer v. Fischer*, 2002 S.D. 62, ¶ 10, 645 N.W.2d 841, 844 (citing *In re Dokken*, 2000 S.D. 9, ¶ 10, 604 N.W.2d 487, 490) (internal citations omitted). This Court reviews a "trial court's conclusions of law under the de novo standard, giving no deference to the trial court's conclusions of law." 2002 S.D. 62, ¶ 10, 645 N.W.2d 841, 844 (citing *Osloond v. Osloond*, 2000 S.D. 46, ¶ 6, 609 N.W.2d 118, 121).

ARGUMENT

I. The parties agreed that interest was to accrue at 12% per annum beginning on July 1, 2013. Defendants owe Plaintiff $277,492 in accrued interest because per annum interest is to be compounded annually.

There is no dispute about either the remaining principal due under the contract for deed (CFD) of $110,000 or the $9,234 owed by Defendants as a result of property taxes paid by Plaintiff as determined by the circuit court. SR 225; Appx. A000002. The circuit court, however, erred in finding that simple interest applied under the terms of the CFD, and therefore improperly determined that Defendants owed only $138,000 of accrued interest.

The Courts will look to the language of the parties to determine intent. *Detmers v. Costner*, 2012 S.D. 35, ¶ 20, 814 N.W.2d 146, 151. "'In order to ascertain the terms and conditions of a contract, [the Court] examine[s] the contract as a whole and give[s] words their "plain and ordinary meaning."'" *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 13, 731 N.W.2d 184, 191 (quoting *Canyon Lake Park, L.L.C. v. Loftus Dental, P.C.*, 2005 S.D. 82, ¶ 17, 700 N.W.2d 729, 734). A contract "is not rendered ambiguous simply because the parties do not agree on its proper construction or their intent upon executing the contract." *Estate of Fisher v. Fisher*, 2002 S.D. 62, ¶ 12, 645 N.W.2d 841, 845 (citations omitted). Importantly, "in the absence of any mistake, fraud or oppression, the courts are not interested in the wisdom or impolicy of contracts and agreements voluntarily entered into between parties *compos mentis* and *sui juris*." *Tsiolis v. Hatterscheidt*, 85 S.D. 568, 571, 187 N.W.2d 104, 106 (1971) (citation omitted).

It is undisputed that the parties agreed to a sale price of $120,000. Defendants made a $10,000 downpayment, and after the downpayment, the contract for deed financed $110,000, *In re Estate of Smeenk*, 2022 S.D. 41, ¶ 38, 978 N.W.2d 383, 395 ("A contract for deed is, in its essence, a financing arrangement for the purchase of real property."), through which the Defendants agreed to make interest only payments in the amount of $500 per month for the first year. SR 181.

The CFD states in relevant part, "From and after the 1st day of July 2013 interest will accrue on the outstanding principal at the rate of Twelve percent (12%) per annum for the remainder of the term of the Note until its maturity date." SR 46; Appx. A000004. "Compound interest" is "interest added to the principal as the interest becomes due, and thereafter made to bear interest." SDCL § 2-14-2(4). The plain and ordinary meaning of the language "per annum" interest rate means the interest rate over a one-year period with the expectation unpaid interest is compounded annually. CFI Team, *Per Annum, Definition, Uses, and Sample Calculation*, Oct. 4, 2023, https://corporatefinanceinstitute.com/resources/accounting/per-annum/.

Compounding interest after it becomes due and owing each year is permissible. SDCL § 53-4-5; *Wieland v. Loon*, 79 S.D. 608, 613, 116 N.W.2d 391, 393 (1962) ("Compound interest" is interest added to the principal as the interest becomes due, and thereafter made to bear interest. SDC 65.0201(4) [SDCL § 2-14-2(4)]. . . .[This has] long been recognized in our jurisdiction, *Hovey v. Edmison*, 3 Dak. 449, 460, 22 N.W. 594, 599 and elsewhere."). Because the use of "*per annum*" shall include unpaid interest being added to the outstanding principal amount, the unpaid interest shall be deemed to have been added to the outstanding principle as it went unpaid. Thus, the unpaid interest would

accrue interest at the given rate for the additional years—it is not simple interest. The interest provided for in the CFD should be compounded annually. Therefore, the obligation owed to Plaintiffs is $277,492. SR 165.

II. The circuit court erred in holding that the Defendant shall have a one-year redemption period where no foreclosure was granted or ordered.

This action, at its core, is a mortgage foreclosure action in which "redemption by the mortgagor extinguishes the foreclosing mortgage but 'leaves the property subject to junior liens.'" *L&L P'ship v. Rock Creek Farms*, 2014 S.D. 9, ¶ 17, 843 N.W.2d 697, 703 (quoting *Rist v. Andersen*, 70 S.D. 579, 19 N.W.2d 833, 835 (1945)). "Redemption is the right to repay the amount paid for real property or any interest thereon, *sold on foreclosure of a real estate mortgage* . . . against the property of a judgment debtor . . . ." SDCL § 21-50-1 (emphasis added). The contract for deed in this case does not establish a redemption period. However, any redemption period must be for one year *following the date of the sheriff's sale*. SDCL § 21-52-11 (emphasis added). It is not within the discretion of the Court to enlarge or diminish this redemption period. *VanGorp v. Seiff*, 2001 S.D. 45, 621 N.W.2d 712.

This Court has previously distinguished between the right to cure a default under a contract for deed and redemption rights under the code. *L&L P'ship v. Rock Creek Farms*, 2014 S.D. 9, 843 N.W.2d 697, 705, n.6. Specifically, in *L&L P'ship*, this Court relied on *Anderson v. Aesoph*, 2005 S.D. 56, 697 N.W.2d 25 and *BankWest, N.A. v. Groseclose*, 535 N.W.2d 860 (S.D. 1995), to better align its precedent with SDCL § 21-50-3 and "differentiate a contract vendee's right to cure the default from other statutory redemption rights in our code." *Id.* Defendants agreed that a trial regarding foreclosure is

the proper procedure before a redemption period is set. *See* Appx. A000007-08. Defendants stipulated that they were in default and that foreclosure was proper. *Id.* Despite this, the circuit court did not order foreclosure. The sheriff's sale, which triggers the redemption period, cannot occur as a matter of law since the circuit court did not order foreclosure. The circuit court erred in granting the Defendant a one-year redemption period without an order for granting Plaintiffs their foreclosure. Plaintiffs submit this issue should be remanded to the circuit court directing an order for foreclosure.

III. Interest shall continue to accrue on the amount due and owing by Defendant until such time as Defendant cures the breach of the contract for deed.

The circuit court found it "appropriate that interest be held in abeyance during the period beginning when Defendants proposed selling the property until the date of this Order." SR 225; Appx. A000002. However, Defendants offer to sell the real property is not an unconditional tender of payment.

South Dakota law provides that "[a]n offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof. SDCL § 20-5-18. It appears the circuit court, erroneously, considered Defendant's initial proposal to sell the property as an "offer of payment or other performance" though it did not cite to SDCL § 20-5-18, or any similar statute or case precedent. "In the context of a contract for deed, interest on the debt will stop running when the buyer tenders an unconditional offer of payment." *Anderson v. Aesoph*,

2005 SD 56, ¶27, 697 NW2d 25, 33 (citing *Adrian v. McKinnie*, 2004 SD 84, P14, 684 NW2d 91, 98). This Court has generally defined "tender" as "an unconditional offer of payment consisting in the actual production of a sum not less than the amount due on a specific debt or obligation." *Berbos v. Krage*, 2008 SD 68, ¶22, 754 N.W.2d 432, 438 (citing *Adrian*, 2004 SD 84, P10, 684 NW2d at 96). An offer to sell is not a tender of payment.

Defendant's proposal to sell the property is not a "tender" as defined by this Court. First, the proposed sale was not unconditional. Defendants did not have a guaranteed sale for which they could ensure Plaintiffs would be paid the amount due and owing under the CFD. Second, it did not consist of an offer of payment sufficient to toll the accrual of interest. Defendants disputed the amount of interest owed. Third, there was no closing date for any sale transaction, and Plaintiffs learned that Defendant had received no offers to purchase. SR 129; Appx. A000032. Defendants merely offered to sell the property in an effort to placate Plaintiffs. Unfortunately, the circuit court took no evidence from Defendant as to who he had contracted with for the transaction.

Defendants offer to sell is not sufficient to toll the accrual of interest and does not satisfy SDCL § 20-5-18. The accrual of interest under the CFD should not have been tolled, and it is inequitable to allow the interest accrual to toll while Defendants remain in default of the CFD. Plaintiffs submit that this Court should find that the circuit court erred in holding interest in abeyance and reverse the order of the circuit court.

IV. Plaintiff shall be awarded attorney fees so as not to make Plaintiff bear the cost to remedy Defendant's breach of the contract for deed.

In this case, costs, including reasonable attorney fees may be fixed by the Court.

SDCL § 21-50-4. An award of attorney fees to Plaintiff for the foreclosure proceeding is proper as Plaintiff should not be required to bear the cost to remedy Defendants' admitted default and breach of the contract for deed. Plaintiffs submit this issue be remanded to the circuit court to consider the amount of attorney fees and costs.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully submit that per annum interest is compounded annually, resulting in $277,492 due and owing to Plaintiffs; that the grant of a one-year redemption period to Defendant was plain error and the proceeding remanded to the circuit court to determine a timeline for a foreclosure sale; that interest shall continue to accrue at 12% per annum as agreed by the parties; and that attorney's fees be awarded to Plaintiffs under SDCL § 21-50-4, the value to be determined on remand.

Dated this 9th day of January 2025.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: */s/ Jonathan P. McCoy*
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CERTIFICATE OF COMPLIANCE

Jonathan P. McCoy, counsel for Appellant, hereby certifies that the foregoing Brief of Appellant complies with the type volume limitation provided for in the South Dakota Codified Laws and pursuant to SDCL 15-26A-66(b)(4). This brief contains 2,714 words, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix, Certificate of Service, and Certificates of Counsel.

Counsel relied on the word and character count of Microsoft Word, word processing software, used to prepare this Brief at font size 12, Times New Roman, and left justified.

Dated this 9th day of January 2025.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

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CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL 15-26C-3 he served an electronic copy in Word format, and the original and two (2) hard-copies of the above and foregoing Appellant's Brief on the Clerk of the Supreme Court by mailing the same this date to the following address:

Clerk of the Supreme Court
State Capital Building
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Dated this 9th day of January 2025.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January 2025, a true and correct copy of the foregoing was served upon the following counsel of record, by placing the same in the service indicated, addressed as follows:

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
RAND WILLIAMS AND GAYLA WILLIAMS,	)	FILE NO. 51 CIV 23-1193
Plaintiffs,	)	**ORDER ON MOTIONS TO DETERMINE AMOUNT REMAINING DUE UNDER THE CONTRACT FOR DEED AND THE LENGTH OF THE REDEMPTION PERIOD**
v.	)	
JOHN CARLTON D/B/A J&L FLOORING,	)	
and	)	
J&L FLOORING, LLC, a South Dakota Limited Liability Company,	)	
Defendants.	)	

This matter came before the court for hearing on June 18, 2024, before the Honorable Heidi L. Linngren on Plaintiffs' Motion for Evidentiary Hearing for Foreclosure and Defendants' Motion to Enforce Settlement Agreement and Motion for Declaratory Action. On July 17, 2024, the Court ordered the parties to submit briefs on the issues, the Court makes the following determinations based on the entirety of the file, as well as the briefs submitted by counsel:

DISCUSSION

I. Amount Remaining Due

Based on the plain language of the Contract for Deed, it is unambiguously apparent that compound interest does not apply. Instead, it is clear that simple interest applies to the Contract for Deed. The Contract for Deed specifies that "From and after the 1st day of July 2013 interest will accrue on the outstanding principal at the rate of Twelve percent (12%) per annum for the remainder of the term of the Note until its maturity date." *See* Exhibit 1 of Plaintiff's Brief Regarding Foreclosure, Defendants' Outstanding Debt, and Redemption Period.

The Contract for Deed purchase price was $120,000, and after the down payment of $10,000, the remaining principal was $110,000. The parties agreed to interest-only $500 monthly payments for the first year, followed by monthly payments of $1,100 plus interest at 12% per annum until paid in full. Therefore, the maximum interest that could have accrued between 2012-2023 is $6,000 for the first year, and $132,000 for the next ten years. Thus, the maximum amount outstanding is approximately $248,000. However, an additional $9,234 in property taxes paid by Plaintiff should be factored in, resulting in a total amount of $257,234 owed.

II. Redemption Period

Plaintiff argues that the redemption period is one year following a foreclosure sale pursuant to SDCL 21-52-11. However, Defendants correctly assert that SDCL 21-50 is the controlling authority, given that these proceedings involve the foreclosure of a real estate contract. Of note, Defendants agree that a one-year period to cure their default under the Contract for Deed is appropriate. The Court agrees. Therefore, Defendants will have a period of one year from the date of this Order to satisfy the Contract for Deed.

III. Attorney Fees and Interest in Abeyance

After reviewing the file in its entirety, the Court declines to award Plaintiff attorneys' fees at this time. The Court finds it appropriate that interest be held in abeyance during the period beginning when Defendants proposed selling the property until the date of this Order.

ORDER

Considering the foregoing, it is hereby

ORDERED that the express terms of Contract for Deed require that interest accrues only on the outstanding principal; it is further

ORDERED that the amount owed under the Contract for Deed is $257,234; it is further

ORDERED that the Defendants have a period of one year from the date of this Order to satisfy the Contract for Deed

ORDERED that Plaintiff's request for attorney fees is **DENIED**; it is further

ORDERED that the interest accumulated between when Defendants first proposed selling the property and the date of this Order will be held in abeyance.

Dated this 10 day of September 2024.

BY THE COURT

The Honorable Heidi Linngren
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:

AMBER WATKINS
CLERK OF COURTS

By: Heather Shaw
Deputy

FILED
Pennington County, SD
IN CIRCUIT COURT

SEP 11 2024

Amber Watkins, Clerk of Courts
By HS Deputy

REAL ESTATE PURCHASE AGREEMENT
COMMERCIAL/AGRICULTURAL

(This is a legally binding contract. If you do not understand it, seek legal advice)

1. **EARNEST MONEY DEPOSIT - PARTIES TO CONTRACT - PROPERTY.**
Purchasers John Carlton DBA J&L Flooring

Broker hereby acknowledges receipt of Earnest Money in the amount of ($5000.00)
Five Thousand DOLLARS Cash ☐ Check X to be deposited the next legal banking day after acceptance of this offer on the property legally described as: Lots 1 & 2, Block 3, South boulevard Addition, City of Rapid City, Pennington County South Dakota

also known as 1905 5th St. Rapid City, South Dakota 57701

Sellers Rand T. Williams and Gayla J. Williams

Purchaser and Seller acknowledge that Broker is the limited agent of both parties to this transaction as outlined in Section III of the Agency Agreement Addendum and authorized by Purchaser and Seller.
Yes ☐ No ☐ (Initials) Purchaser ____/____ Seller ____/____ N/A

2. **PURCHASE PRICE.** The total price is to be ($~~100,000~~ 110,000.00) One Hundred and ~~Ten~~ Thousand DOLLARS

After earnest money herein is credited, an additional down payment of $ 5,000.00 is to be paid by Purchaser on or before June, 1st 2012. This payment is to be made after Rand T. Williams or his agent shows that all liens or encumbrances on said property are cleared and the title is free to be transferred to the purchaser. After earnest money and down payment are herein credited, the remaining balance is to be paid by Purchaser at closing. Owner Financing and borrowers understand and agree that an interest only payment of Five Hundred dollars ($500.00) per month for the first year until the 1st day of June 2013. From and after the 1st day of July, 2013 interest will accrue on the outstanding principal at the rate of Twelve percent (12%) per annum for the remainder of the term of the Note until its maturity date. Monthly Payment of $ 1100.00 Interest only until Pay off.

3. **FINANCING.** If this offer is contingent upon Purchaser obtaining a new loan, Purchaser agrees to immediately make application for and diligently endeavor to procure such loan without delay, and to sign the note and mortgage within five (5) days after they are ready.

4. **TITLE.** Merchantable title shall be conveyed by Warranty Deed, subject to conditions, zoning, restrictions, and easements of record, if any, which do not interfere with or restrict the existing use of the property. ~~An Abstract of Title shall be continued to date and furnished promptly to buyer for examination. In lieu of an Abstract of Title, an owner's policy of Title Insurance in the amount of purchase price may be substituted with cost to be distributed as follows: Seller ____ Purchaser ____~~

5. **INSPECTIONS.** This offer is contingent upon the following inspections: N/A
Inspections shall be completed within 10 days of acceptance of this offer. N/A

Should the results of any inspections not be satisfactory to Purchaser, then, within this same period, Purchaser shall notify Seller or Listing Broker in writing of the specific dissatisfaction and at which time parties may renegotiate or terminate this contract. If Purchaser fails to specifically approve or disapprove any inspections within the time specified, then Purchaser shall be deemed to have approved and accepted the property in its present condition and any real estate licensee having anything to do with this transaction does not have any further obligation to Purchaser as to such inspections or agreement.

INITIALS: PURCHASER ____/____ **SELLER** ____

6. **PRORATIONS.** Taxes are to be paid as follows: The 2010,2011, 2012 and any back taxes for real estate taxes paid in 2012 shall be paid 100% by Seller and 0% by Purchaser. Real estate taxes assessed this year and payable next year will not be prorated to the date of closing. Seller to Pay Current Real Estate Taxes Due.

Other prorations: _____

7. **SURVEY:** N/A

8. **OTHER PROVISIONS:** N/A

9. **CLOSING/POSSESSION.** Possession and ~~closing~~ shall be given to Purchaser on or before (date)May 1st, 2012, provided, however, delivery of possession is conditioned upon closing.

10. **EARNEST MONEY/DEPOSITS.** ~~Listing office shall deposit and hold all earnest money and other deposits until sale is closed~~. If this ~~offer is not accepted by Seller,~~ or if Purchaser is unable to secure financing, if so contingent, or if no agreement is reached regarding ~~conditions found on inspection report(s), this agreement is void and Purchaser's money shall be returned in full, less any expenses incurred on Purchaser's behalf, including any inspection ordered by Purchaser.~~

11. **ADDENDA TO THIS AGREEMENT.** The following documents are addenda to this contract and are attached and become part of this contract by reference. If none, so state. N/A

12. **TIME IS OF THE ESSENCE OF THIS CONTRACT.**

Dated this 2nd day of May, 2012 at 8:00 ~~a~~p.m.

This agreement is void if not accepted by Seller by the _____ day of _____, _____ by _____ a.m.

_John Carlton DBA J&L Flooring Purchaser Purchaser

On this _____day of _____, _____ the foregoing offer is:
(month) (year)

(Initial)**ACCEPTED** _____/_____; **NOT ACCEPTED** _____/_____; **COUNTERED** _____/_____

_____ _____
Seller Seller

THE FOLLOWING IS FOR INFORMATION PURPOSES ONLY:

_____ _____
Selling Company Selling Licensee

_____ _____
Listing Company Listing Licensee

Received $500 - earnest money
ck 3950

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

FILE NO. CIV23-1193

RAND WILLIAMS and
GAYLA WILLIAMS,

Plaintiffs,

vs.

JOHN CARLTON D/B/A
J&L FLOORING

AND

J&L FLOORING, LLC, a
South Dakota Limited Liability
Company

Defendants.

MOTION HEARING

BEFORE: THE HONORABLE HEIDI L. LINNGREN
Circuit Court Judge
Pennington County Courthouse
Rapid City, South Dakota
June 18, 2024

A P P E A R A N C E S:

FOR THE PLAINTIFFS: JONATHAN P. McCOY
Attorney at Law
P.O. Box 290
Rapid City, SD 57703

FOR THE DEFENDANTS: MR. JEFFERY D. COLLINS
Attorney at Law
909 St. Joseph Street, #800
Rapid City, SD 57701

THE COURT: This is the time set for a motions hearing in the matter of Rand Williams and Gayla Williams versus J&L Flooring, LLC; John Carlton, doing business as J&L Flooring. I have the parties with their respective counsel, Mr. McCoy, Mr. Collins.

I guess I see a lot of different back and forth here and I'm wondering if 15 minutes is enough or what you have in mind here today.

MR. COLLINS: I think so. I mean, I think we can simplify this down quite a bit, Your Honor.

THE COURT: Okay. Whomever can start then.

MR. McCOY: Okay. Thank you, Your Honor.

We have a motion out there simply for an evidentiary hearing basically for a foreclosure trial. There's been no dispute that J&L is in default and so the plaintiffs are asking for basically to set that for trial at this point. That's what our motion is designed to do.

And, I guess, going into our reply, I don't know if you want me to let Mr. Collins go first on his motion, Your Honor.

THE COURT: Go ahead, Mr. Collins.

MR. COLLINS: Thank you, Your Honor.

So with that clarification, I don't have an objection. I just didn't know what they were asking for. If they want a trial on the foreclosure, that's the proper

procedure before we set a redemption period.

Our relief, Your Honor, what we're seeking to do to try to simplify this is simply sell the property. We've been trying to do that since, you know, we sent a letter in May of last year saying we want to sell it, and there was a dispute on the purchase price, which has been ongoing. We've asked, we've laid out in terms to the Court, to them saying, here, based on the contract is what we owe. Their number's over 100,000 more than that and there's never been an explanation how they come to that.

We have contract that sets the interest. We've calculated it. I have another thing today what we did through July 1st that shows their interest through today based on the contract itself is 146,000. In giving them every benefit of the doubt of what Mr. Williams has in Exhibit 5 attached to Mr. McCoy's affidavit, a letter laying out what's owed in interest, what's been paid, et cetera. We took his letter to calculate our interest that we believe is owed, and come up with 146,000 through July 1st of this year. Add that to what he agrees the principal is -- our payoff number is around 255,000. We're happy to pay that. Whenever we've tried to have this discussion about selling property, it's been, well, we don't agree on the amount. We still have the deed owners -- recorded owners on the dead. You have to have

us cooperate, which is true because this wasn't set up like a normal contract for deed where you escrow the deed and there's an agreed amount, you pay it off, the deed releases.

So we have to work with Mr. Williams. We get mixed signals. At times they say, yeah, go ahead and sell it and then, no, we're not going to cooperate. And then they're critical we haven't got an offer. Well, no real estate agent is going to bring an offer if I can't promise them I can get them a deed.

So the issue here, and I would like to ask today for them to tell us, are they trying to compound interest, are they trying to add something to the contract that's not there? The interest rate in the contract is 12 percent, which already is over a prejudgment interest amount so I can't imagine that they're trying to argue prejudgment interest. There's no default raised in the contract that allows them. I've done 100 foreclosures, probably, in my career. Any time the change in interest rate, it's because a clause in the interest rate that allows the default to go into effect. That doesn't exist here.

We just want the authority to go sell it, which my client has the absolute right to do under South Dakota law as the holder of a contract for deed as long as he satisfies the amount owed. So at the hearing trial, I

imagine we will determine that. We'll sell it and go from that. But in the interim to try to avoid what we're doing here, we had said let us sell so we can stop interest accruing. We'll make sure we will get more, even than what he's claiming, which is a ridiculous amount, and we'll escrow it. And there's an e-mail back saying that's agreeable. We sent a settlement agreement, you know, stipulation to kind of quantify that, and they say, no, we're not agreeing to that.

So that's part of our motion. You know, kind of twofold. Declare that we have the right to sell it under South Dakota law, which we've never got a clear response that they agree with that. If their argument is, well, you have to pay us off if you sell it, I agree with that. I agree 100 percent.

The second part is I think we had an agreement to allow us to do that and escrow funds over and above whatever they claim is owed until we have the hearing to determine what the interest amount actually is owed on this property.

But, I mean, I would like to hear today, if possible, how they calculated that because I've been asking for a year and have never heard.

THE COURT: Mr. McCoy.

MR. McCOY: Thank you, Your Honor.

We've provided in discovery the amortization to Carlton and his counsel back when they asked for it over a year ago. So I'm not entirely sure where the confusion lies on that. We can recalculate one, but we did provide amortization back then when it was requested.

As far as the agreement that is being purported that exists, there's no material terms involved in that. There's no sale price determined. There's no release clause. In essence, the e-mails that has been presented to the Court as to construe a settlement agreement don't establish any kind of duration upon which Mr. Carlton or J&L Flooring have in order to sell.

So it's undisputed that he's in default. I think in our reply brief I corrected the last payment from being 2014 in my initial brief to 2015. But even still, 2015 is the last known payment. And so to agree to not have a material term that says you have six months, four months, ten days in which to sell before the holders of the contract for deed can foreclose on that, just continually limits what our clients can do under their foreclosure rights.

The agreement is in essence one to prevent -- or the e-mails as construed are being purported to suggest that there's an agreement to sell, but at that moment it prevents the Williams from actually pursuing their rights

to foreclose the rights of the vendee, J&L Flooring in this case. They do have the right to sell their interest.

What they're asking for, though, is for a settlement that has not been agreed to and that is for Rand and Gayla to agree to sell their rights at the same time. And that has not ever been agreed to. It has been agreed if J&L wants to sell his interests, he can. And the title standards, I even speak to that so when the title company goes and does their title search, there is that inalienable interest there.

But without a sale price, without a release clause, without a time period or duration in which for Carlton to find a buyer, if in fact he can, and no escrow company identified, no escrow agreement presented, there's simply no material terms within the e-mails. And that, I believe, is why the secondary -- or not secondary -- but stipulation was sent 25 days later, to establish those terms. And that was where the decision stopped. We reviewed that with our client and didn't have authority to proceed beyond that.

And to the fact that the allegation is we've kept not cooperating, there's simply been no offers ever communicated to Mr. Keegan or myself. In fact, if he has the right to sell this property or sell his interest, he can go do that, and he did list his interests for sale in

October with Dave Olsen. And we presented a letter. We didn't have any notice of that going forward, and that's fine. He can sell what he wants to. It will be subject to the contract for deed.

But since that time, there have been no offers communicated. There's been nothing to cooperate with. Even the real estate agent, Haley Sommer, whose affidavit was provided, said that if there was a purchaser in mid-April or April of 2024, we had no notice there was a purchaser until we read that affidavit. And even at Paragraph 5 of her affidavit, she says ultimately the property didn't meet the requirements.

So it's not any hurdles or blockades presented by us. It's that property didn't meet the requirement. So there's nothing to cooperate with at this point. There's been no failure of a purchase agreement because of anything that we've done.

And so the foreclosure trial gets everybody to the same point. It enables the Williams to retain their rights under statutes and under the contract for deed to retain their interests in the property. It allows the defendant to convey his interests, and it sets the rules going forward as well as the redemption period to do so without the belaboring and delaying and giving J&L more time to possess the property without paying for it.

So, Your Honor, we don't believe there is a settlement agreement without material terms and there's been no dispute or disagreement that he can sell his interests. He just hasn't provided any offer for the wholesale property with which to discuss and come to terms with.

Thank you, Your Honor.

MR. COLLINS: Just briefly, Your Honor.

I agree, if we could get a trial in the near future to address this as long as -- and we will certainly argue at that trial, Your Honor, that we're going to want a reasonable redemption period to give us time to sell it based upon our attempts to try to do this. We've explained in our brief, and I've explained here, why it's hard to get an offer.

Just a preview comment, I'm not quite sure what interests, other than the right to be paid, the Williams believe they have. They have no technically ownership interests. When the contract for deed was signed, that transfers the equitable ownership to my client and they're right is to collect payments. If we default and we don't redeem it in time, they would get the property back, but if we sell it, they have to sign a deed if they're paid off. They don't get to keep this property under any circumstances unless we don't pay it off in full. I'm not a quite sure what interests -- they're saying we can sell

our interests but they get to retain their interests. That's not a thing. I'm not sure what he's talking about.

So set a trial date, we'll have an argument to set the price, set a redemption period, and this thing will probably be resolved. And I think we probably only need a half day at the most.

MR. McCOY: That should be good. A full day just to be safe.

MR. COLLINS: Well, I mean, our position will probably be with the terms that are in the documents that Mr. Williams said is owed, we'll agree to it. The question is how they calculate our interest versus what the contract says. It's that simple.

THE COURT: I have two options. If you want a half day, I've got July 26th in the afternoon. It's a Friday. First full day I have available is Friday, August 9th.

MR. COLLINS: 26th will not work for me, Your Honor.

THE COURT: Okay.

MR. McCOY: And 9th won't work for me.

THE COURT: The next day that I have half or full is Friday, August 30th.

I'm at the mercy of a lot of jury trials.

MR. COLLINS: Is this -- I guess, Your Honor, is this something that we could submit on briefs if it's an argument about what the proper interest rate is?

I don't think we're contesting that there haven't been payments about, you know, how they're calculating their interests versus what the contract says. You know, contract's a question of law for the Court.

THE COURT: I was going to say it seems everything you've argued here is a question of law.

MR. McCOY: So in essence basically a summary judgment?

MR. COLLINS: I think summary judgment and as part of our dec action to declare the amount owed under the contract is. I think it could be submitted on briefs, Your Honor, to be honest.

THE COURT: I don't have a problem doing that.

I really don't know if they aren't contesting the default, essentially they're not contesting the lack of payments, I don't know what evidence you're going to be presenting other than what would be written evidence.

MR. McCOY: Can you give me a minute to ask my client a question, Your Honor?

THE COURT: Sure. You can step out in the hall if you want.

MR. McCOY: Okay.

(Discussion was held off the record.)

THE COURT: Mr. McCoy?

MR. McCOY: Thank you, Your Honor.

There could be an issue or question of fact as to how

the interest was to be compounded, and so I don't know if summary judgment is the more appropriate. There might be evidence to take as far as what the parties thought was being done as far as how the interest was to be attached to the principal.

MR. COLLINS: And we're certainly objecting as parol evidence as the documents speak for themselves.

THE COURT: Well, let's do this, because everything that's been presented to me, which is why I inquired at the beginning, would suggest to me that is worthy of more in-depth analysis at least by way of the parties. This is a question of law. I'm not -- I mean, I don't know that you're -- I don't think we need to refer to it as a summary judgment necessarily. I think maybe Mr. Collins was referring to that maybe by way of process to present it. I don't know that it would be titled a summary judgment. You've put your positions forward. The documents are the documents. The law applies to the documents. The interest is certainly controlled by statute and legal authority other than what's presented in your contracts. And what I think so that we can keep moving and not have to have these scheduling conflicts, I think you submit your stuff in writing, the reservation, Mr. McCoy, that depending on what you get, we can set an additional hearing if you feel something is necessary. I

agree with you that I'm not sure we should be titling it summary judgment because clearly there's a dispute, but I don't think that's maybe the right angle to handle it. I think the angle is rather than having an evidentiary hearing, you're presenting your position in writing. And I think if we take away the summary judgment part, Mr. McCoy, you're not precluding or agreeing to anything by way of facts, if that makes sense.

MR. McCOY: It does, Your Honor.

MR. COLLINS: To me it seems potentially, Your Honor, we have it as a declaratory judgment hearing to declare the rights under the contract as to the interest owed. It seems to me that's the only real issue we have in conflict here.

THE COURT: And you wouldn't be precluded from presenting the facts. You could present your facts by affidavit.

MR. COLLINS: Right.

THE COURT: And you're not locked into agreeing that the facts are the facts. You can submit it however you wish.

I just do believe that we're at the point where this isn't -- there are facts in dispute, but it isn't a credibility issue, it's a legal issue. Testimony would lend to things that may be outside of what the Court is required under the law is my only concern.

MR. McCOY: Okay.

THE COURT: But I'm also not going to preclude you, Mr. McCoy, or Mr. Collins, for that matter. Once you've exchanged your submissions, if you feel the record needs to be supplemented, you can request that. I don't want to get scheduled into September and not get stuff done.

I think this is a good start from the legal perspective and if you want to supplement the record by hearing, I'm much easier to get you in for an hour or two than I am for a half day or full day, and, quite frankly, by the time you have your briefing done, I may have some trials go away that frees up some additional space to get you in quickly.

What do you want timing or can you guys agree?

I mean, you can get together. I don't want to micromanage your time as to what you want to submit and what your timing is.

MR. COLLINS: Would there be a way to backstop it with an hour declaratory judgment hearing on it?

THE COURT: Sure.

MR. COLLINS: So if we want to have argument on what we submit, and we at least have a hearing to back it up on. If at that time the Court determines we need to have evidence taken or something, we can schedule that.

THE COURT: Then you have it.

Why don't we start -- this can be off the record,

Kayla.

(Discussion was held off the record.)

THE COURT: We're back on the record having had a discussion regarding briefing and scheduling. The parties will submit their submissions to the Court no later than July 31st at 5:00 p.m. There would be a 10-day reply due date of August 9th by 5:00 p.m. With a declaratory judgment hearing or motions hearing August 30th, 10:00 to noon if needed.

MR. COLLINS: As to the pending motions, I think we're agreeable to hold ours in abeyance since we've scheduled this.

THE COURT: I think since we're doing it this way, everything just will be decided on the issue then.

MR. McCOY: Yes, Your Honor.

THE COURT: By that August 30th date.

All right. Thank you.

MR. COLLINS: Thank you, Your Honor.

MR. McCOY: Thank you, Your Honor.

(End of proceedings.)

STATE OF SOUTH DAKOTA)
) SS. CERTIFICATE
COUNTY OF PENNINGTON)

I, Kayla L. Maruska, Court Reporter and Notary Public, South Dakota, duly commissioned to administer oaths, certify that the foregoing proceedings were taken by me in shorthand, that the same has been reduced to typewritten form under my supervision; and that the foregoing transcript is a true transcript of the proceedings duly had.

I further certify that I am not related to, employed by, or in any way associated with any of the parties to this action, or their counsel, and have no interest in its event.

Witness my hand at Rapid City, South Dakota, this 27th day of November, 2024.

/s/ Kayla L. Maruska
Kayla L. Maruska
Official Court Reporter

MR. COLLINS: [14] 2/9 2/22 9/7 10/9 10/17 10/23 11/8 12/6 13/10 13/17 14/17 14/20 15/10 15/18

MR. McCOY: [12] 2/12 5/25 10/7 10/19 11/7 11/17 11/21 11/24 13/9 13/25 15/15 15/19

THE COURT: [20]

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STATE OF SOUTH DAKOTA	)	IN MAGISTRATE COURT
	) SS.	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
RAND WILLIAMS and GAYLA WILLIAMS,	)	51CIV23-1193
Plaintiff,	)	**AFFIDAVIT OF RAND WILLIAMS**
v.	)	
JOHN CARLTON D/B/A J&L FLOORING,	)	
AND	)	
J&L FLOORING, LLC, a South Dakota Limited Liability Company,	)	
Defendant.	)	

Rand Williams, upon personal knowledge, being first duly sworn upon his oath, deposes and states as follows:

1. I am one of the Plaintiffs above captioned matter.
2. I was agreeable to letting the property be sold but when I saw the added terms and conditions provided by J&L Flooring, I did not think we could reach an agreement which would clearly define any performance details because he does not agree with my calculations.
3. I first noticed J&L listed the property for sale in October 2023 with Dave Olsen
4. I spoke to J&L's commercial realtor Dave Olsen between March 23 and April 12 and learned there were no offers from any would-be purchasers/buyers.
5. Once I learned there were no written offers from the realtor, I instructed my attorneys to stop negotiating.

6. I was not aware J&L Flooring changed Realtors until I read the filings submitted by J&L on June 4, 2024.

7. Further, your affiant sayeth naught.

Dated this 10 day of June 2024.

Rand Williams

ACKNOWLEDGMENT

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF PENNINGTON)

On this the 10th day June 2024, before me, the undersigned officer, personally appeared, Rand Williams , known to be or satisfactorily proven to be the person whose name is subscribed to the within and foregoing instrument and acknowledged that she executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

JONATHAN R. MASON (SEAL) NOTARY PUBLIC SOUTH DAKOTA

Notary Public
My Commission Expires: 10/30/2027

CERTIFICATE OF SERVICE

On this the 11th day of June 2024, the undersigned hereby certifies that he served a copy of the foregoing document, **Affidavit of Rand Williams**, upon the person herein next designated, by placing the same in the service indicated, addressed as follows:

Jeffery D. Collins
Ty M. Daly
Lynn, Jackson, Shultz & Lebrun, P.C.
909 St. Joseph St. Ste. 800
Rapid City, SD 57701
605-791-6491
jcollins@lynnjackson.com
tdaly@lynnjackson.com
Attorneys for Defendants

[ ] Hand Delivery
[ ] Email
[X] Odyssey File & Serve
[ ] Facsimile
[ ] Federal Express

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: */s/ Jonathan P. McCoy*
Jonathan P. McCoy
Garrett J. Keegan
PO Box 290
704 Saint Joseph St.
Rapid City, SD 57709
(605)343-2410
(605)343-4262 facsimile
jmccoy@costelloporter.com
gkeegan@costelloporter.com
Attorneys for Plaintiffs

EXHIBIT
C

From: Garrett J. Keegan
To: Ty Daly; Jonathan McCoy
Cc: Stephanie Reoh; Jeff Collins
Subject: RE: Carlton, John (Rand Williams Dispute)
Date: Tuesday, April 16, 2024 7:20:23 AM
Attachments: image001.png
image002.png
image003.png
image005.png

Hi Ty,
We are attempting to set up a meeting with our client to discuss the stipulation and agreement as he would like to discuss the same in person. We expect to meet with you next week and will update you after.
Thank you,
Garrett

Garrett J. Keegan
704 St. Joseph St. | P.O. Box 290 | Rapid City, SD 57709-0290
Main: (605) 343-2410 | Fax: (605) 343-4262
gkeegan@costelloporter.com

From: Ty Daly <tdaly@lynnjackson.com>
Sent: Monday, April 15, 2024 8:08 AM
To: Garrett J. Keegan <gkeegan@costelloporter.com>; Jonathan McCoy <jmccoy@costelloporter.com>
Cc: Stephanie Reoh <sreoh@costelloporter.com>; Jeff Collins <jcollins@lynnjackson.com>
Subject: RE: Carlton, John (Rand Williams Dispute)
Good morning, Garrett and Jonathan,
Any update on this?
Thank you,

Ty Daly

Attorney
Lynn, Jackson, Shultz & Lebrun, P.C.
Direct Line:605-716-0995

W: lynnjackson.com E:tdaly@lynnjackson.com

Sioux Falls | Rapid City | Belle Fourche

From: Garrett J. Keegan <gkeegan@costelloporter.com>
Sent: Monday, March 25, 2024 12:00 PM
To: Ty Daly <tdaly@lynnjackson.com>; Jonathan McCoy <jmccoy@costelloporter.com>
Cc: Stephanie Reoh <sreoh@costelloporter.com>; Jeff Collins <jcollins@lynnjackson.com>; Sara Gentry <sgentry@lynnjackson.com>
Subject: RE: Carlton, John (Rand Williams Dispute)

Hi Ty,

We are going through the stipulation with our client to ensure that he is comfortable with the language. We will send you any proposed redlines once he has approved.

Thank you,

Garrett

Garrett J. Keegan
704 St. Joseph St. | P.O. Box 290 | Rapid City, SD 57709-0290
Main: (605) 343-2410 | Fax: (605) 343-4262
gkeegan@costelloporter.com

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER LLP HAS NO RESPONSIBILITY UNDER ANY CIRCUMSTANCES FOR ANY CHANGES OR MODIFICATIONS MADE BY YOU TO THE ATTACHED FILES AND DOCUMENTS.

From: Ty Daly <tdaly@lynnjackson.com>
Sent: Monday, March 25, 2024 11:19 AM
To: Garrett J. Keegan <gkeegan@costelloporter.com>; Jonathan McCoy <jmccoy@costelloporter.com>
Cc: Stephanie Reoh <sreoh@costelloporter.com>; Jeff Collins <jcollins@lynnjackson.com>; Sara Gentry <sgentry@lynnjackson.com>
Subject: RE: Carlton, John (Rand Williams Dispute)

Good morning, Garrett, and Jonathan,

Have you had a chance to look at the Stipulation? We've advised our client not to formally list the property for sale until the Stipulation is signed, so we want to keep things moving.

I appreciate your consideration. Let us know your thoughts after you have reviewed.

Thanks,

Ty Daly

Attorney
Lynn, Jackson, Shultz & Lebrun, P.C.
Direct Line:605-716-0995

W: lynnjackson.com E:tdaly@lynnjackson.com

Sioux Falls | Rapid City | Belle Fourche

From: Sara Gentry <sgentry@lynnjackson.com>
Sent: Friday, March 15, 2024 4:09 PM
To: Garrett J. Keegan <gkeegan@costelloporter.com>; Jonathan McCoy <jmccoy@costelloporter.com>
Cc: Stephanie Reoh <sreoh@costelloporter.com>; Jeff Collins <jcollins@lynnjackson.com>; Ty Daly <tdaly@lynnjackson.com>
Subject: RE: Carlton, John (Rand Williams Dispute)

Garrett and Jonathan,

The attached is being sent at the request of Jeff Collins and Ty Daly.

Thank you.

Sara Gentry

Paralegal
Lynn, Jackson, Shultz & Lebrun, P.C.
Direct Line: 605-791-6461

W: lynnjackson.com E: sgentry@lynnjackson.com

Sioux Falls | Rapid City | Belle Fourche

-

From: Jeff Collins <jcollins@lynnjackson.com>
Sent: Tuesday, February 20, 2024 3:04 PM
To: Garrett J. Keegan <gkeegan@costelloporter.com>; Ty Daly <tdaly@lynnjackson.com>; Jonathan McCoy <jmccoy@costelloporter.com>
Cc: Sara Gentry <sgentry@lynnjackson.com>
Subject: RE: Carlton, John (Rand Williams Dispute)

Thank you, we will propose a Stipulation to this effect and cancel the hearing.

Jeff Collins

Attorney
Lynn, Jackson, Shultz & Lebrun, P.C.
Direct Line: 605-791-6491

W: lynnjackson.com E: jcollins@lynnjackson.com
Sioux Falls | Rapid City | Belle Fourche

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From: Garrett J. Keegan <gkeegan@costelloporter.com>
Sent: Tuesday, February 20, 2024 3:02 PM
To: Jeff Collins <jcollins@lynnjackson.com>; Ty Daly <tdaly@lynnjackson.com>; Jonathan McCoy <jmccoy@costelloporter.com>
Cc: Sara Gentry <sgentry@lynnjackson.com>
Subject: RE: Carlton, John (Rand Williams Dispute)

Jeff and Ty,

Our client is agreeable to allow for the sale of the property subject to the sale price being more than the amounts being claimed to be owed by our client. Furthermore, interest on the amount owed will continue to accrue until the property is sold and the amount owed under the contract for deed is determined.

Thank you,
Garrett

Garrett J. Keegan
704 St. Joseph St. | P.O. Box 290 | Rapid City, SD 57709-0290
Main: (605) 343-2410 | Fax: (605) 343-4262

gkeegan@costelloporter.com

From: Jeff Collins <jcollins@lynnjackson.com>
Sent: Tuesday, February 20, 2024 8:08 AM
To: Ty Daly <tdaly@lynnjackson.com>; Jonathan McCoy <jmccoy@costelloporter.com>; Garrett J. Keegan <gkeegan@costelloporter.com>
Cc: Sara Gentry <sgentry@lynnjackson.com>
Subject: RE: Carlton, John (Rand Williams Dispute)

Jonathan and Garrett – Please advise if we can enter into a settlement to allow for the sale of the property and escrowing of funds. We could even put a condition that if the sale prices is less than the amounts being claimed by our client there would be no sale.
We are simply trying to avoid the cost and expense to both parties of filing the Motion and Brief we sent last week, as the law appears clear, that our client has the right to sell the property if he pays off the amount owed to your client.
Our deadline is today for filing so please advise of your position.
Thank you.
Jeff

Jeff Collins

Attorney
Lynn, Jackson, Shultz & Lebrun, P.C.
Direct Line: 605-791-6491

W: lynnjackson.com E: jcollins@lynnjackson.com
Sioux Falls | Rapid City | Belle Fourche

From: Ty Daly

Sent: Monday, February 12, 2024 3:26 PM

To: Jonathan McCoy <jmccoy@costelloporter.com>; Garrett J. Keegan <gkeegan@costelloporter.com>

Cc: Sara Gentry <sgentry@lynnjackson.com>; Jeff Collins <jcollins@lynnjackson.com>

Subject: Carlton, John (Rand Williams Dispute)

Jonathan and Garrett,

As a follow up to the phone call today, here is a copy of the Brief we plan to file on this issue. We look forward to your response.

Thank you,

Ty Daly

Attorney
Lynn, Jackson, Shultz & Lebrun, P.C.
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Sioux Falls | Rapid City | Belle Fourche

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EXHIBIT
D

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1926-2004

May 1, 2024

Via Email only to jcollins@lynnjackson.com & tdaly@lynnjackson.com

Jeffery D. Collins
Ty Daly
Lynn, Jackson, Shultz & Lebrun, P.C.
909 Saint Joseph Street, Suite 800
Rapid City, SD 57701

RE: J&L Flooring – Rand Williams
Our file no. 222055.001

Dear Jeff and Ty:

Thank you for your patience. We have had the opportunity to review the proposed stipulation with our client. He has expressed concerns which we do not think are resolvable by stipulation. Therefore, despite our earlier communication to you of our belief that we could reach a stipulation to sell the property, our client has rejected the stipulation.

Thank you for your attention to this matter.

Respectfully,

Jonathan P. McCoy

CC: Client

20-5-18. Interest stopped by offer of performance.

An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof.

Source: CivC 1877, § 853; CL 1887, § 3477; RCivC 1903, § 1171; RC 1919, § 778; SDC 1939, § 47.0227.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30867

RAND WILLIAMS AND GAYLA WILLAMS

Appellants,

vs.

JOHN CARLTON D/B/A J&L FLOORING,

and

J&L FLOORING, LLC, a South Dakota Limited Liability Company,

Appellee.

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

The Honorable Heidi L. Linngren, Presiding

BRIEF OF APPELLEES

Jonathan P. McCoy
Garrett J. Keegan
Costello, Porter, Hill, Heisterkamp,
Bushnell & Carpenter
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Attorney for Plaintiff/Appellant

Jeffery D. Collins
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Attorney for Defendants/Appellees

Notice of Appeal filed October 9, 2024

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CFI Team, *Per Annum, Definition, Uses, and Sample Calculation*, Oct. 4, 2023, https://corporatefinanceinstitute.com/resources/accounting/per-annum 12, 13

PRELIMINARY STATEMENT

This brief is in response to Plaintiffs Rand Williams and Gayla Williams' Appellant's Brief. Plaintiff-Appellants will be referred to collectively as the "Williams". Defendants, John Carlton d/b/a J&L Flooring and J&L Flooring, LLC will be referred to collectively as "Carlton". The settled record from the underlying matter is referred to as "SR". References to the Appendix to the Williams' Brief are designated as "Appx.," followed by the appropriate page number assigned by the clerk. References to the Williams' Brief will be referred to as "Will. Br." followed by the appropriate page number.

JURISDICTIONAL STATEMENT

The Williams' appeal from the Seventh Circuit Court's Order on Motions to Determine Amount Remaining Due Under the Contract for Deed and the Length of the Redemption Period, dated September 10, 2024. Notice of Entry was filed on September 10, 2024, and the Williams filed Notice of Appeal on October 9, 2024. This Court has jurisdiction pursuant to SDCL § 15-26A-3(1).

STATEMENT OF THE ISSUES

I. *Whether "per annum" interest, as provided for in the Contract for Deed is compound or simple interest.*

Hovey v. Edmison, 3 Dakota 449, 22 N.W. 594 (1885)
Wieland v. Loon, 79 S.D. 608, 613, 116 N.W.2d 391, 393 (1962)

II. *Whether there shall be a one-year redemption period where no foreclosure was granted or ordered.*

L&L P'ship v. Rock Creek Farms, 2014 S.D. 9, 843 N.W.2d 697

Anderson v. Aesoph, 2005 S.D. 56, 697 N.W.2d 25
BankWest, N.A. v. Groseclose, 535 N.W.2d 860 (S.D.1995)
SDCL § 21-52-1
SDCL § 21-50
SDCL § 21-50-3

III. *Whether interest shall be held in abeyance as of the date Carlton proposed to sell the property.*

SDCL § 20-5-18

IV. *Whether the Williams shall be awarded attorney fees for a foreclosure proceeding.*

SDCL § 21-50-4

STATEMENT OF THE CASE

This appeal stems from an action for foreclosure of a real estate contract for the sale of the Property (defined herein) instituted by the Williams against Carlton, following Carlton's default on his contract for deed ("CFD") payments to the Williams. Carlton conceded his default on the CFD, but filed a counterclaim, asserting that (1) he had equitable title in the Property and has the right to sell the Property to comply with the terms of the CFD, (2) Breach of Contract, and (3) Unjust Enrichment.

After conducting discovery, the Williams filed a Motion for Evidentiary Hearing for Foreclosure, and Carlton filed a Motion to Enforce Settlement Agreement and Motion for Declaratory Action ("Motions"). After a hearing on the Motions, the circuit court, the Honorable Heidi L. Linngren ("Judge Linngren"), executed the Order on Motions and Setting Motions Hearing to Determine Amount Remaining Due Under Contract for Deed on July 17, 2024, and ordered

that Carlton and the Williams submit briefs concerning the amount remaining due under the Contract for Deed and the length of the relevant redemption period. After reviewing the briefing and determining the Court could proceed upon the filings without a hearing, Judge Linngren executed the Order on Motions to Determine Amount Remaining Due Under the Contract For Deed and the Length of Redemption Period on September 10, 2024, ordering that (1) the express terms of the CFD require that interest accrues only on the outstanding principal, (2) the amount owed under the CFD is $257,234.00, (3) Carlton has a period of one year from the date of the Order to satisfy the CFD, (4) interest accumulated between when Carlton first proposed selling the Property and the date of the Order will be held in abeyance, and (5) the Williams were not entitled to attorneys' fees.

STATEMENT OF THE FACTS

In May of 2012, Carlton entered into the CFD to purchase and take possession of the following real property from the Williams:

> Lots 1 & 2, Block 3, South Boulevard Addition, City of Rapid City, Pennington County, South Dakota ("Property").

Under the CFD, Carlton agreed to purchase the Property in installments over an unspecified period of time and took possession of the Property. SR 4-5, 46-7. Pursuant to the CFD, Carlton agreed to pay $120,000.00, which included a $5,000.00 down payment. SR 5, 46-7. Carlton agreed to make interest only payments in the amount of $500.00 per month for the first year of the CFD, with said payments beginning June 1, 2012, and ending May 31, 2013. *Id.* Beginning

June 1, 2013, Carlton agreed to make monthly payments of $1,100.00 plus interest at 12% per annum until the CFD was paid in full. *Id.* Carlton took possession of the Property on May 2, 2012. SR 5. Carlton paid, and the Williams received, the $5,000.00 down payment and an additional $5,000.00 payment toward the principal owed under the CFD. SR 5-6. Since the initial $10,000.00 in payments, Carlton has made additional payments on the Property, the amount of which remained in dispute. SR 6, 22, 83-4. In addition, on reliance of the valid CFD, Carlton made substantial improvements to the Property, the amount and value of which remained in dispute. SR 22, 24.

On March 15, 2023, the Williams sent a letter giving Notice of Default. SR 48. In response and to cure the default, Carlton determined the best course would be to sell the Property and payoff any legally owed amounts to the Williams. Carlton proposed this option as early as May 8, 2023. SR 83-4. However, the Williams indicated they would not cooperate with a sale, by verbalizing this and taking action to interfere with the listing and potential sale of the property. SR 79-80, 129-30. Williams's cooperation was required, as they are the record owners of the Property, and no deed was escrowed as part of the CFD transaction which is the normal process for a CFD. SR 79-80, 93. Thus, Carlton would have needed the Williams' cooperation to sell the Property to generate the funds to pay off the outstanding balance. *Id.*

The Parties also disagreed on the amount owed under the CFD. SR 83-5. According to a letter sent by Attorney McCoy in March of 2023, Plaintiffs claimed

they were owed $364,863.75 under the CFD for principal and interest, which was disputed by Carlton under the terms of the CFD. SR 85. Regardless of the dispute of the payoff amount for the CFD, Carlton proposed the idea of selling the Property and escrowing the sale proceeds until the resolution of the dispute regarding the amount remaining owed by Carlton to the Williams as early as May 8, 2023. SR 83-4. After not getting a satisfactory responses from Williams and wanting to work to a resolution, Carlton went forward with exploring options to sell the Property in October 2023, including listing the Property on or about October 11, 2023, to pay off the amount owed and comply with the CFD. SR 119, 129-30. If Williams had cooperated, Carlton could have long ago listed and likely sold the Property, for an amount that exceeded the amounts being claimed by Willaims, which the disputed amount could have been held in escrow and stopped additional interest from accruing in 2023 on the principal amount owed, which is not in dispute. SR 79-80.

However, Williams made clear throughout the entirety of the dispute that they would not cooperate with the sale of the property and indicated Carlton did not have authority to sell the property even if it was for more monies than remained owed on the CFD. SR 119, 129-30. Not only did the Williams refuse to cooperate, Rand Williams went so far as calling Dave Olsen, Carlton's then realtor, to inquire about and disrupt Carlton's efforts to market the Property in October of 2023. SR 129-130.

Despite Williams interference with sale of property Carlton continued to work to find a path forward to allow the sale of the property that would ensure the CFD could be satisfied. Carlton, through his attorneys believed that an agreement had been reached and a stipulation agreed to which would allow Carlton to sell the property as long as the amount paid for the property would satisfy the amount Willaims claimed was owed and the funds escrowed while the parties put the issue of the amount owed on the CFD before the Court. SR 86-91. Then Rand Williams, without explanation, instructed his attorneys not to negotiate further in allowing a sale with proposed escrow of funds causing the matter to stall and unnecessary interest to accrue along with increased attorney fees fighting meritless claims. SR 92.

After conducting discovery, the Williams filed a Motion for Evidentiary Hearing for Foreclosure, and Carlton filed a Motion to Enforce Settlement Agreement and Motion for Declaratory Action ("Motions"). SR 56-8, 77. After a hearing on the Motions, Judge Linngren, executed the Order on Motions and Setting Motions Hearing to Determine Amount Remaining Due Under Contract for Deed on July 17, 2024, and ordered that Carlton and the Williams submit briefs concerning the amount remaining due under the Contract for Deed and the length of the relevant redemption period. SR 141-2. After reviewing the briefing and without a hearing, Judge Linngren executed the Order on Motions to Determine Amount Remaining Due Under the Contract For Deed and the Length of Redemption Period on September 10, 2024, ordering that (1) the express terms

of the CFD require that interest accrues only on the outstanding principal, (2) the amount owed under the CFD is $257,234.00, (3) Carlton has a period of one year from the date of the Order to satisfy the CFD, (4) interest accumulated between when Carlton first proposed selling the Property and the date of the Order on Motions will be held in abeyance, and (5) the Williams were not entitled to attorneys' fees. SR 224-6.

The Williams filed Notice of Appeal on October 9, 2024. SR 239. In their brief to this Court, the Williams set forth four issues on appeal: (1) Whether "per annum" interest, as provided for in the Contract for Deed is compound or simple interest; (2) Whether there shall be a one-year redemption period where no foreclosure was granted or ordered; (3) Whether interest shall be held in abeyance as of the date Carlton proposed to sell the property; and (4) Whether the Williams shall be awarded attorney fees for a foreclosure proceeding. *See generally* Will. Br. Each of these issues are considered below, but none provide a basis for reversal.

STANDARD OF REVIEW

A trial court's findings of fact will not be set aside unless they are clearly erroneous. See SDCL § 15-6-52(a). "The question is not whether [the Supreme Court] would have made the same findings the trial court did, but whether on the entire evidence, [it] is left with a definite and firm conviction that a mistake has been made." *Stockwell v. Stockwell*, 2010 S.D. 79, ¶ 16, 790 N.W.2d 52, 59 (other citations omitted). *See also Leonhardt v. Leonhardt*, 2014 S.D. 86, ¶ 15, 857

N.W.2d 396, 400 ("We presume the [trial] court's findings of fact are correct and defer to those findings unless the evidence clearly preponderates against them.") (other citations omitted). However, the Court reviews conclusions of law de novo, with no deference to the trial court's ruling. *Id.*

The existence and interpretation of a contract are questions of law which the Court reviews de novo. *J. Clancy, Inc. v. Khan Comfort, LLC*, 2021 SD 9, ¶ 18, 955 N.W.2d 382, 389 (additional citations omitted). Issue I involves the interpretation of a contract, and so the Court reviews it under the de novo standard.

Issue II and III are also questions of law, so the Court reviews them under the de novo standard.

It seems that the Williams argue that all four issues are reviewed by this Court under the de novo standard, but a trial court's award of attorney fees is reviewed by this Court under the abuse of discretion standard. *Anderson v. Aesoph*, 2005 SD 56, ¶ 18, 697 N.W.2d 25, 31 (citing *Adrian v. McKinnie*, 2004 SD 84, ¶ 6, 684 N.W.2d 91, 94 (citing *Osgood v. Osgood*, 2004 SD 22, ¶ 9, 676 N.W.2d 145, 148)). Abuse of discretion occurs when the trial court proceeds "to an end or purpose not justified by, and clearly against reason and evidence." *Id.* (citing *In re South Dakota Microsoft Antitrust Litigation*, 2003 SD 19, ¶ 5, 657 N.W.2d at 671 (quoting *Black v. Class*, 1997 SD 22, ¶ 27, 560 N.W.2d 544, 546)). In other words, "[a] fee award 'is within the ... court's discretion so long as it employs correct standards and procedures and makes findings of fact not clearly erroneous.'" *Loughner v. Univ. of Pittsburgh*, 260 F.3d 173, 177 (3d Cir.2001)

(citing *Pennsylvania Envtl. Def. Found. v. Canon–McMillan Sch. Dist.*, 152 F.3d 228, 232 (3d Cir.1998)). Issue IV involves the trial court's decision of whether to award attorney fees, and so this Court reviews it under the abuse of discretion standard.

ARGUMENT

I. The express terms of the Contract for Deed required that simple interest would accrue only on the outstanding principal, rather than outstanding principal *and* accrued interest. Therefore, the amount owed under the Contract for Deed is $257,234.00.

The parties have discussed the amount remaining due under the CFD prior to and throughout this litigation. The Williams claim far more is owed to them than the CFD provides. The key difference in the parties' calculations stems from the fact that Carlton correctly relies upon the express terms of the CFD to calculate the amount owed, while the Williams make every effort to contradict those express terms.

The CFD explicitly states that interest only accrues on the principal amount. SR 46-7. Carlton and the Williams agreed to interest-only payments in the amount of $500 per month for the first year, then monthly payments of $1,100 plus interest at 12% per annum until the CFD was paid in full. *Id.* The CFD purchase price was $120,000, and after the down payment of $10,000 the remaining principal was $110,000. *Id.* The maximum interest that could have accrued between 2012 and 2023 is $6,000 for the first year and $132,000 for the following ten. Therefore, the maximum amount outstanding pursuant to the plain

terms of the contract is approximately $248,000, regardless of whether Carlton is in breach of the CFD. The amount owed under the CFD is the amount owed per the CFD.

Despite the CFD's unambiguous language, the Williams, without any factual or legal support, maintain interest was to be compounded. Not only does the CFD *not* provide for compound interest, but it also explicitly states that simple interest applies. In part the CFD states, "From and after the 1st day of July 2013 interest will accrue on the *outstanding principal* at the rate of Twelve percent (12%) per annum for the remainder of the term of the Note until its maturity date." *Id.*

The Williams provide no persuasive evidence or argument in favor of their claim, leaving it entirely unsupported. The Williams merely state, "the terms of the contract show interest compounded each year…", without anything more than their say so. SR 158.

The best the Williams' can come up with for a legal argument to support their position is that the CFD is subject to compound interest simply because compound interest is generally permissible under South Dakota law. The Williams cite "favorable", centuries old law, *Hovey v. Edmison*, which merely supports the fact South Dakota law allows parties to *contract* for compound interest if they so

chose. SR 155-62. The Williams fail to recognize the fact that *Hovey* actually supports Court's ruling on this issue.

In *Hovey*, the Supreme Court of the Territory of Dakota defined simple and compound interest, while outlining when each applies. *Hovey v. Edmison*, 3 Dakota 449, 22 N.W. 594, 599 (1885). The note at issue in *Hovey* contained an express provision stating that "should any of the interest not be paid when due, it should bear interest at the rate of twelve per cent, per annum." *Id.* The *Hovey* court stated that it would not "be well to attempt to modify or abridge the meaning of a written contract, if the parties making the same had the clear legal right to execute it, and did so in unmistakable terms," and, based on the above, declared that the "clear, unequivocal intention of the parties to this contract was to provide for the payment of interest upon the installments of interest which should be unpaid and withheld ..." *Id.* at 606.

Unlike the note in *Hovey*, the CFD contains no such language permitting interest to accrue on unpaid interest or compound interest. . Instead, the CFD makes plain the unequivocal intention of the parties to the CFD to provide for the payment of interest upon the "outstanding principal", and not upon the unpaid interest, as it was in *Hovey*. SR 46-7. Thus, *Hovey* holds that the parties to a contract *can* contract for compound interest, not the automatic imposition of compound interest and lends no support to Willaims' position.

Faced with the impotence of all their previous argument, the Williams now and for the first time launch a last ditch effort to change the plain language of the

CFD to require compound interest. The Williams contend that the inclusion of the words "per annum" alone trumps the plain language of the CFD regarding simple interest. The Williams cite to "corporatefinanceinstitute.com" as evidence that inclusion of the term "per annum" creates a presumption that compound interest applies to the Contract for Deed. However, Plaintiffs misinterpret the meaning of "per annum" and so, again their argument fails.

First, the Corporate Finance Institute is not an authoritative source, and flies in the face of longstanding South Dakota law on contract interpretation, and specifically interpretation of contractual language relating to compound and simple interest and when each applies. *See Hovey v. Edmison,* 3 Dakota 449, 22 N.W. 594, 599 (1885). Second, the Williams' source does not even stand for what they claim it does. The Williams cherry pick one sentence out of context from the article, while omitting and ignoring the rest of the article that undermines their position. CFI Team, Per Annum, Definition, Uses, and Sample Calculation, Oct. 4, 2023, https://corporatefinanceinstitute.com/resources/accounting/per-annum/. The CFI article plainly states that a "per annum interest rate can be applied only to a principal loan amount." *Id.* By definition, interest that is applied only to the principal loan amount is simple interest. *Wieland v. Loon*, 79 S.D. 608, 613, 116 N.W.2d 391, 393 (1962) (holding "'Simple interest' is straight interest computed on the principal from the time interest is to commence to the time of payment or judgment"). It is no surprise that Plaintiffs' own resource states that the term "per annum" can apply to either compound interest or simple interest. CFI Team, Per

Annum, Definition, Uses, and Sample Calculation, Oct. 4, 2023, https://corporatefinanceinstitute.com/resources/accounting/per-annum/. That is because "per annum" simply denotes that interest will be calculated on a yearly basis, as opposed to some other amount of time, such as daily or monthly. *Id.* The words "per annum" have absolutely no effect on whether interest is simple or compound. *Id.*

As in *Hovey*, it would not "be well to attempt to modify or abridge the meaning of a written contract, if the parties making the same had the clear legal right to execute it, and did so in unmistakable terms." *Hovey,* at 606. If the parties had negotiated and agreed that the interest to be applied in the CFD was to be compound interest, the CFD would say that. It does not. Based on the above, the Court should uphold the Circuit Court's ruling that simple interest applied to the CFD and that the full amount remaining due, including outstanding principal and accrued interest, is $257,234.00.

II. The circuit court correctly found that that there shall be a one-year redemption period because this is a foreclosure of a real estate contract under SDCL § 21-50, not the foreclosure of a real estate mortgage under SDCL § 21-52.

Carlton does not dispute that one year is a reasonable redemption period, only that a sheriff's sale is inapplicable here and not the proper event that commences the redemption period. The Williams cite to SDCL § 21-52 as controlling law, but SDCL § 21-52 applies to "real property or any interest thereon, sold on foreclosure of a **real estate mortgage**." (emphasis added) SDCL

§ 21-52-1. SR 160. The Williams fail to realize that this is not a foreclosure of a real estate mortgage. This is a real estate contract, and SDCL § 21-50 controls foreclosures of real estate contracts. There is no requirement nor mention of a sheriff's sale under SDCL § 21-50, the controlling authority in this instance which allows the Court to establish the time for compliance.

SDCL § 21-50-3 states:

> 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, and unless the parties against whom such judgment is rendered shall fully comply therewith within the time specified, such judgment shall be and become final without further order of the court, and all rights asserted under the contract sued on shall thereupon be forever barred and foreclosed.

Carlton does not dispute that he is in default on the CFD. Therefore, a trial on the action is unnecessary. The Court then properly set the time for Carlton to comply with the terms of the CFD which is similar to a "redemption period" on a defaulted mortgage, to allow Carlton the opportunity to cure by paying the amount owed under the CFD. If Carlton cannot fully comply within the one year period specified, then the Williams' may have the right to retake possession and full ownership of the Property per SDCL § 21-50 Therefore, Carlton concurs with the

Williams' proposed one year redemption period, but disagrees that a sheriff's sale is required to commence the redemption period.

In addition, the Williams' reliance on *L&L P'ship v. Rock Creek Farms* is misplaced and actually hurts their case. The Court stated in full, "In *Anderson v. Aesoph*, 2005 S.D. 56, 697 N.W.2d 25, and *BankWest, N.A. v. Groseclose*, 535 N.W.2d 860 (S.D.1995), we referred to the statutory right to comply with the terms of the contract for deed upon default as a right to redeem. We retract that terminology in this opinion to better align our writing with SDCL § 21–50–3 and differentiate a contract vendee's right to cure the default from other statutory redemption rights in our code." *L & L P'ship v. Rock Creek Farms*, 2014 S.D. 9, ¶12 n.6, 843 N.W.2d 697, 702. In *L &L P'ship* the Court recognized there is a difference between the "right to cure" a default on a contract for deed, and the right to redeem under a mortgage foreclosure, and that it had previously confused the two. The Court, rightly, attempted to clear up the confusion.

Throughout this litigation and before, both parties have used "redemption rights" and "right to cure" interchangeably, and incorrectly. Since this action falls under SDCL § 21-50, this is a right to cure, not a right to redeem. There is no requirement of a sheriff's sale, or any other type of sale, to commence Carlton's right to cure under SDCL § 21-50.

Despite Williams' position to the contrary, Carlton has always had the right to cure the CFD and continues to have that right as these briefs are written and argued. One way Carlton can cure is by selling the property and using the

proceeds to satisfy the amount remaining due. In fact, Carlton would have cured his default long ago had the Williams not derailed his every attempt to do so by blocking his attempts to sell the property.

It is only equitable that Carlton receive a fair and full opportunity to sell the property to satisfy the correct amount remaining due and retain the proceeds in excess of what is owed to the Williams. Due to the Williams' refusal to cooperate with the sale of the property as the record owners, Carlton agrees that a one-year redemption period, or more correctly, a one year period to cure his default under the CFD, is proper. But the time period to cure should start upon the affirmance or confirmation of the amount remaining due, not a sheriff's sale.

Based on the above, the Court should affirm the Circuit Court's ruling that Carlton's proper time period to his cure is one year from the date of the affirmance of the court's order, and that under SDCL § 21-50, no order of foreclosure or sheriff's sale is required to commence said period.

III. The circuit court correctly found that interest shall be held in abeyance as of the date Carlton proposed to sell the property, because the Williams' unreasonable actions caused the delay.

The Williams argue that Carlton's offer to sell the real property is not an unconditional tender of payment pursuant to SDCL § 20-5-18, and is not sufficient to warrant holding interest in abeyance. In support of this they contend that there

was no guaranteed sale, that there was no offer of payment, that Carlton never actually received any formal offers.

Carlton concedes that his offer to sell the Property alone is not enough to constitute an unconditional tender of payment sufficient to warrant holding interest in abeyance under SDCL § 20-5-18. However, the Williams fail to recognize they were the *sole* reason that Carlton could not make an unconditional tender of payment, secure a guaranteed sale, or even present a willing buyer. From the very beginning, Carlton recognized that he would need the Williams' cooperation to successfully sell the Property to satisfy the CFD, as they remained the record owners, and requested their cooperation.

The Williams argue that the amount remaining due remained an unresolved issue, and that is why they could not cooperate with Carlton to sell the Property. In an effort to ease the Williams' concerns, Carlton proposed that a condition of the potential sale be that the sale price must be above the amount the Williams claimed was remaining due, and that the amount would be held in escrow until that amount owed issue was resolved by the Court. Despite these adequate protections and after representing that they would cooperate, the Williams refused to cooperate, effectively making Carlton's hopes to satisfy the CFD impossible. SR 92.

Carlton's request and the Circuit Court's decision to hold interest in abeyance was never based on SDCL § 20-5-18, it was based on the "file in its entirety". SR 222. The Circuit Court did not mention SDCL § 20-5-18, but it was

aware of the Williams' actions in preventing a timely sale of the Property, and reasonably based its decision to hold interest in abeyance on the same. As such, the Court should affirm the Circuit Court's ruling that the interest accumulated between when Carlton first proposed selling the Property and the date of the Order be held in abeyance.

IV. The circuit court correctly found that the Williams are not entitled collect attorneys' fees for the foreclosure proceeding, because they should not be rewarded for unreasonably delaying Carlton's cure of his breach of the Contract for Deed and needlessly elongating this litigation.

The Williams correctly assert that reasonable attorneys' fees *may* be fixed by the Court pursuant to SDCL § 21-50-4 (*See* Will. Br. pg. 10-11.) but fail to note that whether to do so is "in the discretion of the court". SDCL § 21-50-4. The Williams argue that they should not be required to bear the cost to remedy Carlton's breach and default of the CFD, while overlooking that their actions prohibited Carlton from curing said breach.

If the Williams had cooperated with Carlton to sell the Property, this matter would not be before the Court. The Property would be sold, Williams would have the amount remaining due them, Carlton would have the excess, and this matter would be fully resolved. The Williams' actions, described throughout, needlessly dragged out this litigation, causing both Carlton and themselves to incur additional and unnecessary attorneys' fees. The Williams' actions and the completely unsupported legal positions taken by Williams in this matter are the reason the

attorneys' fees in this matter escalated, and the Williams, should not be rewarded for that.

The Circuit Court considered "the file in its entirety" (SR 222) and based on the same, reasonably exercised its discretion to decline to award the Williams their attorney fees. Therefore, the Court should affirm the Circuit Court's decision to decline to award the Willaims their attorney fees for this matter.

CONCLUSION

For all these reasons, Carlton respectfully requests that the Court affirm the Circuit Court in all respects.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests oral argument.

Dated February 24, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66, Jeffery D. Collins, counsel for the Appellees, does hereby submit the following:

The foregoing brief is 19 pages in length. It is typed in proportionally spaced typeface in Times New Roman 13 point. The word-processing system used to prepare this brief indicates that there are a total of 4818 words and 23,902 characters (no spaces) in the body of the brief.

/s/ Jeffery D. Collins
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Brief of Appellees in the above-entitled action was duly served by serving a true copy thereof by Notice of Electronic Filing generated by the Odyssey File & Serve System, on February 24, 2025, to the following named persons at their last known email addresses as follows:

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The undersigned further certifies that pursuant to SDCL § 15-26A-79, the original of the Brief of Appellee in the above-entitled action was mailed to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501, by United States mail, first class postage thereon prepaid, on the date above written.

/s/ Jeffery D. Collins
Jeffery D. Collins

IN SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30867

RAND WILLIAMS and
GAYLA WILLIAMS,

Appellants,

vs.

JOHN CARLTON D/B/A
J&L FLOORING,

AND

J&L FLOORING, LLC, a
South Dakota Limited Liability
Company

Appellee,

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE HEIDI LINNGREN

NOTICE OF APPEAL FILED OCTOBER 9, 2024

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PRELIMINARY STATEMENT

This brief is in reply to Defendants John Carlton and J&L Flooring, LLC's Brief of Appellees. Plaintiff-Appellants, Rand Williams and Gayla Williams will be collectively referred to as "Plaintiffs". Defendants-Appellees, John Carlton and J&L Flooring, LLC, will be collectively referred to as "Defendants". References to the settled record will be designated as "SR" in accordance with the Chronological Index provided by the Clerk of Courts. References to the Brief of Appellees will be referred to as "Br. of Appellees" followed by the appropriate page number.

STATEMENT OF THE FACTS

Defendants entered into the Contract for Deed (CFD) to purchase the following property from Plaintiffs:

> Lots 1 & 2, Block 3, South Boulevard Addition, City of Rapid City, Pennington County, South Dakota ("Property").

Defendants agreed to make monthly, *interest only* payments of $1,100.00 until the CFD was paid in full. SR 46. Defendants subsequently made two payments in the amount of $1,000 each, totaling $2,000. SR 6. The last payment made by Defendants was in May 2015—meaning that Defendants have been in default under the CFD for over nine years. SR 48. Defendants have failed to make the payments required by the CFD. SR 6. Interest continues to accrue.[1]

This lawsuit commenced in September 2023. Defendants listed the property for sale with Dave Olson in October 2023. SR 129. However, Plaintiffs learned no offers were ever made for the property. *Id.* Defendants—debtors—"could easily

[1] Plaintiffs are aware of the Trial Court's ruling and ultimately submit interest should have continued to accrue, *infra.*

have avoided any injustice" by complying with the contract and "paying the debt as agreed."[2]

STANDARD OF REVIEW

The Court reviews issues I, II, and III de novo with no deference to the trial court's ruling because they are questions of law. See *Estate of Fischer v. Fischer*, 2002 S.D. 62, ¶ 10, 645 N.W.2d 841. 844. Issue IV, regarding a trial court's award of attorney fees, is reviewed by this Court under the abuse of discretion standard. *Anderson v. Aesoph*, 2005 SD 56, ¶ 18, 697 N.W.2d 25, 31.

ARGUMENT

I. At the end of each year, the unpaid interest is to be added to the outstanding principal.

The existence and interpretation of a contract are questions of law which this Court reviews de novo. *J. Clancy, Inc. v. Khan Comfort, LLC*, 2021 S.D. 9, ¶ 18, 955 N.W.2d 382, 389 (additional citations omitted). Contrary to Defendants' argument, *Hovey v. Edmison*, 3 Dakota 449, 22 N.W. 594, remains applicable even though the contract at issue in *Hovey* provided more explicit language providing for compound interest. The question is not a matter of which contract is better but whether the language in CFD in this case is sufficient to show that the parties agreed to compound interest. The complicating issue in this case is the lack of a maturity date, which is referenced but otherwise unidentified. SR 46-47.

However, the *Hovey* Court identified the proper starting point: What were the rights and liability of the parties at the close of the first year with the full amount of

[2] *Hovey v. Edmison*, 3 Dakota 449, 22 N.W. 594 (1884).

interest unpaid. *Hovey, supra.* The parties do not dispute there is a breach of the contract. Defendants admit to being in default. This default recurred every year over nine years. For over nine years Plaintiffs did not receive any benefit from unpaid interest. Stated differently, Defendants retained Plaintiffs' money for their use.

"Interest is the price agreed to be paid for the use of money; rent, is the price agreed to be paid for the use of land; hire is the price agreed to be paid for the use of a horse or other article of personal property; call it interest, rent, or hire, it becomes a debt at the time the party promised to pay it, and from that time he is using the money of the creditor, or of the landlord, or of the bailor, and ought to pay for the use of it, unless he be allowed to take advantage of his own wrong in not making payment at the day." *Hovey v. Edmison*, 3 Dakota 449, 22 N.W. 594 (internal cite omitted). This Court also stated in *Wieland v. Loon*, and the South Dakota Legislature has determined, compound interest is that interest added to principal *as it becomes due*, thereafter being made to bear interest. 116 N.W.2d 391, 393 (1962) (relying on *Hovey v. Edmison, supra*); SDCL §§ 2-14-2, 53-4-5. Thus, unpaid interest is made to accrue interest at the given rate for the additional years. It is not simple interest.[3]

Plaintiffs submit this leads to compounding the interest and that the proper accrued interest is $277,492.

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[3] The *Hovey* Court identified a middle ground: the interest was not compounded but was made itself to bear annual interest of 12 per cent.

II. The Circuit Court still erred to give a one year right of redemption or cure.

Even if this action is controlled by SDCL ch. 21-50, Defendants have not demonstrated that the law allows them to sell the property as its method of cure without any agreement from the Plaintiffs. Under SDCL ch. 21-50, the Circuit Court ordered that Defendants have one year to cure their default but did not order that cure could be done by sale of the property. SDCL § 21-50-3 states, in 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[.]"

However, the Circuit Court determined no evidence needed to be received because Defendants admitted their default. Giving the Defendants one year to fulfill the terms of the contract which they have not managed to perform for over nine years is unreasonable. Defendants (i.e., the debtors), who, of course, agree one year to further possess the property at zero interest under the Circuit Court's order, complain about some unfairness in the broken-down negotiations with Plaintiffs as the basis for this reasonableness. However, they could easily have avoided any injustice by paying the debt as they agreed to do.

Plaintiffs submit that one year to cure is unreasonable, especially where that one year comes at no cost to Defendants who have failed to pay for over nine years. Therefore, this Court should remand this issue to the Circuit Court with instruction for a shorter time to cure based on evidence, with interest to accrue during the cure period.

III. The Circuit Court erred when it held interest in abeyance as of the date of Defendant proposed to sell the property because interest may only be tolled by an unconditional offer.

Defendants admit that "his offer to sell the Property alone is not enough to constitute an unconditional tender of payment sufficient to warrant holding interest in abeyance under SDCL § 20-5-18." Br. of Appellees, 17. Curiously, Defendants believe that Plaintiffs were the sole reason for Defendants plight. Indeed, Defendants ignore the possibility that the Property would not have sold for more than the CFD. To say it would without the benefit of, or evidence of, an appraisal places this Court in the position of not only trying facts, but doing so by pure speculation. However, as an "appellate tribunal, [this Court is] precluded from retrying the facts." *Morrison v. Mineral Palace Ltd. P'ship*, 1999 S.D. 145, 603 N.W.2d 193, 197. Or in this case, it is precluded from trying them for the first time.

Moreover, Defendants seem to argue that the breakdown in negotiations is solely on Plaintiffs' which somehow absolves Defendants of the requirement that they tender an unconditional offer of payment as provided by SDCL § 20-5-18. "In the context of a contract for deed, interest on the debt will stop running when the buyer tenders an unconditional offer of payment." *Anderson v. Aesoph*, 10 2005 S.D. 56, ¶27, 697 NW2d 25, 33 (citing *Adrian v. McKinnie*, 2004 SD 84, ¶ 14, 684 NW2d 91, 98). Neither Defendants nor the Circuit Court provided legal authority for allowing the Circuit Court to hold the interest in abeyance without an unconditional offer of payment. Rather, SDCL § 20-5-18 provides a clear procedure tolling the accrual of interest upon an unconditional offer of payment.

Defendants agree, they never made an unconditional offer of payment. Therefore, the accrual of interest should not have been tolled, and such tolling continues to prejudice the Plaintiffs who have neither possession nor money to show for the transaction. Plaintiffs submit that this Court should find that the Circuit Court erred in holding interest in abeyance and reverse the order of the Circuit Court.

IV. Plaintiffs did not unreasonably delay Defendants ability to cure the breach of the Contract for Deed, and so should not bear the cost of Defendants breach.

Defendant contends that Plaintiffs decision to not agree to the sale of the Property was unexplained and needless, dragging on the litigation. *See* Br. of Appellee, 18. They fail to recognize they have made no payments since 2015 and this after Plaintiffs attempted to resolve the situation in 2017. SR 48; 27-28. As though a reminder is needed, the parties are in litigation because of the Defendants' conduct: they failed to pay their debt. Defendants argue that "Carlton has always had the right to cure the CFD and continues to have that right as these briefs are written and argued." Br. of Appellees, 15. This may be so, but it's the Plaintiffs who have a right to payment which Defendants have failed to pay for nine years. Denying attorney fees requires Plaintiffs to bear the cost of Defendants breach of the CFD.

In not awarding attorney fees, the Circuit Court stated, "After reviewing the file in its entirety, the Court declines to award Plaintiff attorneys' fees at this time." SR 225, *Order on Motions to Determine Amount Remaining Due Under the Contract for Deed and the Length of the Redemption Period*. However, the Circuit Court

received no evidence pertaining to the amount or reasonableness of an award for attorney fees under SDCL § 21-50-4. *See, Booth v. Chamales*, 366 N.W.2d 843, 845 (S.D. 1985) ("an award of attorney fees in a foreclosure action of an executory contract for the sale of real property is controlled by a special statute, SDCL 21-50-4").

Plaintiffs submit the Circuit Court abused its discretion by not accounting for the equities in the case or even receiving evidence as to the amount or reasonableness of an award of attorney fees.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully submit that per annum interest is compounded annually, resulting in $277,492 outstanding interest due and owing to Plaintiffs, in addition to the principal amount remaining; that interest shall continue to accrue at 12 per cent per annum as agreed by the parties; and that attorney fees be awarded to Plaintiffs under SDCL § 21-50-4, the value to be determined on remand.

Dated this 24th day of March 2025.

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Jonathan P. McCoy, counsel for Appellant, hereby certifies that the foregoing Brief of Appellant complies with the type volume limitation provided for in the South Dakota Codified Laws and pursuant to SDCL 15-26A-66(b)(4). This brief contains 1868 words, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix, Certificate of Service, and Certificates of Counsel. Counsel relied on the word and character count of Microsoft Word, word processing software, used to prepare this Brief at font size 12, Cambria, and left justified.

Dated this 24th day of March 2025.

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