IN THE SUPREME COURT
OF THE
STATE OF NORTH DAKOTA

Supreme Court Case No. 20140052
Ward County North Central Judicial District Court No. 51-2011-CV-1591

ROBIN D. FUNKE and KATHLEEN M. FUNKE

Plaintiffs/Appellee

vs.

AGGREGATE CONSTRUCTION, INC. and ROBERT COGDILL,

Defendant/Crossclaim Defendant/Appellants

APPELLANT'S BRIEF

Appellant's Brief (to be filed on or before May 1, 2014). Appeal from Judgment and Order dated October 8, 2012 granting Funke's Motion for Summary/Declaratory Judgment which terminated the Shop Lease effective December 31, 2011; and that portion of the October 31, 2012 Judgment and Order denying Aggregate Construction's Motion for Reconsideration of the Court's October 8, 2012 Order, and that Order and Judgment dated December 16, 2013 granting Funke's Motion for Summary/Declaratory Judgment terminating the Office Lease effective December 31, 2011; and the January 28, 2014 Order and Judgment granting Funke's Motion for Summary Judgment concerning ownership of Lot 3 of the corporate property, and unauthorized expenditure of corporate funds for improvements of Funke's Lot 1 property.

RONALD G. SCHMIDT
N.D. I.D. #02689
SCHMIDT, SCHROYER MORENO
LEE & BACHAND, P.C.
832 St. Joseph Street
P. O. Box 860
Rapid City, SD 57709-0860
Telephone: (605) 341-0112

Attorney for Defendants/Appellants

RICHARD P. OLSON
N.D. I.D. #03183
OLSON & BURNS, P.C.
17 First Ave. S.E.
P. O. Box 1180
Minot, ND 58702-1180
Telephone: (701) 839-1740

Attorney for Plaintiff/Appellees

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2. **Whether the trial court erred granting summary judgment on Aggregate's Verified Counterclaims in light of disputed material facts and/or issues of state of mind and equitable remedies?**

3. **Whether the trial court erred summarily dismissing Aggregate's Verified Counterclaim for the unauthorized transfer of Lot 3 from the Corporation of which Funke was an officer and director to himself and his wife on the sole grounds of ratification as a matter of law.**

4. **Whether the trial court erred summarily dismissing Aggregate's Verified Counterclaims for Funke's unauthorized use of corporate assets for the improvement of the shop building on grounds of either (a) Bob Cogdill being secretary/treasurer of the Corporation, or (b) statute of limitations as a matter of law?**

STATEMENT OF THE CASE

On December 7, 2011 Plaintiffs Robin D. Funke and Kathleen M. Funke ("Funke") initiated this declaratory judgment action against Aggregate Construction, Inc. ("Aggregate") seeking a declaration that the separate Leases for the office and shop properties terminated effective December 31, 2011. (Doc. I.D. #1 - Complaint) (Appendix #3).

On October 8, 2012 the Court entered its Order granting Aggregate's Motion for an Amended Answer and Verified Counterclaims. (Doc. I.D. #85 - Order Granting Motion to Amend Answer and Counterclaims)(Appendix #4) Aggregate's Revised Answer, including Verified Second Counterclaim (Appendix #5)

Aggregate's Verified Second Counterclaim sought the Orders and Judgment of the Court for the equitable cancellation or rescission of the Deed purporting to transfer

the title to Lot 3 from Aggregate by Funke , to himself and his wife as void or voidable or, alternatively, pursuant to the equitable powers of the Court, and for the restitution of the unauthorized expenditure in excess of $82,000, together with interest for unauthorized improvements and construction of the shop building addition on Lot 1, owned by Funke, together with a refund of all increased rent paid for the occupation and use of the leased premises under the misconception that Funke had paid for the improvements and construction.

On October 8, 2012 the Trial Court entered its Order granting Funke's Motion for Summary/Declaratory Judgment, and denying Aggregate's Cross-Motion for Summary Judgment. (Appendix #4 - October 8, 2012 Order.) The Court construed the language of the Shop Lease (Complaint Exhibit "A") and declared under the plain language that the Lease was terminated effective December 31, 2011, as prayed for in the Complaint for declaratory judgment. The declaration only applied to the Shop Lease.

On October 31, 2012 the Trial Court denied Aggregate's Motion for Reconsideration of the October 8th Order. (Doc. I.D. #106 - October 31, 2012 Order)

On August 22, 2013, Judge Mattson recused himself. On September 4, 2013 Judge Hagar was assigned to the case. (Doc. I.D. # 172- Order).

On September 11, 2013 Judge Hagar entered an Order granting a pending Motion of Funke to allow expert testimony of realtor Bruce Walker. (Doc. I.D. # 175 - Order).

On December 16, 2013 the Court granted Funke's Summary/Declaratory Judgment declaring that the Lease on the office property also terminated effective December 31, 2011. (Doc. I.D. # 200 - December 16, 2013 Order.) (Appendix #6.) The Court noted that the matter of Aggregate's Counterclaim regarding ownership of the shop property remains pending.

On January 28, 2014 Judge Hagar entered his Order granting Funke's' Motion for summary judgment as to the ownership of Lot 3 and the expenditure of corporate funds; Order for judgment and Judgment. (Doc. I.D. #231 - January 28, 2014 Order and Judgment). (Appendix #7.) This Order and Final Judgment disposed of all of Aggregate's Counterclaims. It also determined the cross-claim by Funkes against Bob Cogdill was moot. This was a final and appealable Judgment. Section 32-23-01 declares that declarations under the Declaratory Judgments Act have the force and effect of a final judgment or decree.

After this appeal was perfected Judge Hagar, on February 18, 2014 entered his Order holding Funke's Motion to remove Aggregate from the office property would be held in abeyance pending appeal. (Doc. I.D. # 246 - February 18, 2014 Order.) (Appendix #8).

STATEMENT OF THE FACTS

The first appeal was limited to the declarations by the Trial Court that the Shop and Office Leases terminated effective December 31, 2011 as prayed for. The appeal was dismissed and remanded for determination of remaining issues. This appeal relates to both the declaratory judgments concerning the Leases, and the summary dismissal of all of the Counterclaims.

(1) Facts concerning declaratory termination of the Leases

The Trial Court declared that the Leases were terminated by the interpretation and application of their plain language. The express, relevant terms of the Leases to be considered by this Court read as follows:

> "THIS LEASE AGREEMENT is made the 1st day of January, 2008, by and between **Funke Properties, L.L.C.** of Minot, North Dakota,

hereinafter called Landlord and **Aggregate Construction, Inc.** of Minot, North Dakota, hereinafter called Tenant.

* * *

1. Term. The term of this Lease is a period of one year, commencing on the 1st day of January, 2008, and ending on the 31st day of December, 2008, **subject to renewal as hereinafter provided.**

* * *

12. Option to Renew. Tenant shall have the option to renew this Lease for an additional term of one year after the expiration of the initial term, exercisable by giving a written notice of intent to renew the Lease for such additional term to Landlord at least 60 days prior to the expiration of the initial term. If this option to renew is exercised, **the renewed Lease shall be upon all the terms and covenants as the Lease for the initial term, including the option to renew, except that any renewal shall be subject to a three percent increase in the rent amount.**

* * *

17. Termination. Tenant will quit and deliver quiet possession of the premises to Landlord at the end of the term of this Lease, or any previous termination thereof for any cause, . . .

18. Holding Over. If the Tenant remains in possession of the premises after the expiration of this Lease, **and the Landlord accepts rent from him, the Lease shall be deemed renewed.**

* * *

LANDLORD:
FUNKE PROPERTIES, LLC

/s/ Robin D. Funke
By Robin Funke
Its President " (Emphasis added.) (Appendix #9.)

It must be noted that the Shop and Office Leases are identical in relationship to the foregoing relevant provisions.

On August 24, 2011 Funke's attorney wrote Aggregate advising he represented Funke , and that effective December 31, 2011 **your existing Leases with Funke are terminated.** (Doc. I.D. #1- Complaint Exhibit B) (Appendix #10 - August 24, 2011

letter.) The letter did not state any "cause" for the termination. Paragraph 17 of the Leases plainly states the tenant will quit and deliver quiet possession of the premises at the end of the term of the lease for "cause". (See, Appendix #10 - Lease.)

On September 2, 2011 Aggregate wrote Funke and his legal counsel stating in part as follows:

> " **Please accept this as notice of renewal pursuant to Paragraph 12** of the Lease for the following described property: (Legal description for office and shop property)
>
> This Lease has been renewed pursuant to Paragraph 18 for all relevant lease years including the present year. The previous renewals have been upon the same terms and covenants as the lease for the initial term, including the option to renew. This option to renew is accordingly made.
>
> The 2012 lease payments will be increased in this property by three percent pursuant to Paragraph 12. * * *. " (Emphasis added) (Doc. I.D. #1-Complaint Exhibit C) (Appendix #11- September 2, 2011 letter)

Aggregate, as Lessee remained in possession of both of the leased premises for the entirety of calendar years 2008, 2009, 2010, and 2011. **Funke accepted the rent, including with a three percent increase for each year through December 31, 2011.** There was never any mention or discussion of any different terms or time by the parties at anytime from January 1, 2008 through December 31, 2011.

Funke raised the issue of the reasonableness of the rent on the office building. Cogdill affirms that Funke's expert witness, Bruce Walker, rendered his opinion in ¶3 of his November 7, 2013 Affidavit that the current rental value of the office property was approximately $2000-2200 per month. (Doc. I.D. #238 - Robert Cogdill Affidavit.) (Paragraph 5). For the year 2012 Aggregate paid Funkes $2026 per month for the office property. (Paragraph 6). For the year 2013 Aggregate paid Funkes $2086.78 per month for the office property. (Paragraph 7). For the current year 2014 Aggregate is paying

$2149.35 per month for this property. (Paragraph 8). Aggregate is currently paying Funkes the high end of the rental range as opined by his expert Mr. Walker, and Funkes should not be prejudiced during the pendency of this appeal. (Paragraph 9.)

(2) Facts concerning unauthorized transfer of Lot 3 and unauthorized use of corporate funds for the improvement and construction of the new shop property on Funke's Lot 1

Prior to January 1, 2008, Robert Cogdill and Plaintiff Robin D, Funke each owned 50% of the outstanding shares of stock. (Counterclaim ¶2; Admitted Reply ¶3.0).

The duties and responsibilities of Cogdill and Funke were clearly defined and agreed to by them. (Counterclaim ¶ 3; Admitted Reply ¶ 3.0).

Robert Cogdill was to work in the field supervising and managing the various projects of the company. (Ibid.) Funke was to act as President and be responsible for the business and legal affairs of the company as authorized by the Board of Directors. (Ibid.) Funke admits he was "mainly responsible for the business/office operations" of Aggregate. (Doc. I.D. #70 - August 24, 2012 Affidavit of Robin D. Funke, ¶ 3.)

In January, 2008, Robert Cogdill purchased all of the shares of stock owned by Funke and became 100% owner of all outstanding shares of stock of Aggregate and its assets. (Counterclaim ¶ 4; Admitted Reply ¶ 4.0.)

On January 7, 1988 the Funkes, as husband and wife, conveyed Lot 1 to Aggregate for $27,500. (Counterclaim ¶6; Admitted Reply ¶5.0)

On January 7, 1988 the Noacks transferred the West 435' of Lot 3 to Aggregate for $16,000. (Counterclaim ¶7; Admitted Reply ¶5.0.)

On April 21, 1994 Oscar Corum entered into a Contract for Deed for the purchase of Lot 3, less the West 435 of LaViolette Addition for $15,000. (Counterclaim ¶11;

Admitted Reply ¶7.0.) On August 29, 1994, Oscar Corum conveyed the property to Aggregate by Deed. (Counterclaim ¶12; Admitted Reply ¶7.0)

On February 6, 1997 Aggregate agreed to pay Funke $950 per month for "shop rent" for the shop located on Lot 1. (Counterclaim ¶13; Admitted Reply ¶7.0.)

Unknown to Robert Cogdill, between January 14, 1998 and September 30, 1998 Funke, without any corporate authorization expended approximately $70,837.88 of corporate funds for services and materials incurred by Aggregate relating to the construction of the shop building addition on Lot 1. (Counterclaim ¶14; Denied Reply ¶8.0.)

Aggregate expensed the items referenced in the previous paragraph to its shop expense account and at the end of the year Aggregate's CPA firm capitalized $69,945.88 which continues to be shown as an asset of Aggregate. (Counterclaim ¶16; Denied Reply ¶10.0.)

On March 25, 1998 Funke summarized labor and expenses incurred and paid by Aggregate, including invoices from contractors for work performed in the construction of the shop building addition on Lot 1 paid by Aggregate. (Counterclaim ¶17; Denied Reply ¶11.0.)

On October 7, 1998 Aggregate's Board agreed to pay Funke $1,950 per month starting October 1, 1998 for shop rent and shop building addition which was substantially constructed and paid for by Aggregate with corporate funds. (Counterclaim ¶18; Admitted Reply ¶12.0.)

Cogdill was "not aware of the use of the corporate funds for the construction of the shop building addition and assumed and reasonably believed that the building

construction services and materials outlined above had been paid for personally by Robin Funke since he owned Lot 1. (Counterclaim ¶19; Denied Reply ¶13.0.)

Had Cogdill known that Aggregate corporate money was used for the substantial construction of the shop building he would have never agreed to the payment of the increased rent for the building to Funke. (Counterclaim ¶20; Denied Reply ¶14.0.)

On January 4, 2006, a Deed signed without any corporate authorization by Funke , who was a shareholder, Board member and President of Aggregate at that time, purported to make a conveyance from Aggregate to him and his wife of Lot 3. (Counterclaim ¶22;

The December 19, 2005 corporate authorization only authorized the sale of the office described as Lot 1. (Counterclaim ¶21 [It must be noted that the Counterclaim contains two paragraphs 21 and 22 and that this is the second paragraph 21]; denied Reply ¶17.0.) There was never any corporate authorization for the sale of Lot 3. (Ibid.)

On August 24, 2012 Funke prepared and filed an Affidavit. (Doc. I.D. #70 - 8/24/2012 Funke Affidavit.) As mentioned, Funke was mainly responsible for the business and office operations of Aggregate. (¶3.) In ¶4 it states that a lot of the bills were paid by Aggregate so the expenses could be depreciated to offset rent. He admits that additional wiring, steel beams for the overhead cranes and miscellaneous items were paid for by Aggregate.

On August 31, 2012 Cogdill filed a Responsive Affidavit stating he had read Funke's August 24, 2012 Affidavit. (Doc. I.D. #75 - Cogdill 9/4/2012 Affidavit.) Cogdill testifies that all items mentioned in ¶4 of the Funke Affidavit were paid for and are the property of Aggregate. (¶2.) He states there was never any agreement of understanding that the bills for those shop improvements were paid by Aggregate so the

expenses could be depreciated to offset rent. He testified that was the first he had ever heard of that and did not believe it to be true. (Ibid.)

Funke, in ¶5 of his Affidavit states that although it was not mentioned in the corporate meeting minutes, he and Bob agreed that he could purchase Lot 3. Cogdill absolutely denied the statement in ¶5 of Funke's Affidavit that he and Funke agreed that he could purchase Lot 3. (Id. ¶3.) **Cogdill testifies he never saw the Deed for the transfer to Lot 3 to Funkes and only first learned of it in preparation for the defense of the Complaint filed by Funkes concerning the Lease.** (Ibid.) He states that the sale of Lot 3 was never discussed at any corporate meeting and the sale of Lot 3 was never agreed upon. (Ibid.)

Cogdill testifies that at all relevant times he was totally unaware of where the various property lines existed on the various tracts of real estate purchased by Aggregate over the years. (Id. ¶6.) He testifies that he trusted Funke to honor the corporate resolutions and never authorized the sale of any real estate other than specifically set forth in the corporate resolutions adopted at duly convened meetings of the Board. (Ibid.)

Cogdill testifies he did not know when the Leases were signed in January, 2008 that Funke claimed to own all of the shop property including Lot 3. (Id. ¶89.) He states that the statement in ¶7 of the Funke Affidavit is untrue. (Ibid.)

Funke states that in the spring of 2010 he and Bob went to a race in Charlotte, North Carolina, and Bob asked him about buying all of the shop property including Lot 3 from him. (Funke Affidavit ¶9.) Cogdill responds by stating that when he met with Funke in North Carolina they did not discuss any purchase of the shop property, and at

that time he had no knowledge that Funke had conveyed Lot 3 to himself out of Aggregate with no corporate authority or agreement with him. (Cogdill Affidavit ¶9.)

Cogdill prepared and filed a supplemental Affidavit dated December 31, 2013. (Doc. I.D.#225 - Cogdill Supplemental Affidavit.) Cogdill explains that he had read Funke's Motion for Summary Judgment as to property ownership and expenditure of corporate funds, and the Brief in Support of the Motion and specifically responded to the **FACTS** section of the Brief. (Affidavit ¶¶2 and 3.)

Cogdill disputed that he "was in charge of Aggregate's financial affairs." (Id. ¶6.) (Cogdill incoporates ¶3 of the Verified Second Counterclaim set forth above in support of his dispute.)

Cogdill states although Funke had him designated as Secretary/Treasurer of the corporation, it was in name only. (Ibid.) He testifies he spent very little time in the office over the course of any year during the partnership and was usually out of the office for months at a time. (Ibid.) **Cogdill states he placed his total trust in Funke for all business and financial affairs of the company.** (Ibid.) Cogdill states as Secretary/Treasurer of the corporation **"I usually signed corporate records and financial documents asked and when told to do so by Funke . I am not educated nor experienced in business and financial affairs and trusted whatever he presented to me was legal and proper. I always took him at his word. I did not have the ability to analyze or question what was in the corporate or financial documents."** (Emphasis added.) (Id. ¶8.)

Cogdill states that the financial and tax documents were prepared by Funke and the corporate accountant and **"I assumed them to be correct. I did not question them."** (Emphasis added.) (Id. ¶9.)

Cogdill further testifies that the corporate documents, including Deeds or mortgages or corporate documents including his purchase of Funke 's shares and the Leases of the office and shop properties were prepared by Funke and the corporate attorney and **"I believed and trusted they would be legal and proper. Because of my trust in Funke I did not analyze or question those documents"**. (Emphasis added.) (Id. ¶10.)

Cogdill agreed with the statement in ¶6 of Funke's Fact Statement that Aggregate acquired the West 435' of Lot 3 for the sum of $16,000; and further agreed that Aggregate acquired Lot 3, less the west 435' for the sum of $15,000. (Id. ¶13.)

Cogdill disputed any authority from Aggregate or him for the sale by Warranty Deed dated January 4, 2006 of the Lot 3 property to Robin D. Funke and Kathleen M. Funke referenced in ¶6 of Funke's Fact Statement. (Id. ¶14.) He states the Warranty Deed dated January 4, 2006 was prepared and filed by Funke without any corporate authorization or knowledge by him. (Id. ¶14.) **The first time Cogdill became aware of the Warranty Deed was during the course of this litigation.** (Emphasis added.)(Ibid.)

Cogdill found it incomprehensible that Funke would have paid Aggregate $11,990 for the entirety of Lot 3 when the property, as admitted by Funke, cost Aggregate $31,000 as stated in ¶6 of his Fact Statement. (Id. ¶15.)

Cogdill points out that Funke in ¶3 of his Fact Statement says that Lot 3 contains 11.99 acres. (Id. ¶16.) Dividing the $31,000 cost to Aggregate for the purchase of the Lot

3 property in 1988 and 1994 by the 11.99 acres equal an initial cost to Aggregate of $2,605 per acre. (Id. ¶16.) With the inflationary increase of property between 1988 and 1994 and January 5, 2006, Funke's secret purchase of Lot 3 for $1,000 per acre without any corporate authorization was a fraud on the corporation and him as a 50% shareholder. (Id. ¶16.)

Funke admits in ¶7 of his Fact Statement that the conveyance of the Lot 3 property to Funke was <u>not</u> mentioned in any of Aggregate's Meeting Minutes. (Id. ¶17.)(Emphasis added.) Funke acknowledges there was no written corporate authorization for the purchase of Lot 3 from Aggregate in ¶7 of his Fact Statement. (Ibid.)

Cogdill denies the statement in ¶8 of Funke's Fact Statement that Aggregate's financial records show the conveyance of the Lot 3 property to Funke in the General Journal transaction dated January 5, 2006. (Id. ¶18,) That General Journal entry only pertains to that portion of Lot 3 purchased from Oscar Corum. (Ibid.) The remainder of Lot 3 property continued to remain on the books of Aggregate through December 2012. (Ibid.) As admitted by Funke, the General Journal shows "land with gravel pit, at cost, net of accumulated depreciation of $4,068 as an asset. (Ibid.) Cogdill states that was simply a portion of Lot 3 purchased from Oscar Corum. Only that portion of Lot 3 was removed from the Balance Sheet dated December 31, 2007 and 2006. (Ibid.)

As previously mentioned, Cogdill states, "**I was unable by education or experience to read or understand the financial records prepared by our accounting firm working with Funke .**" (Id. ¶19.) Cogdill did not recall ever reviewing the General Journal, and states that his review of the Financial Statements was based upon

his trust of Funke to honestly provide the corporate financial information to the accounting firm for purposes of preparing the Annual Financial Statements. (Ibid.) Cogdill testifies I did not at that time have any reason to question or review any specific entries including related to the land. (Ibid.)

Cogdill points out that Funke admits in ¶9 of his Fact Statement that in 1998 improvements were made to the shop building located on Lot 1. (Id. ¶20.) Cogdill notes that Funke fails to point out that he used Aggregate employees without any authority to perform work on the building. (Ibid.)

Cogdill states that Funke's statement in ¶9 of his Fact Statement that Aggregate contributed $69,945.88 for the improvements paid by Aggregate were "depreciated to offset rent." (Id. ¶21.) Cogdill states there was never any corporate authorization or agreement by him to depreciate any of Aggregate's expenses to "offset rent" at anytime. (Ibid.) **"The first I heard of this was Funke's disclosures in relationship to this litigation."** (Ibid.) Cogdill even questioned how Aggregate could depreciate improvements on property owned by Funke on Lot 1. (Ibid.)

Funke admits there was "no written agreement between the parties regarding who was supposed to pay for the improvements." (Id. at 23.)

"As previously mentioned, I did not have any reason to question any of the entries in the financial statements and trusted that Mr. Funke would have honestly made those entries. Again, I was never aware of these entries referenced in ¶9 of the Funke Fact Statement until brought out by him during the course of this litigation." (Emphasis added.) (Ibid.)

ARGUMENT

(1) Standard of Review

The standard of review is de novo. In interpreting a contract, the Court will look first to its language and, if intent is apparent from its face, there is no room for construction. Stuhlmiller v. Nodak Mut. Ins. Co., 475 N.W. 2d 136 (N.D. 1991). Contract interpretation is a matter of law and must be determined by the Court. Redlin v. Redlin, 436 N.W.2d 5 (N.D. 1989). As far as reasonably possible, a contract is to be construed so as to harmonize all of its parts. Bjerken v. Ames Sand & Gravel Co., 189 N.W.2d 366 (N.D. 1971). Section 32-23-07, N.D.C.C., states that all orders, judgments, and decrees under Ch. 32-23 for declaratory judgments may be reviewed as other orders, judgments and decrees.

On appeal from a summary judgment, the evidence must be reviewed by this Court in a light most favorable to the party against whom summary judgment was granted, and this Court as the reviewing Court cannot decide disputed issues of material fact but may only determine whether genuine issues exist and whether the law was applied correctly. Erickson v. Farmer Union Mut. Ins. Co., 311 N.W.2d 579 (N.D. 1981).

(2) Declaratory Judgment

The prayer in Funke's Complaint exclusively seeks a declaration of the Court that the Leases terminated effective December 31, 2011. The Trial Court acknowledged that Funke's prayer was limited to a declaration as to the termination of the Leases. This Court must make a de novo interpretation of the relevant lease provisions in concluding whether the Trial Court erred in its interpretation as a matter of law.

The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, and each clause is to help interpret the others. Section 9-07-06,

N.D.C.C. Presently, Section 1 of the Lease provides that its term is for one year "**subject to renewal as hereinafter provided.**" The Lease may be renewed either pursuant to Section 12 or Section 18. Section 18 provides that if the Tenant remains in possession of the premise after the expiration of the term, and the Landlord accepts rent from him **"the Lease shall be deemed renewed."** It does not say it will be renewed in part. It does not say that the Section 12 renewal is not included. The plain and clear language states that the entirety of the Lease is renewed including the Section 12 renewal option.

The Lease was renewed in its entirety pursuant to Section 18 for calendar years 2009, 2010 and 2011. The 2009, 2010 and 2011 renewals were a "hybrid" renewal consistent with the provisions of both Sections 12 and 18. The rent was increased by three percent pursuant to Section 12 for each of the three years. Funke accepted the increased rental through all of those years without objection or comment. The annual rental for all three years was increased by three percent for each year consistent with Paragraph 12. Funke must be estopped from arguing that the entirety of the Lease, including Section 12 was not renewed pursuant to the clear language of Sections 12 and 18 for those years and his acceptance of the increased rents pursuant to Section 12.

Of particular relevance is Section 47-16-06, N.D.C.C. which reads as follows:

> " 47-16-06. When a Lease is Presumed Renewed. If a lessee of real property remains in possession thereof after the expiration of the hiring **and the lessor accepts rent from the lessee, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year.**" (Emphasis added.)

This is precisely the undisputed material facts before this Court. Aggregate remained in possession of the property for calendar years 2009, 2010 and 2011, and as mentioned Funke accepted the rent, including the three percent annual increases from Aggregate for each of those years. The statute clearly states: "**The parties are presumed**

to have renewed the hiring on the same terms and for the same time" as the previous term. There was absolutely no change in either any of the terms or the time of the Leases between January 1, 2008 and December 31, 2011. The Lease, including both Sections 12 and 18 was renewed as a matter of law as provided by this statute.

The Lease was negotiated and entered into as part of the transaction for the purchase by Bob Cogdill of all of Funke's Aggregate shares of stock. (Doc. I.D. # 73 - Verified Second Counterclaim, ¶¶ 4 and 5.) The primary communications with legal counsel for the preparation of the Stock Purchase Agreement and Lease was Funke . (Id. ¶5.) Funke controlled the terms of these Leases.

Aggregate specifically renewed the Lease pursuant to Paragraph 12 on September 2, 2011, which was more than 60 days prior to the expiration of the term on December 31, 2011.

An analysis of the Trial Court's Order declaring that the Lease was terminated effective December 31, 2011 discloses the Court erred as a matter of law. The lower Court held that Leases are subject to the Rules of Contract Construction, and if the parties' intent can be determined from the language of the contract alone, the interpretation of the contract is a question of law. (Order at p. 5.)

The Court recognized Aggregate's legal position that the renewals in 2009, 2010 and 2011 **"served to renew the entire Lease, including the renewal option provided in Paragraph 12; and, therefore, Aggregate's September 2, 2011 Notice of Lease Renewal was sufficient to renew the lease for 2012."** (Ibid.) (Emphasis added.)

The Trial Court stated Funke's argument as follows:

> " The Funke's argue that interpreting the Lease as Aggregate does would result in a Lease that would continue at one year intervals at infinitum. Aggregate asserts it is not claiming a 'perpetual' lease in the broadest

sense of the word. Instead, Aggregate argues that under the express terms of the Lease, Aggregate is entitled to renew the Lease under either paragraph 12 or paragraph 18 'in a continuous manner so long as it does not default.' However framed, Aggregate's position, if accepted, would, in effect, make the Lease at issue a perpetual Lease, and the law does not favor perpetual Leases." (Id. 6.)

The Trial Court then quotes at length from 49 Am. Jur. 2d, Landlord and Tenant, §142, 143 and 144 at pp. 6 and 7 of its Order.

Excerpts from the Trial Court's quotation are as follows:

" The fact that perpetual leases are disfavored **does not mean that they are contrary to public policy, and where the intent is clear, a court will not interpret a valid perpetual lease provision merely to relieve a party of a bad bargain.** (Id. at §142.)

* * *

Courts will not construe a lease to create a right to perpetual renewal unless the language employed indicates so clearly, plainly, unambiguously, or unequivocally as to leave no doubt that the parties intended a perpetual renewal. Indeed, there must be some peculiar and plain language to create a lease for perpetuity before it will be assumed that the parties intended to create it. However, formal language may not be required. (I.D. at §142.)

The presence or absence of customary words of perpetuity are accorded significance in determining whether a perpetual lease or perpetual right to renewal exists. Customary words of perpetuity includes the terms 'forever', 'for all time' and 'in perpetuity'. **On the other hand, if there are terms contained in the lease which provide for a restriction on the use of the property, make no provision for the adjustment of rentals, and provide that the property will be returned in as good condition as when originally let, a lease may be seen as one not contemplating perpetual renewals.** (I.D. §144.) (Emphasis added.)

A provision for successive renewals, without more, does **not** provide sufficient manifestation of intent that the right to renew is to continue perpetually." (Emphasis added.) (Order at pp. 6-7.)

The Trial Court's own authority establishes that the Leases before this Court are not perpetual. The Leases do not contain any language indicating the Leases are perpetual so clearly, plainly, unambiguously, or unequivocally as to leave no doubt that the parties

intended a perpetual renewal. The Trial Court's authority states that there must be some peculiar and plain language to create a Lease for perpetuity before it will be assumed that the parties intended to create one. There is nothing in the current Leases indicating perpetuity.

Presently, the Leases limit the use of the property to officing and shop, **and includes an annual increase of three percent of the rentals upon renewal.** As mentioned, Aggregate increased the rental by three percent for each of the years 2009, 2010 and 2011. Funke accepted the increased rentals consistent with ¶12 of the Lease.

A very recent Decision of the this Court is instructive. In Kermit Anderson, Jr. V. Nick Lyons, and Kevin Cabella, 2014 N.D. 61, this Court unanimously refused to determine a Lease perpetual because the term of the Lease was dependent on two contingencies that may occur within the ten year period of the statute. In that Lease the language actually used the term "in perpetuity" in conjunction with other special terms. Presently the Lease provides specific default provisions any of which might occur within the term of the Lease. This Court relied on a Nevada case which concluded that the default could occur anytime within the Lease term. Such is presently the case.

Although not referenced by the Trial Court, Funke relied almost exclusively on Willman v. Harti Co., 305 N.W.2d 909 (N.D. 1981) for its arguments in its Brief. That case is clearly distinguishable. The Lease before the Court was for a period of five years with an option to renew for an additional five year period **"upon such terms and conditions as the parties found to be mutually agreeable."** The essential fact is that the Lease before the Court in Willman did not have any provisions comparable to §§12 and 18 of the Leases before this Court.

This Court is respectfully requested to reverse the Trial Court's grant of summary/declaratory judgment to Funke as to the termination of the Leases.

(3) Summary Judgment

In determining whether summary judgment was appropriately granted, the Supreme Court views 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. Wagner v. Crossland Const. Co., Inc., 840 N.W.2d 81, 2013 N.D. 219. Aggregate's FACT STATEMENT clearly establishes that the Trial Court inappropriately granted summary judgment on both the unauthorized transfer of Lot 3, and the unauthorized expenditure of corporate funds and employees to improve and construct the shop building on Funke's Lot 1. Funke admits there was no corporate authority for the transfer of Lot 3 from the corporation to himself and his wife. He admits that corporate funds and employees were used to improve and construct the shop building. Aggregate incorporates its FACT STATEMENT herein to avoid the necessity of duplication and redundancy.

It is Aggregate's position that the Trial Court not only erred in granting Funke summary judgment, but erred in denying Aggregate's Cross-Motion for Summary Judgment under the facts before this Court.

Even undisputed facts do not justify summary judgment if reasonable differences of opinion may exist as to the inferences to be drawn from the undisputed facts. Norman Jessen & Associates, Inc. v. Amoco Production Co., 305 N.W.2d 648 (N.D. 1981).

As this Court states in Pioneer Credit Co. v. Medalan, 326 N.W.2d 717, 719 (N.D. 1982):

> "Three classes of litigation which are not usually suited for summary disposition are 1) negligence actions, 2) actions involving states of mind, 3) equitable actions. "

The state of mind exception to summary judgment is particularly applicable in the case before this Court. The Trial Court's citing, but not discussing §10-19.1-51, N.D.C.C., states that the question becomes whether the sale of Lot 3 was ratified. The Court then states as follows:

> " There is no dispute that Cogdill signed the 'shop' lease in 2008, two years after the sale of Lot 3 to the Funkes, and the Court finds, as a matter of law, that Cogdill's signature on a Lease that included Lot 3 is a ratification of the sale of Lot 3 to the Funkes. Any claim that Funke acted in bad faith in the conveyance of Lot 3 was waived by Cogdill/Aggregate when the sale was ratified by Cogdill's signature on the 'shop' lease." (Order ¶¶ 20-21.)

A view of the facts as set forth by Aggregate discloses this to be an inappropriate conclusion by the Trial Court. Cogdill testifies that at all relevant times he was totally unaware of where the various property lines existed on the various tracts of real estate purchased by Aggregate over the years. Most importantly, Cogdill testified by Affidavit that he did not know when the Leases were signed in January, 2008 that Funke claimed to own all of the shop property including Lot 3. He testified that Funke was the business partner and was to conduct and be responsible for all of the company's business and financial affairs. He states that although Funke had him designated as Secretary/Treasurer of the corporation, it was in name only. He further states he spent very little time in the office over the course of any year during the partnership and was usually out of the office for months at a time.

Cogdill placed his total trust in Funke for all business and financial affairs of the company. He testifies, "I usually signed corporate records and financial documents asked and when told to do so by Funke. I'm not educated nor experienced in business and

financial affairs and trusted whatever he presented to me was legal and proper. I always took him at his word. I did not have the ability to analyze or question what was in the corporate or financial documents."

The Court admits that the Lease was signed two years after the corporate meeting authorizing the sale of Lot 1 to Funke. **How was Cogdill to be imputed the knowledge and the meaning and effect of legal descriptions in a Deed?** (Emphasis added.) He signed whatever Funke presented to him and unequivocally trusted Funke to be truthful and honest.

Cogdill testifies that corporate documents, including Deeds or Mortgages or corporate documents were prepared by Funke and the corporate attorney and **"I believed and trusted they would be legal and proper. Because of my trust in Funke I did not analyze or question those documents."** (Emphasis added.)

The Warranty Deed conveying Lot 3 was prepared and filed by Funke without any corporate authorization or knowledge by him. **Most importantly, he testified the first time he became aware of the Warranty Deed was during the course of this litigation.**

Cogdill's knowledge at the time he signed the Lease was purely and simply a question of state of mind. The summary judgment was inappropriate on grounds of ratification.

Moreover, a cursory review of §10-19.1-51 discloses that the Trial Court inappropriately relied on that statute for ratification. (Appendix #12 - §10-19.1-51, N.D.C.C.)

That statute states that a contract or other transaction between a corporation and one or more of its directors or a member of the family of a director is not void or voidable because the director or other individual or organization is a party or because the director is present at the meeting of the shareholders or the board or committee at which the contract or transaction is authorized, approved, **or ratified**, if at least one of the requirements of Subsection 2 is satisfied. None of the requirements of Subsection 2 comes even close to being met for ratification purposes.

Subsection 2a provides that the transaction is not void or voidable if the contract or transaction was, and the person asserting the validity of the contract or transaction was, **fair and reasonable as to the corporation at the time it was authorized, approved or ratified.** The undisputed facts clearly disclose that Funke was not fair and reasonable to corporation. Cogdill states in his Affidavit that it is uncomprehensible that Funke would have paid Aggregate $11,990 for the entirety of Lot 3 when the property, as admitted by Funke, cost Aggregate $31,000. The initial cost to Aggregate was $2,605 per acre. Funke's secret purchase of Lot 3 for $1,000 per acre was a fraud upon the corporation.

Subsection 2b provides an exception if the material facts as to the contract or transaction and as to the director's interests are fully disclosed or known to the holders of all outstanding shares, and the contract or transaction is approved in good faith. The record is clear there was never any disclosure meeting or vote. The mere signing of the Lease, including a reference to Lot 3 is certainly not evidence of any disclosure.

Subsection 2c provides an exception if the material facts as to the contract or transaction and as to the director or director's interests are fully disclosed or known to the board or a committee, and the board or committee authorizes, approves, or ratifies the

contract or transaction in good faith. There were obviously no board disclosure or committee meetings or ratification in "good faith" under any stretch of the facts.

There was never any ratification as a matter of law.

Equity actions are also not suited for summary judgment. Aggregate's Second Verified Counterclaim seeks the equitable transfer of Lot 3 back to the Corporation, and the equitable restitution of the unauthorized expenditures for the improvement and construction of the shop building and the refund of all increased rent paid for the occupation and use of the leased premises due to the misconception that Funke had paid for the improvements and construction. The equitable nature of the claims are not subject to summary judgment as a matter of law.

(4) Cogdill's actions as Secretary/Treasurer of the corporation and the statute of limitations inappropriate for summary judgment.

The Trial Court granted summary judgment to Funke on the unauthorized use of corporate funds and employees for the improvement and construction of the shop building on the following grounds:

> "(¶27) Regardless of Cogdill's professed ignorance of the source of the funds used for the improvement of the shop property, he, as secretary/treasurer of the corporation, whether in name only or in reality, had a duty under N.D.C.C. §10-19.1-53(3) with regard to corporate finances and expenditures **and should have known that the improvements were being funded by Aggregate.**
>
> (¶28) As to the statute of limitation's argument, the expenditure for the improvements were made by Aggregate in 1998, at least twelve years before the action was commenced. Under either N.D.C.C. §28-01-16(6yrs.) or §28-01-22(10yrs), Aggregate's claim on this issue is time-barred." (Emphasis added.)

In both instances the Court inappropriately determines Cogdill's " state of mind". The Court in both instances has determined what Cogdill **"should have known"**.

The question of when a party acquires, or in the exercise of reasonable diligence should have acquired knowledge is generally a question of fact which is not appropriate for summary judgment. Diocese of Bismarck Trust v. Ramada, Inc., 553 N.W.2d 760 (N.D. 1996).

In Larson v. Williams Elec. Co-op., 534 N.W.2d 1 (N.D. 1992) this Court held it was a genuine issue of material fact as to whether a farmer's alleged knowledge of his stray voltage problem was sufficient to allow his claim to accrue for purposes of statute of limitations precluding summary judgment. In Biesterfeld v. Asbestos Corp. of America, 467 N.W.2d 730 (N.D. 1987) was held that whether a worker should have discovered a causal connection between his injury and exposure to asbestos were questions of fact precluding summary judgment on the issue of the application of the applicable statute of limitations.

In Jacob v. Hokanson, 300 N.W.2d 852 (N.D. 1980) it was held that the question as to when the administrators, who sold the property, acquired or through reasonable diligence should have acquired actual knowledge of a mutual mistake such as to commence the running of the statute of limitations was a question of fact, and evidence precluded summary judgment with respect to the statute of limitations.

This Court has held that corporation officers, acting in their fiduciary capacity, cannot make an agreement with themselves individually and for their personal benefit. Ludke v. Oleen, 4 N.W.2d 201, 72 N.D. 1 (N.D. 1942). It is universally held that corporate officers are fiduciaries and required to place the interests of the corporation and its shareholders above their private interests. Officers have an affirmative duty to act in the employer corporation's best interest and to effectively promote the interests of the

corporation to the exclusion of their own self-interest. Blackburn, Nickels & Smith, Inc. v. Erickson, 366 N.W.2d 460 (Minn. App. 1985).

Funke was acting in a "fiduciary" capacity when he made the unauthorized transfer of Lot 3 to himself and his wife, and made the unauthorized use of corporate funds and employees to improve and construct the shop building on his own property. He not only utilized corporate assets for the improvement and construction of the shop building on his own property, but led Cogdill to believe that he had paid for all of the improvments and construction as justification for increasing the rent from $950 per month to $1950 per month.

The suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation. Verry v. Murphy, 163 N.W.2d 721 (N.D. 1969). In a court of conscience, the deliberate concealment is equivalent to a deliberate falsehood. (Ibid.) Fraud cannot exist unless an intent to deceive is present, for it is the action of the mind which gives existence to the fraud. Zuraff v. Empire Fire & Marine, Ins. Co., 252 N.W.2d 302 (N.D. 1977).

It is stated in §31-11-05(8), N.D.C.C., that a person cannot take advantage of that person's own wrong. This is a maxim of jurisprudence. Funke is currently attempting to take advantage of his own wrong. The equitable maxim that a wrongdoer may not take advantage of his own wrong is part of the "clean hands" doctrine of equity. Beavers v. Walters, 537 N.W.2d 647 (N.D.1995).

The Trial Court in granting summary judgment on the unauthorized use of corporate funds and employees to improve and construct the shop building on Funke's land due to Cogdill being Secretary/Treasurer of the corporation and statute of limitations grounds is unsustainable. It ignores Funke's "fiduciary" duties to the corporation and

Cogdill in his attempt to utilize his office for his own self-interests. Both grounds involve "state of mind" and again are unsustainable. Cogdill states that had he known that Aggregate corporate money was used for the substantial construction of the shop building he would have never agreed to the payment of the increased rent for the building to Funke.

Cogdill testified he signed corporate records and financial documents when asked and told to do so by Funke. The facts establish that Funke prepared the Leases, and Cogdill simply signed them as requested. Cogdill was not educated nor experienced in business affairs and trusted whatever Funke presented to him was legal and proper. He always took Funke's word. He did not have the ability to analyze or question what was in the corporate documents.

The summary judgment must in all respects be reversed.

CONCLUSION

For all of the above and foregoing reasons this Court is respectfully requested to enter the following orders and judgment:

1. To reverse the summary/declaratory judgments terminating both Leases;

2. To hold that the Trial Court erred granting summary judgment on Aggregate's Verified Second Counterclaims in light of disputed material facts and/or issues of state of mind and equitable remedies;

3. To hold that the Trial Court erred summarily dismissing Aggregate's Verified Second Counterclaim for the unauthorized transfer of Lot 3 from the Corporation of which Funke was an officer and director to himself and his wife, and that the transaction was not ratified by Cogdill by merely signing the Leases as a matter of law;

4. To hold that the Trial Court erred summarily dismissing Aggregate's Verified Second Counterclaims for Funke's unauthorized use of corporate assets for the improvement of the shop building on his own property due to either (a) Bob Cogdill being Secretary/Treasurer of the Corporation, or (b) statute of limitations as a matter of law;

5. To hold that the Trial Court erred in denying Aggregate's Cross-Motion for Summary Judgment, and mandating that the Trial Court enter summary judgment for Aggregate on the Cross-Motion as a matter of law;

6. To deny Funke's Motion to Dismiss the Appeal, and grant Aggregate its legal fees in opposing the Motion in the amount set forth in counsel's Affidavit on file herein.

7. For the costs and disbursements related to the appeal; and

8. For such other or further relief as the Court deems appropriate under the facts and circumstances.

Dated this 28 day of April, 2014.

SCHMIDT, SCHROYER, MORENO, LEE & BACHAND, P.C.

By: _____

RONALD G. SCHMIDT
N.D. Bar I.D. #02689
P. O. Box 860
Rapid City, SD 57709-0860
Telephone: (605) 341-0112

REQUEST FOR ORAL ARGUMENT

_____

Ronald G. Schmidt

IN THE SUPREME COURT
OF THE
STATE OF NORTH DAKOTA

Supreme Court Case No. 20120405
Ward County District Court No. 51-2011-CV-01591

AGGREGATE CONSTRUCTION, INC.,

AFFIDAVIT OF MAILING

Defendant/Appellant

vs.

ROBIN D. FUNKE and KATHLEEN M. FUNKE

Plaintiff/Appellee

State of South Dakota)
: cc
County of Pennington)

The undersigned hereby certifies, under oath, that on the 28 day of April, 2014, he served two copies of Appellant's Brief upon the person herein next designated by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelope addressed to the following addressee:

Richard P. Olson
Andrew T. Forward
OLSON & BURNS, P.C.
17 First Ave. SE - P. O. Box 1180
Minot, ND 58702-1180

which address is the last address of the addressee known to the subscriber.

SCHMIDT, SCHROYER, MORENO, LEE & BACHAND, P.C.

By: _____
Ronald G. Schmidt

Subscribed and sworn to before me this 28 day of April 2014.

_____
Notary Public

My commission expires:
(Seal)

My Commission Expires
February 14, 2016