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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Big Pines, LLC, Plaintiff & Appellants vs. Biron D. Baker, M.D., and Biron D. Baker Family Medicine PC, Defendants & Appellees	Supreme Court Case No: 20190249

APPELLANT'S REPLY BRIEF

APPEAL FROM POST-JUDGMENT ORDER ENTERED JULY 1, 2019,
SOUTHCENTRAL JUDICIAL DISTRICT, BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE WILLIAM HERAUF
CIVIL NO. 08-2018-CV-00351

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I. ARGUMENT

A. Big Pines Did Not Waive Any Claim Under The "Personal Guaranty Agreement"

[¶ 1] Dr. Baker argues Big Pines waived its claims arising under Dr. Baker's Guaranty of the Lease Agreement by not requesting the jury to address the issue. Dr. Baker's argument is without merit.

[¶ 2] First, Dr. Baker's obligation to pay Big Pines' attorney's fees under the Guaranty was contingent upon Big Pines prevailing upon its claim against Biron D. Baker Family Medicine, PC ("Baker Medicine") of breach of the Lease Agreement, the performance of which Dr. Baker guaranteed. Whether Baker Medicine breached the Lease involved questions of fact which only the jury could, and did resolve at trial. It was only after the jury resolved those factual questions in favor of Big Pines that Big Pine's claim under the Guaranty against Dr. Baker become ripe for determination by the district court. Big Pines' claim against Dr. Baker under the Guaranty involved strictly questions of contract interpretation, i.e. questions of law, for the district court alone to decide. Big Pine's claim against Dr. Baker under the Guaranty would not have been appropriately submitted to the jury for determination. After the jury ruled in favor of Big Pines on the factual breach of Lease issue, Big Pines appropriately presented its remaining contractual claim against Dr. Baker to the district court for resolution.

[¶ 3] Second, Big Pines followed the procedure mandated by North Dakota Rule of Civil Procedure 54(e)(3), which provides as follows:

> (e) *Attorneys' Fees*. A claim for attorneys' fees and related nontaxable expenses not determined by the judgment must be made by motion. The motion must be served and filed within 21 days after notice of entry of

> judgment. The trial court may decide the motion even after an appeal is filed.

(Italics in original.) Big Pines' motion requesting an award of its attorneys' fees under Dr. Baker's Guaranty complied with Rule 54(e)(3). (App. 37-46.)

[¶ 4] Third, at no time did Dr. Baker argue to the district court that Big Pines had waived its claim against Dr. Baker under the Guaranty by allegedly failing to present such claim to the jury. Dr. Baker's waiver argument is being raised for the first time on this appeal. Ironically, it is Dr. Baker who has waived his argument. As this Court has repeatedly stated, it will not consider arguments raised for the first time on appeal. *E.g. Carlson v. Farmers Ins. Group of Companies-Farmers Ins. Exchange*, 492 N.W.2d 579, 581 (N.D. 1992). Dr. Baker failed to afford the district court an opportunity to consider his waiver argument. This Court should reject Dr. Baker's waiver argument on this basis alone.

[¶ 5] Fourth, Big Pines' claim against Dr. Baker under the Guaranty was determined by the district court with the consent of Dr. Baker. In responding to Big Pines' post-trial motion to the district court to rule upon Big Pines' claim for attorneys' fees against Dr. Baker under the Guaranty, Dr. Baker did not argue Big Pines had waived such claim, or in any other manner object to the district court's ruling on the legal issues presented by Big Pines. Considering the district court considered and ruled upon Big Pines' motion requesting an award of attorney's fees under the Guaranty, the issue before this Court, Dr. Baker is essentially arguing the district court erred on ruling on Big Pines' motion for an award of attorneys' fees under the Guaranty in the first place. However, Dr. Baker did not cross-appeal from the district court's Order challenged by Big Pines. Dr. Baker has waived his waiver argument.

[¶ 6] Ultimately, Big Pines did not waive its claim against Dr. Baker under the Guaranty by not requesting such claim be addressed by the jury as the claim was contingent upon the jury's factual determination of breach of the Lease by Baker Medicine, and only upon such factual determination was the interpretation of the contractual documents by the district court appropriate to resolve Big Pine's claim against Dr. Baker under the Guaranty.

B. The District Court Erred In Determining The Guaranty Was Not Assigned To Big Pines

[¶ 7] As a preliminary matter, Dr. Baker cites the wrong standard of review applicable to the district court's erroneous determination the Guaranty was not assigned by Phoenix to Big Pines, which involves strictly a question of law which this Court reviews de novo. *Myaer v. Nodak Mut. Ins. Co.*, 2012 ND 21, ¶ 10, 812 N.W.2d 345 ("We independently examine and construe a contract to determine if the district court erred in its interpretation." (citation omitted)). Dr. Baker concedes that in reaching its determination, the district court simply construed the language of contractual documents, including the combined Lease Agreement/Personal Guaranty, and the Assignment of Lease Agreement. (Appellee's Brief at ¶ 49.) Bolstering this point is the fact Dr. Baker relies upon North Dakota law governing contract interpretation (Appellee's Brief at ¶ 50) – again, questions of law to be reviewed de novo.

[¶ 8] As discussed in Big Pines principal brief, the district court erred in concluding that although Phoenix assigned the Lease to Big Pines, the Guaranty constituted a separate agreement which Phoenix did not assign to Big Pines. As discussed below, the language of the Lease, Guaranty and Assignment unambiguously establish Phoenix assigned the Lease and the integrated Guaranty to Big Pines, with the sole exception of Phoenix's expressly retained claims against Baker Medicine and Dr. Baker in relation to

past rents remaining owed Phoenix.

[¶ 9] "The general rule in North Dakota is that attorney fees are recoverable when provided for by contract or statute." *Burlington Northern R. Co. v. Farmers Union Oil Co. of Rolla*, 207 F.3d 526, 534 (8th Cir. 2000) (citing *Hoge v. Burleigh County Water Management Dist.*, 311 N.W.2d 23, 31 (N.D. 1981)). "[T]he amount of fees of attorneys in civil actions **must** be left to the agreement, express or implied, of the parties." N.D.C.C. § 28-26-01(1) (emphasis added). This Court has held that even in the absence of a contractual provision expressly providing for attorneys' fees, a contractual provision stating that one party would pay "all damages" stemming from a breach of contract demonstrated the clearly ascertainable intent of the parties to include an award of attorneys' fees under N.D.C.C. § 28-26-01(1). *Hoge v. Burleigh County Water Management Dist.*, 311 N.W.2d 23, 31 (N.D. 1981).

[¶ 10] Under the express provisions of the Guaranty, Dr. Baker unambiguously agreed to guaranty Baker Medicine's performance under the Lease, and to pay all expenses, costs, and damages that the Landlord is entitled to recover from the Tenant, including all costs and attorney's fees incurred in attempting to realize upon the Guaranty.

> I. OBLIGATIONS. This Guaranty is given by the Guarantor [Baker] to induce the Landlord to enter into the attached lease agreement with the Tenant for the purpose of leasing commercial property located at 300 West Century Avenue, Bismarck, North Dakota and in consideration of the Landlord doing so, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and further acknowledging that the Landlord intends to rely on this Guaranty, the Guarantor absolutely and unconditionally guarantees prompt and satisfactory performance of the lease agreement, in accordance with all of its terms and conditions, by the Tenant under the terms set forth below. **If the Tenant should default in performance of its obligations under the lease agreement according to it's [sic] terms and conditions, the Guarantor shall be liable to the Landlord for all expenses, costs, and damages that the Landlord is entitled to recover from the Tenant,**

> **including, to the extent not prohibited by law, all costs and attorneys' fees incurred in attempting to realize upon this Guaranty.**

(App. 28-29 at ¶ I (emphasis added).) It is not disputed that Phoenix's rights, title and interest as Landlord under the Lease relative to the claims at issue were assigned to Big Pines. Big Pines not only attempted to realize upon the Guaranty by alleging that Baker Medicine breached the Lease and that Dr. Baker breached the Guaranty, but Big Pines was successful in obtaining a jury verdict, *Order for Judgment on Jury Verdict* and *Judgment on Jury Verdict* awarding judgment against both Baker Medicine and Dr. Baker and in favor of Big Pines for breach of the Lease, and awarding damages to Big Pines. *See* App. 36-39.)

[¶ 11] The Lease, Guaranty and Assignment, when read together, evidence a clear intention by Phoenix to assign to Big Pines Phoenix's rights, title and interest in the Guaranty as they pertain to the interests in the Lease Phoenix assigned to Big Pines. First, the Lease expressly refers to the Guaranty in its last paragraph, and notes the Guaranty was the Landlord's inducement to enter into the Lease:

> 28. **PERSONAL GUARANTY.** LANDLORD's entry into this Lease Agreement with TENANT was induced by the personal guaranty of TENANT's performance hereunder by Biron D. Baker, M.D., pursuant to the terms of that certain Personal Guaranty Agreement, attached hereto.

(App. 27 at p. 18 ¶ 28 (bold in original).) The district court failed to address this provision, which was one of Big Pine's principal arguments on its motion requesting attorney's fees and costs. (App. 43-44 at ¶ 7.)

[¶ 12] Second, both the Lease and Guaranty are contained in the same document - not simply attached to each other. The first page of the Guaranty begins on the last page of the Lease. (App. 28.) The Guaranty is part of the Lease and is paginated as pages 18

through 20 of the Lease itself. (App. 28-30.) The exhibits to the Lease are attached at the end of the combined Lease/Guaranty document. (App. 31-33.)

[¶ 13] Third, Dr. Baker signed both the Lease and Guaranty at the same time, both on behalf of Baker Medicine as its President, and in his individual capacity in relation to the Guaranty. (App. 27-28, 30.) Dr. Baker is the sole shareholder of his professional corporation.

[¶ 14] Fourth, the Guaranty expressly states "the Guarantor absolutely and unconditionally guarantees prompt and satisfactory performance of the lease agreement, in accordance with all of its terms and conditions . . . ." (App. 27-28 at ¶ I.) The Guaranty expressly contemplates an assignment of the Landlord's rights to a third-party and Dr. Baker's ongoing liability to such third-party: "[t]his Guaranty . . . shall inure to the Landlord, its successors **and assigns**, and (c) **may be enforced by any party to whom all or any part of the liabilities may be sold, transferred, or assigned by the Landlord**." (App. 29 at ¶ V (bold added).) The "liabilities" referenced are clearly the Tenant's liabilities owed the Landlord under the integrated Lease – the liabilities guaranteed under the Guaranty.

[¶ 15] Fifth, the *Assignment* expressly states that claims for damage to real and/or personal property on the subject premises were assigned by Phoenix to Big Pines. (App. 34-35.) Such claims are the subject of this lawsuit. Whether the Assignment reserved to Phoenix the ability to seek recourse "for past rents due and owing" against Dr. Baker is irrelevant. That simply means Phoenix retained its rights under the Guaranty in relation to those specific claims, but assigned to Big Pines all of its rights under the Guaranty pertaining to the Tenant's other liabilities under the Lease.

[¶ 16] In sum, the plain language of the Lease, Guaranty and Assignment evidence Phoenix's intention to assign to Big Pines all right, title and interest in the Guaranty, except to the extent those rights may pertain to Phoenix's retained rights in relation to past due rents owed. As the Guaranty specifically provides for recovery of attorney's fees and costs, Big Pines should be awarded its reasonable attorney's fees and costs. *See* App. 29 at ¶ I ("If the Tenant should default in performance of its obligations under the lease agreement according to it's terms and conditions, the Guarantor shall be liable to the Landlord for all expenses, costs, and damages that the Landlord is entitled to recover from the Tenat, including, to the extent not prohibited by law, all costs and attorneys' fees incurred in attempting to realize upon this Guaranty."); N.D.C.C. § 28-26-01(1) ("[T]he amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties."). As the jury found that Dr. Baker and Baker Medicine breached the Lease and caused damages to Big Pines, Big Pines must be awarded all costs and attorneys' fees it incurred in pursuing its claims in this case in accordance with the Guaranty.

C. Dr. Baker's Personal Guaranty Is Not Governed By N.D.C.C. § 28-26-04

[¶ 17] Dr. Baker argues his Guaranty is governed by N.D.C.C. § 28-26-04, which provides:

> Any provision contained in any note, bond, mortgage, security agreement, or other evidence of debt for the payment of an attorney's fee in case of default in payment or in proceedings had to collect such note, bond, or evidence of debt, or to foreclose such mortgage or security instrument, is against public policy and void.

(Appellee's Brief at ¶¶ 55-65.) However, this Court has expressly stated Section 28-26-04 has no application to attorney's fees provisions pertaining to commercial leases, as follows:

> We, however, do not believe "evidence of debt" in N.D.C.C. § 28-26-04 is intended to be viewed as a catchall rubric embracing any and all writings, not otherwise specifically listed, which represent an obligation on the part of the writer to do something for the holder.
>
> A commercial lease is distinguishable from a mortgage, security agreement, bond, note, or loan agreement. The state constitution or statutes define whether a contractual provision is against public policy. If the legislature chooses to declare the attorney fee provisions in commercial lease agreements violate public policy, it may do so. In the absence of legislative or constitutional direction to the contrary, we decline to expansively interpret public policy to void attorney fee agreements in commercial leases.

T.F. James Co. v. Vakoch, 2001 ND 112, ¶ 13, 628 N.W.2d 298 302-03 (citations and quotations omitted). In *TF James Co.*, this Court also noted leases do not fall within the definition of "instrument" under North Dakota law, citing N.D.C.C. §§ 41-03-03 and 41-03-04. *Id*. at ¶ 11. A guaranty of performance of obligations under a lease is distinguishable from a guaranty of an instrument evidencing a debt, such as a note, mortgage, security agreement, or in relation to an open account as was at issue in *Farmers Union Oil Co. v. Maixner*, 376 N.W.2d 43, 49 (N.D. 1985). The error in Dr. Baker's logic is his failure to consider what is being guaranteed. In *Maixner*, this Court determined the open account which was guaranteed constituted "evidence of debt" under Section 28-26-04, whereas the commercial lease guaranteed in *TF James Co*. did not constitute an "instrument" or "evidence of debt" and was therefore not governed by Section 28-26-04. The present case falls within the parameters of *TF James Co.* as Dr. Baker's Guaranty relates to performance of a commercial lease – which is neither an "instrument" nor "evidence of a debt". This Court should therefore reject Dr. Baker's argument under Section 28-26-04.

D. In The Alternative, The Assignment Is Ambiguous As To The Intentions Of Phoenix And Big Pines, And Such Ambiguity Should Be

Resolved By The Trier Of Fact On Remand

[¶ 18] In the alternative, as discussed in Big Pines' principal brief, should the Court conclude the Lease, Guaranty and/or Assignment is/are ambiguous as to the intentions of Phoenix and Big Pines in relation to what was assigned, a genuine issue of material fact exists for resolution by the trier of fact. *See Myaer v. Nodak Mut. Ins. Co.*, 2012 ND 21, ¶ 10 ("Although extrinsic evidence is not admissible to contradict unambiguous written contract language, extrinsic evidence may be considered to show the parties' intent if the contract is ambiguous." (citing *Kuperus v. Willson,* 2006 ND 12, ¶ 11, 709 N.W.2d 726)). Whether a contract is ambiguous is a question of law. *Id.* In such case, this Court should reverse the district court's Order and remand this case to the district court for further proceedings to resolve any remaining questions of fact in this regard.

II. CONCLUSION

[¶ 19] For the foregoing reasons, Big Pines, LLC requests the Court reverse the challenged Order of the district court, determine Big Pines is entitled to an award of its reasonable attorney's fees and costs in this action pursuant to the terms of the Guaranty, and remand this case to the district court for a determination as to the amount of reasonable attorney's fees and costs to be awarded Big Pines. In the alternative, should the Court determine any ambiguity in the contracts at issue exists precluding a determination as a matter of law as to the intentions of Phoenix and Big Pines relative to the Guaranty, Big Pines requests the Court reverse the challenged Order and remand this case to the district court for purposes of having the trier of fact resolve any such ambiguity.

[¶ 20] Dated this 6th day of November, 2019.

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CERTIFICATE OF COMPLIANCE

[¶ 21] The undersigned, as attorneys for the Appellant in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face in 12-point font and equals 12 pages, exclusive of this Certificate of Compliance.

[¶ 22] Dated this 6th day of November, 2019.

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CERTIFICATE OF SERVICE

[¶23] I hereby certify that a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was on the 6th day of November, 2019, emailed to the following:

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