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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 20100159
Burleigh County District Court No.: 08-08-C-02172

Jim Kost,

Appellee,

v.

Allen M. Kraft,

Appellant.

APPELLEE'S BRIEF

APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORALBE GAIL HAGERTY

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STATEMENT OF FACTS

1. Appellant Allen Kraft ("Kraft") and Appellee Jim Kost ("Kost") are former partners of the partnership of Kost and Kraft Harvesting, which did custom combining work. (App. 6). Throughout the partnership relationship, Kraft and Kost shared work and equipment. (Docket No. 43, Plaintiff's Response to Defendant's Motion for Summary Judgment, Exh. F Affidavit of Jim Kost; Docket No. 49, Plaintiff's Response to Defendant's Supplemental Motion for Summary Judgment, Exh. 3, Excerpt of Kraft Deposition, p. 39, lines 24-25, p. 40 lines 1-10).
2. Although the parties agree that the partnership was dissolved in 2003, some of the deposition testimony indicates that the relationship may have continued into 2004. Kost and Kraft continued to share some work and equipment in 2003 and 2004. (Docket No. 63, Exh. A, Excerpt of Kraft Deposition, p. 29, lines 15-25, p. 30, lines 1-25, p. 31, lines 1-13).

Appellant's Bankruptcy Proceedings

3. Kraft was married to Chondra Kraft, who is the daughter of Jim Kost. (App. 7).

4. Allen and Chondra Kraft commenced a Chapter 12 bankruptcy by filing a voluntary Chapter 12 bankruptcy petition on June 7, 2005. (App. 8).
5. Kraft signed the bankruptcy filing and asserted under oath that he was not making any false statements or concealing any property and that all the information within was complete and accurate. Kraft made the same declaration under oath for all subsequent amendments to the original bankruptcy filing. (Docket No. 55, Exhibits attached as Kraft Deposition Exhibits 15-18).
6. Kraft did not disclose the existence of the claims against Kost which he raises as counterclaims in this case in his Schedule B, Amended Schedule B, Second Amended Schedule B, or Third Schedule B fi led with the bankruptcy court. (Docket No. 62, Brief Resisting Motion for Summary Judgment, Exh. C-E).
7. Kost held an auction on March 17, 2007, to liquidate his farm equipment and machinery. Kraft claimed an interest in some of the auctioned property, as well as other machinery and equipment owned by Kost. (App. 8).
8. The proceeds of the March 17, 2007 were voluntarily deposited with the Court until the dispute between the parties could be resolved. (App. 9).
9. Judge Robert O. Wefald dismissed the Petition for Voluntary Deposit of Funds with the Court on August 8, 2007, instructing the parties to resolve the issues of dissolving and winding up the partnership and suggesting that they litigate if they were unable to resolve the issues between them. (App. 8.)
10. Kost initially filed suit on August 26, 2008, requesting that the Court resolve disagreements surrounding the dissolution of the partnership and distribution of partnership assets. (Docket No. 2, Complaint). Kraft's counterclaims arose in

response to the September 11, 2008 filing of the first Amended Complaint. (Docket No. 6, Answer and Counterclaims).

11. The existence of the claims against Kost was not disclosed to the bankruptcy trustee until after they were asserted as counterclaims to Kost's action to wind up the Kost and Kraft Partnership. It was only when faced with potential dismissal of the counterclaims through summary judgment that Kraft discussed the claims with the bankruptcy trustee. (See Docket No. 62, Defendant's Brief Resisting Plaintiff's Motion for Summary Judgment, Exh. D).

Appellant's Counterclaims

12. Kraft asserted two counterclaims. First, he claimed he suffered damages from purported verbal agreements that Kost would rent Kraft's harvesting equipment and pay its fair rental value. (App. 16). Kraft claimed he was damaged in the approximate amount of $150,000.00 because Kost did not pay Kraft for the purportedly leased equipment. (App. 16). Second, Kraft claimed that he was not compensated for custom work he did for Kost. (App. 16).

13. Kost denied the existence of the oral agreements and asserted the affirmative defense of the statute of frauds found at N.D.C.C. § 41-02.1-10. (App. 20). Because there is no writing signed by Kost sufficient to indicate a lease contract has been made, Kost asserted that the purported verbal agreement is unenforceable. (App. 20).

14. Kost also asserted that some or all of Kraft's counterclaims were barred or Kraft was estopped from asserting the claims because Kraft did not disclose the

existence of such claims in the bankruptcy proceeding commenced on June 7, 2005. (App. 20).

15. On January 14, 2010, Judge Gail Hagerty issued an order granting Kost's motion for summary judgment. (App. 22-27). Judge Hagerty found that the alleged oral agreements were unenforceable under the statute of frauds and that the part performance exception to the statute of frauds did not apply. (App. 26).

16. Judge Hagerty also found that Kraft's counterclaims were not properly disclosed during the bankruptcy proceedings, and thus Kraft's claims were barred under several legal doctrines. (App. 27).

LAW AND ARGUMENT

ISSUE 1: Whether the district court erred in granting summary judgment as to Kraft's counterclaims for leased harvesting equipment when it concluded that the part performance exception to the statute of frauds did not apply

I. The District Court Did Not Make a Finding of Fact When It Ruled that Kraft's Counterclaims Were Barred by the Statute of Frauds.

17. In the Brief of Appellant ("Kraft Brief"), Kraft alleges that the district court made findings of fact "that payment was not required for the equipment and that instead it appeared that the agreements between Kraft and Kost 'consisted mostly of the exchange of work and/or equipment.'" Kraft Brief, ¶29.

18. Although it is true that the wording of the district court's order referenced by Kraft relates to factual information, it is not true that the district court actually made a finding of fact.

19. In the passage quoted by Kraft, the district court was discussing the part performance exception to the statute of frauds, and more specifically, the rule that

"part performance of an oral contract which is consistent only with the existence of the alleged contract removes it from the statute of frauds." (App. p.26).

20. Thus, although the district court noted that payment was not required, and indicated that it appeared that the agreements between Kraft and Kost consisted of exchanges of work and equipment, these statements were intended to convey only that Kraft did not allege any part performance that would have been consistent *only with* the existence of the contract he alleged. The district court was noting in the quoted passage that there could be another obvious explanation for Kraft's alleged part performance based on the facts in the record. Even if the wording of the district court's order indicates the district court might be more likely to find one way or another, this does not equate to the district court actually making a finding of fact. The district court's conclusion that payment was not required was not a finding of facts contrary to those asserted by Kraft; it was merely a recognition that the part performance alleged by Kraft did not point *exclusively* to his alleged contract, and therefore the part performance exception did not apply as a matter of law, and, *ipso facto*, no payment was required because Kraft's alleged contract could not be enforced.

21. Kraft cites to Hoops v. Selid for the proposition that "[b]y definition the granting of summary judgment is improper where it is necessary for the court to make a finding of fact." Kraft Brief, ¶25 (citing Hoops v. Selid, 379 N.W.2d 270, 272 (N.D. 1985)). In Hoops, the district court specifically stated "the Court *finds*" with respect to a factual issue, and it was the explicit use of this language that the North Dakota Supreme Court focused on in its review. 379 N.W.2d at 271, ("We

must, however, take the court's words as their plain meaning dictates. The words quoted above constitute a factual finding...."). In this case, the District Court used no such explicit language, and any ambiguity in the language used should be construed as discussed above.

II. To Apply the Partial Performance Exception to an Alleged Lease Contract the Alleged Partial Performance Must Unmistakably Point to the Existence of the Alleged Lease Contract.

22. Kraft argues that because "the statute of frauds relating to goods is a relaxed statute of frauds," the test that requires that the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement does not apply. See Kraft Brief, ¶¶ 31-32. To support this argument, Kraft relies primarily on Hofmann v. Stoller, 320 N.W.2d 786 (N.D. 1982) and N.D.C.C. §§ 41-02-08(3)(c) (regarding sales of goods). Kraft asserts that because the language of the "received and accepted" exception from the statute of frauds regarding sales is the same as the "received and accepted" exception from the statute of frauds regarding lease of goods, (N.D.C.C. § 41-02.1-10(1)), they should be treated exactly the same.

23. Although Kost agrees that the logic of the Court in Hofmann is sound with respect to an alleged *sale* of goods, this logic and its underpinnings do not apply to an alleged *lease* of goods.

24. In the Hofmann case, the district court used a "greater weight" of evidence standard to determine if the part performance exception applied, and the defendant/appellant argued on appeal that the standard should have been "clear and convincing" evidence. Because the Court in Hofmann noted that the U.C.C.

statute of frauds was relaxed, it used the more relaxed standard and refused to apply the "non-code" law standard. The Court's discussion of this standard is not applicable to its discussion of the test outlined in Buettner v. Nostdahl, 204 N.W.2d 187 (N.D. 173), that requires that the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement (the "Buettner test").

25. The Court in Hofmann stated that "[i]n respect to the sale of goods under the [U.C.C.], the contract need not be 'exclusively referable' to the oral contract." Id. (citing Gerner v. Vasby, 250 N.W.2d 319, 325 (Wis. 1977)). The Court based its decision regarding whether the partial performance need be "exclusively referable" on Comment 2 to Section 2-201, (N.D.C.C. §41-02-08), as did the Wisconsin court in Gerner v. Vasby, which also dealt with a sale of goods.

26. Specifically, the Court in Hofmann placed significant emphasis on one particular passage of the Official Comment to Section 2-201, which is not found in the Official Comment to Section 2A-201:

> The overt actions of the parties make admissible evidence of the other terms of the contract necessary to a just apportionment. *This is true even though the actions of the parties are not in themselves inconsistent with a different transaction such as a consignment for resale or a mere loan of money.*" 1 Uniform Laws Annotated, Official Comment, § 2-201, U.C.C., p. 148.

Hofmann, 320 N.W.2d at 791 (emphasis in original). The caveat emphasized in the language from the Official Commentary is significant because it does not properly apply to a lease transaction; which explains why this statement is absent from the commentary to Section 2A-201. Thus, the rationale in Hofmann for

refusing to apply the Buettner test does not apply to a lease of goods under Section 2A-201 (N.D.C.C. § 41-2.1-10).

27. Section 2A-201 (N.D.C.C. §41-02.1-10) doesn't simply deal with leases. "This section, although closely parallel to Article 2-201, conforms to custom and usage in lease transactions." U.C.C. Text § 2A-201, Official Commentary, ¶1. Lease transactions are different in nature than sales transactions, and this must be taken into consideration when deciding when exceptions to the statute of frauds apply. Section 2A-201, for example, does not contain an "exception for transactions where payment has been made and accepted." U.C.C. Text § 2A-201, Official Commentary, ¶1. "Leases often involve a complex, on-going relationship between the lessor and lessee, and it is often important that there be a record that affords a basis to believe that the proffered evidence rests on a real transaction unless, as in Article 2, a substitute for a record described in subsection (4) fulfills the same function." Id. at ¶2. Although Section 2A-201 (N.D.C.C. §41-02.1-10) does contain the exception for "goods that have been received and accepted by the lessee," the above commentary and distinctions indicate that the drafters of the U.C.C. were aware of the fundamental differences in the nature of and the customs and usage in lease transactions as opposed to sales transactions.

28. Neither the commentary of the "received and accepted" exception to the statute of frauds for *leases* nor the definitions of receipt and acceptance provide any guidelines as to how a party's actions under these provisions are interpreted in terms of the part performance exception. "[N]on-Code law is, of course, to be utilized to supplement the provisions of the U.C.C. This is only to be done,

however, in situations where non-Code law has not been displaced *by a particular U.C.C. provision*." Merwin v. Ziebarth, 252 N.W.2d 193, 197 (N.D. 1977) (emphasis added). No U.C.C. provision displaces the rule in Buettner regarding whether the part performance refers exclusively to the alleged contract, therefore it is proper to look to non-code law to provide guidance regarding the interpretation of U.C.C. language.

29. The Hofmann Court's statement that "non-code law is not to be used in situations in which non-code law has been displaced by a particular provision" must be read in context. In citing to Merwin the Court was refusing to apply non-code law to an area where the U.C.C. had clearly displaced non-code law. In Merwin, the Court was considering the sufficiency of a writing, and refused to apply a restrictive test from Johnson v. Auran, 214 N.W.2d 641 (N.D.1974), which required a writing contain several distinct items of clearly intelligible information in order to satisfy the requirement of a sufficient writing. The Court noted that the U.C.C. specified the requirements for a writing sufficient to overcome that statute of frauds in the sale of goods. Therefore it refused to apply the more restrictive requirements of Johnson in which the Court was dealing with non-code law.

30. The Buettner test, or its logical equivalent, should apply to the partial performance exception in the statute of frauds for lease transactions. A lease transaction, as recognized by the Official Commentary to the U.C.C., is different in nature, and in custom and usage, than a sales transaction. This difference

militates in favor of applying some form of the Buettner test to the exceptions to the statute of frauds for lease transactions.

31. To illustrate, the Official Commentary to Section 2-201, U.C.C. refers to actions which might be consistent with transactions other than a sale, such as a "consignment for resale or a mere loan of money." The example of a loan of money applies to the exception to Section 2-201 regarding payment, which as stated previously, is inapplicable to Section 2A-201. A consignment for resale, however, raises an important point. With a sales transaction, the conveyance of goods essentially equates to the passing of title to those goods. The receipt and acceptance of the goods in an alleged sales transaction would seem to indicate the obvious existence of *some* contractual sales arrangement between the parties, though the precise terms could vary. In other words, the conveyance of goods in an alleged sales transaction raises a strong implication of a contract because there would be no reason for the conveyance without the existence of a sales transaction; *ipso facto*, the conveyance itself evidences the existence of a sales transaction.

32. A lease transaction, however, is inherently different in nature because there are multitudinous other reasons and explanations for the conveyance of goods on a temporary basis. The temporary conveyance of goods related to an alleged lease contract could be explained in any number of ways: Party A is requesting that he be allowed to store something in a more secure place on the property of Party B; Party A is allowing a friend to borrow his truck for the day; Party A is engaging Party B in a bailment agreement; Party A and Party B are simply sharing their

possessions as needed, etc. The example of a bailment raises an issue of particular concern: If the "receipt and acceptance" of goods in an alleged lease contract need not be exclusively referable to the alleged contract, then a party could make a bailment agreement for the benefit of the bailor, and turn around, and rather than pay the bailee for his service, attempt to force the bailee to pay him! The nature of a bailment is similar on the surface to a lease contract, and it is this similarity that highlights the need for a rule within the lease contract context that requires the partial performance of receipt and acceptance to be *exclusively* referable to the alleged contract.

33. One example of the many possible other arrangements that might look like a lease contract is a situation where the parties are simply sharing possessions. This is particularly true when those parties are a father and former son-in-law who operated as a partnership for several years, as in the current case. In his deposition, Allen Kraft essentially admits that this was the case. The relevant exchange follows:

> Q. Did you use any of Jim Kost's equipment after March of 2003?
>
> A. Yes, I did.
>
> Q. Did you do any farm work or combining work with Jim Kost after March of 2003?
>
> A. We still did some -- I mean, we helped each other back and forth in 2003 and 2004. But we were no longer jointly farming any land together.
>
> Q. Okay, so when you say helping each other, you would be helping him on his farm and he would be helping you on your farm?
>
> A. Yeah.

Q. Did you pay him in cash every time he came and worked on your farm?

A. No, I did not.

(Docket No. 63, Exh. A, Excerpt of Kraft Deposition, p.29, lines 15-25, p.30, lines 1-4).

34. More importantly, the facts of this case highlight the importance of requiring, in the context of an alleged lease, that the alleged partial performance be exclusively referable to the alleged contract. As opposed to a sales transaction, the nature of a lease transaction is such that, on the surface, the actions of the parties could point to a multitude of arrangements quite different from a lease contract. The implication of receipt and acceptance with respect to an alleged *sale* of goods is that the conveyance obtrusively signifies a sales transaction. Reliance on this implication is sorely misplaced in the context of an alleged lease transaction, however, because receipt and acceptance of goods could be the result of an arrangement vastly different from a lease transaction. As such, under Section 2A-201 (N.D.C.C. §41-02.1-10), the partial performance of receipt and acceptance, within the factual circumstances of the case, must unmistakably point to the existence of the alleged lease contract, and not some other plausible arrangement such as the sharing of farm work and equipment between a father and son-in-law formerly farming as a partnership.

35. The District Court properly concluded that the part performance exception to the statute of frauds as asserted by Kraft did not apply. The District Court properly concluded that the agreement was unenforceable under the statute of frauds.

ISSUE 2: Whether the district court erred in granting summary judgment as to Kraft's counterclaims when it concluded that Kraft's counterclaims did not appear to be properly disclosed during bankruptcy proceedings

I. Res Judicata Bars Kraft's Counterclaims Against Kost.

36. In his brief, Kraft ignores the fact that he filed a Chapter 12 bankruptcy action on June 7, 2005. The United States Bankruptcy Court for the District of North Dakota issued an Ordering Confirming Plan for Allen Kraft's Chapter 12 Plan which was filed and entered on December 15, 2005. In Re Allen M. Kraft, dba Kraft Farms, dba Dakota Production Farms, and Chondra L. Kraft, Bankruptcy No. 05-31171 (at Docket # 56) (Bkrtcy.D.N.D 2005). "Under 11 U.S.C.A. § 1141(a), a bankruptcy court's confirmation of a reorganization plan is binding on the debtor and any creditor, and, for purposes of res judicata, confirmation is a valid, final judgment by a court of competent jurisdiction." Littlefield v. Union State Bank, Hazen, N.D., 500 N.W.2d 881, 884 (N.D. 1993). The same res judicata effect is applied to confirmation of reorganization plans in Chapter 12 bankruptcies. See 11 U.S.C. §1227; see also, In re Wruck, 183 B.R. 862, 865 (Bkrtcy.D.N.D. 1995).

37. "As such, [Kraft] may not assert rights which are inconsistent with the provisions of a confirmed plan. A confirmed Chapter 12 plan has binding and preclusive effect due to the need for finality in establishing the rights and obligations of the various parties affected by a plan of reorganization." In re Wruck, 183 B.R. 862, 865 (Bkrtcy.D.N.D. 1995).

38. Kraft failed to list the counterclaims pertinent to this appeal in any of his disclosures to the bankruptcy court. (Docket No. 55, Memorandum in Support of

Motion for Summary Judgment, Kraft Deposition Exhibits 15-18). Kraft confirmed, under oath in his deposition, that he did not make any false statements or conceal any property in the Schedules B. (Docket No. 55, Memorandum in Support of Motion for Summary Judgment, Exhibit A, pp. 21-25).

39. Kraft might attempt to reply that in his case, there was another proceeding for his Chapter 7 bankruptcy, and despite the fact that Kraft himself *never disclosed his counterclaims* to the bankruptcy estate, they were nonetheless disclosed by Kost during the pendency of the Chapter 7 proceedings. This is a spurious argument. To the extent Kraft has claims of any veracity against Kost, Kost was entitled to participate in the Chapter 12 proceedings, and would have participated, had he known Kraft believed he had claims against him for over $150,000. Kraft is barred by the doctrine of res judicata from asserting that he now has valid counterclaims against Kost after asserting in *two* bankruptcy cases that the counterclaims he is now pursuing did not exist.

II. Kraft Did Not Adequately Disclose the Substance of Kraft's Counterclaims Against Kost to the Bankruptcy Trustee.

40. Kraft asserts that he "provided documentation of the settlement agreement on Kraft's counterclaims against Kost" and other materials to the district court. Kraft Brief, ¶34. It is important to look at the language of the documents submitted by Kraft. (See Docket No. 62, Brief Resisting Motion for Summary Judgment, Exhibits C-E). The first document is an Amended Schedule B – Personal Property, filed by Kraft in August of 2007 with the bankruptcy court. (Docket No. 62, Exhibit C). Of note on this first document is that Kraft listed three lawsuits, one against Kost for auction proceeds (which was the basis of Kost's

original Complaint herein). It did not, however, list any claims against Kost that relate to Kraft's counterclaims in this matter.

41. The next document is an email from bankruptcy trustee Michael Wagner to James Coles (Kraft's attorney below), and a response from James Coles back to Michael Wagner. (Docket No. 62, Exhibit D). In the first email from trustee Michael Wagner, Mr. Wagner informs Mr. Coles that he is the trustee of Kraft's bankruptcy estate, and that a cause of action entitled Kost v. Kraft is one of the assets of the bankruptcy estate. Mr. Wagner then questions why Mr. Coles is actively involved in that case on behalf of the debtor "since the debtor has no pecuniary interest in the cause of action." (Id.) Mr. Wagner's reference to "the cause of action entitled Kost v. Kraft" as "one of the assets of the estate" shows Mr. Wagner is referring to the cause of action that Kraft actually listed on his bankruptcy schedules (which did not include his counterclaims). Although trustee Wagner was aware that there were counterclaims involved in the lawsuit, there is nothing that indicates he had knowledge of precisely what those counterclaims entailed, or that they were not related to the disputed auction proceeds. (See Docket No. 62, Exhibits C-E).

42. The description of the lawsuit in the settlement agreement between the debtors and the bankruptcy estate fully describes the dispute of Kost's initial Complaint, which is a dispute over auction proceeds, (which, again, *was* listed by Kraft in his disclosures in bankruptcy). (Docket No. 62, Exhibit E).

43. Kraft makes much of the fact that at some point the counterclaims were disclosed to the trustee. Kraft does not, however, mention that the claims were disclosed

after he brought them in a separate legal proceeding, and more importantly, that they were disclosed to the trustee by *Kost*. Kraft's purchase of bankruptcy estate's interest in "the lawsuit" came *after* Kost disclosed the specifics of the claims to the trustee and brought a motion to dismiss the claims because Kraft had no standing to assert them. Again, it was only after Kost brought a lawsuit to wind up the Kost and Kraft Partnership business that Kraft's allegations and claims materialized, and it is apparent that they are retaliatory, likely mendacious or at the very least, unenforceable and barred.

III. Kraft's Arguments that He Is Not Barred or Estopped as a Result of His Nondisclosure Are Not Persuasive.

44. Kraft argues that the district court "erroneously relied upon Littlefield v. Union State Bank, Hazen, N.D., 500 N.W.2d 881, 883 (N.D. 1993) and the cases cited therein for the holding that a debtor is equitably estopped from bringing an action which they have failed to disclose in a bankruptcy proceeding." Kraft Brief, ¶35. Kraft relies heavily upon In re Atkinson, 62 B.R. 678, 679 (Bkrtcy D.Nevada 1986), to show that Littlefield doesn't apply. Kraft Brief, ¶¶35, 43. Kraft asserts that the cases relied on by Kost and the district court "involve factual settings which differ markedly from this case" and proceeds to emphasize that Kraft did not "deprive the trustee of adequate knowledge." Kraft Brief, ¶35. Kraft also emphasizes, as the court did in In re Atkinson, that "there was no doubt as to the existence of the counterclaims." Id.

45. The cases Kraft relies on (In re Atkinson and Rosinski v. Boyd (In re Rosinski), 759 F.2d 539, 541-52 (6th Cir. 1985)) to show the District Court erred in relying on Littlefield are inapposite and deal with whether a bankruptcy case should be

reopened or whether a debtor should be allowed to amend schedules. They do not deal with res judicata or estoppel. Further, in the Atkinson case, the debtor *had actually listed* the litigation in the bankruptcy disclosures. As noted, for example: Kraft cites to In re Atkinson when he argues that the Littlefield cases differ markedly, that there was no doubt as to the existence of the counterclaims, and that he did not deprive the trustee of knowledge of the pending litigation. Kraft Brief, ¶35; see also In re Atkinson, 62 B.R. 678, 679 (Bkrtcy D.Nevada 1986). While important in Atkinson, neither the existence of the counterclaims nor whether the trustee knew of the pending litigation are relevant to the applicability of estoppel and res judicata. Estoppel is based upon *Kraft's* action or inaction rather than the trustee's action or knowledge.

46. Kraft also argues that "the bankruptcy court had exclusive jurisdiction to determine whether to approve the sale to Kraft, and this Court should not have jurisdiction to question that sale." Kraft Brief, ¶45. No one is questioning the bankruptcy court's sale. The trustee noted in the settlement agreement that the "Estate makes no representations or warrantys [sic] with respect to the Lawsuit and the consideration paid to the Estate shall not be reduced on account of any outcome of the Lawsuit. The effect of this settlement is that the Estate will claim no further interest nor assume any obligations with respect to the Lawsuit." (Docket No. 62, Exhibit E). The trustee stated clearly that he was not making any representations as to whether Kraft's claims were viable. Applying the statute of frauds to Kraft's claims, barring them by res judicata, or estopping Kraft from prosecuting the counterclaims are all actions irrelevant to his purchase of said

claims from the bankruptcy estate. No one is arguing that Kraft has no claims; indeed, Kost would not be forced to defend what he considers a frivolous appeal if Kraft had no claims. Kost's argument is simply that Kraft is barred or estopped from enforcing those claims, and for good reason.

47. Overall, Kraft fails to draw a distinction between the doctrines of res judicata, equitable estoppel, and judicial estoppel. As discussed *infra*, the doctrines have different considerations, only some of which Kraft references in his brief. Regardless, the doctrines of res judicata, equitable estoppel and judicial estoppel apply to bar Kraft's claims. Further, he fails to address Kost's claims that waiver and laches also bar his counterclaims.

IV. Equitable Estoppel Bars Kraft from Asserting His Counterclaims.

48. Equitable estoppel is codified in North Dakota law by N.D.C.C. §31-11-06. The elements of equitable estoppel are:

> 1. conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than those which the party subsequently attempts to assert;
> 2. the intention, or at least the expectation, that such conduct will be acted upon by, or will influence, the other party or persons; and
> 3. knowledge, actual or constructive, of the real facts.

Karch v. Equilon Enterprises, L.L.C., 286 F.Supp.2d 1075, 1078 (D.N.D. 2003) (citing O'Connell v. Entertainment Enterprises, Inc., 317 N.W.2d 385, 389 (N.D. 1982)).

49. "Proof of fraud, positive misrepresentation, or unconscionable conduct akin to fraud are necessary to invoke equitable estoppel." Karch, 286 F.Supp.2d at 1078,

(citing Farmers Coop. Ass'n of Churchs Ferry v. Cole, 239 N.W.2d 808, 811-12 (N.D. 1976). In addition, the party claiming the estoppel must show:

> 1. lack of knowledge and of the means of knowledge of the truth as to the facts in question;
> 2. reliance, in good faith, upon the conduct or statements of the party to be estopped; and
> 3. action or inaction based thereon, of such a character as to change the position to statute of the party claiming the estoppel, to his injury, detriment, or prejudice.

Karch 286 F.Supp.2d at, 1078. "In order to succeed on his equitable estoppel argument, [Kost] must show that [Kraft] intentionally and deliberately acted in a manner that amounted to a false representation, a concealment of material facts, or an impression that the facts were otherwise than those which [Kraft] now attempts to assert." Id.

50. As noted *supra*, Kraft did not disclose his counterclaims to the bankruptcy court in any of his Schedules B, and he testified under oath that in those Schedules he made no false statements and concealed no property. (See Docket No. 55, Memorandum in Support of Motion for Summary Judgment, Kraft Deposition Exhibits 15-18; Exhibit A, pp. 21-25).

51. In applying the elements of equitable estoppel to the present case: 1. Kraft's conduct amounts to a false representation to, and a concealment of material facts from, the bankruptcy court by his numerous failures to disclose the existence of the claims against Kost to the bankruptcy court; 2. Kraft had, at a minimum, the expectation that his conduct would influence Kost, insofar as Kost would certainly have hired a lawyer and responded had Kraft disclosed claims of over $150,000 against Kost during his Chapter 12 proceedings; and 3. according to

Kraft, his claims all arose prior to the confirmation of the Chapter 12 reorganization in December of 2005, and he was aware of the existence of the claims prior to the reorganization and long before he decided to assert his counterclaims. (Docket No. 28, Memorandum in Support of Motion to Dismiss, Exhibit B).

52. In applying the requirements of Karch, Kost can demonstrate: 1. Kost lacked knowledge and the means of knowledge of that his former son-in-law intended to assert claims against him for over $150,000, and believed that the disputed auction proceeds, actually listed by Kraft in his Schedules, was the only claim Kraft had against him; 2. Kost relied, in good faith, upon the fact that Kraft did not intend to assert any claims for over $150,000 against him; and 3. Kost did not participate in Kraft's Chapter 12 bankruptcy proceedings, but certainly would have had he known Kraft planned to assert claims against him for over $150,000.

53. Kost should have been entitled to participate in Kraft's Chapter 12 bankruptcy proceedings, and would have participated had he been aware that Kraft believed he had claims against Kost amounting to over $150,000.

54. It should be noted that "[e]stoppel is *ordinarily* a question of fact." Nelson v. Johnson, 2010 ND 23, ¶30 778 N.W.2d 773 (citing Peterson Mech., Inc. v. Nereson, 466 N.W.2d 568, 571 (N.D.1991); Global Acquisitions, LLC v. Broadway Park Ltd., 2001 ND 52, ¶¶18-20, 623 N.W.2d 442). In this case, however, there are undisputed facts that entitle Kost to summary judgment. As has been noted several times, nowhere in Kraft's Schedule B or the latter four amendments to his Schedule B, did he disclose his counterclaims to the

bankruptcy court, and he testified under oath that in those Schedules he made no false statements and concealed no property. (See Docket No. 55, Memorandum in Support of Motion for Summary Judgment, Kraft Deposition Exhibits 15-18; Exhibit A, pp. 21-25). Kraft does not dispute that such representations were made, under oath, on several occasions. Therefore, Kost is entitled to summary judgment as a matter of law based on the undisputed facts of the case.

V. Judicial Estoppel Bars Kraft from Asserting His Counterclaims.

55. "Judicial estoppel prohibits a party from assuming inconsistent or contradictory positions during the course of litigation." Dunn v. North Dakota Dept. of Transp., 2010 ND 41, ¶10, 779 N.W.2d 628 (citing BTA Oil Producers v. MDU Res. Group, Inc., 2002 ND 55, ¶14, 642 N.W.2d 873). The North Dakota Supreme Court "has consistently assumed, without deciding, the doctrine of judicial estoppel applies in North Dakota." Dunn, 2010 ND 41, ¶10 (citing DeMers v. DeMers, 2006 ND 142, ¶¶18-19, 717 N.W.2d 545; Ingebretson v. Ingebretson, 2005 ND 41, ¶¶16-18, 693 N.W.2d 1; Stenehjem ex rel. State of N.D., 2002 ND 128, ¶¶13-15, 649 N.W.2d 532; BTA Oil Producers, 2002 ND 55, ¶¶13-18, 642 N.W.2d 873).

56. This Court referenced the doctrine of judicial estoppel in Littlefield v. Union State Bank, Hazen, N.D., 500 N.W.2d 881, (N.D. 1993). In Littlefield, the Court cited to Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414 (3rd Cir. 1988) and Scarano v. Central R. Co. of N. J., 203 F.2d 510 (3rd Cir. 1953). In Oneida, the court noted that "[e]ven absent a specific mandate to file a counterclaim, complete disclosure is imperative to assist interested parties in making decisions

relevant to the bankrupt estate. We are also mindful of the equitable concept of judicial estoppel. This doctrine, distinct from that of equitable estoppel, applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted." Oneida, 848 F.2d at 419. "The difference between judicial estoppel and equitable estoppel is the focus of the two doctrines. 'Judicial estoppel looks to the connection between the litigant and the judicial system while equitable estoppel focuses on the relationship between the parties to prior litigation.'" In re Hoffman, 99 B.R. 929, 935 (N.D.Iowa 1989) (quoting Oneida 848 F.2d at 414). "Judicial estoppel lies when a party, after assuming a certain position in a legal proceeding, attempts to assume a contrary position. It applies whether the position first assumed has been successful or not." In re Hoffman, 99 B.R. at 935.

57. The court in Scarano explained: "The 'estoppel' of which, for want of a more precise word, we here speak is but a particular limited application of what is sometimes said to be a general rule that 'a party to litigation will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits.'" Scarano, 203 F.2d at 512-513.

58. As explained *supra*, Kraft testified under oath in his deposition that his Schedules B were accurate and complete when filed, and these were filed in both his Chapter 12 and his Chapter 7 bankruptcy proceedings. Kraft attempts to argue that because the undisclosed assets, after being disclosed by *Kost* to the bankruptcy estate, were eventually administered, that he now has the freedom to assert the

counterclaims at issue. This is simply not the case. "Judicial estoppel looks to the connection between the litigant and the judicial system while equitable estoppel focuses on the relationship between the parties...." In re Hoffman, 99 B.R. at 935.

59. The important consideration here is not with Kraft's creditors, but rather with the judicial system. Kraft is not allowed to intentionally take entirely contrary positions regarding his assets and claims in courts of law. Because Kraft represented to the bankruptcy court through his filings that no other claims existed, he should not be allowed to later return to court and assert that they do. "Such use of inconsistent positions would most flagrantly exemplify that playing 'fast and loose with the courts' which has been emphasized as an evil the courts should not tolerate. And this is more than affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice." Scarano, 203 F.2d at 513.

CONCLUSION

60. The district court did not err in granting summary judgment as to Kraft's counterclaims for the following reasons:

61. Kraft's counterclaims are barred by the statute of frauds and are not excepted from the writing requirements of the statute of frauds by the doctrine of part performance. The part performance exception and relaxed statute of frauds standards governing *sales* of goods under the U.C.C. are not applicable to *leases* of goods due to the inherently different nature of the transactions.

62. Kraft is barred by the doctrine of res judicata from asserting his counterclaims against Kost by virtue of the confirmation of his bankruptcy reorganization plan.

63. Kraft's counterclaims are barred by equitable and judicial estoppel because he did not disclose the counterclaims against Kost in his bankruptcy filings.

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Dated this 10th day of November, 2010.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 20100159
Burleigh County District Court No.: 08-08-C-02172

The following document was electronically served on this date to Chad R. McCabe at crmccabe@hotmail.com.

APPELLEE'S BRIEF

Dated this 10th day of November, 2010.

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