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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court # 2013 0284

Kermit Anderson, Jr.,
Plaintiff/Appellant,

vs.

Nick Lyons,
Defendant/Appellee,

and Kevin Kabella,
Defendant/Appellant.

APPELLEE BRIEF

Appeal from:

Order for Judgment and Judgment dated May 16, 2012, made by the Honorable Richard W. Grosz, Judge of District Court,

and

Order Denying Motion to Amend Caption, To Amend Findings, and for a New Trial dated August 29, 2013, made by the Honorable Daniel D. Narum, Judge of District Court.

Richland County District Court # 39-2012-CV-133
Southeast Judicial District

Kip M. Kaler
Attorney at Law
ND Attorney ID Number 03757
Kaler Doeling, PLLP
3429 Interstate Blvd. S.
P.O. Box 9231
Fargo, ND 58106-9231
(701) 232-8757
(701) 232-0624 (fax)
kip@kaler-doeling.com
ATTORNEY FOR APPELLEE ESTATE OF NICK LYONS

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[5] **I. Whether the Payments under the Contract were "Rent" within the Meaning of N.D.C.C. § 47-16-02**

[6] The appellee agrees that the appellants' Statement of facts and Statement of the Case are an accurate representation of the facts and history of this case.

[7] The consideration in question is not "rent or services" under the contemplation of the statute. Section 47-16-02, N.D.C.C., makes void a "lease or grant of agricultural land reserving any rent or service of any kind for a longer period than ten years." In Wegner v. Lubenow, the North Dakota Supreme Court held that a lease "for the full term of 40 years or during the full term of the natural life" did not violate the prohibition against agricultural leases reserving rent for longer than ten years. 12 N.D. 95, 95 N.W.2d 442, 443, 445 (1903). In Wegner, consideration paid for a lease was the single payment of $200. Id. at 443. The term of the lease was 40 years or for the life of the lessees. Id. The Court held that this single payment could not properly be considered "rent" because rent envisions some type of periodic and continuing payment. Id. at 445 "[I]t must reserve rent, as rent, payable at stated periods, and that a grant or lease of land for life or for a long term of years, for a specified consideration, whether payable in installments or at one time is not such a lease." Id. The statute does not apply to every lease, as the appellant seems to suggest. The key distinction is whether the lease reserves "rent or service." N.D.C.C. §47-16-02. The purpose of the statute is clear from its language: to prevent leases which bind a lessee to pay periodic rent or services to a lessor for long periods of time or perpetually, essentially binding the lessee to the land.

See Parsell v. Stryker, 41 N.Y. 480, 483 (1869); (stating "[t]hat clause of the Constitution, as all know, was not aimed at agreements like this, but against manorial leases.") see also The End of the Hudson Valley's Peculiar Institution, 27 Law & Soc. Inquiry 941, 942-43 (2002).

[8] In the present case, the contract calls for a definite amount of compensation, $20,670, paid in four installments. App. at 12. The lease does not "[reserve] rent for a longer period than ten years." N.D.C.C. § 47-16-02. The lease in question is not of the type contemplated under the statute, and therefore is not void.

[9] **II. Whether the Term of the Lease is Dependent on the occurrence of a Contingency that may occur within the Limitation Period**

[10] "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others." N.D.C.C. § 09-07-06. "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." N.D.C.C. § 09-07-08. "Particular clauses of a contract are subordinate to its general intent." N.D.C.C. § 09-07-15. It is essential that the court understand the general intent of this lease, which can be clearly seen from the plain language. This lease was not intended to be a perpetual lease, but a contract in contemplation of the eventual sale of the land. It is for this reason that the lease does not reserve annual rent. Upon the payment of the last installment, the lessor would no longer have any incentive for the arrangement to remain a lease, and would sell the land to the lessee.

[11] As stated above, section 47-16-02, N.D.C.C., makes void a "lease or grant of agricultural land reserving any rent or service of any kind for a longer period than ten years." However, a lease "for an indefinite time, which can only be made definite or fixed by the happening of a contingency . . . which may occur within the limitation . . . cannot, therefore, be said to create a term for a longer period than 12 years, within the meaning of the provision." Anderson v. Blixt, 72 N.W.2d 799, 805 (N.D. 1955). In this case, the district court held termination of the contract was contingent on the exercise of the purchase option and the exercise of the opt out clause. The court held that either of contingencies could occur within the 10 year limitation, and therefore the lease was not void.

[12] The Appellants argue primarily that the term "in perpetuity" is a definite period longer than ten years, being forever. This reading of the lease ignores both the general intent and the other terms of the lease. The contract must be interpreted as a whole. The lease provides for two methods of terminating the lease: the option to purchase and Lyons' right to "opt out." The lease ends when one of these two clauses is exercised. In concert with the other terms of the contract, the term "in perpetuity" simply means the contract continues until one of those two terms is exercised. To interpret the contract as a perpetual lease with no method of termination would render these terms meaningless.

[13] Appellants argue that termination is not dependent on these terms, and termination "is not dependent upon any event because it is forever." But the lease is not "forever" if either of the exclusive means of termination are exercised. It is difficult to see how termination of the lease is not dependent on the exclusive means of terminating the lease. The appellants seem to be suggesting that the lease cannot be terminated,

despite the clear language of the contract to the contrary. The clear meaning of the contract is that the contract will continue in perpetuity until one of the two contingencies is exercised. We do not know when those contingencies will be exercised, and therefore the duration of the contract is indefinite.

[14] Appellants try to escape the clear language of the contract by arguing first that the "opt out" clause is indefinite and vague, and therefore invalid. They argue that "no details are provided as to what happens if Lyons 'opts out' of the agreement." The appellants provide no authority for this assertion. It is well-settled that a contract that is so vague, indefinite, and ambiguous so as to not define its essential terms is unenforceable. However, there is no authority for the proposition that every term of a contract must spell out every consequence of its invocation. Further, the consequences of an unconditional opt-out term of a lease are as clear as they would be for any other lawful termination of a lease: the lessor regains possession of the land and the lessee no longer is required to pay rent.

[15] Appellants also argue that the option to purchase cannot be considered a measurable event for purposes of terminating the lease. Their argument is two-fold: (1) the purchase option in Anderson did not factor into the Court's decision in that case, and (2) the lease does not necessarily terminate upon exercise of that clause.

[16] It is true that the Court in Anderson did not address whether the option was also a contingency taking the lease out of the statute. The Court's silence on the issue only means the Court has not answered the question. The appellants have implied a holding where one does not exist.

[17] The appellants also argue that "the right of first option does not necessarily terminate the lease." However, this is more than a right to have the first chance to buy the property. The lease gives Lyons the right to buy the property for a specified price of three and one-half times the lease price ($72,345). If Lyons exercises the option, he will have acquired title superior to that of the lessor, and the lease will terminate as a matter of law. See N.D.C.C. § 47-16-14. If Kabella sells the land, and Lyons does not purchase the land, Lyons has not exercised the option and the contingency has not been met. The simple fact that Lyons is not required to exercise the option does not mean that exercising the option does not terminate the lease.

[18] This case is similar to Aikins v. Nevada Placer, 13 P.2d 1103 (Nev. 1932), a case cited by the North Dakota Supreme Court in Anderson. In Aikins, the lease was "effective for a period of five years unless default be made prior thereto and as long thereafter as the second party or his assigns may see fit to operate said property pursuant to the terms and conditions of said lease." Id. at 1104. The Nevada Supreme Court held "the duration of the lease in question is dependent on a contingency which may or may not happen within twenty years." Id. at 1105. "As it does not appear affirmatively from the lease that it will extend beyond the statutory limitation, we cannot, in view of the applicable rule of strict interpretation, declare it void." Id.

[19] There is no practical difference between the Aikins case and this case. If the lessee and his assigns in Aikins chose to operate under the lease in perpetuity, it was well within their rights. The distinguishing feature that made the lease valid under the statute was the contingency that limited the duration of the contract: the option to terminate the lease at any point in the future. The fact that the contingency was not

required to happen did not defeat the validity of the lease. Similarly, in this case, the exercise of the "opt out" clause and the exercise of the purchase option would each terminate the lease. Either could happen within the ten year period. Therefore, the lease is not void under N.D.C.C. § 47-16-02.

[20] **Conclusion**

[21] Therefore, for the reasons stated herein, the Appellee respectfully requests the Court affirm the district court's order and judgment finding a valid lease in favor of Nick Lyons.

[22] Dated this 26th day of December, 2013.

/s/Kip M. Kaler
Kip M. Kaler (ND Atty. #03757)
KALER DOELING, PLLP
Attorney for Ken Lyons/Appellee
3429 Interstate Blvd. S.
P.O. Box 9231
Fargo, ND 58106-9231
(701) 232-8757
kip@kaler-doeling.com

[23] **CERTIFICATE OF SERVICE**

[24] Kip M. Kaler of Fargo, ND, swears that on December 31, 2013, he served electronically at the given e-mail address a copy of the following:

APPELLEE BRIEF

to the parties listed below:

Mark Andrew Meyer - markameyer@702com.net

/s/ Kip M. Kaler_____
Kip M. Kaler