

*Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2003-382

MARCH TERM, 2004

	} APPEALED FROM:
	}
Fred Magdoff and Amy Demarest	} Franklin Superior Court
	}
v.	} DOCKET NO. 172-03 Fc
	}
Ronald and Robin Hibbard	} Trial Judge: Dennis R. Pearson
	}
	}

In the above-entitled cause, the Clerk will enter:

This is an interlocutory appeal in an eviction action concerning an agreement between the lessors and the lessees of a farm. Defendants, the lessees, contend that the superior court erred by concluding that the parties= agreement did not create an equitable mortgage, which would have required plaintiffs, the lessors, to obtain possession of the farm through foreclosure rather than eviction proceedings. We conclude that we cannot decide the question presented to us until the superior court resolves other issues pending in the case. Accordingly, we dismiss the appeal as improvidently granted and remand the matter for further proceedings before the superior court.

Plaintiffs are the owners in fee simple of a 285-acre farm located in Georgia, Vermont. In January 1997, the parties entered into an agreement, entitled A LEASE/PURCHASE AGREEMENT,@ that allowed defendants to continue to farm the property. Under the terms of the agreement, defendants were required to make lease payments of \$2000 per month for sixty months, subject to change depending on increases or decreases in property taxes, insurance, or mortgage payments. The lease period was to begin on February 1, 1997 and end on February 1, 2002. Upon termination of the lease, defendants were required to quit claim any interest in the premises to plaintiffs, at which point plaintiffs could sell the farm to any other buyer. During the lease period, defendants were required to pay all utilities, while plaintiffs were obligated to pay all taxes and insurance. Under a provision entitled A OPTION TO PURCHASE,@ defendants were given the right to purchase the farm for \$230,000, less \$400 for each monthly lease payment made and any additional payments made toward purchase of the property. Plaintiffs were obligated to deliver to defendants a deed to the farm within thirty days of defendants providing written confirmation of their intent to purchase the property and demonstrating their ability to finance the purchase. In the event plaintiffs failed to do so, defendants could seek reimbursement for improvements to the land or a sum representing the difference between the stated purchase price and the fair market value of the property. In addition, plaintiffs were required to repay defendants the total amount paid against the purchase price, plus interest at a rate of eight percent per annum.

Defendants made monthly payments of \$2000 or more throughout the lease period, but they neither confirmed their desire to purchase the farm nor paid the balance of the purchase price. Defendants remained on the farm after the lease termination date, however, and continued to make lease payments. In April 2003, plaintiffs commenced an eviction action in the superior court, alleging that the lease had expired and that defendants owed over \$4000 in unpaid rent. Defendants moved to dismiss the eviction action, contending that the parties= agreement had created an equitable mortgage, and thus plaintiffs= only remedy was to initiate foreclosure proceedings, which would give defendants an opportunity to redeem the property. In May 2003, the superior court denied defendants= motion to dismiss, ruling that

the parties= agreement was closer to a A true option@ than a A contract for deed,@ and did not create an equitable mortgage. The court reserved judgment, however, on the issue of whether defendants were entitled to reimbursement for improvements to the land and sums paid toward the purchase price of the property. After the court denied defendants= motion for permission to appeal, plaintiffs moved for a writ of possession. In July 2003, the court granted plaintiffs= motion while reaffirming its opinion that the parties= agreement did not create an equitable mortgage. The court stayed issuance of the writ of possession, however, and granted defendants= renewed motion for permission to appeal. We denied plaintiffs= motion to dismiss the appeal as improvidently granted.

Unfortunately, we now conclude, upon review of the record, that the matter must be remanded to the superior court for further proceedings before we can resolve the issue of whether the parties= agreement created an equitable mortgage, thereby requiring plaintiffs to foreclose on defendants= interest in the property. The record before us is extremely limited B for the most part consisting of the lease agreement and an agreed statement of facts. In its May 2003 order, the superior court expressly stated that it was withholding judgment as to whether the A somewhat ambiguous@ language of the agreement= s option provision entitled defendants to be reimbursed for improvements to the farm and those portions of the lease payments that would have been applied to the purchase price of the farm had they exercised their option. In its July 2003 order, the court reaffirmed its decision that the parties= agreement did not create an equitable interest in the farm. But the A critical factor@ cited by the court was its bare statement that the option provision did not allow plaintiffs to retain sums paid by defendants toward the farm= s purchase price B the very question that the court stated in its May 2003 order would have to be resolved at a later time. In short, the court arrived at its ruling by assuming the answer to a question that it had not yet resolved.

It is understandable that the court would consider, in determining whether the parties= agreement created an equitable mortgage, whether the agreement obligated plaintiffs to reimburse defendants for any equitable interest they acquired as the result of the agreement. Indeed, the case law cited by the parties suggests that the key question, in determining whether a lease/purchase agreement created an equitable mortgage, is whether the agreement required that the lease payments to be applied toward the purchase price of the subject property. See Tromblay v. Dacres, 135 Vt. 335, 339-340 (1977). Here, the superior court appears to reason that the parties= agreement did not create an equitable interest because the option provision required plaintiffs to reimburse defendants for any interest accruing under the agreement. But the court does not appear to have actually determined whether the agreement requires plaintiffs to reimburse defendants for improvements and sums paid toward the purchase price of the farm, even though defendants did not exercise their option to purchase the property. Until the superior court resolves this question, we do not have all of the facts we need to determine whether the agreement created an equitable interest that warrants protection in foreclosure proceedings. The superior court has equivocated on whether the option provision is ambiguous, and thus may have to take evidence and examine the circumstances surrounding the agreement before construing that provision. Accordingly, we must remand the matter for further proceedings without resolving the question presented to us.

The above appeal is dismissed as improvidently granted. The matter is remanded for the superior court to resolve, as expeditiously as possible, the remaining issues pending in the case. The superior court= s conditional stay of its order issuing a writ of possession remains in effect unless and until lifted or amended by the court.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

Paul L. Reiber, Associate Justice