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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Golden Eye Resources, LLC, Plaintiff, Appellee and Cross-Appellant vs. Debra K. Ganske, Wesley G. Borgen, Gay M. King, Michael R. Borgen, Sue E. Evans, and Linda R. McCoy, Defendants, Debra K. Ganske, Wesley G. Borgen, Michael R. Borgen, Sue E. Evans, and Linda R. McCoy, Appellants and Cross-Appellees.	Supreme Court Case No. 20130219 District Court Case No. 53-2010-CV-00536

APPELLEE'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
WILLIAMS COUNTY, NORTH DAKOTA
THE HONORABLE DAVID W. NELSON

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I. LAW AND ARGUMENT[1]

A. GOLDEN EYE ESTABLISHED A PRIMA FACIE CASE FOR BREACH OF CONTRACT AND BREACH OF THE COVENANT OF QUIET ENJOYMENT

[1] Golden Eye established in its opening brief a prima facie case for both breach of contract and breach of the covenant of quiet enjoyment against the Appellants. *See Mobil Oil Expl. & Prod. Southeast, Inc. v. U.S.*, 530 U.S. 604, 608 (2000); *Langer v. Bartholomay*, 2008 ND 40, ¶¶ 8, 25, 745 N.W.2d 649; *Nycal Offshore Dev. Corp. v. U.S.*, 106 Fed. Cl. 222, 229 (Fed. Cl. 2012); *Campanella Corp. v. Lyndon Realty Trust*, 611 F. Supp. 864, 867 (D. Mass. 1985). An oil and gas lease is a contract and, as a lease contract, it carries with it an implied covenant of quiet enjoyment. N.D.C.C. § 47-16-08; *Irish Oil and Gas, Inc. v. Riemer*, 2011 ND 22, ¶ 11, 794 N.W.2d 715; *Smith v. Nortz Lumber Co.*, 72 N.D. 353, 355-56, 7 N.W. 2d 435, 436-37 (1943).

[1] The Appellants include deposition transcripts from other lessors in an apparent effort to demonstrate that Golden Eye made misrepresentations to them. This evidence is inadmissible under N.D. R. Evid. 402 and 404(b). To clear the record, however, Golden Eye attaches herewith portions of deposition transcripts demonstrating that the other lessors quoted by Appellants had a very different experience during lease negotiations. Don Cartier specifically denied being told the misrepresentations claimed by the Ganske group. (Appellee's Supp. App. at 2-3, 17.) He confirmed that Golden Eye represented that it could not make a drilling commitment (*id.* at 7), that Golden Eye had three years to develop if it wanted to maintain its lease (*id.* at 2-3, 5), that lease owners may cooperate in developing units (*id.* at 8-10), that a customary oil and gas lease grants a right but does not create an obligation (*id.* at 6-7), that he is satisfied with his lease (*id.* 13-14, 15), and that he did not feel he had a lawsuit against Golden Eye (*id.* at 11-12, 13-14, 15.) Tom Rolfstad similarly believed the Appellants' lawsuit to be "bogus." (*Id.* at 19-20.)

[2] The Defendants unquestionably breached the leases by repudiation when they sent their May 25 and May 28, 2010 communications claiming fraud and an unqualified right to rescind. *Langer v. Bartholomay*, 2008 ND 40, ¶¶ 8, 25, 745 N.W.2d 649; *Hanson v. Boeder*, 2007 ND 20, ¶¶ 3-5, 727 N.W.2d 280, 283-84. A repudiation is any words or actions by a contracting party indicating that he is not going to perform. *Group Life & Health Ins. Co. v. Turner*, 620 S.W.2d 670, 673 (Tex. Civ. App. 1981) (quoting Samuel Williston, *Repudiation of Contracts*, 14 Harv. L. Rev. 317 (1901)); Black's Law Dictionary, (9th ed. 2009). Further, Golden Eye established by affidavit how this repudiation interfered with its ability to use and enjoy the leasehold estate granted by the Appellants. (Appellee's App. 163, 168.)

[3] Thus, the only question that remains is whether Golden Eye has been damaged by the Appellants' breaches. The Court should remand the case back to the trial court solely for this determination.

[4] The Appellants' argument that Golden Eye did not prove damages is incorrect, and it ignores the procedural posture of the case when the trial court entered its judgment. By oral Order dated January 7, 2012, the Williams County District Court bifurcated the case, ruling that the equitable title claims (quiet title and rescission/fraud) would be tried prior to any legal damages claims (breach of contract, lease cancellation). (Appellant's App. 75.) The court found persuasive the reasoning that a second trial may not be necessary depending on the outcome

of the first (*i.e.*, if the leases do not exist, there may not be the need for a second trial). (Appellant's App. 77-78.) For this reason, the district court stated in its May 2, 2012 First Scheduling Order,

> A three day bench trial has been set on the issues of quiet title and rescission for November 7, 8 and 9, 2012. The deadlines below govern for that trial. If there is a second trial on the remaining claims and defenses, the Court will set a second trial date and enter a Second Scheduling Order.

(Appellee's Supp. App. at 21.)

[5] Thus, the Appellants acted prematurely when they filed their Motion for Summary Judgment on Golden Eye's legal claims before the court first disposed of the equitable title dispute. Specifically, Appellants sought to dismiss Golden Eye's breach of contract claim, which was clearly a claim that was to be heard at the second trial. The parties were not yet litigating that claim. If the leases were upheld, the district court was going to establish a second trial date for this claim under a Second Scheduling Order. Like the First Scheduling Order, this order would have set forth expert designation dates. Further, Golden Eye was in fact in discussions with a possible expert on the issue of contract damages but, in accordance with the lower court's orders, had not yet designated an expert or submitted a report prior to the Defendants' Motion for Summary Judgment.[2] (Appellee's App. at 163.)

[2] Golden Eye also planned to amend its Complaint to add a claim for breach of the covenant of quiet enjoyment pursuant to the Second Scheduling Order, although the breach of contract claim encompasses this claim. Given the lower court's

[6] Nevertheless, Golden Eye established by affidavit the specific manner in which it has been damaged. (*Id*.) It explained how Appellants' breach and the resulting cloud on Golden Eye's title prevented Golden Eye from being able to finance its proportional share of well costs for wells proposed by third parties on units embracing Appellants' acreage. (*Id*.) This, in turn, forced Golden Eye into going non-consent as to the Appellants' interests in two wells under N.D.C.C. § 38-08-08, thereby causing Golden Eye to incur the statutory non-consent penalties. (*Id.*)

[7] Further, as to other wells in which Golden Eye risked its own capital to participate, Golden Eye will not be able to receive production revenues while the dispute is pending. (*Id.* at 163, 168.) This loss of its revenue stream has prevented Golden Eye from engaging in other business transactions. Further, there is uncertainty as to how Golden Eye will recoup its investment if the Appellants succeed in any of their successive challenges to Golden Eye's title. Meanwhile, although Golden Eye expends its funds without any corresponding revenue, the Appellants have demanded and received 16% royalties under N.D.C.C. 38-08-08(1) on the theory that – regardless of the outcome of their case – their minimum royalty is 16%. Golden Eye should not be deprived of its due process right to prove and recover damages.

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rulings on summary judgment, this amendment did not occur. Nevertheless, the court addressed this claim and dismissed it. The Appellants similarly did not plead a breach of contract claim based on the assignment of an overriding royalty, but the district court addressed this claim as well.

[8] Finally, the Appellants wish to argue certain issues related to damages that cannot be determined on the current record. For example, Appellants argue about the proper measure of damages and whether Golden Eye failed to mitigate. As to the measure of damages, the Appellants suggest that N.D.C.C. § 32-03-13 applies. This statute does not apply, however, because an oil and gas lease is not an agreement to convey, but is itself a conveyance and a contract governing the terms of exploration and development. *Irish Oil and Gas, Inc. v. Riemer*, 2011 ND 22, ¶ 11, 794 N.W.2d 715*; Mar Win Dev. Co. v. Wilson*, 104 N.W.2d 369, 373 (N.D. 1960). North Dakota Century Code § 32-03-13 applies only when there has been a failure to convey. *Bumann v. Maurer*, 203 N.W.2d 434, 438 (N.D. 1972). Here, there was not a failure to convey, but a conveyance followed by a subsequent breach by repudiation. Regardless, this Court should remand back to the trial court issues such as the proper measure of damages and whether Golden Eye properly mitigated, so that they may be determined on a fully developed evidentiary record. *See Langer*, 2008 ND at ¶ 27 (lost profits recoverable for breach of contract where they are reasonable and not speculative); *Nycal*, 106 Fed. Cl. At 229 (lessor repudiation is cause for recovery of benefit of bargain, including lost profits.)

B. GOLDEN EYE'S CLAIMS ARE NOT BARRED BY THE ELECTION OF REMEDIES DOCTRINE

[9] In their response brief, the Defendants argue that Golden Eye obtained a decree of specific performance from the district court. (Reply Brief at 11-12.)

Earlier in the brief, however, the Appellants take the exact opposite position – arguing that Golden Eye's Complaint should have been dismissed because Golden Eye failed to plead specific performance. (*Id.* at 1.) The Appellants are simply wrong that Golden Eye obtained an order requiring specific performance of the leases. Moreover, specific performance was not even an available remedy.

[10] The district court's final judgment quieted title to the disputed leases in Golden Eye's name. Quiet title is a completely different remedy from specific performance. In an action to quiet title, a court determines the relative validity and, if necessary, priority of the parties claiming a right, title or interest in specific property. *See State v. Amerada Petroleum Corp.*, 71 N.W.2d 675, 679 (N.D. 1955). Specific performance, on the other hand, is an equitable remedy requiring a party to fulfill a contractual obligation. *Larson v. Larson*, 129 N.W.2d 566, 567 (N.D. 1964); *see also Green v. Gustafson*, 482 N.W.2d 842, 848-49 (N.D. 1992) (acknowledging specific performance and quiet title as different remedies); *Semmler v. Beulah Coal Mining Co.*, 48 ND 1011, 188 N.W. 310, 313 (1922) (same).

[11] Further, specific performance was not a remedy available to Golden Eye. First, specific performance is not available when money damages provide an adequate remedy. *Livinggood v. Balsdon*, 2006 ND 11, ¶5, 709 N.W.2d 723. Here, money damages can compensate Golden Eye for the economic losses caused by the Appellants' breach. Second, specific performance is not available when the

remedy is impossible to carry out. *Ziebarth v. Kalenze*, 238 N.W.2d 261, 266 (N.D. 1976). In such instances, damages are the exclusive remedy. *Id.* Here, the Appellants first breached the lease, including the covenant of quiet enjoyment, in late May, 2010. During the pendency of the action, the Appellants have abided by the position taken in their May, 2010 notices. The Appellants have continuously argued that the leases are void *ab initio*. Golden Eye cannot retroactively compel the Appellants to retract their repudiation and honor their lease covenants. Money damages is Golden Eye's exclusive remedy.

[12] The Appellants acknowledge that the election of remedies doctrine is designed to prevent double recovery. Because Golden Eye did not (and in fact could not) obtain a decree retroactively mandating specific performance, money damages do not provide a double recovery and are proper.

[13] The "obstruction doctrine" underscores the necessity of a damages remedy in this case. As stated in Golden Eye's opening brief, Golden Eye could normally argue that the Appellants' leases are suspended for so long as the dispute continued. *Ridge Oil Co., Inc. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 157 (Tex. 2004); *NRG Exploration, Inc. v. Rauch*, 671 S.W.2d 649, 652 (Tex. App. 1984). If the leases could be suspended in this manner, Golden Eye could effectively obtain specific performance of the leases following resolution of the dispute. In the instant case, in contrast, other leasehold owners in the 1280 acre spacing units have exercised their rights to develop the units where the Appellants' minerals are

located. Lease suspension was impossible. Golden Eye was unable to use and enjoy the leasehold granted by Appellants, because it was unable to participate in certain wells lawfully proposed by third parties and was forced to invest in other wells without any return on its investment to date. Golden Eye incurred statutory risk penalties and lost opportunities as a result, and should be able to recoup the damages to which it is entitled.

[14] The Appellants finally argue in passing that they cannot be held liable for mistakenly exercising their legal rights. However, it is well-established that a party acts at his peril if he refuses to perform a contract based on a mistaken belief regarding his rights. *Chamberlin v. Puckett Constr.*, 921 P.2d 1237, 1240 (Mont. 1996); Restatement (Second) of Contracts § 250 cmt. d (1981). Indeed, the three leading authorities on American contract law unanimously support the position that a breach of contract by repudiation may be based on an erroneous interpretation of legal rights. *In re Pickel*, 493 B.R. 258, 270 (Bankr. D. N.M. 2013).

[15] If a mistaken belief in legal rights was all that was required for immunity from breach of contract liability, then there would be few cases where one could prevail on such a claim. Every party who was unable or unwilling to perform could simply "unilaterally rescind" on some basis, or create some other legal justification in order to evade liability. This is not the law. The law places the risk of breach on the party claiming that he is free from his contractual

obligations. If he is wrong, he must bear the consequences – not the party who continued to honor the contract. The party who honored the contract should be compensated for its losses.

[16] This Court should grant Golden Eye the opportunity to recover the damages caused by Appellants' breaches. At trial, the Appellants are free to argue the proper measure of damages, whether Golden Eye failed to mitigate, and whether Golden Eye's damages are speculative. Those matters cannot, however, be resolved on the current record.

II. CONCLUSION

[17] For all of the foregoing reasons, and for the reasons stated in Golden Eye's opening brief, Golden Eye respectfully requests that this Court:

1. Affirm the district court's ruling that the Appellants' fraud argument fails as a matter of law;

2. Affirm the district court's ruling that the Appellants' breach of contract/lease cancellation claims fail as a matter of law;

3. Reverse the district court's ruling that Golden Eye's breach of contract claim is barred by the election of remedies doctrine and remand back to that court for a trial on the issue of damages; and

4. Reverse the district court on the question of whether the Appellants are entitled to a jury trial on their fraud defense, unless this issue is moot.

Respectfully submitted this 10th day of February, 2014.

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CERTIFICATE OF SERVICE FOR APPELLEE'S REPLY BRIEF AND APPELLEE'S SUPPLEMENTAL APPENDIX

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I HEREBY CERTIFY that on the 10th day of February, 2014, the following Word version of the Appellee's Reply Brief and Portable Document Format version of Appellee's Supplemental Appendix was filed electronically by e-mail with the Clerk of the North Dakota Supreme Court at supclerkofcourt@ndcourts.gov and were also served electronically by e-mail upon the following:

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