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OCTOBER 28, 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kevin Pifer, Plaintiff and Appellee, v. Barbara McDermott, Defendant and Appellant	)))))))))	Supreme Court No. 20130027 Grand Forks County No. 18-2010-CV-01940

APPELLANT'S PETITION FOR RE-HEARING

APPEAL FROM THE DISTRICT COURT,
GRAND FORKS, NORTH DAKOTA
NORTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE LAWRENCE E. JAHNKE, PRESIDING

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I. The extreme remedy of summary judgment should not have been granted where Plaintiff's evidence is conflicting and actually supports Appellant McDermott's position.

[¶1] North Dakota law steadfastly holds "[s]ummary judgment is an **extreme remedy** and should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant [Plaintiff Pifer]." *Albers v. NoDak Racing Club, Inc.*, 256 N.W.2d 355, 359 (N.D. 1977) (emphasis added). Additionally, "summary judgment should be granted only if there is no genuine issue of fact and there is **no conflicting inference** from the facts." *Id*. at 358 (emphasis added). As a matter of overwhelming law, summary judgment should not have been granted in this instance.

[¶2] The Plaintiff claims that a purported option contract, despite having all the hallmarks of a contract, was supposedly a gift by the Defendant's mother. In contrast, the Defendant (Barbara McDermott) has set forth that this was not a gift but a failed contract that has no legal consequence or import. Indeed, Plaintiff Pifer's own testimony clearly shows that he and Dorothy Bevan, a distant relative of his, consistently dealt with each other on a contractual basis. (Pifer Tr. p. 30, R.O.A. 81) This Honorable Court in its decision states "Pifer assisted Bevan with managing her farmland and with performing other miscellaneous tasks…." *Pifer v. McDermott*, 2013 ND 153, ¶ 2, 836 N.W.2d 432. This statement is simply incorrect whereas Pifer did not assist Dorothy Bevan in a charitable manner, but rather his company had a contract with Ms. Bevan to manage her farmland for 7% of the gross income received from said property. (Pifer Tr. p. 37, R.O.A. 81; R.O.A. 47) This was the going rate for a management fee – as Pifer readily admits.

(Pifer Tr. p. 37, R.O.A. 81) Moreover, this agreement shows that Pifer and Bevan dealt with each other on a contractual basis.

[¶3] The Plaintiff claims this option contract was purportedly a gift, however, Don Hager, the person who drafted the agreement, refers to the option as a legally binding agreement in his deposition testimony. (Hager Tr. pp. 86, 108, R.O.A. 80) As a result, the drafting attorney's own conflicting testimony creates a triable issue of fact as to whether this was a purported gift or an invalid option contract. Additionally, Pifer's testimony that his company managed the property at the going rate pursuant to an agreement with Ms. Bevan is indicative that the parties always dealt with each other in a contractual manner and this evidence strongly supports Ms. McDermott's position.

II. The Court applied the wrong legal standard in this instance. A gratuitous option lapses upon the death of the offeror.

[¶4] As this Honorable Court knows, it is Plaintiff Pifer who bears the burden in attempting to prove his case. North Dakota law holds "[a] motion for summary judgment is not an opportunity to conduct a mini-trial," and "the party opposing summary judgment is entitled to present its evidence to a finder of fact in a full trial." *Farmers Union Oil Company of Garrison v. Smetana*, 2009 ND 74, ¶ 11, 764 N.W.2d 665. Additionally, "[i]t was not the purpose of [summary judgment] to require a party to try his case on affidavits with no opportunity to cross- examine witnesses." *Id.* Rather than applying this burden to the Plaintiff, this Court erroneously required that Barbara McDermott prove that the purchase option was withdrawn. Specifically, the decision states "McDermott does not argue that the purchase option was withdrawn, and we have not found any indication in the record that either Bevan or McDermott formally or informally withdrew the option prior to Pifer's attempt to exercise the option." *Pifer* at ¶ 12. The

Court further states "[a]lthough *Horgan* involved a purchased option, we see no reason to treat a gratuitous option differently when it has not been withdrawn prior to acceptance." *Pifer* at ¶ 14. With all due deference, the Court's legal reasoning here is clearly erroneous. That is, a gratuitous option is treated far differently under the law. Specifically, the overwhelming case law in this country holds that a **gratuitous option lapses upon the death of the offeror.** *Pearl v. Merchants-Warren Nat. Bank of Salem*, 400 N.E.2d 1314 (Mass.App. 1980)(*citing* 1 Williston, Contracts § 55 (3d ed. 1957)); 1 Williston, Contracts § 62 (3d ed. 1957) ; *Aitken v. Lang's Adm'r*, 51 S.W. 154 (Ky. 1899); *Tucker v. Rucker*, 73 So.2d 269 (Miss. 1954); *Beall v. Beall*, 434 A.2d 1015 (Md. 1981); *Jordan v. Dobbins*, 122 Mass. 168 (1877); *Pratt v. Trustees of Baptist Soc. of Elgin*, 93 Ill. 475 (1879); 30 Williston on Contracts § 77:69 (4th ed.). The purchase option, as a matter of law, was not valid and enforceable.

III. A purchase option cannot be "gifted" to another party.

[¶5] This failed legal contract also cannot be reclassified as a purported "gift" – as was argued by the Plaintiff. Specifically, the Plaintiff's argument is based upon two faulty legal premises. The Plaintiff first claims "the Purchase Option was a valid and enforceable contract." (R.O.A. 78) This is simply not true as a gratuitous option lapses on the death of the offeror. Thereafter, the Plaintiff argues in the alternative, that supposedly "a purchase option is an interest in real property that may freely be transferred or given," and that "real property, like personal property, can be the subject of a gift in which no consideration is necessary." (R.O.A. 78) North Dakota law clearly holds that an "option to purchase property is a **mere privilege** given by the owner to the optionee and does not constitute the optionee a purchaser of said property nor give him

any right to or interest in the property…." *Hutlberg v. City of Garrison*, 79 N.D. 356, 361, 56 N.W.2d 319, 322 (1952) (*citing Larson v. Wood*, 75 N.D. 9, 10, 25 N.W.2d 100, 101 (1946)) (emphasis added); *Larson v. Cole*, 76 N.D. 32, 33, 33 N.W.2d 325, 327 (1948). This invalid contract also fails under the "gift theory" espoused by Plaintiff's counsel.

IV. Alternatively, there is ample evidence that the option contract was not intended as a gift and that Ms. Bevan's purported offer was withdrawn.

[¶6] Even if North Dakota decides to be the only state that permits a gratuitous option to remain open after the offeror's death, there are clear issues of fact as to whether Ms. Bevan intended to gift the property to the Plaintiff. Indeed, this Honorable Court would also have to overturn well-grounded law which holds that an option contract is not a gift nor does such a contract give any right or interest in property.

[¶7] Attorney Hager in his deposition testimony states that Pifer was removed as Bevan's power of attorney in 2006. (Hager Tr. p. 26, R.O.A. 80) In 2010, Pifer's company sued Dorothy Bevan for purported land management fees. *The Pifer Group LLC v. Dorothy Bevan*, Cass County District Court, Case No. 09-2010-CV-00767. Finally, Ms. Bevan in 2009 established a joint tenancy for herself and her daughter – Barbara McDermott. This is compelling evidence that Bevan never intended to gift this property to the Plaintiff, and/or that Ms. Bevan had revoked her 2004 offer. In the least, there is clearly a triable issue of fact as to whether this was a gift and/or whether the offer was revoked. "An offer is revoked when the offeree learns of acts by the offeror that are inconsistent with the continuance of the offer or that imply that the offer has been

revoked."[1] *First Dev. Corp. of Kentucky v. Martin Marietta Corp.*, 959 F.2d 617, 621 (6th Cir. 1992)(citing 1 Williston, Contracts § 57 (3d ed. 1957); *McCutchen v. Iowa Bank of Fort Madison*, 5 N.W.2d 813, 816 (Iowa 1942) (sale of land was evidence of revocation of the offer); *Restatement (Second) of Contracts* §§ 42 & 43 (1979). Moreover, North Dakota law clearly holds "under a gift analysis, the donor's intent is a question of fact." *Doedon v. Stubstad*, 2008 ND 165, ¶ 12, 755 N.W.2d 859.

[¶8] The Court determined an option contract was purportedly a valid gift based upon the self-serving and conflicting testimony of the Plaintiff and the attorney who drafted the purported option contract. Indeed, much of Plaintiff Pifer's deposition testimony showed that he and Ms. Bevan dealt with each other on a contractual basis and Attorney Hager refers to the option as a legally binding agreement. North Dakota law holds a "district court may not weigh the evidence, determine credibility, or attempt to discern the truth of the matter when ruling on a motion for summary judgment." *Farmers Union* at ¶ 10. Consequently, the evidence and the credibility of the parties, as a matter of law, should have been decided by a jury.

[¶9] With all due deference to this Honorable Court, in its decision the Court misapprehends several facts which are used to support the Plaintiff's position for summary judgment. For instance, the Court states "[t]he attorney described Bevan's relationship with Pifer as akin to a 'mother/son' relationship." *Pifer* at ¶ 17. However, Attorney Hager admits that he only saw Pifer and Bevan on one occasion – when the purchase option was signed. (Hager Tr. pp. 108-09, R.O.A. 80) He testified that he never saw the Plaintiff and Ms. Bevan together before or since. (Hager Tr. pp. 108-09,

[1] Applying this Court's reasoning, the recordation of an instrument (joint tenancy deed) in 2009 placed the Plaintiff on notice that the failed contract and/or purported gift was withdrawn by Bevan. *Pifer* at ¶ 15.

R.O.A. 80) Clearly, Attorney Hager was in no position to determine the relationship between Plaintiff and Ms. Bevan. In another instance, Plaintiff Pifer claims he was surprised by the purchase option contract as evidenced by the Court's decision wherein it states "Pifer testified that he was unaware of Bevan's decision to give him the option." *Pifer* at ¶ 17. However, a jury should have determined the Plaintiff's credibility regarding this issue whereas the Plaintiff attempted to purchase the property a few months earlier as evidenced by a 2003 letter from his company. (R.O.A. 208) The Plaintiff's own purchase letter creates a triable issue of fact. Clearly, he was negotiating a purchase of the property which is indicative of a contract, albeit a failed one, rather than a gift.

V. The Plaintiff, in the unlikely event that he would prevail at trial, could only obtain 50% of the property for that was Ms. Bevan's interest in the property at the time of her death.

[¶10] The Court also misstated the law by stating "when Bevan transferred her interest in the property to herself and McDermott as joint tenants in 2009, McDermott became a 'successor' to Bevan's fee simple interest in the property…." *Pifer* at ¶ 13. This legal reasoning is simply wrong whereas Barbara McDermott may have succeeded Ms. Bevan's 50% share of the property upon her passing, however, upon the creation of a joint tenancy Barbara McDermott owned half of the property upon the creation of this joint tenancy. At the time of her death, if a jury finds this failed contract to be a gift, then Bevan could only bequeath half of her share to the Plaintiff. The Plaintiff, in the unlikely event that he would prevail in his case, could only receive half of the property.

CONCLUSION

[¶11] As a matter of law, this failed option contract has no legal bearing nor can this failed option contract be reclassified as a purported "gift." This Honorable Court must rule in favor of Appellant McDermott, or in the least, afford the Appellant a trial where triable issues of fact clearly exist.

DATED this 28 day of October, 2013.

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AFFIDAVIT OF MAILING

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 28 day of October, 2013, she mailed a copy of the foregoing *Appellant's Petition for Re-Hearing, Motion for Admission of John Siskopoulos Pro Hac Vice, Affidavit of John Siskopoulos Pro Hac Vice;* and (proposed) *Order for Admission of John Siskopoulos Pro Hac Vice* by placing a true and correct copy thereof in an envelope, addressed to the following:

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and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Annette Kirschenheiter

Subscribed and sworn to before me this 28 day of October, 2013.

DAYNA BARONE
Notary Public
State of North Dakota
My Commission Expires October 10, 2018

Notary Public