20100297

FILED
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CLERK OF SUPREME COURT
NOVEMBER 23, 2010
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

David Locken, Plaintiff/Appellant, vs. Loren Locken as Trustee of the Virgil and Marjorie Locken Family Trust under Trust Agreement dated December 27, 2002; Jon Locken and Loren Locken as co-personal representatives of the Marjorie Locken Estate; Jon Locken and Loren Locken, as co-personal representatives of the Virgil K. Locken Estate; Jon Locken, Inc.; Loren W. Locken, Inc.; Jon Locken; Loren Locken; Bernard Vculek as Trustee of the Bernard L. Vculek Revocable Trust; Marlene Vculek as Trustee of the Marlene Vculek Revocable Trust; and the unknown spouses, the unknown heirs, administrators, executors, successors, devisees, legatees, assigns and personal representatives of any kind of all of the above-named defendants and all other persons unknown claiming any rights, title or interest in, or lien or encumbrance upon the property described in the Complaint, Defendants/Appellees.	Supreme Court No. 20100297

APPEAL FROM JUDGMENT DATED JULY 21, 2010, IN THE DISTRICT COURT
OF DICKEY COUNTY, STATE OF NORTH DAKOTA,
THE HONORABLE JOHN E. GREENWOOD, PRESIDING

REPLY BRIEF OF APPELLANT

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INTRODUCTION

[¶ 1] Freely interchanging the words "due" and "paid," as if these words had the same meaning, the Appellees' Brief essentially argues that the term "**due** date" has the same meaning as the term "**payment** date" when the payment is made prior to the due date. This conclusion is incorrect.

I. The "payment date" and the "due date" maintain distinct meanings, even if the payment is made prior to the "due date."

[¶ 2] As explained by this Court in Langer v. Gray, 15 N.W.2d 732 (N.D. 1944), the "due date" for filing a tax return is "the time appointed or required for filing the return." Id. at 735. In Langer, the taxpayer's return was originally due on March 15, 1939, but he received an extension to file it until May 31, 1939. Id. Notwithstanding that the tax return was *actually* filed on May 22, 1939, the "due date," from which the statute of limitations was calculated, remained May 31, 1939. Id. Thus, the "due date" does not change even if the item to be due (in Langer, the filing of the tax return) is actually completed prior to the due date. Id.

[¶ 3] Appellees' Brief does not quarrel with the holding in Langer; instead, it attempts to argue that the trial court's holding is consistent with the holding in Langer, stating: "[The trial court's] conclusion is consistent with this Court's decision in Langer v. Gray where it determined that the due date was the date the parties mutually agreed to be the due date (emphasis added)." (Appellees' Brief, ¶ 23.) The second part of this statement can be true–Langer can stand for the proposition that the "due date" was the date the parties mutually agreed to be the "date the last payment was **due**." However, to say that the trial court's conclusion is consistent with Langer misapprehends the holding of Langer, which did not find that the "due date" changed if the item to be due was

completed prior to the "due date." 15 N.W.2d at 735. Instead, the "due date" remained May 31, 1939, even when the return was filed prior to the due date, on May 22, 1939. Id. Contrary to this Court's holding in Langer, the trial court found the "due date" changed when the item to be due (i.e., payment) was completed prior to the "due date." (App. 50) (finding that when the payment was made, "March 1, 1998, was no longer the due date of the last payment."). The trial court's decision should be reversed.

II. New arguments should not be considered for the first time on appeal.

[¶ 4] Appellees' Brief brings up new legal arguments that were not raised in the trial court, and they should not be considered for the first time on appeal. As explained by this Court:

> One of the touchstones for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court so it could intelligently rule on it. The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories.

In re Hirsch, 2009 ND 135, ¶ 13, 770 N.W.2d 225.

[¶ 5] To the extent the Court considers the new legal arguments, they will be addressed in this Brief. Appellees' Brief claims the doctrine of merger erases any significance of the payment terms called for in the contract for deed, arguing that such terms were merged into the Warranty Deed to Virgil Locken. (Appellees' Brief, ¶ 21.) This argument misapprehends the merger doctrine, which provides that "where a greater and a less estate **meet in the same person** the less estate is at once merged in the greater[.]" Rouse v. Zimmerman, 212 N.W. 515, 516 (N.D. 1927) (emphasis added). Here, of course, the problem is that the two estates–the one created in the contract for deed and the one created by the Warranty Deed–did *not* meet in the same person. Marjorie Locken was not included in the Warranty Deed despite the requirements of the Contract for Deed. As Appellees acknowledge: "The Contract for Deed required the

grantors 'to convey unto the [**grantees**] by deed of warranty upon the prompt and full performance of said [grantees] of their part of the agreement.'" (Appellees' Brief, ¶ 18.) The doctrine of merger does not have any significance in this case.

[¶ 6] The Appellees' Brief also argues, for the first time in this appeal, that N.D.C.C. § 28-01-15(2) applies rather than N.D.C.C. § 28-01-42. In making this argument, Appellees cite Diocese of Bismarck Trust v. Ramada, Inc., 553 N.W.2d 760 (N.D. 1996). However, this case does not support Appellees' arguments. In Diocese, the Court reaffirmed a basic principle regarding statutory construction, explaining that "a specific statute controls a general statute[.]" Id. at 766. Here, N.D.C.C. § 28-01-42 specifically pertains to the enforcement of a contract for deed, which statute is more specific than the general 10-year limitation for an action based upon "a contract contained in any conveyance" in § 28-01-15.

[¶ 7] Moreover, Appellees' argument regarding N.D.C.C. § 28-01-15 has an incorrect premise: Appellees allege this action is a reformation action for which the statute of limitations began to accrue at the time the Warranty Deed to Virgil Locken was *executed*. This Court has rejected such an argument:

> [W]e follow the weight of authority and hold that a reformation action accrues, or comes into existence as a legally enforceable right, **not at the time the instrument in question is executed**, but at the time the facts which constitute the mistake and form the basis for reformation have been, or in the exercise of reasonable diligence should have been, discovered by the party applying for relief.

Ell v. Ell, 295 N.W.2d 143, 151-52 (N.D. 1980) (citations omitted) (emphasis added). Thus, in Ell, this Court found that the statute of limitations began to accrue not when the deed to be reformed was executed but rather when a title examination revealed the deficiency in the title. Id. at 152. Here, a title examination revealed the deficiency in the title in October 2007, which was just three months prior to the commencement of this

lawsuit. (Docket No. 49, Danny Smeins Aff., ¶ 24.) Accordingly, even under the Appellees' new theory, the statute of limitations has not yet expired.

III. Conclusion

[¶ 8] The trial court erred in determining that under N.D.C.C. § 28-01-42, the term "due date" means the date the payment was paid, rather than the date the payment was due. David Locken respectfully requests that the Judgment of the trial court be reversed.

Dated: November 23, 2010.

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David Locken v. Loren Locken, et al. **Supreme Court No. 20100297**

STATE OF NORTH DAKOTA)
) **CERTIFICATE OF SERVICE**
COUNTY OF CASS)

I hereby certify that on November 23, 2010, I caused the **Reply Brief of Appellant** to be filed electronically with the Clerk of the Supreme Court by e-mailing a true and correct copy of both to **supclerkofcourt@ndcourts.com** and to be served upon the attorney for Appellee, Michael D. McNair, by e-mailing a true and correct copy to **mike.mcnair@mlcfargolaw.com**.

The original of the foregoing is being held in my office.

Dated this 23rd day of November, 2010.

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