ORIGINAL

20080129

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

BRIEF OF APPELLANT

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

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STATEMENT OF ISSUES

Whether the District Court erred in granting summary judgment for Bragg and Gleason on the ground that a quit claim deed from Continental Resources, Inc. ("Continental") to Bragg and Gleason as part of a "settlement agreement," by which Continental quitclaimed its interest in oil and gas leases that it previously assigned to Burlington Oil & Gas Resources LP ("Burlington"), served to divest Burlington (a prior purchaser) of its interest in those leases under the lis pendens doctrine.

STATEMENT OF THE CASE

James H. Bragg ("Bragg") and J. Michael Gleason ("Gleason") (collectively, "Appellees" or "Bragg and Gleason") sued Burlington to quiet title in certain oil and gas leases in Bowman County and for an accounting for the leasehold interest represented by those leases. The title dispute at the center of this suit was previously litigated in *Bragg and Gleason v. Continental Resources, Inc.*, Bowman County Civil No. 99C-061 ("*Bragg I*"). Accordingly, Burlington moved for summary judgment on the ground that its interest in the leases is superior to Appellees' interest and that its interest is not barred by the lis pendens recorded prior to resolution of *Bragg I*.

On August 31, 2007, the district court (the Honorable Zane Anderson) denied Burlington's motion and granted partial summary judgment for Appellees, holding that the terms of the "settlement agreement" between Continental and Appellees in *Bragg I* were binding on Burlington. The court also ruled that Appellees were entitled to an accounting.

In accordance with the Court's order, Burlington provided Appellees with accounting information. On March 14, 2008, the court issued a second opinion that addressed issues related to the accounting. On April 8, 2008, the Court entered an Order on Motion for Summary Judgment, awarding Appellees $757,560.63 in principal plus prejudgment interest in the amount of $34,306.21 and interest at the rate of $62.27 per day after February 29, 2008. The Court also quieted title to the leases in question in favor of Appellees, effective July 7, 2004, and ordered that net income attributable to those leases from and after November 29, 2007 be paid to Appellees in the "ordinary

course of business" or bear interest at the post judgment rate for judgments. The court entered final judgment on April 11, 2008, and Burlington initiated this appeal on May 29, 2008.

STATEMENT OF FACTS

A. The Diamond Lease

On January 23, 1995, Larry and Kathryn White entered into an oil and gas lease with Continental through its broker, Diamond Resources, Inc. (the "Diamond Lease"). The Diamond Lease covered the following land in Bowman County, North Dakota:

Township 131 North, Range 105 West
Section 23: N/2SE/4. SE/4SE/4
Section 24: NE/4SW/4, NW/4

(the "Property"). App. 5. As consideration for the lease, Diamond Resources gave the Whites a sight draft in the amount of $3,200.00 subject to approval of title. App. 104. The sight draft was not immediately paid because the Whites could not provide documents showing clear title to the Property, as a result of a quitclaim deed that the Whites previously had given Robert Thom. Accordingly, the Whites sued Thom to resolve the dispute over ownership of the mineral estate in the Property. App. 104-105. By that point, Diamond Resources had assigned the Diamond Lease to Continental.[1] But just before filing suit against Thom, and ignoring their prior conveyance to Diamond Resources (and Continental as a successor), the Whites executed two leases on the Property in favor of Bragg (the "Bragg Leases").[2] App. 4.

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[1] Continental was never made a party to the Whites' quiet title action.

[2] The two leases to Bragg—one covering the land in Section 23 and the other covering the land in Section 24—involve the same property that is the subject of the Diamond Lease..

On September 9, 1999, Thom and his wife executed a quitclaim deed transferring all their right, title and interest in the Property to Larry White. App. 102-103. Subsequently, Continental approved title to the Diamond Lease and paid the agreed-upon consideration for the lease, and the Whites, in turn, ratified the Diamond Lease. App. 106.

B. Title Dispute in *Bragg I* and the Lis Pendens

Claiming that they owned title to the Property, Appellees sued Continental in *Bragg I* to quiet title to the leases covering the Property. App. 5. While *Bragg I* was pending, Continental assigned its interest in the Diamond Lease to Burlington by assignment dated January 1, 2000 and recorded August 11, 2000. App. 37-46. This conveyance was in accordance with a trade agreement between Continental and Burlington and was pursuant to an order issued in litigation between Continental and Burlington in Garfield County, Oklahoma. *Id.*

On November 14, 2000, Continental filed a notice of lis pendens. App. 5. By assignment dated January 22, 2001, Burlington reassigned the Diamond Lease to Continental. App. 47-54. By a separate assignment also dated January 22, 2001 and effective February 1, 2001, Continental re-assigned all of its interest in the Continental Lease to Burlington. App. 6-7.

On September 11, 2003, the district court in *Bragg I* granted partial summary judgment for Continental, concluding that the Diamond Lease was "valid and superior to the subsequent leases covering the same land given by White to Bragg" and quieted title to that lease in Continental. App. 110-121.

C. Settlement Between Appellees and Continental

On June 18, 2004, Gleason met with Harold Hamm, president of Continental, and they agreed to settle the remaining claims and counterclaims asserted in *Bragg I.* App. 75. As part of the settlement, Continental agreed to pay Appellees $325,000 and the parties agreed that Appellees would retain "some small mineral interests in Burlington southern unit . . .." App. 133. In exchange, Appellees agreed to "***assign*** all right title & interest in all leases & minerals to [Continental] except [the Diamond Lease]" while Continental agreed only to "***quitclaim***" its interest to Bragg." App. 133 (emphasis added). With all parties knowing that Continental had already conveyed its interest in the Diamond Lease to Burlington, Continental gave Appellees a "quit claim deed" dated July 7, 2004 whereby Continental quitclaimed "all right, title and interest, ***if any***, that Continental ***may now own*** in and to" the Diamond Lease. App. 134 (emphasis added).[3]

During his deposition, Bragg admitted that he knew a "quitclaim" meant only that Continental would "no longer have any claim" to the interest quitclaimed and that Continental could only "convey whatever interest they own to the grantee." App. 76. Yet, Appellees now seek to challenge Burlington's title, claiming that their title is superior based on the very quitclaim deed that Appellees knew would only convey whatever interest Continental owned, while at the same time knowing that Continental owned no interest, having conveyed its interest to Burlington.

Appellees contend that the purported settlement agreement, including the quitclaim conveyance, is binding on Burlington as a result of the notice of *lis pendens*

[3] By giving Appellees a quitclaim deed, Continental was merely disclaiming any interest it may have in the Diamond Lease and passing that claim on to Appellees. A quitclaim deed neither warrants nor professes that the grantor's claim is actually valid.

filed by Continental. But neither the Stipulation for Dismissal, the Order of Dismissal, nor the Judgment of Dismissal in *Bragg I* incorporate by reference, refer to, or even mention the quitclaim deed from Continental to Bragg of any interest in the Diamond Lease that Continental had earlier assigned to Burlington.

ARGUMENT

A. Standard of Review.

This is an appeal from the District Court's determination in granting summary judgment in favor of Appellees that a series of documents consisting of a sheet entitled "Terms of Settlement," a quitclaim deed, and a stipulation of dismissal with prejudice, constituted an agreement between Continental and Appellees to recognize the superiority of the Bragg Leases to the Diamond Lease which was binding on Burlington under North Dakota's lis pendens statute. The "settlement agreement" between Continental and Appellees is contractual in nature. *Kuperus v. Willson,* 2006 ND 12, ¶11. 709 N.W.2d 726. The construction of a written contract to determine its legal effect is a question of law and, on appeal, the Supreme Court will independently examine and construe the contract to determine if the trial court erred in its interpretation of it. *Kuperus, supra; Kondrad ex rel. v. McPhail v. Bismarck Park District,* 2003 ND 4, ¶6, 655 N.W.2d 411. Questions of law are fully reviewable on appeal. *Kienzle v. Selensky,* 2007 ND 180, ¶ 9, 741 N.W.2d 209.

B. The District Court erred in concluding that Continental's actions in entering into a stipulation of dismissal with prejudice and a quitclaim of any interest in oil and gas leases it had previously conveyed to Burlington acted to divest Burlington of its interest in the oil and gas leases in question under the doctrine of lis pendens.

1. **The purpose of the lis pendens statute is to give notice to subsequent purchasers of the pendency of the action and not to change the obligations or priority of obligations of the parties.**

Section 28-05-07 of the North Dakota Century Code provides that either the plaintiff or the defendant in any action affecting title to real property may file a "notice of the pendency of the action." From the time of filing only, a subsequent purchaser has constructive notice of the action and is "bound by all proceedings taken after the filing of such notice."

Under the common law, the interest of a purchaser acquired during the pendency of litigation concerning the property was bound by the outcome of the litigation, regardless of whether the purchaser had notice of the litigation. *Richardson v. White,* 18 Cal. 102, 106 (1861). Lis pendens statutes, such as Section 28-05-07, N.D.C.C., were intended to mitigate the hardship for purchasers who had no ready method to ascertain the existence of litigation. *Allied Eastern Financial v. Goheen Enterprises,* 265 Ca. App.2d 131, 132 (Cal.App.1st Dist. 1968). Recording the notice of pendency puts potential purchasers on notice of the fact of the litigation and of the pleadings on file in the litigation. *Ahmanson Bank & Trust Co. v. Tepper,* 269 Cal. App.2d 333, 342 (Cal.App.2nd Dist. 1969). The notice does not "create any lien" or "have any effect upon the obligations" of the parties, but "merely serves to give notice to subsequent purchasers or incumbrancers of the pendency of the action, so as to make the judgment therein binding upon such persons." *Boehm v. Long,* 172 N.W. 862, 866 (N.D.1919).

2. **The settlement between Continental and Appellees did not include an acknowledgement that the Bragg Leases were superior to the Diamond Lease or a relinquishment by Continental of Burlington's interest in the Diamond Lease.**

As set forth above, the facts in this case are largely undisputed. Continental claimed ownership of the Diamond Lease, which was dated January 23, 1995. While Continental did not pay the draft which constituted consideration for the Diamond Lease because there was a title question, when that title question was resolved in 1999, Continental did pay the consideration to the Whites, who accepted the consideration and ratified the Diamond Lease. The Bragg Leases were taken from the Whites in 1996, subsequent to the Diamond Lease. Bragg and Gleason asserted that the Diamond Lease was void because the consideration had not been paid. App. 120.

While litigation was pending between Continental and Appellees over the relative superiority of the Diamond Lease and the Bragg Leases, Continental assigned its interest in the Diamond Lease to Burlington. This assignment was part of a settlement of larger issues between Continental and Burlington and Bragg and Gleason were aware of the settlement and the assignment of the White Lease. App. 70. In *Bragg I*, the trial court entered a partial summary judgment determining that the Diamond Lease was "valid and superior to" the Bragg Leases and quieted title in Continental. App. 120-121.

Continental and Appellees decided to settle their disputes. There is no formal settlement agreement but there is a single hand-written document entitled "Terms of Settlement." App. 133. The terms of settlement provided that, in exchange for $325,000, Bragg and Gleason would "assign" all their right title and interest in all leases and minerals other than the "White lease" to Continental. Continental, on the other hand, would "quitclaim" its interest in the "White lease" to Bragg. Bragg knew that Continental had already assigned its interest in the this lease to Burlington. Bragg knew that a "quitclaim" would mean only that Continental would "convey whatever interest

they own" to him. After the assignment by Appellees and the quit claim by Continental, Bragg, Gleason and another party would own "some small mineral interests in Burlington southern unit consisting of less than 10 acres."[4] App. (Bragg Depo Ex. 12 at tab 2.) Additionally, Continental and Bragg/Gleason agreed to mutually dismiss their claims and counterclaims against each other "with prejudice."

There is no pleading, stipulation, consent decree, judgment or other "proceeding" in *Bragg I* in which it was determined that the Bragg Leases are superior to the Diamond Lease. There is no pleading, stipulation, consent decree, judgment or other proceeding which determines that the Appellees' title is superior to Continental's title. There is only a stipulation of dismissal with prejudice of both the Appellees' and Continental's claims.

Rather than rely on a judgment, stipulation, or similar document to determine that the Bragg Leases are superior to the Diamond Lease, Appellees and the District Court rely solely on a "quit claim" of any interest Continental "may now own," which is ***subsequent in time*** to Continental's assignment of its interest to Burlington.

Bragg I was mutually dismissed with prejudice, and Appellees had notice and actual knowledge when that occurred that Burlington had a prior claim to Continental's interest. Had Continental and the Appellees intended to establish a prior or superior right of ownership in Appellees, they could have done a number of things.

(i) They could have had the court in *Bragg I* determine that the Bragg Leases were superior to the Diamond Lease;

(ii) They could have agreed to a warranty deed from Continental to Bragg;

[4] The White Minerals consist of 25 net mineral acres in Section 24 and 22.5 net mineral acres in Section 23, or a total of 47.5 net mineral acres.

(iii) They could have requested that the court adopt or approve the settlement agreement with a warranty deed included as part of the judgment.

In the absence of any such agreement or determination, the District Court simply found that, by virtue of the quitclaim deed, Continental "[gave] up its claim to the White lease" (App. 237) (which, of course, it had already conveyed to Burlington) and an "[acknowledged] that [Appellees] were entitled to ownership of the White Leases and this term of the settlement is binding upon Burlington." App. 243. The District Court concluded that, as a result of a notice of lis pendens, which was filed by Continental, not Bragg, Burlington is "bound by all the terms of the settlement agreement between [Appellees] in this matter and Continental" and that, based on the "settlement agreement[5] and quit claim deed" Appellees are "entitled to a judgment of quiet title, quieting ... title to the Lessees Interest in the oil and gas leases on the White Oil & Gas Properties."

In *E.E.E.,, Inc. v. Hanson,* 318 N.W.2d 101 (N.D.1982), this Court stated as follows:

> Normally, parties to a contract are allowed to write the terms of the contract themselves. (citation omitted) A court may be called upon to interpret a contract written by the parties thereto but the court's authority to interpret a contract does not give a court the authority to modify it. (citation omitted). 318 N.W.2d at 104.

In short, a court cannot make a contract or alter or rewrite a contract for the parties.

[5]The District Court never defines the "settlement agreement" and, as noted above, there is no formal settlement agreement. Since the District Court refers to the settlement agreement and the quit claim deed separately, presumably, the reference to "settlement agreement" is intended to refer to the one page "Terms of Settlement." App. 133.

The settlement agreement between Continental and Appellees included only an agreement for Continental to "quit claim [its] interest in White lease" to Appellees. The parties clearly understood the difference between an assignment and a quit claim. A quit claim conveyance is "one which purports to convey, and is understood to convey, nothing more than the interest or estate in property described of which the grantor is seized or possessed, if any, at the time, rather than the property itself." *Bilby v. Wire,* 77 N.W.2d 882, 887 (N.D. 1956). That is exactly the understanding Bragg had of the settlement agreement: Bragg and Gleason would receive "whatever interest [Continental] owned" and Continental would no longer have any claim to the property. App .76. At the time, Bragg knew Continental did not have any interest in the Diamond Lease, having assigned that interest to Burlington. In addition to the quit claim, Continental and Appellees each stipulated to a dismissal without prejudice of their claims against each other.

There was no term or provision of the settlement between Continental and Appellees whereby Continental agreed or stipulated that Appellees' title was superior to the title it had earlier conveyed to Burlington or that the Bragg Leases were superior to the Diamond Lease. The District Court stated that "under any reasonable interpretation of the settlement agreement it is clear that Continental was giving up its claim to the White lease" and further that "[i]t defies logic and seems inconceivable that Bragg and Gleason would accept a quit claim deed from Continental as part of a settlement agreement and know they were receiving nothing." App, 237. To the extent these are findings of fact, they are not supported by the record. Bragg knew that Continental had conveyed its interest to Burlington and that the quit claim did nothing more than convey "whatever interest Continental owned" – which was none. Continental and Appellees

carefully and deliberately distinguished the obligation of Bragg and Gleason to "assign" the other leases and minerals from the obligation to Continental to "quit claim" the White lease. And it is equally clear that Appellees, by dismissing with prejudice their claims to the superiority of the Bragg Leases, was giving up their claim to the leasehold on the Subject Lands. Bragg and Gleason were paid a considerable sum of money - $325,000.00 – to induce them to give up this claim. At a minimum, if the settlement is ambiguous and the intent of the parties is therefore relevant, there is a question of fact as to the intent of the parties.

Giving effect to the plain language of the settlement agreement, including the use of both the words "assign" and "quit claim," and giving effect to both the customary and usual meaning of the term "quit claim" and that ascribed to it by Bragg, the settlement was nothing more than Bragg and Gleason taking $325,000 for their leasehold and mineral interests in dispute, accepting a quit claim from Continental as to any interest in the White lease, and both parties mutually agreeing to dismiss their claims against the other with prejudice. There was no stipulation or agreement that the Bragg Leases were superior to the Diamond Lease. There was no stipulation or agreement that Bragg and Gleason's interest, if any, in the White minerals was superior to Continental's interest, if any. When the District Court read these terms into the settlement agreement, it added terms to the settlement agreement and rewrote the settlement agreement for the parties.

3. **There was no "proceeding" as part of the settlement to which preclusive effect can be given under the doctrine of lis pendens.**

The District Court determined that, because Continental filed its notice of lis pendens on November 14, 2000, Continental's assignment of its interest in the Diamond

Lease to Burlington in January, 2001 is rendered subject to Continental's later quit claim of the same interest to Bragg in July, 2004.

As set forth above, Section 28-05-07 of the North Dakota Century Code provides that a notice of lis pendens constitutes "constructive notice to a purchaser or encumbrancer of the property affected thereby" and every person "whose conveyance or encumbrance is subsequently executed or subsequently recorded is deemed a subsequent purchaser or encumbrancer with notice and is bound by all **proceedings taken** after the filing of such notice." A notice of *lis pendens* "merely serves to give notice to subsequent purchasers or incumbrancers of the pendency of the action, so as to make **the judgment therein** binding upon such persons (emphasis added)." *Boehm v. Long, supra.*

There is no "proceeding" or "judgment" in *Bragg I* which in any manner determines that the Bragg Leases are superior to the Diamond Lease. The stipulation for dismissal, order for dismissal, and judgment of dismissal make no mention of the quit claim deed and have the simple effect of dismissing both Bragg's claims and Continental's counterclaims "with prejudice and without costs to any of the parties." App. 55-56. In their complaint, Appellees do not even claim the existence of any "proceeding" or "judgment," as required by Section 28-05-07, N.D.C.C. for the application of the doctrine of lis pendens, but assert only that "the case was settled and a part of the settlement was a Quit Claim Deed from Continental." App. 6.

In its August 31, 2007 Memorandum Opinion, the District Court concludes that "the quit claim deed, combined with the Judgment of Dismissal, both of which came out of a settlement agreement, are part of the 'proceedings taken.'" App. 235.

North Dakota's lis pendens statute, Section 28-05-07, N.D.C.C., does not define "proceeding," and there is no reported case law defining the term for purposes of the lis pendens statute. However, in the context of determining when a statement was privileged in the law of libel and slander, this Court, relying on a Black's Law Dictionary meaning and other authorities, held that the term "proceeding" is applicable "only to judicial acts before some judicial tribunal." In *Emo v. Milbank Mutual Insurance Co.*, 183 N.W.2d 508 (N.D.1971), the Court held that a letter from an insurance company to one of its clients "does not constitute a 'proceeding' within the most liberal scope of such definition." *Id.* at 514.

Like the letter from the insurance company to an insured in *Emo*, *supra,* the quitclaim deed from Continental to Bragg does not, under the most liberal of definitions, constitute a "proceeding." The "proceeding taken" which is binding upon Burlington as a result of the lis pendens is nothing more than the mutual dismissal with prejudice of Continental's and Appellees' claims. The District Court distinguishes *Emo* as follows:

> "the documents created were not isolated writings, but rather steps taken in furtherance of an agreement to dismiss the action before the court, and were thereby intertwined with official judicial procedure." App. 236.

This distinction ignores the very language and purpose of the lis pendens statute. Section 28-05-07 of the North Dakota Century Code provides that a person who acquires an interest after the filing of a notice of lis depends "is deemed a subsequent purchaser or encumbrancer with notice" and is bound "by all proceedings taken." The statute "merely serves to give notice to subsequent purchasers" of the pendency of the action. By virtue of Continental's filing of the notice of lis pendens, Burlington was put on notice of the pendency of the action. Burlington was made subject to "all proceedings taken" in the

action of which it had notice. There is a very logical reason for providing by statute that a person who acquires an interest pendent lite is subject to "proceedings taken." A third party such as Burlington is put on notice not as to every extra-record act or agreement of the parties to the litigation but to "proceedings" - judicial acts which are official, and public, matters of record.

"Judgments" and "settlements" are not functional equivalents. *Mares v. Baughman,* 112 Cal Rptr.2d 264 (2001). A judgment is "the imposition of a resolution on the parties to a dispute as determined by a court" while a settlement is "an agreement between the parties to a dispute regarding how that dispute will be resolved." *Id.* at 676.

A similar claim under a similar statute was made in *Perry Park Country Club, Inc. v. The Manhattan Savings Bank,* 813 P.2d 841 (Colo.App. 1991). In that case, Perry Park Country Club commenced an action seeking to quiet title to some property in 1979. A notice of lis pendens was filed in the county clerk and recorder's office. Judgment was entered against Perry Park in December, 1980 and while post-decree motions were pending, a defendant in the action mortgaged the property by deed of trust to The Manhattan Savings Bank. The 1979 lawsuit was subsequently appealed and while on appeal, the parties to that lawsuit, which did not include Manhattan, entered into a settlement agreement which required the defendants to convey ownership and title of the land to Perry Park. A stipulation of dismissal with prejudice was filed and a "certificate of dismissal of action" stating that the action had been dismissed was filed in the trial court. In 1984, a quitclaim deed to the property was executed by the principal defendant in the 1979 lawsuit. Perry Park then sued Manhattan, claiming that under the lis pendens filed in 1979, its 1984 deed "related back" to the commencement of the 1979 lawsuit.

The Colorado Court of Appeals noted that the "purpose and effect of filing a lis pendens is to give notice to all who may acquire an interest in the property during the pendency of the litigation that they will be bound by its outcome." 813 P.2d 843. *Compare, Boehm v. Long, supra,* 172 N.W. at 866. The court noted that Manhattan did acquire its interest "lis pendens;" therefore the issue was "not whether Manhattan was bound by the final determination in the lawsuit, but rather, it is whether the final determination of the litigation upheld Perry Park's claim of a right prior to that of Manhattan." Because the stipulation of dismissal and subsequent certificate "failed to include a copy of the parties' settlement agreement or, at a minimum, set forth its controlling terms" they gave no indication that the parties had agreed that title would vest in Perry Park. Instead, the stipulation and certificate merely eliminated Perry Park's claims and obviated any effect of the lis pendens. 813 P.2d at 844. Harking back to the purpose of providing notice of the pendency of the litigation, the Court noted that any interested party, except those who were actual parties to the 1983 settlement agreement, was entitled to rely on the conclusions that could be drawn from the trial court file.

Likewise, in this case, the issue is whether the outcome, or the "proceedings" or "judgment" in *Bragg I*, uphold Bragg's claim of a right or title in the subject leases superior to that of Burlington and are binding upon Burlington. There is no judgment or order determining that Bragg's title is superior to that of Continental or Burlington – indeed, the only judgment is a partial summary judgment (albeit an interlocutory order that was not made a final order in *Bragg I*) holding that Continental's title was superior to Bragg's. App. 110-121. There is no judgment or order quieting title in any lease in Bragg – instead, the judgment dismisses Bragg's claims "on the merits [and] with

prejudice." *Id.* As in *Perry Park,* the stipulation for dismissal and order and judgment of dismissal do nothing more than eliminate Bragg's claims and obviate any effect of the lis pendens.

The *Perry Park* case was not binding on the District Court and is not binding on this court. However, it does address the issue in this case – what is the preclusive effect under a lis pendens statute of a settlement (assuming for purposes of argument that there was a settlement which determined the priority of the White leases as between Continental and Appellees, which Burlington disputes) which is not expressly or implicitly incorporated, by reference or otherwise, into a judicial proceeding? It was briefed to the District Court. App. 28-29. It was distinguished on non-existent grounds by Appellees. App 106. The District Court did not address *Perry Park*, but instead relied upon *Manzo v. Shawmut Bank, NA,* 677 A.2d 224 (N.J.Super A.D. 1996).

Manzo is distinguishable from the facts in this case for at least two reasons. First, there is no indication in the Superior Court's decision that the settlement at issue was or was not incorporated into or approved by an order or other court proceeding. Second, the Superior Court's decision in *Manzo* was based, at least in part, on a provision in the New Jersey lis pendens statute which expressly contemplates that disputes covered by a notice of lis pendens "might be resolved by a settlement" – a provision that has no counterpart in North Dakota's statute. Section 28-05-08 of the North Dakota Century Code provides that a notice is only cancelled by order of the court or the entry of a judgment, with no similar reference to a "settlement."

Other courts have reached the same result as the Colorado Court of Appeals in *Perry Park.* In *Olson v. Cornwell,* 25 P.2d 879 (Cal.App.1st Dist.), the court held that a

judgment of dismissal in a quiet title action constituted a termination of a notice of lis pendens and that "a person acquiring interests before settlement, abandonment or dismissal does not take such rights *pendent lite* so as to be affected thereby." Similarly, in *Harris v. Whittier Building and Loan Association,* 63 P.2d 840 (Cal.App.2 Dist.), the court said that while it had been held that the doctrine of lis pendens extends to a compromise, it the action is settled and dismissed without any consent decree or judgment determining any rights in the property in question, the lis pendens is terminated an persons acquiring an interest before settlement do not take *pendent lite.*[6]

There is no "proceeding" which determines that the Bragg Leases are superior to the Diamond Lease, or that Apelles's title in either the Bragg Leases or the Diamond Lease is superior to the interest of either Continental or Burlington. As such, there is no "proceeding" to bind Burlington and the District Court's decision is erroneous as a matter of law.

CONCLUSION

This issue presented in this case is not whether or not a subsequent purchaser who is put on notice as to pending litigation is bound by the ultimate outcome in that litigation, even if the outcome is reached through settlement. To the extent the District Court relied on North Dakota's public policy in favor of compromising litigation whenever possible, the court misapprehended the issue presented to it.

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[6] Neither *Mares* nor *Harris* have been expressly overruled. In an unpublished decision which cannot be cited under California rules, the First District Court of Appeals has distinguished these cases from the facts at issue before it and suggested that they "appear to be contrary" to the holdings of several courts outside of California. See, *Roman v. Whedbee,* 2004 WL 928177 (Cal.App.1 Dist.).

Instead, this case is about whether there was any settlement or other agreement between the parties to *Bragg I* which resolved the issue of priority of the Diamond Lease as against the Bragg Leases and, if so, whether that agreement amounts to a "proceeding" binding on parties under Section 28-05-07 of the North Dakota Century Code.

The undisputed facts demonstrate that no such agreement can be found without rewriting the parties' agreement for them. The "proceedings" which could be binding against Burlington are nothing more than mutual dismissals with prejudice.

For these reasons, the Court should reverse the summary judgment order and judgment and remand to the District Court for further proceedings. If, as Burlington asserts, the doctrine of lis pendens does not preclude Burlington from asserting the title it obtained from Continental, the underlying issue of the priority of the Diamond Lease as against the Bragg Leases, while resolved against Bragg and Gleason in a partial summary judgment order in *Bragg I,* has not been resolved in this case.

Respectfully submitted this 22nd day of July, 2008.

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By _____
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was on the 22nd day of July, 2008, mailed to the following:

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