ORIGINAL

20080129

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James H. Bragg and J. Michael Gleason, Appellees,	)	Supreme Court No. 20080129 Bowman County No. 05C-73
Vs.	)	
Burlington Resources Oil and Gas Company LP, Appellant.	)	

APPELLANT'S REPLY BRIEF

Appeal from April 10, 2008 Judgment
The Honorable Zane Anderson
Bowman County District Court
Southwest Judicial District

John W. Morrison (ID# 03502)
FLECK, MATHER & STRUTZ, LTD.
400 East Broadway, Suite 600
Post Office Box 2798
Bismarck, North Dakota 58502-2798
Phone: 701-223-6585

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1. The District Court's March 19, 1999 Judgment is not relevant to the issues presented in this case.

Bragg and Gleason argue that Burlington's Brief "deletes [facts] that are not favorable to its position" (Brief of Appellees at 5) and identifies as one of those facts the March 19, 1999 "Final Judgment" in a lawsuit between Larry E. White and Robert C. Thom in which Bragg and Gleason intervened.[1] *Id.* Bragg and Gleason, however, fail to mention that this "judgment" was entered in a lawsuit in which neither Burlington, nor its predecessor Continental, nor Continental's predecessor Diamond was made a party. App. pp. 128-130. The "partial judgment" determines only that Bragg and Gleason's interest in the Bragg Leases was superior to "any lien, security interest, or mortgage claim (sic) by Defendant Robert C. Thom and that the leases are valid as to any mineral interest claimed or hereafter obtained by Robert C. Thom in the lands included in" the Bragg Leases. The "partial judgment" is meaningless in this dispute.

2. Burlington's legal authorities provide an appropriate basis for reversal.

Bragg and Gleason criticize and attempt to distinguish much of the authority cited by Burlington in its brief. The problem, however, is that the facts and the ruling presented in this case appear to be somewhat unique, and there does not seem to be any clearly controlling authority either from North Dakota or from other jurisdictions. Burlington's legal authorities demonstrate that the holding of the trial court contravenes concepts so firmly rooted in our system of jurisprudence that summary judgment in favor of Bragg and Gleason must be reversed.

[1] The partial judgment addressing Bragg and Gleason's interest was actually dated June 9, 1998. App. p. 128-130.

Continental and Bragg/Gleason settled *Bragg I* by agreeing not to resolve anything. They did not stipulate that the Diamond Lease was void for lack of consideration and have judgment entered accordingly, although they could certainly have chosen to pursue that course of action. They could have, but did not, stipulate that either the Diamond Lease or the Bragg Leases were superior to the other. They simply agreed that Continental, whom all parties knew had already conveyed its interest in the Diamond Lease to Burlington, had no interest in either the Diamond Lease or the Bragg Lease and agreed to mutually dismiss the claims each had against the other after entry of an order by the court in that case determining that the Diamond Lease was superior.

Not surprisingly, there is no reported case law from any other jurisdiction where a court has made a ruling granting judgment to a party under a lis pendens statute based upon facts like those in this case. The parties are left to draw analogies and present arguments based on authority that addresses somewhat similar, but distinguishable, facts and laws. In their brief, Bragg and Gleason criticize Burlington's treatment of this authority. In doing so, they mischaracterize Burlington's arguments and mischaracterize the authority.

***a. Boehm v. Long*, 172 N.W.2d 862 (N.D.1919).**

Bragg and Gleason assert that Burlington cites *Boehm* as support for the argument that the settlement in Bragg I was not effective as to Burlington because it was not part of a judgment or proceeding. Bragg/Gleason Brief at pp. 14-15. Burlington does not so rely on *Boehm*. As indicated at pages 9 and 18 of Burlington's brief, *Boehm* is cited simply for the holding that a notice of lis pendens does not substantively affect the obligations of

parties but serves only to give notice to subsequent purchasers of the pendency of the action so as to make the judgment (or any "proceeding") binding upon such persons. The notice of lis pendens in this case does not substantively affect the obligations of the parties in this case by turning Continental's quitclaim of "all right, title and interest, if any, that Continental may now (i.e., July 7, 2004) own in and to" the Diamond Lease into a grant or conveyance or assignment of the interest it had already assigned to Burlington.

***b. Emo v. Milbank Mut. Ins. Co.*, 183 N.W.2d 508 (N.D. 1971).**

Bragg and Gleason also criticize Burlington's citation of *Emo* as it relates to the definition of "proceeding." Bragg and Gleason argue, without citation to any authority, that "all proceedings taken" has a substantively different meaning than "a proceeding" and that *Emo* somehow supports their position because it incorporates a Black's Law Dictionary definition that refers to "all possible steps in an action." Bragg/Gleason Brief at pp. 15-16. Bragg and Gleason's argument ignores the fact that the "steps in [the] action," the steps to which a third party put on notice by a notice of lis pendens would be aware, are the filing of a stipulation for dismissal of mutual claims with prejudice and the entry of an order for judgment and judgment of dismissal in the clerk of court's office. App. pp. 55-61. Nothing in these documents incorporates or refers to a quitclaim or other assignment or conveyance. All the notice of lis pendens did was put Burlington on notice of the pendency of the action, and having notice, all Burlington or any other third party would know is that there was a dismissal of the lawsuit.

c. *Perry Park Country Club, Inc. v. Manhattan Savings Bank*, 813 P.2d 841 (Colo. App. 1991).

Bragg and Gleason assert that *Perry Park* "does not support Burlington's position." Bragg/Gleason Brief at p. 16. This assertion is incorrect. The *Perry Park* court stated as follows:

> First, we note that the "Stipulation and Order" failed to include a copy of the parties' settlement agreement or, at a minimum, set forth its controlling terms. Indeed, the stipulation, order and certificate of dismissal gave no indication that the parties did, as Perry Park asserts, agree that title to the Stables Property would vest in Perry Park. Accordingly, these documents, in their generality, fail to support Perry Park's position that it had any interest in the property.
>
> Thus, even if the trial court had jurisdiction to enter an Order of Dismissal of all claims after our mandate, an issue we do not address here, such order merely eliminates Perry Park's claims and obviates any effect of a lis pendens.
>
> Secondly, as previously discussed, anyone examining the court files after June 15, 1983, would have concluded that the 1979 lawsuit had concluded with the determination that Perry Park held no right, title, or interest in the Stable Property. Thus, there was essentially no way the 1979 lawsuit, the source of the lis pendens, could be "resurrected" to bind anyone whose interest had been affected by it.
>
> We conclude that all interested parties, except those who were actual parties to the 1983 agreement, were entitled to rely on the conclusions which could be drawn from an examination of the trial court file. Any other conclusion would be contrary to the limited purpose of lis pendens, that is, to bind those who may acquire an interest during its pendency to the outcome of the *litigation*. 813 P.2d at 844.

Thus, the Colorado Court of Appeals expressly held that the May 9, 1984, "Certificate of Dismissal" did not have a binding effect on the party who was subject to lis pendens for two reasons: (1) the Stipulation and Order of Dismissal did not "include a copy of the parties settlement agreement or, at a minimum, set forth its controlling terms" but merely

dismissed Perry Park's claims; and (2) the case was resolved by the appellate court mandate and could not later be revived.

d. ***Manzo v. Shawmut Bank, NA*, 677 A.2d 224 (N.J.Super. A.D. 1996).**

Bragg and Gleason argue that *Manzo* is "directly on point." It is not. In determining that New Jersey's lis pendens statutes bound subsequent purchasers to settlements, the Court expressly relied upon a provision of New Jersey law which provides that a notice of lis pendens can be discharged if "the action has been settled." The Court said this provision, which has no counterpart in North Dakota's lis pendens statute, "recognizes that a party such as defendant can reasonably anticipate one of three resolutions of the underlying dispute; dismissal, judgment in favor of plaintiff or a settlement." In addition to involving substantially different facts, *Manzo* is based upon a substantively different statute and is not "directly on point."

3. Bragg and Gleason have not identified any factual basis for establishing that Burlington is estopped from asserting that it is not barred by the doctrine of lis pendens.

Bragg and Gleason argue that Burlington is equitably estopped from asserting that it is not barred by the doctrine of lis pendens. This issue was not addressed by the trial court.

The general rule in North Dakota is that an appellee may attempt to save a favorable judgment by urging any ground asserted in the trial court, even if not addressed by the trial court. See, *Tangen v. North Dakota Workers Comp. Bur.*, 2000 ND 135, ¶8 n.1, 613 N.W.2d 490; *Water Dist. v. 1.43 Acres in Highland Tp.*, 2002 ND 83, ¶26 n.1,

643 N.W.2d 685. A cross-appeal generally is not required. *Kraft v. State Bd. Of Nursing,* 2001 ND 131, ¶27 n.1, 631 N.W.2d 572.

In this case, however, the issue of estoppel was not "asserted at the trial court." Estoppel was asserted by Bragg and Gleason as an affirmative defense to Burlington's counterclaim for quiet title. App. p. 017. Estoppel is not favored and the burden of proving each element is on the party asserting it. *Gorley v. Parizek,* 475 N.W.2d 558, 560 (N.D.1991); *Kouba v. Great Plains Pelleting, Inc.,* 372 N.W.2d 884, 886 (N.D.1985). The elements are (1) a false representation or concealment of material facts by the party against whom it is asserted; (2) an intention or expectation on the part of the party against whom estoppel is asserted that such conduct would be acted upon by or would influence the other party; (3) knowledge of the real facts by the party against whom it is asserted; (4) lack of knowledge and of means of knowledge of the truth as to the facts in question by the party asserting estoppel; (5) good faith reliance by that party on the conduct or statement of the other party; and (6) action or inaction based thereon of such a character as to change the position of the other party to his injury, detriment or prejudice. *Hanson v. Cincinnati Life Insurance Co.,* 1997 ND 230, ¶25, 571 N.W.2d 363.

In their response to Burlington's motion for summary judgment, Bragg and Gleason raised the estoppel issue and said "the issue of equitable estoppel is a factual issue, which would normally require a trial." They did not seek summary judgment on their estoppel claim but argued that because it raised a fact issue "if the Court does not grant summary judgment to Bragg/Gleason, it must deny Burlington's Motion for Summary Judgment." App. p. 173. They offered no affidavit and no citation to any

evidentiary materials to support the essential elements of their estoppel claim. App. pp. 171-173. They cite to no such evidentiary support in their brief to this Court. Bragg/Gleason Brief pp. 25-26. The record contains no affidavit or other evidentiary support as to (1) Burlington's intentions in May or June, 2001, when they argue that Burlington told them "it would pay them on the working interest if they resolved the claim of Continental on that working interest" Bragg/Gleason Brief, p. 25; (2) Burlington's expectations in May or June 2001 as to what Bragg and Gleason would or would not do; (3) Burlington's knowledge in May or June 2001 of what it would do if Continental and Bragg/Gleason resolved Bragg I in the manner they did in 2004; (4) Bragg or Gleason's reliance, whether in good faith or otherwise, on Burlington's statements; or (5) any detriment or prejudice suffered by Bragg and Gleason.

Burlington responded at the District Court by arguing that Bragg and Gleason's estoppel argument failed as a matter of law. App. p. 218. In the only assertion supported by any evidentiary material, Bragg and Gleason alleged that "Burlington told the plaintiffs that it recognized their interests in the property and that it would pay them on the working interest if they resolved the claim of Continental on that working interest." App. pp. 171-172. They relied on a July 18, 2001 letter from Burlington to establish this fact. App. p. 161. That letter advised Bragg and Gleason that their interests in Tracts 43 and 44, which are the tracts in question in this lawsuit, were put in a "suspense" status because of title requirements. Copies of the relevant portions of the title opinions were included. The title opinions contained requirements that Bragg I be concluded with a "certified copy of the judgment ... recorded in the office of Register of Deeds" (App. p. 138) and "the entry of a final, non-appealable judgment in *Bragg v. Continental*

Resources, Inc." (App. p. 141). More than a quit-claim by Continental of any interest "it may now own" after it had already assigned its interest and a stipulated judgment of dismissal of both Continental's and Bragg/Gleason's claims was required.

While Bragg and Gleason failed to offer sufficient evidence which "amounted to a false representation of material facts," as set forth above, they failed to produce any evidence of any of the other necessary elements of their estoppel claim. They admitted the same when they told the trial court that they were not seeking summary judgment on the estoppel issue. App. p. 173.

In essence, Bragg and Gleason were the moving parties on the estoppel issue. It was their affirmative defense. They failed to prove the lack of any genuine issue of material fact and that they were entitled to judgment as a matter of law on the estoppel affirmative defense. *Wishnatsky v. Berquist,* 550 N.W.2d 394, 397 (N.D.1996). Since Bragg and Gleason, by their own admission, failed to meet their burden, Burlington was not required to set forth specific facts showing there is a genuine issue for trial. N.D.R.Civ.P. 56(3).

CONCLUSION

The District Court's decision and the judgment entered pursuant thereto turn the settlement between Continental and Bragg/Gleason into something it was not – a resolution of the competing claims of validity as to the Diamond Lease and Bragg Leases in favor of the Bragg Leases. All Continental and Bragg/Gleason agreed was that Continental would quitclaim whatever interest it then owned in the leases and would make no further claim to these leases, with all parties knowing that Continental no longer

owned an interest in any of the leases. The District Court's decision attempts to enforce this revisionist version of the settlement against Burlington under the doctrine of lis pendens even though it is not incorporated in a "judgment" or any other "proceeding taken" in the litigation between Continental and Bragg/Gleason. Neither North Dakota's lis pendens statute nor any other authority cited to the Court authorizes such a result.

Respectfully submitted this 14th day of September, 2008.

FLECK, MATHER & STRUTZ, LTD.
Attorneys for Appellant
400 East Broadway, Suite 600
Post Office Box 2798
Bismarck, North Dakota 58502
(701) 223-6585

By _____
JOHN W. MORRISON (ID# 03502)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was on the 16th day of September, 2008, mailed to the following:

Lyle W. Kirmis
ZUGER, KIRMIS & SMITH
316 North Fifth Street
P.O. Box 1695
Bismarck, ND 58502-1695

JOHN W. MORRISON