20100064

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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

APPELLEES' BRIEF

Appeal from Judgment entered December 24, 2009

District Court, Dunn County, North Dakota
Southwest Judicial District

The Honorable Zane Anderson

Mary E. Nordsven, ND ID 04367
HARDY, MAUS & NORDSVEN, PC
Attorneys at Law
137 First Avenue West, PO Box 570
Dickinson, ND 58602
1-701-483-4500

Attorneys for: Gerald C. Riemer and
Doris E. Riemer

Corrected cover

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page(s)

Statutes: Page(s)

Other Authorities:

STATEMENT OF THE ISSUES

1. Whether the trial court erred and abused its discretion in denying Irish's Motion to Amend its Complaint to add a tort claim for deceit to an action for breach of contract.

2. Whether the district court properly granted Summary Judgment to Gerald and Doris Riemers when Irish failed to pay the "Bonus Consideration".

STATEMENT OF FACTS

On January 21, 2008, Gerald and Doris Riemers (Gerald) executed an Oil and Gas Lease with Irish Oil and Gas Inc. (Irish). The lease was dated January 22, 2008, and covered the following described property:

Township 144N, Range 92W, Dunn County, North Dakota
Section 5: S½N½, Lots 1 (39.01), 2 (39.14), 3 (39.24), 4 (39.41), SE¼

Simultaneously and as part of the same transaction, Gerald and Irish entered into an Agreement also dated January 22, 2008, entitled "Letter Agreement in Lieu of Draft for Oil and Gas Lease **Bonus Consideration**" (App. 7-11) (Emphasis added). Both documents were prepared by Irish.

Gerald did not receive his bonus consideration check of $10,640.00 prior to the expiration of the 60 days as required by the Agreement. On or about March 24, 2008, Gerald called Clarence Herz, Irish's representative, and inquired as to the whereabouts of the check. On March 25, 2008, T. P. Furlong (Furlong), Vice President of Irish Oil and Gas, Inc., called Gerald claiming that issues as to the title had been discovered and requested an extension of

time to pay the bonus consideration (App. 9, 38-39). Subsequent to the telephone conversation, Furlong sent a letter to Gerald C. Joanne Johnson and Lillie J. Riemer at Gerald's address purporting to memorialize the conversation between Furlong and Gerald and suggesting that Gerald had agreed to extend the time for payment (App. 49). Gerald did not respond to the letter.

Contrary to the allegations of Irish, Gerald did not represent to Irish's representatives that he would extend the time of payment for himself or for his sisters as he did not have power of attorney for his sisters. Nor did Gerald, verbally or in writing, agree to extend the time within which Irish could pay the lease bonus (App. 62, 64). Irish ultimately attempted a late payment of the bonus money which Gerald refused.

STANDARD OF REVIEW

Summary Judgment Standard: Appellant's brief correctly states the standard of review of summary judgment.

Motion to Amend Standard: Pursuant to Rule 15(a), N.D.R.Civ.P., a party may amend its pleading by leave of court and such leave "shall be freely given when justice so requires." The propriety of permitting an amendment under the rule is a discretionary matter for the trial court, and its decision will not be overturned by this court unless there is an abuse of discretion. Bender v. Time Insurance Company, 86 N.W.2d 489 (N.D.1979); Crosby v. Sande, 180 N.W.2d 164 (N.D.1970).

A district court abuses its discretion only if its decision is arbitrary, unreasonable, or unconscionable, its decision is not the product of a rational mental process leading to a

reasoned determination, or it misinterprets or misapplies the law. WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 10, 730 N.W.2d 841.

LAW AND ARGUMENT

1. Irish's Motion to Amend was properly denied.

Once a responsive pleading has been served, a complaint may be amended only by leave of Court or by written consent of the adverse party. N.D.R.Civ.P. 15(a). Leave to amend a pleading "shall be freely given when justice so requires". N.D.R.Civ.P. 15(a); Greenwood v. American Family Ins. Co., 398 N.W.2d 108, 111 (N.D. 1986). However, "leave to amend is not to be granted automatically." See Isaak v. State Farm Mut. Auto. Ins. Co., 547 N.W.2d 548, 551 (N.D. 1996).

A decision by a District Court on a motion to amend a pleading under N.D.R.Civ.P. 15(a) is within the sound discretion of the District Court and will not be overturned in the absence of an abuse of discretion. First Interstate Bank v. Rebarchek, 511 N.W.2d 235, 243 (N.D. 1994).

Permitting Irish to amend would have been futile and a waste of the court's time as the allegations of deceit would be subject to dismissal or summary judgment.

Irish commenced this action alleging breach of an oil and gas lease and a contemporaneously executed letter agreement. The alleged breach of the lease and letter agreement are matters of contract law. Irish's proposed amendment attempted to add allegations of deceit against Gerald (App. 72-77). Irish claims that Gerald represented to Irish that he would extend the first payment deadline and that he was acting as agent for

Johnson and Lillie Riemer and that his actions constituted deceit. Actions for deceit are tort actions. N.D.C.C. § 9-10-02.

A deceit action is maintainable only when there is not a contract between the parties. Johnson v. Mineral Estate, Inc., 343 N.W.2d 778 (N.D. 1984); Egeland v. Continental Resources, Inc., 2000 ND 169, 616 N.W.2d 861 (N.D. 2000).

Whether or not Gerald made the alleged representations is irrelevant to this action which arose out of the lease and letter contracts.

In Erickson v. Brown, 2008 ND 57, ¶ 24, 747 N.W.2d 34, this Court held:

> "This Court has recognized that under the statutory definitions for deceit and fraud, the same conduct, a promise made without any intention of performing, may constitute both deceit and fraud. Delzer v. United Bank, 527 N.W.2d 650, 653 (N.D.1995) (Delzer I) (comparing N.D.C.C. § 9-03-08(4) with § 9-10-02(4)). Under those statutes, we have said that although the same conduct can constitute both deceit and fraud and those terms are often used interchangeably, fraud under N.D.C.C. § 9-03-08 applies to parties to a contract, while deceit under N.D.C.C. § 9-10-02 applies where there is no contract between the parties." (Citations omitted).

The case of Pioneer Fuels, Inc., v. Montana-Dakota Utilities Company, 474 N.W.2d 706, 710 (N.D. 1991), involved a similar situation in which Pioneer attempted to bring an action against MDU for deceit. Pioneer and MDU had entered into a contract whereby MDU agreed to purchase used oil from Pioneer from time to time if its price was the lowest. Although Pioneer's prices were the lowest, MDU never purchased any used oil from MDU. Despite repeated inquiry by Pioneer as to why MDU was not purchasing any oil, MDU never responded or explained their actions. The court held that Pioneer could not maintain an action for deceit as contract law was applicable.

> "A breach of contract even if intentional, malicious, or in bad faith, is not enough to convert a contract action into a tort action." Hay v. Dahle, supra, 386 N.W.2d at 811. "[I]f the alleged obligation to do or not to do something that was breached could not have existed but for a manifested intent [of the parties to a contract], then contract law should be the only theory upon which liability would be imposed." Prosser and Keeton on Torts Sec. 92, p. 656 (5th ed. 1984). Cf. Madler v. McKenzie County, 467 N.W.2d 709, 715 (N.D.1991) ("a mere breach of contract does not, by itself, furnish a basis for liability in tort for negligence"). Id.

In the present action Irish's deceit claim against Gerald could not have existed but for the oil and gas lease and letter agreement. Thus, as stated by the court in Pioneer, Id., "contract law should be the only theory upon which liability would be imposed." Id. Accordingly, the District Court did not abuse its discretion and properly denied Irish's motion to amend its complaint. A district court does not abuse its discretion when it denies a requested amendment which would be futile. Bernabucci v. Huber, 2006 ND 71, ¶ 30, 712 N.W.2d 323 (N.D. 2006), Avatar Exploration, Inc. v. Chevron, U.S.A., Inc., 933 F.2d 314 (5th Cir.1991); Jackson v. Bank of Hawaii, 902 F.2d 1385 (9th Cir.1990).

2. The Lease terminated when Irish failed to pay the lease bonus.

A. Judicial determination of breach is not required.

Irish argues that Gerald had to secure a judicial determination that Irish had breached the lease and letter agreement before the lease could be terminated (Brief of Appellant, page 6). Irish bases its argument on paragraph 16 of the lease which provides:

> "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 firs 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 unto 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 fo breach of any implied covenant or obligation."

The Trial Court correctly determined that paragraph 16 relates to development of the property subsequent to production or development of the property and not the circumstances before this Court (App. 78, p. 3-4). The trial court held that the word "implied" in paragraph 16 must be read as applying to the words "covenants, conditions and stipulations" after development.

Oil and gas leases are subject to the same rules of interpretation and construction as other contracts. West v. Alpar Resources, Inc., 298 N.W.2d 484 (N.D. 1980); Bice v. Petro-Hunt, L.L.C., 2009 ND 124, 768 N.W.2d 496 (N.D. 2009). Egeland v. Continental Resources, Inc., 2000 ND 169, 616 N.W.2d 861 (N.D. 2000).

The letter agreement and oil and gas lease must be read and construed together under the "contemporaneous execution" rule which requires instruments relating to the same transaction and executed at the same time to be read and construed together. Nantt v. Puckett Energy Co., 382 N.W.2d 655,658 (N.D. 1986).

Rules for interpreting and construing oil and gas leases are set forth in Bice, Id. at page 503:

> [¶ 11] " When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible." N.D.C.C. § 9-07-04. A contract must be construed as a whole to give effect to each provision if reasonably practicable."
>
> [¶ 25] " The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." N.D.C.C. § 9-07-02. " The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, unless

used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

N.D.C.C. § 9-07-09 is also applicable.

" The words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." Id.

In the oil and gas industry there are implied duties imposed on the lessee of an oil and gas lease with respect to the development and protection of the property. Before an oil lease may be terminated because of a breach of an implied duty or covenant, there must first be a judicial determination that there has been a breach of the implied duty or covenant. Feland v. Placid Oil Co., 171 N.W.2d 829 (N.D. 1969); 3 Summers, Oil & Gas, Section 468, page 365. There is no corresponding law or usage in the oil and gas industry which requires a prior judicial determination of a breach of express covenant or stipulation before a lease terminates.

Reading paragraph 16 as a whole, giving effect to each provision as required by NDCC §9-07-06 and giving the language of paragraph 16 the special meaning used by the oil industry leads to the inescapable conclusion that the word "implied" was meant to be applied to all three words: "covenants, conditions and stipulations", and that paragraph 16 relates to post-production duties and breaches. This is especially apparent as paragraph 16 also provides that, after a judicial determination of default has been made ,the lessee has as one of its options the right to surrender the lease "reserving under the terms of this lease each producing well and forty (40) acres surrounding as selected by Lessee . . ." Reading paragraph 16 as a whole and considering use of the word "implied" preceding covenants,

conditions or stipulations, followed by the options of curing or releasing the acreage and reserving a producing well, clearly manifests an intent that this paragraph applied to post-production breaches.

Paragraph 16 is the only place in the lease and letter agreement where the words conditions and stipulations appear. Throughout the documents the parties' mutual obligations are expressed as covenants, agreements and obligations. Had Irish intended that prior judicial determination of default applied to the lease as a whole and not just "implied covenants, conditions and stipulations", it would have or should have included in paragraph 16 express covenants. Irish's drafting at a minimum creates an uncertainty and ambiguity requiring the uncertainty be construed against them . In West v. Alpar Resources, Inc., Id., at page 490, this Court recognized the superior position of lessees when taking oil leases and the propriety of construing the lease against the lessee if there is an ambiguity and held:

> "Pursuant to Section 9-07-19, N.D.C.C., the language of a contract, in cases of uncertainty, should be interpreted most strongly against the party who caused the uncertainty to exist. This Court has stated that the ambiguous terms of a contract will be interpreted most strongly against the party who caused the ambiguity. Grove v. Charbonneau Buick-Pontiac, Inc., 240 N.W.2d 853 (N.D. 1976). An ambiguity exists under a contract when good arguments can be made for either of several contrary positions as to the meaning of a term. Kruger v. Soreide, 246 N.W.2d 764 (N.D. 1976)."

We agree with the following language of the Kansas Supreme Court in Gilmore v. Superior Oil Company, 192 Kan. 388, 388 P.2d 602 (1964), with regard to construction of oil and gas leases:

> "Construction of oil and gas leases containing ambiguities is in favor of the lessor and against the lessee for the reason that the lessee usually provides the

> lease form or dictates the terms thereof and if such lessee is desirous of more complete coverage, the lessee has the opportunity to protect itself by the manner in which its draws the lease." 388 P.2d at 603.

The district court correctly construed paragraph 16 as being inapplicable to the issues before the court.

B. The Lease is not enforceable as the failure to pay the lease bonus was a total failure of consideration.

It is undisputed that Irish failed to pay the bonus consideration within the time limit provided for in the letter agreement.

Time is of the essence in a contract for the execution of an oil lease because of the nature of the interest and the rapid fluctuation in the value of oil and gas interests. Kuntz, Oil and Gas, § 19.10 at 35.

When Irish failed to timely pay the bonus, consideration for Gerald's execution of the lease failed. Irish argues that it had an oral agreement to extend the time for payment. However, the oral agreement if it existed is unenforceable. North Dakota law requires that modification of a written agreement must be in writing. N.D.C.C. § 9-09-06 states that "[a] contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise. An oral agreement is executed within the meaning of this section whenever the party performing has incurred a detriment which that party was not obligated by the original contract to incur". Irish incurred no detriment as a result of the alleged oral agreement and thus there was no binding agreement permitting the delayed payment of the lease bonus.

Failure to pay the lease bonus is fatal to the lease as there has been a total failure of consideration. Irish's argument is that, under the terms of the lease, Irish promised to develop the property which represents partial consideration and the lease is thus binding on Gerald (Appellant's Brief, p. 12, 26). This argument is without merit.

Irish did not promise to develop the property during the term of the lease, nor did it promise to pay royalties unless Irish developed the property. The lease granted Irish the right to enter on the land and develop the property which it may or may not do during the term of the lease.

The promised lease bonus set out in the letter agreement was the only consideration promised to obtain Gerald's signature and to obtain the rights granted to Irish under the terms of the lease.

A "bonus" is the sum paid or consideration for the execution of the lease. Richard W. Hemingway, The Law of Oil and Gas 3rd §2.4 at 56. It represents the market value for a "sale" of the minerals to the lessee for a limited term for development purposes. The bonus is paid for the execution of the lease which grants the right of access to develop. Kuntz, Oil and Gas § 15.5 at 441.

It is also apparent that Irish intended the lease bonus to be consideration for Gerald signing the lease. The letter agreement title refers to the amount to be paid as "bonus consideration" for execution of the lease.

Failure to pay the lease bonus is a total failure of consideration. A total failure of consideration occurs where a party has failed to perform a substantial part of its obligation, so as to defeat the very object of the agreement. First Nat. Bank of Belfield v. Burich, 367

N.W.2d 148 (N.D. 1985; Lawrence v. Lawrence, 217 N.W.2d 792, 796 (N.D.1974). The object of the letter agreement was payment of the lease bonus. When that failed, there was a total failure of consideration and the letter agreement and lease are not binding upon Gerald in any manner.

CONCLUSION

Based upon the above and foregoing argument and law, the District Court's decision should be affirmed in all respects.

Dated this 5th day of May, 2010.

HARDY, MAUS & NORDSVEN, P.C.
137 First Avenue West, PO Box 570
Dickinson, ND 58602
1-701-483-4500

By _____
Mary E. Nordsven, ID 04367

Attorneys for:
Gerald C. Riemer and Doris E. Riemer

CERTIFICATE OF MAILING

A true and correct copy of the foregoing document was on the 5th day of May, 2010, mailed to:

Patrick W. Durick
Zachary E. Pelham
Attorneys at Law
P.O. Box 400
Bismarck, ND 58502-0400

Dann Greenwood
Attorney at Law
PO Box 1157
Dickinson, ND 58602-1157

Charles Peterson
Attorney at Law
PO Box 1097
Dickinson, ND 58602-1097

Mary E. Nordsven