ORIGINAL

IN THE SUPREME COURT

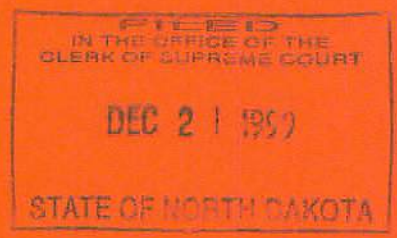
STATE OF NORTH DAKOTA

SUPREME COURT NO. 990312

990312

Marvin Schlafman,

Plaintiff-Appellant,



-vs-

Dale L. Schell,

Defendant-Appellee.

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

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUE

Is the Trial Court's finding concerning the rental value clearly erroneous?

STATEMENT OF FACTS

This case was tried to the Court without a jury. The Trial Judge was the Honorable Donald L. Jorgensen.

In 1990, the Appellee, Dale L. Schell (Schell) purchased the following described real property (real property) with an FHA Loan: (A. P.24, L.3 & 4)

> Southwest Quarter (SW¼) and Southeast ¼ (SE¼) of Section Twenty-two (22), Township One Hundred Forty-two (142), Range Seventy-one (71) in Kidder County, North Dakota.

When Schell purchased the real property, he intended to allow the Plaintiff, Marvin Schlafman (Schlafman) to purchase it from him. (A. P.34, L.12 & 13) The problem with such a sale was Schlafman had gone through bankruptcy and the FHA policy at that time prevented a sale to anyone who had gone through bankruptcy, but it didn't prevent leases. Therefore, because of FHA's policy, Schell and Schlafman decided to enter into a written lease agreement. This lease agreement lasted for 10 years and contained an option to purchase. Both Schell and Schlafman signed this lease agreement on September 25, 1990. (A. P.6) Under this lease agreement, the annual rent was $1,740.00 and the purchase price was $29,000.00 plus interest. (A. P.6) This lease agreement also allowed the annual rent to be applied toward the purchase price. (A. P.6) In the lease agreement no interest rate appears. (A. P.6)

Schell claimed that the interest was to be determined by whatever percentage of interest was charged by the FHA on his FHA loan. (A. P.35, L.10 to 14 and A. P.37, L.15 to 28) Schlafman says he understood the interest to be 6%. (A. P. 19, L.1 to 3)

Schlafman made payments of $1,740.00 in 1990, 1991, 1992, 1993, 1994 and 1997. $4.000.00 payments were made in 1995 and 1996. (A. P.36, L.20 to 23 and P.37. L.1 to 5) The 1998 payment wasn't made by Schlafman until February 26. 1999. Schell refused to accept this payment. (A. P.37, L.6 to 10) The 1999 payment of $1.740.00 was deposited with the Court.

Schlafman used the leased property in 1990 and 1991. (A. P.19, L.7 ad 8) In 1992 Schell started using the leased property. (A. P.21, L.13 to 16 and A. P.36. L.16 to 17)

The Trial Judge found that the interest rate on the lease agreement to be 6%. (A. P.16 to 19) He also found that when Schlafman made the $4,000.00 payment in 1995 he exercised his option to purchase under the lease agreement. (A. P.40, L.31 to 34)

After the Trial Judge considered all the payments Schlafman had made, the Judge found the unpaid balance on the lease agreement was $23,455.10. (A. P.41, L. 5 to 12) Because Schell had used the leased land since 1992, the Trial Judge found Schlafman was entitled to an off set of $12,626.40. (A. P.42. L.2 to 7 and A. P.45, L.12 to 20) This $12.626.40 offset was determined by the Trial Judge's finding that the lease agreement provided for the payment of an annual rental of $1,740.00 and that $1,740.00 was the fair market value of the leased property. (A. P.41, L.23 to 26) When the $12,626.40 offset was deducted from the balance remaining on the lease agreement, Schlafman still owed Schell $10.828.70. (A. P.42., L.8 to 11)

Schlafman is now appealing because he believes the Trial Judge's finding concerning the $1,740.00 per year rental value of the leased land was clearly erroneous.

ARGUMENT

This case was tried to the Court without a jury. The issue raised by the Appellant involves a claim that the Court's findings on the rental value of the land was clearly erroneous. When such an issue is raised, the Applicable North Dakota Rule of Civil Procedure is Rule 52(a). According to Rule 52(a), the Court "shall find the facts specially". In this case, the Court followed the Rule 52(a) requirement when it made the following finding:

Plaintiff is entitled to a setoff upon the purchase price since the Defendant utilized the land for grazing cattle and cutting hay. The setoff totals $12.626.40 as more fully shown:

1.	(1992) $1,740 + $626.40 =	$ 2,366.40
2.	(1993) $1,740 + $522.00 =	$ 2,262.00
3.	(1994) $1,740 + $417.60 =	$ 2,157.60
4.	(1995) $1,740 + $313.20 =	$ 2,053.20
5.	(1996) $1,740 + $208.80 =	$ 1,948.80
6.	(1997) $1,740 + $104.40 =	$ 1,844.40
	TOTAL	$12,626.40

The Appellant Schlafman claims the above finding of $1.740.00 for the annual rent is clearly erroneous.

According to North Dakota Rule of Civ.Pro 52(a):

Findings of fact, whether based on oral or documentary evidence. shall not be set aside unless clearly erroneous. and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Appellant Schlafman doesn't mention North Dakota Rule of Civ.Pro. 52(a) in his

brief. Instead, the Appellant cites Tibor vs. Tibor, 1999 ND 150, 598 N.W.2d 480 (N.D. 1999), which is one of a legion of cases that have dealt with N.D. Rule of Civ.Pro. 52(a). According to Tibor:

A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made. Id.

An examination of Appellant Schlafman's brief will reveal that it makes no claim that the trial court's finding on the rental value of the land is an erroneous view of the law. Therefore, the erroneous view of the law test in Tibor doesn't apply to the case now before the Court.

Exhibit #1, the lease agreement, is documentary evidence that supports the Trial Judge's finding that the rental value of the land is $1,740.00. This evidence is supported by the testimony of Schell that the rental value of the land is $1,740.00. Because of Exhibit #1 and Schell's testimony, the test in Tibor that deals with no evidence to support the Trial Judge's finding can be eliminated.

This leaves only one test in Tibor regarding a clearly erroneous finding. That test requires the Appellate Court to review all of the evidence and after that review only to reverse a Trial Judge's finding if the Appellate Court is left with a definite and firm conviction a mistake has been made.

When all the oral testimony in this case is reviewed regarding the rental value of the land, the testimony of three people is involved:

1. Appellee Schell who says the value is $1,740.00;

2. Appellant Schlafman who says the value is $10.00 per acre; and

3. Joe Gross. the Kidder County Agent who says the value is $10.00 per acre.

The documentary evidence that states the rental value is $1,740.00 is the lease agreement which went into evidence as Plaintiff's exhibit #1 and is found at A. P.12. There is also documentary evidence attached to Joe Gross's Affidavit that supports his rental evaluation. Therefore, the oral testimony and documentary evidence in this case makes it possible for the Court to find an annual rent on the land of $1,740.00 or $10.00 per acre. The Court in this case, in favor of the oral testimony and documentary evidence, found that said rental value of the land was $1,740.00.

One of the claims in Appellant Schlafman's brief appears to be that his evidence and testimony was stronger and of better quality then the evidence and testimony that the trial Court based its findings on. Such a claim was made by the Appellant in Giese vs. Morton County 464 N.W.2d 202 (N.D. 1990).

The following is how the Court responded in Giese:

Our review of the district court's findings of fact is governed by the "clearly erroneous" standard of Rule 52(a), N.D.R.Civ.P. E.g., Miller enterprises vs. Dog N'Cat pet Ctrs., 447 N.W.2d 639, 644 (N.D. 1989). In applying the "clearly erroneous" standard of review, we will not substitute our judgment for that of the district court. Id. In order to hold that the district court's findings were clearly erroneous, we must determine that the findings have no support in the evidence or, although some evidence exists to support the findings, we are left with a definite and firm conviction that a mistake has been made. Id. We will not determine that the district court's findings are clearly

erroneous merely because we may have viewed the facts differently had we been the trier of facts differently had we been the trier of fact. Id.

The federal standard that is applied to the clearly erroneous rule is set out in the following language of Anderson vs. Bessemer City 470 US 564, 84 L Ed 2d 518, 105 S Ct 1504:

Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The question before us, then, is whether the Court of Appeals erred in holding the District Court's finding of discrimination to be clearly erroneous.

[3a] Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v United States Gypsum Co. 333 US 364, 395, 92 L Ed 746, 68 S Ct 525 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it

undertakes to duplicate the role for the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Zenith Radio Corp. V. Hazeltine Research, Inc. 395 US 100, 123, 23 L Ed 2d 129, 89 S Ct 1562 (1969). If the [470 US 574] district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v Yellow Cab Co. 338 US 338, 342, 94 L Ed 150, 70 S Ct 177 (1949); see also Inwood Laboratories, Inc. v Ives Laboratories, Inc. 456 US 844, 72 L Ed 2d 606, 102 S Ct 2182 (1982).

CONCLUSION

The Trial Court's finding on the rental value of the land being $1,740.00 per year is supported by evidence and testimony.

The Appeals Court shouldn't reverse the finding on the rental value just because it would have made a different choice than the Trial Court.

DATED this 20 day of December, 1999.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

A true and correct copy of the APPELLEE'S BRIEF was served by mail on the following individual at the following address on this 10 day of December, 1999.

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