IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Eugene Pegg, Plaintiff-Appellee, vs. Kelly Kohn and Kohn Electric, LLC, Defendants-Appellants.	Supreme Court No. 20140202 District Court Case No. 02-2013-CV-00080

BRIEF OF DEFENDANTS/APPELLANTS

APPEAL FROM THE JUDGMENT DATED MAY 16, 2014, ISSUED BY THE HONORABLE JAY A. SCHMITZ, DISTRICT COURT JUDGE, BARNES COUNTY, SOUTHEAST JUDICIAL DISTRICT

Lawrence P. Kropp
KROPP LAW OFFICES, P.C.
105 Tenth Street SE
Jamestown, ND 58401
Tel (701) 252-5505
Fax: (701) 252-1014
Email: kropplaw@csicable.net
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES:

STATUTES:

STATEMENT OF THE ISSUES

I. **The district court erred in determining that an oral agreement existed between the parties.**

II. **The district court erred in concluding that Pegg was entitled to damages even though he did not pay the full amount due under the purported oral agreement.**

STATEMENT OF THE CASE

[¶1] This is an appeal from the Judgment of the Barnes County District Court entered on May 16, 2014 (Appendix page 22; herein after "A.___")

[¶2] This matter was commenced by Plaintiff Eugene Pegg (hereinafter "Pegg") by service of a Summons (A.9) and Complaint (A.4) on August 17, 2011 upon Leah Kohn, wife to Defendant Kelly Kohn (hereinafter "Kohn") (A.10) and upon Leah Kohn, wife of Kelly Kohn for Defendant Kohn Electric, LLC (hereinafter "Kohn Electric"). Pegg's Complaint sought amounts allegedly due under an asserted oral agreement with Kohn and Kohn Electric under five different legal theories (A.4-8).

[¶3] Kohn and Kohn Electric interposed an Answer and Counterclaim on August 26, 2011, denying the existence of the purported oral agreement, denying that Pegg made any "contribuations" to Kohn Electric, and alleging that not only had Pegg been paid in full for all amounts due from Kohn Electric, that Pegg was liable to Kohn Electric for various personal property retained by Pegg (A.12-16).

[¶4] Some nineteen months after this action was commenced, Pegg finally filed this case on March 27, 2013 (A.1). Kohn and Kohn Electric then filed their Answer and Counterclaim on April 1, 2013 (A.1).

[¶5] The case was tried before the court, without a jury, on April 2, 2014 (A.2). The Court thereafter made its Findings of Fact, Conclusions of Law, Order for Judgment (A.17-21), determining that an oral agreement existed between the parties and that Kohn breached that agreement. Judgment was entered on May 16, 2014 (A.22), awarding Pegg the sum of $11,164 together with his costs. Notice of Entry of Judgment was served on May 16, 2014 (A.23; A.2). The Notice of Appeal of Kohn and Kohn Electric was served on June 10, 2014 (A.24-25; A.2-3).

STATEMENT OF THE FACTS

[¶6] Kohn has been an electrician since 1996 (Appeal Transcript, page 117; hereinafter "T.___ "). Kohn was 43 years old at the time of the trial of this action (T.114). Kohn began his career as an electrician at Grotberg Electric in Valley City, where he become a partner after some 10 years (T.141-142). Kohn's partnership at Grotberg continued for some 5 to 8 years (T.117). Kohn then went to work at Enterprise Electric, where he became a partner after some 5 years (T.117; T.143). In both of those situations, the partnerships were reduced to writings, and Kohn was required to pay cash or a check (T.143-144).

[¶7] In March of 2009, Kohn left Enterprise and started Kohn Electric (T.116-117). At the time of trial, Kohn was the sole owner of Kohn Electric (T.115) and there have never been any other owners of Kohn Electric other than Kohn and his ex-wife, Leah Kohn (T.115-116; A.54, 55 & 56).

[¶8] Pegg and Kohn were formerly employed together as electricians at Enterprise Electric (T.118), when Kohn was a part owner of that business (T.15-16), and before that at Grotberg Electric (T.22). At all times pertinent to this action, both Kohn and Pegg were journeymen electricians (T.140).

[¶9] Since Kohn Electric was in need of help, Kohn averred that he approached Pegg in the summer of 2009 relative to possible employment with Kohn Electric (T.146). Contrarily, Pegg asserted that he had approached Kohn relative to such (T.23-24). In any event, Pegg commenced employment with Kohn Electric on July 27, 2009 (T.87; A.57) and quit in late 2010 or early 2011 (T.15).

[¶10] Pegg has been employed as a electrician since 1982 or 1983 (T.12). Pegg was 62 years old at the time of trial of this action (T.9). Pegg has been self-employed since he left Kohn Electric in February 2011 (T.13-15). In his some 30 year career as an electrician Pegg has worked for a dozen or more employers, never working for any particular company for more than two to three years (T.65). Prior to working for Kohn Electric, Pegg was always an employee -- never an owner/partner (T.16-19). Pegg has been the primary electrician for Sungold since 1998 or 1999, and while he's changed employers, the Sungold account has followed him (T.65-66).

[¶11] Before Pegg started working at Kohn Electric, Pegg inquired about whether he could buy into the business and receive 10 percent of the gross of Sungold, which Pegg indicated had a value of $10,000 (T.123). Pegg acknowledged that it was not discussed how he was to invest the $10,000 (T.25). Pegg was not able to state any basis for that figure (T.82-84). Kohn replied that he would consider such and that he would talk to his accountant (T.123). Before Kohn spoke with his accountant in 2009 about any one buying in, Kohn's then wife, Leah, put a proposal together which she gave to and discussed with Pegg (T.128; T.158-159; A.4). Kohn did not participate in that discussion (T.159). After discussing the matter with his accountant, Kohn repeatedly told Pegg that his accountant stated that Pegg could not buy in until being with the business for at least two years (T.123-129). Nothing was ever put in writing concerning the terms of Pegg's employment

with Kohn Electric (T.127-128). In fact, nothing about any purported agreement between the parties was ever put in writing, nor did Pegg ever write a check to Kohn Electric to buy in (T.81).

[¶12] In derogation of the explicit directives of Kohn Electric and not based upon any purported agreement of the parties, Pegg made payments out of his own funds totaling some $9,152.49 directly to third party vendors of Kohn Electric (T.128). More particularly:

1. Kohn discussed with Pegg the fact that he was going to buy a certain pickup (T.148). When Kohn went to the dealership to pay for the pickup he was informed that Pegg had already gone to the dealership and paid for the pickup with his own funds (T. 149). When asked why he had done that, Pegg indicated that such would go towards his requested buy-in, to which Kohn responded was not happening (T.149).

   The vehicle was titled in Kohn Electric (T.149; A.257). Kohn attempted to pay for that pickup when it was first purchased, but Pegg wouldn't take the money (T.153).

2. Kohn had various discussions with Pegg relative to him picking up tools and other items for Kohn Electric (T.149-150). There was never any discussions relative to Pegg using his own personal funds; rather, Pegg was given a company credit card for such purchases (T.150). Kohn attempted to pay for those items, but was unable to do so because, despite Kohn's requests, Pegg did not provide the receipts for those purchases until he quit (T.128; T.150-151; T.153-154; A.258-265).

3. Kohn believed that Pegg was trying to push his way into the business (T.183).

4. As noted by counsel in his opening comments, the amount of monies Pegg paid on behalf of Kohn Electric were paid before trial (T.7).

[¶13] Pegg was never required nor asked to ever contribute any tools nor other equipment

to the company and the various old power tools which Pegg brought to the company on his own volition were not used in the business and sat on the shelf collecting dust in the shop until Kohn dropped them off at Pegg's house, as Pegg failed to take them as requested (T.151-153).

[¶14] Pegg testified that Kohn Electric paid him a wage of $20 per hour, with no vacation nor overtime (T.26, 28-29; A.6). However, consistent with Kohn's testimony (T.118-123), Pegg was actually paid $22 per hour, with compensation for vacation, holiday and overtime as reflected in the timesheets Pegg maintained, payroll records and canceled checks received as Defendants' Exhibits 4, 5, 6 and 7 (A.57-255). Pegg has been paid in full for all wages due from Kohn Electric at the rate Pegg requested or otherwise agreed, and in accordance with the time cards submitted by Pegg (T.154-157; A.57-209). Pegg accepted and negotiated all paychecks from Kohn Electric (T. 157; A.210-256).

LAW AND ARGUMENT

Standard of Review.

[¶15] "The existence of an oral contract and the extent of its terms are questions of fact subject to the clearly erroneous standard of review under N.D.R.Civ.P. 52(a)." **WFND, LLC v. Fargo Marc, LLC**, 2007 ND 67, ¶ 38, 730 N.W.2d 841. The same standard applies when determining if an oral contract has been altered because a modification would necessarily encompass the contract terms and because the consent and consideration provisions of N.D.C.C. § 9-09-05 are fact questions subject to clearly erroneous review. **See, e.g., Gravel Products, Inc. v. Neshem-Peterson, Inc.**, 335 N.W.2d 323, 327 (N.D. 1983) (applying clearly erroneous standard of review to consent finding); **G.L. Ness Agency v. Woell**, 335 N.W.2d 561, 562-63 (N.D. 1983) (applying clearly erroneous standard of review to consideration finding). "A finding of fact is clearly

erroneous if it is not supported by any evidence, if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made, or if the finding is induced by an erroneous conception of the law." **Pfeifle v. Tanabe**, 2000 ND 219, ¶ 7, 620 N.W.2d 167. "A trial court's choice between two permissible views of the weight of the evidence is not clearly erroneous, and simply because we may have viewed the evidence differently does not entitle us to reverse the trial court." **Edward H. Schwartz Constr., Inc. v. Driessen**, 2006 ND 15, ¶ 6, 709 N.W.2d 733 (quoting **Brandt v. Somerville**, 2005 ND 35, ¶ 12, 692 N.W.2d 144).

[¶16] This Court reviews conclusions of law de novo. **State v. Torgerson**, 2000 ND 105, ¶3, 611 N.W.2d 182.

I. The district court erred in determining that an oral agreement existed between the parties.

[¶17] As summarized in paragraphs 6 through 10 on page 2 the district court's Findings of Fact (A.18), this action is predicated upon an alleged oral agreement as asserted by Pegg and denied by Kohn. More particularly, while it appears undisputed that Pegg made a proposal to Kohn to the effect that in addition to his hourly wage, Pegg would receive 10 percent of the gross of Sungold and 10 percent of the net of Kohn Electric by payment of a $10,000 buy in (T. 23-28; T.123), Pegg did not state a basis for that figure (T.82-84) and that it was not discussed how Pegg was to invest the $10,000 (T.25); Kohn disputes Pegg's averments that the proposal was accepted and that Pegg's purchases of items for Kohn Electric with his own funds constituted "investments" into the business and towards his requested buy-in (T.128).

[¶18] The terms of an oral contract can be established through extrinsic evidence, and a determination of those terms is for the trier of fact. **See Comstock Constr., Inc. v. Sheyenne**

Disposal, Inc., 2002 ND 141, ¶ 13, 651 N.W.2d 656; **Fronteer Directory Co., Inc. v. Maley**, 1997 ND 162, ¶ 13, 567 N.W.2d 826; **Delzer v. United Bank**, 459 N.W.2d 752, 757 (N.D. 1990).

[¶18] When Pegg made his proposal to buy in, Kohn replied that he would consider such and that he would talk to his accountant (T.123). After discussing the matter with his accountant, Kohn repeatedly told Pegg that his accountant stated that Pegg could not buy in until being with the business for at least two years (T.123-129). Pegg did not write Kohn Electric a check for $10,000 for the purported buy in (T.29). Nothing was ever put in writing concerning the terms of Pegg's employment with Kohn Electric (T.127-128). In fact, nothing about any purported agreement between the parties was ever put in writing (T.81). The only writings identified by the parties which had any plausible relevancy to the parties agreement was the certain handwritten note of Kohn's ex-wife, Leah Kohn, received as Plaintiff's Exhibit 4 (A.47), which Kohn's then wife, Leah, prepared and gave to and discussed with Pegg before Kohn spoke with his accountant in 2009 about any one buying in (T.128; T.158-159; A.4).

[¶19] The district court clearly erred in finding a contract existed between the parties because Kohn did not accept Pegg's offer (T.123-129).

[¶20] First, ¶12 of the district court's findings of fact (A.19-20) relative to the conflicting testimony of the parties concerning the purported oral agreement are not supported by the greater weight of the evidence. More particularly:

A. Sungold. Prior to working for Kohn Electric, Pegg was always an employee -- never an owner/partner (T.16-19). Pegg has been the primary electrician for Sungold since 1998 or 1999, and while he's changed employers, the Sungold account has followed him (T.65-66). While Pegg may have received some year end bonuses from a past employers, it wasn't

clear whether any such bonuses were predicated on the Sungold account (T.67-68). When Pegg was employed with Kohn Electric, Pegg had any agreement with Sungold to charge them $55 per hour and not to charge them any overtime hours (T.77-79).

B. Changing Jobs. Pegg has been employed as a electrician since 1982 or 1983 (T.12). Pegg was 62 years old at the time of trial of this action (T.9). Pegg has been self-employed since he left Kohn Electric in February 2011 (T.13-15). In his some 30 year career as an electrician Pegg has worked for a dozen or more employers, never working for any particular company for more than two to three years (T.65). Pegg had been subjected to layoffs at his previous employer, Enterprise (T.136), and while that business had a longer existence, its ownership as of July 2009 was about as new as that of Kohn Electric in light of Kohn's departure from Enterprise in March of 2009 (T.15-16). It is evident that the district court adopted the argument of counsel – which is not evidence – while disregarding the testimonial evidence.

C. Pegg's Expenditures. When Pegg made his proposal to buy in, Kohn replied that he would consider such and that he would talk to his accountant (T.123). After discussing the matter with his accountant, Kohn repeatedly told Pegg that his accountant stated that Pegg could not buy in until being with the business for at least two years (T.123-129). Nonetheless, in derogation of the explicit directives of Kohn Electric and not based upon any purported agreement of the parties, Pegg made payments out of his own funds totaling some $9,152.49 directly to third party vendors of Kohn Electric (T.128). More particularly:

1. Kohn discussed with Pegg the fact that he was going to buy a certain pickup (T.148). When Kohn went to the dealership to pay for the pickup he was informed that Pegg

had already gone to the dealership and paid for the pickup with his own funds (T. 149). When asked why he had done that, Pegg indicated that such would go towards his requested buy-in, to which Kohn responded was not happening (T.149).

The vehicle was titled in Kohn Electric (T.149; A.257). Kohn attempted to pay for that pickup when it was first purchased, but Pegg wouldn't take the money (T.153).

2. Kohn had various discussions with Pegg relative to him picking up tools and other items for Kohn Electric (T.149-150). There was never any discussions relative to Pegg using his own personal funds; rather, Pegg was given a company credit card for such purchases (T.150). Kohn attempted to pay for those items, but was unable to do so because, despite Kohn's requests, Pegg did not provide the receipts for those purchases until he quit (T.128; T.150-151; T.153-154; A.258-265).

While the trial court found that "Pegg's expenditures were consistent with his testimony as to the agreement between him and Kohn," the court did not specifically find that the parties agreed that Pegg could make any part of the purported $10,000 buy in by such expenditures (A.19-20). Kohn believed that Pegg was trying to push his way into the business (T.183). Such bullying tactics of a person some 20 years older than Kohn should not be condoned and given credence. In any event, as provided above, Kohn did explain why he did not reimburse Pegg for such expenditures until after Pegg filed this suit; however, the district court did not acknowledge the fact that Pegg did not refute Kohn's testimony that he attempted to pay Pegg for the pickup, tools and other items but Pegg wouldn't take the money for the pickup and Pegg refused or otherwise failed to provide Kohn with the receipts for the other items purchased by Pegg until he quit his employment with Kohn Electric.

D. Plaintiff's Exhibit 4. While Pegg asserted that Kohn's then wife, Leah, gave to and discussed with Pegg in the summer of 2010 the document received as Plaintiff's Exhibit 4 relative to various payment options (T.59-62); Kohn asserted that Leah prepared and discussed with Pegg that undated handwritten note in the early fall of 2009, before Kohn spoke with his accountant in 2009 about any one buying into the business (T.128; T.158-159; A.4). Kohn did not participate in that discussion nor did he discuss that handwritten note with Pegg (T.159). Neither party has asserted that the handwritten proposal was accepted. Any reliance on that document by the district court was not warranted.

[¶21] Second, Kohn asserts the district court clearly erred in determining the existence of an oral contract despite the fact that the court also found that Pegg failed to failed to pay the purported $10,000 contribution in full. That is, in ¶11 of its findings of fact, the district court found that Pegg had made expenditures for Kohn Electric totaling $9,152.49; while the court did not make any determination relative to any consideration of the old tools which Pegg asserted he brought into the business (T.29).

[¶22] Third, the district court's conclusions of law are not supported by its findings of fact, and are conflictory. More specifically, in ¶¶17 & 18 of its conclusions of law, the trial court stated, in pertinent part:

> ¶17"...Specifically the parties orally agreed that Pegg would reeceive 10% of Kohn Electric's gross billings to Pegg's captive client Sungold in addition to his hourly wage, in exchange for Pegg making a $10,000 capital contribution to Kohn Electric." (A.20)
>
> ¶18 Pegg substantially performed his obligations under the oral agreement by purchasing the pickup, tools, and equipment for Kohn Electric with a total value of

$9,152.49 from August to October, 2009, and by bringing the Sungold account with him when he went to work for Kohn Electric in July 2009.

"Substantially" performing an obligation is not adequate consideration. See N.D.C.C. § 9-03-20. The district court did not address the fact that there was not testimony was presented reflecting when the purported buy in was to be paid. Likewise, the district court did not address the fact that those alleged "contributions" were made in August to October of 2009 whereas Pegg started working for Kohn electric in late July 2009. How could Pegg possibly believe that he should be able to enforce an agreement before he made any plausible "contribution" and when the purported amount due was not paid in full? There clearly was not a "meeting of the minds" necessary for a binding contract. The district court failed to make any determination as to consent nor consideration.

[¶23] The district court erred in determining that an oral agreement existed between the parties, and should be reversed.

II. The district court erred in concluding that Pegg was entitled to damages even though he did not pay the full amount due under the purported oral agreement.

[¶24] Alternatively, in the event that this Court finds that an oral contract existed between the parties, it is asserted that Pegg was not entitled to any damages because he did not pay the full $10,000 amount due under the purported oral agreement.

[¶25] Since Pegg acknowledged that it was not discussed how he was to invest the $10,000 (T.25), coupled with the fact that no testimony was presented reflecting when the purported buy in was to be paid, any alleged subsequent agreement(s) of the parties relative to when and how payment would be made would constitute a modification(s) of the parties' purported oral agreement.

[¶26] An oral contract only can be altered with consent. N.D.C.C. § 9-09-05; **RRMC**

Construction v. Bill Barth, 2010 ND 60, ¶8, 780 N.W.2d 656. After hearing both parties' testimony and viewing the relevant evidence, the district court did not make any specific findings that Kohn consented to Pegg's attempted contributions nor that the parties ever modified the purported $10,000 buy in figure. Further, the district court did not make any determination whether new consideration supported an agreement to modify the contract. See N.D.C.C. § 9-09-05. Again, "substantially" performing an obligation is not adequate consideration. See N.D.C.C. § 9-03-20. The undersigned is not aware of any contractual relationship where a party can assert the full benefits of a contract until he has fully performed his obligations (ie., a contract for deed, purchase agreement, or loan agreement). The district court's decision awarding Pegg damages in the sum of $11,164 is not supported by the evidence, and is clearly erroneous.

[¶27] The district court also failed to state any basis for its decision making Kohn personally liable to Pegg for an obligation due by Kohn Electric, a limited liability company.

[¶28] As noted by counsel in his opening comments, the amount of monies Pegg paid on behalf of Kohn Electric were paid before trial (T.7). Pegg has been paid in full for all wages due from Kohn Electric at the rate Pegg requested or otherwise agreed, and in accordance with the time cards submitted by Pegg (T.154-157; A.57-209). Pegg accepted and negotiated all paychecks from Kohn Electric (T. 157; A.210-256).

[¶29] The district court erred in concluding that Pegg was entitled to damages because he did not pay the full amount due under the purported oral agreement, and any and all amounts plausibly due Pegg from Kohn Electric have been paid in full.

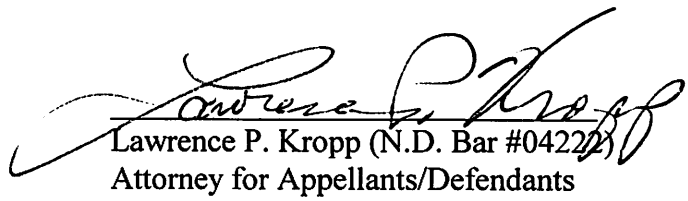
CONCLUSION

[¶30] The district court's decisions finding the existence of an oral contract and awarding

Pegg damages should be reversed as such are not supported by the evidence and induced by an erroneous conception of the law.

Respectfully submitted this 3rd day of September, 2014.

KROPP LAW OFFICES, P.C.



Lawrence P. Kropp (N.D. Bar #04222)
Attorney for Appellants/Defendants
105 Tenth Street SE
Jamestown, ND 58401
Tel (701) 252-5505
Fax: (701) 252-1014
Email: kropplaw@csicable.net

CERTIFICATE OF MAILING

Lawrence P. Kropp, a member of the bar of this Court, certifies that on the 3rd day of September, 2014 he mailed a true and correct copy of the foregoin brief to:

Robert Manly
Attorney at Law
215 30th St. N.
P.O. Box 1077
Moorhead, MN 56561-1077

LAWRENCE P. KROPP (N.D. Bar #04222)
Attorney at Law
105 Tenth Street SE
Jamestown, ND 58401
Tel (701) 252-5505
Fax: (701) 252-1014
Email: kropplaw@csicable.net

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief of Appellant complies with the type-volume limitations imposed by the North Dakota Rules of Appellate Procedure. The Brief of Appellant contains 3,789 words of proportionately spaced type as counted by WordPerfect the software used to prepare the Brief of Appellant.

LAWRENCE P. KROPP (N.D. Bar #04222)
Attorney at Law