IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 990312

Marvin Schlafman,)
)
Appellant,)
)
-vs-)
)
Dale L. Schell,)
)
Appellee.)

APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
KIDDER COUNTY CIVIL NO. 98-C-053
THE HONORABLE DONALD L. JORGENSEN, PRESIDING

BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

Marvin Schlafman appeals for a District Court Judgment which determined the remaining balance on the purchase price of the real estate. Mr. Schlafman feels the judge erred in arriving at his calculations and not taking into account the evidence that was presented in reaching his decision.

STATEMENT OF THE FACTS

Marvin Schlafman, hereinafter referred to Schlafman, has known Dale L. Schell, hereinafter referred to as Schell, for 54 years and worked with him on his farm in the early part of 1990's. (A. 18.) In 1990 Schlafman had some discussions with Schell relative to purchasing real estate he owned described as the Southeast Quarter (SE¼) and Southwest Quarter (SW¼) of Section Twenty-two (122), Township One Hundred Forty-two (142), Range Seventy-one (71), Kidder County, North Dakota. (A. 18.)

On or about September 25, 1990, a Lease Agreement with option to purchase was entered into between the parties. (A. 3, 8, 18) This document was prepared by the Schell. (A. 18.)

Schlafman only utilized this property for a couple of years and in 1991 decided to stop farming (A. 19.) During the time he was farming this property, there were approximately 128 acres in Alfalfa. (A. 19.)

Schlafman obtained employment outside of the state, but kept in contact with family and Schell over the years concerning this property. During this time, Schlafman was never asked by Schell if he could use the land for cutting hay or grazing cattle. (A. 19.) On at least one occasion, Schell admitted to Schlafman he had been cutting hay and had been grazing cattle on this property. (A. 19.) These activities started in 1992 and continue through today. (A. 19, 20.) During one of their recent telephone conversations, the issue of rental to be paid by Schell came up. Although no definite

amount was agreed upon, Schell indicated they would resolve this later when Schlafman was ready to purchase the land and he would be given proper credit. (A. 20.)

When Schlafman contacted Schell about purchasing the property and paying off the balance, he learned that he was not being given proper credit for his payments (A. 21.) and that he was being charged a higher rate than the legal rate of interest. (A. 9, 21.) Due to the inability to work out their differences, this action was commenced. During the term of the Agreement, Schlafman made payments every year (A. 3, 13, 19.) and paid the real estate taxes. (A. 19.)

Due to the fact that the Defendant did not appear at the trial on May 19, 1999, the court suggested and the parties agreed that this matter could be submitted to the court based upon Affidavits and Briefs. (A. 39.) Schlafman submitted his Affidavit (A. 18-22) along with the Affidavit of Joe Gross, Kidder County Agent (A. 23-33), while Schell submitted his Affidavit to the court (A. 34-38).

The District Court concluded that the rate of interest would be the legal rate of interest of Six (6%) percent. (A. 41, 46.) The court determined that Schlafman had made payments towards the purchase price and there was an unpaid balance of $23,455.10. (A. 41, 45.) The court further determined that Schlafman was entitled to a set off because of Schell utilizing the property in the sum of $12,626.40 (A. 42, 45, 46) leaving a remaining balance under the agreement of $10,828.70. (A. 42, 45.)

Schlafman appeals the District Court's Judgment relative to the amount of the remaining purchase price.

STANDARD OF REVIEW

A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if this court, on the entire evidence, has a definite and firm conviction a mistake has been made. Tibor v. Tibor, 1999 ND 150, 598 NW2d 480 (ND 1999).

THE COURT'S DETERMINATION CONCERNING THE RENTAL VALUE WAS CLEARLY ERRONEOUS.

Schlafman entered into an agreement with Schell to lease, but more importantly, to purchase the real estate in question. By doing so, Schlafman had the right to control how the property would be utilized and by whom. However, without the prior consent of Schlafman, Schell utilized the property for cutting hay and grazing cattle. In effect, Schell was treating this property just as if he had not signed the agreement and was ignoring the fact that he was receiving yearly payments, plus the real estate taxes were being paid by Schlafman.

Schlafman stated that he could have rented the property to other neighbors, but was assured by Schell that the matter of the credit for the use of the land would be taken care of at a later date. Logically, Schlafman was reluctant to alienate Schell by renting to someone else in light of the agreement and the fact that Schell might try and cancel the agreement. Also, Schlafman had known Schell for many years and thought he could trust him.

In discussing the value of property, 31A Am Jur 2nd, *Expert and Opinion Evidence*, hereinafter referred to as *Expert*, at pages 303-304, provides as follows:

> "In determining the value of property, opinion testimony is indispensable since a court or jury can hardly determine the value of any property, real or personal, from even the most minute description of it. Direct testimony as to the value of property is, in its essence, exclusively a matter of opinion, and rarely can testimony as to value be considered as testimony of a fact. Thus, it is universally recognized that witnesses who are competent to give their opinion as to the value of property may do so when the value of property is an issue to be determined, including its value before and after a given event or occurrence. This principle applies in the determination of the value of both real and personal property of all kinds, provided that it is value, as distinguished from cost, which is at issue, and further provided, that the question of value is not conclusively determined by other controlling considerations, such as an actual sale."

In this case, the main issue was the fair rental value of the property in order to determine the set off on the remaining purchase price. Three witnesses testified that being the owner of the property, purchaser of the property, and the Kidder County Extension Agent.

Schlafman stated that based upon his many years in farming, his familiarization with this real estate, and in checking with neighbors, the fair rental value for this property was $10 per acre. On the other hand, Schell felt that the fair rental value should be the yearly payment of $1,740, which in this case would work out to $6.18 per acre. Obviously, both of these individuals had something to win or lose depending upon what the court decided would be a fair rental value and set off on the contract.

Due to this fact, the court had a duty to look at independent and expert testimony in arriving at the reasonable rental value of the property.

In discussing the competency and qualifications of witnesses in valuing real property, *Expert* , at pages 305-306, provides as follows:

> "There is no precise or inflexible rule respecting the amount of knowledge witnesses must possess in order to qualify them to testify as to the value of property. However, it must be shown that the witnesses have some particular means of forming an intelligent and correct judgment as to the value of the property in question beyond that which is presumed to be possessed by people generally, and that they have utilized those means in forming an intelligent opinion. They must be acquainted with the value of things of the class to which the thing whose value is in opinion belongs, and in the case of real estate should also have knowledge of the market value of property in the vicinity. The competency of witnesses must be shown; there is no presumption that a witness is competent to give an opinion as to value. Witnesses other than the owner of the property in question, are required to demonstrate some source of knowledge of its value in order to remove their opinions from the realm of mere conjecture. Further, bare declarations by witnesses that they know the value of property are insufficient."

Granted, Schlafman and Schell had knowledge since they had both farmed and worked the property. However, Joe Gross, the Extension Agent, certainly was qualified to give his opinion concerning the value.

In order to provide the court with an impartial determination as to the fair rental value of the property, Schlafman contacted the Kidder County Extension Agent, Joe Gross. Obviously, this individual is knowledgeable about the rental values in Kidder County and had the education, experience, and independent information in order to make a fair and impartial determination of the rental value. Mr. Gross was provided

with information concerning the location of the land, what the land was used for, and compared that with similar land in Kidder County.

Mr. Gross utilized two different methods in arriving at his value, the first being the Ag Statistics values and the second was the factor method. Under the first method, the land used for alfalfa would be $15.38 (A. 24) and the land used for pasture was $10.48 (A. 24), or an average of $12.93 per acre. Under the second method, he determined the land used for alfalfa would be $15.40 (A. 25) and the land used for pasture was $10.72 (A. 25, or an average of $13.06 per acre. Based upon his calculations, he determined that $10 an acre as suggested by Schlafman was certainly reasonable for a rental property this property since it was lower than the values he had determined.

However, in reviewing the Memorandum Opinion and the Findings of Fact, there is no mention that the court took into account the testimony and opinion of Mr. Gross even though this individual was the only expert called, his conclusions were not challenged, and he was certainly the only impartial witness who testified concerning the rental of the property. Therefore, the court was clearly erroneous in not taking into account this testimony when arriving at the fair rental value.

Schlafman, as part of the agreement, was required to pay the real estate taxes each year. He testified that he had paid the taxes every year with the last payment being $553. Utilizing this figure and the number of acres involved, this works out to

$1.97 per acre. Even though the court does acknowledge that Schlafman paid the real estate taxes each year, the court did not factor or take into account this expense when arriving at its rental value. Taking into account the additional cost for taxes of $1.97, this amounts to a figure of $8.15 per acre as a fair rental value. By the court not factoring or taking into account this additional cost, was clearly erroneous.

The court, in its Memorandum Opinion (A. 41), indicates that since the parties had agreed to annual rent of $1,740, this was the fair rental value. However, I would submit that this figure was arrived at by factoring in the legal interest rate of 6 percent times the purchase price of $29,000 or the $1,740. This figure was not based upon a fair rental value, but was in fact the interest on the purchase price of $29,000 at the legal rate of 6 percent. As noted before, this figure did not factor into the fact that Schlafman was also paying the real estate taxes in addition to this amount. This conclusion is further supported by the testimony of Joe Gross and the other rents being charged in Kidder County for similar real estate. Therefore, the court was clearly erroneous when it accepted this figure and not take into account the above-mentioned other factors.

It is interesting to note that Schell did not call any other witnesses to testify relative to the fair rental value of the property. Due to the fact that he is a long time resident of Kidder County, there must be many neighbors he could have called upon to support his position relative to the rental value. I would submit to the court that the

reason he did not do so is he knew that if the witness was cross-examined, they would have to admit that $6.18 per acre was low and that $10 an acre was more realistic.

An obvious question is why should Schlafman pay more to Schell than Schell is paying to Schlafman for rental. First of all, Schlafman is paying the real estate taxes each year which is not being factored in. Secondly, Schlafman would want to maximize his return on his investment and would logically rent the property for more than he is paying. This is just common sense and good business practice. Realistically, Schell took advantage of the situation due to the fact of the sales agreement and the fact that Schlafman was out of state and it was difficult for him to monitor or control the situation. Schell should not benefit from this.

CONCLUSION

Schlafman respectfully requests the court to remand this matter back to the District Court for the computation of the proper rental agreement relative to the set off.

Dated this 23rd day of November, 1999.

Respectfully submitted,

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IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOV 23 1999
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AFFIDAVIT OF PERSONAL SERVICE

STATE OF NORTH DAKOTA)
)ss
COUNTY OF BURLEIGH)

The undersigned, being first duly sworn on oath, deposes and says that I am a United States citizen, over twenty-one (21) years of age, and on the 23rd day of November, 1999, I served a copy of the attached:

BRIEF OF THE APPELLANT AND APPENDIX

by delivering to the offices of Benjamin C. Pulkrabek, Attorney at Law, 402 First Street NW, Mandan, North Dakota, personally, a true copy thereof.

Maury C. Thompson

Maury C. Thompson

Subscribed and sworn to before me this 23rd day of November, 1999.

DOROTHY J. GEIGER NOTARY SEAL PUBLIC STATE OF NORTH DAKOTA

Notary Public

DOROTHY J. GEIGER
Notary Public, STATE OF NORTH DAKOTA
My Commission Expires APRIL 10, 2002