20130059
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 1, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Tim Bloomquist, Plaintiff/Appellant, vs. The Goose River Bank, and Goose River Holding Company, Defendants/Appellees.	Supreme Court File No. 20130059

BRIEF OF DEFENDANTS/APPELLEES, THE GOOSE RIVER BANK AND GOOSE RIVER HOLDING COMPANY

ON APPEAL FROM ORDER RE:
MOTION FOR SUMMARY JUDGMENT DATED NOVEMBER 14, 2012 AND A JUDGMENT OF DISMISSAL ENTERED DECEMBER 18, 2012
IN DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT,
TRAILL COUNTY, STATE OF NORTH DAKOTA
THE HONORABLE LISA K. FAIR McEVERS PRESIDING

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STATEMENT OF ISSUES

ISSUE A:

The Trial Court properly concluded that the alleged contract was unenforceable.

ISSUE B:

The Trial Court properly concluded that the Statute of Frauds renders any alleged oral agreement invalid.

ISSUE C:

The Trial Court properly concluded that promissory estoppel is not applicable to the instant matter.

STATEMENT OF THE CASE

I. Nature of the case and course of proceedings

¶1 This is an appeal by Tim Bloomquist from the Judgment entered on December 18, 2012 in the East Central Judicial District, Traill County, North Dakota, granting summary judgment in favor of The Goose River Bank ("the Bank") and Goose River Holding Company ("the Holding Company"). (Appx. 118-126). The Judgment was entered following the Trial Court's Memorandum Decision found in its Order Granting Defendants' Motion for Summary Judgment and Denying Motion to Compel. (Appx. 127).

¶2 This is an action initiated by Bloomquist wherein he asserted that the Bank breached an oral agreement to lend him $750,000.00. (Appx. 5-10). The original Summons and Complaint was dated December 19, 2011. (D. 1-2). An Answer to the Plaintiff's Complaint was interposed on January 6, 2012. (D. 6). Bloomquist subsequently interposed an Amended Complaint dated July 11, 2012 amending Count Two of the action to assert a vicarious liability claim. (Appx. 5-10). An Answer to the Amended Complaint was interposed and is dated August 28, 2012. (Appx. 11-16). The Bank and the Holding Company each brought a motion for summary judgment dated September 14, 2012. (Appx. 17-91).

¶3 A hearing was held on the Defendants' Motion for Summary Judgment on November 14, 2012 before the Honorable Lisa Fair McEvers. The Court issued its Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion to Compel on December 12, 2012. (Appx. 118-126). Therein, the Court found, among other things, that there were no disputes as to material facts; that there was no enforceable oral

contract between the parties; and that the alleged oral agreement is barred by the statute of frauds codified at Section 9-06-04 of the North Dakota Century Code. (Appx. 118-126). The Trial Court also granted the Holding Company's Motion for Summary Judgment, noting that Bloomquist did not object or otherwise contest the Holding Company's motion. (Appx. 118, 125-126). It is noted herein that Bloomquist does not appear in any manner to be challenging the summary judgment of dismissal of the Holding Company. As such, the briefing will pertain only to the Bank.

¶4 Judgment was entered in this case on December 12, 2012. (Appx. 127). Bloomquist's Notice of Appeal was filed on February 19, 2013. (Appx. 128).

II. Facts

¶5 The undisputed material facts presented by the Bank to the Trial Court, and again presented on appeal, are more accurately described as Bloomquist's version of the facts of this case. These "facts" were gleaned from Bloomquist's sworn testimony in this matter. It is parenthetically noted that, for all other purposes in this litigation, the Bank and the Holding Company dispute the "facts" identified in the briefing related to the motion for summary judgment and throughout this brief. The following are Bloomquist's factual assertions in this litigation.

¶6 Around June or July, 2011, Bloomquist contacted the Bank to discuss obtaining a loan for the purchase of real estate. (Appx. 37-38). According to Bloomquist, he discussed the loan with Curtis Kaufman ("Kaufman"), who, at all relevant times prior to

February 2, 2010, was the President of the Bank's Hillsboro, North Dakota branch[1]. (Appx. 37-38; 51-52).

¶7 Bloomquist alleges that he and Kaufman entered into an agreement with the following terms:

> Mr. Kaufman and I discussed the fact that I was to use the line of credit that I had with Goose River Bank in addition to the equity in property that I owned to refinance and finance the purchase of the property that I intended to purchase. Mr. Kaufman agreed with the proposal and what we discussed. He authorized me to bid up to $500,000.00 on two quarters of land. We then discussed the fact that if I sold beet stock, I could bid on a third quarter of land. Mr. Kaufman said yes, that would be fine, and he did not give me an amount to bid on for the third quarter of land, however, it was understood that it would be approximately $250,000.00 for the third quarter of land.

(Appx. 37-38; 62). Bloomquist further alleged that Kaufman assured him that "he would be able to secure a loan with the assistance of the Bank of North Dakota at the interest rate of 6%." (Appx. 61). Bloomquist alleged that it was "understood" and "assumed" that the loan was to be amortized over for 30 years with an interest rate of 6%. (Appx. 61). The parties do not have <u>any</u> written documentation of the terms of the alleged agreement described above. (Appx. 41-42).

¶8 In response to an "Invitation to Bid" published on or around December 2009, Bloomquist submitted written bids to purchase four parcels of land owned by the Pemberton family, located in Telen Township, Kittson County, Minnesota. (Appx. 59-60; 66). Because Bloomquist was one of the top five written bidders for each parcel, he was given the opportunity to participate in oral bidding on the properties, which took place on Thursday, January 7, 2010. (Appx. 59-60; 66).

[1] Bloomquist implies Kaufman's ultimate termination from this position is somehow relevant to the issues before this Court. The Trial Court conducted an in camera review of Kaufman's personnel file and held that "the conduct described as supporting the termination of [Kaufman] would not be relevant in supporting either claim brought by the Plaintiff." (Appx. 119). Bloomquist has not appealed this holding.

¶9 Bloomquist was the successful bidder on three of the four parcels that were offered for bidding, and he entered into three purchase agreements (collectively "Purchase Agreements") for the purchase of property as follows:

¶10 a. "**Parcel 1**": Purchase Agreement between Timothy J. Bloomquist, Buyer, and Susan J. Pemberton and her husband Edward Schneider, Seller, in the amount of $258,795, for the purchase of the following described property situated in the County of Kittson, State of Minnesota, legally described as follows:

> The Southeast Quarter (SE1/4) of Section Twenty-four (24), Township One Hundred Fifty-nine (159) North of Range Fifty (50) West of the Fifth Principal Meridian, according to the Government Survey thereof, excepting therefrom lands given for highway purposes as shown by the final certificate recorded in Book "Y" of Miscellaneous Records, Page 155 and the quit claim deed recorded in Book 170 of Deeds, Page 287 and Book 170, Page 289.

(Appx. 64; 67-72).

¶11 b. "**Parcel 2**": Purchase Agreement between Timothy J. Bloomquist, Buyer, and Jane Cecchettini, a legally separate person, Seller, in the amount of $263,729, for the purchase of the following described property situated in the County of Kittson, State of Minnesota, legally described as follows:

> The Southwest Quarter (SW1/4) of Section Twenty-four (24), Township One Hundred Fifty-nine (159) North of Range Fifty (50) West of the Fifth Principal Meridian, according to the Government Survey thereof, excepting therefrom lands given for highway purposes as shown by the final certificate recorded in Book "Y" of Miscellaneous Records, Page 155 and excepting therefrom the premises described in those two warranty deeds recorded in Book 128 of Deeds, Page 99 and Book 128 of Deeds, Page 403.

(Appx. 63-64; 73-78).

¶12 c. "**Parcel 3**": Purchase Agreement between Timothy J. Bloomquist, Buyer, and Beth Pemberton Seewald, a single person, Seller, in the amount of $322,000, for the

purchase of the following described property situated in the County of Kittson, State of Minnesota, legally described as follows:

> The Northeast Quarter (NE1/4) of Section Twenty-five (25), Township One Hundred Fifty-nine (159) North of Range Fifty (50) West of the Fifth Principal Meridian, according to the Government Survey thereof, excepting therefrom lands given for highway purposes as shown by the final certificate recorded in Book "Y" of Miscellaneous Records, Page 155.

(Appx. 64; 79-84). Bloomquist asserted below that the party that attempted to purchase Parcel 3 was not, in fact, Timothy Bloomquist, but rather "Bloomquist Farms, Inc." (Appx. 65; 85-87).

¶13 Bloomquist failed to close on any of the real estate transactions contemplated by the Purchase Agreements. He asserts as a reason the failure of the Bank to lend him the money necessary to complete the real estate purchases. (Appx. 88-91). Bloomquist asserts in his Amended Complaint that he was damaged by the Bank's alleged breach of oral contract to lend him money, the terms of which are set forth above. (Appx. 8).

¶14 The Holding Company owns shares of the Bank, but it does not have any connection to Bloomquist or the subject matter of this suit. (Appx. 50; 57-58).

¶15 Assuming, arguendo, that each of the above "facts" are true, Bloomquist failed, in all respects, to state an actionable claim against the Bank and the Trial Court properly entered a summary judgment of dismissal, as a matter of law.

III. Standard of Review

¶16 The North Dakota Supreme Court has firmly established the standard for reviewing summary judgment:

> Under N.D.R.Civ.P. 56, summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are not genuine issues of material fact or inferences that can reasonably be

> drawn from undisputed facts, or if the only issues to be resolved are questions of law. The party moving for summary judgment must show there are no genuine issues of material fact and the case is appropriate for judgment as a matter of law. A district court's decision on a motion for summary judgment is a question of law that we review de novo on the record. In determining whether summary judgment was appropriately granted, we view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record.

Kambeitz v. Acuity Ins. Co., 2009 ND 166, ¶ 8, 772 N.W.2d 632 (quoting *Bragg v. Burlington Res. Oil and Gas Co., LP*, 2009 ND 33, ¶ 5, 763 N.W.2d 481).

IV. Argument

¶17 Bloomquist raises three primary contentions on appeal. First, he asserts that the Trial Court erred in concluding that there was no valid, enforceable oral agreement to lend Bloomquist $750,000. As will be discussed further herein, assuming, arguendo, that Bloomquist's bare allegations regarding discussions about obtaining a loan are true, such discussions cannot constitute a valid, enforceable contract. Second, Bloomquist asserts that the Trial Court erred in concluding that any verbal agreement to lend money in this case is invalidated by North Dakota's statute of frauds. As will be discussed below, the alleged oral agreement is patently violative of the statute of frauds in that it asserts the lending of money in an amount greater than $25,000 (Section 9-06-04(4), N.D.C.C.) and in that it asserts that the contract was not to be performed within a year (Section 9-06-04, N.D.C.C.). Finally, Bloomquist asserts that the Trial Court erred in concluding that the doctrine of promissory estoppel was inapplicable to the instant matter. As will be discussed below, Bloomquist cannot meet the elements required to establish promissory estoppel. Each of Bloomquist's contentions will be discussed in detail, below.

A. The Trial Court properly concluded that the alleged contract was unenforceable.

¶18 On appeal, Bloomquist devotes a significant portion of his brief (page 6-10) attempting to argue that the alleged oral contract was valid and enforceable upon the terms alleged by him. Bloomquist alleges, generally, that the Bank, through an officer, Curtis Kaufman, breached an oral agreement to loan Bloomquist money.

> A breach of contract is the nonperformance of a contractual duty when it is due. The elements of a prima facie case for breach of contract are: (1) the existence of a contract; (2) breach of contract; and (3) damages which flow from the breach. The burden of proving the elements of a breach of contract is on the party asserting the breach.

WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 13, 730 N.W.3d 841 (internal citations omitted). As set forth below, a breach of contract claim cannot survive because the first element of breach of contract – that a contract actually exists – is not present.

¶19 Bloomquist alleges that there was an oral agreement whereby the Bank, through Kaufman, promised to lend him money. Assuming, arguendo, that all of Bloomquist's allegations regarding his conversations with Kaufman are true; such representations would not create a contract. As discussed below, Bloomquist cannot show that either the essential elements or essential terms required to create a valid contract are present.

1. <u>The essential elements to form a contract are not present in Bloomquist's alleged oral agreement to make a loan because no mutual consent existed</u>.

¶20 To establish a contract, there are four essential requirements:

1. Parties capable of contracting;
2. The consent of the parties;
3. A lawful object; and
4. Sufficient cause or consideration.

N.D.C.C. § 9-01-02. In this case, in viewing the facts in the light most favorable to Bloomquist, the element of mutual consent was clearly absent.

¶21 In order to establish the consent element required under section 9-01-02, "the parties' consent must be free, mutual, and communicated to each other." *Stout v. Fisher Industries, Inc.*, 1999 ND 218, ¶ 11, 603 N.W.2d 52 (citing N.D.C.C. § 9-03-01). "Consent is not mutual unless the parties all agree upon the same thing in the same sense." N.D.C.C. § 9-03-16. "Courts will not enforce a contract which is vague, indefinite, or uncertain, nor will they make a new contract for the parties. To be valid and enforceable, a contract must be reasonably definite and certain in terms, so as to ascertain what is required of the parties." *Stout*, 1999 ND 218 at ¶ 11 (internal citations omitted).

¶22 Again, Bloomquist asserted in sworn testimony in this litigation that the Bank consented, as follows:

> [Kaufman] authorized me to bid up to $500,000 on two quarters of land. We then discussed the fact that if I sold beet stock, I could bid on a third quarter of land. Mr. Kaufman said yes, that would be fine, and he did not give me an amount to bid on for the third quarter of land, however, it was understood that it would be approximately $250,000.00 for the third quarter of land.

(Appx. 37-38; 62). Assuming, arguendo, this to be true, Bloomquist cannot establish consent on the part of the Bank for the three reasons set forth below.

¶23 First, Bloomquist's bids exceed the amount allegedly consented to by the Bank. Bloomquist bid and entered into an agreement to purchase Parcel 1 for $258,795.00. (Appx. 67-72). Bloomquist bid and entered into an agreement to purchase Parcel 2 for $263,729.00. (Appx. 73-78). Finally, Bloomquist bid and entered into an agreement to purchase Parcel 3 for $322,000.00. (Appx. 79-84). Each individual bid, and the purchase

price on each individual parcel, far exceeded the limit to which Bloomquist is claiming that the Bank consented. Collectively, the actual bids and actual purchase prices exceed the amount allegedly authorized by the Bank by some $94,000. There is simply no evidence in this case that the Bank ever consented to the bids offered, or the amounts identified, in the purchase agreements.

¶24 On appeal, Bloomquist asserts, without any citation to the factual record, that the Bank was "on notice and consented to the higher bids based on the amount of earnest money it authorized to be released to Bloomquist." Brief of Plaintiff/Appellant, p. 7. Not only does this statement directly contradict the sworn testimony of Bloomquist as to the terms of the alleged agreement, it is completely without factual support in the record.

¶25 The Bank did authorize the advance of the earnest money for the real estate out of Bloomquist's operating line of credit. However, the operating line of credit was established in May 2009, well in advance of the alleged agreement to lend money which is the subject matter of this suit. (D. 49). The purpose of an operating line of credit is to provide a source of funds to producers for the operations of their farms. (D. 49). The funds may be used for virtually anything related to farm operations including, but not limited to, purchase of inputs, purchase of equipment, construction of farm buildings or earnest money for land purchases. (D. 49). Indeed, it is not uncommon for operators to use their lines of credit to fund earnest money for land purchases. (D. 49). This is true in the experience of the Bank, whether permanent financing for the land purchase is obtained through the Bank or elsewhere. (D. 49).

¶26 There is no evidence in this case that the Bank ever agreed to do anything except honor the terms of the preexisting line of credit by extending to Bloomquist the amounts

requested for his farming operations. Bloomquist does not testify as to any agreements or to any terms reached subsequent to his bidding on the property. There is no documentary evidence of any agreements reached subsequent to his bidding on the property. There simply was no such agreement. Bloomquist entered into contracts to purchase land which went far beyond any terms allegedly agreed to by the Bank. The failure of consent is fatal to the claim of an enforceable contract. *See* N.D.C.C. § 9-01-02.

¶27 Second, Bloomquist asserts in this litigation that the entity, Bloomquist Farms Inc., was the purchaser of Parcel 3. (Appx. 65; 85-87). Bloomquist Farms Inc. is not a party to this action, nor is it even alleged by Bloomquist that the Bank made a contract with Bloomquist Farms or anyone other than Tim Bloomquist to purchase Parcel 3. There simply is no evidence that the Bank ever consented to lend Bloomquist Farms, Inc. any money for the purchase of Parcel 3 or for any other purpose relevant to this suit.

¶28 Finally, Bloomquist alleges that the Bank consented to him bidding on the third parcel of land if he sold his beet stock. (Appx. 37-38; 62). However, Bloomquist never sold any beet stock prior to bidding on the land or prior to entering into the Purchase Agreements. (Appx. 62-63). There is no evidence presented by Bloomquist in this matter which would support the assertion that that the Bank consented to Bloomquist bidding on or purchasing the third Parcel of land while retaining his beet stock.

¶29 The failure of consent is self-evident in the contradictory allegations of Bloomquist. While the Bank denies it ever agreed to lend <u>any</u> money to Bloomquist for the purchase of the subject real estate, Bloomquist's own allegations of the Bank's promises demonstrate a complete and utter lack of consent to Bloomquist's actions. Bloomquist asserts that if he did not sell his beet stock, the Bank consented to his bidding

up to $500,000 for two parcels and that, if he did sell his beet stock, he could bid up to $750,000 on three Parcels. (App. 37-38). In actuality, Bloomquist bid and entered into purchase agreements on three parcels, totaling in excess of $844,000, without selling any beet stock. (Appx. 63, 88). There is no evidence in this action that the Bank ever consented to such transactions or promised to lend money therefore. There simply is no evidence of consent to support a contract for lending of money for the purchases attempted by Bloomquist.

2. <u>The essential terms required to form an oral contract to lend money are not present in Bloomquist's alleged oral agreement to make a loan</u>.

¶30 In addition to not having the mutual consent required to form a contract, Bloomquist's allegations also fail to allege the essential terms of an oral contract.

> Essential terms of an oral contract to continue lending money in the future include the amount and duration of the loans, interest rates, and, where appropriate, the methods of repayment and collateral for the loans, if any. Taken alone, the absence of any one of these terms may not be of great significance; however, viewed collectively**, their absence is fatal to the existence of a binding contract**.

State Bank of Kenmare v. Lindberg, 471 N.W.2d 470, 473 (N.D. 1991) (citing *Union State Bank v. Woell*, 434 N.W.2d 712, 717 (N.D. 1989)) (emphasis added).

¶31 In *Lindberg*, the Lindbergs alleged that the bank promised to loan them money. *Id.* at 472. The court analyzed two cases in which parties made similar claims, *Union State Bank v. Woell*, 434 N.W.2d 712 (N.D. 1989) and *Delzer v. United Bank of Bismarck*, 459 N.W.2d 752 (N.D. 1990). *Id.* at 473-74. The Court stated "[w]e determined in *Woell* that there existed no reasonable inference that the parties agreed on any specific terms to continue financing and thus concluded that the alleged oral

agreements failed for lack of certainty of the contract terms." *Id.* at 473. Although the court recognized in *Delzer* that it had an enforceable oral agreement to provide money, it stressed that the result was reached because of comments in the record of the lender indicating the additional financing amount, repayment period, and schedule. *Id.*

¶32 The *Lindberg* court concluded that even in

> viewing the evidence in a light most favorable to the Lindbergs, there is no reasonable inference of an enforceable agreement to provide future financial assistance. The Lindbergs have produced no evidence of the amount or duration of these alleged loans, nor of the method of repayment. While, as in *Delzer*, we might infer an interest rate from the prevailing rate for like operations if such a rate exists, we have no evidence from which to infer the other essential terms. While the lack of one term may not be of great significance, the collective absence of essential terms "is fatal to the existence of a binding contract."

Id. at 474 (quoting *Woell*, 434 N.W.2d at 717). The Court "refuse[d] to recognize that the failure of a bank to make a loan after negotiations creates an inference that the bank originally promised to make a loan." *Id.*

¶33 The same analysis should be applied to this case. Bloomquist fails to allege the necessary terms required to support the alleged oral agreement that the Bank would lend him money. In Answers to Interrogatories and in sworn deposition testimony, Bloomquist asserted that the Bank would lend him $500,000 to purchase two parcels of land and another $250,000 to purchase a third parcel, but only if he sold his beet stock, a condition precedent which did not occur. (Appx. 37-38; 62). On pages 3, 6, 8, and 9 of his appellate brief, Bloomquist confirms these were the terms. However, Bloomquist also claims that the Bank "approved and consented to the three land purchases" (page 3); that the Bank was "on notice and consented to the higher bids" (page 7); and that the "increased loan amount was ratified" by the Bank (page 9). Clearly, until the summary

judgment motion was made, Bloomquist was asserting that the amount the Bank agreed to lend was $750,000, upon the happening of certain conditions precedent. It is entirely unclear at this point if Bloomquist is now asserting the Bank agreed to lend him $500,000, $750,000 or $844,524 dollars. Neither argument of counsel nor subsequent affidavits or testimony can be used to create a genuine issue of material fact. *See Hysjulien v. Hill Top Home of Comfort, Inc.*, 2013 ND 38, ¶ 23, 827 N.W.2d 533; *State v. One Black 1989 Cadillac VIN 1G6DW51Y8KR722027*, 522 N.W.2d 457, 465 (N.D. 1994).

¶34 Bloomquist further alleges that "Kaufman assured Bloomquist that he would be able to secure a loan with the assistance of the Bank of North Dakota at the interest rate of 6%." (Appx. 6). However, Bloomquist fails to allege any repayment terms, other than that it was "understood" that it was to be amortized over 30 years. (Appx. 61). In fact, Bloomquist testified at his deposition that the term of the loan and the interest rate were not expressly discussed but that such were "assumed" by the parties. (Appx. 61). He did not offer any terms of an amortization schedule, when payments would be made, method of repayment, source of repayment, etc., all of which are essential to the terms of the loan, and the absence of which "is fatal to the existence of a binding contract." *Lindberg*, 471 N.W.2d at 474 (quoting *Woell*, 434 N.W.2d at 717). Therefore, without the essential terms, no binding oral contract existed between Bloomquist and the Bank.

B. The Trial Court properly concluded that the Statute of Frauds renders any alleged oral agreement invalid.

¶35 The Bank denies that there was ever a contract formed between Bloomquist and the Bank for the lending of money for the purchase of the subject real estate. However,

even if there was an oral agreement to provide financing, it is invalid under two distinct sections of our statute of frauds. Under North Dakota law, "[a]n agreement or promise for the lending of money or the extension of credit in an aggregate amount of twenty-five thousand dollars or greater" is invalid, "unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party's agent." N.D.C.C. § 9-06-04(4). "Because an oral agreement is neither in writing nor subscribed by the party to be charged, the statute of frauds defense under N.D.C.C. § 9-06-04(4) applies to an oral promise to make a loan." *Smestad v. Harris*, 2001 ND 91, ¶ 10, 796 N.W.2d 662 (internal citations omitted).

¶36 In the instant matter, Bloomquist alleges that the Bank agreed to lend him $750,000 (or $844,452.40) to purchase real estate. However, as Bloomquist concedes, there is no writing subscribed by the Bank, or by any agent of the Bank, promising to lend that money to Bloomquist. (Appx. 41-42); Brief of Plaintiff/Appellant, p. 10. Thus, any alleged oral promise to lend Bloomquist money is invalid under the statute of frauds. As such, the claim of oral contract must be dismissed, as a matter of law.

¶37 Further, Bloomquist asserts that "[t]he agreed term [of the loan] was thirty years." (Appx. 61; 105). Section 9-06-04(1) of the North Dakota Century Code states:

> The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party's agent:
>
> 1. An agreement that by its terms is not to be performed within a year from the making thereof.

"[T]he statute applies to any oral contract that *by its terms* is not to be performed within one year." *Kohanowski v. Burkhardt*, 2012 ND 199, ¶ 10, 821 N.W.2d 740 (emphasis in original).

¶38 By its terms, the alleged oral contract in this case was not to be performed within a year from its making. In his brief, Bloomquist asserts, without citation to the record, that it was possible that Bloomquist could have completed that contract within one year. Brief of Plaintiff/Appellant, p. 11. There simply is no evidence that would support this bare assertion. Indeed, this assertion directly contradicts Bloomquist's testimony that this was a 30 year contract. Bloomquist certainly did not identify any terms, such as prepayment terms, which would allow this contract to be performed within one year. Nor is there any other evidence in the record from which one could conclude that this alleged contract could be performed within one year.

¶39 While Bloomquist argues that partial performance takes the alleged oral contract out of the statute of frauds, the North Dakota Supreme Court has never held that part performance takes a contract out of the statute of frauds in cases where the contract, by its terms, cannot be performed within a year and where the object of the contract is not real estate. The North Dakota Supreme Court has stated:

> This Court has previously questioned whether the doctrine of partial performance applies to an oral agreement which by its terms cannot be performed within one year and which does not involve real estate:
>
> > We also observe that the general rule is that under provisions similar to Section 9-06-04(1), N.D.C.C., contracts which cannot be performed within one year are not taken out of the statute of frauds by part performance. However, that general rule is subject to an exception for cases involving real estate.

Kohanowski, 2012 ND 199 at ¶ 14 (quoting *Thompson v. North Dakota Workers' Compensation Bureau*, 490 N.W.2d 248, 252 (N.D. 1992)). Bloomquist has also failed to identify any case law holding that part performance removes an alleged oral contract for the lending of money in excess of $25,000 from the statute of frauds.

¶40 Per the terms alleged by Bloomquist, the oral contract to lend money was in excess of $25,000 and could not be performed within a year. Part performance, which can be used to except real estate contracts from the statute of frauds, is not a recognized exception to an alleged oral contract for the lending of money. Therefore, the alleged oral contract is barred by the statute of frauds. However, even if the doctrine of partial performance is applicable to the alleged oral contract for the lending of money, Bloomquist cannot meet the required elements.

¶41 Bloomquist argues that oral contracts may be removed from the statute of frauds requirement by partial performance consistent only with the existence of an oral contract. *Knudson v. Kyllo*, 2012 ND 155, ¶ 18, 819 N.W.2d 511. As this Court stated in *Knudson*: "Part performance consistent **only** with the existence of an oral agreement may remove the agreement from the statute of frauds." *Id.* (emphasis added). As the Trial Court noted, Bloomquist has failed to show that the alleged partial performance was consistent only with the oral contract he has alleged.

¶42 In a recent case considering part performance as an exception to the statute of frauds, *Kohanowski v. Burkhardt*, the plaintiff loaned ten thousand dollars to his brother and his former fiancée for the purchase of a new house. 2012 ND 199, ¶ 2, 821 N.W.2d 740. The plaintiff alleged that the money would be repaid in 36 monthly payments over three years. *Id.* at ¶ 3. Burkhardt signed two checks payable to the plaintiff for $215 each. *Id.* at ¶ 4. However, after the defendant and plaintiff's brother called off the engagement, no further payments were made. *Id.* Plaintiff alleged that the two payments constituted part performance, removing the agreement from the statute of frauds. *Id.* at ¶ 15. This Court disagreed stating:

> Jon Kohanowski has overly simplified and mischaracterized the nature of part performance required to remove an oral agreement from the statute of frauds. To take a contract out of the statute of frauds, the party seeking to enforce the oral contract must establish part performance that is not only consistent with, but that is consistent *only* with, the existence of the alleged oral contract.

Id. at ¶ 16 (emphasis in original). "When it is alleged that partial performance removes an unwritten agreement from the statute of frauds, the most important question is whether the part performance is consistent only with the existence of the alleged oral contract." *Id.* (citing *In re Estate of Thompson*, 2008 ND 144, ¶ 12, 752 N.W.2d 624; *Fladeland v. Gudbranson*, 2004 ND 118, ¶ 8, 681 N.W.2d 431; *Johnson Farms v. McEnroe*, 1997 ND 179, ¶ 19, 568 N.W.2d 920).

> As further clarified in *Estate of Thompson*, at ¶ 13 (quoting *Anderson v. Mooney*, 279 N.W.2d 423, 429 (N.D. 1979)):
>
> > "'Another requirement of the doctrine * * * is that the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. If they point to some other relationship . . . or may be accounted for on some other hypothesis, they are not sufficient.'"

Id. This Court in *Kohanowski* found that the alleged oral agreement was not the only plausible explanation for the payments and, thus, the plaintiff failed to establish part performance sufficient to remove the agreement from the statute of frauds. *Id.* at ¶ 18.

¶43 Like in *Kohanowski*, the part performance alleged by Bloomquist does not "unmistakably point to the existence of the claimed agreement." Bloomquist claims he partially performed the alleged oral agreement by bidding on the real estate and entering into purchase agreements. Brief of Plaintiff/Appellant, pp. 10-11. In fact, as demonstrated throughout, Bloomquist's bids on all three parcels of land far exceeded the amounts the Bank allegedly orally agreed to lend him. Additionally, Bloomquist bid on

the third parcel without first selling his beet stock, which Bloomquist alleged was a condition precedent to the loan. The bids made by Bloomquist were utterly inconsistent with the claimed oral agreement.

¶44 Bloomquist asserts that the authorization by the Bank of the advance from Bloomquist's preexisting line of credit demonstrates partial performance on the part of the Bank. Brief of Plaintiff/Appellant, p. 11. As the Trial Court found, the fact that the earnest money funds were advanced from Bloomquist's line of credit with the Bank does not point unmistakably to the alleged agreement. (Appx 122). The line of credit pre-existed the alleged agreement. (D. 49). Bloomquist was entitled to an advance out of the pre-existing line of credit for use in his farming operations, including using it as a source for earnest money for the purchase of land. (D. 49). It is not uncommon for Bank customers to use a ready source of cash such as a line of credit for earnest money for the purchase of real estate. (D. 49). Such would be true whether permanent financing would be obtained through the Bank or some other financial institution. (D. 49). The use of the line of credit unmistakably points only to the fact that a line of credit existed which was available for Bloomquist's use. Its use does not in any way relate to any alleged agreement to lend additional money. Because the part performance alleged by Bloomquist and the Bank does not unmistakably point only to the existence of the alleged oral contract, Bloomquist cannot establish that the oral agreement is removed from the statute of frauds.

C. The Trial Court properly concluded that promissory estoppel is not applicable to the instant matter.

¶45 Bloomquist asserts that "[o]ral contracts can rise above the statute of frauds requirement on the doctrine of promissory estoppel or reliance." Brief of Plaintiff/Appellant, p. 12. However, Bloomquist has not established the necessary elements of promissory estoppel. "Estoppel is not favored and the burden of proving each element is on the party asserting it." *Gorley v. Parizek*, 475 N.W.2d 558, 560 (N.D. 1991) (citing *Johnson v. Northwestern Bell Telephone Co.*, 338 N.W.2d 622 (N.D. 1983)). To establish promissory estoppel, Bloomquist must establish the following four elements:

> 1) A promise which the promisor should reasonably expect will cause the promisee to change his position; 2) a substantial change of the promisee's position through action, or forebearance; 3) justifiable reliance on the promise; and 4) injustice which can only be avoided by enforcing the promise.

Russell v. Bank of Kirkwood Plaza, 386 N.W.2d 892, 896 (N.D. 1986) (citing *O'Connell v. Entertainment Enterprises*, 317 N.W.2d 385, 390 (N.D. 1982)).

¶46 Bloomquist's claim of promissory estoppel must fail because he cannot establish even the first element of the claim. The first element requires a promise which the promisor should reasonably expect will cause the promisee to change his position. "The promise must 'be clear, definite, and unambiguous as to essential terms before the doctrine of promissory estoppel may be invoked to enforce an agreement or to award damages for the breach thereof.'" *University Hotel Development, LLC v. Dusterhoft Oil, Inc.*, 2006 ND 121, ¶ 11, 715 N.W.2d 153 (quoting *Lohse v. Atlantic Richfield Co.*, 389 N.W.2d 352, 357 (N.D. 1986)). "Unsupported conclusory allegations are insufficient to withstand summary judgment." *Id.* at ¶ 14 (citing *Dalan v. Paracelsus Healthcare Corp.*, 2002 ND 46, ¶ 7, 640 N.W.2d 726). "The party resisting a summary judgment motion must present sufficient

evidence that would allow a reasonable jury to find for that party." *Id.* (citing *Beckler v. Bismarck Pub. Sch. Dist.*, 2006 ND 58, ¶ 7, 711 N.W.2d 172).

¶47 As previously discussed, the alleged promise in this case is not clear, definite and unambiguous. Bloomquist has asserted, under oath, that the promise was to loan $500,000 for two parcels of land and another $250,000 for a third parcel, on the condition that Bloomquist sell his beet stock. (Appx. 62, 105). He apparently asserts on appeal that the amount of the loan was to have been in excess of $844,000. Bloomquist asserts that the term of the loan was to be 30 years with interest of six percent. (Appx. 61, 105). However, there is no evidence to establish how the loan would be repaid, what the repayment schedule would be, how much payments would be, where the additional monies for down payment would originate, what the collateral would be or the source of the repayment. The terms of the alleged promise were anything but clear, definite and unambiguous.

¶48 Bloomquist also cannot establish the third element, justifiable reliance on the promise. As discussed previously, Bloomquist alleged that he was authorized to bid up to $750,000 on three quarter sections of land, $500,000 on the first two and $250,000 on the third, provided he sell beet stock. In actuality, Bloomquist bid in excess of $844,000 and sold no beet stock. This is not justifiable reliance on the promise as alleged by Bloomquist.

¶49 Bloomquist argues that his reliance was justified because he has established a course of dealing with area banks. Brief of Plaintiff/Appellant, p. 13. Bloomquist cites to no prior experiences with the Bank that would support his claim of justifiable reliance. It is unclear how Bloomquist's purported course of dealing with other banks could have any relevance to whether he justifiably relied on an alleged promise by Goose River Bank. Bloomquist simply cannot establish the required elements for promissory estoppel.

¶50 Finally, Bloomquist suggests that some injustice will result if the summary judgment is not reversed. This is the exemplar statute of frauds case. Bloomquist asserts vague discussions as grounds for an oral contract. He asserts in sworn testimony that the Bank agreed to lend him $750,000, but asserts on appeal that it failed to lend him the $844,000 he actually bid on the property. He asserts that the Bank agreed to extend credit if he sold his beet stock, but asserts on appeal that it should have extended credit even though he did not sell the stock. He asserts that there was a 30-year term and a 6% interest rate, but that these were not expressly discussed, just assumed. He does not assert, at all, how the loan would be repaid, what the repayment schedule would be, how much payments would be, where the additional monies for down payment would originate, what the collateral would be or the source of the repayment. It is submitted that the very purpose of the statute of frauds is to protect parties from the types of claims asserted by Bloomquist in this matter.

V. Conclusion

¶51 The Trial Court properly granted summary judgment in favor of the Defendants in this action. The Bank respectfully requests that the Order and Judgment of the Trial Court be affirmed.

Dated this 1st day of May, 2013.

/s/ Scott J. Landa

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CERTIFICATE OF COMPLIANCE

¶52 The undersigned, as one of the attorneys representing Defendants/Appellees The Goose River Bank and Goose River Holding Company, and one of the authors of the above and foregoing Brief of Appellees, hereby certifies that said Brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that the Brief was prepared with proportionate typeface and that the total number of words does not exceed 10,500 from the portion of the Brief entitled Statement of the Case through the signature block on page 22 above at the end of the Brief. The word count was verified with the assistance of the undersigned's word processing software, which also counts abbreviations as words.

Dated this 1st day of May, 2013.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Tim Bloomquist, Plaintiff/Appellant, vs. The Goose River Bank, and Goose River Holding Company, Defendants/Appellees.	)	Supreme Court File No. 20130059

AFFIDAVIT OF FILING AND SERVICE BY E-MAIL

SARA HAMLING, being first duly sworn, deposes and says that on the 1st day of May, 2013, she filed by e-mail the attached **BRIEF OF DEFENDANTS/APPELLEES, THE GOOSE RIVER BANK AND GOOSE RIVER HOLDING COMPANY** according to the N.D. Sup. Ct. Admin. Order 14 upon:

supclerkofcourt@ndcourts.gov

SARA HAMLING, being first duly sworn, deposes and says that on the 1st day of May, 2013, she served by e-mail the attached **BRIEF OF DEFENDANTS/APPELLEES, THE GOOSE RIVER BANK AND GOOSE RIVER HOLDING COMPANY** as required by N.D.Sup.Ct. Admin. Order 14(D)(1), in Adobe PDF Format (document formatting and page numbering may be slightly different than Word), upon:

Michael S. Montgomery
Attorney for Plaintiff/Appellant
mike@bullislaw.com

Dated this 1st day of May, 2013.

/s/ *Sara Hamling*
SARA HAMLING

Subscribed and sworn to before me this 1st day of May, 2013.

Shirley Bakken
NOTARY PUBLIC
My Commission Expires: 6-24-2017