20110294

IN THE SUPREME COURT OF NORTH DAKOTA

Working Capital #1, LLC, Appellee, v. Quality Auto Body, Inc., and, Bradley R. Hubner, Appellant.	Supreme Court File No. 20110294 Grand Forks Co., Civil No. 18-2011-CV-00837 APPELLANT'S BRIEF

APPEAL FROM JUDGMENT AND ORDER OF EVICTION OF COMMERICIAL PROPERTY DATED AUGUST 11, 2011 ENTERED IN DISTRICT COURT, NORTHEAST CENTRAL JUDICIAL DISTRICT GRAND FORKS, NORTH DAKOTA THE HONORABLE SONJA CLAPP, PRESIDING.

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QUESTIONS PRESENTED

I. Whether the district court improperly ordered the Defendant to be evicted from a commercial property located within the County of Grand Forks, North Dakota.

II. Whether the District Court improperly awarded attorney fees.

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JURISDICTION

[¶ 1] The North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D. R. App. P. Rule 3(a).

SUMMARY OF THE ARGUMENTS

I. [¶ 2] The District Court improperly evicted the Appellant because the court improperly determined that the provisions in the eviction statute had been satisfied and further because the Appellant was not a hold over tenant.

II. The District Court improperly evicted the Appellant because the eviction action contemplated matters outside its limited scope.

III. The District Court improperly awarded attorney fees because the award was based on contractual provisions, time spent on negotiations and services unrelated to the eviction action.

OPINION BELOW

[¶ 3] Grand Forks County District Court Sonja Clapp entered a Findings of Fact, Conclusions of Law and Order evicting the Defendant from his commercial Property on the 11th day of August, 2011 because the court found that the Defendant was a hold over tenant, had materially breached the lease contract and had interfered with the quiet enjoyment of the co-tenant's use of the property. (Appellant Appx. p. 1-11). A subsequent amended judgment awarded attorney's fees of $19,11.50 was filed September 27, 2011. (Appellant Appx., p. 40-41).

STATEMENT OF CASE

I. PROCEDURAL DISPOSITION

[¶ 4] This matter is on direct appeal from a Northeast Central Judicial District, Grand Forks County decision by the Honorable Judge Sonja Clapp.

II. STATEMENT OF FACTS

[¶ 5] On March 22, 2010 the Defendant, Quality Auto Body (hereinafter "QAB"), a North Dakota registered LLC entered into a lease of commercial premises located in the city of Grand Forks, North Dakota. (Appellant Appx., p. 19). The owner of this property is the Plaintiff, Working Capital LLC (hereinafter "Working Capital"). (Appellant Appx., p. 12). The lease was for a period of one year from April 1, 2010 to March 31, 2011. (Appellant Appx., p. 12). The lease included a clause to allow renewal for one (1) year at a time, up to five (5) times. Id. On February 15, 2011, QAB provided Working Capital with a notice of its intent to renew the lease. (Appellant Appx., p. 2).

[¶ 6] Working Capital then informed QAB that it was in default on various provisions in the contract and directed QAB to cure the defaults before the lease would be extended. Id. In addition to the defaults Working Capital demanded that QAB pay a security deposit of $4,250 as well as increased rent of $4,250. (Appellant Appx., p. 3).

[¶ 7] On April 1, 2011 QAB wired the April rent payment. Id. On or about April 5, 2011 Working Capital received a check for the security deposit of $4,250 which was returned for non-sufficient funds. (Appellant Appx., p. 3-4). Subsequently QAB did furnish a security deposit which was received on April 15, 2011. Id.

[¶ 8] That same day Working Capital served notice of Default and Termination of Lease upon QAB. Id. In this letter Working Capital offered to relet the premises to QAB on different terms. Id. Working Capital asserted that QAB rejected this offer. Id.

[¶ 9] On May 6, 2011 a letter was sent indicating that QAB was to vacate or an eviction action would be taken. (Appellant Appx., p. 4). Further the letter explained that the May rent would be deposited with the court. Id. The lower court determined that the

May and June rents *were* tendered but not the July rent as of the date of the hearing. (Appellant Appx., p. 4, ln. 13-14).

[¶ 10] A complaint for eviction was filed in this matter in the District Court of Grand Forks, ND on June 27, 2011. (Appellant Appx., p. 21). The eviction hearing was held on July 12, 2011. The lower court explained that the eviction action was proper because they found that QAB had held over after the termination of the lease, acted in a manner that unreasonably disturbed the other tenant's peaceful enjoyment of the premises and violated material provisions of the lease agreement. (Appellant Appx., *generally* p. 1-11).

STANDARD OF REVIEW

[¶ 11] "In an action tried without jury, a district court's findings of fact are governed by a clearly erroneous standard of review under N.D. Civ. P. 52 (a). Nelson v. Johnson, 2010 ND 23, ¶ 31, 778 N.W.2d 773, 782 (*citing* In re Estate of Elken, 2007 ND 107, 735 N.W.2d 842). "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, we are left with a definite and firm conviction the district court made a mistake." Id. (*citing* Doeden v. Stubstad, 2008 ND 165, ¶ 19, 755 N.W.2d 859). "A trial court's conclusions of law are fully reviewable on appeal." H-T Enters v. Antelope Creek Bison Ranch, 2005 ND 71, ¶ 6, 694 N.W.2d 691 (*citing* Fladeland v. Gudbranson, 2004 ND 118, ¶ 7, 681 N.W.2d 431).

[¶ 12] "Questions of law are reviewed de novo." Green v. Green, 2009 ND 162, ¶ 5, 772 N.W.2d 612 (*citing* Interest of J.K., 2009 ND 46, ¶ 14, 763 N.W.2d 507). Where a trial court exercises its discretion after weighing the equities of the case, we will not

interfere in the absence of a showing that its discretion was abused. Schwarting v. Schwarting, 354 N.W.2d 706, 708 (N.D. 1984) (*citing* Zimmerman v. Campbell, 245 N.W.2d 469, 471 (N.D. 1976). "A trial court abuses its discretion when is acts in an arbitrary, unreasonable, or unconscionable manner. Id. (*citing* Fleck v. Fleck, 337 N.W.2d 786, 789 (N.D. 1983).

LAW AND ARGUMENT

I. The District Court Improperly Found That The Provisions Of The Eviction Statute Were Satisfied.

[¶ 13] As indicated in the complaint, the Plaintiff brought the action citing subsections 4, 7 & 8 of N.D.C.C. § 47-32-01. Id. The lower court based the findings of fact and conclusions of law on these provisions. (Appellant Appx., p. 9).

[¶ 14] The issue regarding these claims is whether the lower court's findings of fact were clearly erroneous when finding that the Plaintiff met the burden of proving the summary eviction elements. There are three provisions cited in the complaint. (Appellant Appx., p. 21). The law and argument will address each provision separately. Additionally basic common law explanations will be given with supplemental case law to support the explanations for each issue.

[¶ 15] **A. First is the issue of subsection 4,** "A lessee, in person or by subtenant, holds over after the termination of the lease or expiration of the lessee's term, or fails to pay rent for three days after the rent is due." N.D.C.C. § 47-32-01 (4).

[¶ 16] Quality Auto Body argued at the lower court, as provided by N.D.C.C. § 47-16-06, that acceptance of rent after the tenant remains in possession of the property

after the expiration of the lease presumes that the parties renewed the lease for the same period and time as the previous lease, not to exceed one year. (Appellant Appx., p. 28).

[¶ 17] The lower court erred in finding the Plaintiff rebutted this presumption because QAB, "failed to correct the defaults in a timely manner as requested..." (Appellant Appx., p. 10). This error is due to the fact that the statute, N.D.C.C § 47-16-06 does not create a "rebuttable" presumption rather it is a presumption only. As testified to in the lower court the Plaintiff did accept rent on at least two occasions after the period in which the lease expired. (Hrg. Tr. July 12, 2011 at p. 46, ln 9-15.) Additionally the court made this same finding of fact on page 4 of the judgment. (Appellant Appx., p. 4).

[¶ 18] The N.D.C.C. § 47-16-06 operates to extend the period of the lease for another similar term so as not to exceed one year. If payment is accepted the statute triggers an extension for another year. The only presumption to rebut at that point is not that the Defendant failed to correct "defaults" but rather that the statutorily presumed period of extension was sometime less than one year.

[¶ 19] If this statute creates a presumption of renewal unless there exists evidence to the contrary, the Plaintiff did not present evidence that the lease was not presumptively extended rather, they present evidence that the Defendant was not willing to accept the increased rent amounts demanded by the Working Capital. (Appellant Appx., p. 4). If it is true that QAB rejected the new lease agreement that does not negate the presumption that arose due to Working Capital accepting payments after the expiration of the lease or even after an alleged material violation occurred. Judge Clapp's conclusion is not grounded in law. It misinterprets and misapplies how the extension statute operates.

[¶ 20] Subsequent to the alleged expiration of the lease agreement, the presence of alleged material violations, and the failure to accept the higher rent amounts QAB furnished rent payments, which were accepted. (Hrg. Tr. July 12, 2011, p. 46, ln. 6-17). These acts trigger application of the statute and therefore by law the lease extends for an additional year.

[¶ 21] Further the lower court found that QAB did provide notice of its intent to renew the lease on February 15, 2011. (Appellant Appx., p. 2). The lease agreement outlines this clause. (Appellant Appx., p. 12). Judge Clapp found that the failure to pay the security deposit on time caused the lease to not be renewed and therefore QAB held over after the termination. (Appellant App., p. 9-10). Judge Clapp writes that, "While QAB expressed their interest to renew the lease, it failed to do so in a number of respects." (Appellant Appx., p. 9, ln 17). Yet the only reason cited for "failing to do so" was that QAB did not pay the security deposit in a timely manner. That payment was made and received according to the findings. (Appellant App., p. 4). The lease provision only requires, "Tenant must provide written notice to Landlord of its intent to renew the lease no later than 30 days prior to the expiration of the Lease." (Appellant Appx. p. 12, clause 1).

[¶ 22] QAB did not merely "express interest" in renewing the lease as Judge Clapp suggests, they explicitly complied with the renewal clause by submitting the February letter. This clause does not require the security deposit to be made at the time the renewal is noticed. By operation of the contract the lease renewal was properly noticed and the lease extended for one year. Therefore on April 1, 2011 the lease was valid and even if the security deposit was not paid in a timely manner rents were later

tendered to the landlord and even this act would cause renewal under the statutory extension.

[¶ 23] B. **Second is the issue of subsection 8,** "The Lessee violates a material term of the written lease agreement between the lessor and the lessee." N.D.C.C.§ 47-32-01 (8).

[¶ 24] Here the statute operates on a "material term" of the lease agreement. Essentially it can be argued that the statute is ultimately referencing a "material breach" of a contract. A material breach is, "A breach of contract that is significant enough to permit the aggrieved party to elect to treat the breach as total (rather than partial), thus excusing that party from further performance and affording it the right to sue for damages." Black's Law Dictionary 200 (8th Ed. 2004).

[¶ 25] A "total" material breach is a material breach that cannot be cured. *See generally* Restatement (Second) of Contracts § 236, comments and illustrations. A breach cannot be cured if it is either impossible to cure or if a reasonable amount of time to cure the defect has expired. *See generally* Restatement (Second) of Contracts 236 (b) & 237 (1981). Under the restatements a "total material breach" justifies cancellation or discharge of remaining duties of the contract. *See generally* Restatement (Second) of Contracts § 243, comment a, (1981). A "partial" material breach is one that is able to be promptly cured or can be cured in a reasonable time. Id at § 237, comment b. This defect can manifest into a total material breach if it is not cured within a reasonable time. See *Generally* id.

[¶ 26] In contrast to these breaches is a "non-material" breach. A "non-material" breach exists where substantial performance has occurred and the injured party may not

cancel the contract or suspend its own performance rather it is simply entitled to damages that arise from the non-material breach. Restatement (Second) of Contracts § 236(2) & comments. While every breach gives rise to a party seeking damages only a material breach allows either suspension of performance or cancellation of contract. Id. In summary, the materiality of a breach depends on whether it is impossible to cure or if the time for curing the defect has passed. Any other curable breach or material breach which still has time to be cured is a partial breach.

[¶ 27] In Judge Clapp's findings of fact several violations of the lease agreement were mentioned. (Appellant Appx., p. 10). However as these findings apply to the "material violation" provision of the summary eviction statute, there was no explanation that any of the defaults were material to the extent they were incurable. There is only a conclusory indication, in section 4 of the conclusions of law, in which the lower court asserts that that QAB violated material provisions of the lease. Id at 4. However there is no explanation as to how these defaults were either impossibly incurable or the period for the cure had expired such that damages would not be an adequate remedy justifying cancellation of the contract. Indeed the summary eviction statute, in providing a remedy where a material provision has been violated, is essentially a statutory justification for cancellation of a contract. The effect of the eviction statute mirrors the remedy upon a total material breach because they both allow cancellation of the contract. That is why it is important to determine how to interpret the "material violation" provision.

[¶ 28] The Appellant asserts here that the "material violation" provision of the summary eviction statute must be read and interpreted in a manner similar to that of a "material breach" in contract law. This is because the materiality of a violation of a

particular provision is directly bound to the lease agreement whose interpretation and adjudication falls under contract law. Therefore without the court explaining that there exists an impossibility to cure or where the time has expired for a cure to remedy the grievance it cannot summarily award an order of eviction. Here the court has not made such a finding thus rendering the judgment as one that is clearly erroneous as it fails to properly interpret the law.

[¶ 29] The findings of fact are peppered with references as to operation under the contract and failure of QAB to perform. However the findings lack any specific finding that there was a total material breach such that it could not be cured or there was a partial material breach and the time to cure had expired to the extent it rose to the level of a total material breach. In order to sustain a claim under the "material term of the written lease agreement" provision in § 47-32-01(8) the court was obligated to find that the violation was either impossible to cure or could not be cured within a reasonable time. None of the six (6) provisions mentioned in the findings of fact indicate that they exist in this state of incurability. That this distinction was not made is important because without the existence of a "total material breach" the court should not have awarded such a remedy to the Plaintiff.

[¶ 30] C. **Third is the issue of subsection 7**, "A lessee or a person on the premises with the lessee's consent acts in a manner that unreasonably disturbs other tenants' peaceful enjoyment of the premises." N.D.C.C. § 47-32-01 (7) 2010.

[¶ 31] The statute itself provides no definition for "peaceful enjoyment". N.D.C.C § 47-16-13.2 (Tenant Obligations) also shares this similar terminology, "Conduct oneself and require other persons on the premises with the tenant's consent to conduct themselves

in a manner that will not disturb the tenant's neighbors' peaceful enjoyment of the premises." Although this statute designates obligations in a "dwelling unit". Id. The only other similar terminology is used in conjunction with implied covenants as outlined by N.D.C.C § 47-04-26 (2), "For quiet enjoyment;" Here, in regards to property rights, quiet enjoyment has generally contemplated a relatively high level of intrusion. Quiet enjoyment is defined as, "The possession of land with the assurance that the possession will not be disturbed by a superior title." Black's Law Dictionary 570 (8th Ed. 2004).

[¶ 32] There is no case law that outlines what the standard of "peaceful enjoyment" is. But it is important to consider that if "peaceful enjoyment" is akin to "quiet enjoyment", a disturbance of quiet enjoyment contemplates a significantly high degree of intrusion and not merely a nuisance or some lesser invasion of property rights. The reason is because of the heavy remedy for the summary eviction. Any other, more casual, interference in property rights is properly remedied by a claim for damages or injunction. Therefore this provision should be interpreted so that, "unreasonably disturbs the other tenant's peaceful enjoyment of a premises", contemplates interference to the degree that causes the other tenants to be divulged of their actual or constructive possessory rights or alternatively has resulted in some manifestation such that a claim for damages has been made. Or construed in a manner so that eviction is the only available remedy after damages or an injunction are deemed exhausted.

[¶ 33] Any alternative argument suggesting that an unreasonable disturbance is a subjective standard would allow even the smallest of interferences to justify eviction so long as they were deemed unreasonable.

[¶ 34] In Judge Clapp's Finding of fact she states, in section 9: "QAB interfered with other tenants' lawful use of the premises." (Appellant Appx., p. 5). This section begins by citing the lease clause that prohibits interference with a "shared system". The findings do not address disturbing the quiet enjoyment of the tenants' as a matter of law but rather as an analysis of alleged contractual violations. There are basically 4 areas of concern addressed by the court. (Appellant Appx. at § 9, p. 5-7). Parking, restricting the "fenced-in" area, water and an air compressor usage and use of digital signage. (*See generally* id). The court then finds that the "above" interferences were found but did not find sufficient evidence that the digital signage had been interfered with. (Id at p. 7).

[¶ 35] Regarding parking issues the testimony indicates occurrences were cyclical and photos were offered into testimony from "two summers ago". (See Hrg. Tr., July 12, 2011at 82 ln. 25, 83, ln. 2). It was alleged that certain QAB vehicles were parked in a manner that blocked Braaten's Auto sales, one of the tenants. While initially Mr. Braaten testified that QAB through its owner Brad Hubner engaged in, antagonistic, harassing, and threatening conduct. (See Hrg. Tr. at 82, ln. 5, July 12, 2011). Yet Mr. Braaten testified only that vehicle has been parked in such a manner as to be "nearly up against" a walk-in door or such that access to Mr. Braaten's tow truck was "inhibited". (See Hrg. Tr. at 80, ln. 19-21, July 12, 2011).

[¶ 36] When QAB cross examined Mr. Braaten about parking complaints and about QAB having parking complaints about similar conduct that Braaten's Auto had allegedly committed the court sustained an objection by Working Capital suggesting that such issues were outside the scope of an eviction action. (Hrg. Tr. at 130, ln. 5, July 12,

2011). Here the issue was parking complaints and the court allowed the Plaintiff to make their claim while restricting the Defendant from the very same allegation.

[¶ 37] Regarding issues related to the air compressor the court found that because of the allegations of it being shut off from time to time Mr. Braaten eventually purchased his own. (Appellant Appx. at p. 6, § 9).

[¶ 38] Finally regarding the "fenced-in" area Mr. Braaten testified only that it was a common area for all the tenants and had been in disrepair some time and had garbage and snow piled in it for a while. (Hrg. Tr. at 97-100, ln. 5, July 12, 2001). Mr. Braaten did testify that it had been repaired about a month prior to the hearing. (Hrg. Tr. at 97, ln. 23-4, July 12, 2001). The court merely found that is was unusable. (Appellant Appx. at p. 10, ln. 13). It did not find that that any of the other tenants were indeed trying to use it or if they suffered any damages as a result.

[¶ 39] While there were issues regarding use of the property there was no testimony that QAB disturbed the other tenants' quiet enjoyment of the property to an extent that would justify eviction. There only appear minor inconveniences and inhibitions. Further the court impeded QAB's ability to defend certain allegations by finding its objections outside the scope of an eviction action yet allowing Working Capital extensive room to litigate details of the lease contract and other similar items equally beyond the scope of eviction.

[¶ 40] These are perhaps issues to be determined when assessing damages under a breach of contract action but do not justify eviction. There must be some more tangible standard on which to assess a disturbance of quiet enjoyment.

II. THE DISTRICT COURT ERRED IN PROVIDING A REMEDY UNDER N.D.C.C. 47-32-01 BECAUSE THE COURT RULED ON EXTRANEOUS MATTERS NOT RELATED TO THE EVICTION ACTION AND THIS IS PROHIBITED BY STATUTE AND CORRESPONDING CASE LAW.

[¶ 41] At issue in this case is whether a district court can properly enter a judgment of eviction where the justification for ordering eviction requires making findings of fact and conclusions of law that fall outside the limited scope of the summary eviction action or where it fails to recognize that a tenant is not a hold over tenant.

[¶ 42] Eviction actions are governed by N.D.C.C. § 47-32 (2010). This statute is the re-codified version of N.D.C.C. § 33-06, which was replaced in 2009 by North Dakota House Bill 1042 Ch. 65, § 4,8. 2009 N.D. ALS 65. While re-codified, N.D.C.C. 47-32 remains essentially unchanged from N.D.C.C. 33-06. *See* Johnson 2010 ND 23 at ¶ 11. As case law explains, eviction actions were governed under this previous (§ 33-06) statute. *See generally* Riverwood Commer. Park, LLC v. Standard Oil Co., 2005 ND 118, ¶ 6, 698 N.W.2d 478. An eviction action under the old N.D.C.C. 33-06 was deemed a summary proceeding to recover possession of real estate. Riverwood at ¶ 6 (*citing* H-T Enters. V. Antelope Creek Bison Ranch, 2005 ND 71, ¶ 6, 694 N.W.2d 691; Minto Grain, LLC v. Tibert, 2004 ND 107, ¶ 8, 681 N.W.2d 70; Anderson v. Heinze, 2002 ND 60, ¶ 11, 643 N.W.2d 24).

[¶ 43] The intent of this summary eviction provision was to provide expedited means to put the plaintiff in lawful possession of leased property where there is, "little or no dispute to his right to possession." Riverwood at ¶ 12. "The purpose of this statute is to provide an inexpensive, expeditious and simple means to determine possession. Id at ¶

6 (*citing* VND, LLC v. Leevers Foods, Inc., 2003 ND 198, ¶18, 672 N.W.2d 445). "The proceeding is limited to a speedy determination of the right to possession of the property, without bringing in extraneous matters. Id at ¶ 6. (*citing* Leevers Foods, Inc. 2003 ND 198, ¶ 11, 672 N.W.2d 445). "In keeping with the summary nature of an eviction action, N.D.C.C. § 33-06-04 provides, in part: 'No counter claim can be interposed in such action, except as a setoff to a demand made for damages or for rents and profits.'" Anderson v. Heinze, 2002 ND 60, ¶ 11, 643 N.W.2d 24. Specifically the statute enumerates eight specific factual grounds which will give rise to an eviction action. Riverwood at ¶ 8.

[¶ 44] Because the court did not support that the defaults of the lease agreement were to the extent that they could not be remedied by either damages or injunction, including them in the findings of fact shows that they were used to justify the eviction in a manner that is outside the scope of the eviction action. The record shows that a great deal of discussion and reasoning hinged upon how the contract operated. Additionally there were no concessions that any of the breaches were material. This was a breach of contract action that was shoehorned into an eviction action. If so much time was spent litigating the merits of the contract the case was likely not appropriate for an eviction action.

III. The Award of Attorney Fees in This Matter was Improper Because the award was based upon damages "related to defaults" of QAB and the issue of damages as related to a breach of contract is outside the jurisdiction of the court in this matter.

[¶ 45] "North Dakota generally applies the "American Rule." Which assumes each party to a lawsuit bears its own attorney fees. Deacon's Dev., LLP v. Lamb, 2006

ND 172, ¶11, 719 N.W.2d 379 (*quoting* Anderson v. Shelby, 2005 ND 126, ¶17, 700 N.W.2d 696). "Therefore, successful litigants are not allowed to recover attorney fees unless authorized by contract or by statute. Lamb at ¶ 11. Generally attorney fees are awarded only when there is a statutory provision, by contract, or when an action is deemed frivolous. N.D.C.C. § 28-26-01(2).

[¶ 46] Here there are no contentions of frivolity or fees awarded by contract. Rather the claim must rest only in statutory provisions. Under N.D.C.C. § 47-32-04, "An action of eviction cannot be brought in a district court in connection with any other action, except for rents and profits accrued or for damages arising by reason of the defendant's possession."

[¶ 47] Here the complaint asks for "...the reasonable attorney's fees incurred by Plaintiff in this action and related to the defaults of Quality Auto Body, Inc. in an amount of not less than $7,000. (Appellant Appx. at p. 25). The Plaintiff's complaint does not ask for costs arising from the Defendant's possession. Rather the language, "related to defaults" of QAB, suggests that the costs asked for are related to litigating the merits of the contract and not due to either rents, profits or damages related to the Defendant's possession.

[¶ 48] In the claim affidavit for attorney fees Working Capital's counsel indicates costs of nearly $20,000. (Appellant Appx. at p. 47). The Plaintiff's firm's hourly accounting includes a long list of litigation related to on going contract negotiations and other matters outside the scope of the eviction process. (Appellant Appx. at p. 44-47). Indeed in the memorandum decision and order for attorney fees Judge Clapp based the award for attorney fees on paragraph 13 of the lease agreement. (Appellant Appx. at p.

35). The lower court allowed a joint claim to be brought in on the eviction action by awarding attorney fees based on contract and not awarding based on damages resulting in the tenants possession as provided by the eviction statute.

[¶ 49] Again the summary nature of the eviction statute is intended to be used where there is little or no claim of right to possession. Riverwood at ¶ 12. Here QAB's claim of possession is well grounded, detailed and vigorous. The lower court relied on, interpreted and based its attorney fee award on contractual provisions. (Appellant Appx., p.35).

[¶ 50] Further the sheer amount of expense claimed on the affidavit is extraordinary. The goal of the summary eviction statute is designed so that, "The proceeding is limited to a speedy determination of the right of possession of the property, with out brining extraneous matters. *See* Minto Grain, at ¶9; VND, LLC v. Leevers Foods Inc., 2003 ND 198, ¶ 11, 672 N.W.2d 445; Anderson v. Heinze, at ¶ 11, The purpose of the statute is to provide an inexpensive, expeditious, and simple means to determine possession. Leevers Foods, at ¶ 18.

[¶ 51] A nearly $20,000 bill for litigation, in the record, includes items not related to the eviction proceedings does not comport with a intent to provide, "speedy determinations of the right of possession of the property."

[¶ 52] N.D.C.C. § 47-32-04 allows only for rents, profits or damages arising from the defendant's possession. Any other award is beyond the scope of the action.

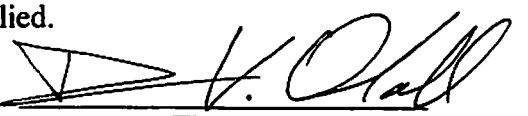
[¶ 53] The lower court erred in awarding attorney fees because they were excessive and not in accordance with the intent of the summary eviction action. The basis for awarding attorney fees in the amended judgment was based on contractual provision

and is the smoking gun confirming the litigation of issues extraneous to the eviction action.

CONCLUSION

[¶ 54] This eviction action was improper because it contemplated matters outside the limited scope of an eviction action, the finds of fact do not support the conclusions of law and attorney fees awarded in this manner were both outside the scope of applicable damages available in an eviction proceeding and were further excessive because they were based on time spent unrelated to the eviction action.

[¶ 55] The court should reverse the district court's summary eviction, order that the Defendant was wrongfully evicted, extend the lease for one year, deny the award of attorney's fees and remand for a determination of the Defendant's damages because the record shows that the law was misinterpreted and misapplied.



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IN THE SUPREME COURT OF NORTH DAKOTA

Working Capital #1, LLC, Plaintiff/Appellee, v. Quality Auto Body, Inc. and, Bradley R. Hubner, Defendant/Appellant.	)	Supreme Court File No. **20110294** Grand Forks County Civil No. **18-2011-CV-00837** **AFFIDAVIT OF PERSONAL SERVICE**

STATE OF NORTH DAKOTA)
)SS.
COUNTY OF GRAND FORKS)

THE UNDERSIGNED, being first duly sworn, on oath deposes and says that s/he is of legal age, a citizen of the United States of America, and is not a party to nor has s/he an interest in the above-entitled action; that on December 16, 2011 he personally delivered a true and correct copy of the **Appellant's Brief and Appendix** in the above-entitled matter. That said personal service was executed at the following address:

Warren Roehl
Zimney Foster, P.C.
3100 South Columbia Road #200
Grand Forks, ND 58201

To the best of your affiant's knowledge, information and belief, such address as given above was the location of the party or agent intended to be so served.

That the above document was duly mailed in accordance with the provisions of the *North Dakota Rules of Civil Procedure.*

Clint D. Morgenstern

Subscribed and sworn to before me on December 16, 2011.

Notary Public

(SEAL)

NICOLE D BENSON
Notary Public
State of North Dakota
My Commission Expires May 21, 2016