IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20120111

John Riedlinger, Steam Brothers of Austin/Albert Lea, LLC, Dale Stroh, Kevin Vetter, K&M, Inc., Leo Horner, and Duane Leier,

Plaintiff/Appellee,

vs.

Steam Brothers, Inc., d/b/a Steam Brothers Carpet Cleaning,

Defendant/Appellant.

On Appeal from Judgments of the District Court dated December 29, 2011, and February 1, 2012, respectively, South Central Judicial District, Burleigh County, North Dakota
Burleigh County Case No. 08-10-C-02658

The Honorable Cynthia M. Feland

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APPELLANT'S REPLY

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INTRODUCTION

The district court based its decision on extrinsic evidence – comparing a prior franchise license agreement with the Agreements. That led the district court to draw inferences against Steam Brothers, finding that the parties had "intentionally" left the Agreements silent on the issues in dispute. Licensees' brief wrongly argues that was proper. The district court erred in determining that the Agreements could not be terminated for breach, in disregarding (without analysis) Steam Brothers' argument that N.D.C.C. §§ 9-07-20 and 21 gives it a right to the information at issue, and in drawing inferences against Steam Brothers. The judgments and the protective order should therefore be reversed and the case remanded for further proceedings.

LEGAL ARGUMENT

I. Licensees' argument that Steam Brothers is judicially estopped from seeking discovery is without merit.

Licensees argue that Steam Brothers is judicially estopped from asserting that discovery is necessary because they claim Steam Brothers allegedly "argued discovery was unnecessary." That statement is false and Licensees' selective citations from Steam Brothers' brief and oral argument opposing their attorney fee motion are misleading. When opposing Licensees' attorney fee motion, Steam Brothers noted that *Licensees' position* was that discovery was unnecessary. Steam Brothers then argued based on *Licensees' position*, that the fees Licensees incurred in discovery – mainly obstructing it – were unnecessary and should not be awarded.

Steam Brothers made its position clear in its brief opposing Licensees' motion for attorneys' fees, stating that "Plaintiffs assert" that the case "present[ed] strictly legal questions, not driven by any facts." (Supp. App. 52-53.) At oral argument, Steam

Brothers' counsel stated that "under [Licensees'] view of things" discovery was unnecessary. (App. 640-41.) He added, "I will acknowledge, Steam Brothers' view of this case is not the same as theirs, obviously. It's not that it could be decided solely by the contracts." (App. 642.) Steam Brothers' counsel added, "Now, we certainly acknowledge we take a different view of the case . . . but under their view there was an easy route to avoid a lot of these fees." (App. 660.)

Steam Brothers has *never* taken the position that discovery was unnecessary. Accordingly, Licensees' argument that Steam Brothers is judicially estopped from seeking discovery is without merit.

II. The Agreements do not preclude legally implied terms.

Licensees argue that two provisions of the Agreements preclude legally implied terms. They cite, out of context, a provision stating that neither party "shall have the power to obligate the other," and another, again out of context, stating that the Agreements "fully govern." Neither precludes legally implied terms.

In context, the first provision states, "The Grantor and the Licensee are not joint venturers, partners, or agents of each other, and neither shall have the power to obligate the other, except as is set forth in this Agreement," and continues to further discuss the parties' relationship with respect to third parties. (App. 392.) The provision plainly applies to the parties' relationship with respect to third parties (i.e., the power of one partner, for example, to obligate another to a third party). It does not purport to preclude implied terms. Moreover, Steam Brothers does not purport to have "the power to obligate" Licensees to provide the information (i.e., to agree on their behalf). It is North Dakota law – as explicitly incorporated into the parties' Agreements – that obligates Licensees to those things that are "necessary" or "incidental" to the Agreements.

The second provision states as follows:

> This Agreement, upon execution, shall supersede and replace the prior License Agreement between the parties. As such, the prior License Agreement shall be considered fully terminated and ineffective. This Agreement shall hereafter fully govern the relationship between the Grantor and the Licensee.

(App. 383.)

That provision simply means that the prior franchise agreements were "fully terminated" and the new (1991) Agreements govern the relationship. It does not purport to exclude legally implied terms. Steam Brothers, moreover, does not claim that its rights to the information in dispute or to terminate for breach arise, as a matter of contract, from the prior franchise agreements. They are imposed by law. The provisions Licensees cite therefore provide no support for their position.

III. Licensees' argument that the district court should be affirmed because the Agreements are "unambiguous" is without merit.

A. The Agreements are neither clear nor ambiguous on the matters in dispute – they are silent.

Licensees devote much of their brief to arguing the general ambiguity or clarity of the Agreements, divorced from any particular language. Throughout their brief, Licensees claim that the "nature" of the Agreements is unambiguous. (Appellees' Br. at 4.) They claim the Agreements "unambiguously do not" obligate them to provide the information in dispute and "unambiguously fail to provide [Steam Brothers] with a termination right." (Appellees' Br. at 1, 29.) Those statements are illogical and simply mean the Agreements are silent on the matters in dispute.

Under North Dakota law, "When good arguments can be made for either of two contrary positions as to the meaning of *a term in a document*, an ambiguity exists." Atlas Ready-Mix of Minot, Inc. v. White Properties, Inc., 306 N.W.2d 212, 220 (N.D. 1981)

(emphasis added). The Agreements assume that Licensees are obligated to provide the information in dispute (by, among other things, making provision for Licensees to "communicate[]" such information to Steam Brothers "by virtue of" the "operation" and "enforcement" of the Agreements) and that Steam Brothers may terminate them for breach (by preserving all "remedies" and contemplating "termination . . . for any reason").[1] Yet the Agreements have no terms that explicitly state Licensees must, or need not, produce the information, or that Steam Brothers may, or need not, terminate/cancel for breach. Without governing terms, the question of clarity or ambiguity is irrelevant.

Licensees nonetheless assert that the "unambiguous nature" of the Agreements justified the district court in (a) "basically quash[ing] any efforts that the defense had in this case to get discovery," as the district judge understood her order, and (b) drawing inferences against Steam Brothers from extrinsic evidence. Licensees base their argument on Langer v. Bartholomay, which provides that extrinsic evidence (i.e., evidence "not contained in the body of an agreement") is not admissible "to contradict the written language" of a contract. 2008 ND 40, ¶ 12, 745 N.W.2d 649; see also Black's Law Dictionary (6th Ed. 1990) (defining "extrinsic evidence").

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[1] Licensees assert that under Steam Brothers' view of the confidentiality provision, they would also be able to demand similar information from Steam Brothers, as the Agreements also impose a confidentiality obligation on them. (Appellees' Br. at 23, n. 12.) The argument has no merit. The Agreements provide that "Adam Leier may be available as a consultant" to Licensees, which explains why Licensees are subject to confidentiality obligations. Nothing in the Agreements, however, explains why Steam Brothers is required to keep the information at issue confidential, except if Licensees are required to provide it to Steam Brothers by virtue of the Agreements' "operation" and "enforcement."

But because the Agreements are silent on the issues in dispute, there is no written language to contradict. Licensees' argument, as well as the district court's order, improperly conflated the interpretation of specific contract language with the legal implication of "necessary" or "incidental" terms. While the principle set forth in Langer applies to the former, it does not to the latter.

B. The district court's order – and Licensees' argument – is based on extrinsic evidence.

Licensees' argument concerning extrinsic evidence is contrary to their own litigation position and to the basis of the district court's decision. For example, in their summary judgment affidavits, Licensees claimed that the Agreements included a "termination provision," though the provision governed only the "term." The district court accepted their position, as set forth in their extrinsic affidavits, over that set forth in Steam Brothers' Adam Leier affidavit. (Appellant's Br. at 18-19.)

Additionally, in their extrinsic affidavits, Licensees implied (but did not directly state) that the Agreements' vague reference to "a very different business relationship" related to their obligation to provide business information and Steam Brothers' inability to terminate for breach. (Appellant's Br. at 19.) This invited the district court to examine yet more extrinsic evidence, one party's former franchise license agreement (which was not submitted on summary judgment).[2] (Appellant's Br. at 20.) Based on a factual

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[2] Licensees acknowledge that the record they submitted on summary judgment did not include the *only* prior franchise license agreement in the district court file. They assert, however, that the district court properly based its decision on a comparison of that former agreement with the Agreements. North Dakota Rule of Civil Procedure 56, however, provides that a court shall decide a summary judgment motion "by examining the pleadings and *evidence before it* and by interrogating the attorneys" (emphasis added). The agreement was not "before" the district court and should not have been the

comparison of that former agreement with the Agreements, the district court drew inferences against Steam Brothers, disregarding Adam Leier's testimony that the different relationship related to the payment of "on-going franchise fees," not the issues in dispute. (Appellant's Br. at 19-20.)

On appeal, Licensees continue to argue extrinsic evidence, urging the Court to draw inferences against Steam Brothers on the basis of Licensees' franchise offering circulars and, as the district court did, on the claimed period of "almost two decades of performance." (Appellees' Br. 4-7, 9-10.) From the offering circulars, Licensees argue (as the district court found) that, when entering into the Agreements, Steam Brothers *intentionally* gave up its prior right to police the use of its name and trademarks, as well as the remedy of termination/cancelation. (Appellees' Br. 27-28, 32-34.) The issue of contracting parties' intent, however, is a fact issue when based on extrinsic evidence. See Garofalo v. St. Joseph's Hospital, 2000 ND 149, ¶ 7, 615 N.W.2d 160. From the parties' claimed history, they argue that Steam Brothers is seeking to rewrite the Agreements, rather than to avail itself of rights implied by North Dakota law – the very law the parties incorporated into the Agreements.

In truth, then, Licensees' position is not that extrinsic evidence should be excluded (their argument and the district court's decision are based upon it) but that theirs

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basis of the district court's decision. (Appellant's Br. at 6, n. 2.) In contrast, the federal rule provides that the "court need consider only the cited materials, but it may consider other materials in the record" – a permission not in North Dakota's rule. Compare Fed. R. Civ. P. 56(c)(3). There is good reason for North Dakota's rule, as it prevents the district court from improperly granting a motion on the basis of evidence that was not submitted, explained, and argued on summary judgment.

should be accepted over that presented by Steam Brothers. That is improper on summary judgment, and it was error for the district court to rule accordingly.

IV. Licensees' arguments that the district court should be affirmed based on the doctrine of integration and the parol evidence rule are without merit.

Licensees argue that the Agreements are completely integrated and, thus, that parol evidence must be excluded. The parol evidence rule, however, does not preclude legally implied terms. (Appellants' Br. at 32-26.) It excludes only "oral negotiations or stipulations concerning [a written contract] which preceded or accompanied . . . execution" when offered for certain purposes. N.D.C.C. § 9-06-07. No such evidence is required to establish legally implied obligations (as opposed to a claim asserting that the parties, in fact, agreed to something more than or different from what their writing sets forth). Moreover, such evidence is always permitted to establish that a legally implied term is reasonable and necessary. (Appellant's Br. at 35-36.)

V. North Dakota's statutes and case law concerning implied terms require reversal.

In its principal brief, Steam Brothers explained that N.D.C.C. §§ 9-07-20 and 21, as well as this Court's precedent, require reversal. (Appellant's Br. 24-36.) In response, Licensees argue that a court may imply terms under § 9-07-20 "only when necessary to interpret an ambiguity," citing Mandan Educ. Ass'n v. Mandan Pub. Sch. Dist. No. 1, 2000 ND 92, ¶ 9, 610 N.W.2d 64. They further assert that § 9-07-21 "cannot be used to imply terms into an unambiguous and integrated agreement," citing Reitman v. Miller, 54 N.W.2d 477 (1952). Neither case supports Licensees' position.

The Mandan case merely states that course of dealing and usage "should" be given effect in interpreting an ambiguity, citing N.D.C.C. § 9-07-20. 2000 ND 92, ¶ 9,

610 N.W.2d 64. The case does not purport to limit the application of § 9-07-20 to interpreting ambiguities. Such a limitation would be contrary to the text of the statute, which implies stipulations that are "necessary" to make a contract "reasonable," and is not limited in application to ambiguous contracts.

The Reitman case, while noting that one party argued the contract was "ambiguous in that it is silent," primarily dealt with whether a contract could be modified by a subsequent oral agreement. 54 N.W.2d at 478-81. The majority ruled that "custom and usage" evidence could not be used to "vary [a contract's] clearly expressed terms"; § 9-07-21 was not part of the majority's analysis. Reitman, 54 N.W.2d at 479. Thus the case was fundamentally different from this one and does not support the district court's ruling.

VI. The district court erred in finding that the Agreements cannot be terminated without mutual consent.

In its principal brief, Steam Brothers explained that, well before summary judgment, it had already terminated/canceled the Agreements for breach, rendering Licensees' declaratory claims moot. (Appellant's Br. at 21-23.) Further, because Licensees had presented no evidence to warrant an injunction or specific performance (nor even made such a claim), Steam Brothers explained that the district court erred in ignoring the terminations and reinstating the Agreements. (Id.) In response, Licensees argue that, while the Agreement preserved all Steam Brothers' "remedies," termination/cancelation for breach is a "right" that must be explicitly set forth.

This Court, however, has repeatedly held that termination or cancelation of a contract for breach is a "remedy." See Keller v. Hummel, 334 N.W.2d 200, 203 (N.D. 1983); Tower City Grain Co. v. Richman, 262 N.W.2d 22, 24 (N.D. 1978). Steam

Brothers did not purport to avail itself of some contractual "right" to terminate, but instead of the "remedy" provided by this Court's long-standing precedent. The ultimate determination of whether the termination/cancelation was justified could perhaps be an issue in the litigation, but the fact of termination is inescapable.

Accordingly, Licensees' failure to plead a claim for injunction/specific performance and to submit evidence that damages would be inadequate (assuming a wrongful termination), requires reversal. North Dakota law requires a party seeking such relief to plead and prove "that the legal remedy of damages is inadequate." Wolf v. Anderson, 334 N.W.2d 212, 215 (N.D. 1983). Because Licensees did neither, the district court had no basis to reinstate the Agreements and its decision should be reversed.

CONCLUSION

Steam Brothers respectfully requests that the judgments and the protective order be reversed and the case be remanded for further proceedings.

Dated: June 25, 2012

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IN THE SUPREME COURT
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John Riedlinger, Steam Brothers of Austin/Albert Lea, LLC, Dale Stroh, Kevin Vetter, K&M, Inc., Leo Horner, and Duane Leier, Plaintiff/Appellee, vs. Steam Brothers, Inc., d/b/a Steam Brothers Carpet Cleaning, Defendant/Appellant.	**AFFIDAVIT OF SERVICE BY MAIL**

Andrea Nowak, being first duly sworn on oath, deposes and states that she is a resident of the City of West Fargo, North Dakota, of legal age, and not a party to the above-entitled matter.

On June 25, 2012, affiant deposited in the United States Mail at Fargo, North Dakota and sent a true and correct copy of the following documents:

Appellant's Reply.

Copies of the foregoing were sent to the last known address of said addressee and sent securely in an envelope with postage duly paid and addressed as follows:

Rob A. Stefonowicz
Larkin, Hoffman, Daly & Lindgren, Ltd.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Bloomington, MN 55431-1194

To the best of affiant's knowledge, the address above given was the actual address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the Rules of Civil Procedure.

Andrea Nowak
Andrea Nowak

Subscribed and sworn to before me on June 25, 2012.

Christy A. Carrier
Notary Public
Cass County, North Dakota

CHRISTY A. CARRIER
Notary Public
State of North Dakota
My Commission Expires Nov. 1, 2014