IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Irish Oil and Gas, Inc.	)	
	)	
Appellant,	)	Supreme Court Case No. 20100064
	)	
vs.	)	District Court Case No. 13-09-C-11
	)	
Gerald C. Riemer, Doris E. Riemer, Lillie J. Riemer, and Joanne Johnson,	)	
	)	
Appellees.	)	

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
DUNN COUNTY, NORTH DAKOTA
THE HONORABLE ZANE ANDERSON

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STATEMENT OF THE ISSUES

1. Whether the district court should have granted Irish Oil and Gas, Inc.'s motion to amend its complaint.

2. Whether the district court should have granted Irish Oil and Gas, Inc.'s motion for summary judgment and denied the summary judgment motions of Gerald C. Riemer and Doris E. Riemer, husband and wife; Joanne Johnson; and Lillie J. Riemer.

STATEMENT OF THE CASE

¶1 Irish Oil and Gas, Inc. ("Irish") served its Complaint on Gerald C. Riemer and Doris E. Riemer, husband and wife; Joanne Johnson; and Lillie J. Riemer, (together "Riemers") on or about October 6, 2008, and filed it with the district court on or about February 18, 2009. (Appendix ("App.") 6, 7-11). Joanne Johnson filed her Answer and Counterclaim on or about October 30, 2008. (App. 21-29). Gerald C. Riemer and Doris E. Riemer served their Answer and Counterclaim on or about October 29, 2008. (App. 12-20). Lillie J. Riemer served her Answer and Counterclaim on or about February 20, 2009. (App. 30-35). A scheduling order was entered on or about June 26, 2009. (App. 5).

¶2 Joanne Johnson moved for summary judgment on or about August 3, 2009. (App. 5). Lillie J. Riemer moved for summary judgment on or about August 6, 2009. (App. 5). Irish moved for summary judgment, and filed its combined response to summary judgments, on or about October 1, 2009. (App. 3). Joanne Johnson filed a reply brief in support of her motion for summary judgment on or about October 8, 2009. (App. 3). Lillie J. Riemer's filed her response in opposition to Irish's summary judgment motion and reply to Irish's response brief on or about October 8, 2009. (App. 3). Joanne Johnson filed her response brief in opposition to Irish's summary judgment motion on or about October 22, 2009. (App. 3). Gerald C. Riemer and Doris E.

Riemer filed their response in opposition to Irish's summary judgment motion on or about October 29, 2009. (App. 2-3). Gerald C. Riemer and Doris E. Riemer also filed a motion for summary judgment against Irish on or about October 29, 2009. (App. 2). Irish filed its combined reply brief in support of its summary judgment motion on or about October 30, 2009. (App. 2). Irish filed its response to the summary judgment motion brought by Gerald C. Riemer and Doris E. Riemer on or about November 25, 2009. (App. 2).

¶3 Irish moved to amend its complaint on September 1, 2009. (App. 4-5). Lillie J. Riemer filed a response in opposition to Irish's motion to amend on or about September 11, 2009. (App. 4). Joanne Johnson filed a response in opposition to Irish's motion to amend on or about September 14, 2009. *Id.* Gerald C. Riemer and Doris E. Riemer filed a response in opposition to Irish's motion to amend on or about September 17, 2009. *Id.* Irish filed a reply to Lillie J. Riemer's response in opposition to Irish's motion to amend on or about September 21, 2009. *Id.* Irish filed a reply to Joanne Johnson's, Doris E. Riemer's, and Gerald C. Riemer's response in opposition to Irish's motion to amend on or about October 1, 2009. (App. 3).

¶4 The district court's Memorandum Opinion denying Irish's summary judgment motion, granting summary judgment in favor of the Riemers, and denying Irish's motion to amend its complaint was issued on December 17, 2009. (App. 78-87). Judgment was entered on December 24, 2009. (App. 88). Notice of entry of judgment was filed by Gerald C. Riemer and Doris E. Riemer on or about December 29, 2009. (App. 89-90). Notice of appeal was filed by Irish on or about February 24, 2010. (App. 91).

STATEMENT OF THE FACTS

¶5 This action was commenced by Irish Oil and Gas, Inc. ("Irish") for damages resulting from the breach of a Letter Agreement in Lieu of Draft for Oil and Gas Lease

Bonus Consideration ("Bonus Agreement") and an Oil and Gas Lease ("Lease") by each of the defendants Gerald C. Riemer and Doris E. Riemer, husband and wife; Joanne Johnson; and Lillie J. Riemer, (together "Riemers") owners of mineral interests in Dunn County, North Dakota. (App. 7-11). Irish filed its complaint seeking enforcement of the terms of the Lease as contracted between the parties and damages caused by noncompliance with the Lease. *Id.*

¶6 On January 21, 2009, Irish offered identical five-year paid-up oil and gas leases to the Riemers. (App. 8). The leases granted them royalties for the exclusive right to drill, capture, produce, and market oil, gas and other hydrocarbons. (App. 40-45). Bonus consideration was included by the terms of the Bonus Agreement. (App. 46-48). The area included 476.83 gross mineral acres in Dunn County, described as: Township 144 North, Range 92 West of the 5th P.M.: Section 5: S1/2N1/2, Lots 1 (39.01), 2 (39.14), 3 (39.27), 4 (39.41), SE1/4. (App. 8). The Riemers all executed their respective Leases and the Bonus Agreements. (App. 40-48).

¶7 Irish discovered issues as to the title of the mineral rights. (App. 9, 38-39). These issues were relayed to Gerald Riemer orally and in a letter dated March 25, 2008. (App. 9, 38-39, 49). Irish believed it had negotiated an extension in which to make bonus payments to the Riemers. (App. 10, 38-39, 49-52). Irish's Tim Furlong spoke with Gerald Riemers, who agreed to extend the deadline for payment of the bonus consideration. (App. 9, 38-39). This conversation was memorialized in a letter from Irish to Gerald Riemer. (App. 49). Irish was made to believe that Gerald Riemer acted as agent for the group. (App. 10, 36-39, 49). At his deposition, Gerald Riemer at first denied ever having talking with Tim Furlong, but when presented with a recorded telephone conversation between him and Furlong admitted they had spoke. (App. 69-70). These title issues were determined not be problematic; Irish sent the Riemers their

bonus consideration payments on May 27, 2008. (App. 10). But these checks were returned to Irish and the Riemers indicated they would not honor the Lease. *Id.*

STANDARD OF REVIEW

Summary Judgment Standard

¶8 This Court has outlined the standard for review of summary judgment:

> Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if either party is entitled to judgment as a matter of law, and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result. A party moving for summary judgment has the burden of proving there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, a court must view the evidence in the light most favorable to the party opposing the motion and must give that party the benefit of all favorable inferences that reasonably can be drawn from the evidence. Whether a district court properly granted summary judgment is a question of law that we review de novo on the record.

Grinnell Mut. Reinsurance Co. v. Thies, 2008 ND 164, ¶ 5, 755 N.W.2d 852 (internal citations omitted). The Court reviews summary judgment by viewing "the evidence in the light most favorable to the non-moving party and then determin[ing] if the trial court properly granted summary judgment as a matter of law." *Hovland v. City of Grand Forks*, 1997 ND 95, ¶ 5, 563 N.W.2d 384. Here, the appeal involves a legal determination on the application of paragraph 16 of the Lease and whether sufficient consideration was maintained to preclude rescission of the Lease.

Motion to Amend Standard

¶9 This Court has held that a district court's decision on a motion to amend will not be reversed unless the district court has abused its discretion. *Leet v. City of Minot*, 2006 ND 191, ¶ 7, 721 N.W.2d 398. "A district court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, when its decision is not the product of a rational mental process leading to a reasoned determination, or when it misinterprets or

misapplies the law." *Id.* The district court did not provide any rationale for denying Irish's motion to amend. (App. 80-81).

LAW AND ARGUMENT

I. The District Court Should Have Granted Irish's Motion to Amend its Complaint.

¶10 The district court's Memorandum Opinion denies Irish's motion to amend its complaint. (App. 80-81) Rule 15(a) of the North Dakota Rules of Civil Procedure provides that a party may amend its pleadings by leave of court and that such "leave shall be freely given when justice so requires." *Hansen v. First Am. Bank & Trust*, 452 N.W.2d 770 (N.D. 1990); *Greenwood vs. Am. Family Ins. Co.*, 398 N.W.2d 108 (N.D. 1986). The district court concluded that "[e]ven though the motion was timely filed, in accordance with the scheduling order, the Court does not find that justice requires that leave to amend the complaint be given. The Court therefore denies the motion." (App. 80-81). There is no discussion by the district court as to its rationale for denying Irish's motion.

¶11 The proposed amendment would have added allegations of deceit against Gerald Riemer. (App. 72-77). Gerald Riemer represented to Irish that he would extend the first bonus payment deadline until June 15, 2008. (App. 76). Evidence also exists that Gerald Riemer was acting as agent for Johnson and Lillie Riemer. *Id.* At the same time, Gerald Riemer had no intention of honoring that commitment. A letter memorializing a telephone conversation between Irish and Gerald Riemer set forth the agreement; it also indicated that if the statements were incorrect that Gerald Riemer was to contact Irish. (App. 49). Such deceitful conduct proximately caused damages to Irish.

¶12 In a letter dated March 25, 2008, Irish's Tim Furlong memorialized a telephone conversation he had with Gerald Riemer in which he agreed to an extension of time until June 15, 2008, for Irish to pay the Bonus payments. *Id.* Furlong invited Gerald Riemer in this letter to contact him if he had not correctly set out the oral agreement. *Id.* At Gerald Riemer's deposition, while first denying he ever spoke with Furlong, admitted that he stated that the reason he was not honoring his commitment to Irish was that Irish would not pay him additional bonus money above and beyond what was negotiated. (App. 69-70). Irish contends that the reason Gerald Riemer did not honor his verbal agreement with Furlong was simply so he could get more money in dishonoring his obligations with Irish. (App. 51).

¶13 The district court did not permit Irish to develop this factual allegation of deceit. It was error for the district court to dispense with Irish's deceit action with nothing more than a cursory denial. The Court should reverse the district court's refusal to permit Irish to amend its complaint.

II. The Riemers Failed to Adhere to Paragraph 16 of the Lease.

¶14 Paragraph 16 of the Lease required lessors to first seek judicial determination of a default, and if a default existed, to give Irish a reasonable amount of time to cure the default. The executed Lease states at paragraph 16:

> This Lease shall not be terminated, forfeited, or canceled for failure by Lessee to perform in whole or in part any of its implied covenants, conditions, or stipulations until it shall have been first finally and judicially determined that the failure or default exists, and then Lessee shall be given a reasonable time to correct any default so determined, or at Lessee's election it may surrender the Lease with the option of reserving under the terms of this Lease each producing well and forty (40) acres surrounding it as selected by Lessee, together with the right of ingress and egress.

> Lessee shall not be liable in damages for breach of any implied covenant or obligation.

(App. 41 ,43, 45).

¶15 The Riemers allege that Irish defaulted by failing to make a timely bonus consideration payment. Irish, however, had informed the Riemers of a title curative problem with the subject minerals that had to be investigated. Irish received what it believed to be an extension from Gerald Riemer; Irish was led to believe that Gerald Riemer was representing his siblings as agent. Riemers dispute this. Be that as it may, this dispute, even if it was a default, was never deemed a default by a court pursuant to paragraph 16. Irish was not given a reasonable opportunity to cure the default. Though, presently, Irish has forwarded the subject bonus consideration to Riemers. The Riemers have refused payment of the bonus consideration.

¶16 Contract law applies in interpreting the Lease. "The same general rules that govern interpretation of contractual agreements apply to oil and gas leases." *Johnson v. Mineral Estate, Inc.*, 343 N.W.2d 778, 780 (N.D. 1984). "The construction of a written contract to determine its legal effect is a question of law for the court to decide, and on appeal, this Court will independently examine and construe the contract to determine if the trial court erred in its interpretation of it." *West v. Alpar Resources, Inc.*, 298 N.W.2d 484, 490 (N.D. 1980). "Words in a contract are construed in their ordinary and popular sense, unless used by the parties in a technical sense or given a special meaning by the parties." *Grynberg v. Dome Petroleum Corp.*, 1999 ND 167, ¶ 10, 599 N.W.2d 261. "A contract must be read and considered in its entirety so that all of its provisions are taken into consideration to determine the true intent of the parties." *Miller v. Schwartz*, 354 N.W2d 685, 688 (N.D. 1984).

¶17 "Equity and the law abhor forfeitures." *Ehrman v. Feist*, 1997 ND 180, ¶ 16, 568 N.W.2d 747. This Court has held that even if an "expressed condition, not an implied covenant" is breached that "[a] contract cannot be arbitrarily terminated under

a provision authorizing termination." *Keller v. Bolding*, 2004 ND 80, ¶ 18, 678 N.W.2d 578. Even if it can be found that an expressed condition or stipulation has been breached by Irish, rescission is not supported.

¶18 The Riemers were required to first seek a judicial determination as to whether a breach of the lease occurred. Yet the district court determined that "the provision is not applicable to the circumstances presented here." (App. 83). The district court "base[d] its interpretation on who drafted it, the language used, the placement and the context of the paragraph." *Id.* Irish would concede that a contract is construed against the party who drafted it. But that does not mean a clear provision should be interpreted against the drafting party simply because it is the drafting party. The question on appeal, as it was for the district court, is whether the word "implied" is operative for the words covenants, conditions, *and* stipulations. *Id.* The district court's application concludes that that the lease practically read "implied covenants, implied conditions, and implied stipulations." (App. 84). As Irish explained to the district court, there is a phrase "implied covenant" that is recognized in the oil and gas lease context. There is no common recognition of implied stipulation or implied condition in an oil and gas lease.

¶19 Reading the provision in an ordinary and sensible manner, it is clear that the use of the word "implied" is tied *only* to the word "covenants." That is, implied covenants. Black's Law Dictionary defines "implied covenant" as: "A covenant that can be inferred from the whole agreement and the conduct of the parties." Black's Law Dictionary 158 (2nd pocket ed. 2001). Indeed, within oil and gas leases, generally, are the following implied covenants: implied covenants to develop the lease, implied covenants of protection, and implied covenants relating to management and administration of the lease. *See* HEMINGWAY OIL AND GAS LAW AND TAXATION § 8.1. An implied covenant in an oil and gas lease is to be interpreted and understood in the context of an oil and gas lease. The stipulations and conditions referred to in paragraph

16 naturally refer to the express and specific conditions and stipulations contained in the Lease.

¶20 The district court reasoned that paragraph 16 appeared to apply to complex duties of development. (App. 84). The district court reasoned that such a breach involving development would be difficult to ascertain. And the district court reasoned that an explicitly expressed duty would be less difficult to ascertain and therefore "it would be unreasonable and it would waste judicial and other resources to require the non-breaching party to obtain a Court order." *Id.* The district court concluded that a "violation of express contractual obligations does not create a duty to seek a judicial determination before terminating the lease." *Id.*

¶21 The determination of whether a breach occurred, whether it be an express provision or implied provision, is typically difficult to determine. Here, the subject of the alleged default is not contained in the Lease, rather it is contained in the Bonus Agreement. A dispute exists between Irish and the Riemers whether an extension to pay bonus consideration was valid. Irish does not believe it breached its agreement with the Riemers; Irish relied on the representations of Gerald Riemer regarding an extension for payment of bonus consideration. Whatever the outcome of this dispute, paragraph 16 clearly provides that a court must first determine whether a breach occurred and allow Irish a reasonable amount of time to cure any breach. Assuming for purposes of argument only that a breach on an express condition occurred, Irish is entitled to a determination of this and then a reasonable amount of time to cure the breach. Because this did not occur, a default has not occurred and the Lease remains valid.

¶22 Further, Irish has already cured any alleged or potential default when it provided bonus consideration payments to the Riemers. It is undisputed that the Riemers received a letter dated May 27, 2008, from Irish containing the first bonus payment.

While the Riemers assert that the Lease had already terminated at this time, Irish's action can be deemed as an attempt to cure any alleged default. This attempt to cure the purported default occurred prior to the Riemers seeking a judicial determination of the alleged default. Even *if* Irish had at one time been in default of the Lease and Bonus Agreement, it is now the Riemers who are in default of their contractual obligations.

III. The Lease is Still Valid Because Consideration Exists.

¶23 The Riemers contend in their counterclaims, and the district court determined, that the Oil and Gas Lease was void for total failure of consideration. (App. 18-19, 27-28, 33-34, 85-86). Yet the district court ignored that "the basic consideration for an oil and gas lease . . . is the development of the land for the production of petroleum products." 58 C.J.S. Mines and Minerals § 280. The Lease provides:

> The Lessor, in consideration of Ten Dollars and other valuable consideration . . . grants . . . to Lessee, the land described below, with the exclusive right for the purpose of mining exploring by geophysical and other methods, and operating for and producing oil (including, but not limited to, distillate and condensate), gas (including, but not limited to casinghead gas and helium), and other hydrocarbons of whatever nature or kind . . . and any and all other rights and privileges necessary, incident to, or convenient for the economical operation alone, or conjointly with neighboring land, for the production, saving, taking care of, and selling all substances produced . . . .

(App. 40, 42, 44). The Lease contains a royalty section at paragraph 3 providing that Irish will develop the land by exploring for oil. *Id.* The Bonus Agreement for Gerald Riemer, Doris Riemer, and Joanne Johnson also contained a provision stating receipt of ten dollars represented legal and binding consideration for the Oil and Gas Lease. (App. 47-48). Irish does not dispute that the Bonus Agreement provides for a bonus payment in two installments. That the circumstances surrounding this Lease delayed paying on the bonus consideration, however, does not justify rescission of the Lease for failure of consideration. Even if the bonus consideration was deemed untimely,

sufficient consideration existed. The failure of partial consideration does not entitle the Riemers to rescission.

¶24 Even if the bonus consideration failed due to delay, there was no total failure of consideration. Consideration is "[s]omething of value (such as an act, a forbearance, or a return promise) received by a promisor from a promisee." BLACK'S LAW DICTIONARY 131 (2nd pocket ed. 2001). Failure of consideration is a question of fact. *Farmers Union Oil Co. v. Maixner*, 376 N.W.2d 43, 47 (N.D. 1985). This Court has held that it does not favor forfeitures under leases:

> "Whether a contract should be canceled for breach depends upon the facts of each case." Forfeitures of estates under leases are not favored. "A condition involving a forfeiture must be interpreted strictly against the party for whose benefit it is created." Adequacy of compensation determines whether equitable relief will be granted:
>
> > "The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured."

Helm Bros., Inc. v. Trauger, 389 N.W.2d 600, 603 (N.D.1986) (citations omitted). While the Riemers alleged that the bonus consideration aspect of the Bonus Agreement was untimely conveyed, caused consideration to totally fail, and caused the entire Lease to terminate, the bonus consideration was not the only consideration in the Lease Agreement.

¶25 This Court has addressed failure of total consideration and failure of partial consideration. *Check Control, Inc. v. Shepherd*, 462 N.W.2d 644 (N.D. 1990); *First Nat. Bank of Belfield v. Burich*, 367 N.W.2d 148 (N.D. 1985). "Failure of consideration may be total or partial." *First Nat. Bank of Belfield*, 367 N.W.2d at 152 (citation omitted). "There is a total failure of consideration when a party has failed or refused to perform a substantial part of his bargain, thereby defeating the very object of the contract." *Id.* at 153 (citations omitted). The non-breaching party is excused from

performing on its duty under the contract if total failure of consideration occurs. *Id.* (citations omitted). Partial failure of consideration occurs "when the failure to perform is insubstantial, *so that sufficient consideration remains to sustain the contract.*" *Id.* (citation omitted) (emphasis added). When partial failure of consideration occurs, the non-breaching party is not excused from performance; though the non-breaching party is entitled to damages. *Id.* (citation omitted). Here, if any consideration failed at all, it was at most a partial failure of consideration.

¶26 Even if it is factually determined that the bonus consideration failed, greater consideration existed in the form of Irish's promise of development of the subject land, consideration of ten dollars, and royalty payments. The Lease, as a whole, was always supported by valid consideration. The Bonus Agreement states that Irish was offering Riemers "a bonus consideration payment of $160.00 per net mineral acre, for a primary term of five years, and a 1/6th royalty in the event of production." (App. 46-48). While a cash payment was part of the consideration contained in the Bonus Agreement, the primary consideration was a 1/6th royalty in production. The Riemers do not dispute Irish's assertions that valid consideration in the form of Irish's promise to develop the subject land existed. Valid consideration existed *even if* a factual determination is made that the bonus consideration failed.

¶27 The object of the lease is exploration of land for the development of oil and gas production, and tied to this is the promise of royalty payments. The bonus consideration is just that, a bonus payment of consideration on top of the consideration that exists as the object of the Lease. Certainly, if a bonus payment is above and beyond that which contract law provides for valid consideration, then the Lease did not totally fail for want of consideration. At most, a partial failure of consideration occurred; the Riemers do not assert claims for damages in their counterclaims.

CONCLUSION

¶28 For all the reasons set forth above. this Court should reverse the district court's decision to grant the Riemers' motions for summary judgment, reverse the district court's decision to deny Irish's motion to amend, and remand the matter for a determination of damages to Irish.

Dated this 6th day of April, 2010.

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