ANSWER 1 TO PERFORMANCE TEST - B

MEMORANDUM

TO: Logan Dillard
FROM: Applicant
RE: In re Ryan Cox

This memorandum addresses the legal position and options of Ryan Cox regarding the sale of real property in Columbia.

Is there an enforceable land installment contract?

The first issue is whether the contract signed by Adam Cox as seller and dated July 9, 2002 is enforceable, or whether there is an oral agreement between the parties that satisfies the Statute of Frauds.

Agreement: Meeting of Minds

To have any type of enforceable contract there must first be an agreement. This means there must be a "meeting of the minds" regarding the essential terms, including price of the contract. If there is no such meeting of the minds, as was the case in Cavallaro, there is no agreement to serve as the basis of a contract.

The idea of selling the Columbia property to the Belmonts was first raised by Mr. Cox's daughter, Emily. She told Mr. Cox that the Belmonts "might be interested" in buying the house. However, at this point, there was no agreement. Neither party had evidenced a set desire to buy or sell.

The second exchange between the Belmonts and Emily came much closer to an agreement. As Mr. Cox described, he considered various options, including a land installment contract. This period resemble the negotiations in Cavallaro when plans were redefined and new pricing formulated. Mr. Cox and the Belmonts likewise negotiated price. Mr. Cox initially asked for $130,000, but settled on $120,000.

According to Mr. Cox and confirmed by Emily, the Belmonts and Mr. Cox reached a meeting of the minds. The price was set at $120,000. It seems that the Belmonts reviewed the written contract and agreed to its terms. The essential terms included Mr. Cox's continued use of the barn, residing there in his motor home, etc.

This agreement was made orally between the parties in May. Thus, the threshold issue of finding whether there was meeting of the minds is met. Further evidence is the recognition of the agreement's terms in the letters from the Belmonts' lawyers.

Statute of Frauds

The agreement described above was made orally. It was memorialized in a writing that was signed by Adam Cox. The Columbia statute of frauds requires that a contract for the sale of land is unenforceable unless the essential terms are in writing and the writing is signed by the party being charged. (See Cavallaro).

Here, only Adam Cox signed the written contract. The Belmonts, against whom Mr. Cox wants to enforce the contract, did not sign it. The contract cannot be enforced against them unless the Statute of Frauds is somehow satisfied.

One option would be satisfaction through another written document signed by the Belmonts read in conjunction with the failed contract. So far, we know of no other writings. The letter from the Belmonts' attorney seems to acknowledge the terms of the contract; however, there is no internal reference between the documents as required by Cavallaro. In addition, the Belmonts themselves did not sign it.

Partial Performance

The Statute of Frauds may also be satisfied by the partial performance doctrine. An oral agreement to sell real property is enforceable if there is partial performance, meaning 1) delivery of possession of the property and 2) acquiescence by the parties to the terms of the contract. See Cavallaro.

Mr. Cox's situation in this regard is favorable. He moved out of his house following the oral agreement and the Belmonts moved in. The agreement was made in May and possession was delivered in June. It is not clear whether the Belmonts actually lived at the house. From the interview, it seems that Marsha Belmont did but her husband Nicky was traveling with the carnival until October. Nicky was there at some times, as shown by the meeting of Mr. Cox and Nicky in the house in September.

Possession alone, though, is not enough. In Binninger, the purchaser took possession of the property but the seller was not found to have acquiesced in either the possession or the contract terms.

Mr. Cox clearly acquiesced in the possession. The issue is whether the Belmonts acquiesced to the essential terms. The fact that the Belmonts paid the requested $40,000 down payment supports acquiescence. Had they paid less, as the purchaser in Binninger did, it would be a counteroffer because unilateral subsequent modification requires consent.

In addition, the Belmonts did not object to Mr. Cox's staying on the property in his motor home. More information is needed on whether they left the pole barn in his exclusive possession. The terms of the contract provided for Mr. Cox's remaining on the property and retaining sole access to the barn. If the Belmonts took possession and allowed these things to continue, their acquiescence may be inferred. Mr. Cox must show this

acquiescence by clear and positive proof, as required by Binninger.

In sum, Mr. Cox has a strong case for proving an enforceable contract exists. Although there were preliminary negotiations, the parties reached a meeting of the minds on the essential terms in May. This contract was oral and thus potentially unenforceable under the Statute of Frauds. However, because both possession and acquiescence are provable, the doctrine of part performance satisfies the statute.

<u>What are the seller's remedies</u>?

Assuming (as presented above) that the land installment contract is enforceable, the seller is entitled to certain remedies.

The contract itself provides for forfeiture if the buyer fails to – for a period of 30 days – pay seller sums due, pay taxes or assessments, or comply with any covenants.

Mr. Cox reported that the monthly payments were received for August, September and October. However, the monthly payments since then have not been paid. In addition, the $12,000 due in November was not paid. The failure of the Belmonts to pay gives rise to seller's remedies.

As explained in Tanner, the seller in a land installment contract retains legal title to the property even though the buyer takes immediate possession. The property is a security for the buyer's obligation.

The seller's election to terminate the contract – "forfeiture" – is an exclusive remedy. This means that further action on the contract is barred. But the seller can still recover damages if the amount already paid by the buyer is less than the fair rental value of the property plus deterioration or destruction from buyer's use.

Mr. Cox can seek to terminate the contract. So far, the Belmonts have paid $43,000. The fair rental value of the property is $1,000 per month. The Belmonts have been in possession since June of 2002. It is now July of 2003, meaning the total rental value is $13,000. Given that the furniture – when purchased – was worth $10,000, it is impossible/unlikely that the damage or deterioration will reach $30,000. Mr. Cox can keep the full $43,000, even though it exceeds the rental value plus damages. See Tanner.

Tanner also makes it clear that specific performance is not available to the seller. Because Mr. Cox (Adam) bargained for money, damages are adequate compensation.

Thus, if the contract is enforceable, Mr. Cox can force forfeiture but cannot get specific performance, which was the option he wanted.

What if the Contract is not enforceable?

If there is no enforceable contract between the parties, then their legal relationship must be analyzed.

Legal Relationship

Columbia Landlord and Tenant Act provides the relevant definitions for this situation.

The parties do not have a lease. A lease is an oral or written agreement that transfers possession of real or personal property §704. As discussed above, if there is an agreement it does more than just transfer possession, it attempts to transfer title.

There are two types of tenancies without leases. A periodic tenant is a tenant with possession who pays rent by period. This could have described the relationship in August, September and October when the Belmonts made monthly payments of $1,000.

Because no payments have been made since October, the legal relationship between the parties is best described as a tenancy at will. The Belmonts are in possession of the property – at least the house and furniture, not the pole barn. However, no periodic payments have been made. The Belmonts' possession is with the permission of Mr. Cox.

If their possession were unauthorized, it would constitute a trespass. See Hansen. Because Mr. Cox gave consent for their occupation of the premises, a tenancy at will exists.

Remedies Available

Section 710 defines the notice required to terminate a leaseless tenancy.

If there is an express agreement between the parties regarding termination, it controls. If there is any such agreement it would need to be proved by clear and convincing evidence. The (failed) contract provided for forfeiture. See above.

Termination may also be effected by a surrender of the premises. The Belmonts have not vacated the property.

If a periodic tenancy were in effect, it could end at the end of a rental period. This would be the 9th of the month. However, a tenancy at will can be terminated at any time, as long as 28 days notice is given.

Section 714 provides specific termination procedures if failure to pay rent or commission of waste are the basis [sic]. A tenancy at will can be terminated if the landlord gives the tenant notice to pay rent (or remedy the default) or vacate within 5 days.

Mr. Cox can terminate the tenancy by giving just 5 days notice because it is based on the Belmonts' commission of waste. Mr. Cox described the house as "trashed" and the furniture as "ruined." The presence of untrained house pets and lack of cleaning constitute "waste."

Mr. Cox can also file an action for damages at law for waste under Section 720. Vogel defines waste as neglect or misconduct resulting in material damage to the property. The things Mr. Cox observed in September have probably gotten worse.

Mr. Cox can recover compensatory damages, but unjust environment must be avoided. Vogel. Although the furniture was purchased for $10,000, it was probably not worth that much when the Belmonts took possession.

Because there was no express agreement to buy or lease the furniture, the Belmonts' possession and use was authorized only by Mr. Cox's implied consent. In Vogel, the court limited damages for waste of real property (like furniture) to the value of the thing destroyed or removed. Paying Mr. Cox the purchase price would unjustly enrich him. The Belmonts' were entitled to ordinary use and wear. It was only misuse or abuse that constitute waste.

Procedures

As mentioned above, Mr. Cox should first terminate the tenancy. He should give at least five days notice in writing that substantially informs the Belmonts of the intent to terminate and date of termination.

Mr. Cox should also file suit for damages. Section 740 permits inclusion in the judgment the costs of the prevailing party and reasonable attorney's fees.