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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dan and Leanne Abelmann,	)	
	)	
Plaintiffs/Appellants,	)	
	)	
vs.	)	Supreme Court No. 20130349
	)	McKenzie County District Court
SmartLease USA, L.L.C.	)	Case No. 27-2013-CV-00115
	)	
Defendant/Appellee,	)	
	)	

APPEAL FROM THE McKENZIE COUNTY DISTRICT COURT
ORDER DENYING EVICTION DATED AUGUST 26, 2013

NORTHWEST JUDICIAL DISTRICT

BRIEF OF DEFENDANT – APPELLEE

SMART LEASE USA, L.L.C.

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STATEMENT OF THE ISSUES

[¶1] Does the evidence viewed in the light most favorable to the District Court's findings support the conclusion that Defendant-Appellee Smart Lease USA, L.L.C. did not commit a material breach justifying eviction?

STATEMENT OF THE CASE

[¶2] Plaintiffs-Appellants Dan and Leanne Abelmann served upon Smart Lease a Notice of Intention to Evict on May 3, 2013. App. 94-95. Plaintiffs-Appellants filed this action for eviction on May 30, 2013. The eviction hearing took place on July 9, 2013. The District Court heard testimony from Leanne Abelmann; Smart Lease principal Kent Guthrie; former Smart Lease property manager Aaron Smith; and Ray Wurth, a principal of the company Executive Housing Solutions, Inc. ("EHS"). Trans. of July 9, 2013 Eviction Hearing (hereinafter "Trans.") at 2.

[¶3] The District Court entered an order denying eviction on August 26, 2013, finding that there was no material breach justifying eviction. App. 322. Rather, the District Court found that "[t]he facts show that any noncompliance by Smart Lease has been minor and of non-essential terms." *Id.* The District Court summarized the facts as follows:

> The essence of the lease was for Smart Lease to develop the property so it would generate income for the Abelmanns. Smart Lease has invested in excess of $500,000 in the property to do so. It has spent substantial time and effort turning it from a hayfield/pasture into a commercial venture with significant value under which the Abelmanns have been paid in excess of $300,000 pursuant to the lease. Abelmanns have only made the claim for termination after Smart Lease's money, labor and effort have borne fruits worth potentially millions of dollars.

App. 322.

[¶4] A Judgment of dismissal was entered on August 30, 2013. App. 324. Plaintiffs-Appellants filed a notice of appeal on October 28, 2013. App. 325.

STATEMENT OF THE FACTS

[¶5] Appellants' statement of facts focuses on testimony and other evidence that Appellants believe support their case for eviction. It omits, however, much of the testimony and other evidence that support the District Court's conclusions. Viewing the evidence in the light most favorable to the District Court's conclusions, noncompliance with the Lease, if any, was minor and of non-essential terms. The complaints of non-compliance were raised after the fact as a pretense for eviction when the Abelmanns realized that the leased property had greatly appreciated in value. As set forth below, the record contains ample evidence to support the District Court's finding that there was no material breach justifying eviction. Smart Lease has also filed a Supplemental Appendix (hereinafter "Supp. App.") containing several trial exhibits that appear to have been selectively excluded from the Appellants' Appendix.

A. Smart Lease Enters into a Land Lease Agreement with the Abelmanns.

[¶6] During the relevant period, Smart Lease was an LLC with three principals: Kent Guthrie, Tony Marshall, and Steve Furst. Trans. 91:1-9. After investigating opportunities in the Williston Basin, Smart Lease met with the Abelmanns in the fall of 2011 and discussed developing an RV park on a tract of land owned by the Abelmanns. Trans. 94:23 through 95:14.

[¶7] On December 18, 2011, Smart Lease and the Abelmanns entered into the Land Lease Agreement that is the subject of this action (the "Lease"). App. 152-62. The Lease covers a parcel of approximately 110 acres in McKenzie County, North Dakota. App. 152, Lease para. II. The initial term of the lease ran through 2016, with an option

for Smart Lease to hold over and renew the Lease for successive 3-year terms for up to 39 years. App. 152, Lease para. IV.

[¶8] The stated "Purpose" of the Lease was for use as "short/long term RV (recreational vehicle), mobile home, cabin units, and truck parking." App. 152, Lease para. II. Additional terms of the lease referred to care and development of the property, including obligations of Smart Lease to "take good care" of the premises and to construct and maintain necessary improvements "in good condition and repair." App. 153, Lease para. VI § 1. In the event that Smart Lease failed to keep the premises "in a good and orderly repair," the Lease provided as a remedy that the Abelmanns could perform necessary repairs and add the costs of the repairs to the rent due. *Id.*

[¶9] The Lease further provided that Smart Lease would use the premises "for the purposes of operating a high quality, clean and professionally managed RV/mobile home/cabin park, truck parking and supporting services." App. 154, Lease para. IX. The Lease did not, however, provide a timetable for development of the park. Smart Lease was to calculate its rent to the Abelmanns as a function of housing lot and truck parking rentals each month. App. 152-53, Lease para. V.

[¶10] The Lease also provided for use of a nearby gravel pit owned by the Abelmanns. App. 153, Lease para. VI § 2. The Lease permitted Smart Lease to use and barter the gravel for development of the premises at no cost. It also provided that Smart Lease could process additional gravel for sale to third parties, with profits from such sales split 50/50 between Smart Lease and the Abelmanns. *Id.*

[¶11] The parties later formed a company named Ranger Rock, LLC for purposes of processing and selling gravel from this pit. Although the Abelmanns have attempted to

cast the efforts of Ranger Rock as irrelevant to Smart Lease's performance under the Lease, the record contains ample evidence to support Smart Lease's position that the formation and operation of Ranger Rock was a manifestation of Smart Lease's performance of the "gravel provision" of the Lease. *See, e.g.,* Trans. 99:11 through 102:23. Ranger Rock was formed shortly after the Abelmanns and Smart Lease entered into the Lease here, and the members of Ranger Rock entered into an operating agreement in April 2012. App. 164-73. Although Appellants' brief notes that the Smart Lease entity was not a member of Ranger Rock, it glosses over the fact that the members of Smart Lease were, along with the Abelmanns, the owners of Ranger Rock, either individually or through a member LLC. App. 172, Operating Agreement. The operating agreement was signed by the Abelmanns and by all three principals of Smart Lease. *Id.* Indeed, Leanne Abelmann admitted in her testimony that the Abelmanns, "together with the principals of Smart Lease, formed an entity called Ranger Rock, LLC." Trans. 27:2-4.

[¶12] It is undisputed that Ranger Rock was formed for the purposes of operating the same gravel pit that was the subject of the "gravel provision" in the Lease. See App. 165, Operating Agreement § 1.6; Trans. 29:4-8. Under the terms of the operating agreement, the Abelmanns were to receive 56 percent of the company's income and the "Smart Lease" members an aggregate of 44 percent. App. 173, Operating Agreement. Kent Guthrie testified that Smart Lease bumped the Abelmanns' profit share up to 56 percent—more than the 50/50 split they were entitled to under the Lease— "in consideration for Abelmanns being the landowners," even though Smart Lease's principals took the lead on managing the LLC. Trans. 100:13 through 102:3.

B. Smart Lease Diligently Develops the Property Pursuant to the Lease.

[¶13] Smart Lease set to work earnestly developing the premises after entering into the Lease. At the time the Lease was executed, the property was nothing more than, as the District Court put it, "a hayfield/pasture." App. 322; *see also* Tr. 18:2-11. Yet Smart Lease began generating income from camper or truck parking by February 2012, within 60 days of signing the Lease. Trans. 71:17 through 72:3.

[¶14] Indeed, one of Smart Lease's principals, Steve Furst, moved into the Abelmanns' house in fall 2011 and lived with them while he oversaw development of the property. Trans. 21:4-8; Tr. 108:23 through 109:1. Furst remained with them until September 2012, when he became ill and had to leave. Trans. 21:19-25.

[¶15] Throughout 2012, Smart Lease worked on a number of fronts to develop the property. In all, Smart Lease itself invested over $500,000.00 in the property and increased its value by millions of dollars. Supp. App. 29, Chart of Value; Trans. 113:14 through 117:15; App. 267-71, Smart Lease USA Timeline; Trans. 131:3-24. Its principals devoted countless hours to developing the property. Supp. App. 23, Kent Guthrie Summary of Time; Trans. 112:3 through 113:12. For example, Smart Lease worked to have the property zoned as a residential tract, differentiating the property from surrounding agricultural zoning and increasing its development potential. Trans. 107:10 through 108:22. Leanne admitted that Smart Lease made arrangements for line taps with the McKenzie Water Resource District. Trans. 38:14-21. Smart Lease did not run water to the RV park at the time, however, and it advertised and ran a "dry" RV park. Trans. 106:17-19. Smart Lease even brought a sublessee, Executive Housing Solutions, Inc. ("EHS"), to the site to construct a sewage package treatment plant, which was to provide sewage treatment for trailers on the site. Trans. 37:25 through 38:5; App. 190-91. EHS

also brought electricity to the site. Trans. 79:16. In all, EHS has invested over $1 million in the property. Trans. 76:15-17; 77:23 through 78:6.

[¶16] Smart Lease also hired a manager named Aaron Smith. Trans. 108:23 through 109:1. Kent Guthrie testified that although Smith did not have previous experience managing an RV park, he trained under the direction of Furst and did a good job while he was working for Smart Lease. Trans. 145:8-22. Smith worked full-time on the property from January to October 2012 and then part-time until Leanne Abelmann assumed management of the property in January 2013. Trans. 84:6-14, 89:2-16; App. 211-215, Aaron Smith Invoices.

C. Leanne Abelmann Assumes Management of the Premises.

[¶17] Steve Furst fell ill in September 2012. Trans. 21:19-25. Aaron Smith continued to manage the property for a time, but ultimately Smart Lease turned management of the park over to Leanne Abelmann on approximately January 25, 2013. Trans. 89:15 through 90:8. When Smith left, he met with Leanne, gave her an accounting, and turned over his Smart Lease phone to her. Trans. 89:15 through 90:8; 122:20 through 123:12.

[¶18] Leanne admitted that she had expressed a willingness to assist with operating the leased property. Trans. 22:8-21. Although Abelmanns resist characterizing Leanne as the manager during this period, Leanne admitted that she agreed to "help out" taking care of the RV park and that she became the person collecting the rent. Trans. 22:17 through 23:3. She also admitted that she was to be paid $15.00 per hour by Smart Lease "[f]or taking care of the park." Trans. 36:4-12.

[¶19] Notwithstanding the Abelmanns' contention that Smart Lease failed to pay rent, Smart Lease was current through the time that Leanne began collecting rent from RV tenants. Leanne admitted as much in her testimony. Trans. 36:20-24 (admitting that

Smart Lease was current through the end of January 2013). After Leanne assumed management on January 25, 2013, she collected the rents from RV tenants but soon stopped remitting any portion to Smart Lease. Specifically, Leanne testified that she remitted $4,600 to Smart Lease the first month and after that time set aside all of the money in the Abelmann's personal safe, at the advice of counsel. Trans. 23:2-11. Despite an allegation in Leanne's affidavit that Smart Lease owed $8,700 in rent for February through April 2013, Leanne admitted at the eviction hearing that she had retained over $15,000 in rents that she had collected from RV park tenants. *Compare* App. 77-78 *with* Trans. 23:2-13.

D. Smart Lease's Efforts Create Substantial Income for the Abelmanns and Result in an Offer to Purchase the Property for Nearly Five Million Dollars.

[¶20] Smart Lease's efforts generated significant income for the Abelmanns. Leanne admitted that in total the Abelmanns received $43,000 in rents from the RV park. Trans. 44:7-9. They received even more from gravel sales. In her testimony, Leanne attempted to downplay the income that the Abelmanns received from gravel sales, claiming it was "not much," upon which the District Court commented when it came to light that the Abelmanns had received income in the hundreds of thousands of dollars. Trans. 26:11-25. Leanne eventually admitted that the Abelmanns had received over $270,000.00 from gravel sales. Trans. 45:16-21; *see also* App. 209-10, Ranger Rock Summary of Bank Activity Since 2012 (showing $59,435.81 distributed to the Abelmanns for 2012 and $218,790 for 2013); Trans. 118:16 through 119:5. As discussed above, Ranger Rock was formed and operated the gravel pit in furtherance of the Lease's "gravel provision." *See* App. 153, Lease para. VI § 2. Thus, as noted by the District Court, the Abelmanns, in a

period of about a year, received over $300,000 pursuant to the Lease, due to Smart Lease's efforts and investments.

[¶21] Smart Lease and the Abelmanns also modified the Lease to make the leased property more attractive to investors. On November 10, 2012, the parties agreed to an addendum to the Lease (the "Addendum"). App. 163, First Addendum to Land Lease Agreement. The Addendum stated that it would "lengthen the renewal terms up to a 99 year total period." It also granted Smart Lease a 36-month option to purchase some or all of the 110-acre premises, "for a static price of $20,000 per acre." This results in a $2.2 million purchase price for the entire 110 acres. Kent Guthrie testified that the reason for the addendum was to assist in attracting potential investors or buyers for the premises. Trans. 96:11 through 97:3.

[¶22] Smart Lease worked diligently to attract investors interested in a potential sale or other investment in the premises. It retained a consultant to bring interested potential investors and buyers. Trans. 96:22-25; App. 242-66, Bakken Consulting, Inc. Marketing Materials. Smart Lease eventually received multiple offers for sale of the property, including some offers for millions of dollars. Trans. 130:23 through 131:2. These efforts culminated with a purchase agreement dated January 25, 2013 between Smart Lease and a prospective purchaser for $4,999,940.00. Trans. 129:21 through 130:21; Supp. App. 15, Purchase Agreement. Kent Guthrie testified that the prospective purchaser, the Hegg companies, completed a concept design for developing the entire 110 acres subject to the Lease, and planned to invest 50 to 60 million dollars in developing the property. Trans. 120:11-21; App. 241, Concept Sketch Plan.

E. The Abelmanns Attempt to Terminate the Lease Only After Realizing that the Property Has Increased in Value.

[¶23] As of November 2012, the Abelmanns were satisfied enough with Smart Lease's performance that they extended the term of the Lease to 99 years. On about February 22, 2013, Leanne admittedly spoke with Steve Furst and told him she was excited about having him come back to the property. Trans. 24:17-22. A week later, however, on March 1, 2013, the Abelmanns transmitted to Smart Lease a letter dated February 28 that purported to terminate the Lease, seemingly out of the blue. App. 192-200.

[¶24] Although the Abelmanns have stressed the unclean condition of the property as a basis for terminating the Lease, the record contains ample evidence showing that the Abelmanns raised these complaints only after the fact as a pretense for eviction. Leanne claimed she had complained of unclean conditions before she assumed management of the park, but she was unable to point to any correspondence or other documentation showing complaints to Smart Lease before the Abelmanns attempted to terminate the Lease. Trans. 25:8-16. In addition, the Lease stated that the Abelmanns could make repairs that became necessary and add the costs of the repairs to the rent due from Smart Lease, but there was no evidence that the Abelmanns ever did so. For example, although the Abelmanns have claimed they graded a road, Leanne admitted at the hearing that they never attempted to charge Smart Lease for the grading prior to the termination letter and that they "just put it in with all of our stuff." Trans. 42:22 through 43:12.

[¶25] Kent Guthrie testified that the Abelmanns had never complained of material breaches or problems with the Lease before the time that Leanne began managing the property. Trans. 123:5-8. Leanne had raised certain discrete problems with Smart Lease as they occurred, and the problems were addressed. *See* Trans. 123:6 through 124:11.

The Abelmanns attempt to seize upon Guthrie's admission that the RV park was not a clean, high quality RV park when he visited it two to three weeks before the eviction hearing—approximately four months after the Abelmanns attempted to terminate the Lease and bar Smart Lease from entering the property. Trans. 140:5-13; 152:5-12. Guthrie also testified, though, that Smart Lease remained in the process of developing the property, and that even so "the park was probably in better shape than most of the parks" in the area. Trans. 139:13-18 and 146:8-10.

[¶26] Indeed, the Abelmanns' evidence primarily showed that conditions deteriorated after Leanne assumed management of the park and later barred Smart Lease from returning. The photos of the park that the Abelmanns submitted into evidence were taken well after Leanne assumed management of the park. Trans. 33:11-14; 72:4-15. In fact, Leanne admitted at trial that the photos had been taken recently—after Leanne had managed the property, and after the Abelmanns had sent Smart Lease a notice of termination and tried to bar Smart Lease from coming on the property. Trans. 72:4-15.

[¶27] Perhaps most tellingly, there is evidence that the Abelmanns' eviction claim was really motivated by the Abelmanns' realization that the leased property had become worth substantially more than Smart Lease's option to purchase the property for $2.2 million. Leanne admitted hearing of the nearly $5 million Hegg companies offer through Ray Wurth of EHS, though she claimed that the first time she had ever spoken with Wurth was two days before the eviction hearing. Trans. 49:25 through 50:19. Leanne also denied having seen the sublease agreement between Smart Lease and EHS. 40:11 through 41:3. Ray Wurth, however, contradicted Leanne's testimony. He testified concerning an e-mail that he sent to Smart Lease's principals on March 6, 2013, showing

that Leanne had spoken with Wurth and others from EHS in the weeks leading up to March 6, 2013, and that Wurth had shown the Abelmanns the agreements between Smart Lease and EHS. Supp. App. 1, E-mail dated March 6, 2013; Trans. 74:13-25; 75:18 through 76:24. Wurth also made clear that there was tension in the relationship between EHS and Smart Lease. *See* Trans. 78:23-25.

[¶28] Taken together, the evidence paints a striking timeline. The Abelmanns granted Smart Lease a 99-year extension and an option to purchase in November 2012. On or about February 22, 2013, Leanne admittedly spoke with Steve Furst and expressed that she was excited about his return. Trans. 24:17-22. And yet a week later, the Abelmanns sent Smart Lease a letter purporting to terminate the Lease. Although the termination letter ran 8 pages and set forth a laundry list of alleged breaches of the Lease, the Abelmanns had not previously documented the supposedly serious and ongoing problems. It would seem that in the interim between February 22 and March 1, the Abelmanns spoke with EHS, realized the value that Smart Lease had added to the leased property, and developed a plan to squeeze Smart Lease out of the picture. The District Court took this view when it concluded, "Abelmanns have only made the claim for termination after Smart Lease's money, labor and effort have borne fruits worth potentially millions of dollars." App. 322, Order Denying Eviction.

ARGUMENT

I. Standard of Review

[¶29] This appeal is primarily an attack on the District Court's factual findings, notwithstanding the Abelmanns' attempt to cast their appeal as a matter of contract interpretation subject to *de novo* review.

[¶30] North Dakota's eviction statute provides that "[a]n action of eviction to recover the possession of real estate is maintainable" when, among other things, "[a] lessee . . . fails to pay rent for three days after the rent is due" or when "[t]he lessee violates a material term of the written lease agreement between the lessor and lessee." N.D.C.C. § 47-32-01 (emphasis added). The so-called "material breach rule" is a well-established principle of landlord-tenant law, given "the potential harshness inherent in abruptly declaring a lease at an end." 54 A.L.R.4th 595 s. 2[a]. "Nearly all courts hold that, regardless of the language of the lease, to justify a cancellation, forfeiture, or other premature termination of a lease, the breach must have been 'material,' 'serious,' 'substantial,' or the like." *Id.* (collecting cases). Thus, the right of possession in eviction actions will often depend on "whether or not [the lessee] failed to pay rent and whether or not there were any material breaches." *VND, LLC v. Leevers Foods, Inc.*, 2003 ND 198 ¶ 13, 672 N.W.2d 445, 449.

[¶31] This Court has held that the question of substantial performance under a lease (the opposite of material breach) is a question of fact: "[W]hether there has been substantial performance of a contract is a question of fact. The question of whether a lease has been fully complied with should also be treated as a finding of fact because the rules of construction relating to contracts generally apply to the construction of leases." *VND, LLC*, 2003 ND 198 ¶ 31, 672 N.W.2d at 453 (quoting *Kolling v. Goodyear Tire & Rubber Co.*, 272 N.W.2d 54, 60 (N.D. 1978)). Because material breach of a lease is a question of fact, the trial court's findings on the issue "are presumptively correct." *Hutton v. Janz*, 387 N.W.2d 494, 496 (N.D. 1986). As such, this Court "view[s] the evidence in the light most favorable to the findings" and will not overturn the findings of

the District Court unless they are clearly erroneous. *Guthmiller Farms, LLP v. Guthmiller*, 2013 ND 248 ¶ 7, 840 N.W.2d 636, 639 (quoting *Lorenz v. Lorenz*, 2007 ND 49, ¶ 5, 729 N.W.2d 692)).

[¶32] The determination of substantial performance tends to be especially fact-intensive where the question is whether a lessee adequately performed commercial arrangements set forth in a lease. *See, e.g.*, *Hutton*, 387 N.W.2d at 496 (affirming finding that "such managerial failure as may be attributed to defendants was not of such nature as to be material" concerning covenant to operate a ranch "in a good and husbandlike manner"); *Ehrman v. Feist*, 1997 ND 180 ¶¶ 15-16, 568 N.W.2d 747, 753 (affirming as not clearly erroneous trial court's refusal to terminate lease based on allegedly wasteful farming practices).

[¶33] Where a lease is unclear, the North Dakota Supreme Court "has consistently held a lease will ordinarily be construed most strongly against the lessor." *VND, LLC*, 2003 ND 198 ¶ 34, 672 N.W.2d at 449. This rule applies even where the lessee's attorney drafted the lease. *Ehrman*, 1997 ND 180 ¶10, 568 N.W.2d at 752.

II. Smart Lease Did Not Commit a Material Breach of the Lease Justifying Eviction, Especially When the Evidence is Viewed in the Light Most Favorable to the District Court's Findings.

[¶34] The District Court did not clearly err in rejecting the Abelmanns' claims that multiple material breaches occurred. The Abelmanns protest that the District Court did not make specific findings about whether or not a breach occurred as to each of their laundry list of complaints. As the Abelmanns note in their brief, however, eviction actions call for a summary proceeding with an expedited timeframe. *See* N.D.C.C. chap. 47-32. The summary nature of eviction proceedings would likely be lost if District Courts were required to draft lengthy written opinions addressing each point of

everything-but-the-kitchen sink arguments of the sort attempted by the Abelmanns. The District Court here simply concluded that there was no material breach justifying eviction, because "[t]he facts show that any noncompliance by Smart Lease has been minor and of non-essential terms." *Id.* In other words, the District Court considered the evidence and made a factual finding that no material breach had occurred. This finding is presumptively correct, and it must be affirmed unless this Court concludes that the record will not support such a finding.

[¶35] As set forth below, the evidence viewed in the light most favorable to the District Court's findings supports a conclusion that Smart Lease substantially performed under the Lease as to each of the provisions about which the Abelmanns raise arguments. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981) (setting forth factors to be considered in determining whether a failure to render or to offer performance is material). In addition, the District Court did not err in finding that the Abelmanns received over $300,000 pursuant to the Lease, and that finding was not outcome-determinative in any event.

A. Particular Breaches Alleged

1. Smart Lease Never Breached Its Obligation to Pay Rent.

[¶36] Eviction is proper if a lessee "fails to pay rent for three days after the rent is due." N.D.C.C. § 47-32-01. Viewing the evidence in the light most favorable to the District Court's findings, however, Smart Lease was current on its rent through January 25, 2013, when Leanne Abelmann assumed management of the RV park. *Supra* ¶¶ 17-19. "[E]ach party to a contract impliedly agrees not to prevent the other party from performing and not to render performance impossible." *Barrett v. Gilbertson*, 2013 ND 35 ¶ 21-22, 827 N.W.2d 831, 840. When one party prevents the other party's performance of a term of a

contract, it excuses the nonperformance and provides a defense in a suit for breach by the nonperformance. *Id*. Here, the Abelmanns retained all the rent money with no accounting, preventing Smart lease from paying any rent to them.

[¶37] In any case, Leanne Abelmann admitted at the eviction hearing that she was holding back more in rent (in excess of $15,000) than her affidavit claimed Smart Lease owed ($8,700). *Compare* App. 77-78 *with* Trans. 23:2-13. To try and skirt this fact, the Abelmanns attempt to tack on $6,604.38 worth of repairs to the property claimed in Leanne's affidavit. App. 79-80. But there is no evidence that the Abelmanns attempted to bill Smart Lease for these repairs to the property. That additional amount still only brings the total to $15,304.28, and Leanne admitted that she was retaining more than $15,000 of rents in her safe. Aside from Leanne's bare assertion at the hearing, the Abelmanns cite no evidence that Smart Lease owed $35,000 in rent at the time of trial. The Abelmanns seem to think that the District Court was bound to credit every word spoken by Leanne unless Smart Lease introduced evidence that specifically contradicted each detail, but that is not the law. The trial judge is uniquely qualified to determine the credibility of a witness and may disregard testimony found to be not credible, subject only to the clear error standard set forth in Rule 52. *Erickson v. Brown*, 2012 ND 43 ¶ 11, 813 N.W.2d 531, 535 (relying on *Urlaub v. Urlaub*, 325 N.W.2d 234, 236 (N.D. 1982)). Here, the District Court was certainly entitled to disregard Leanne's testimony where it was not corroborated by other credible evidence, given Leanne's attempts to shade the truth in her testimony (for instance, regarding when she first spoke with Ray Wurth of EHS or concerning the income that the Abelmanns received from gravel sales). *Cf.* N.D. Pattern Jury Instruction K-5.10, Impeachment.

[¶38] In short, the Abelmanns have no basis for claiming that Smart Lease breached its duty to pay rent.

2. Smart Lease Used and Developed the Premises in Accordance with the Purpose of the Lease.

[¶39] The stated "Purpose" of the Lease was for Smart Lease to lease the premises for use as "short/long term RV(recreational vehicle), mobile home, cabin units, and truck parking." App. 152, Lease para. II. A "Use of Premises" provision further provided that Smart Lease agreed to use and occupy the premises "for the purposes of operating a high quality, clean and professionally managed RV/mobile home/cabin park, truck parking and supporting services." App. 154, Lease para. IX.

[¶40] Regarding violations of use restrictions in a lease, North Dakota's statute on the leasing of real property provides:

> 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 hold the lessee responsible for the safety of the property during such use in all events or may treat the contract as rescinded thereby.

N.D.C.C. § 47-16-11. This Court's *Kolling* decision provides an instructive example of how the material breach rule has been applied regarding alleged violations of use restrictions. In *Kolling*, a commercial lessee was held to have substantially complied with a lease term restricting use of the premises to lawful purposes, even though the lessee "may not have technically fully complied with the lease." 272 N.W.2d at 60. Specifically, the city building inspector and lessee's store manager reached an agreement with respect to the outdoor storage of tires that allegedly had violated a zoning ordinance, and the lessee corrected the zoning violations before the lessors' refusal to recognize the lessee's exercise of an option to renew. See *id.* at 56-57, 60. The court also noted that the

lessee had presented evidence that the lessors' "primary reason for wanting to terminate the lease may have been because the present rental value of the property greatly exceed[ed]" the monthly rent under the existing lease. *Id.* at 58.

[¶41] Additionally, a party's efforts and investment of money will likely be relevant where the lease calls for some sort of commercial development. *See 501 DeMers, Inc. v. Fink*, 148 N.W.2d 820, 828-29 (N.D. 1967) (reciting landlord's efforts in constructing parking facility). In another contractual context where performance required commercial efforts, substantial performance has been defined as "the expenditure of time, effort, or money." *Schlossman & Gunkelman, Inc. v. Tallman*, 1999 ND 89 ¶ 37, 593 N.W.2d 374, 383 (interpreting real estate listing agreement).

[¶42] As detailed in the statement of facts, Smart Lease diligently developed the property for use as an RV park in line with the Lease's use restrictions, especially when the evidence is viewed in the light most favorable to the District Court's findings. In arguing that Smart Lease violated the Lease's use restrictions, the Abelmanns primarily rely on an admission by Kent Guthrie that the premises did not constitute a clean, high quality RV park when he visited it two to three weeks before the eviction hearing. Trans. 140:5-13. But a clean, high quality RV park was the end product that Smart Lease was to develop, and it is uncontested that Smart Lease remained in the process of developing the property at the time that the Abelmanns attempted to termination the Lease. Nothing in the Lease required Smart Lease to wave a magic wand over undeveloped farm land and transform it into the finished product overnight.

[¶43] The Abelmanns attempt to buttress their argument by pointing to a "time of the essence" clause in the Lease. App. 157, Lease para. XXVI. They rely on authority that

"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) (emphasis added). But the Lease here did not name a time by which development of the property was to be completed—there was no deadline expressed in the lease. Smart Lease cannot be held to a deadline that did not exist. All that remained was for the District Court to determine whether Smart Lease reasonably performed its ongoing duty to develop the property. "What constitutes a reasonable time within the facts of a given case is a question of fact." *Keller v. Hummel*, 334 N.W.2d 200, 203 (N.D. 1983) The evidence shows that Smart Lease put forth reasonable ongoing efforts and exercised good faith in developing the property from the time it executed the Lease, and therefore did not run afoul of any "time of the essence" provision with respect to development of the property.

[¶44] The Abelmanns also try to argue that Smart Lease was bound to complete development of the RV park before accepting tenants, but there is no such provision to be found in the Lease. Moreover, the Abelmanns should not be heard to complain that Smart Lease began generating revenue even while it continued to develop the property. Had Smart Lease put off accepting tenants until it had fully developed an immaculate RV park, the Abelmanns would no doubt be here arguing that Smart Lease breached the Lease by failing to generate sufficient rentals.

[¶45] The Abelmanns also argue that Smart Lease breached the "Use of Premises" provision in that "the project was never professionally managed." Br. of Appellants ¶ 15 (emphasis in original). This assertion disregards the fact that Steve Furst, one of Smart

Lease's principals, lived with the Abelmanns for almost a year while he managed the development of the leased property. Trans. 21:4-8; Tr. 108:23 through 109:1. The Abelmanns do not even mention Furst in their appellate brief. Although the Abelmanns also attempt to disparage the qualifications of Smart Lease's property manager, Aaron Smith, there was testimony that Smith trained under Furst's supervision and did a good job while he worked at the property. Trans. 145:8-22. Thus, the evidence viewed in the light most favorable to the District Court's findings shows that the property was professionally managed through January 25, 2013, at which time Leanne Abelmann assumed management duties for the property. If Leanne did a poor job managing the property, the Abelmanns cannot use her work for Smart Lease as a basis for eviction. *See Barrett*, 2013 ND 35 ¶ 21-22, 827 N.W.2d at 840 ("[E]ach party to a contract impliedly agrees not to prevent the other party from performing and not to render performance impossible." (quotation omitted)).

[¶46] Smart Lease did not breach any use restrictions set forth in the Lease.

3. Smart Lease Did Not Materially Breach the "Good Repair" Provision, and the Abelmanns Cannot Seek Eviction Based on Conditions that Leanne Abelmann Helped to Create.

[¶47] The Abelmanns also argue that Smart Lease committed a material breach of a "good repair" provision in the Lease.

[¶48] First and foremost, this provision cannot serve as the basis for an eviction, because it provides a different remedy in the event of a breach. In the event that Smart Lease failed to keep the premises "in a good and orderly repair," the Lease provided as a remedy that the Abelmanns could perform necessary repairs and add the costs of the repairs to the rent due. App. 153, Lease para. VI § 1. In other words, the Lease provides a non-eviction remedy for any breach of this provision. If the Court believes it is unclear

whether this was the sole remedy intended, the Lease must be construed most strongly against the lessor. *See VND, LLC*, 2003 ND 198 ¶ 34, 672 N.W.2d at 449. And there is no evidence in the record that the Abelmanns billed Smart Lease for any repairs before they attempted to terminate the Lease.

[¶49] Even if the Court believes that that the "good repair" provision could theoretically support an eviction, the record supports the District Court's finding that no material breach occurred. The North Dakota eviction statute provides that a lessor may terminate a lease if the lessee "[d]oes not make such repairs as the lessee is bound to make within a reasonable time after a request is made." N.D.C.C. § 47-16-16 (emphasis added). Evidence of a "strained relationship [between lessee and lessor] is important in determining whether a material breach has occurred." *VND, LLC*, 672 N.W.2d at 449. Conversely, evidence showing a lack of previous complaints may support a finding of substantial compliance with lease provisions. *See 501 DeMers, Inc.*, 148 N.W.2d at 829 (affirming finding of substantial performance by landlord regarding tenant's counterclaim alleging incomplete construction of parking facility).

[¶50] Although the Abelmanns claim that they orally complained to Smart Lease about the state of the property, Kent Guthrie testified that they had never complained of material breaches or problems with the Lease before the time that Leanne began managing the property. Trans. 123:5-8. And insofar as the Abelmanns complained of discrete problems, Smart Lease stood ready to correct them. For instance, when Leanne complained of problems with one or more port-a-potties, "she called Aaron [Smith] and rectified the situation." Trans. 123:9 through 124:11.

[¶51] The "good repair" provision also required Smart Lease to construct and maintain "necessary" road, sewer, water, and electrical systems, and there was evidence that Smart Lease either constructed or was developing such systems. For instance, it was undisputed that roads were added to the Property. Leanne Abelmann testified that Dan Abelmann had been required to grade the roads, although she admitted that the Abelmanns never attempted to bill Smart Lease for the work. Trans. 42:22 through 43:8. When asked if trucks had become stuck on the roads, Kent Guthrie testified that he was not aware this had happened. Trans. 147:22 through 148:12. Smart Lease had not reached the point of running water to the RV park, but it had made arrangements for line taps. *Supra* ¶ 15. Besides, whether water service was "necessary" at this point of the development or at a "dry" RV park like that here was an issue of fact for the District Court. Smart Lease also contracted with EHS regarding sewage and electrical systems. *Supra* ¶ 15. That these systems were not completely developed within the first year of operation is not surprising considering that Smart Lease began with undeveloped farmland, and as set forth above, Smart Lease put forth more than reasonable efforts to develop the property and it planned to continue with additional improvements. The property was clearly a work in progress.

[¶52] Moreover, concerning covenants to keep a property in good repair, the character of the property must be taken into account when determining if a material breach has occurred. *See, e.g.*, *In re Royal Yarn Dyeing Corp.*, 114 B.R. 852, 857-58 (Bankr. E.D.N.Y. 1990) (taking into account use of premises for dyeing, bleaching, and finishing yarn); *Kaplan v. Flynn*, 150 N.E. 872, 873 (Mass. 1926) (covenant to repair containing an exception for reasonable wear and use had to be considered with reference to the use of the premises as a motion picture theater involving severe use and wear). A tenant's good

faith and diligence in pursuing repairs are also important factors. *See, e.g.*, *Waldbaum Inc. v Fifth Ave. of Long Island Realty Assocs.*, 650 N.E.2d 1299, 1302-03 (N.Y. 1995) (holding that tenant would be permitted to exercise renewal provision if on remand it could show substantial compliance with a cure provision and reasonable diligence "in its efforts to cure its failure in maintaining and operating a first-class facility"); *Royal Yarn Dyeing Corp.*, 114 B.R. at 859.

[¶53] Here, the property began as undeveloped farmland in middle of the oil patch. Aaron Smith testified about how difficult it could be to get vendors out to the property to make repairs. Trans. 86:12-22 (describing how he had to "badger" vendors to visit the property). Moreover, the pictures on which the Abelmanns have relied so heavily were taken approximately four months after they attempted to terminate the Lease and bar Smart Lease from entering the property. Trans. 140:5-13; 152:5-12. The Abelmanns should not be allowed to seek eviction on the basis that the property deteriorated under Leanne Abelmann's watch and after the Abelmanns had interfered with Smart Lease's ability to make necessary repairs. *See Barrett*, 2013 ND 35 ¶ 21-22, 827 N.W.2d at 840. This is especially so considering that the Abelmanns provided Smart Lease with no written complaints or demand for cure before they declared the Lease terminated.

4. Smart Lease Obtained Adequate Financing.

[¶54] The Lease stated that it was "contingent upon Lessee's ability to obtain financing and permits." App. 153, Lease para. VI § 3. Nothing in the Lease set forth the amount or type of financing required. The record contains evidence that Smart Lease itself invested over $500,000.00 in the property (*supra* ¶ 15); that it acquired a sublessee (EHS) who invested over $1,000,000.00 in the property (*supra* ¶ 15); and that Smart Lease even located a purchaser willing to pay $4,999,940.00 for the property and who intended to

invest 50 to 60 million dollars in developing it (*supra* ¶ 22). Viewing this evidence in the light most favorable to the District Court's findings, there was no breach of the financing provision.

5. Smart Lease Obtained Liability Insurance, and Its Delay in Doing So Did Not Constitute a Material Breach.

[¶55] The Lease contained a "Liability Insurance" provision requiring Smart Lease to obtain certain insurance and to provide the Abelmanns with a certificate showing the coverage. App. 154-55, Lease para. XI. As with the "good repair" provision discussed above, this provision cannot be used as a basis for eviction, because it provided a non-eviction remedy in the event of a breach. Namely, the Lease provided, "If Lessee fails to procure and maintain said policy or policies, Lessee shall pay Lessor the premium cost upon demand." App. 155, Lease para. XI.

[¶56] Even setting aside the alternative remedy required by the Lease, the evidence supports a finding that Smart Lease's delay in obtaining insurance did not constitute a material breach. The evidence showed that Smart Lease initially failed to obtain insurance due to an oversight, but it has since obtained appropriate coverage. Trans. 117:16-24. There is no evidence that the Abelmanns have suffered any loss due to the delay. Thus, the evidence supports a finding that the delay in obtaining coverage was not a material breach justifying eviction.

6. Smart Lease Paid for Utilities, and Any Minor Delay Did Not Constitute a Material Breach.

[¶57] The Lease required Smart Lease to pay the utility bills for the leased premises. App. 155, Lease para. XII. Nothing in the Lease states that late payment of a utility bill shall justify eviction. Regarding utility covenants, the materiality of noncompliance depends on the circumstances, rather than automatically warranting an eviction. *See, e.g.,*

Acme Precision Bldg., Ltd. v Dayton Forging & Heat Treating, Inc., 23 B.R. 79, 82-84 (Bankr. S.D. Ohio 1982) (nonpayment of utility charges for several years did not warrant forfeiture of the lease where the total amount of such charges would be less than one month's rent).

[¶58] Here, the evidence showed that any delay by Smart Lease in paying utility bills was minor. Leanne testified that the power was once shut off to the park for several hours. Trans. 39:5-15. She stated that she initially provided her credit card information to have the power reinstated but that 20 minutes later the electric company called back and told her that one of Smart Lease's principals had paid the bill. *Id.* The District Court was not required to find a material breach based on such minor noncompliance.

7. There is No Evidence that Smart Lease's Maintenance of its Signs Justifies Eviction.

[¶59] The Lease permitted Smart Lease to construct signs and required it to maintain any such signs in a good state of repair and save the Abelmanns harmless from any loss, cost or damages as a result of Smart Lease's erection of signage. App. 153-54, Lease para. VII. Breach of the signage provision of the Lease was never argued to the District Court as a basis for eviction, so the argument is waived.[1] *See Guthmiller Farms, LLP v. Guthmiller*, 2013 ND 248 ¶ 17, 840 N.W.2d 636, 640 ("Arguments not raised at the trial court and raised for the first time on appeal are not generally considered" on appeal). In any event, the Abelmanns cite no testimony or sworn statements that Smart Lease breached this provision, but rather rely on a single allegation from their lease termination letter. App. 197. The condition of Smart Lease's signs was not the subject of testimony

[1] The Abelmanns' post-trial brief contained a passing reference to signage when arguing a breach of the "good repair" provision of the Lease, but an independent breach of the "signage" provision was never argued as a basis for eviction. App. 289 ¶ 42.

at the hearing. The District Court was not required to find that breaches of the signage provision necessitated eviction.

8. The Abelmanns Have Waived Their Argument Regarding Splitting of Gravel Profits, and the Allegations Do Not Suggest a Material Breach in Any Event.

[¶60] The Abelmanns have likewise waived their argument that Smart Lease breached the Lease by attempting to collude with Dan Smith to avoid splitting gravel profits. These allegations were not a subject of testimony at the eviction hearing, nor were they raised as a basis for eviction in the post-trial briefs. *See Guthmiller Farms, LLP*, 2013 ND 248 ¶ 17, 840 N.W.2d at 640. In support of the argument, the Abelmanns cite an unsworn hearsay statement attached to Leanne Abelmann's affidavit. App. 81-82 ¶¶ 51-52. Had the argument been raised before the District Court, Smart Lease would have asserted a hearsay objection. In any event, the Abelmanns simply allege that Smart Lease made a proposal to sell gravel to a man named Dan Smith at below-market prices – not that the plan was ever carried out or that the Abelmanns suffered any loss. The District Court was not required to order eviction on this basis.

B. The District Court Properly Found that Operation of the Gravel Pit Occurred in Furtherance of the Lease, and the Finding Was Not Necessary to the Court's Conclusion in Any Event.

[¶61] Plaintiffs also contend that the District Court committed clear error by considering evidence of the more than $270,000 in profits that the Abelmanns received from gravel pit operations. The Abelmanns argue in their brief that the Lease and the Ranger Rock operating agreement were not "integrated agreements," but their argument is a red herring. Smart Lease introduced evidence about Ranger Rock's formation and operations not to alter interpretation of the Lease, but rather to demonstrate Smart Lease's performance under the Lease. The Lease expressly contemplated the operation and

splitting of profits from the gravel pit. App. 153, Lease para. VI § 2. As set forth in the statement of facts, Ranger Rock, LLC was formed for the purpose of operating that same gravel pit, in furtherance of this Lease provision. *See supra* ¶¶ 11-12. The Ranger Rock operating agreement was signed by Smart Lease's three principals and the Abelmanns, and Leanne Abelmann even admitted that the Abelmanns "together with the principals of SmartLease, formed an entity called Ranger Rock, LLC." Trans. 27:2-4 (emphasis added). In light of these facts, the District Court did not err in treating Ranger Rock's profits as related to the Lease.

CONCLUSION

[¶62] For the reasons set forth above, Defendant-Appellee Smart Lease USA, L.L.C respectfully requests that the Court AFFIRM the order and judgment of the District Court.

DATED this 3rd day of March, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶63] This Brief contains 7,798 words, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(7)(A). I certify that this 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.

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CERTIFICATE OF SERVICE

[¶64] I hereby certify that a true and correct copy of the foregoing **BRIEF OF DEFENDANT – APPELLEE SMART LEASE USA, L.L.C.** was on the 3rd day of March, 2014, served electronically on the following:

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