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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20130349

Dan and Leanne Abelmann,

Plaintiffs/Appellants,

McKenzie County District Court
Case No. 27-2013-CV-00115

v.

SmartLease USA, L.L.C.,

Defendant/Appellee.

APPEAL FROM THE MCKENZIE COUNTY DISTRICT COURT
ORDER DENYING EVICTION
THE HONORABLE DAVID W. NELSON, PRESIDING
DATED AUGUST 26, 2013

# BRIEF OF APPELLANTS

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II. WAS THE TRIAL COURT'S FINDING THAT THE ABELMANNS WERE PAID IN EXCESS OF $300,000 PURSUANT TO THE LEASE CLEARLY ERRONEOUS?

## STANDARD OF REVIEW

¶1 As to issue No. 1, this Court reviews *de novo* a contract to determine whether the district court erred in its interpretation of it. Koondrad v. Bismarck Park Dist., 2003 ND 4, ¶ 6, 655 N.W.2d 411. Interpretation of a contract is a question of law if the intent of the parties can be ascertained from the agreement alone. See N.D.C.C. § 9-07-04; Garofalo v. St. Joseph's Hospital, 200 ND 149, ¶ 7, 615 N.W.2d 160. Whether a contract is ambiguous is also a question of law. Keller v. Hummel, 334 N.W.2d 200, 203 (N.D. 1983) .

¶2 As to issue No. 2, the trial court's finding of fact should be set aside if clearly erroneous. A finding of fact is "clearly erroneous" if it is induced by an erroneous view of the law. VND, LLC v. Leevers Foods, Inc., 2003 ND 198, ¶ 32, 672 N.W.2d 445.

## STATEMENT OF THE CASE

¶3 This is an appeal from an eviction proceeding that Appellants, Dan and Leanne Abelmann ("the Abelmanns"), brought against the tenant and Appellee, SmartLease USA, LLC ("SmartLease") before the Northwest Judicial District Court, County of McKenzie, pursuant to N.D.C.C. §§ 47-32-01(4) and (8). In accordance with N.D.C.C. § 47-32-02, the Abelmanns served a Notice of Intention to Evict on May 3, 2013.

(Appendix, pp. 94-95). The Complaint in this action was filed May 30, 2013. (App. at 4).

¶4 The case was continued pursuant to SmartLease's motion and was heard in the Williams County Courthouse on July 9, 2013, before the Honorable David W. Nelson. (App. at 1).

¶5 The Abelmanns sought eviction of SmartLease for failure to pay rent for more than three days after rent was due, and for multiple violations of material terms of the parties' Lease.

¶6 After the evidence was heard, the Abelmanns submitted a Closing Brief and a Reply. (App. at 272, 310). SmartLease submitted a Response Brief. (App. at 293).

¶7 The trial court entered an Order Denying Eviction on August 26, 2013. (App. at 322). The Order was silent on the issue of overdue rents and made no findings as to whether or not SmartLease did breach any terms of the Lease. Rather, the court determined that "any non-compliance by SmartLease has been minor and of non-essential terms." The court concluded that "[t]he essence of the lease was for SmartLease to develop the property so it would generate income for the Abelmanns." The court pointed to evidence of purported money, time and effort invested by SmartLease in the Demised Premises, turning it "into a commercial venture with significant value under which the Abelmanns have been paid in excess of $300,000 pursuant to the Lease."

¶8 Judgment of Dismissal was entered on August 30, 2013. (App. at 324).

¶9 The Abelmanns filed a Notice of Appeal on October 28, 2013. (App. at 325). The McKenzie County Clerk forwarded the transcript to the Court on December 10, 2013.

## STATEMENT OF THE FACTS

¶10 The Abelmanns own an approximately 110-acre parcel of land in McKenzie County, North Dakota ("Demised Premises"). The Demised Premises are the subject of a Land Lease Agreement the Abelmanns entered into with SmartLease on or about December 18, 2011 ("the Lease"). (App. at 152). Article II of the Lease specifies that the "PURPOSE" of the Lease was for the Abelmanns to lease the Demised Premises to SmartLease "for use as a short/long term RV (recreational vehicle), mobile home, cabin units, and truck parking [sic]." (App. at 152). The purposes of the Lease are further detailed in its Article IX, which reads in pertinent part:

> **USE OF PREMISES**: [SmartLease] agrees to use and occupy the Demised Premises for the purposes of operating a high quality, clean and professionally managed RV/mobile home/cabin park, truck parking and supporting services.

(App. at 154) (emphasis added).

¶11 Article IV, Section 1, of the Lease specifies the duration of the Lease, stating that SmartLease shall have and hold the Demised Premises from November 1, 2011 through October 30, 2016, "upon the condition that [SmartLease] fulfills the terms and conditions hereof." (App. at 152). Consistent therewith, Article XVI specifies that SmartLease was granted peaceable and quiet enjoyment of the Demise Premises "free from any eviction or interference by [the Abelmanns] if [SmartLease] pays the rent and other charges provided in this Lease Agreement and otherwise fully and punctually performs the terms and conditions imposed on [SmartLease]." (App. at 155-156) (emphasis added). The Lease was "the entire agreement between [the parties] and … there are no other oral or collateral agreements or understandings of any kind or character except those contained herein." (App., 157 at Article XXIII). The Lease could only be

modified through a writing signed by each party and "any additional obligation assumed by either party in connection with this Lease Agreement shall be binding only if evidenced in a writing signed by each party or an authorized representative of each party." (App., 157 at Article XXIV) (emphasis added). Further, the Lease "specifically declared that time is of the essence in all provisions of this Lease Agreement." (App., 157 at Article XXVI).

## I. Smart Lease Breaches All But One of Its Performance Obligations Which Arose Under the Lease.

¶12 With one exception,[1] the following provisions contain all of SmartLease's performance obligations under the Lease – except for potential obligations which never arose.[2] The evidence respecting SmartLease's breaches of each of these provisions is set forth thereafter:

¶13 USE OF PREMISES. As noted above, pursuant to Article IX SmartLease's foremost obligation was to use and occupy the Demised Premises "for the purposes of operating a high quality, clean and professionally managed" RV Park. (App. at 154).

¶14 BREACHES. Most significantly, when SmartLease's principal, Kent Guthrie, was asked at trial, "Would you consider [the Demised Premises] a clean, high quality RV Park?" he answered, "No." (Tr. 140:10-11). In the face of this damning admission, Mr. Guthrie asserted that though the Lease had commenced over 18 months earlier,

[1] The only performance obligation which arose, and which SmartLease did not breach, is Article XIV – as SmartLease did not prevent the Abelmanns from gaining access to the Demised Premises.

[2] For example, SmartLease was not required to discharge any mechanics liens filed against the Demised Premises under Article VIII, MECHANIC'S LIENS; the Abelmanns never required SmartLease to obtain other forms of insurance under Article X, PROPERTY INSURANCE; and the Abelmanns made no claims against SmartLease for indemnification under Article XV INDEMNITY and XXVI HOLD HARMLESS.

SmartLease was not yet required to operate a clean, high quality RV Park: "I would say that we have a lot of time. We have got 99 years [*i.e.*, the length of the amended Lease]. We are not done yet." (Tr. 138:13-14) (emphasis added). Yet, SmartLease had commenced performance—*i.e*: accepted truck and camper tenants at the RV Park – by February 1, 2012. (App. at 267; Tr. 71-72).

¶15 The Abelmanns presented extensive evidence detailing SmartLease's breaches of this fundamental obligation. In particular, the project was never professionally managed. For a time, SmartLease employed Aaron Smith as the RV Park manager. By his own account, Aaron Smith is 23 years old, has no college degree, and prior to meeting SmartLease had never managed anything – including an RV Park, an apartment building, or any other facility where people lease living accommodations. (Tr. 82-83). From the time Mr. Smith commenced working with SmartLease at year-end 2011, he worked collecting rent. (Tr. 83-84). During his employ, Mr. Smith alone was providing any and all management services on behalf of SmartLease. (Tr. 88). Mr. Smith claimed to have worked full-time at the Demised Premises from January to October, 2012, then picked up an additional job in October 2012 and thereafter only worked 8-10 hours per week. (Tr. 84:8-20). He left SmartLease's employ entirely on January 25, 2013. (Tr. 89:15-18).

¶16 Mr. Smith's own timesheets actually reflect that as early as September 7, 2012, he was not working eight-hour days at the Demised Premises, but more often only 5-7 hour days in September and October of 2012 and sometimes 1.5-3.5 hour days. (App. at 211-215; T 89). Further, from November 3, 2012 through January 25, 2013 – a period of 12 weeks – Mr. Smith purported to work for SmartLease a total of 158.5 hours, including stretches from November 16 through November 28, December 14 through December 27,

January 6 through January 18, and January 20 through January 25 when he worked only one hour per day via telephone. (App. at 214-215).

¶17 When asked what caused him to look for another job in October, 2012, Mr. Smith testified as follows :

> A. Multiple things, I guess. The first one would be I was -- it seemed like I was the only one there doing anything. I felt like I was the only one who actually believed in the project, more or less.… I was collecting the rent. I was dealing with the tenants. I was maintaining the property as best I could. And I just -- I couldn't stick it out anymore, you know. I mean, we had 110 acres there to develop. I mean, I was gonna be the - - basically the mayor of a new city, more or less, and 23 years old, college dropout, you know.

(Tr. 85:6-18) (emphasis added). When he took on another job in October, 2012 and "wasn't able to give as much time as [he] normally did," the conditions at the Demised Premises deteriorated, including overflowing "port-a-johns", campers filling up with sewage, and no water whatsoever provided at the Demised Premises during winter months. (Tr. 86-87). When asked his opinion of the conditions on the Demised Premises, Mr. Smith testified, "I wouldn't live there…." (Tr. 85-86).

¶18 SmartLease did not contradict any of Mr. Smith's testimony concerning (i) the absence of a professional manager, (ii) his limited appearances at the Demised Premises in and after October, 2012, and (iii) the complete absence of any SmartLease manager – or any SmartLease personnel at all – after January 25, 2013. Rather, SmartLease suggested that Leanne Abelmann had orally agreed to manage the Demised Premises after Mr. Smith's departure. (Tr. 122-123). Mrs. Abelmann testified[3] only that she

[3] The trial court accepted Leanne Abelmann's Affidavit into evidence as her direct testimony. (Tr. 128:17-22).

volunteered to try to collect rents and help out in taking care of the park after Aaron Smith's departure. (App., 77 at ¶ 31; Tr. 22:22-24). She had no experience managing anything, including an RV Park, and the parties never modified the Lease to shift the professional management obligation to her. (Tr. 54-55). Mr. Smith further testified that he was led to understand that Mrs. Abelmann would only "take over the things that [Mr. Smith was] doing" as "a temporary thing, like you know, until [SmartLease] found someone else … like me." (Tr. 89-90). Indisputably, SmartLease did not even retain a manager "like [Mr. Smith]," let alone a full-time professional manager or management team to operate the RV Park.

¶19 Mr. Guthrie acknowledged that (i) no provision in the Lease requires the Abelmanns to manage the property or collect any rent and (ii) SmartLease had not attempted to collect any rent since the first week of June, 2013. Mr. Guthrie did not dispute that the conditions on the Demised Premises started to deteriorate around September, 2012. (Tr. 140, 146).

¶20 As a result of SmartLease's failure to provide professional, on site management, the condition of the Demised Premises was unsightly, dangerous and unsanitary – rather than "high-quality" and "clean." (App., 79 at ¶¶ 38-39).

¶21 The Abelmanns introduced photographs documenting SmartLease's myriad breaches of Article IX, including photos reflecting a truck which was left tipped over on the Demised Premises for several weeks (App. at 131-132; Tr. 61:11-17); several campers broken into and damaged in the absence of management security/supervision (App. at 133-134; Tr. 62:5-26); rocks and debris from bonfires, including nails, beer cans and broken bottles, left in place for extended periods (App. at 136; Tr. 63-64); garbage

and a tipped over "port-a-john" (App. at 137; Tr. 64:7-12); live electrical outlets lying on the ground right next to combustible dry weeds (App. at 138; Tr. 64:15-21); a camper which had been pulled out of its position in what was a "mud hole" surrounded by strewn debris (App. at 139; Tr. 65-66); a handgun left lying in the open on a table next to an abandoned trailer (App. at 140-142; Tr. 66); unprotected electrical outlets lying on the ground, absent any fencing or protections, piping debris, scattered junk, and planks and rocks placed near campers—for the apparent purpose of walking through the mud of trailer pads; collapsing trailer pads with junk including abandoned toilets, shop vacs and the like; and rutted and muddy pathways (App. at 144-149; Tr. 67-69); see also additional photographs of the Demised Premises. (App. at 101-130).

¶22 SmartLease did not refute the accuracy of this evidence. (Tr. 138:3-9).

¶23 SMARTLEASE OBLIGED TO OBTAIN ADEQUATE FINANCING. Article VI, Section 3 does not merely oblige SmartLease to obtain financing and the necessary permits for the project, but specifies that the Lease is "contingent upon" SmartLease doing so. (App. at 153).

¶24 BREACH. The Abelmanns understood that SmartLease had arranged financing and was able to commence operation of a high quality, clean and professionally-managed RV/mobile home/Cabin Park upon the signing of the Lease, only to discover that SmartLease lacked financing at all times up to the Termination Notice. (App. at 80); see also February 28, 2013 Notice of Land Lease Agreement Termination ("Termination Notice") (App. at 86) ("SmartLease USA has failed to obtain financing to move forward with the timely development of this property…").

¶25 SmartLease admitted in ¶ 13 of its Answer to the Complaint that it failed ever to "secure financing to fully develop the property." (App. at 98). Mr. Guthrie testified that SmartLease sought and obtained from the Abelmanns an Addendum to the Lease, almost one year after the Lease was originally executed – which provided a longer lease term and purchase option in the hopes this would induce potential investors to finance the project. (App. at 163).

¶26 PAYMENT OF RENT AND DAMAGE DEPOSITS. Article V, Section 1 of the Lease obliges SmartLease to pay the Abelmanns monthly rent in the amount of $75.00 for each housing lot in the RV Park rented for 30 days, $37.50 for each housing lot in the RV Park rented for 15 days, and 10% of the gross revenue for each truck parking space leased in the RV Park. (App. at 152-153). Rent was due by the 15th day of the month. Id. Article V, Section 2 obliges SmartLease to pay the Abelmanns a non-refundable damage deposit of $25.00 per month for every housing unit in the RV Park rented for a 30-day period, until the total amount of $50,000 in damage deposits was received. (App. at 153).

¶27 BREACHES. Mrs. Abelmann testified that as of May 28, 2013, SmartLease had failed to pay to the Abelmanns rent and damage deposits for February and March, 2013, of $5,800, as well as April rent and security deposits of $2,900 (due April 15, 2013).[4] (App. at 77-78). SmartLease presented no evidence contradicting this testimony.

[4] While SmartLease asserted at trial that the Abelmanns interfered with SmartLease's ability to collect rents by directing tenants to make their rent payments to the Abelmanns, the evidence respecting that contention reflects that only after serving their Termination Notice on SmartLease did the Abelmanns notify RV Park tenants that SmartLease was no longer managing the Park and to pay the Abelmanns directly "effective April 1, 2013"

Further, the Termination Notice noted that some 23 RV tenants had left the site for better living conditions, due to SmartLease's failure to provide sewer and water as required under the Lease – thereby depriving the Abelmanns of further rent and damage deposits. (App. at 192). Again, SmartLease presented no conflicting evidence.

¶28 The Abelmanns performed a number of repairs and incurred necessary maintenance costs on the Demised Premises – due to SmartLease's breaches of its obligations to make replacements and repairs and perform maintenance. Article VI, Section 1 provides that all such costs incurred by the Abelmanns are recoverable by them as "part of the rent provided for herein." (App. at 153). Mrs. Abelmann testified to $6,604.28 in such additional rent owing. (App., at 79-80 at ¶ 40). All told, at the time of trial SmartLease owed the Abelmanns $35,000 in unpaid rent, above and beyond the $15,000 which the Abelmanns had collected from tenants and maintained in their safe. (Tr. 70:11-14). SmartLease did not refute this evidence.

¶29 VARIOUS LESSEE OBLIGATIONS. Article VI, Section 1, further sets forth the following list of obligations:

> **LESSEE'S OBLIGATIONS**. [SmartLease] agrees to take good care of the Demised Premises and make as and when needed all repairs or replacements as necessary in and about the Demised Premises. [SmartLease] shall, at its sole expense, construct and maintain in good condition and repair all necessary structures/improvements, roads, sewer, sewer treatment systems, water, well(s), gas and electrical distribution systems and facilities that are now in or are to be installed by [SmartLease] on the Demised Premises…. (emphasis added).

(App. at 153).

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and thereafter. See Defendant's Exhibit 17. (App. at 207). Nothing arguably prevented SmartLease from collecting rents from tenants prior to April 1, 2013.

¶30 BREACHES. SmartLease failed to: (a) install and maintain roads for the RV Park, thereby creating dangerous conditions on the Demised Premises for tenants and visitors; (b) install and properly maintain appropriate sewer, sewer treatment and water systems; (c) timely maintain portable toilets, thereby allowing those toilets to overrun with waste and causing unsanitary and unsafe conditions; and (d) install and maintain proper electrical distribution systems and facilities on the pads where tenant units are to be located. (App., 78-79 at ¶¶ 36-37). In particular, SmartLease failed to properly build the road leading into the RV Park, then failed to maintain that improperly constructed road — thereby forcing the Abelmanns to try to maintain the road for the tenants and visitors. Id.; see also, Termination Notice, (App. at 192). SmartLease presented no evidence refuting these assertions.

¶31 SmartLease's witness, Ray Wurth, also confirmed that the trailer pads installed by SmartLease "weren't compacted, so literally you walk in there and you sink up to your knees on these pads … [O]ur job is not to build roads, our job was to maintain the road from County Road 17 to our plant. Well, we had to build the road to the plant…." (Tr. 79-80).

¶32 The Abelmanns asserted in their Termination Notice that "[t]here are long-term RV tenants who were promised there would be sewer and water provided for at least a year. No hard lined sewer and, or water has been provided to this date [February 28, 2013]." (App. at 192; see also, App., 78-79 at ¶ 36).

¶33 To compound these failures, SmartLease even failed to maintain the portable toilets which it installed at the Demised Premises and failed to remove sewage. As the Abelmanns chronicled in their Termination Notice:

> [O]n multiple occasions, the portable units have been overrun with waste, and not emptied, or maintained in a responsible, cleanly, or orderly manner. Porta-Potties have been found turned over on their sides, allowing waste to seep out of them onto the property. In at least one case, RV tenants have commandeered these units, and have located them within direct proximity to their living space(s). This is unsanitary, and provides the possibility of disciplinary action upon the Lessor by the County, and state health officials.

(App. at 192).

¶34 SmartLease's former employee, Aaron Smith, confirmed all of these assertions. (Tr. 86-87).

¶35 SmartLease did not even dispute the fact that it had failed to install sewer, sewage treatment and water systems. Instead, SmartLease's Mr. Guthrie asserted that SmartLease had no obligation to do so under the terms of the Lease – claiming that the SmartLease development was to be a "dry RV park":

> A. I'll agree that we never ran any water there, because we didn't operate -- we operated a dry RV Park, other than what limited -- what we provided for them.
>
> Q. Do you agree that sewage on portable toilets or portable water closets was overflowing?
>
> A. I believe that it was, because Leanne called me and I told her how to remedy it.

(Tr. 149:8-23) (emphasis added); see also, (Tr. 106:18) ("We always advertised that – as a dry RV park ….").

¶36 Mr. Guthrie's assertion about "a dry RV park" not only flies in the face of the plain and unambiguous language of Article VI, Section 1 of the Lease, but of Article XII, wherein the Abelmanns specifically granted SmartLease permission to construct a sewage treatment system and SmartLease specifically committed to doing so:

> Lessor [the Abelmanns] understands [SmartLease] may/will construct a sewage treatment system on the Demised Premises that will conform to state and local standards.

(App. at 155) (emphasis added).

¶37 Mrs. Abelmann testified that the "electrical access for the pad has not been maintained and malfunctions. Instead of installing proper 220 volt access to the pads, SmartLease installed 110 volt access. At least two of the electric units are blackened and look to be burnt out." (App., 79 at ¶ 37). SmartLease presented no contradictory evidence concerning its failure to construct and maintain proper electrical systems and facilities.

¶38 SMARTLEASE OBLIGED TO SPLIT ANY NET PROFITS FROM SALES OF SCORIA/GRAVEL. Article VI, Section 2 obliges SmartLease to split with the Abelmanns on a 50/50 basis any net profit from sales to third parties of scoria/gravel material from the Abelmanns' nearby quarry/pit. (App. at 153).

¶39 BREACH. The Abelmanns learned of SmartLease seeking to engage a third party, Mr. Dan Smith, to purchase gravel from the Abelmanns' pit on SmartLease's account for the nominal amount of $2.25 per ton – without the Abelmanns' knowledge or consent. (App., 81-82 at ¶ 51). SmartLease told Mr. Smith he could resell that gravel and keep any amount over $14 per ton. This would allow SmartLease to secretly keep the $11.75 per ton difference ($14 per ton – $2.25 per ton), while splitting with the Abelmanns only the profit on $2.25 per ton, if any. (App., 82 at ¶ 52). SmartLease presented no evidence refuting this asserted breach of the Lease.

¶40 SIGNS. Article VII obliges SmartLease to maintain any signage it erects on the Demised Premises in a good state of repair and save the Abelmanns harmless from

any loss, cost or damages as a result of SmartLease's erection of signage. (App. at 153-154).

¶41 BREACH. SmartLease hung a flimsy vinyl sign on a fence at the Demised Premises, which SmartLease allowed to hang only half secured for months and which SmartLease failed to maintain or repair, so that the text of this dangling sign, advertising the RV Park, was and is obscured from the visibility of roadway traffic. (App. at 197). SmartLease presented no evidence refuting this assertion.

¶42 LIABILITY INSURANCE. Article XI obliges SmartLease to obtain and maintain liability insurance covering its operations or business on the Demised Premises, in the amount of $1 million per occurrence and $2 million aggregate, naming the Abelmanns as an additional insured. SmartLease was to "furnish the [Abelmanns] with a copy of such insurance coverage or with a certificate from the company issuing such insurance certifying that the same is in full force and effect prior to commencement of this Lease." (App. at 154-155) (emphasis added).

¶43 BREACH. SmartLease failed to provide the Abelmanns any documentation showing the requisite liability insurance, or that the Abelmanns were named as an additional insured, and that such insurance was in full force and effect prior to commencement of the Lease. (App., 80-81 at ¶ 46). Mr. Guthrie admitted that SmartLease never procured any liability insurance respecting the Demised Premises prior to the Termination Notice. (Tr. 117-118). He admitted that the insurance was a SmartLease obligation under the Lease of which he was aware, but simply claimed that SmartLease was guilty of "an oversight."

¶44 UTILITIES. Article XII obliges SmartLease "to pay for all heat, gas, power, electrical current, telephone, garbage and all other communication facilities or utilities furnished to the Demised Premises during the term of the Lease. [SmartLease] shall place all such utilities unto its own name." (App. at 155).

¶45 BREACH. Mr. Guthrie admitted that the power was shut off at the Demised Premises at least twice due to SmartLease's failure to pay the bills, and that the Abelmanns were forced to pay the power bills in order to have the electrical power reinstated. (Tr. 151:5-15). SmartLease's failure to pay the power bill caused all power to the RV Park to be shut down for several hours. (Tr. 38-39).

## II. The Court Admits, and Relies Upon Irrelevant and Parole Evidence.

¶46 Over the Abelmanns' persistent objections based on lack of relevance, the trial court admitted extensive, oral and documentary evidence of purported separate, later contracts and dealings amongst other parties, through which SmartLease sought to show: (i) the Abelmanns had been paid substantial sums under one of those contracts; (ii) there were third parties interested in leasing or buying portions of the Demised Premises; and (iii) SmartLease had spent time and effort developing the Demised Premises, thereby purportedly enhancing its value. See (Tr. 28-29; 30-31; 43-45; 100-104; 107-109; 110-112; 118-119; 119-122; 124-126 and 129-130; see also (App. at 164, 174, 189, 201, 203, 209, 216, 217, 240, 241 and 242). In particular, the court admitted into evidence the April 1, 2012 Limited Liability Company Operating Agreement for Ranger Rock LLC, a contract entered into by R.A.S.B.M.A., LLC, Dan Abelmann, Leanne Abelmann, Kent Guthrie and Anthony Marshall as "Members." ("the Ranger Rock Agreement"). (App. at 164).

¶47 The court also admitted extensive testimony about the Ranger Rock Agreement and a related contract, and the money which the Abelmanns purportedly received "through Ranger Rock." (Tr. 26-30; 118-119). In response to the Abelmanns' relevancy objections, counsel for SmartLease argued that the Ranger Rock Agreement was "part of this integrated [*i.e.*, with the Lease] agreement. It is part of what the income generation of this whole original deal was to create, … to develop the pad, to turn it into a developable piece of property and they [the Abelmanns] made three hundred and seventy-eight thousand dollars ($378,000.00) from Ranger Rock …." (Tr. 29) (emphasis added). Over the same relevancy objection, the court also admitted Defendant's Exhibit 21 (App. at 209), which purports to be a Ranger Rock accounting record showing distributions to the Abelmanns from Ranger Rock in the amount of the $59,435.81 in 2012 and $218,790.35 in 2013, for a total of the $278,226.16. (Tr. 118-119).

¶48 In its Order Denying Eviction, the trial court made no findings as to whether or not SmartLease breached the terms of the Lease or failed to timely pay rent. It simply concluded that "any non-compliance by SmartLease has been minor and of non-essential terms." The court further concluded that "[t]he essence of the lease was for SmartLease to develop the property so it would generate income for the Abelmanns." The court pointed to evidence of purported money, time and effort invested by SmartLease in the Demised Premises, turning it "into a commercial venture with significant value under which the Abelmanns have been paid in excess of $300,000 pursuant to the lease" (App. at 322) (emphasis added).

¶49 This conclusion by the trial court could only have been based upon its acceptance of SmartLease's assertion that the Ranger Rock Agreement constituted part of

an "integrated agreement" with the Lease – as counsel for SmartLease admitted that the Abelmanns only received $43,000 in rents and/or damage deposits under the Lease in the one and one-half years from the commencement of the Lease to the time of trial, but argued that the Abelmanns also received $278,000.00 from Ranger Rock. (Tr. 44-45).

¶50 As noted above, SmartLease is not a party to the Ranger Rock Agreement.

¶51 Finally, the court ruled that to the extent SmartLease's breach of the Lease "has cost the Abelmann's [sic] any losses they can assert such losses in an action upon the contract."

## LAW AND ARGUMENT

### I. As a Matter of Law, the Trial Court Erred When It Disregarded the Plainly Stated Purpose of the Lease in Determining That Any Breaches by SmartLease Were Immaterial and of Non-Essential Terms.

¶52 An eviction action is a summary proceeding to recover possession of real estate. Minto Grain, LLC v. Tibert, 2004 ND 107, ¶ 8, 681 N.W.2d. 70 (quoting South Forks Shopping Ctr. v. Dastmalchi, 446 N.W.2d 440, 443 (N.D. 1989). "The proceeding provides an expedited time period [of 3 to 15 days] ... within which a defendant must appear and defend in an eviction action." Id. (quoting Flex Credit, Inc. v. Winkowitsch, 428 N.W.2d 236, 240 (N.D. 1988)). In an eviction action, the defendant may show the character of the possessory rights claimed by the parties. Anderson v. Heinze, 2002 ND 60, ¶ 11, 643 N.W.2d 24. "[T]he right to the possession of the real estate is the only fact that can be rightfully litigated unless damages or rent is claimed." Id. at ¶13 (emphasis added). "If a defendant were allowed to assert affirmative defenses or cross-claims which were irrelevant to the right of immediate possession, the summary character of the proceedings would be lost." Minto Grain, at ¶8. When arguments presented by a

defendant do not affect whether or not the defendant is entitled to possession of the property, those arguments will not be considered an appropriate defense to an eviction action. Id. at ¶10.

¶53 Most significantly for purposes of the instant case:

> Leases are subject to general rules of contract construction Agra-By-Products, Inc. v. Agway, Inc., 347 N.W.2d 142, 146 (N.D.1984). If the parties' intent can be ascertained from a written contract alone, the interpretation of the contract to determine its legal effect is a question of law. See, e.g., Mougey Farms v. Kaspari, 1998 ND 118, ¶ 19, 579 N.W.2d 583. The object of interpreting a contract is to give effect to the parties' mutual intent when the contract was executed. N.D.C.C. § 9-07-03; Pamida, Inc. v. Meide, 526 N.W.2d 487, 490 (N.D.1995); Agra-By-Products, at 146. If a written contract is unambiguous, extrinsic evidence is not admissible to contradict the written language. Mougey Farms, at ¶ ¶19. A contract is ambiguous when rational arguments can be made to support contrary meanings of the language in question. Pamida, at 490. Whether or not a contract is ambiguous is a question of law. Mougey Farms, at ¶ 19.

Prairieview Nursing Home v. North Dakota Dept. of Human Services, 1999 ND 142, ¶ 10, 98 N.W.2d 116 (emphasis added).

¶54 As to what constitutes a "material breach," the U.S. Claims Court and courts from various jurisdictions have determined that "[a] breach is material when one of the primary purposes of a contract is violated." Reuter v. Jax Ltd., Inc., 711 F.3d 918, 921 (8th Cir. 2013) (applying Minnesota law); San Carlos Irrigation & Drainage Dist. v. United States, 23 Cl.Ct. 276, 279-280 (Cl.Ct.1991) (material failure of performance when due as to go to the essence and frustrate substantially the purpose for which the contract was agreed to by the injured party); see also J.P. Stravens Planning Associates, Inc. v. City of Wallace, 129 Idaho 542, 545, 928 P.2d 46, 49 (Idaho App., 1996); (substantial or material breach is "one which touches fundamental purpose of contract and defeats the object of the parties in entering into the contract"); AMPC, Inc. v. Meyer,

2003 WL 21459665, p. 3 (Iowa, App., 2003) (breach was material where it went to the "purpose of the severance agreement"); Gray v. Bicknell, 86 F.3d 1472, 1485 (8th Cir. 1996) (applying Missouri law) (material breach defined as "the failure to perform a promise contained in the contract which is essential to the agreement of the parties") (emphasis added).

¶55 While this Court has not explicitly defined "material breach" in the context of contract interpretation generally, or leases in particular, North Dakota's statute on the leasing of real property makes clear that North Dakota also holds that a violation of a lease's stated "use restrictions" or articulated "purpose" necessarily constitutes a material breach, warranting termination of the lease. Specifically, Section 47-16, N.D.C.C., LEASING OF REAL PROPERTY, states in pertinent part:

> **Use of real property for purpose leased – Violation.** When real property is leased for a particular purpose, the lessee must not use it for any other purpose. If the lessee violates the lease in this respect, the lessor may … treat the contract as rescinded thereby.

N.D.C.C. § 47-16-11) (emphasis added).

¶56 In the case at bar, the trial court disregarded the plain and unambiguous language of the written Lease – and thereby erred as a matter of law – when the court concluded that the "essence of the [L]ease was for Smart Lease to develop the property so it would generate income for the Abelmanns." In fact, Article IX of the Lease specifies, in no uncertain terms, that "[SmartLease] agrees to use and occupy the Demised Premises for the purposes of operating a high quality, clean and professionally managed RV/mobile home/cabin park, truck parking and supporting services" (emphasis added).

¶57 If the trial court were correct respecting the "essence" of the Lease, SmartLease could have disregarded the above-quoted, plain and unambiguous "use/purpose" provisions of the Lease and developed and occupied the Demised Premises for any purpose it chose – so long as SmartLease could argue that its development would somehow "generate income for the Abelmanns." Rather, as Article IX and other material provisions of the Lease make clear, the true "essence" of the Lease **was for SmartLease to develop a high-quality, clean and professionally managed residential/truck parking facility, thereby maximizing the number of tenants paying rents and damage deposits – which are the only sources of income to which the Abelmanns are unconditionally entitled under the terms of the Lease**. See (App., pp. 152-153 at Article V, Sections 1 and 2). Quite simply, rents and damage deposits – based on the number of paying tenants attracted to the facility – constitute the only income assured to the Abelmanns under the plain and unambiguous terms of the Lease.[5] Contrary to the trial court's analysis, throughout the entire 99-year Lease the Abelmanns have no right to any income merely due to an increase in the value of the Demised Premises, or due to the time, effort or money invested by SmartLease.

¶58 The trial court simply disregarded the plain and unambiguous language of the written Lease setting forth the true purpose of the contract. Having done so, the court did

[5] While the First Addendum to the Lease purports to afford SmartLease an option to buy some or all of the Demised Premises for a fixed price, this afforded the Abelmanns no right to any income – since SmartLease, as the optionee, possessed the power – but not the obligation – to accept the Abelmanns' offer to purchase for a limited time. Black's Law Dictionary (9th ed. 2009), option; (App. at 163). Similarly, under Article VI, Section 2 of the Lease, the Abelmanns afforded SmartLease the right – but not the obligation – to process additional scoria/gravel from the Abelmanns' quarry/pit and split with the Abelmanns any net profits of sales to third parties – should there be any such profits. (App. at 153).

not even make any factual findings as to whether SmartLease breached the "use/purposes" provision (Article IX) of the Lease, or any or all of the additional contract provisions touching on the fundamental purpose of the Lease.

¶59 More importantly, SmartLease either ignored or failed to refute any of the above-described breaches. For example, SmartLease indisputably breached Article IX. Mr. Guthrie admitted that as of the of trial (July, 2013) the facility was not a clean, high quality RV Park, but contended that "[w]e have got 99 years" to make it so. (Tr. 138:13-14). Yet, the Lease "specifically declared that time is of the essence in all provisions of this Lease." See (App., 157 at Article XXVI). SmartLease began renting out lots in the RV Park by February 1, 2012 – thereby commencing performance under Article IX by that date, at the latest. When parties specify that time is of the essence, "failure to comply with the terms of the contract, at the time named therein for performance, will debar the person in default from claiming any rights thereunder, even in a court of equity." E.E.E., Inc. v. Hanson, 318 N.W.2d 101, 104 (N.D. 1982). SmartLease may not be heard to contend that it could commence performance as an RV Park, yet utterly disregard its specific obligation to provide a high quality, clean, professionally managed facility.

¶60 Given the true "essence" or "purpose" of the Lease, the materiality of SmartLease's undisputed breaches of other provisions of the Lease becomes obvious as well.

¶61 Thus, SmartLease's failure to timely make payments to the Abelmanns of rent, damage deposits, and additional rent for costs of repairs incurred by the Abelmanns, touch precisely on the true purpose of the Lease and are thereby material breaches.

Indeed, Section 47-32-01(4), N.D.C.C., which specifically authorizes eviction of a lessee for failure to pay rent for three days after it is due, thereby acknowledges the materiality of rental payment obligations in all leases. N.D.C.C. § 47-32-01(4).

¶62 Similarly, SmartLease's failure to obtain financing, upon which the parties agreed the Lease is "contingent," was most certainly material – as SmartLease's ability to timely commence operation of a high-quality, clean and professionally managed facility was dependent upon adequate financing. In fact, performance of such a contingency is not only material, but is a condition precedent to the enforceability of a contract. In Airport Inn Enterprises, Inc. v. Ramage, 2004 ND 92, ¶ 12, 679 N.W.2d 269, where this Court addressed an agreement "contingent upon Buyer obtaining financing," it noted that "[w]hen an agreement is conditioned upon obtaining financing, a condition precedent to performance of the agreement is created" and further stated that "there is no enforceable agreement until the financing is obtained."; see also Quinn Distributing Company v. North Hill Bowl, Inc., 139 N.W.2d 860, 863-64 (N.D. 1966).

¶63 Similarly, SmartLease's breaches of its obligations under Article VI constitute material breaches, in that they are integral to the operation of a high-quality, clean and professionally managed RV/mobile home/cabin park. Such an intended facility necessarily required SmartLease to "make as and when needed all repairs or replacements as necessary in and about the Demised Premises" and to "construct and maintain in good condition all … roads, sewer, sewer treatment systems, water … and electrical distribution systems and facilities" – which the evidence demonstrates SmartLease failed to do. Similarly, SmartLease's obligation to timely pay the utility bills for the Demised Premises, to maintain the signage which it erected, and to adequately insure its operations

and business throughout the Lease term all were material obligations to meet the Abelmanns' expectation for a high-quality, clean and professionally managed facility. See (App., 153-155, 154-155 at Articles VII, XI, and XII). While the record amply demonstrates that SmartLease breached all of these material obligations, the trial court simply deemed these provisions "non-essential terms" and failed to address them or make findings.

## II. The Trial Court's Finding That the Abelmanns Were Paid In Excess of $300,000 "Pursuant to the Lease" was Clearly Erroneous.

¶64 Not only did the trial court err, as a matter of law, when it failed to consider the plain and unambiguous terms of the Lease in determining the essence or purpose of the Lease, but the court relied on a finding of fact – "the Abelmanns have been paid in excess of $300,000 pursuant to the lease" – which was clearly erroneous. In truth, the Abelmanns were paid only $43,000 "pursuant to the Lease" (while SmartLease failed to pay $35,000 due under the Lease), and SmartLease's counsel acknowledged at trial this limited sum paid under the Lease. The remaining $278,226.16 which the Abelmanns received all came from Ranger Rock, pursuant to the Ranger Rock Agreement. The Ranger Rock Agreement arose on April 1, 2012, some three and one-half months after the Lease was executed, and SmartLease was not even a party to the Ranger Rock Agreement.

¶65 While SmartLease argued, and the trial court obviously concluded, that the Lease and the Ranger Rock Agreement constituted integrated agreements, this cannot be the case. Under North Dakota law, only when "[s]everal contracts relating to the same matters between the same parties and made as parts of substantially one transaction are [they] to be taken together." See N.D.C.C. § 9-07-07 (emphasis added). The

"contemporaneous execution rule" does require certain instruments to be read and construed together, but only when those instruments relate to the same transaction and are executed at the same time by the same parties. Nantt v. Puckett Energy Co., 382 N.W.2d 655, 658 (N.D. 1986); U.S. v. Basin Elec. Power Co-op, 248 F.3d 781, 808-09 (8th Cir. 2001) (applying North Dakota law) (two agreements signed by same parties on same day were components of same transaction); accord Grynberg v. Dome Petroleum Corp., 1999 N.D. 167, ¶ 10, 599 599 N.W.2d 261; Knox v. Kreuger, 145 N.W.2d 904 (N.D. 1966). In the instant case, almost $280,000 of the more than $300,000 to which the trial court referred was paid to the Abelmanns not pursuant to the Lease, and not by SmartLease, but by Ranger Rock – of which SmartLease is not a party. The trial court's finding that the Abelmanns were paid these sums "pursuant to the Lease" was necessarily induced by an erroneous view of the law respecting the construction of multiple instruments. As such, the finding is clearly erroneous. See VND, LLC v. Leevers Foods, Inc., 2003 ND 198, ¶ 32, 672 N.W.2d 445, 453. This erroneous finding formed the basis for the trial court's determination that SmartLease did not materially breach the Lease. As such, the court's Order must be set aside on this basis as well.

## III. Smartlease Has An Alternative Forum In Which To Litigate Any Claims It May Have Against The Abelmanns.

¶66 It is clear from the Order Denying Eviction that the trial court based its decision on its view that the Abelmanns might be unjustly enriched, were SmartLease to be evicted (App. at 322). Even if the trial court is correct in its assessment of SmartLease's contributions to the Demised Premises, the court clearly erred by disregarding the parties' clear and unambiguous statement of intent respecting the purpose of the Lease and by considering extrinsic evidence having nothing to do with the

narrow issues presented in an eviction proceeding. Clearly, the trial court was persuaded by the parole evidence and irrelevant contracts introduced by SmartLease, while it disregarded the plain and unambiguous language of the Lease itself respecting the Abelmanns' entitlement to eviction thereunder. Perhaps SmartLease's extraneous evidence and claims have a place in another legal proceeding, but not here. "They are not legal defenses to the eviction.… If [SmartLease] wishes to bring those claims as separate suits [it] may do so." See Anderson v. Heinze, 2002 N.D. 60, ¶ 7, 643 N.W.2d 24.

## CONCLUSION

¶67 For the reasons set forth above, the Abelmanns respectfully pray that this Court reverse the Order Denying Eviction and award them immediate possession of the Demised Premises.

Respectfully submitted this 31st day of January, 2014.

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## CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This Opening Brief contains 7,306 words, excluding the parts of the brief exempted by N.D.R.App.P. (a)(7)(A). I certify that this Opening Brief complies with the typeface requirements of N.D.R.App.P. 32 and the type style requirements of that rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Times New Roman, 12 point font.

Dated this 31st day of January, 2014.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellants has been served by e-mail to the following:

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20130349

Dan and Leanne Abelmann,

Plaintiffs/Appellants,

McKenzie County District Court
Case No. 27-2013-CV-00115

v.

SmartLease USA, L.L.C.,

Defendant/Appellee.

APPEAL FROM THE MCKENZIE COUNTY DISTRICT COURT
ORDER DENYING EVICTION
THE HONORABLE DAVID W. NELSON, PRESIDING
DATED AUGUST 26, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Brief of Appellants, corrected to reflect the request of the Supreme Court that the Table of Contents and Table of Authorities reflect paragraph numbers instead of page numbers, has been served by e-mail to the following:

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Dated this 4th day of February, 2014.

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