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STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

Supreme Court Case No. 20130084
McLean County District Court No. 28-2012-CV-00018

Robert D. Knorr and Cheri Knorr,

Plaintiffs/Appellees,

v.

Jon Norberg and Alonna Norberg/Jon Norberg

Defendant/Appellant.

BRIEF OF DEFENDANT JON NORBERG/APPELLANT

**APPEAL FROM THE ORDER RE:
COURT TRIAL ON JANUARY 24, 2013,
MEMORANDUM OPINION AND ORDER FEBRUARY 15, 2013
AND THE JUDGMENT ENTERED SEPTEMBER 20, 2013,
IN DISTRICT COURT, COUNTY OF MCLEAN, STATE OF NORTH DAKOTA,
THE HONORABLE THOMAS J. SCHNEIDER, PRESIDING**

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STATEMENT OF ISSUES

- 1) Did the District Court incorrectly conclude there was sufficient evidence of an alleged oral option agreement sufficient to constitute partial performance removing the contract from the statute of frauds?
- 2) Should the District Court's Findings and Order of February 15, 2013 and the Judgment entered September 20, 2013 be reversed and remanded?

STATEMENT OF THE CASE

This is an appeal from a January 24, 2013 Court Trial in South Central Judicial District, McLean County, wherein, the Court found in favor of the Plaintiffs and against Defendant, Jon Norberg. (Appx 47-51). Furthermore, this is an appeal from a Judgment of the District Court, dated February 15, 2013 and an Order dated September 24, 2013. (Appx 47-51; 115-118).

This action was commenced via Summons and Complaint dated February 7, 2012. (Appx 5-8). An Answer and Crossclaim was interposed by Defendant Alonna Norberg on or about February 17, 2012. (Appx 15-16). Defendant Jon Norberg interposed an Answer to the Complaint and an Answer to the Crossclaim on or about March 12, 2012. (Appx 17-19).

This action arises out of a dispute over the existence of an oral agreement of an option to repurchase property. (Appx 5-14). A day long Court Trial was held on January 24, 2013. Order for Judgment and Judgment were entered on February 15, 2013 and September 24, 2013. (Appx 47-51; 115-118). This appeal followed and was filed on March 15, 2013. (Appx 120).

STATEMENT OF FACTS

Defendant Jon and Alonna Norberg are the legal owners of a lake home property, legally described as follows:

Lot Four (4) of Snake Creek Cottage Site Area, according to the Official Plat thereof on file in the Office of the County Recorder in and for McLean County, North Dakota, platted out of the North Half (N½) of Section Seven (7), Township One Hundred Forty-eight (148) North, Range Eighty-three (83) West.

The Defendants purchased the property from Defendant Alonna Norberg's parents, Plaintiffs, Robert and Cheri Knorr pursuant to a Warranty Deed dated December 2, 2010. (Appx 28-29).

At the time of the purchase, Robert and Cheri Knorr were experiencing financial hardship and were unable to make the mortgage loan payments on the property. (Appx 121). Robert and Cheri Knorr entered into a loan workout agreement with their creditor, Choice Financial Bank, which required them to pay off their loan on the property. (Appx 121). The Knorrs approached Jon Norberg about Jon and Alonna purchasing the home, because they felt they had no other choice but to sell the property. (Appx 122). Accordingly, the parties entered into a Purchase Agreement for the property on or about October 6, 2010. (Appx 54-56). The purchase agreement fails to mention an option for the Knorrs to purchase the property from Jon and Alonna Norberg. (Appx 54-56). The parties then signed and executed a Warranty Deed to the property on December 2, 2010, which was recorded with the McLean County Recorder's Office on December 8, 2010. (Appx 57-58).

The Knorrs remained on the property and paid rent to Jon and Alonna Norberg. (Appx 123). Shortly after the closing in December 2010, Jon Norberg was presented with a lease agreement for the Knorrs to rent the lake home property which did not contain an option to purchase. (Appx 76-81). The lease agreement was prepared by the Knorrs' attorney and presented to Jon Norberg. Jon and Alonna Norberg never signed the lease agreement. Several months later, Jon Norberg was presented with a lease agreement with option to purchase. (Appx 30-34). Around the time Jon Norberg was presented with the lease agreement with option to purchase, Jon and Alonna Norberg were experiencing marriage difficulties, and it was evident around that time that a divorce between the two was likely. The lease with option to purchase was eventually signed by Robert and Cheri Knorr as well as Alonna Norberg. (Appx 30-34). It is undisputed that Jon Norberg did not sign or execute the lease agreement with option to purchase. (Appx 30-34). There was no evidence presented by any party during the litigation of this matter or at trial that Jon Norberg ever signed the lease agreement with option to purchase.

In its Order finding in favor of the Knorrs' claims, the District Court concluded that the Knorrs' partial performance satisfied the exception to the statute of frauds set forth in N.D.C.C. §9-06-04.

LAW AND ARGUMENT

- I. **The District Court erred in concluding that the lease agreement with option to purchase is enforceable against Jon Norberg under North Dakota Law.**

A. Standard of Review.

The District Court held in its Memorandum Opinion and Order dated February 15, 2013 that there was clear and unequivocal evidence of an oral option agreement sufficient to constitute part performance removing the contract from the statute of frauds. (Appx 47-51). On appeal, this Court applies a de novo standard of review for questions of law. Oien v. Oien, 2005 ND 205, ¶8, 706 N.W.2d 81.

It is the position of Jon Norberg, that even if all of the allegations set forth in Plaintiff's Complaint, and the testimony of parties at trial, are taken as true and construed in the light most favorable to the Plaintiffs, Jon Norberg is still entitled to a judgment as a matter of law in his favor on the grounds that the statute of frauds precludes any relief against Jon Norberg. The Knorrs do not specifically allege that Jon Norberg signed the lease agreement with option to purchase. (Appx 6-8). Jon Norberg did not sign or execute the lease agreement with option to purchase and therefore he is not bound by the provisions of this document. (Appx 30-34). The fact that Jon Norberg did not sign the lease agreement with option to purchase cannot be contested. Jon Norberg did not sign the lease with option to purchase which was obviously prepared at Plaintiffs' direction sometime after the fact, and there were no set of facts presented at trial or otherwise that Jon Norberg did in fact sign the lease agreement with option to purchase.

B. The District Court erred in concluding that the oral and unsigned lease agreement with option to purchase is enforceable.

The North Dakota Supreme Court has, in the past, addressed similar issues regarding oral and unsigned agreements for the purchase and/or sale of land. The North Dakota Supreme Court cited §9-06-04 N.D.C.C., and Wachter Dev., LLC v.

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Gomke, 544 N.W.2d 127 (N.D. 1966), which held that “generally, a contract for the sale of land is unenforceable against one who has not signed it” 544 N.W. 2d 127, 131 (N.D. 1966).

Section 9-06-04(3), N.D.C.C. provides in part that “the following contracts are invalid, unless the same note or memorandum thereof is in writing and subscribed by the party to be charge or by the parties’ agent:

3. An agreement...for the sale, of real property, or of an interest therein. Such agreement, if made by an agent of the parties sought to be charged, is invalid unless the authority of the agent is in writing subscribed by the parties sought to be charged.”

A review of the Complaint in this matter herein establishes the allegations of the Knorrs in paragraph III that:

“the Defendants made a promise, through oral and written representation, that if the Plaintiffs transferred the McLean County property to the Defendants, they would lease it back to the Plaintiffs and grant them an option to repurchase the property for the amount of the indebtedness owing to Choice Financial.” (Appx 6).

The Complaint in this matter does not allege or represent that Jon Norberg ever signed or executed the lease agreement with option to purchase or any other document governing the conveyance of the real estate that is the subject matter of the Complaint. (Appx 6-8). No lease agreement with option to purchase, allegedly

signed by Jon Norberg, was ever presented at trial of this matter. There is no allegation that Alonna Norberg was the agent for Jon Norberg. Even if the allegations of the Plaintiffs' Complaint are true and construed in the light most favorable to the Plaintiffs, there are no set of facts the Plaintiffs can create which would establish that Defendant Jon Norberg is bound by the provisions of the lease agreement with option to purchase. Jon Norberg did not sign or execute the lease agreement with option to purchase, and under North Dakota law he is not bound by the terms and conditions of the lease agreement with option to purchase as alleged by the Knorrs. (Appx 30-34).

The only fully executed conveyance document presented at trial was the Warranty Deed dated December 2, 2010 in which Robert and Cheri Knorr deed the property that is the subject matter of this law suit, to Jon and Alonna Norberg. (Appx 28). (Appx 124-126). The lease agreement with option to purchase was not presented to Jon Norberg until months after the deed had been executed and filed with the county recorder's office. (Appx 124). Jon Norberg never agreed to any terms and conditions set forth in the lease agreement with option to purchase, and accordingly under the provisions of North Dakota Law, N.D.C.C. §9-06-04(3), the lease agreement with option to purchase is invalid as it was never subscribed by Jon Norberg, the party the Plaintiffs seek to charge with the obligations under the provisions of the subject lease agreement with option to purchase.

C. The District Court erred in finding that the Knorrs' actions constituted partial performance.

It is clear under North Dakota Law that in order to enforce an oral contract, the Knorrs must establish part performance not only consistent with but consistent

only with the existence of an alleged oral agreement. Kohanowski v. Burkhardt, 2012 N.D. 199, ¶16 (emphasis added) 821 N.W. 2d 740.

Therefore, the Knorrs must present some evidence demonstrating an act of partial performance, which was consistent only with the existence of an alleged unwritten contract, which could not be accounted for by some other hypothesis. Id. The Knorrs have presented no such testimony.

In Kohanowski v. Burkhardt, the Plaintiff loaned \$10,000.00 to his brother and his former fiancé for the purchase of a new house. 2012 N.D. 199, ¶2 821 N.W. 2d 740. The Plaintiff alleged that the money would be repaid in 36 monthly payments over three years. Id. at ¶3. Burkhardt signed two checks payable to the Plaintiff for \$215.00 each Id. at ¶4. However, after the Defendant and Plaintiff's brother called off the engagement, no further payments were made. Id. Plaintiff alleged that the two payments constituted part performance, removing the agreement from the statute of frauds. Id. at 15. The Court disagreed stating:

“Jon Kohanowski has overly simplified and mischaracterized the nature of part performance required to remove an oral agreement from the statute of frauds. To take a contract out of the statute of frauds, the party seeking to enforce the oral contract must establish part performance that is not only consistent with, but that is consistent **only** with the existence of the alleged oral contract.” Id. at ¶16 (emphasis in original).
“When it is alleged that the partial performance removes an alleged agreement from the statute of frauds, the most

important question is whether the part performance is consistent only with the existence of the alleged contract.”

Id. (citing In re State of Thompson, 2008 N.D. 144, ¶12, 752 N.W.2d 624; Fladeland v. Gudbranson, 2004 N.D. 118, ¶8 681 N.W.2d 431; Johnson Farms v. McEnroe, 1997 N.D. 179, ¶19, 568 N.W.2d 920). As further clarified in State of Thompson at ¶13 (“Anderson v. Mooney, 279 N.W.2d 423, 429 (N.D. 1979))”):

“Another requirement of the doctrine...is that the acts relied upon as constituting part performance must unmistakably point to the existence of the claimed agreement. If they point to some other related relationship...or maybe accounted for on some other hypothesis, they are not sufficient.” Id.

This Court in Kohanowski found that the alleged oral agreement was not the only plausible explanation for the payments and, thus, the Plaintiff failed to establish part performance sufficient to remove the agreement from the statute of frauds. Id. at ¶18.

Like in Kohanowski the part performance alleged by the Knorrs does not “unmistakably point to the existence of the claimed agreement.” The Knorrs claim they partially performed the alleged oral agreement by living on the property, making payments, and paying insurance and taxes. The Knorrs’ actions point to exactly what they had agreed to with Jon Norberg, that is that they would continue to lease the property. (Appx 127-128). The Knorrs leasing the property certainly points to

the plausible explanation for the Knorrs' payments, and in of itself is not enough to remove this agreement from the statute of frauds.

Making payments to Jon and Alonna, paying taxes and insurance and occupying the property do not show partial performance consistent only with the existence of an oral agreement for an option to purchase. Jon Norberg testified the parties had an oral lease agreement. (Appx 127). In fact, the first document that Rob Knorr presented to Jon Norberg after closing was a lease agreement that did not contain an option to purchase. (Appx 125). In this case, all the payments made were considered rent, which was evidence of an oral lease. The fact that the rent payments were the exact amount as the mortgage payments is indicative of a lease, since the Knorrs are paying the least amount necessary to remain on the property. The Knorrs are paying nothing over and above which can be construed as consideration for an option to purchase. A landlord may establish any value of rent as he or she chooses, and since the renters were Jon Norberg's in-laws, he testified that he was doing them a favor by setting a lower rent amount. (Appx 122). Also, having the Knorrs pay the insurance and taxes on the property is not unusual in a landlord/tenant relationship. Therefore, the actions by the Knorrs were not consistent **only** with an option to purchase because Jon and Alonna could have rented the property to the Knorrs whether or not there was an option to purchase. Because the Knorrs failed to establish part performance to take the alleged contract out of the statute of frauds, the alleged option to purchase is barred under N.D.C.C. §9-06-04(3).

D. The actions of the Knorrs do not constitute promissory estoppel to remove the statute of frauds requirement.

It is anticipated the Knorrs will raise the defense of promissory estoppel in this matter. However, the Knorrs have not established the necessary elements of promissory estoppel. “Estoppel is not favored and the burden of proving each element is on the parties asserting it.” Gorley v. Parizek, 475 N.W.2d 558, 560 (N.D. 1991)(citing Johnson v. Northwest Bell Telephone Co., 338 N.W.2d at 622 (N.D. 1983)). To establish promissory estoppel the Knorrs must establish the following four elements:

1. A promise which the promisor should reasonably expect will cause the promisee to change his position;
2. A substantial change of the promisee’s position through action or forbearance;
3. Justifiable reliance on the promise;
4. Injustice which can only be avoided by enforcing the promise.

Russell v. Bank of Kirkwood Plaza, 386 N.W.2d at 892, 896 (N.D. 1986).

The Knorrs claim of promissory estoppel must fail because they cannot establish even the first element of the claim. The first element requires a promise which the promisor should reasonably expect will cause a promisee to change his position. Id. “The promise must be clear, defiant, and unambiguous as to essential terms before the doctrine of promissory estoppel may be invoked to enforce an agreement or to award damages for the breach thereof.” University Hotel Development, LLC v. Duster Hoft Oil, Inc., 2006 N.D. 121 ¶11, 750 N.W.2d 153.

As previously discussed, the alleged promise in this case is not clear, defiant and unambiguous. Jon Norberg testified under oath that he never promised or agreed to give the Knorrs an option to repurchase the property. (Appx 129). Without a promise, promissory estoppel is not established. The Knorrs testified that they approached Jon Norberg about the transaction not the other way around, because they had no choice but to sell the property. (Appx 125). Also the Knorrs failed to prove they suffered an injustice in this transaction. Jon Norberg, did what he could to help his in-laws who were in dire financial problems. (Appx 125-126). It appears that now the Knorrs have cured some of their financial difficulties, they are now attempting to rewrite history and claim that they have a right to purchase the property. Bob Knorr testified that he would not have sold the property without an option to purchase, however, this is contradictory to his testimony under oath that their creditor was requiring them to sell the property, with or without an option to purchase. (Appx 121, 130). It would be an injustice to award the Knorrs an option to repurchase the property that was never agreed upon.

This is the exemplar statute of frauds case. The Knorrs assert vague discussions as grounds for oral contract, Bob Knorr testified he wouldn't have sold the property without an option to purchase even though his bank was forcing or otherwise requiring him to sell the property, with or without an option to purchase. (Appx 121, 130). It is submitted that the very purpose of the statute of frauds is to protect parties from the types of claims asserted by the Knorrs in this matter.

II. NEITHER A CONSTRUCTIVE OR IMPLIED TRUST WAS CREATED BETWEEN THE PARTIES.

A constructive trust must have been established by clear and convincing evidence. Schroeder v. Buchholz, 2001 ND 36, ¶ 5, 622 N.W.2d 202. The Knorrs failed to meet this strict burden at trial. The elements to establish a constructive trust include:

- 1) a confidential relationship; and
- 2) unjust enrichment.

North Dakota law states that "unjust enrichment" is an equitable doctrine applied **in the absence of a contract**. Id. at ¶14 (emphasis added). The parties executed a contract for the sale and purchase of the property that accurately reflects their agreement. (Appx 54-56). Both parties read and signed the purchase agreement. (Appx 54-56). The purchase agreement is a contract, and because a contract existed in regards to this transaction, unjust enrichment should not be applied.

Even if a contract did not exist and unjust enrichment was applied, Plaintiffs failed to prove any of the elements of unjust enrichment, which include:

- 1) an enrichment;
 - 2) an impoverishment;
 - 3) a connection between the enrichment and the impoverishment;
 - 4) absence of a justification for the enrichment and impoverishment;
- and,
- 5) the absence of a remedy provided by law.

Id. at ¶15. "The essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value." Zuger v. North Dakota Ins. Guar.

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Ass'n, 494 N.W.2d 135, 138 (N.D. 1992). The purchase agreement and appraisal of the property showed that Jon and Alonna Norberg paid approximately \$50,000 more than the appraised value of the property. (Appx 131). Not only did they purchase the property, they subjected themselves to a significant amount of risk by signing promissory notes for the loans. Jon Norberg testified that they did so in order to help the Knorrs recover from financial trouble. (Appx 122, 131). Therefore, the Knorrs did not establish that Jon and Alonna Norberg were enriched. Bob Knorr and Rob Knorr both testified that the family was relieved of a significant amount of personal and business-related debt because of the transaction. Bob Knorr and Rob Knorr both testified that they were facing debt exceeding \$30 million at the time. (Appx 53). Jon testified that bankruptcy for the Knorrs was imminent, and both Bob Knorr and Rob Knorr testified that their creditor, Choice Financial, required them to complete this transaction. Therefore, the Knorrs did not establish that they were impoverished by selling the property to Jon and Alonna Norberg. The Knorrs actually benefited from selling the property because they were relieved of a significant amount of debt.

Because there was no enrichment or impoverishment, there was no connection between the two, as required by the third element of unjust enrichment. Even if the first three elements had been satisfied, the Knorrs failed to establish that there was an absence of a justification for the enrichment and impoverishment. According to testimony from Bob Knorr, Rob Knorr, and Jon Norberg, the justification was that Choice Financial required the Knorrs to remove the loan for the

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property from their books. Jon and Alonna Norberg helped the Knorrs accomplish what the bank was requiring. Finally, the Knorrs have a remedy at law:

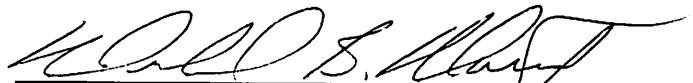
Parties to a contract have a remedy at law for enforcement of the contract or damages flowing from any contractual breach. There can be no implied-in-law contract to prevent unjust enrichment when there is an express contract between the parties relative to the same subject matter. Where, as here, the parties have voluntarily entered into an express written contract which defines the rights of each, unjust enrichment is a non sequitur.

Spagnolia v. Monasky, 2003 ND 65, ¶22, 660 N.W.2d 223. Once again, the purchase agreement served as "an express contract between the parties relative to the same subject matter." Id. The Knorrs failed to establish that unjust enrichment existed, and therefore failed to establish a constructive or implied trust.

CONCLUSION

Jon Norberg respectfully request that the Judgment of the District Court be reversed and remanded.

Dated this 12th day of November, 2013.



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**RE: Robert D. Knorr and Cheri Knorr v. Jon Norberg and Alonna Norberg
Case No. 28-2012-CV-00018 Supreme Court No. 201330084**

STATE OF NORTH DAKOTA)
)ss. AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF CASS)

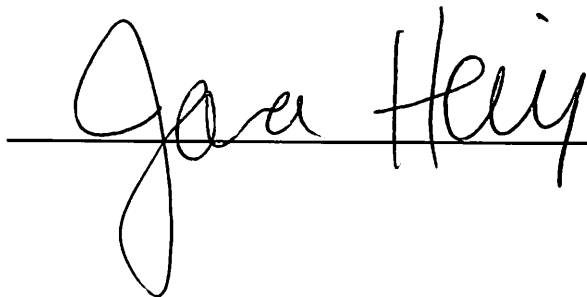
The undersigned, being first duly sworn, says that a copy of the attached:

**Brief of Defendant Jon Norberg/Appellant
Appellant's Appendix**

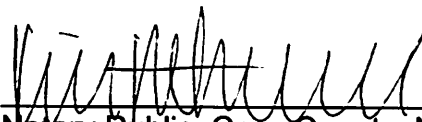
was served upon the following by enclosing the same in an envelope addressed to such person(s)/attorney at his/her/their business address with postage fully prepaid and by depositing the said envelopes in a United States Postal Service mailbox at Fargo, North Dakota, on November 6, 2013.

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Subscribed and sworn to before me
on November 6, 2013.



Notary Public, Cass County, North Dakota
Commission Expires:

KARISSA ROTHMEIER
Notary Public
State of North Dakota
My Commission Expires Sept. 4, 2019

RE: Robert D. Knorr and Cheri Knorr v. Jon Norberg and Alonna Norberg
Case No. 28-2012-CV-00018 Supreme Court No. 201330084

STATE OF NORTH DAKOTA)
)ss. AFFIDAVIT OF SERVICE BY MAIL
COUNTY OF CASS)

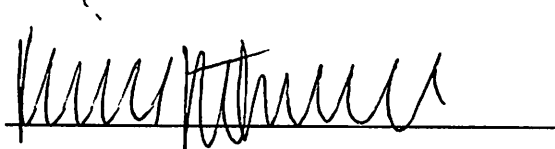
The undersigned, being first duly sworn, says that a copy of the attached:

Brief of Defendant Jon Norberg/Appellant

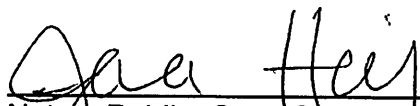
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Mr. Sheldon Smith
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Subscribed and sworn to before me
on November 18, 2013.



Notary Public, Cass County, North Dakota
Commission Expires:

