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STATE OF NORTH DAKOTA

In the

Supreme Court

for the

State of North Dakota

SUPREME COURT CASE NO.: 20190224
DISTRICT COURT CASE NO.: 31-2018-CV-00055

TARRYL JOYCE, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF VERA MITCHELL, AKA VERA DELORES (KILEN) JOYCE, AKA VERA DELORES (KILEN) JOYCE, AKA VERA DELORES JOYCE, AKA VERA DELORES KILEN, AKA VERA K. MITCHELL, AKA VERA J. MITCHELL, AKA VERA JOYCE MITCHELL AND AKA VERA D. MITCHELL,

Plaintiffs-Appellants,

vs.

STEVEN R. JOYCE,

Defendant-Appellee.

Appeal from the Final Judgment entered on May 23, 2019

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT

A. IT IS UNDISPUTED THAT THE REQUIRED SECOND MORTGAGE IS NOT VALID OR ENFORCEABLE UNDER TEXAS LAW.

[¶1] The enforceability of mortgages under Texas law is at the heart of this appeal. Tarryl and the Estate maintain that under the Texas Constitution the second mortgage required by the Settlement Agreement would not be valid or enforceable. In his brief, **Steven has made no argument to the contrary**. This is not surprising. The provisions of Sec. 50 of Article XVI of the Texas Constitution are clear. Mortgages against Texas homesteads are not valid unless they meet one of the 8 exceptions described in Sec. 50(a) of said Article XVI. The second mortgage required by the Settlement Agreement does not.

B. TARRYL WAS UNFAIRLY SURPRISED BY STEVEN'S ARGUMENTS AT THE HEARING ON THE MOTIONS.

[¶2] At the hearing on Stevenôs motion, it certainly was a surprise that Stevenôs counsel took the position that **there was no law** to support Appellantsô claim that the mortgage was unenforceable. This was **the** issue that prevented Tarryl from moving forward with the settlement agreement. As soon as Tarrylôs attorney became aware of it (only seven days after the Settlement Agreement was signed), Stevenôs attorney was notified of the problem. See Exhibit B at Index #89. As explained by Mr. Plambeck at the hearing on the motion:

> ñIn any event, this settlement agreement clearly contemplated an enforceable mortgage against Mr. Joyceôs home. And that was the problem when I went and tried to draft a mortgage that would satisfy that requirement of the settlement agreement, I was told it would be unenforceable and I contacted

> Mr. Hankla. Mr. Hankla was surprised and he said he would check it out and I understand that he did. I donôt know who he talked to either but I gave him the name of the attorney that I spoke to.ò (Tr. p. 41, lines 5-13)

[¶3] Thereafter, as stated in Tarrylôs Answer Brief, attorneys for the parties had phone conversations and exchanged correspondence and emails regarding settlement. Exhibits C and D, at Index #90 and #91, respectively, are examples of these communications and constitute evidence.

[¶4] At the hearing on Stevenôs motion in response to the Courtôs question, Mr. Richard, the attorney for the Estate, stated: ñMy understanding is that both sides had reviewed this and come to the conclusion that there could not be an enforceable second mortgage.ò (Tr. p. 47, lines 19-21)

[¶5] The following statement in ¶16 of Appellantôs Brief bears repeating: ñTarryl believes that Stevenôs attorney was aware of the provisions of the Texas Constitution concerning debts secured by mortgages against a Texas homestead and his failure to acknowledge it at the hearing was inappropriate.ò Steven did not take issue with this statement in his brief.

[¶6] Steven did not submit a reply brief to Tarrylôs Answer Brief. As Steven correctly points out, Rule 3.2 of the North Dakota Rules of Court, in this respect, is permissive, not mandatory. However, under the circumstances of this case, where: Steven has been made aware of an issue regarding the enforceability of mortgages under Texas law; Steven has had an opportunity to verify it; Stevenôs attorney leads Tarrylôs attorney to believe that he has done so, whether he has or not; and settlement discussions between the parties resume; it is unfair for Steven to

raise for the first time at oral argument, that Tarryl has cited no Texas law to support her position. This was the core issue that derailed the settlement agreement and Steven knew it before he filed his motion.

[¶7] If Steven was aware of any Texas law to the contrary on the issue, he should have raised it in his Motion to Dismiss, in a written reply brief to Tarrylôs answer brief, during his oral argument at the hearing on the Motion to Dismiss or in Appelleeôs Brief. He did not do so.

[¶8] Although hearings had been requested on Tarrylôs motions, **no party requested a hearing on Steven's Motion to Dismiss**. The Court, nevertheless, by written order dated April 2, 2019, Court directed the Calendar Control Clerk to ñschedule and notice a Motion Hearing in Ward County District Court **at which time the Court will hear oral arguments**ò on all pending motions. Index #95.

[¶9] Pursuant to Rule 3.2(b) of the North Dakota Rules of Court, ñthe court may require ***oral argument*** and may allow or require ***evidence*** on a motion.ò In this case, the Courtôs order refers to **oral arguments.** The order **made no statement about allowing or requiring evidence on any motion**. Pursuant to the Courtôs order, the Notice of Hearing dated April 2, 2019 was issued by the Court Administratorôs Office scheduling the hearing. Index #95. The notice contains no statement regarding the allowance or requirement for evidence on any of the motions.

[¶10] At the hearing on May 8, 2019, Stevenôs attorney argued:

ñI think I made my position fairly clear. No evidence, no law. And

> actually itôs this morning, Your Honor, that the Court is to look at any evidence or law and make the decision not some requested evidentiary hearing in some point in the future. I mean, that time has come and gone, Your Honor. That should be right now.ò (Tr. p. 48, lines 8-14)

[¶11] Since no evidentiary hearing was contemplated, Tarrylôs attorneys and the Estateôs attorney were not present in person at the scheduled ***oral argument*** on the motions. Appellants and their attorneys certainly would have been present if an evidentiary hearing was contemplated. Tarryl was not opposed to an evidentiary hearing. (Tr. p. 41, lines 22-25)

[¶12] Even though an evidentiary hearing was not noticed or held, it is worth discussing the evidence that may have been presented at such a hearing. Since Steven was trying to enforce the Settlement Agreement, the hearing might have involved testimony from all participants in the mediation process which would have included, at a minimum, Tarryl Joyce, Steven Joyce, the mediator, and the attorneys who were present at the mediation. Testimony would have been elicited concerning the terms of the Settlement Agreement; the execution of the Settlement Agreement; the required second mortgage; the fact that requirement for the second mortgage was specifically negotiated; and that the parties believed a second mortgage was enforceable. Indeed, it is anticipated that such testimony would have been consistent with the evidence that was submitted to the Court as Exhibits B, C and D. See Index #89, #90 and #91, respectively.

[¶13] As the author of Exhibits B (Index #89) and D (Index #91), the recipient of Exhibit C (Index #90), and as an attorney and an officer of the Court, by

filing these Exhibits in support of Tarrylôs Answer Brief to Stevenôs Motion to Dismiss, Mr. Plambeck vouched for their authenticity. These exhibits constitute evidence which is part of the record without objection by Steven. Moreover, no contrary evidence has been presented and there has been no argument that there exists any evidence contradicting the content of these Exhibits. These exhibits should have been considered evidence which was sufficient to deny Stevenôs motion.

[¶14] In connection with Stevenôs Motion to Dismiss, there was no brief, no citation of law, and no supporting affidavits. The sole document submitted by Steven in support of his Motion to Dismiss was a copy of the Settlement Agreement. As a submission filed with the motion that was signed by counsel, Tarryl understood that Stevenôs attorney was, in effect, vouching for its authenticity. Tarryl took no issue with the submission of the Settlement Agreement in this manner as there was no good faith argument or legitimate reason to raise an issue regarding its relevance or admissibility. The agreement was signed by Steven, Tarryl and their attorneys.

[¶15] Although Tarryl acknowledges that she signed the agreement, for the reasons stated in Exhibits B (Index #89) and D (Index #91), the brief filed in answer to Stevenôs Motion to Dismiss, Tarrylôs oral argument at the hearing and the reasons set forth in Appellantsô Brief, Tarryl has maintained that there is no contract because the required second mortgage is not enforceable under Texas law.

Tarrylôs position has been consistent from the moment it became apparent that Texas law deems the required mortgage not valid.

C. THE SETTLEMENT AGREEMENT DOES NOT CONSTITUTE AN AGREEMENT PURSUANT TO N.D.C.C. §30.1-20-12.

[¶16] As Steven points out in his brief, N.D.C.C. §30.1-20-12 provides:

> ñ**Subject to the rights of creditors and taxing authorities**, competent **successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent**, or under the laws of intestacy, **in any way that they provide in a written contract executed by all who are affected by its provisions**. The personal representative shall abide by the terms of the agreement subject to the personal representativeôs obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of the personal representativeôs office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedentsôestates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.ò (emphasis added)

[¶17] The Settlement Agreement does not contain any provision regarding an **alteration of the interests, shares, or amounts to which Tarryl and Steven may be entitled under Vera Mitchell's Will** and does not refer to any aspect of the administration of the Vera Mitchell Estate**.** The Settlement Agreement only provides for certain payments by Steven to Tarryl.

[¶18] In this litigation, Tarryl, individually, asserted claims against Steven. Claims in favor of the Estate were also asserted against Steven. At the time of the mediation, First International Bank & Trust was the duly appointed Personal Representative of the Estate. The Settlement Agreement was not signed by the

Personal Representative and no evidence has been presented to support Stevenôs contention that the Estate approved the Settlement Agreement.

[¶19] Even if the agreement is construed as an agreement governed by N.D.C.C. §30.1-20-12, it will not support the Courtôs dismissal of the Estateôs claims since it was ***not executed by the Personal Representative***.

D. AN ENFORCEABLE SETTLEMENT AGREEMENT REQUIRES A MUTUAL INTENT TO CREATE A LEGAL OBLIGATION.

[¶20] There should be no question that when the parties signed the Settlement Agreement, they had a reasonable expectation that the required second mortgage would be enforceable under Texas law should Steven default on his payment obligations. If the parties had any other intentions, this requirement was meaningless. If the mortgage is not enforceable, the intent of this material term of the Settlement Agreement has been frustrated. The mortgage requirement fails to create a legal obligation.

[¶21] In the context of contract formation, citing N.D.C.C. §§ 9-01-02 and 9-03-01, the North Dakota Supreme Court has stated:

> To create an enforceable contract, there must be **a mutual intent to create a legal obligation**. N.D.C.C. §§ 9-01-02; 9-03-01. The parties' mutual assent is determined by their objective manifestations, not their secret intentions. Nat'l Bank of Harvey v. Int'l Harvester Co., 421 N.W.2d 799, 804 (N.D. 1988); Amann v. Frederick, [**6] 257 N.W.2d 436, 439 (N.D. 1977).

Lire, Inc. v. Bob's Pizza Inn Restaurants, 541 N.W.2d 432, 434 (N.D. 1995)

[¶22] In this case, there has been no meeting of the minds and the lack of consent means there is no contract. Whether it is characterized as one of law or

fact, there was a clear mistake and, based on the record, the mistake should be deemed mutual. There was a suggestion of fraud in Appellantsô Brief only because fraud is the only reasonable alternative to a mistake in the circumstances of this case. Neither Tarryl nor the Estate knows Stevenôs secret intentions.

Dated this 26th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief For Appellant complies with the page limit requirements imposed by Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. The Brief For Appellant contains eleven (11) pages.

Dated this 26th day of December, 2019.

/s/ Dan D. Plambeck
Dan D. Plambeck
/s/ **Peter E. Karlsson**
Peter E. Karlsson
/s/ **Timothy G. Richard**
Timothy G. Richard

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify pursuant to Rule 25 of the North Dakota Rules of Appellate Procedure that I served the following:

- **REPLY BRIEF OF APPELLANTS**

by emailing the same to:

Brian W. Hankla
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on the 26th day of December, 2019.

/s/ Dan D. Plambeck
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