20180264
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 8, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Twin City Technical LLC, Three Horns Energy, LLC, Prairie of the South LLC, and Irish Oil & Gas Inc.,	)	
Plaintiffs-Appellees,	)	
vs.	)	Supreme Court No. 20180264 Williams Co. No. 53-2015-CV-01394
Williams County and Williams County Commission;	)	
Defendants-Appellants.	)	

APPEAL FROM ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, DATED APRIL 27, 2018.

THE DISTRICT COURT OF WILLIAMS COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE BENJAMEN J. JOHNSON, PRESIDING

REPLY BRIEF OF APPELLANTS

Scott K. Porsborg (ND Bar ID 04904)
sporsborg@smithporsborg.com
Sarah E. Wall (ND Bar ID 07822)
swall@smithporsborg.com
Williams County Special Assistant State's Attorneys
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendants – Appellants,
Williams County and Williams County Commission

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Paragraph Number

STATUTES:

RULES:

I. ARGUMENT

[¶1] While Lessees generally restated many of same facts as those provided in the County's statement of facts, Lessees erroneously assert the County's statement of facts contains a number of facts that are irrelevant to the issues presented by this case. Rather, the County's statement of facts includes all the facts necessary for the Court's complete understanding of the events giving rise to this dispute. As such, the County urges the Court to accept the County's facts, as they are undisputed based on the record.

A. Lessees are not Entitled to a Declaratory Judgment that No Valid Contract was Formed between the Parties.

[¶2] In their brief, Lessees attack the County's defenses to Lessees' declaratory judgment claim that the Leases should be invalidated due to an allegedly invalid bidding process. However, Lessees' arguments are without merit, and the County reasserts all of its arguments in its initial brief. As an initial matter, Lessees argue that they are not contesting the statutory bidding process, but rather that they are entitled to a declaratory judgment contesting the bidding process. See Brief of Appellees, ¶ 15. Lessees' argument is based on a misinterpretation of the County's position that its laches defense establishes Lessees are barred from contesting the bidding process, not that Lessees are barred by laches from asserting a breach of contract action. However, upon a review of the County's brief, it is clear the County was distinguishing between a direct contract action and an action contesting the statutory bidding process, which is presented here. Therefore, Lessees' arguments to that effect are unpersuasive.

[¶3] Regarding standing, Lessees argue that Baukol and Frieh are distinguishable from this case because Lessees are seeking a declaratory judgment, which was not at issue in those two cases. See Baukol Builders, Inc. v. County of Grand Forks,

2008 ND 116, ¶ 11, 751 N.W.2d 191; Frieh v. City of Edgeley, 317 N.W.2d 818, 819-20 (N.D. 1982)). Lessees argue that because they accept the outcome of the bidding process and are not requesting a new bidding process, it exempts them from the standing requirements set forth in Baukol and Frieh; that voluntary participation in a flawed process without any objection amounts to consent to the process and precludes standing. The competitive bidding statutes under which Lessees seek to invalidate the Leases was created not to protect individuals that willingly participate in and benefit from a flawed process; rather, a competitive bidding process is to protect the public and the taxpayers. Id. It is telling that Lessees provide no legal support for distinguishing a declaratory judgment action contesting a statutory bidding process from a direct action contesting a competitive bidding process. Essentially, Lessees are requesting a distinction without a difference, as the Leases could be invalidated under either action.

[¶4] Most importantly, Lessees ignore they are requesting relief to which they are not entitled. Any harm allegedly caused by the bidding process to Lessees has already been done, precluding declaratory relief. Richland Cnty. Water Res. Bd. v. Pribbernow, 442 N.W.2d 916, 919 (N.D. 1989) ("Furthermore, the Board's violation, if any, of Pribbernow's rights had already occurred, rendering declaratory relief inappropriate. '**Once rights are violated, declaratory relief is inappropriate**.'" (quoting Allen v. City of Minot, 363 N.W.2d 553, 554 n. 1 (N.D.1985) (emphasis added)). As a result, Lessees' declaratory action cannot be sustained, and summary judgment should have been granted in the County's favor.

B. Lessees are not Entitled to Rescission of the Leases due to Mistake, Fraud, or Failure of Consideration because there are no Genuine Issues of Material Fact

[¶5] Lessees argue their rescission claims do not fail because there is an issue of fact as to Lessees' actions upon discovering the title issues affecting the Leases. However, Lessees have failed to demonstrate such an issue of fact. All of Lessees' representatives testified vaguely at their depositions regarding what took place between the time of discovering alleged title issues and informing the County of these issues. Sara Caya stated she was "not sure" why there was a delay in notifying the County. App. at 151 (86:10-14). Terry Harris stated they "had to get some legal advice and try to determine how we were going to handle it after we did our research." App. at 335 (103:8-11). Tim Furlong stated that they were gathering information during that time. App. at 92 (50:6-22). Wayne Harris stated he did not recall and they were very busy at the time. App. at 177 (52:8-17). Obviously, there is no dispute that Lessees were aware of the potential title dispute, and instead of bringing the issue to the County to try to resolve the issue in a timely fashion, they decided to sit on it, conduct research, and discuss the issue with an attorney. As a result, there is no genuine dispute of fact as to this issue. Accordingly, Lessees failed to act with reasonable diligence upon discovering the alleged title defects. "A party will be granted rescission only if the party acts with reasonable diligence to rescind promptly and restore to the other party the value which was received under the contract." Check Control, Inc. v. Shepherd, 462 N.W.2d 644, 648 (N.D. 1990) (citing Holcomb v. Zinke, 365 N.W.2d 507, 510 (N.D. 1985)); N.D.C.C. § 9-09-04. "A party waives the right of rescission if the party fails to promptly exercise that right upon discovering the facts necessary for

rescission." Id. Therefore, the County is entitled to summary judgment on Lessees rescission claims.

[¶6] Regarding rescission for mistake of fact, Lessees argue there is a dispute of fact regarding whether Lessees conducted due diligence and whether the County's own conduct contributed to the mistake of fact. However, Lessees' position ignores that the County is not asserting rescission, Lessees are, and rescission for mistake of fact is not proper where a mistake stems from a party's own negligence or carelessness rather than from any misrepresentation or warranty on the part of the other party. Sec. State Bank of Wishek v. State, 181 N.W.2d 225, 232-33 (N.D. 1970). It is undisputed that Lessees did not properly conduct their due diligence, because if they had, they would have discovered the same issue allegedly discovered by Hess when it refused to purchase the Leases from Lessees. Therefore, Lessees have not rebutted the County's request for summary judgment on their claim for rescission based on mistake of fact.

[¶7] Regarding Lessees' claim for rescission based on fraud, Lessees also argue there is a dispute of fact as to whether the information available to Innis "during the negotiation of the Leases warranted her assertions and actions in doing so." This argument is both confusing and irrelevant; there is no evidence Innis knew of any alleged title defects at the time of negotiation and there is no evidence that a layman's search of title records would have presented any such issue. Indeed, even Lessees' title search during the due diligence period failed to reveal the alleged title defect, so an allegation that Innis would have been able to discover it on her own is simply wrong. There is no issue of fact on this claim, and as demonstrated by the County in its motion, Lessees cannot demonstrate actual or constructive fraud, and their claim should have been dismissed as a matter of law.

[¶8] Lessees' claim for rescission based on failure of consideration also fails as a matter of law. In their response, Lessees argue that striking the warranty clause does not constitute an express disclaimer of the warranty clause. However, Lessees' hyper-technical argument is based on a case that is inapplicable here. In Marcia R. Sickler Mineral Trust v. Lonetree Energy & Assoc., LLC, the court stated the parties' express disclaimer did not represent the parties' intentions as to whether the lease was akin to a quitclaim deed. No. 4:12-cv-077, 2013 WL 4508429, at *8 (D.N.D. Aug. 23, 2013). In that case, the parties had multiple lease documents from which the court determined the intent of the parties, not solely the lease agreement, as we have here. Id. Additionally, the lessor in Lonetree terminated one oil and gas lease and then immediately entered into another with Lonetree, which led to the title dispute. Id. Here, the County did not want the warranty clause stricken to avoid responsibility for potential title issues it created by arguably questionable leasing behavior; rather, the County struck the warranty clauses specifically because it does not conduct title searches, so it would be unable to verify title prior to entering into the Leases. Both parties agreed that this was the intention of striking the warranty clause, which was not the case in Lonetree. App. at 34, ¶ 10; Doc. ID# 90 at ¶ 16. Thus, Lonetree is inapplicable in this case, and does not support Lessees' position. As a result, the County is entitled to summary judgment on rescission for failure of consideration claim.

C. The Leases do not Contain a Covenant of Quiet Possession, and the County has not Breached that Covenant.

[¶9] Lessees allege the Leases contain an implied covenant of quiet possession, and the County breached this covenant by not having good title to the Subject Lands. As discussed in the County's initial brief, the Leases do not contain an implied covenant of quiet possession, and even if they did, the covenant was expressly disclaimed when the

County struck the warranty language from the Leases. In addition, Lessees have failed to present any evidence of a party lawfully claiming right to the use or possession of the *Subject Lands*. Lessees have not brought a quiet title action to these lands, or even produced a title opinion. Lessees must demonstrate that a party has a competing claim to title, or a party has put Lessees out of possession in order to sustain a breach of covenant of quiet possession claim. See N.D.C.C. § 47-16-08; Smith v. Nortz Lumber Co., 7 N.W.2d 435, 436 (N.D. 1943). The only "evidence" Lessees present are charts of various lease interest-holders. Appellees' App. at 17-45. These charts appear to be Hess' list of various third-party interest-holders Hess has paid for its oil and gas development activities. Lessees assert these charts demonstrate third parties that are "disturbing and/or preventing the Lessees from obtaining quiet possession of the oil and gas in and under the Subject Lands." Brief of Appellees, ¶ 31. The presentation of these documents demonstrates Lessees' half-hearted attempt at obtaining quiet possession in this case, as its own *Amended Complaint* asserts that the State of North Dakota has title to the Subject Lands, not the individuals listed on the Hess charts. App. at 11-12. It is clear that Lessees are bringing this action in order to avoid the legal complexities presented by the accretion of the Missouri River as seen by this Court in recent years. See Reep v. State, 2013 ND 253, 841 N.W.2d 664; Wilkinson v. Bd. of Univ. and Sch. Lands, 2017 ND 231, 903 N.W.2d 51; see also Statoil Oil & Gas LP v. Abaco Energy, LLC, 2017 ND 148, 897 N.W.2d 1. As a result, the undisputed facts establish the County is entitled to summary judgment on the Lessees' quiet possession claims.

II. CONCLUSION

[¶10] For the foregoing reasons, the District Court's order granting Lessees' motion for summary judgment should be reversed and remanded with an instruction to grant the County's motion for summary judgment.

Dated this 8th day of November, 2018.

By /s/ Scott K. Porsborg
Scott K. Porsborg (ND Bar ID 04904)
sporsborg@smithporsborg.com
Sarah E. Wall (ND Bar ID 07822)
swall@smithporsborg.com
Williams County Special Assistant State's Attorneys
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendants – Appellants,
Williams County and Williams County Commission

CERTIFICATE OF COMPLIANCE

[¶11] The undersigned certifies the above brief is in compliance with N.D.R.App. P. 32(a)(8)(A) and the total number of words in the brief, excluding words in the table of contents, table of authorities, signature block, certificate of service, and this certificate of compliance totals 1,894 words.

Dated this 8th day of November, 2018.

By /s/ Scott K. Porsborg
Scott K. Porsborg (ND Bar ID 04904)
sporsborg@smithporsborg.com
Sarah E. Wall (ND Bar ID 07822)
swall@smithporsborg.com
Williams County Special Assistant State's Attorneys
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

Attorneys for Defendants – Appellants,
Williams County and Williams County Commission

CERTIFICATE OF SERVICE

[¶12] I hereby certify that on the 8th day of November, 2018, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANTS** was served as follows:

Lawrence Bender
Attorney at Law
1133 College Drive, Suite 1000
Bismarck, ND 58501

lbender@fredlaw.com

By */s/ Scott K. Porsborg*
SCOTT K. PORSBORG