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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

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

APPEAL FROM THE JUDGMENT OF DISTRICT COURT

DUNN COUNTY

SOUTHWEST JUDICIAL DISTRICT

HONORABLE ZANE ANDERSON, PRESIDING

APPELLEE LILLIE J. RIEMER'S BRIEF

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1. Whether the district court reasonably exercised its discretion in denying Irish Oil and Gas, Inc. leave to amend its Complaint to assert a futile allegation of agency.

2. Whether the district court properly granted summary judgment in favor of Lillie Riemer when Irish Oil and Gas, Inc. failed to perform its duties as required by their agreement.

II. STATEMENT OF THE CASE

1. In October, 2008, Irish Oil and Gas, Inc. ("Irish") commenced this action by serving Gerald Riemer and Doris Riemer, husband and wife,; Joanne Johnson; and Lillie Riemer, with a Summons and Complaint alleging that they had each breached a lease and bonus agreement with Irish. (App. 7-11). The Complaint indicates that the bonus agreement required Irish to make payment within 60 days of receiving the signed lease, with a possible 30 additional days in the event of title curative issues. (App. 9) The Complaint also indicates that Lillie Riemer's lease and bonus agreement was executed on February 4, 2008, but that Irish did not mail a payment to Lillie Riemer until 113 days later on May 27, 2008. (App. 9-10).

2. Gerald Riemer and Doris Riemer, husband and wife,; Joanne Johnson; and Lillie Riemer each filed and served an Answer and Counterclaim which, among other things, asserted that Irish's failure to pay consideration as required by the bonus agreement constituted a material breach, entitling them to complete recission of any alleged contract with Irish. (App. 12-35).

3. Between August 3, 2009 and October 30, 2009, each party to this action filed their own motion for summary judgment. Also during this time, Irish moved for leave to amend its Complaint. On December 17, 2009, the district court issued a Memorandum Opinion denying Irish's motion to amend its Complaint and granting summary judgment in favor of Lillie Riemer, Joanne Johnson, Gerald Riemer and Doris Riemer. (App. 78-87)

III. STATEMENT OF THE FACTS

4. Irish offered Lillie Riemer a five-year paid-up oil and gas lease pertaining to mineral rights in Dunn County, North Dakota. (App. 8). Accompanying the lease was a document entitled "LETTER AGREEMENT IN LIEU OF DRAFT FOR OIL AND GAS LEASE BONUS." (App. 8-9) The document was signed by Clarence Herz, Irish's agent, and described the terms of the lease. (App. 9) The first paragraph of this bonus agreement reads as follows:

> Irish Oil & Gas, Inc., is interested in acquiring an oil and gas lease on the above referenced mineral interest, which you appear to own mineral interest, and is offering a bonus consideration payment of $160 per net mineral acre, for a primary term of five years, and a $1/6^{th}$ royalty in the event of production. Please review the attached lease and its terms. (App. 46).

The document also contains the following language:

> Within 60 days upon receipt of the signed lease, and subject to approval of title, with right of payment extension of 30 additional days, in the event of title curative issues, from expiration of original 60 days, you will receive a check in the amount of $10,640.00 (App. 9, 46)

¶ 16 of the lease states:

> This lease shall not be terminated, forfeited, or canceled for failure of Leasee 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 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 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. 8, 41).

5. Lillie Riemer executed the lease and the bonus agreement on February 4, 2008, in Cleveland County, Oklahoma. (App. 9, 41, 46) After the execution Irish claims to have discovered a title curative issue. (App. 9) On March 25, 2008, Tim Furlong, an agent of Irish, telephoned Gerald Riemer and asked for an extension due to the newly discovered issues. (App. 39). Mr. Furlong contends that Gerald Riemer agreed to an extension on behalf of himself and the other Defendants. (App. 39). Gerald Riemer maintains that he agreed to no such extension and that he in no way was authorized to contractually bind Lillie Riemer or Joanne Johnson. (App. 62).

6. Irish did not send a bonus check to Lillie Riemer until May 27, 2008, which is 113 days after Lillie Riemer had executed the lease and bonus agreement (App. 10). On June 13, 2008, Irish received a letter from Brett D. Sanger of Turner Oil & Gas Properties, Inc., stating that Lillie Riemer had accepted another oil and gas lease from a different company. (App. 10).

IV. STANDARD OF REVIEW

Motion to Amend Standard

7. This Court has held that a decision 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 on appeal in the absence of an abuse of discretion. *Bernabucci v. Huber*, 2006 ND 71, ¶28, 712 N.W.2d 323 (citation omitted). A district court does not abuse its

discretion when it denies a requested amendment which would be futile. *Id.* at ¶ 30 (citations omitted).

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 reasonable 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.

V. LAW AND ARGUMENT

A. The District Court Did Not Abuse its Discretion in Denying Irish's Motion to Amend its Complaint As The Requested Amendment Would Be Futile.

9. 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." *Id.* However, leave to amend is not to be automatically granted. *Bernabucci v. Huber*, 2006 ND 71, ¶28, 712

N.W.2d 323 (citation omitted). A decision 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 on appeal in the absence of an abuse of discretion. *Id.* (citation omitted). In this case, the district court did not abuse its discretion. A district court does not abuse its discretion when it denies a requested amendment which would be futile. *Id.* at ¶ 30 (citations omitted).

10. As it related to Lillie Riemer, the sole change Irish sought to make to its Complaint was to contend that Lillie Riemer represented to an agent of Irish that Gerald Rimer was her agent for purposes of negotiating oil and gas leases. (App. 75). Lillie Riemer has denied this allegation. (*See* Affidavit of Lillie Riemer In Support of Motion For Summary Judgment, Docket No. 34). More importantly, Irish does not claim there is a written document authorizing Gerald Riemer to act as Lillie Riemer's agent for these purposes, but that such authorization was made to Irish's agent verbally. (App. 36)

11. Under N.D.C.C. § 9-06-04(3) an agreement for leasing for a longer period than one year, or for the sale, of real property, or of an interest therein must be in writing. Further, an agreement covered by N.D.C.C. § 9-06-04(3) "if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing subscribed by the party sought to be charged." Thus, if an agency relationship between Gerald Riemer and Lillie Riemer were to be relied upon on by Irish, the law requires that there would have to have been a written agreement in place. *Id.* No such agreement, however, has been alleged to exist, thus Irish's requested amendment is futile. 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. Accordingly, the

district court did not abuse its discretion when it denied Irish's requested amendment, and the district court's decision should be affirmed by this Court.

B. The District Court Acted Properly in Granting Summary Judgment as Irish's Breach Constituted a Total Failure of Consideration, Excusing Lillie Riemer From Any Duty to Perform Under the Lease.

12. Irish breached the lease contract by failing to timely make payments to Lillie Riemer as required by the agreement. Irish's breach constituted a total failure of consideration excusing Lillie Riemer from her duties, if any, to perform under the lease. "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." *First Nat. Bank of Belfield v. Burich*, 367 N.W.2d 148, 153 (N.D. 1985) (citations omitted). "A total failure of consideration excuses the nonbreaching party from its own duty to perform under the contract." *Id.* (citation omitted). In contrast, partial failure of consideration occurs "when the failure to perform is insubstantial, so that sufficient consideration remains to sustain the contract." *Id.* (citation omitted). When partial failure of consideration occurs, "the nonbreaching party is not excused from performance but rather is entitled to an award of damages." *Id.* (citation omitted).

13. Whether consideration has failed is a question of fact. *Id.* However, a fact question becomes a question of law for which summary judgment may be appropriate when reasoning minds could draw but one conclusion from the evidence. *Long v. Jaszczak*, 2004 ND 194 ¶ 17, 688 N.W.2d 173, 178 (citation omitted). Irish clearly failed to make payment within the required time period, as it did not mail a check to Lillie Riemer until May 27, 2008, which was 113 days after Lillie Riemer executed the lease and bonus agreement on February 4, 2008 (App.10, 46). Viewing the evidence in the

light most favorable to Irish and assuming that Irish was entitled to additional time to make payment as a result of a title curative issue, the latest arguable deadline for payment was 90 days after February 4, 2008 (i.e., May 4, 2008). (App. 46).

14. Irish does not contest the authority of the district court to issue an order for summary judgment on this matter, but rather asks this Court to determine that the failure of consideration was merely partial. The weakness of Irish's argument, however, is that it is the same argument that was made unsuccessfully before this Court in *First Nat. Bank of Belfield v. Burich*, 367 N.W.2d 148 (N.D. 1985). In that case, First National Bank of Belfield ("Bank") attempted to enforce a $2,000 promissory note against Jeffrey Burich. *First Nat. Bank of Belfield*, 367 N.W.2d at 151. The purpose of the note was to renovate a home currently owned by Mr. Burich's former spouse, but the Bank had induced Mr. Burich to borrow the $2,000 with a verbal promise to obtain title to the house. *Id.* The trial court dismissed the action, finding that the consideration failed entirely due to Bank's failure to timely secure the title to the house in Mr. Burich. *Id.* at 153. The Bank argued that there was at most a partial failure of consideration, so that even if the Bank totally failed to perform its obligation to obtain title, the consideration of the $2,000 existed separately from that promise. *Id.* This Court, however, ruled against the Bank and affirmed the trial court's judgment. *Id.* at 155. This Court also, in the same opinion, drew a distinction between "lack of consideration" and "failure of consideration" at footnote 3:

> "Failure of consideration should be distinguished from lack of consideration. When there is a lack of consideration no contract is ever formed. *Harrington v. Harrington*, 365 N.W.2d 552 (N.D. 1985). When there is a failure of consideration, a contract, valid when formed, becomes unenforceable because the performance bargained for has not been rendered. *Franklin v. Carpenter*, 309 Minn. 419, 244 N.W.2d 492 (1976)

See also, 1 Williston, Contracts, §§ 119A (3d ed.); 1 Corbin, contracts, § 133".

15. Like the Bank in *First Nat. Bank of Belfield*, Irish argues that its default is merely a partial failure of consideration. However, timely payment of the bonus payments was clearly intended to induce Lillie Riemer to enter into the leasing agreement; the first sentence of the bonus agreement states "Irish Oil & Gas, Inc. is interested in acquiring an oil and gas lease on the above referenced mineral interest . . . ." (App. 46). "Several contracts relating to the same matters between the same parties and made as parts of substantially one transaction are to be taken together." N.D.C.C. 9-07-07. The lease and the letter agreement are accordingly construed together. Irish's promise to make timely payments to Lillie Riemer, which Irish failed to do, was the object and essence of the contract.

16. Irish also contends that pursuant to paragraph 16 of the lease, Lillie Riemer was required to first seek a judicial determination as to whether a breach of the contract occurred, and if a default existed, to give Irish an opportunity to cure the default, before rescinding the contract. The district court, however, appropriately ruled that the language in paragraph 16 is not applicable to the matter in dispute. (App. 83). The district court's ruling is accurate as Paragraph 16 explicitly applies only to breaches of covenants, conditions and stipulations which are *implied* as opposed to those which are *express*. The lease states at paragraph 16 (emphasis added):

> 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 (40) forty 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).

17. What is significant is that the language in the lease upon which Irish rests its argument specifically refers to *implied* covenants, obligations, and stipulations, but not *express* covenants, obligations, or stipulations. Black's Law Dictionary defines "implied" as "Not directly expressed; recognized by law as existing inferentially." Black's Law Dictionary 757 (7th ed. 1999). In contrast, the term "express" is defined as "clearly and unmistakably communicated; directly stated." *Id.* at 601.

18. Construction of a written contract to determine its legal effect is a question of law; on appeal, this Court will independently examine and construe the contract to determine whether or not the trial judge erred in his interpretation of it. *West v. Aplar Resources, Inc.*, 298 N.W.2d 484, 490 (N.D. 1980), (citation omitted). This Court has stated that 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; and that ambiguous terms of a contract will be interpreted most strongly against the party who caused the ambiguity. *Id.* (citations omitted). As it pertains to oil and gas leases, this Court has stated it agrees with the following language of the Kansas Supreme Court:

> "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 it draws the lease." *Id.* at 490-491 (quoting *Gilmore v. Superior Oil Company*, 192 Kan. 388, 388 p.2d 602 (1964).

19. This Court has stated it also agreed with the following rationale for determining that an oil and gas lease should be construed most strongly against the lessee:

> "The lessor usually knows nothing of the law applicable to such instruments; while the operator is usually well informed. Years of experience have shown the operator how to draw a lease giving him many advantages, of which the lessor has not even thought. For this reason the courts have adopted a rule to the effect to construe an oil or gas lease most favorably to the lessor, where its terms can be so construed without doing violence to the language used." *Id.* at 491 (citation omitted).

20. Application of the term "implied" in this context is ambiguous. While Irish contends that the word "implied" is tied only to the word "covenants" and that the words "conditions" and "stipulations" refer to those that are express as well as implied, rational arguments can be made in support of the view that the term "implied" is tied to the entire phrase "covenants, conditions, or stipulations." Not only does Irish fail to offer any evidence that its interpretation is appropriate, such an interpretation would render the word "implied" superfluous and meaningless. Moreover, as the district court properly indicated "The wording appears to cover duties under the lease which pertain to development, which can be complex. It is difficult to ascertain whether a breach has occurred when one is dealing with implied responsibilities. If an explicitly expressed duty is breach, it would appear to the Court that it would be unreasonable and it would waste judicial and other resources to require the non-breaching party to obtain a Court order." (App. 84).

21. Considering that the ambiguity of the lease in this case must be strongly interpreted against Irish, the district court properly found that "the reasonable interpretation, based on the context, is that a violation of express contractual obligations does not create a duty to seek a judicial determination before terminating the lease." (App. 84). The district court's ruling should be affirmed by this Court.

VI. CONCLUSION

22. For the reasons set forth above, this Court should affirm the district court's decision in all respects, including the decision to grant Lillie Riemer's motion for summary judgment.

Dated the 10th day of May, 2010.

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VII. ADDENDUM TO STATUTES AND RULES

NDCC §9-06-04. Contracts invalid unless in writing - Statute of frauds. The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party's agent:

1. An agreement that by its terms is not to be performed within a year from the making thereof.

2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 22-01-05.

3. An agreement for the leasing for a longer period than one year, or for the sale, of real property, or of an interest therein. Such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing subscribed by the party sought to be charged.

4. An agreement or promise for the lending of money or the extension of credit in an aggregate amount of twenty-five thousand dollars or greater.

5. An agreement or promise to alter the terms of repayment or forgiveness of a debt that is in an aggregate amount of twenty-five thousand dollars or greater.

NDCC §9-07-07. Several contracts part of one transaction interpreted together. Several contracts relating to the same matters between the same parties and made as parts of substantially one transaction are to be taken together.

N.D.R.Civ.P. 15 (a) Amendments. A party's pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party's pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

VIII. CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee, Lillie J. Riemer, and as author of the above brief, hereby certifies compliance with the North Dakota Rules of Appellate Procedure, including specifically Rule 32, as to proper form of Appellee's Brief. Counsel certifies that consistent with Rule 32(a)(5), the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, addendum and certificate of compliance totals 3246.

IX. CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **CORRECTED APPELLEE LILLIE J. RIEMER'S BRIEF,** was on the 10th day of May, 2010, emailed to the following persons:

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