

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

CASE NO. 20130084

Robert D. Knorr and Cheri Knorr,)
)
 Plaintiffs/Appellees,)
)
 vs.)
)
 Jon Norberg and Alonna Norberg,)
)
 Defendants)
)
 _____)
)
 Jon Norberg)
)
)
 Appellant.)

APPELLEES' BRIEF

APPEAL FROM THE MEMORANDUM OPINION AND ORDER,
 AND JUDGMENT OF THE DISTRICT COURT, ISSUED BY
 THE HONORABLE THOMAS J. SCHNEIDER,
 SOUTH CENTRAL DISTRICT COURT, MCLEAN COUNTY,
 NORTH DAKOTA, CASE NO. 28-2012-CV-00018

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STATEMENT OF THE ISSUES

- [¶1] I. Was the District Court correct in finding sufficient evidence of partial performance by Knorrs, which removed the option agreement from the Statute of Frauds?
- II. If the District Court's finding of partial performance is reversed, do the equitable principles of promissory estoppel and constructive trust nevertheless remove the option agreement from the Statute of Frauds?

STATEMENT OF THE FACTS

[¶2] The concise statement of facts offered by the appellant Jon Norberg ("Norberg") both mischaracterizes the evidence presented at trial and fails to recognize numerous factual findings made by the District Court. Accordingly, the appellees, Robert and Cheri Knorr (the "Knorrs"), being dissatisfied with Norberg's statement of facts, hereby submit their statement of facts.

[¶3] In the late 1990s, the Knorrs and their son, Robert J. Knorr ("Rob"), expanded their North Dakota farming operation to Arizona. (Tr. 8 at 22-25; Tr. 9 at 1-16). With a booming Arizona real estate market, the Knorrs eventually became involved in different real estate investments that complimented their Arizona farming operations. (Tr. 10 at 5-14). Additional family members of the Knorrs were invited to participate in these Arizona real estate investments. (Tr. 11 at 3-10).

[¶4] In 2004 and 2005 the Knorrs and Rob began selling off portions of their Arizona real estate holdings and accumulated significant amounts of cash. (Tr. 14 at 18-25; Tr. 15 at 1-3). On September 20, 2004, Robert and Cheri Knorr purchased real property on Lake Audubon, 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 (N1/2) of Section Seven (7) in Township One Hundred Forty-eight (148) North, Range Eighty-two (82) West and the Northeast Quarter (NE1/4) of Section 12 in Township 148 North of Range 83 West of the 5th P.M., McLean County, North Dakota.

(App. at 47, 113). This property, referred throughout the trial as the Coleharbor home, was built by the Knorrs specifically with Cheri Knorr's Parkinson's disease in mind. (Tr. 52 at 25; Tr. 53 at 1-11). The Coleharbor home was handicap accessible, including doors and showers, and was located on one level. (Tr. 70 at 6-8). The intent was to accommodate Cheri's condition as it progressed over time. (Tr. 53 at 9-10). Because of the Knorrs' successful Arizona investments, the Coleharbor home was owned debt-free. (App. 47).

[¶5] However, the Arizona real estate market began to decline in 2007-2008 and the Knorrs began experiencing significant financial concerns. (Id.; Tr. 16 at 1-13) To stay current on their loan obligations, the Knorrs borrowed against their assets and mortgaged their Coleharbor home. (Tr. 19 at 9-16) Through Choice Financial, a \$500,000 note was placed on the Coleharbor home. (Tr. 24 at 16-20). Because of the Knorrs' financial concerns in 2010, they reached out to family members for assistance. (App. at 52-53); (Tr. 21 at 7-9).

[¶6] The Knorrs developed a plan for getting replacement financing on the Coleharbor home and their house in Maricopa, Arizona. (Tr. 27 at 19-25, 28 at 1-7). The Knorrs' eldest daughter, Alyssa, and her husband, Will, secured financing and purchased the Knorrs' Arizona home and leased the property to the Knorrs with an option to purchase the home back. (Tr. 28 at 17-22). Similarly, an agreement was ultimately reached that the Knorrs' daughter Alonna and her husband Jon Norberg (collectively "the Norbergs")

to purchase the Coleharbor property. (Tr. 29 at 2-6). The precise terms of the agreement between the parties regarding the purchase of the Coleharbor home is where the Jon Norberg and the entire Knorr family disagree.

[¶7] Jon Norberg alleges that the Knorrs were unable to make their mortgage loan payments on the Coleharbor home and that he and Alonna Norberg purchased the home. (Appellant's brief at p.3). Norberg further contends that the Coleharbor home was leased to the Knorrs and that no option to buy back the home was included in the transaction. (Appellant's brief at p. 4). At trial, Bob Knorr, his sons Rob Knorr and Steve Knorr, and his daughters Renae Beeter and Alonna Norberg, all testified that deals for both homes included a lease to the Knorrs with an option granted to the Knorrs to buy back the properties for the price of the indebtedness. (Bob Knorr: Tr. 83 at 13-18; Rob Knorr: Tr. 28 at 5-7; Steve Knorr: Tr. 63 at 23-25; Renae Beeter: Tr. 122 at 17-20; and Alonna Norberg: Tr. 178 at 11-22, 179 at 1-8). Bob Knorr testified at trial that he would not have transferred the Coleharbor home to the Norbergs without the option to buy back the home. (Tr. 83 at 16-18).

[¶8] As a result of the Knorrs financial difficulties, Choice Financial ("Choice"), which is based in Grafton, North Dakota, elected to sever ties with the Knorrs and negotiated a work out agreement to end its relationship with the Knorrs. (Tr. 19 at 24-25, 20 at 1-2 and 8-13; 17 at 11-13). The Coleharbor home was collateral held by Choice and the transfer to the Norbergs was part of the agreement with Choice. (Tr. 20 at 20-24; 32 at 4-15). All of the Knorr children were included in the discussion of purchasing the Coleharbor home from their parents. (Tr. 29 at 2-3). Before the Norbergs agreed to purchase the Coleharbor home, the Knorrs' daughter Renae Beeter and her husband

Kevin agreed to purchase the Coleharbor home and began the process of obtaining financing. (Tr. at 121:10-25; 122:1-22). However, Bob Knorr informed Renae that he felt Jon and Alonna were more suited to the transaction. (Tr. 122 at 7-16). To be clear, only family members were being considered by the Knorrs to help them by purchasing their homes in North Dakota and Arizona with the previously described lease and buy back options. (App. at 48, 50).

[¶9] The Norbergs financed their purchase of the Coleharbor home through Choice Financial. (Tr. 137 at 22-25). Choice had set a hard deadline of December 10, 2010, to complete the work out with the Knorrs; therefore, there was pressure to complete the transaction quickly and only the purchase agreement between the Knorrs and Norbergs and warranty deed were executed by this date. (Tr. 38 at 1-6, 16-25). The parties were not able to get the written lease and buy back option completed and signed. (App. at 48); (Tr. 39 at 1-7). Neither Bob nor Rob Knorr were concerned about the unsigned option agreement because it had been thoroughly discussed and they were dealing with family. (Tr. 39 at 5-7; 73 at 17-25).

[¶10] In December 2010, the Knorrs had an Arizona attorney draft lease and buyback agreements with regard to the Arizona property transaction. (App. 66-75); (Tr. at 39:10-22). Copies of these documents were provided to North Dakota attorney Bruce Gibbens so that he could use them as a concept in drafting a single document, incorporating both the lease and buy back option agreements with regard to the Coleharbor home property located in North Dakota. (Tr. at 39:10-22; 74:13-22).

[¶11] On February 8, 2011, a Lease Agreement containing an option to buy back the Coleharbor home was executed by the Knorrs and sent to the Norbergs to sign. (Tr. at

43:14-25; 44:1-4; 74: 23-25; 75:1-2). Alonna Norberg signed the agreement and testified that she witnessed Jon Norberg signing the same, but that version of the document was never found. (Tr. 179 at 3-8). After transferring their Coleharbor home to the Norbergs, the Knorrs continued to live in the Coleharbor home. (App. at 50). Jon Norberg was never given a key to the Coleharbor home. (App. at 51). The Knorrs made monthly payments to Jon Norberg for an amount equal to the Norbergs' mortgage payment due to Choice Financial. (Tr. at 134: 20-25). The Knorrs paid all real estate taxes on the property following the transfer of title to the Norbergs. (Tr. 135 at 4-6). The Knorrs maintained the property and paid all utilities and other expenses associated with the Coleharbor home. (Tr. at 78 at 4-10). In fact, the Norbergs did not spend any money as a result of the arrangement that was made with the Knorrs. (Tr. at 173:1-3). The sole exception to this was a late payment made by Jon Norberg that was a result of his failure to make a timely payment to Choice; however, Norberg had already received payment from the Knorrs at that time. (Tr. 134 at 14-15).

[¶12] On December 15, 2011, the Knorrs provided notice to the Norbergs that they were exercising their option to repurchase the property; however, Jon Norberg refused to recognize the Knorr's option to buy back the Coleharbor home. (App. at 49, 51). By this time, Jon and Alonna Norberg had been experiencing marital difficulties and had previously separated in June of 2011. (Tr. at 46:18-25; 47:1-4; 75:6-8; 110:9-11).

[¶13] At trial on January 24, 2013, Jon Norberg acknowledged that he was aware of the Knorrs' financial situation and that he and Alonna Norberg had agreed to help. (App. at 50); (Tr. at 131:18-25; 132:1-20);(App. at 50). Jon Norberg further admitted the existence of an oral lease agreement with the Knorrs and that he was involved in

discussions regarding the buy-back option with regard to the Coleharbor home property. (App. at 50); (Tr. at 133:4-7; 136:10-15; 138:14-25; 139:1-2). However, when Jon Norberg was asked if there was an agreement by which the Knorrs could buy back the Coleharbor home, Norberg did not directly answer the question. (Tr. 134 at 7-12).

[¶14] In its *Memorandum Opinion and Order*, dated February 15, 2013, the District Court found clear and unequivocal evidence of an oral option agreement sufficient to constitute part performance and removing the oral agreement from the Statute of Frauds. (App. at 49-50). The Court ultimately concluded that the Knorrs were entitled to buy back the Coleharbor home in accordance with the terms of the parties' oral agreement. (App. at 51).

LAW AND ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THERE WAS SUFFICIENT EVIDENCE OF PARTIAL PERFORMANCE BY THE KNORRS THAT REMOVED THE ORAL OPTION AGREEMENT FROM THE STATUTE OF FRAUDS.

[¶15] A. Standard of Review.

“The existence of an oral contract is a question of fact.” *See In re Estate of Thompson*, 2008 ND 144, ¶ 10, 752 N.W.2d 624. “In an appeal from a judgment entered after a bench trial, a district court’s findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a).” *Id.* (citing *Fladeland v. Gudbranson*, 2004 ND 118, ¶ 7, 681 N.W.2d 431). Findings of fact, whether based on oral or other evidence, “must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.” *See* N.D.R.Civ.P. 52(a)(6).

A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made. A district court's choice between two permissible views of the evidence is not clearly erroneous, and simply because we may have viewed the evidence differently does not entitle us to reverse the district court. In a bench trial, the district court decides credibility issues. We give due regard to the district court's opportunity to assess the witnesses' credibility, and we do not second guess the court on its credibility determinations nor do we reweigh the evidence.

See In re Estate of Thompson, at ¶ 10 (internal citations omitted).

[¶16] The appellant is challenging the sufficiency of evidence presented at trial that led the District Court to conclude the Knorrs partially performed the oral option contract and that the Statute of Frauds was inapplicable. The appellant is claiming this is a question of law, to which a de novo standard of review applies. However, the issues of whether an oral contract existed and whether Knorrs partially performed that oral contract to a degree sufficient to remove the oral contract from the Statute of Frauds, are questions of fact. Accordingly, the Court should apply a clearly erroneous standard of review.

[¶17] **B. The District Court's finding of an oral option agreement sufficient to constitute part performance removing it from the Statute of Frauds is not clearly erroneous.**

The "partial performance doctrine" is an exception to the Statute of Frauds requirement that an agreement to transfer real property must be in writing and signed by the party to be bound in order to be enforceable. *See Johnson Farms v. McEnroe*, 1997 ND 179, ¶ 18, 568 N.W.2d 920. "In the absence of a written contract or agreement, N.D.C.C. § 47-10-01 allows a court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof." *See In re Estate of*

Thompson, 2008 ND 144, ¶ 12, 752 N.W.2d 624; *See also* Anderson v. Mooney, 279 N.W.2d 423, 429 (N.D. 1979).

[¶18] This Court has previously explained the quantum of proof necessary to successfully assert part performance of an oral contract for the sale of land in the context of a claim for specific performance. *See In re Estate of Thompson*, 2008 ND 144, ¶ 13, 752 N.W.2d 624. “The first requirement of the doctrine that part performance of an oral contract exempts it from the provisions of the statute of frauds is that the contract be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract.” Id. “If the evidence leaves it at all doubtful as to whether or not a contract was entered into, the court will not decree specific performance.” Id. “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.” Id.

[¶19] **1. The oral option contract was proven by clear and unequivocal evidence establishing its terms, character and existence.**

The District Court found clear and unequivocal evidence of an oral agreement between the parties sufficient to constitute part performance removing the contract from the statute of frauds. (App. at 49-50). In support of its findings, the Court outlined multiple reasons in concluding the oral option contract existed. First, the Knorrs had purchased the land and built the Coleharbor home specifically with Cheri Knorr’s Parkinson’s disease in mind. It was clearly established that the Knorrs intended to live at the Coleharbor homes in retirement and for the rest of their lives. (Tr. 53 at 5-7). Second, only Knorr family members were being considered to help out the Knorrs financially by buying the homes in North Dakota and Arizona with a lease and buy back

option. The Knorr family testified consistently at trial that this transaction always included a buy back provision to allow Bob and Cheri Knorr to repurchase the homes; limiting investors to family members supports this statement (Tr. 28 at 3-7). Third, it is uncontested that the Knorrs continued to live in the Coleharbor home even after the home was transferred to the Norbergs.

[¶20] Fourth, Jon Norberg was aware of the family discussions regarding the Knorrs' financial situation. (Tr. 132 at 3-9). With the exception of Jon, all participants in the family discussions agreed that the option to buy-back the property was clearly established. (Tr. 83 at 13-18; 28 at 5-7; 63 at 23-25; 122 at 17-20; and 178 at 11-22, 179 at 1-8). Fifth, Jon testified that he was aware of the lease and buy back option discussions. (Tr. 133 at 4-7).

[¶21] The sixth item the District Court cited in support of its determination that an oral option existed is that the Norbergs agreed that they would help the Knorrs. The Knorrs were facing serious financial issues and were looking to family members to help preserve their homes, especially their Coleharbor home. The purchase of the Coleharbor home by the Norbergs provided a benefit to the Knorrs and no benefit to the Norbergs; the Knorrs were able to complete their work out agreement with Choice and remain living in their home. All of the Norberg's actions relating to this transfer are evidence that they were helping out the Knorrs in the same manner as discussed by the family members.

[¶22] Seventh, the agreement is consistent with the terms and character discussed by the Knorr family. Eighth, with the exception of a late payment to Choice (which was the fault of Jon Norberg), it did not cost the Norbergs any money to help the Knorrs. (Tr. 152 at 18-22). Ninth, Jon Norberg never had a key to the Coleharbor home. Tenth,

Robert and Cheri Knorr paid for everything: the Knorrs paid the precise amount of the Norbergs' obligation to Choice; the Knorrs paid the real estate taxes; the Knorrs paid for insurance for the property; the Knorrs paid for the maintenance of the property; and the Knorrs paid for the utilities.

[¶23] In viewing these factors in the aggregate, the District Court concluded that the agreement between the Knorrs and Norbergs contained an oral agreement permitting the Knorrs to buy back the Coleharbor home for the amount of the indebtedness owed on the property.

[¶24] **2. The acts constituting part performance of the oral contract unmistakably point to the existence of the claimed agreement.**

The acts constituting partial performance by the Knorrs include the following: payment of rent in the precise amount of the Norberg's indebtedness to Choice; maintaining control the Coleharbor home; paying all utilities, taxes, insurance and maintenance on the property; and providing notice of their intention to exercise the option to buy back the home. The appellant has not offered an alternative theory to describe the arrangement between the Knorrs and Norbergs. Moreover, these actions are consistent only with the agreement described by the Knorrs and their children at trial, including the option to buy back the home.

[¶25] For the reasons discussed above, the District Court's finding of an oral option agreement sufficient to constitute part performance removing it from the statute of frauds is not clearly erroneous. These findings are supported by sufficient evidence in the record and are not induced by an erroneous view of the law. Furthermore, the District Court's choice between multiple views of the evidence is not clearly erroneous and must not be reweighed by this Court. *See In re Estate of Thompson*, 2008 ND 144, ¶ 10, 752

N.W.2d 624. Accordingly, the District Court did not err in concluding that Robert and Cheri Knorr are entitled to buy back the Coleharbor home in accordance with the parties' oral agreement.

II. IF THE DISTRICT COURT'S FINDING OF PARTIAL PERFORMANCE IS REVERSED, THE EQUITABLE PRINCIPLES OF PROMISSORY ESTOPPEL AND CONSTRUCTIVE TRUST REMOVE THE ORAL OPTION FROM THE STATUTE OF FRAUDS

[¶26] **A. The doctrine of promissory estoppel provides that Robert and Cheri Knorr should be entitled to buy back the Coleharbor home from Jon and Alonna Norberg.**

Under North Dakota law, the doctrines of promissory and equitable estoppel may bar the assertion of a statute of frauds defense. *See* Cooke v. Blood Systems, Inc., 320 N.W.2d 124, 127 (N.D.1982). Whereas equitable estoppel applies when a person makes a representation as to a present or past fact, promissory estoppel applies when a person makes a representation as to future events. *See* O'Connell v. Entertainment Enterprises, Inc., 317 N.W.2d 385, 389 (N.D. 1982). These doctrines developed "to prevent inequities that may result when an agreement is void or unenforceable because of inadequate consideration or the statute of frauds and one of the parties has acted to his detriment because of a representation or promise made by the other person." Id. Because this matter relies on representations made by the Norbergs as to future events, the doctrine of promissory estoppel is applicable and Jon Norberg is estopped from asserting the statute of frauds defense.

[¶27] The elements of promissory estoppel are: (1) a promise which the promisor should reasonably expect will cause a change of position in the promisee; (2) a substantial change in the promisee's position through action or forbearance; (3) justifiable reliance on the promise by the promisee; and (4) injustice that can only be

avoided by enforcing the promise. *See Peterson Mechanical, Inc. v Nereson*, 466 N.W.2d 568, 571 (N.D. 1991).

[¶28] Jon Norberg argues that the Knorrs have not established the necessary elements of promissory estoppel. Specifically, he asserts that the Knorrs cannot establish the existence of a promise or that the Knorrs have suffered an injustice as a result of the transaction in question. However, it is clear from the facts of this case that the doctrine of promissory estoppel permits the Knorrs the option to buy back the Coleharbor home from the Norbergs. Bob Knorr testified that he would not have transferred the Coleharbor home to the Norbergs if the agreement did not include an option to repurchase the Coleharbor home. (Tr. 83 at 16-18).

[¶29] The promise by the Norbergs to reconvey the property induced the Knorrs to transfer the Norbergs the Coleharbor home. The Knorrs had other children, including Renae Beeter, that were willing to complete the transaction on the same terms, but elected to transfer to Jon and Alonna because of their income. The Knorrs substantially changed their position by transferring title of their Coleharbor home to the Norbergs. The Knorrs relied on the promise to reconvey by the Norbergs, their daughter and son-in-law. Finally, if the option is not honored, the Norbergs will receive a windfall, receiving the Coleharbor home and all associated equity with no consideration of their own and the Knorrs will lose what should have been their final home, where they would retire, and which was built to lessen the effect of Cheri Knorr's Parkinson's.

[¶30] Accordingly, absent a finding of an enforceable contract between the parties, promissory estoppel is necessary to avoid the injustice of Jon Norberg keeping title to the Coleharbor without providing any consideration, and to the detriment of the Knorrs'

reliance on Jon's promises. Therefore, under the doctrine of promissory estoppel, Jon Norberg should be estopped from asserting the statute of frauds defense to the oral option agreement between the parties, and the Knorrs should be entitled to exercise the option to buy back the Coleharbor home.

[¶31] B. Alternatively, there is sufficient evidence to conclude Jon and Alonna Norberg hold the Coleharbor home subject to a constructive trust.

“A constructive trust is an equitable remedy to compel a person who unfairly holds a property interest to convey it to the rightful owner.” *See Spagnolia v. Monasky*, 2003 ND 65, ¶ 15, 660 N.W.2d 223. Notwithstanding the statute of frauds, a constructive trust may be imposed upon land based upon a prior oral agreement. *See Radspinner v. Charlesworth*, 369 N.W.2d 109, 114 (N.D. 1985). A constructive trust may be imposed “in order to do equity and prevent unjust enrichment when title to property . . . is acquired or retained in violation of a fiduciary duty or confidential relationship.” *Id.* “The party seeking imposition of a constructive trust bears the burden of proving the existence of the trust by clear and convincing evidence.” *Id.*

[¶32] A constructive trust is a variation of an implied trust, which is created by operation of law. *See McGhee v. Mergenthal*, 2007 ND 120, ¶ 10, 735 N.W.2d 867. Constructive trusts have two essential elements: (1) unjust enrichment; and (2) a confidential relationship. *Id.* at ¶ 16. “A confidential relationship exists whenever trust and confidence is reposed by one person in the integrity and fidelity of another.” *Id.* “The essential element of recovery under 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.” *See Schroeder v. Buchholz*, 2001 ND 36, ¶ 14, 622 N.W.2d 202. This Court has identified five elements in order to establish unjust enrichment: (1) an enrichment; (2)

an impoverishment; (3) a connection between the enrichment and impoverishment; (4) absence of justification; and (5) absence of a remedy provided by law. *See McGhee*, at ¶ 16.

[¶33] Jon Norberg argues that the “unjust enrichment” requirement of a constructive trust does not exist in this case. However, given the facts presented by this case, it is clear that the Norbergs were unjustly enriched. Jon Norberg is claiming title to the Coleharbor home despite paying no consideration for the property. He received a benefit (ownership of the Coleharbor home) from the Knorrs that would be inequitable to retain without paying for its value. The Norbergs were enriched at the impoverishment of the Knorrs; this enrichment has no justification. Furthermore, in the event that the Court refuses to enforce the oral agreement as found by the District Court (or other relief as requested herein), there is an absence of a remedy provided by law.

[¶34] It is also clear that a confidential relationship existed between the Knorrs and the Norbergs. It is unnecessary to show that an actual fiduciary relationship between the parties existed at the time of the transfer, particularly in cases of family relationships. *See Paulson v. Meinke*, 389 N.W.2d 798, 801 (N.D. 1986). With regard to the transaction at issue, the Knorrs were looking for assistance from *within* the family (not outside parties, but people with whom they trusted) to hold title to the Coleharbor home for the benefit of the Knorrs.

[¶35] Because the elements of unjust enrichment and a confidential relation are present in this case, it is imperative that, in the absence of another remedy provided by law, this Court find that the Norbergs hold the Coleharbor home in constructive trust and be ordered to convey this property back to the Knorrs.

CERTIFICATE OF SERVICE

[¶37] I hereby certify that a true and correct copy of the forgoing brief was electronically filed with the Clerk of the North Dakota Supreme Court on the 9th day of December and e-mailed to the following:

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