CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION

IN CIVIL COURT

(42)

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LONG FAMILY LAND AND CATTLE COMPANY, INC.-RONNIE AND LILA LONG,

Plaintiffs,

vs.

EDWARD AND MARY MACIEJEWSKI and RALPH H. AND NORMA J. PSICKA, and THE BANK OF HOVEN,

Defendants.

MOTION FOR ORDER PERMITTING PLAINTIFFS TO EXERCISE THEIR OPTION TO PURCHASE

R-120-99

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Plaintiffs, Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long, move the Court for an order permitting Plaintiffs to exercise at this time their option to purchase their land back from the Defendant, Bank of Hoven, upon the following grounds:

1) The jury determined in special interrogatory one that the Bank breached the December 5, 1996 Loan Agreement (Exh. 6) between the Long Family Land and Cattle Company, Inc. and the Bank.

2) This Court has ruled that the Lease With Option to Purchase (Exh. 7) and the Loan Agreement (Exh. 6) "were part and parcel of the same agreement." (See Order dated 1-3-03, p. 10) This Court has previously ruled that the Loan Agreement (Exh. 6) and the Lease With Option to Purchase (Exh. 7) are related documents under the integrated document doctrine. See Battery Steamship Corp. v. Refineria Panama S.A., 513 F.2d 735 n.3 (2d Cir. 1975). "The Court must examine both documents to determine if the performance of promises made within

one agreement should be assessed by the promises referred to in the other." (See Order dated 9-30-02, p.7.)

3) The jury determined in special interrogatory two that the breach of the Loan Agreement by the bank prevented the Plaintiffs, Long Family Land and Cattle Company and Ronnie and Lila Long, from performing under the Lease With Option to Purchase.

4) This Court has previously held that a condition precedent is any fact except mere lapse of time which must occur before a duty of immediate performance by the promissor can arise. See Video Update v. Videoland, 182 F.3d 659 (8th Cir. 1999). As this Court stated, "a party is not bound to perform a contract in the time frame contracted for if the other party breaches prior to the required performance or commits an anticipatory breach of that contract." (See Order dated 9-30-02, p. 8.) That is exactly what happened in this case, as determined by the jury. (See Jury Interrogatory Two.)

5) Plaintiffs demonstrated at trial, and the jury determined, that Plaintiffs Longs' performance under the Lease With Option to Purchase was conditioned upon the Defendant Bank's performance of the Loan Agreement. Therefore, the Defendant Bank's breach relieved Plaintiffs of the obligation to perform under the time frames of the Lease With Option to Purchase Agreement. Where the bank immediately breached the loan agreement after it was signed on December 5, 1996, by failing to make the $70,000 operating loan or an emergency collateral preservation loan, and as a result of such breach, the Longs' loss or damage happened shortly thereafter in late January and early February of 1997, the two year time frame set out in the lease with option to purchase December 5, 1996, to December 5, 1998, never began to run. Defendant Bank's breach relieved Plaintiffs of the obligation to perform under the time frame of

the Lease With Option To Purchase. Defendant Bank's breach stopped the time running as of the date of the breach in December of 1996.

6) This Court ruled in the Order dated 1-3-03 p. 10, as follows:

> In light of the jury's verdict that the Bank did breach the loan agreement, and this Court's previous finding that the lease with option to purchase and loan agreement were part and parcel of the same agreement, the Court must rule against the Bank on the counterclaim for eviction. A party that has failed to comply with a lease with an option to purchase cannot seek to enforce the agreement through an eviction action. The jury advised the Court that the Bank's breach prevented the Longs from performing under the lease with an option to purchase. The Court therefore concludes that the Plaintiffs did not violate the lease with an option to purchase and their option to purchase remains intact.

7) Where the Court has concluded that the Plaintiffs' option to purchase their land remains intact, Plaintiffs seek an order of this Court permitting the Plaintiffs to exercise their option at this time and purchase their land back from the Bank.

8) Under the terms of the Lease With Option to Purchase the option purchase price for the farm real estate described therein (2,230 acres) is $468,000. (Exh. 7, para. A, p. 2.) Such purchase price is reduced by the net selling price of the house in Timber Lake over $10,000. (Exh. 7, para. F, p. 3.) The house was sold, and the amount to be deducted from the option purchase price is $16,478.64. (Exh. 15.) With the house deduction the option purchase price is reduced to $451,521.36 ($468,000 – $16,478.64 = $451,521.36). In addition, the Lease With Option to Purchase provides that all rent payments (CRP payments) received by the bank prior to the purchase of the real estate will be credited against the purchase price of the real estate. (Exh. 7, para. G, p. 3.) Plaintiffs paid rent by assigning their CRP payments to the bank. (See "Lease

Payments," p. 1) The Bank received payments of $44,198 for 1997 and $44,198 for 1998; thus, the amount of $88,396 shall be credited off the purchase price, leaving a balance of $363,125.36 ($451,521.36 – $88,396 = $363,125.36).

The Lease With Option to Purchase also provides that interest at 8.5% per annum shall accrue on the unpaid balance during the time frame December 5, 1996 to December 5, 1998. However, this time frame does not apply because the jury determined that the breach of the loan agreement by the bank prevented the Longs from performing under the lease with option to purchase. (See Special Interrogatory Two) Therefore, interest did not begin to accrue during the time frame in the lease with option to purchase, because the bank breached the agreements immediately after the agreements were signed on December 5, 1996. It would be manifestly unfair for the bank to accrue interest on the purchase price during the time frame December 5, 1996, to December 5, 1998, when the bank breached the Loan Agreement in December of 1996. From that date forward the Longs were denied the $70,000 operating loan and the loan to buy additional cattle as promised by the bank, which were the very tools the Longs needed to care for their livestock and increase their livestock income to enable them to buy their land back under the Lease With Option to Purchase.

The trial evidence supports this conclusion. Dennis Huber of the North and South Dakota Native American Business Development Center, United Tribes Technical College, Bismarck, North Dakota, testified that he and his assistant, Bret Maxon, were present at a meeting at the bank conference room in late October of 1996. He stated that BIA officer, Stacey Johnston, attended by speakerphone. Also in attendance were bank president, Dennis Jensen; and bank officers, Jim Nielsen and Charles Simon; and the bank's attorney, David Von Wald. Ronnie and Lila Long also attended the meeting. Dennis Huber testified that he and Bret Maxon

presented to the group the cash flow they had prepared which reflected the Loan Agreement and Lease With Option to Purchase, which were finalized and signed on December 5, 1996. He identified the cash flow that he prepared as Exhibit 8a. He testified that all parties present at the meeting approved his cash flow (Exh. 8a) and agreed that the Long operation under the loan agreement and the lease with option to purchase agreement would work.

The trial evidence shows that after the agreements were signed on December 5, 1996; the Bank came up with an entirely different cash flow, which it sent to the BIA by letter dated December 12, 1996. (Exh. 8) Dennis Huber and Ronnie Long testified they had never seen the Bank's cash flow before. The BIA rejected the bank's letter as an incomplete application, and requested that the bank submit a complete application. The bank never responded to the BIA and never did send a complete application to the BIA.

Dennis Huber's cash flow requires the Bank to provide $40,000 of the $70,000 operating loan to the Longs in November of 1996. (See Exh. 8a). Dennis Huber and Ronnie Long both testified that this operating money was necessary for the Longs to prepare their operation for winter, including moving the hay to the winter pasture where the cattle were located.

The bank breached the Loan Agreement as soon as it was signed December 5, 1996, by failing to advance the $70,000 in operating costs to the Plaintiffs, as promised, and in failing to loan $37,500 to Plaintiffs to purchase 110 additional cattle, as promised, to increase their income to enable them to buy their land back under the Lease With Option to Purchase. The Plaintiffs would not have had the catastrophic cattle losses they experienced if the $70,000 operating loan had been made by the bank after the agreements were signed in December of 1996, because the Plaintiffs would have been able to move their hay twenty miles to feed their

livestock. Plaintiff, Ronnie Long, testified that if the bank had made the operating loan as agreed, prior to the cattle losses, the cattle losses would have been prevented. He also testified that the loan to buy 110 additional cattle would have increased Plaintiffs' income. Had the bank advanced the $70,000 operating money to the Longs as agreed, and had the bank advanced the $37,500 cattle purchase money to the Longs as agreed, the Longs would have been able to feed and care for their cattle and increase their income as shown on Dennis Huber's cash flow (Exh. 8a), and would have been able to purchase their land back at the end of the two year time frame set out in the Lease With Option to Purchase. These were questions of fact for the jury to resolve, and the jury resolved these questions against the bank.

The Loan Agreement (Exh. 6) and the Lease With Option to Purchase (Exh. 7) were both signed December 5, 1996. The testimony of Ronnie Long was clear and at trial. He testified that the bank breached the Loan Agreement right after it was signed. The bank breached the Loan Agreement and the implied covenant of good faith and fair dealing (a) by failing to timely make a complete application to the BIA to increase the percent of BIA guarantee, (b) by failing to timely make the $70,000 operating loan, as promised, to enable the Longs to feed and care for their cattle, (c) by failing to timely make an emergency loan of up to $40,000 to preserve collateral and get feed to the Longs' cattle as authorized by the BIA and 25 CFR 103.22, and (d) by failing to make the cattle purchase loan, as promised. Ronnie Long testified based on his years of experience caring for cattle, that if the bank had loaned him the $70,000 operating money or an emergency protection loan in December of 1996, he could then have moved his hay 20 miles from the fields where it was baled to the winter pastures where the cattle were located some 20 miles away, and the cattle would have survived the winter weather. The jury apparently agreed.

The trial evidence established when the Plaintiffs' loss or damage occurred. Ronnie Long testified that his cattle died in winter storms in late January and early February of 1997. He testified that 230 cows and 260 yearlings died. The death losses were verified by the FEMA inspectors (Exh. 14). Thus, the evidence is clear that the Longs' damages, caused by the bank's breach of contract and covenant of good faith, happened in late January and early February of 1997.

The jury decided that the Bank's breach of the loan agreement prevented the Longs from performing under the Option to Purchase. (See Jury Interrogatory Two) Where the Bank breached the loan agreement as soon as the agreement was signed on December 5, 1996, and the Longs' losses and damages caused by the Bank's breach followed in late January and early February of 1997, interest of 8.5% should not begin to accrue during the time frame of December 5, 1996, to December 5, 1998, on the option purchase price as provided in the Lease With Option to Purchase. As this Court has previously stated, "a party is not bound to perform a contract in the time frame contracted for if the other party breaches prior to the required performance or commits an anticipatory breach of that contract." (See Order dated 9-30-02, p. 8.) Where the bank breached the agreements in December of 1996, the time frame in the lease with option to purchase of December 5, 1996, to December 5, 1998, does not apply. The bank's breach prevented the time frame from running. Such time frame never started running. Thus, the provision of the Lease With Option to Purchase that requires 8.5% interest to accrue on the option purchase price during the time frame of December 5, 1996, through December 5, 1998, does not apply.

9) The jury awarded Plaintiffs damages against the bank of $750,000 plus prejudgment interest. The purchase price of the land under the option to purchase of

$363,125.36, and the option purchase price will be paid immediately in full at this time by deducting such amount from the judgment entered against the bank after the judgment is entered on the record. The plaintiffs will file a partial satisfaction of the judgment in the amount of the purchase price when the plaintiffs receive a deed to the land.

10) When the option price is paid in full by deducting $363,125.36 from the judgment, the bank should deliver to Plaintiffs a warranty deed to the 2,230 acres, with a policy of title insurance showing good and merchantable title in Ronnie and Lila Long.

11) When the bank received the deed to the 2,230 acres of land, a policy of title insurance was issued to the bank, and the Longs paid $1,118.25 in land credit for such policy of title insurance (See Exh. 6). The bank subsequently sold parcel one of 960 acres to the Maciejewskis under a contract for deed (Exh. 13), and sold 320 acres to Psickas (Exh. 19). When Maciejewskis entered into the contract for deed with the bank, the Maciejewskis also received a policy of title insurance. Similarly, when the Psickas purchased the 320 acres they also received a policy of title insurance. This Court has concluded, "that the Plaintiffs did not violate the lease with an option to purchase and their option to purchase remains intact." (See Order dated 1-3-03 p. 10) Thus, the sale of the Longs' land by the bank to the Maciejewskis and the Psickas was subject to the Longs' option to purchase, which this Court has determined is still intact. When the Longs purchase their land from the bank at this time, the bank, the Maciejewskis, and the Psickas will not be damaged because they have full title insurance coverage in place.

WHEREFORE, Plaintiffs move this Court for an order permitting Plaintiffs to exercise the option to purchase at this time, and pay the full purchase price by deducting the full purchase price of $363,125.36 from the judgment.

Respectfully submitted this 24 day of January, 2003.

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

BY: James P. Hurley

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the Plaintiffs' Motion for Order Permitting Plaintiffs to Exercise Their Option to Purchase upon the person herein next designated, all on the date below shown, by depositing a copy thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in an envelope addressed to said addressee, to wit:

Mr. David A. Von Wald
Attorney at Law
P.O. Box 468
Hoven, SD 57450

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

Dated this 24 day of January, 2003.

James P. Hurley
JAMES P. HURLEY