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THE REAL ESTATE CONTRACT IN NEW MEXICO: *EIFERLE v. TOPPINO*

I. INTRODUCTION

The use of the real estate contract as a real property security device was an issue presented to the New Mexico Supreme Court in the recent case of *Eiferle v. Toppino*.¹ The court's holding has raised a number of questions about the enforceability of the forfeiture clause in the standard form real estate contract, and the future of the real estate contract generally. A comparison of the use of the real estate contract with other real property security devices in New Mexico and other states supports the hypothesis that *Eiferle* and other recent New Mexico cases call for reevaluation of the use of the real estate contract.

II. A STATEMENT OF THE CASE

In *Eiferle*, the New Mexico Supreme Court held that the vendor of a real estate contract could not enforce the terms of the contract when under the specific facts of the case enforcement would shock the conscience of the court.² The real estate contract involved was for the purchase and sale of a residence.³ A standard Valliant Form Real Estate Contract provided that the purchaser would make a cash down payment to the vendor, make monthly installment payments into an escrow account for the vendor, and assume a mortgage with Prudential Insurance Company.⁴ The contract provided that both the monthly payment on the escrow account⁵ and the monthly payment on the mortgage⁶ were due on the first day of each month.

Five years after the parties entered into the real estate contract, the events which led to this case occurred. The purchaser sent a check for the monthly mortgage payment on the first day of the month and also made the installment payment that was due on the escrow account. On the twentieth day of the month, Prudential

1. 90 N.M. 469, 565 P.2d 340 (1977).

2. *Id.* at 470, 565 P.2d at 341.

3. *Id.* at 469, 565 P.2d at 340.

4. *Id.*

5. Record at 30.

6. 90 N.M. at 469, 565 P.2d at 340.

returned the check to the purchaser, along with a letter threatening foreclosure because the bank refused to honor the check. A copy of this letter was sent to the vendor. The letter advised the purchaser that he had until the thirty-first day of the month to pay all existing delinquencies. On the twenty-fifth day of the month, the purchaser mailed to Prudential a cashier's check for the amount due. Three days later, the vendor's attorney sent a demand letter to the purchaser requesting payment to Prudential and \$25 to cover the expenses of sending the demand letter. The purchaser received the demand letter on the twenty-ninth day of the month. By the first day of the next month, Prudential had applied the cashier's check to the mortgage. The escrow agent refused to accept any further payments from the purchaser until the \$25 was paid to cover the cost of the demand letter. Two months after the mortgage payment in question was due, the vendor filed a special warranty deed conveying the title to the property back to himself.⁷

In evaluating these facts, the court considered Paragraphs 3 and 8 of the real estate contract.⁸ Paragraph 3, after reciting the purchase price and terms of payment, provided:

Further, it is agreed that if this real estate contract is placed by the Owner in the hands of an attorney upon default by the Purchaser in the payment of any monies due hereunder for the purpose of mailing of written demand, pursuant to the termination provision of Paragraph 8, hereof, the Purchaser shall pay, in addition to the payment of all other sums required hereunder, the sum of \$25.00 to cover the costs, expenses, and fees involved in such action.⁹

Paragraph 8 provided:

It is mutually agreed that time is the essence of this contract. Should the Purchaser fail to make any of the said payments at the respective times herein specified . . . and continue in default for thirty (30) days after written demand for such payments, . . . then the owner may, at his option, declare the whole amount remaining unpaid to be then due, and proceed to enforce the payment of the same; or he may terminate this contract and retain all sums theretofore paid hereunder as rental to that date for use of said premises. . . .¹⁰

7. *Id.* at 470, 565 P.2d at 341.

8. *Id.* at 469-70, 565 P.2d at 340-41. Notice that the court cites Paragraph 2 but refers to the contents of Paragraph 3 of the standard Valliant Real Estate Contract Form. See Record at 30; a review of the real estate contract reveals that the typist who inserted the purchase price and terms of payment typed over the first line of Paragraph 3 thereby obliterating the number "3."

9. Record at 30.

10. Record at 31.

The court did not apply the general rule that real estate contracts are enforceable as written and upon default by a purchaser, a vendor is entitled to terminate the contract, regain possession of the property, and retain the payments made as rent. The court said that because Prudential had given the purchaser an opportunity to meet the payments, which the purchaser did, to allow the vendor to terminate the contract, retaining the property and the payments, would shock the conscience of the court.¹¹

Two issues were presented to the court by the briefs submitted in the case. The first was whether the purchaser was actually in default at the time the demand letter was sent; the second was whether under the terms of the contract failure to pay within 30 days the \$25 to cover the cost of the letter resulted in forfeiture even though the amount of the original default was paid.¹² The omission of the analysis of these issues from the opinion raises important questions about the status of the real estate contract in New Mexico. This note will consider these issues and evaluate the holding of *Eiferle v. Toppino* after reviewing the development and use of the real estate contract.

III. DEVELOPMENT AND USE OF THE REAL ESTATE CONTRACT AND OTHER REAL PROPERTY SECURITY DEVICES

A. Background.

The validity of a contract for the sale of land is judged by the same rules as apply to contracts generally. It must be definite and certain as to the essential terms, or capable of being made certain by legal presumption or custom.¹³ The purchaser takes the equitable title to the property while the vendor retains the legal title.¹⁴ The main difference between contracts for the sale of land and other contracts has been the measure of damages.¹⁵ The law has allowed the vendor to enforce a contract for the sale of land through foreclosure by judicial sale,¹⁶ strict foreclosure by judicial order,¹⁷ strict foreclosure by condition subsequent and statutory notice,¹⁸ or a personal judgment for the purchase money.¹⁹ On the vendor's failure to deliver title, the purchaser is entitled to the difference

11. 90 N.M. at 470, 565 P.2d at 341.

12. Appellants' Brief-In-Chief and Appellee's Answer Brief.

13. 3 American Law of Property § 11.13 (A. J. Casner ed. 1952).

14. *Id.* § 11.22.

15. *Id.* § 11.67.

16. *Id.* § 11.74.

17. *Id.* § 11.75.

18. *Id.* § 11.76.

19. *Id.* § 11.77.

between the amount of the contract price remaining unpaid and the market value of the land.²⁰

B. Use of the real estate contract and other real property security devices in New Mexico

The term "real estate contract" may refer to either a security or a marketing device. In New Mexico, the term is used to describe a security device, an installment contract, which is used in lieu of a mortgage or deed of trust.²¹

Early New Mexico case law involving real estate contracts established that if the purchaser defaulted after part performance and the vendor was willing and able to proceed under the contract, the purchaser had no right to recover payments made.²² But absent definite terms, in a case where the contract was oral, *status quo ante* was restored.²³ Failure to make payments did not of itself make the contract void or effect a forfeiture; the vendor must have given notice of his election and intention to forfeit the contract.²⁴ Reasonable delay in performance would not defeat a contract unless it specifically stated that time is of the essence.²⁵ Subsequent New Mexico case law has not altered these holdings.

The standard Valliant Form Real Estate Contract used in *Eiferle* is commonly used in New Mexico.²⁶ It provides for the execution of a warranty deed from the vendor to the purchaser, and the execution of a special warranty deed from the purchaser to the vendor. The real estate contract is usually recorded, and the real estate contract and the deeds are placed in escrow. When the purchaser complies with all of the conditions of the contract, the warranty deed is delivered by the escrow agent to the purchaser. If the purchaser defaults, and remains in default after a written demand for payment, the vendor may either declare the whole amount remaining unpaid due and sue for enforcement, or terminate the contract and retain as rental all the sums paid. If the vendor chooses to terminate the contract, the real

20. *Id.* § 11.67.

21. The purpose of real estate contract determines whether it is a marketing device or security device. Deposit-receipt and earnest-money agreements are examples of marketing devices. Installment contracts, mortgages, and deeds of trust are examples of security devices. Hetland, *Land Contracts*, in California Land Security and Development 43 (1960). See also Hetland, *The California Land Contract*, 48 Calif. L. Rev. 729 (1960).

22. *Melfi v. Goodman*, 73 N.M. 320, 388 P.2d 50 (1963); *Dunken v. Guess*, 40 N.M. 156, 56 P.2d 1123 (1936); *Albuquerque Lumber Co. v. Tomei*, 32 N.M. 5, 250 P. 21 (1926).

23. *Young v. Lee*, 47 N.M. 120, 138 P.2d 259 (1943).

24. *Nelms v. Miller*, 56 N.M. 132, 241 P.2d 333 (1952).

25. *Viramontes v. Fox*, 65 N.M. 275, 335 P.2d 1071 (1959).

26. Telephone conversation with Patricia Espalin, Clerk, Bernalillo County Clerk's Office in Albuquerque, New Mexico (May 15, 1978).

estate contract and the special warranty deed are delivered by the escrow agent to the vendor.^{2 7}

Bishop v. Beecher^{2 8} sets forth the reason for using real estate contracts in New Mexico:

27. The Valiant Co. Real Estate Contract, Form 103, Paragraphs 3 and 8:

3. In consideration of the premises, the said Purchaser agrees to buy said real estate and to pay said Owner therefor the sum of _____

Dollars (\$ _____) lawful money of the United States of America, which sum is to be paid as follows, to-wit: _____

Dollars (\$ _____), cash in hand paid, the receipt of which is hereby acknowledged, and the balance of \$ _____ shall be payable as follows, to-wit: _____

If not otherwise specified the above-mentioned payments shall continue until the full purchase price and interest on deferred payments shall have been fully paid. All of said unpaid balance of the purchase price shall bear interest at the rate of _____ per centum (_____%) per annum from date, payable _____

Further, it is agreed that if this Real Estate Contract is placed by the Owner in the hands of an attorney upon default by the Purchaser in the payment of any monies due hereunder for the purpose of mailing of written demand, pursuant to the termination provision of Paragraph 8 hereof, the Purchaser shall pay, in addition to the payment of all other sums required hereunder, the sum of \$50.00 to cover the costs, expenses, and fees involved in such action.

8. It is mutually agreed that time is the essence of this contract. Should the Purchaser fail to make any of the said payments at the respective times herein specified, or fail or refuse to repay any sums advanced by the Owner under the provisions of the foregoing paragraph, or fail or refuse to pay said taxes, assessments or other charges against said real estate and continue in default for _____ days after written demand for such payments, or payment of taxes or payment of assessments or other charges against said real estate, or repayment of sums advanced under provisions of the foregoing paragraph has been mailed to the Purchaser addressed to _____ h _____ at _____

then the Owner may, at his option, either declare the whole amount remaining unpaid to be then due, and proceed to enforce the payment of the same; or he may terminate this contract and retain all sums theretofore paid hereunder as rental to that date for the use of said premises, and all rights of the Purchaser in the premises herein described shall thereupon cease and terminate and _____ h _____ shall thereafter be deemed a tenant holding over after the expiration of _____ h _____ term without permission. An affidavit made by said Owner or his agent showing such default and forfeiture and recorded in the County Clerk's office shall be conclusive proof, in favor of any subsequent bonafide purchaser or encumbrancer for value, of such default and forfeiture; and the Purchaser hereby irrevocably authorizes the Owner or his agent to thus declare and record such default and forfeiture, and agrees to be bound by such declarations as _____ free act and deed.

28. 67 N.M. 339, 355 P.2d 277 (1960).

[C]ontracts such as this are utilized as devices to allow purchases of property with very small down payments. This is on the theory that in gaining the advantage of the elimination of the larger initial investment, the grantee must forego whatever advantage he might obtain by reason of the delays incident to foreclosure and redemption. Admittedly, there may be some disadvantages to this type of contract, but it is felt that the advantages far outweigh them when the benefits, which are derived by thousands of people who have been enabled to purchase property by merely paying for it over many years in a manner likened to rent, are considered.²⁹

In *Bishop*, the court focused on the advantages of the real estate contract. A purchaser who cannot qualify for a mortgage or cannot afford a large cash down payment can purchase property with a small investment. The court did not discuss the disadvantage of real estate contracts, that is, the purchaser's risk of losing his entire investment on default at any time before completion of the contract.

Since *Bishop*, the New Mexico Supreme Court has appeared to become increasingly critical of real estate contracts. In *Davies v. Boyd*³⁰ the court cited *Bishop* in comparing the retained payments to rent and declared that where the forfeiture approximated the rental value of the property, the contract would be enforced. The court did not discuss what result might be reached if the forfeiture were greater than the rental value of the property. However, the court did point out that where a contract has two possible constructions, the construction that avoids forfeiture is followed.³¹ Thus it would be expected that where the amount paid by the purchaser before default was greater than the rental value of the property, the forfeiture clause would not be enforced.

In *Ott v. Keller*³² the New Mexico Court of Appeals found two grounds for dismissing the vendor's complaint. The real estate contract followed the standard form and provided that if the purchaser continued "in default for fifteen (15) days after written demand for such payments . . . has been mailed to the Purchaser,"³³ then the vendor could terminate the contract and the purchaser would "be deemed a tenant holding over after the expiration of their [sic] term without permission."³⁴ The vendor had brought an unlawful detainer action under sections 36-12-1 through 36-12-4 of the New

29. *Id.* at 342, 355 P.2d at 279.

30. 73 N.M. 85, 385 P.2d 950 (1963).

31. *Id.* at 89, 385 P.2d at 952 (specially concurring opinion).

32. 90 N.M. 1, 558 P.2d 613 (Ct. App. 1976).

33. *Id.* at 2, 558 P.2d at 614.

34. *Id.*

Mexico statutes based on the provision of the contract quoted above. The court held, "[a]n equitable owner under a real estate contract cannot be ousted from possession by a summary proceeding, and the question of title to land cannot be determined in an unlawful detainer action."³⁵

In addition, the court held that the purchaser was not in default.³⁶ Though the contract provided that the vendor could terminate the contract if the purchaser continued in default for fifteen days after a demand letter was mailed, the demand letter stated that the contract would be terminated fifteen days from the effective date of the notice. The court focused on the demand letter and said that the equitable construction of that letter was to interpret the effective date of the notice to be the date the notice was received. Because the vendor withdrew the papers from escrow exactly fifteen days after the demand letter was mailed, assuming at least one day was required for delivery, the vendor withdrew the papers one day prematurely. The purchaser tendered payment several hours after the papers were withdrawn from escrow, but the payment was refused.³⁷ It is a well accepted principle that if a contract can be interpreted to avoid forfeiture, it will be so construed.³⁸ But the contract did not provide the construction adopted by the court. The forfeiture was avoided by considering the demand letter by itself, rather than in light of the contract.

The mortgage is another frequently used security device for real property in New Mexico. Usually the vendor executes and delivers a deed to the purchaser upon receipt of the entire purchase price. The purchaser obtains the purchase price from a lender, giving the lender a note and a mortgage. Of course it is possible for the vendor to accept a note and mortgage from the purchaser, but typically, a real estate contract is used in that situation. In New Mexico, the deed of trust is subject to the same statutory conditions as the mortgage and is virtually indistinguishable from it.³⁹

35. *Id.* at 3, 558 P.2d at 615.

36. *Id.* at 5, 558 P.2d at 617.

37. *Id.* at 4-5, 558 P.2d at 616-17.

38. *Davies v. Boyd*, 73 N.M. at 89, 385 P.2d at 952 (specially concurring opinion).

39. N.M. Stat. Ann. § 61-7-7 (Repl. 1974):

Sale of real property under power of sale prohibited.—No real property or any interest therein shall be sold under or by virtue of any power of sale contained in any mortgage, mortgage deed, trust deed or any other written instrument having the effect of a mortgage, which shall have been executed subsequent to the time this act [this section] shall go into effect.

N.M. Stat. Ann. §§ 70-1-37 to 39 (Repl. 1961):

70-1-37. *Mortgage or deed of trust provisions*—Effect.—A deed in substance following the forms entitled "Mortgage" or "Deed of Trust" shall when duly

executed have the force and effect of a mortgage or deed of trust by way of mortgage to the use of the mortgagee and his heirs and assigns with mortgage covenants and upon statutory mortgage conditions as defined in the following two sections to secure the payment of the money or the performance of any obligation therein specified. The parties may insert in such mortgage any other lawful agreement or condition.

70-1-38. Construction of "mortgage covenants."—In a mortgage or deed of trust by way of mortgage of real estate "mortgage covenants" shall have the full force and meaning and effect of the following words and shall be applied and construed accordingly: "The mortgagor for himself, his heirs, executors, administrators and successors, covenants with the mortgagee and his heirs, successors and assigns that he is lawfully seized in fee simple of the granted premises; that they are free from all encumbrances; that the mortgagor has good right to sell and convey the same; and that he will, and his heirs, executors, administrators and successors shall, warrant and defend the same to the mortgagee and his heirs, successors and assigns forever against the lawful claims and demands of all persons."

70-1-39. Construction of "statutory mortgage condition."—In a mortgage or deed of trust by way of mortgage of real estate the words, "statutory mortgage condition" shall have the full force, meaning and effect of the following words and shall be applied and construed accordingly: "In the event any of the following terms, conditions or obligations are broken by the mortgagor, this mortgage (or deed of trust) shall thereupon at the option of the mortgagee, be subject to foreclosure and the premises may be sold in the manner and form provided by law, and the proceeds arising from the sale thereof shall be applied to the payment of all indebtedness of every kind owing to the mortgagee by virtue of the terms of this mortgage or by virtue of the terms of the obligation or obligations secured hereby:

(1) Mortgagor shall pay or perform to mortgagee or his executors, administrators, successors or assigns all amounts and obligations as provided in the obligation secured hereby and in the manner, form, and at the time or times provided in said obligation or in any extension thereof.

(2) Mortgagor shall perform the conditions of any prior mortgage, encumbrance, condition or covenant.

(3) Mortgagor shall pay when due and payable all taxes, charges, and assessments to whomsoever and whenever laid or assessed upon the mortgaged premises or on any interest therein.

(4) Mortgagor shall, during the continuance of the indebtedness secured hereby keep all buildings on the mortgaged premises in good repair and shall not commit or suffer any strip or waste of the mortgaged premises.

(5) Mortgagor shall keep the buildings on the mortgaged premises insured in the sum specified and against the hazards specified in the mortgage, for the benefit of the mortgagee and his executors, administrators, successors and assigns; such insurance to be in such form and in such insurance companies as the mortgagee shall approve. Mortgagor shall deliver such policy or policies to the mortgagee; and at least two [2] days prior to the expiration of any policy on such premises shall deliver to mortgagee a new and sufficient policy to take the place of the one [1] so expiring.

In the event of the failure or refusal of the mortgagor to keep in repair the buildings on the mortgaged premises; or to keep the premises insured, or to deliver the policies of insurance, as provided; or to pay taxes and assessments, or to perform the conditions of any prior mortgage, encumbrance, covenant or condition, the mortgagee and its executors, administrators, successors or assigns may, at his option, make such repairs, or procure such insurance, or pay such taxes or assessments or perform such conditions and all moneys thus paid or expenses thus incurred shall be payable by the mortgagor on demand and shall be so much additional indebtedness secured by the mortgage.

C. *Utility of the real estate contract compared with other real property security devices.*

The utility of the real estate contract is not a new topic of debate. Two articles published in the 1930's⁴⁰ thoroughly discuss this issue and seem quite relevant to current New Mexico law. The installment contract for the purchase of land is most often used by purchasers of small means who are able to make only a small initial payment. A vendor would be reluctant to sell to such a purchaser if the land could be reclaimed only with the delay and expense of judicial foreclosure.⁴¹ However, if the payments made by the purchaser prior to default exceed the vendor's damages, the purchaser suffers forfeiture and the vendor has a windfall.⁴² One author argued that any amount retained by the vendor in excess of his injury is a penalty, and the purchaser should be allowed restitution of that amount.⁴³ The other author recommended legislative control of real estate contract remedies, allowing the purchaser to sue for return of payments and value of improvements less the vendor's damages.⁴⁴

A more recent commentator indicates that where legislative action has not been taken, the trend of the case law is to provide relief from forfeiture.⁴⁵ Courts have avoided forfeitures whenever possible. In an 1878 case involving a contract for life insurance which included a forfeiture clause, the United States Supreme Court reviewed the topic of forfeiture generally and noted, "Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made."⁴⁶

A series of three articles⁴⁷ provides a survey of current legislation and case law governing interests created by the real estate contract and remedies for breach of the real estate contract. These articles do not include New Mexico or specifically discuss a real estate contract

40. Gerdes, *Installment Land Contracts: Legislative Protections of Defaulting Purchasers*, 52 Harv. L. Rev. 129 (1938); Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 Yale L.J. 1013 (1931).

41. Gerdes, *supra* note 40, at 130.

42. *Id.* at 129.

43. Corbin, *supra* note 40, at 1025-26.

44. Gerdes, *supra* note 40, at 136-37.

45. G. Pindar, *American-Real Estate Law* §§ 21-24 (1976).

46. *Knickerbocker Life Ins. Co. v. Norton*, 96 U.S. 234, 242 (1878).

47. Lee, *Defaulting Purchaser's Right to Restitution Under the Installment Land Contract*, 20 U. Miami L. Rev. 1 (1965) [hereinafter cited as *Purchaser's Right to Restitution*]; Lee, *Remedies for Breach of the Installment Land Contract*, 19 U. Miami L. Rev. 550 (1965); Lee, *The Interests Created by the Installment Land Contract*, 19 U. Miami L. Rev. 367 (1965).

providing for placement of deeds in escrow with the vendor's right to withdraw the deeds on the purchaser's default. But no jurisdiction was found in which the treatment accorded the parties to a land contract is satisfactory:

A strict and undeviating application of the majority rule that a party in default cannot recover payments made will result in unconscionable forfeiture. The application of general equitable principles in an effort to avoid forfeiture makes for uncertainty The results obtained in the so-called minority jurisdictions are equally unsatisfactory. California labored for many years to shake off the majority rule only to adopt a position which has rendered the installment land contract virtually obsolete as a security device in that state. (Footnotes omitted.)⁴⁸

The California minority rule referred to above was announced in *Barkis v. Scott*⁴⁹ in 1949. In that case, the vendor attempted to terminate a real estate contract after two payment checks from the purchasers were dishonored for insufficient funds. The purchasers were a husband and wife. While the husband was in the hospital, the wife had miscalculated the funds in their checking account. The court held that it would enforce the forfeiture clause of a real estate contract only when the purchaser's default resulted from gross negligence or a wilful breach of duty. After *Barkis*, the court extended protection of the purchaser until equitable doctrine completely predominated contract theory.⁵⁰ Hetland, an authority in California property law, confirms the conclusion that adoption of this minority rule defeated the usefulness of the real estate contract, and as a result its use has been abandoned.⁵¹

In a survey on the use of the real estate contract in Florida, the author recommended that strict foreclosure be abolished and remedies be controlled by statute.⁵² In a series of three cases,⁵³ the Florida courts held that all installment land contracts were to be treated like mortgages. In 1976, the Florida legislature significantly amended its "Uniform Land Sales Practices Law" which now states that the purpose of the law is to prevent unsound financing techniques and to recognize the importance of installment land sales

48. *Purchaser's Right to Restitution*, *supra* note 47, at 19.

49. 34 Cal. 2d 116, 208 P.2d 367 (1949).

50. Note, *Reforming the Vendor's Remedies for Breach of Installment Land Sales Contracts*, 47 S. Cal. L. Rev. 191 (1973).

51. Hetland, *Land Contracts*, *supra* note 21, at 61.

52. *Purchaser's Right to Restitution*, *supra* note 47, at 21-24.

53. *Torcise v. Perez*, 319 So.2d 41 (Fla. Dist. Ct. App. 1975); *Hoffman v. Semet*, 316 So.2d 649 (Fla. Dist. Ct. App. 1975); *H & L Land Co. v. Warner*, 258 So.2d 293 (Fla. Dist. Ct. App. 1972).

contracts to the Florida economy.⁵⁴ The law provides for a Division of Florida Land Sales to regulate the use of real estate contracts.⁵⁵ The law does not provide remedies for breach of real estate contracts and there are no recent cases to indicate whether the courts will continue to apply statutory mortgage remedies to real estate contracts.

The real estate contract has also undergone judicial reform in Alaska. *Land Development, Inc. v. Padgett*⁵⁶ involved a real estate contract with the vendor holding the deed to the property as security. The purchaser admitted default but protested forfeiture of a substantial equitable interest. The trial court determined that the issue was whether the law would enforce a typical forfeiture clause strictly in accordance with its terms, and refused to enforce the forfeiture, giving the purchaser a "period of redemption."⁵⁷ The Alaska Supreme Court affirmed this decision, holding that enforcement of a forfeiture clause would be inequitable if it resulted in loss to the purchaser out of proportion to the injury of the vendor, and that in such situations it is within the court's discretion to grant a period of redemption.⁵⁸ In subsequent cases, the Alaska court has relied on this case to avoid the inequitable results of default on real estate contracts.⁵⁹ Current literature and case law do not indicate whether the real estate contract will survive reform in Alaska or fall into disuse there as in California.

Arizona achieved a result similar to Alaska's period of redemption with a statutory grace period. The length of the grace period ranges from 30 days to nine months depending on the percentage of the purchase price paid by the purchaser.⁶⁰ The purchaser may redeem

54. Fla. Stat. Ann. § 478.01-34 (West Supp. 1977).

55. *Id.* § 478.041.

56. 369 P.2d 888 (Alaska 1962).

57. *Id.* at 890.

58. *Id.* at 889-90.

59. *E.g.*, Williams v. Delay, 395 P.2d 839 (Alaska 1964); Jameson v. Wurtz, 396 P.2d 68 (Alaska 1964).

60. Ariz. Rev. Stat. § 33-741 (Repl. 1974):

Forfeiture of interest of purchaser in default under contract for conveyance of real property.

A. Forfeiture of the interest of a purchaser in default under a contract for conveyance of real property may be enforced only after expiration of the following periods after the default:

1. When the purchaser has paid less than twenty per cent of the purchase price, thirty days.

2. When the purchaser has paid twenty per cent, or more, but less than thirty per cent of the purchase price, sixty days.

3. When the purchaser has paid thirty per cent, or more, but less than fifty per cent of the purchase price, one hundred and twenty days.

4. When the purchaser has paid fifty per cent, or more, of the purchase price, nine months.

his interest and avoid forfeiture by complying with the terms of the real estate contract within the statutory grace period.⁶¹ However, the use of the real estate contract in Arizona has rapidly declined in the last few years.⁶²

As the use of the real estate contract has declined in some states, the use of the deed of trust has increased. A number of states permit the use of the deed of trust by statute.⁶³ The main reason for the popularity of the deed of trust is that it avoids both the forfeiture aspect of the real estate contract and the expense and delay of the mortgage for foreclosure.⁶⁴

In California, the deed of trust has become the most common real property security device, with mortgages and real estate contracts disappearing from use.⁶⁵ There are no statutory provisions dictating its form or effect, the deed of trust relying entirely on common use and case law for its development.⁶⁶ One commentator, writing for the Committee on Continuing Education of the Bar, has defined the deed of trust as a "written instrument by which the owner of property, called the trustor, who usually also is the debtor or obligor, grants the property to a trustee 'in trust with power of sale' to secure to a creditor or obligee, called the beneficiary, the payment or performance of the obligation."⁶⁷ In a deed of trust transaction, the vendor executes and delivers a deed to the purchaser. The purchaser gives a note to the vendor or lender, and a deed of trust as security for the debt to a third party trustee. The main difference between the deed of trust and the mortgage is the power of sale.⁶⁸ The practical effect is that if the purchaser defaults, the trustee has the power to sell the property and distribute the proceeds. The procedure for non-judicial foreclosure is strictly controlled by statute.⁶⁹

In 1971, the Arizona Revised Statutes were amended to permit

61. Ariz. Rev. Stat. § 33-742 (Repl. 1974).

62. See text accompanying note 71, *infra*.

63. E.g., Alaska Stat. §§ 34.20.070-.20.135 (Supp. 1977); Ariz. Rev. Stat. §§ 33-801 to 821 (Repl. 1974); Idaho Code §§ 45-1502 to 1515 (Repl. 1977); Mont. Rev. Codes Ann. §§ 52-401 to 417 (Supp. 1975); Nev. Rev. Stat. §§ 107.020-.100 (1973); Wash. Rev. Code §§ 61.24.010-24.130 (Supp. 1976).

64. Rarick, *The Background for the Proposed Deed of Trust Legislation*, 40 Okla. B. Ass'n J. 215, 216-7 (1969); Gose, *The Trust Deed Act in Washington*, 41 Wash. L. Rev. 94 (1966); Galbraith, Gant, & Leen, *Due Process and Deeds of Trust—Strange Bedfellows?*, 48 Wash. L. Rev. 763, 764-65 (1972-73).

65. Eagen, *Deed of Trust Transactions*, in California Land and Security Development 3, 5 (1960).

66. *Id.* at 8.

67. *Id.*

68. *Id.* at 6; Comment, *Comparison of California Mortgages, Trust Deeds and Land Sale Contracts*, 7 U.C.L.A.L. Rev. 83, 89 (1960).

69. Cal. Civ. Code §§ 2924, 2953 (West 1974, Supp. 1977).

the use of the deed of trust.⁷⁰ This extensive revision excluded the deed of trust from existing sections controlling foreclosure of mortgages and included a new chapter dictating form and effect of the deed of trust and providing for non-judicial foreclosure. Only a year after the statutory changes, the deed of trust was recognized as a boon to both creditors and debtors because the non-judicial foreclosure was so much more efficient and economical than judicial foreclosure: uncontested non-judicial foreclosures take only 91 days while uncontested judicial foreclosures take at least nine months.⁷¹

In both California and Arizona, a non-judicial foreclosure proceeds much like a judicial foreclosure in New Mexico except that the trustee does not have to obtain a judgment from the court. If the purchaser defaults on the real estate contract, the trustee gives notice to the purchaser of default and of the time and place of the sale. The statutes require specific forms of notice, a particular time lapse between notice and sale (e.g., 90 days in Arizona), and that the sale occur during certain hours in a particular location. The statutes also provide for the offer and acceptance of bids at the sale, payment of the bid, and disposition of the money received in payment.⁷²

IV. ANALYSIS OF THE HOLDING IN *EIFERLE v. TOPPINO*

As discussed above, the issues presented by counsels' briefs in *Eiferle* were whether the purchaser was in default when the demand letter was sent, and if so, whether failure to pay the \$25 cost of the demand letter was a continuing default which would support forfeiture. According to the terms of the contract, the payment was due on the first day of the month. The purchaser argued that the default was cured before the letter of default was sent because the cashier's check was purchased on the twenty-fifth day of the month.⁷³ The vendor did not respond to this, but argued that the purchaser's default caused the vendor to send the demand letter and therefore the purchaser owed the \$25 whether or not the purchaser was still in default when the demand letter was sent.⁷⁴

70. Ariz. Rev. Stat. §§ 10-481 to 485, -802 (Repl. 1977); Ariz. Rev. Stat. §§ 33-702, -721, -742, -801 to 821, -1103 (Repl. 1974, Supp. 1977-78).

71. Fry, *The Deed of Trust: A New Device in Arizona Real Estate Financing*, 7 Ariz. B.J. No. 3, 5 (1972); accord, *Andreola v. Arizona Bank*, 26 Ariz. App. 556, -, 550 P.2d 110, 113 (1976); Lawyer, *The Deed of Trust: Arizona's Alternative to the Real Property Mortgage*, 15 Ariz. L. Rev. 194 (1973).

72. Cal. Civ. Code §§ 2924, 2953 (West 1974, Supp. 1977); Ariz. Rev. Stat. §§ 33-807 to 818 (Repl. 1974).

73. Appellants' Brief-In-Chief at 3-4, *Eiferle v. Toppino*, 90 N.M. 469, 565 P.2d 340 (1977).

74. Appellee's Answer Brief at 2-3.

It seems that a logical response to the purchaser's contention is that purchase of a cashier's check does not satisfy the terms of the real estate contract. The real estate contract called for payment, and the stipulated facts alleged only that payment was received by the first day of the second month. The purchaser failed to show that payment had been made at the time the demand letter was sent on the twenty-eighth day. From this line of reasoning, it could be argued that the purchaser was in default when the demand letter was sent.

The purchaser, relying on *Barkis v. Scott*,⁷⁵ argued that payment by a check dishonored by the bank is not a substantial breach when the purchaser was not grossly negligent or wilfully in breach of the real estate contract.⁷⁶

The purchaser then argued that even if he were in default, the failure to pay the \$25 cost of the demand letter would not support forfeiture of the purchaser's equity. This argument relied primarily on the rule applied in the recent Alaska decisions that equity will not allow forfeiture where the purchaser's loss would be disproportionate to the vendor's injury.⁷⁷

The vendor basically relied on the development of the real estate contract in New Mexico and pointed out that the trend has been to enforce the terms of the real estate contract. The contract provided that it was the purchaser's obligation to pay the cost of the demand letter, and the result of the purchaser's failure to meet obligations of the contract was forfeiture.

But the court did not discuss these arguments. It held that the demand letter was premature and of no effect because Prudential, the holder of the mortgage assumed in the real estate contract, had given the purchaser until the thirty-first day of the month to make payment.⁷⁸ The court did not discuss the basis for Prudential's authority to extend the time for payment set by the contract between the purchaser and the vendor. The court seems to be striving to avoid forfeiture without applying the established principles of equity. This leaves in question the results in cases involving real estate contracts yet to come before the court.

V. THE FUTURE OF THE REAL ESTATE CONTRACT IN NEW MEXICO

There are a number of possible alternatives to consider in pre-

75. 34 Cal. 2d 116, 208 P.2d 367 (1949). See text accompanying notes 48, 49 for a description of the *Barkis* case.

76. Appellants' Brief-In-Chief at 6-8.

77. Appellants' Brief-In-Chief at 6-8. *Id.*

78. *Eiferle v. Toppino*, 90 N.M. at 470, 565 P.2d at 341.

dicting the future of the real estate contract in New Mexico. One is that the court may refuse to enforce forfeiture clauses. *Ott* and *Eiferle* may be the beginning of a trend of case by case evaluation of fact patterns to find any possible construction of the contract or a subsequent agreement that will avoid forfeiture. Although the New Mexico Supreme Court has thus far declined to take the bold step of judicial reform taken by the courts of Alaska, it has laid the ground work in *Bishop* and *Davis* by comparing the purchaser's forfeiture to the rental value of the property. An extension of these cases could lead to an actual balancing of the amount paid by the purchaser with the loss of the vendor, and result in an equitable period of redemption or restitution where the amount paid by the purchaser exceeds the vendor's loss. This is similar to what occurred in California and resulted in the discontinuance of the use of the real estate contract.⁷⁹

A second possibility is that the court may declare the real estate contract a mortgage and as such, subject to judicial foreclosure. While there is little basis in the New Mexico case law to support the notion, it seems possible that if a case arises where enforcement of the forfeiture clause would result in extremely disproportionate loss and yet nonenforcement would leave a wilfully defaulting purchaser flaunting a vendor without remedy, the court might order foreclosure. This was the path taken by the Florida courts which led to legislative action.⁸⁰

A third possibility is that the legislature might effect some control over the real estate contract and provide a statutory redemption period based on the principles that led the Alaska courts and the Arizona legislature to provide a period of redemption. According to one author,

[t]he goal of any reform in the treatment accorded the installment land contract should be to preserve as many of its advantages as are consistent with securing the purchaser against unjust forfeiture, and at the same time permit the contract to operate under a clear and recognized standard so that the effect of the purchaser's breach may be predicted.⁸¹

The demise of the real estate contract in a number of states, as well as the difficulty encountered with statutory remedies in other states, should lead us to question the advantage of the real estate contract. The advantage is that the vendor is willing to sell to a

79. See text accompanying notes 30-31, 48-51, *supra*.

80. See text accompanying notes 53-55, *supra*.

81. *Purchaser's Right to Restitution*, *supra* note 47, at 19.

purchaser with minimal assets because if the purchaser fails to make monthly payments toward the vendor's equity and the assumed mortgage, the vendor can recover his property without incurring the financial expense and loss of time required by judicial foreclosure. The continued use of the real estate contract in New Mexico seems to be primarily a method of avoiding judicial foreclosure. But why should vendors and purchasers of real property in New Mexico have to risk uncertain enforcement of contract terms and forfeiture of equity if they cannot afford a mortgage and judicial foreclosure? This suggests another possibility: legislative revision to allow use of the deed of trust and non-judicial foreclosure.

The successful long-term use of the deed of trust in California and other states shows that the deed of trust could also be used successfully in New Mexico. The relatively recent revision of the Arizona statutes to allow the use of the deed of trust provides a framework for similar revision of the New Mexico statutes. This would require repeal of the statute prohibiting the sale of real property under power of sale contained in any mortgage, mortgage deed, trust deed or any other written instrument,⁸² and adoption of statutes providing a procedure for non-judicial foreclosure.

VI. CONCLUSION

The already uneasy status of the real estate contract in New Mexico is left more unsettled by the decision in *Eiferle v. Toppino*. The New Mexico Supreme Court is hesitant to enforce the standard real estate contract forfeiture clause, the heart of the real estate contract and yet, the court is unwilling to decide that such a clause violates public policy. The clause remains valid but its enforceability may now be in question.

The real estate contract has fallen into disuse in a number of states in spite of both statutory and judicial reform, as the deed of trust with power of sale has become a common real property security device. The legislature should adopt a statutory redemption period to avoid inequitable results of default on real estate contracts, and a deed of trust statute to provide for non-judicial foreclosure.

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82. See note 39, *supra*.