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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

	)	Supreme Court Case No. 20170275
	)	
	)	
Alerus Financial, N.A.,	)	Appeal from Northeast Central
	)	Judicial District, Grand Forks
Plaintiff/Appellee,	)	County
	)	
vs.	)	Case No. 18-2016-cv-01305
	)	
Charles D. Erwin,	)	
	)	
Defendant/Appellant.	)	
	)	
	)	

Appeal from Memorandum Decision and Order Granting Summary Judgment dated June 1, 2017, Judgment dated July 10, 2017, and Amended Judgment dated September 15, 2017
Honorable Donald Hager, Judge

RESPONSIVE BRIEF OF PLAINTIFF/APPELLEE ALERUS FINANCIAL, N.A.

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NOTICE OF APPEAL FILED JULY 20, 2017

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I. STATEMENT OF THE ISSUES

[¶1] The issues before this Court are as follows:

A. Whether the District Court properly granted Alerus' Motion for Summary Judgment?

B. Whether the District Court properly denied Erwin's Motion for Further Discovery?

C. Whether Erwin's Appeal regarding his mooted Motion to Amend is properly before this Court?

II. STATEMENT OF THE CASE

A. Nature of the Case

[¶2] This case arises out of appellant/defendant Charles D. Erwin's ("Erwin") breach of loan guaranty contracts with Alerus Financial, N.A. ("Alerus"). Alerus loaned Diverse Energy Systems, LLC ("Diverse") over $14,000,000, $4,000,000 of which was personally guaranteed by Erwin through unambiguous and binding contracts. Diverse subsequently defaulted on the loans when it filed for bankruptcy and failed to pay the notes as due, triggering Erwin's obligations under the guarantees. Erwin then also failed to make any payment to Alerus, constituting a breach of his guaranty obligations.

[¶3] In the course of the district court proceedings against Erwin for breach of his guaranty obligations, Alerus established the amounts owed by Diverse and Erwin through sworn testimony, which Erwin failed to rebut with any competent, admissible evidence sufficient to raise genuine issues of material facts or preclude summary judgment on Alerus' breach of contract claim against Erwin. For these reasons, the district court

properly found there were no genuine issues of material fact and that Alerus was entitled to summary judgment as a matter of law.

[¶4] Erwin's arguments in this appeal that the district court erred in granting summary judgment and abused its discretion by denying his motion for further discovery fail for three reasons. First, Erwin's entire theory is premised on unsupported allegations of fraud which – at the time of the summary judgment briefing and argument – had simply not been plead. Erwin's briefing repeatedly attempts to conflate this timing, but the record is clear that no motion to amend had been made until after all summary judgment proceedings occurred and were under advisement.

[¶5] Second, the only reason Erwin could arguably have needed additional time for discovery is because he failed to respond to Alerus' lawsuit with diligence. Erwin served his Answer four months after being served with the Complaint, waited eight months to serve discovery on Alerus, waited until Alerus brought a motion for summary judgment to argue (but not plead) supposed fraud, and waited until after the summary judgment motion was under advisement to bring his actual Motion to Amend. It was Erwin's strategy of delay – not an abuse of discretion by the district court – that resulted in the proper disposition of his unsupported, speculative defenses.

[¶6] Third, Alerus provided all the evidence necessary to decide the breach of guaranty claim through a sworn affidavit and its timely document production. Erwin failed to explain what further information he

needed in discovery, why he failed to seek the information earlier, or why any additional information would arguably preclude summary judgment, as required by Rule 56(f). Accordingly, the district court properly ruled on the record submitted in granting Alerus' summary judgment motion.

[¶7] Finally, Erwin attempts to distract from his strategic failures by alleging that the district court's failure to consider his Motion to Amend was an abuse of discretion. As a dispositive threshold matter, this issue is not properly before this Court and should be dismissed as: 1) there is no appealable order for this Court to review; and 2) even if Erwin could appeal, he failed to comply with the statutory requirements to notice and preserve these arguments for appeal.

[¶8] For these reasons, this Court should affirm the district court's Order Granting Summary Judgment dated June 1, 2017, Judgment dated July 10, 2017, and Amended Judgment dated September 15, 2017, and should further deny all relief sought by Erwin in this appeal.

B. District Court Proceedings and Disposition

[¶9] Alerus commenced this action on May 13, 2016. (Dkt. No. 13.) After Erwin failed to timely serve an Answer, Alerus brought a Motion for Judgment by Default. (Dkt. No. 16 at ¶ 4.) Shortly after, counsel for Erwin filed a Notice of Appearance, and Alerus agreed to four extensions before finally receiving Erwin's Answer on September 6, 2016. (Dkt. Nos. 28, 29, 34, 38, 43 and 51.)

[¶10] On February 28, 2017, and more than five months after Erwin answered the Complaint, Alerus filed a Motion for Summary Judgment, which Erwin opposed. (Dkt. Nos. 62-64, 66-67, 71.) Following oral arguments on May 22, 2017, the district court took Alerus' motion under advisement. (App. 52; Aplees. App. at 107.)

[¶11] After the submission of Alerus' Motion for Summary Judgment, on May 26, 2017, Erwin filed a Motion to Amend Answer, seeking leave to add causes of action regarding fraudulent inducement based on alleged conversations that took place without Erwin's involvement in 2012. (Dkt. Nos. 85-89; App. at 34, ¶ 1.)

[¶12] On June 1, 2017, the district court issued a Memorandum Decision and Order Granting Summary Judgment. (App. 50-69.) As the district court's ruling on summary judgment resolved all claims against Erwin, the district court entered final Judgment in favor of Alerus. (App. 70-71.) The trial court issued an Amended Judgment on September 15, 2017, clarifying the costs due by Erwin. (App. 72-73.) This appeal followed. (Aplees. App. 1-5.)

III. STATEMENT OF THE FACTS

A. The Loan Agreements

[¶13] Alerus made various loans (the "Loans") to Diverse, a company owned and operated by Erwin, pursuant to the terms of a Loan Agreement dated August 20, 2012 (the "Loan Agreement"). (Aplees. App. 6-58.) Among the Loans made in accordance with the terms of the Loan Agreement are

those memorialized by six promissory notes totaling a principal of $14,700,000.00. (collectively, the "Notes"). (*Id.* at 59-81.)

[¶14] Under the terms of the Loan Agreement, the following events and/or actions (among others) constitute Events of Default:

a. "Failure to pay the amount of the Indebtedness when due so long as such default continues uncured." (*Id.* at 32, §16.1); and

b. "Insolvency of Borrower or any Guarantor . . . or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Borrower or any Guarantor." (*Id.* at 33, §16.6.)

B. The Guaranties

[¶15] As a material inducement for Alerus to make the Loans, Erwin executed and delivered to Alerus three personal guaranties, respectively dated April 9, 2012, August 20, 2012 and June 20, 2013 (collectively, "the Guaranties"). (Aplees. App. 82-93.)

[¶16] Pursuant to the Guaranties, Erwin "absolutely and unconditionally" guaranteed payment of his share of "each and every Debt, of every type, purpose and description" owed by Diverse to Alerus "now or at any time in the future…including without limitation, all principal, accrued interest, attorneys' fees and collection costs, when allowed by law" (hereinafter, the "Indebtedness"). (Aplees. App. at 83, §2; 87, §2; 91.)

[¶17] The terms of the April 2012 Guaranty specifically provide that the following events and/or actions constitute a default by Erwin in regard to his guaranty obligations:

a. Failure "to make a payment in full when due";

b. The "commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against [Erwin], [Diverse], or any co-signer, endorser, surety or guarantor of this Guaranty or any [Indebtedness]"; or

c. Failure "to perform any condition or to keep any promise or covenant of this Guaranty."

(*Id.* at 84, §8.)

[¶18] The terms of both the April 2012 and August 2012 Guaranty also establish that "[i]f a bankruptcy petition should at any time be filed by or against [Diverse], the maturity of the [Indebtedness], so far as [Erwin's] liability is concerned, shall be accelerated and the [Indebtedness] shall be immediately payable by [Erwin]." (*Id.* at 83, §4; 87, §5.)

[¶19] Furthermore, the April 2012 Guaranty states that Erwin is "unconditionally liable under this Guaranty, regardless of whether or not [Alerus] pursue[s] any of [Alerus'] remedies against [Diverse] . . . ." (*Id.*) In addition, Erwin "will remain obligated to pay on this Guaranty even if any other person who is obligated to pay the Debt, including [Diverse], has such obligation discharged in bankruptcy, foreclosure, or otherwise discharged by law." (*Id.*)

[¶20] The terms of the June 2013 Guaranty also confirm that "[i]f [Alerus] presently holds one or more guaranties, or hereafter receives additional guaranties from [Erwin], [Alerus'] rights under all guaranties shall be cumulative." (*Id.* at 91.) The June 2013 Guaranty further provides for Erwin's responsibilities, in material part, as follows:

a. Erwin "absolutely and unconditionally guarantees full and punctual payment and satisfaction of Guarantor's Share of the Indebtedness . . . ." (*Id.*)

b. "The words 'Guarantor's Share of the Indebtedness . . . mean an amount not to exceed Four Million & 00/100 Dollars ($4,000,000.00) of the principal amount of the Indebtedness that is outstanding from time to time and at any one or more times. 'Guarantor's Share of the Indebtedness' also includes all accrued unpaid interest on the Indebtedness and all collection costs, expenses and reasonable attorneys' fees whether or not there is a lawsuit, and if there is a lawsuit, any fees and costs for trial and appeals paid or incurred by [Alerus] for the collection of the Indebtedness, the realization on any collateral securing the Indebtedness or any guaranty of the Indebtedness (including this Guaranty), or the enforcement of this Guaranty." (*Id.*)

[¶21] The June 2013 Guaranty also includes several important waivers by Erwin, including:

- Waiver of "any right to require [Alerus] . . . (C) to resort for payment or to proceed directly or at once against any person, including [Diverse] or any other guarantor; (D) to proceed directly against or exhaust any collateral held by [Alerus] from [Erwin], any other guarantor, or any other person . . . [and] (F) to pursue any other remedy within [Alerus'] power . . . ." (*Id.* at 92).

- Erwin "further waives and agrees not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter demand, recoupment or similar right, whether such claim, demand or right may be asserted by [Diverse], [Erwin], or both." (*Id.*)

- Waiver of "any and all rights or defenses based on suretyship or impairment of collateral . . . [and] any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness." (*Id.*)

C. Diverse's Default

[¶22] On September 7, 2015, Diverse filed a voluntary petition under chapter 11 of the United States Bankruptcy Code in the Southern District of Texas (the "Bankruptcy Case"). The Bankruptcy Case, captioned *In re*

Diverse Energy Systems, LLC d/b/a Lean Technologies, LLC, Case No. 15-bk-34738, was pending as of the date of the summary judgment hearing. (Dkt. No. 63 at ¶ 11.)

[¶23] Pursuant to section 16 of the Loan Agreement, and as a product of its bankruptcy filing, Diverse was in default under the Loan Agreement, the Notes, and other agreements. (Aplees. App. 32-33 at §16).

[¶24] The Indebtedness owed by Diverse to Alerus at the time of Diverse's bankruptcy filing and default exceeded $14,400,000, including unpaid principal, interest, late fees, and costs, expenses, and other fees payable under the Notes. (Dkt. No. 64 at ¶ 6).

D. Alerus' Demand and Erwin's Failure to Pay

[¶25] As a product of the default by Diverse and the fact that the Indebtedness remained outstanding, Alerus made a demand on Erwin to pay the amounts owed by Erwin under the plain terms of the Guaranties. (*Id.* at p. 2, ¶ 5.) Erwin refused to make any payment to Alerus, and this litigation followed. (*Id.* at p. 2, ¶¶ 5 - 7.)

E. Litigation Delays

[¶26] Alerus commenced this lawsuit in May of 2016. (App. 2-13; Dkt. No. 13.) After a period of default and numerous extensions, Erwin finally submitted his Answer on September 26, 2016. (Dkt. Nos. 16, 28, 29, 34, 28, 43 and 51.) The district court issued its Scheduling Order on September 27, 2016. (Dkt. No. 60.) Five months later, on February 28, 2017, Alerus filed a Motion for Summary Judgment. (Dkt.

Nos. 62-64, 71.) In support of its motion, Alerus filed the Affidavit of Brian Hunt, swearing to the accuracy of the Loan Documents and Guarantees and stating the precise principal, interest, and costs owed by Diverse and Erwin. (Dkt. No. 64, ¶¶ 1-7.) Erwin opposed Alerus' motion, alleging that further discovery was needed regarding the amounts owed by Diverse and regarding his share of the Indebtedness. (App. 22-26, ¶¶ 7-9, 11-13.) Both parties served discovery. (Aplees. App. at 96, lns. 2-3.) For its part, Alerus timely responded to Erwin's discovery and provided all responsive information, including copies of over 7,000 documents. (*Id.* at ln. 3; App. 46 at lns. 23-24.)

[¶27] Erwin argued for the first time as part of his summary judgment opposition that he was fraudulently induced into entering into the Guaranties. (App. 26-28, ¶¶ 14-15.) Erwin did not raise this in his Answer, nor did he bring a counterclaim at any time during the ten months of litigation preceding Alerus' Motion for Summary Judgment. (*See generally*, Dkt. prior to February 28, 2017.) Further, despite making arguments regarding the alleged fraud in his summary judgment opposition, Erwin made no motion to amend his Answer to actually plead fraud prior to the summary judgment hearing. (*See generally*, Dkt. prior to May 22, 2017.) As of the date of the summary judgment hearing, the only pleadings of record were the Complaint and Answer. (*Id.*) The district court heard oral arguments on May 22, 2017, and took the motion for summary judgment

under advisement on the record submitted as of that date. (App. at 52; Aplees. App. at 107.)

[¶28] On May 26, 2017, Erwin filed a Motion to Amend Answer, seeking leave to add causes of action relating to his allegations of fraudulent inducement. (Dkt. Nos. 85-89; App. at 34, ¶ 1.)

[¶29] On June 1, 2017, the district court issued a Memorandum Decision and Order Granting Summary Judgment, and later entered a Judgment and Amended Judgment in favor of Alerus. (App. 50-69, 70-71, 72-73.) The present appeal followed. (Aplees. App. at 1-5.)

IV. ARGUMENT

[¶30] This Court should affirm the district court's Decision for two reasons. First, the district court's grant of summary judgment against Erwin was proper, because Erwin failed to identify any admissible evidence demonstrating a genuine issue of material fact with regard to the essential elements of Alerus' claims. Second, the district court acted within its discretion when it denied Erwin's motion for further discovery, because Erwin failed to identify what information was still necessary, how that information would preclude summary judgment, and why that information had not been previously obtained through the voluminous discovery that actually took place.

[¶31] Similarly, this Court should dismiss Erwin's arguments regarding his Motion to Amend for two reasons. First, Erwin waived his right to appeal his Motion to Amend by failing to identify it as an issue on his

Notice of Appeal. Second, Erwin's Motion to Amend was never decided by the district court, meaning there is no appealable order for this Court to review in regard to those issues.

A. STANDARD OF REVIEW

1. Standard of Review on Motion for Summary Judgment

[¶32] On appeal from an order granting a motion for summary judgment, this Court determines whether the information provided to the district court, viewed in a light most favorable to the opposing party, precludes the existence of a genuine issue of material fact and entitles the moving party to summary judgment as a matter of law. *Binstock v. Tschider*, 374 N.W.2d 81, 83 (N.D. 1985).

[¶33] Summary judgment can dispose of a lawsuit without a trial when there are no genuine issues of material fact or inferences which can reasonably be drawn from undisputed fact, or if the only issues to resolve are questions of law. *Vansickle v. Hallmark & Assoc., Inc.*, 2008 ND 12, ¶ 8, 744 N.W.2d 532, 536. Summary judgment is a procedural device particularly fitting when a question of law involves the interpretation of a written contract. *Stuhlmiller v. Nodak Mut. Ins. Co.,* 475 N.W.2d 136,137 (N.D. 1991).

[¶34] A party opposing a motion for summary judgment must establish – by submitting competent, admissible evidence – a genuine issue of material fact. N.D.R.Civ.P. 56(e)(2); *see, e.g., Barbie v. Minko Const., Inc.*, 2009 ND 99, ¶ 6, 766 N.W.2d 458, 460-61. When a nonmoving party does

not present sufficient evidence to support its claims or defenses, "it is presumed such evidence does not exist," and summary judgment is proper. *Halvorson v. Sentry Ins.*, 2008 ND 205, ¶ 5, 757 N.W.2d 398, 400; *Barbie*, 2009 ND 99, ¶ 6, 766 N.W.2d at 460-61. Importantly for this case, North Dakota law is clear that an affidavit containing only conclusory allegations is insufficient to raise a genuine issue of material fact. *BTA Oil Producers v. MDU Res. Group, Inc.*, 2002 ND 55, ¶ 49, 642 N.W.2d 873, 887. Summary judgment must therefore be entered against a party who fails to present enough evidence for a reasonable jury to find for the nonmoving party. *Barbie*, 2009 ND 99, ¶ 6, 766 N.W.2d 458, 461 (citations and quotations omitted). This Court reviews the district court's decision to grant summary judgment de novo. *Dunford v. Tryhus*, 2008 ND 212, ¶5, 776 N.W.2d 539.

2. Standard of Review on Denial of Request for Further Discovery under Rule 56(f)

[¶35] The decision of whether or not to grant a Rule 56(f) motion for further discovery is within the district court's discretion, and this Court will not reverse unless the district court has abused its discretion. *Vicknair v. Phelps Dodge Indus., Inc.*, 2011 ND 39, ¶ 18, 794 N.W.2d 746, 755-56. "A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, or if it misinterprets or misapplies the law." *Choice Fin. Group v. Schellpfeffer*, 2006 ND 87, ¶ 9, 712 N.W.2d 855, 858 (quoting *Security Nat'l Bank v. Wald,* 536 N.W.2d 924, 928 (N.D. 1995)).

B. ALERUS WAS ENTITLED TO SUMMARY JUDGMENT, BECAUSE ERWIN FAILED TO IDENTIFY ANY ADMISSIBLE EVIDENCE DEMONSTRATING A GENUINE ISSUE OF MATERIAL FACT REGARDING THE ESSENTIAL ELEMENTS OF ALERUS' CLAIM OF BREACH OF CONTRACT.

[¶36] In this case, the district court properly found that – based on the pleadings, discovery, and affidavits on file – there was no genuine issue as to any material facts, and that Alerus was entitled to judgment as a matter of law on its breach of contract claim. (App. 68, ¶47.) The Order explains, "[r]easonable minds can draw but [these] conclusions from the facts and inferences: Diverse defaulted on its Agreements and Notes by failing to pay when due and by filing for bankruptcy; Erwin breached his guaranty contract by failing to pay any of his 'share' upon Diverse's default and Alerus' demand; Erwin owes Alerus the amounts specified above; Erwin failed to properly plead a defense of fraud; and Erwin waived all claims or defenses against Alerus." (App. 68, ¶46.)

[¶37] The district court also held that the language of the Guaranties was unambiguous and that Erwin failed to submit sufficient admissible evidence to raise a genuine issue of material fact regarding: (1) Diverse's breach of the Loan Agreements by failing to pay the amounts due and filing for bankruptcy protection; (2) Erwin's breach of the Guaranties; (3) the calculation of Erwin's "share" of indebtedness; and (4) the calculation of the total damages and indebtedness claimed by Alerus. (App. 67-68, ¶¶ 39-44.) As discussed below, the district court's grant of summary judgment was appropriate and should be affirmed.

1. Erwin failed to identify admissible evidence demonstrating a genuine issue of material fact regarding Diverse's breach.

[¶38] Diverse undisputedly defaulted on its obligations under the Loan Agreement when it failed to pay the amounts due and when it filed for bankruptcy protection. *See Good Bird v. Twin Buttes Sch. Dist.*, 2007 ND 103, ¶ 9, 733 N.W.2d 601, 605 ("Breach of contract occurs when there is nonperformance of a contractual duty when it is due"). On this record, the district court properly determined that no genuine issue of material fact remained in regard to Diverse's breach of its contract with Alerus, the result of which triggered Erwin's obligations under the Guaranties.

[¶39] As evidenced by the Loan Agreement, Notes, and Guaranties, Alerus and Erwin formed contracts in regard to Alerus' agreement to loan funds to Diverse and Erwin's guaranty to repay all such funds as necessary. Alerus performed its obligations as required by those contracts by loaning more than $14,000,000 to Diverse. (Dkt. No. 64, at p. 2, ¶ 6.)

[¶40] Diverse, however, plainly failed to pay principal, interest, and fees and expenses when due and filed bankruptcy, each of which independently qualify as events of default under the Loan Agreement. (Aplees. App. 32, §16.1; 33, §16.6.)

[¶41] Erwin failed to present any evidence to the district court disputing Diverse's default of its obligations under the Loan Agreement and Notes. (App. 14-16; 19-31.) Accordingly, the district court properly found that were no genuine issues of material fact regarding Diverse's breach of its

contract with Alerus, triggering Erwin's obligations under the Guaranties. (App. 67 at ¶ 40.)

2. Erwin failed to identify admissible evidence demonstrating a genuine issue of material fact regarding Erwin's breach of his guarantee contracts.

[¶42] Having established Diverse's breach of the underlying loan contracts with Alerus, the district court also properly determined that no genuine issue of material fact existed in regard to Erwin's undeniable breach of his attendant guaranty contracts.

[¶43] The construction of a written contract to determine its legal effect is a question of law appropriate for the court to decide. *Moen v. Meidinger*, 547 N.W.2d 544, 546 (N.D. 1996). Here, Erwin signed numerous guaranty contracts with Alerus, repeatedly declaring himself as a guarantor for the debt owed to Alerus by Diverse. (Aplees. App. 82-93.) Erwin's plain and undisputable responsibility for the Loans is provided for within the Loan Agreement which states:

> Each individual Guarantor jointly and severally guaranties payment of Borrower's total Indebtedness outstanding at all times on Loans A, B, C, and D. Each guaranty is of payment jointly and severally and is a continuing, absolute, and unconditional guaranty, limited in an amount not to exceed $4,000,000 each. Corporate Guarantor guaranties Borrower's total indebtedness outstanding at all times on Loans A, B, C, and D, jointly and severally, on a continuing, absolute, unconditional and unlimited basis.

(Aplees. App. at 21, §5.7.)

[¶44] To date, Erwin has failed to make any payment on the amount guaranteed by the Guaranties and the Loan Agreement. (Dkt. No. 64 at p.

2, ¶ 5.) As a result, Erwin is in material breach of the Guaranties by reason of, among other things, failing to pay Alerus the amounts currently due under the Guaranties, including, but not limited to, Erwin's share of the Indebtedness and attendant interest, costs, and expenses. (*Id.* at ¶¶ 5, 7.)

[¶45] Furthermore, the plain language of the Guaranties executed (and subsequently breached) by Erwin confirms that Erwin has "waive[d] and agree[d] not to assert or claim at any time any deductions to the amount guaranteed under this Guaranty for any claim of setoff, counterclaim, counter demand, recoupment or similar right, whether such claim, demand or right may be asserted by [Diverse], [Erwin], or both." (Aplees. App. 92.)

[¶46] As a direct and proximate result of Erwin's breach of the Guaranties, Alerus has sustained damages in an amount of $5,049,847.95, as of January 25, 2017, and increasing at the rate of $1,518.47 every day thereafter, plus additional applicable interest, charges, legal costs, and fees. (Dkt. No. 64 at p. 2, ¶ 7.)

[¶47] In examining this evidence, the district court properly found that there was no genuine issue of material fact as to Erwin's breach of the Guaranties. That finding was proper and warranted based on the record and must be upheld on appeal.

3. Erwin failed to identify admissible evidence demonstrating a genuine issue of material fact regarding the calculation of Alerus' total damages.

[¶48] In his opposition to Alerus' Motion for Summary Judgment, Erwin claimed the damages presented by Alerus were inaccurate. However, Alerus' damages are supported by the sworn Affidavit of Brian Hunt, which states the precise amount due from Diverse as of January 25, 2017. (Dkt. No. 64.) Erwin, on the other hand, failed to produce *any* evidence to refute Alerus' calculations. Erwin's rank speculations as to the alleged inaccuracy of the calculations are not enough to defeat summary judgment, and the district court correctly determined there were no genuine issues of material fact as to the amount of Alerus' total claimed damages.

[¶49] In order to defeat a motion for summary judgment, the non-moving party must put forward some evidence in order to demonstrate that a genuine issue of material fact exists on the record. *Gillespie v. Nat'l Farmers Union Prop. & Cas. Co.*, 2016 ND 193, ¶ 6, 885 N.W.2d 771, 774 (holding that "When no pertinent evidence on an essential element is presented to the district court in opposition to a motion for summary judgment, it is presumed no such evidence exists."). As a matter of North Dakota law, "mere speculation is not enough to defeat a motion for summary judgment." *Iglehart v. Iglehart*, 2003 ND 154, ¶ 10, 670 N.W.2d 343, 347 (citation omitted).

[¶50] Here, Alerus submitted a sworn Affidavit from Brian Hunt, which clearly states the precise total due from Diverse as the underlying debtor. (Dkt. No. 64.) In his Affidavit, Mr. Hunt confirmed he was personally familiar with the facts and circumstances of this case, including the payment history on the loans guaranteed by Erwin and the bankruptcy proceeding filed by Diverse. (*Id.* at ¶¶ 1, 4.) Mr. Hunt generated the total amount owed by Diverse based on his knowledge of the loan status, Alerus' files, and information regarding Diverse's bankruptcy proceedings. (*Id.*)

[¶51] In contrast, Erwin failed to produce any admissible evidence that would impugn the sworn testimony provided from Mr. Hunt in regard to his calculation of the amount owed by Diverse and Erwin. Furthermore, for Erwin's speculation regarding some unspecified recovery by Alerus in the bankruptcy proceeding to have any effect on the claims against Erwin, Erwin would have to show that Mr. Hunt's calculations were off by more than $8,000,000. (Compare Dkt. No. 64 at ¶6 (stating the total amount of indebtedness owed by Diverse as $12,899,248.89) with Aplees. App. 83 at §2; 87 at §2; 91 (containing Erwin's guaranty of $4,000,000 of principal).)

[¶52] Erwin's speculation that he is potentially due unspecified "credits" towards the amount of Indebtedness he owed – particularly credits exceeding $8,000,000 - is without any support in the record. The terms of each of the Guaranties signed by Erwin confirm that Alerus is under no obligation to pursue recovery from any other potential sources of payment

and can, instead, turn directly to Erwin to immediately honor the terms of his entire payment obligation. (Aplees. App. 83, 87, 91.)

[¶53] Further, Erwin failed to identify evidence of any actual recovery by Alerus in the course of Diverse's bankruptcy proceeding that was not already included within the calculations provided by Mr. Hunt. As a review of the public court record detailing Diverse's bankruptcy proceedings confirms, the only recovery Alerus received on its bankruptcy claim in excess of $14,400,000 was an order providing for payment of $2,250,000 to Alerus through the sale of certain Diverse assets, and that order was issued in January 2016 – a year prior to Mr. Hunt's calculations of the amount due from Erwin. *See* Jan. 22, 2016 Order entered by United States Bankruptcy Court for Southern District of Texas in *In re: Diverse Energy Systems, LLC, et al.* (Case No. 15-34736). Put another way, the amount claimed against Erwin, as calculated by Mr. Hunt, was already reduced when compared against the $14,400,000 proof of claim filed by Alerus in the Diverse bankruptcy. *See* Proof of Claim No. 38, filed Jan. 5, 2016 with United States Bankruptcy Court for Southern District of Texas in *In re: Diverse Energy Systems, LLC, et al.* (Case No. 15-34736). Erwin has not presented any evidence of any recovery by Alerus occurring since January 2016 (or at any other time) to support his rank speculation that Alerus recovered more in the course of the bankruptcy than what was already credited in Mr. Hunt's January 2017 calculations.

[¶54] Furthermore, Erwin waived this argument in his executed 2013 Guaranty. That Guaranty makes clear that "Guarantor's Share of the Indebtedness will only be reduced by sums actually paid by Guarantor under this Guaranty, but will not be reduced by sums from any other source including, but not limited to, sums realized from any collateral securing the Indebtedness or this Guaranty, or payments by anyone other than Guarantor, or reductions by operation of law, judicial order or equitable principles. Lender has the sole and absolute discretion to determine how sums shall be applied among guaranties of this Indebtedness." (Aplees. App. 91.)

[¶55] Finally, it should not be overlooked that Alerus provided Erwin all documents supporting its calculations when Alerus timely responded to Erwin's discovery prior to the summary judgment hearing. (Aplees. App. 96 at ln. 3; App. 46 at lns. 23-24.) Having received all of Alerus' loan files as part of the discovery Alerus timely produced, Erwin never identified any information to support his claim for additional credits.

[¶56] Because Erwin failed to provide any evidence to refute Alerus' precise calculations of its damages, and because the unambiguous language of the Guaranty precludes Erwin's argument that he is owed additional credits towards the amounts due, the district court properly found there was no genuine issue of material fact with regard to the amount of Alerus' total damages.

4. Erwin never properly raised fraudulent inducement as a defense, and such defenses were expressly waived by the terms of the Guaranties.

[¶57] Erwin's arguments in opposition to Alerus' Motion for Summary Judgment also asserted – for the first time - that he was fraudulently induced into entering into each of the three guaranty contracts. Erwin alleged that, based on statements made to someone other than him, he believed that the guaranties were merely a "formality" and that Alerus would not pursue collection in regard to any guaranty obligations. (App. 26-27.)

[¶58] Despite having this alleged knowledge since 2012, Erwin never plead, referenced, or even alluded to these issues in his Answer. (App. 14-16.) In fact, during oral argument, Erwin's counsel conceded that a motion to amend was not pending at the time of the summary judgment hearing and that fraud was not raised or contained in the pleadings. (Aplees. App. 100 at lns 23-24, 106 at lns. 3-11.) The only evidence that Erwin produced to the district court in support of this argument during the course of the summary judgment proceedings was three sentences in his own affidavit. (App. 29, ¶2.)

[¶59] However, even this submission was wholly insufficient to provide the district court a basis to deny Alerus' motion. In his affidavit, Erwin failed to detail any representations that were actually made to him, the dates on which any alleged representations were made, or reconcile how those representations – presumably made in 2012 – affected his signature more

than a year later on his subsequent guaranty. As such, the district court was correct in finding that "Erwin failed to plead alleged fraud as an affirmative defense, and to do so with particularity as to the circumstances upon which he claims Alerus fraudulently induced him to enter into the guarantees." (App. 68, ¶44.)

[¶60] Of particular note, Erwin also failed to submit an affidavit from the individual who supposedly heard the alleged statements in the first place. If the allegations about statements made in 2012 were true, there is no reason Erwin could not have included them in his 2016 Answer and also submitted competent, admissible evidence for the district court's review as part of the summary judgment proceedings. However, Erwin failed to do so.

[¶61] The case law is clear that these bare averments are not enough to create a genuine issue of material fact sufficient to defeat summary judgment. *Univ. Hotel Dev. v. Dusterhoft Oil, Inc.*, 2006 ND 121, ¶ 14, 715 N.W.2d 153, 157 ("Unsupported conclusory allegations are insufficient to withstand summary judgment"); N.D.R.Civ.P. 56(c) (requiring competent, admissible evidence in regard to the evaluation of summary judgment motions); *Riverwood Comm'l Park, LLC v. Standard Oil Co., Inc.*, 2007 ND 36, ¶ 9, 729 N.W.2d 101, 106 (confirming the requirement that an opposition to a motion for summary judgment rest on competent admissible evidence).

[¶62] The averments submitted by Erwin are particularly insufficient because they are inadmissible under both hearsay and parole evidence rules. First, the alleged statements were made in 2012, with Erwin signing a guaranty in 2013. Written agreements, such as the 2013 guaranty, supersede any prior oral agreements or understandings between the parties as a matter of law. *Norwest Bank N. Dakota, Nat. Ass'n v. Christianson*, 494 N.W.2d 165, 168 (N.D. 1992). Erwin argues the statements in his affidavit are not barred by hearsay because the statements are "operative facts." However, at the time of the summary judgment hearing, Erwin had not appropriately raised a fraud or misrepresentation defense. It follows that the alleged statements could not be supporting a necessary part of a cause of action or defense, because there simply was no existing cause of action or defense of record to support. Moreover, the statements in Erwin's affidavit actually constitute hearsay within hearsay. For these statements to be admissible, each part has to fall under an exception. N.D.R.Ev. 805. Here, while a statement from Alerus' representative to a third party *might* have fallen under the party-opponent exception, the subsequent statement by that third party to Erwin does not fall under any hearsay exception and is therefore barred under N.D.R.Ev. 802.[1]

[1] Alerus did object to this inadmissible argument before the trial court, contrary to the contention in Erwin's appellate brief. (*Compare* App. Brief at ¶39, *with* Aplees. App. 97.)

[¶63] Finally, this argument also fails when examined in the context of the agreements Erwin executed. In the 2013 Guaranty alone, Erwin expressly "represent[ed] and warrant[ed] to [Alerus] that (A) no representations or agreements of any kind have been made to [Erwin] which would limit or qualify in any way the terms of this Guaranty…" (Aplees. App. 91.)

[¶64] In addition, the terms of the 2013 contract also waived "any defense given to guarantors at law or in equity other than actual payment and performance of the Indebtedness" and further confirmed that the waiver of such defenses "is made with [Erwin's] full knowledge of its significance and consequences and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law." (*Id.* at 92.)

[¶65] Particularly in light of the unambiguous representation, warranty, and waiver contained in Erwin's Guaranties, Erwin's fraudulent inducement argument was properly rejected, and North Dakota law requires that the district court's grant of summary judgment be affirmed.

C. ERWIN'S STRATEGIES REGARDING DISCOVERY DO NOT PRECLUDE SUMMARY JUDGMENT.

[¶66] Erwin waited until faced with a motion for summary judgment to serve discovery on Alerus. Similarly, despite having the ability to do so at any time after he was served with the Complaint, Erwin waited until after Alerus' Motion for Summary Judgment was noticed, briefed, argued, and submitted before filing his Motion to Amend based on conversations that allegedly occurred in 2012. Erwin and his counsel had every right to make these strategic choices, but they also bear the consequences of those

choices. The district court acted within its discretion when it denied Erwin's Rule 56(f) Motion for Further Discovery because Erwin failed to comply with the requirements of N.D.R.Civ.P. 56(f), and its order in this regard should also be affirmed.

1. The District Court Did Not Abuse its Discretion in Denying Erwin's Motion for Further Discovery, Because Erwin Failed to Comply with the Requirements of N.D.R.Civ.P. 56(f).

[¶67] Erwin repeatedly argues the district court abused its discretion in denying his Rule 56(f) Motion for Further Discovery, claiming that he did not have a reasonable opportunity to conduct discovery. However, the district court did not abuse its discretion, because there was no explanation by Erwin or his counsel as to what additional information was sought, how the information would preclude summary judgment, or a valid reason why the information had not been previously obtained.

[¶68] The primary concern of N.D.R.Civ.P. 56(f) is to ensure the parties have a fair opportunity to conduct discovery before responding to a summary judgment motion. *Alerus Fin., N.A. v. Marcil Grp. Inc.*, 2011 ND 205, ¶ 35, 806 N.W.2d 160, 172 (citation omitted). However, the party invoking Rule 56(f) cannot "merely recite conclusory, general allegations that additional discovery is needed." *Id.* (internal quotation omitted). Instead, the party invoking Rule 56(f) must "identify with specificity what particular information is sought, and explain how that information would preclude summary judgment and why it has not previously been obtained." *Id.* Moreover, "a party seeking a Rule 56(f) continuance is

generally required to demonstrate due diligence both in pursuing discovery before the summary judgment motion is made and in pursuing the extension of time after the motion is made." 11 James Wm. Moore, Moore's Federal Practice ¶ 56.10(8)(a) (1997).

[¶69] In his response to Alerus' Motion for Summary Judgment, Erwin requested additional discovery to obtain "(a) Alerus' calculations as to the total indebtedness owed by Diverse; (b) Alerus' calculations as to my alleged share of the debt; and (c) the application of any proceeds from the sale of Diverse's assets to said debt." (App. 30 at ¶ 5.) However, as discussed above, Alerus had already provided all such information through Mr. Hunt's sworn Affidavit and the documents it timely produced in response to Erwin's discovery requests. To the extent Erwin needed additional information, he was required to specify the particular information that was sought, and he simply did not do so. *Alerus Fin., N.A.*, 2011 ND 205 at ¶ 35, 806 N.W.2d at 172.

[¶70] Erwin also failed to show how any unspecified, additional information would preclude summary judgment. Erwin's claims that Alerus' damages calculations are somehow incorrect are pure speculation. Erwin failed to provide the district court any reason based in evidence to believe that additional documentation would refute Alerus' precise calculations of its damages, particularly to the extent that it would affect Erwin's liability and preclude summary judgment.

[¶71] Finally, Erwin failed to explain why any additional information had not previously been obtained. The record confirms that Erwin failed to diligently pursue discovery before the summary judgment motion was noticed. Alerus commenced the action in May of 2016. Pursuant to N.D.R.Civ.P. 33, Erwin could have served discovery requests as soon as he was served with the Complaint. Instead, Erwin waited until April 3, 2017 – the day he submitted his opposition to Alerus' Motion for Summary Judgment – to serve any discovery requests. Alerus responded timely and produced over 7,000 documents, which corroborated the amounts set forth in Mr. Hunt's sworn Affidavit and which Erwin received prior to the summary judgment hearing. (Aplees. App. 96 at ln. 3; App. 14 at lns. 23-24.)

[¶72] In this case, Erwin had nearly a year to obtain discovery related to any alleged defenses or potential counterclaims. Considering this undisputable timing, Erwin cannot and did not establish that he did not have an adequate opportunity to obtain discovery in this case. *Continental Cas. Co. v. Kinsey,* 513 N.W.2d 66, 69 (N.D. 1994) (agreeing with district court that appellant had "considerable time to conduct discovery" and holding that district court had not abused its discretion in refusing to grant a Rule 56(f) continuance). Moreover, the district court found that Erwin failed to comply with Rule 56(f)(2) and failed to point to any credible evidence in the record to support his position. (App. 60 at ¶ 29.) As such, the district court acted reasonably and within its discretion when denying

Erwin's Rule 56(f) Motion for Further Discovery, and its decision should be affirmed by this Court.

2. This Court Must Dismiss Erwin's Arguments Regarding his Motion to Amend, Because those Arguments Were Not Preserved for Appeal.

[¶73] Erwin attempts to distract this Court from an examination of the unassailable summary judgment record by raising a number of arguments regarding his Motion to Amend. However, not only does Erwin lack an appealable order in regard to his Motion to Amend, but more importantly, Erwin failed to properly preserve any issues regarding his Motion to Amend when he filed this appeal, because he wholly omitted mention of any such issue from his Notice of Appeal. (App. Brief at ¶¶ 19-44; *but* s*ee* Aplees. App. 1-5.) Accordingly, this Court lacks jurisdiction to hear Erwin's arguments regarding the Motion to Amend, and his appeal in this regard should be denied.

[¶74] The right of appeal and the time for filing an appeal in North Dakota are jurisdictional matters governed by statute. *Vorachek v. Citizens' State Bank of Lankin,* 421 N.W.2d 45, 49 (N.D. 1988); *Nastrom v. Nastrom,* 1998 ND 75, ¶ 9, 576 N.W.2d 215, 217. Appeals are only authorized from judgments and specified orders. N.D.C.C. §§ 28-27-01 and 28-27-02. In a civil case, the notice of appeal must be filed with the clerk of the trial court within sixty days of service of the notice of entry of the judgment appealed, and must contain a preliminary statement of the issues. N.D.R.App.P. 4(a); 4(c). The Supreme Court "cannot waive compliance with the jurisdictional

requirement that the notice of appeal be timely filed." *State v. Metzner*, 244 N.W.2d 215, 220 (N.D. 1976). "Failure to comply with the Rules of Appellate Procedure may be grounds for dismissal of the appeal." *Bye v. Fed. Land Bank Assoc. of Grand Forks,* 422 N.W.2d 397, 399 (N.D. 1988).

[¶75] Here, the district court never ruled on Erwin's Motion to Amend, so there is no appealable order Erwin can present to this Court for review. (*See, generally,* Dkt.) As Erwin's own counsel admitted, Erwin's Motion to Amend was deemed "mooted by, obviously, the summary judgment being granted." (Aplees. App. 106 at lns. 20-21.) If Erwin believed there was an outstanding motion requiring a ruling after summary judgment issued, the proper course of action would have been to seek further ruling on that motion from the district court in order to obtain an appealable order. Erwin did not do so, meaning there is no appealable order for this Court to review. N.D.C.C. §§ 28-27-01 and 28-27-02.

[¶76] What is independently fatal to all Erwin's appellate arguments regarding his Motion to Amend is that Erwin's Notice of Appeal (conveniently omitted from his Appendix) fails to raise or preserve any issues regarding the Motion to Amend. In fact, Erwin's Notice of Appeal never mentions Erwin's Motion to Amend. (Aplees. App. 1-5.) Instead, the Notice of Appeal identifies five issues, all dealing with the district court's grant of summary judgment and denial of Erwin's Rule 56(f) Motion. (*Id.*) The Notice of Appeal is silent with regard to Erwin's Motion to Amend. (*Id.*)

[¶77] It follows that the first time Alerus – or this Court – learned of Erwin's objections regarding the lack of a ruling on his Motion to Amend was in Erwin's brief that was filed and served on December 29, 2017, well past the date by which Erwin had to timely file a Notice of Appeal.

[¶78] Because there is no appealable order regarding the Motion to Amend and because Erwin's Notice of Appeal is insufficient to confer jurisdiction upon this Court in regard to that issue, any arguments by Erwin here regarding his Motion to Amend must be dismissed for lack of appellate jurisdiction.

V. CONCLUSION

[¶79] For the reasons set forth above, the district court properly granted Alerus' Motion for Summary Judgment because there were no genuine issues of material fact remaining as to Alerus' breach of contract claim against Erwin. Furthermore, the district court did not abuse its discretion in its disposition of Erwin's Rule 56(f) Motion, as there was no need for further discovery and Erwin failed to comply with the requirements of the Rules of Civil Procedure in his request for additional discovery. Finally, Erwin's arguments regarding his Motion to Amend are not properly before this Court and should be dismissed. As such, Alerus respectfully requests that this Court affirm the District Court's June 1, 2017, Order, its related Judgment and Amended Judgment, and deny any and all appellate relief sought by Erwin.

Respectfully submitted,
January 29, 2018

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, Alerus Financial, N.A., in the above-entitled matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and (8)(a) of the North Dakota Rules of Appellate Procedure, that the above Brief of Appellee was prepared with proportional typeface and the total number of words in the above Brief, excluding words in the table of contents, table of authorities, certificate of service and this certificate of compliance, totals 7,408.

Dated: January 29, 2018.

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I hereby certify that on the 29th day of January, 2018, I caused the foregoing principal brief of Appellee/Plaintiff Alerus Financial, N.A. to be served by electronic mail on the following:

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