

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Dianna L. Holm,)	
)	
Plaintiff and)	Supreme Court File No. 20160299
Appellant,)	
)	
vs.)	
)	Cass County District Court
Thomas J. Holm,)	No. 09-2015-DM-01427
)	
Defendant and)	
Appellee.)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER FOR JUDGMENT DATED JUNE 28, 2016
AND THE JUDGMENT DATED JUNE 29, 2016

Cass County District Court

East Central Judicial District

Honorable Judge Steven L. Marquart

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[¶1] **ARGUMENT**

[¶2] Appellee's Statement of Facts severely misconstrues and falsifies the evidence presented in Court.

[¶3] Not to belabor what is clearly in the record, which the Court can review for itself, it is necessary to point out a few inaccuracies in the Brief of the Appellee, which presents the evidence in a false light. First, Thomas was not living on the floor in his shop during the separation. He was staying at hotels, with friends and family, or sleeping on the nice leather couch in his office. (Tr. Trans. 11:6-25).

[¶4] Next, Thomas argues that the parties' earning ability is almost identical and that they made the same amount of money in 2015, during their separation, with Thomas netting approximately \$60,688.13 and Dianna netting \$55,283.23. (Appellee Br. ¶ 15). Thomas leaves out the \$35,000 dividend check he received because "that dividend has historically been earmarked by the parties for taxes and other expenses." (Appellee Br. ¶15; Tr. Trans. 96, 100). All of the parties' income was earmarked to some bill or another. They lived paycheck to paycheck and that wasn't enough. Thomas's main argument throughout his brief is that the dividend check from B&F is part of his compensation, yet where it is convenient to argue that it shouldn't be considered his compensation, he argues that angle. (Appellee Br. ¶¶ 15, 19). Thomas also states that Dianna does not consider her bonuses as marital property, citing the trial transcript at 76-77. The transcript does not reflect this statement. Nor does the transcript at page 70 reflect that Dianna doesn't know how the money was spent as cited in Appellee's Brief, ¶ 16.

Dianna simply argued that her bonuses are part of her salary or employment compensation and not part of the marital estate. (Tr. Trans. 76-77).

[¶5] The District Court erred in finding that the dividends received from the Building Fasteners of Fargo, Inc. stock ownership interest is additional compensation for Thomas's employment.

[¶6] Thomas and the District Court argue that because the option to buy stock is in the same contract as his employment terms, that it must be compensation under the principal set forth in N.D.C.C. § 9-07-06 ("The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others.") To support his argument, Thomas argues that his dividend check is "akin" to the performance bonuses received by Dianna as part of her compensation. This is inaccurate. Thomas's employment contract sets forth in Section 4 what his compensation is. (App. 19-20). This includes a base wage and "Incentive Pool Participation" (App. 19), which appears on Thomas's paychecks as a commission. (Doc. Id. # 43). A bonus is more comparable to a commission check, which is based on an individual's performance. The dividend in question is based on how the company does each year and is only payable to those who own stock in the company. (Tr. Trans. 99:16-21).

[¶7] The stock in question is simply stock ownership of the company that pays a dividend that the parties bought into. Compensation is not something you buy with marital assets. Nor is compensation something you can sell, transfer, or gift. Compensation is something you earn for your work. Had the parties not bought

the stock, Thomas would not receive a dividend simply by virtue of being employed there, regardless of how well the company did. Thomas and Dianna bought a 10% ownership interest in the company. This stock can be sold, transferred or gifted if it is approved by the company. (App. 23). If the stock was meant to be part of Thomas's compensation, it would be listed under section 4 of the Agreement, which is the exclusive section to define compensation. Further, Section 7.1 of the Agreement states: ". . . Employee shall not disclose to any other employee of the company . . . Employee's compensation arrangement with the Company, including, but not limited to Employee's Base Wage, benefit package, bonus payments, and increases or decreases or the percentage of increases or decreases of the same." (App. 27). Again, in talking about compensation, the Agreement excludes stock dividend payments. In reading the document as a whole, it all talks about the various aspects of employment, not that the whole contract discusses compensation. Different sections are exclusive of each other and the agreement even says that if one section is invalid, the others continue to be enforceable (Section 8.6 and 8.7, App. 30). Any other interpretation would be contrary to the clear and explicit language of the Employment Agreement. The District Court erred in its interpretation of the Employment Agreement and its holding that the stock is part of Thomas' compensation should be reversed.

[¶ 8] The District Court erred in its failure to properly value the Building Fasteners of Fargo, Inc. stock ownership interest and to equitably divide that interest based on that valuation.

[¶ 9] Thomas fails to answer the question of whether the stock was correctly valued by the district court at \$25,000 in his Appellee Brief. One must conclude that Thomas agrees that the Employment Contract is clear that the valuation method is not the purchase price of the stock, as the court erroneously found. As fully explained in the Brief of Appellant, ¶¶ 27-30, Section 6.7.3 of the Employment Agreement is the proper method to value the stock. (App. 24). Even Thomas acknowledged during the trial that the value of the stock was well over the \$25,000 amount that the parties purchased it for. In fact, when the Court asked what it was worth, Thomas testified, “[t]oday it’s worth, if I sold it, 100,000.” (Tr. Trans. 120 :16-17).

[¶ 10] As Thomas inaccurately, but aptly, pointed out, Dianna did receive some of the benefit of the annual dividend check in the past. (Appellee Br. ¶ 39). To be clear, Dianna did not receive any of the funds from the Dividend check in 2015, as Thomas claims in his brief. *Id.* Dianna is no longer receiving the dividend from the stock the parties purchased jointly during the marriage. This is inequitable. Now, Thomas argues that this is part of his salary, which for reasons previously noted, is not accurate either. This Court noted in *Rebel v. Rebel*, “[t]he district court’s choice between two permissible views of the evidence is not clearly erroneous. On appeal, we do not reweigh conflicts in the evidence and will not reverse because we may have viewed the evidence differently.” 2016 ND 144, ¶9, 882 N.W.2d 256, 261) (internal citations omitted).

[¶ 11] The District Court had a choice: to order the stock to be valued pursuant to the agreement and award one-half to Dianna; believe the testimony of Thomas of

the \$100,000 valuation and award one-half of that to Dianna; order Thomas to pay one-half of the dividend to Dianna each year moving forward; or to order the transfer of 5% of the company stock to Dianna. Those were all the permissible options before the court and none of those options were chosen. Instead, the District Court chose an incorrect value of the stock and awarded one-half of that value to Dianna. The stock is a marital, income-producing asset that was awarded solely to Thomas. That was clear error.

[¶ 12] The District Court erred in finding that an equitable distribution of property would be an equal one even though Thomas did not contribute to many of the costs of maintaining the marital home and marital debts after he was served divorce pleadings.

[¶ 13] Thomas argues that during the separation, Dianna was able to maintain her lifestyle. This is simply not true as shown by the fact that Dianna was forced to bring an Interim Motion for financial assistance from Thomas to continue paying the parties' marital debt. The District Court did not give Dianna the relief she was seeking and from December 2015 through June 2016, Dianna paid those marital debts mostly on her own while Thomas enjoyed an even greater lifestyle than he did previously. Thomas spent frivolously in 2015 and 2016 on things like a four bedroom house for himself and his dog, eating out, party buses, a Vegas vacation, hotels, all new furniture, and alcohol. (Int. Hrg. Trans. 42-44, 46; Doc. Id #'s 76, 79). The court received a statement of the marital debts Dianna paid since Thomas stopped contributing to the debts. (Doc. Id. 70). These were only the bills that should have equally been Thomas's responsibility and from which he

received the benefit of having lower balances when it was all paid off with the proceeds from the sale of the house. Dianna should be awarded a greater portion of the marital estate.

[¶ 14] CONCLUSION

[¶ 15] The trial court clearly erred in interpreting Thomas's Employment Contract. That error led to an inequitable and unequal distribution of the marital estate in favor of Thomas. Dianna respectfully requests that this Court reverse and remand for findings consistent with the evidence.

Respectfully submitted this 20th day of January, 2017.

AALAND LAW OFFICE, LTD.

/s/ Rachel Gehrig

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Dianna L. Holm,

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AFFIDAVIT OF SERVICE BY ELECTRONIC MEANS

Supreme Court File No. 20160299

Cass County District Court
No. 09-2015-DM-01427

STATE OF NORTH DAKOTA)
)**SS**
COUNTY OF CASS)

[¶ 1] Heather Livdahl, hereby being first duly sworn on oath, does depose and say: that she is a citizen of the United States, over the age of eighteen years, and not a party to the above entitled matter.

[¶ 2] That on the 20th day of January, 2017, this affiant did transmit via electronic transfer, a true and correct copy of the following documents filed in the above captioned action:

1. Reply Brief of Appellant.

[¶ 3] That the copies of the above documents were addressed as follows:

Leslie Johnson Aldrich – Attorney for the Defendant and Appellee
ljohnson@ljalaw.net

[¶ 4] That the above documents were duly sent in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Walter Lindahl

Heather Livdahl

Subscribed and sworn to before me this 20 day of January, 2017.

Dear Mr. Brennan

~~Notary Public:~~

My Commission Expires: 9-17-2020

