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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20130349

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

Dan and Leanne Abelmann,

Plaintiffs/Appellants,

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

REPLY BRIEF OF APPELLANTS

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LEGAL ANALYSIS AND ARGUMENT

I. SmartLease Concedes that the District Court Erred in its Conclusion Respecting the Purpose of the Lease

¶1 SmartLease repeatedly admits in its brief[1] that the purpose of the Lease was to "operat[e] a high quality, clean and professionally managed RV/mobile home/cabin park, truck parking and supporting services." *See* SLB ¶¶ 8, 9, 39. Thus, there is no issue that the terms of the Lease specify its true purpose/essence. Yet, the district court instead concluded that "the essence of the lease was for SmartLease to develop the property so it would generate income for the Abelmanns." App. at 322. In light of SmartLease's concession to the contrary, it is indisputable that the district court erred as a matter of law. *See* N.D.C.C. § 9-07-02 ("The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity."); N.D.C.C. § 9-07-04 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone . . . .").

II. The District Court's Findings of Fact are Clearly Erroneous

¶2 The district court compounded the above error by finding that the Abelmanns had received substantial income under the Lease, erroneously finding that "the Abelmanns have been paid in excess of $300,000 pursuant to the lease." App. at 322 (emphasis added). In fact, the Adelmanns received over $278,000 of this money not "pursuant to the lease," but under the Ranger Rock Agreement—a separate venture entered at a different time by different parties. SmartLease's cursory attempt to justify the district court's erroneous finding is futile.

[1] Reference to Abelmanns' Principal Brief will be denoted as "APB" and reference to SmartLease's Brief will be denoted as "SLB."

¶3 Even had the Abelmanns received income "in excess of $300,000 pursuant to the lease," this would not be relevant to whether SmartLease was operating a high quality, clean and professionally managed RV/mobile home/cabin park, or whether SmartLease had timely paid the Abelmanns all rent due.

¶4 However, the above-referenced $278,000 was not paid to the Abelmanns "pursuant to the lease." In its SLB, SmartLease attempts to obfuscate the facts, asserting "the formation and operation of Ranger Rock was a manifestation of SmartLease's performance of the 'gravel provision' of the Lease" and "SmartLease introduced evidence about Ranger Rock's formation and operation not to alter interpretation of the Lease, but rather to demonstrate SmartLease's performance under the Lease." SLB ¶¶ 11, 61.

¶5 Such evidence has nothing to do with "performance under the Lease." Fundamentally, SmartLease is a separate legal entity from its members or other LLCs in which its members hold some interest. The independent activities of Ranger Rock are simply irrelevant to SmartLease's performance under the Lease. *See Addy v. Myers*, 2000 ND 165, ¶ 10, 616 N.W.2d 359. With regard to the gravel pit, SmartLease did not perform any of the actions specified in the Lease, and SmartLease's failure to quote the Lease's gravel provision reflects the weakness of its argument. Paragraph VI, Section 2 provides that "Lessor [will] allow Lessee the right to process additional scoria/gravel material . . . for sale to 3rd parties during the term of this lease. Lessor agrees to a 50/50 split of net profit with Lessee of sales to 3rd parties." APP-153. With regard to Ranger Rock, it is undisputed that SmartLease did not process the additional scoria/gravel and did not sell the material to third parties. Nor was there any sharing of profits between

SmartLease and the Abelmanns. As noted in the APB, the Lease and the Ranger Rock Agreement most certainly were not "part of this integrated agreement," as SmartLease argued, and the Abelmanns most certainly were not "paid in excess of $300,000 pursuant to the Lease." The actions of a third party under a separate transaction did not constitute SmartLease's "performance under the Lease."[2]

¶6 Consequently, the district court's factual findings regarding income purportedly received by the Abelmanns "pursuant to the lease" were irrelevant, were based on impermissible extrinsic evidence, and were clearly erroneous to boot.

III. The District Court Erred by Failing to Make Findings of Fact Regarding SmartLease's Breaches of the Lease

¶7 SmartLease conflates the district court's findings of fact and conclusions of law, in an effort to obscure the district court's reversible error in failing to make factual findings, as required by N.D. R. Civ. P. 52.

¶8 District court orders in eviction proceedings are subject to the requirements of N.D. R. Civ. P. 52. *See Nelson v. Johnson*, 2010 ND 23, ¶ 32, 778 N.W.2d 773. Rule 52 requires that, "[i]n an action tried on the facts without a jury . . ., the court must find the facts specially and state its conclusions of law separately." The trial court "must specifically state the subordinate facts upon which its ultimate conclusions rest." *Radspinner v. Charlesworth*, 346 N.W.2d 727, 730 (N.D. 1984). A district court's "[c]onclusory, general findings do not constitute compliance with Rule 52(a)." *Fed. Land Bank of St. Paul v. Lillehaugen*, 404 N.W.2d 452, 459 (N.D. 1987). "More

[2] SmartLease does not refute that the Lease is an integrated document or that extrinsic evidence is inadmissible to interpret or vary the terms of the Lease. SLB ¶ 61; *see also Riedlinger v. Steam Bros., Inc.*, 2013 ND 14, ¶ 15, 826 N.W.2d 340.

specifically, findings of fact which merely state that a party 'has failed in its burden of proof' are inadequate under Rule 52(a)." *Id.* (finding that "there has not been convincing evidence" was insufficient); *see also Radspinner*, 346 N.W.2d 727, 729–30 (N.D. 1984) (finding that "[t]he evidence submitted did not support any kind of claim" was insufficient).

¶9 As the Abelmanns noted in their APB, the district court simply made no factual findings as to whether SmartLease breached the Lease. *See* APB 58–63. Rather, the district court's order stated, "The facts show that *any* non-compliance by SmartLease has been minor and of non-essential terms." App-322 (emphasis added). This statement reflects the absence of any specifically stated subordinate facts upon which the court's ultimate conclusions purportedly rest. The court failed to state what "facts show" that SmartLease's alleged breaches were not material, and the court's reference to "any noncompliance" confirms that it did not actually determine whether there was non-compliance. Moreover, the court's sweeping generalization —that "any non-compliance by SmartLease has been minor and of non-essential terms"—was and is clearly erroneous, since the Abelmanns asserted that SmartLease failed to pay rent when due. It is indisputably a material breach if a lessee "fails to pay rent for three days after the rent is due"—as this alone is a legal basis for eviction. *See* N.D.C.C. § 47-32-01(4). In any event, the court's statement is equivalent to statements this Court has rejected as conclusory—"[t]he facts show" is synonymous with "the evidence submitted" and must be similarly rejected as insufficient. *See Radspinner*, 346 N.W.2d at 730.

¶10 SmartLease argues that it has somehow discerned the district court's implicit factual findings regarding breaches of the Lease, and that this Court should review these

implicit factual findings for clear error. SLB ¶ 34. SmartLease offers no authority to support this position, and there can be none—as such an approach would require this Court to engage in guesswork and speculation in its review. This is the very reason for the requirements of Rule 52. *See, e.g.*, *Radspinner*, 346 N.W.2d at 730 (findings of fact must "afford a *clear understanding* of the trial court's decision") (emphasis added). Accordingly, this Court should give no weight to SmartLease's alleged divination of the district court's unarticulated factual findings.[3]

¶11 The district court failure to make sufficient factual finding under Rule 52 constitutes reversible error on its part. *Ebach v. Ebach*, 2008 ND 187, 757 N.W.2d 34 ("This Court cannot properly review a decision if the district court did not provide the evidentiary and theoretical basis for its decision because we would be left to speculate whether the court properly considered the factors [] and properly applied the law. When a court does not make the required findings, it errs as a matter of law . . . .").

IV. SmartLease's Material Breaches of the Lease

¶12 Notwithstanding the district court's failure to make the requisite factual findings on the issues before it, this Court is presented with indisputable evidence of SmartLease's material breaches and failures of condition precedent, thereby warranting an order of eviction.

[3] Furthermore, SmartLease's concern that the "summary nature of eviction proceedings would likely be lost if District Courts were required to draft lengthy written opinions," SLB ¶ 34, is without merit. In fact, district courts are required to adhere to Rule 52's requirements in eviction proceedings. *See Nelson*, 2010 ND 23, ¶ 32,778 N.W.2d 773.

i. SmartLease Admitted to Failing to Obtain Financing

¶13 SmartLease has admitted that it failed to timely "obtain the requisite financing [to] fully and properly develop the Property, as provided under the Lease." *See* Complaint ¶ 26; APP-9; *see also* SLB ¶ 21 ("[T]he reason for the addendum [to the Lease] was to assist in attracting potential investors . . . ."). That admission in its brief is in accord with SmartLease's admission in its Answer dated June 13, 2013—i.e., well after the Adelmanns terminated the Lease and instituted this eviction action—wherein SmartLease acknowledged "that it was in the process of securing financing to fully develop the property . . . ." APP-98 (emphasis added). Having admitted to this absence of financing—on which the Lease was "contingent" (*see* APP-153)—SmartLease cannot now argue on appeal that it did not know how much financing was required or that it had procured sufficient financing. *See Gallagher v. Haffner*, 77 N.D. 570, 578, 44 N.W.2d 491, 495 (1950) (formal judicial admissions in pleadings are conclusive admissions).

¶14 As a matter of law, these admissions are sufficient to warrant the eviction. SmartLease's failure to obtain suitable financing is not merely a material breach. Rather, the failure of this condition precedent precludes SmartLease's enforcement of the Lease, and thereby warrants its eviction. *See N. Plains Alliance, L.L.C. v. Mitzel*, 2003 ND 91, ¶ 12, 663 N.W.2d 169 (concluding that failure to perform a condition precedent relieves the other party of any duty to perform).

ii. SmartLease Admitted to Its Material Breach of the Lease by Operating an RV Park that Was Not a "Clean, High Quality RV Park"

¶15 At its essence, the Lease required SmartLease to "operate[] a high quality, clean . . . RV . . . park," and further specified that "time is of the essence in all provisions of this Lease Agreement." APP-152, 154, 157. Yet, SmartLease's principal, Kenneth

Guthrie, admitted at trial that while SmartLease commenced operating the Property as an RV Park by February 1, 2012, the park was not "a clean, high quality RV Park." *See* SLB ¶¶ 13-14.

¶16 In the face of its damning admissions, SmartLease attempts to avoid the consequences of its breaches by referring this Court to cases discussing substantial performance. SLB at ¶ 41. However, those cases have no application in this eviction proceeding. *See 501 DeMers, Inc. v. Fink*, 148 N.W.2d 820, 828–29 (N.D. 1967) (discussing substantial performance with regard to previous tenant's counterclaim against landlord in an action where landlord sought past rent after tenant voluntarily relinquished possession of property); *Schlossman & Gunkelman, Inc. v. Tallman*, 1999 ND 89, ¶ 37, 593 N.W.2d 374 (discussing substantial performance "[i]n the context of a claim for a real estate commission.").

¶17 While there is extensive, unrefuted evidence of SmartLease's other, material breaches, the above, admitted breaches go to the core of the Lease and warrant the prompt eviction of SmartLease.

CONCLUSION

¶18 For the aforementioned reasons, the Abelmanns respectfully request that this Court reverse the Order Denying Eviction and award them immediate possession of the Demised Premises.

Respectfully submitted this 17th day of March, 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This Reply Brief contains 1,993 words, excluding the parts of the brief exempted by N.D.R.App.P. (a)(7)(A). I certify that this Reply 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 17th day of March, 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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Dated this 17th day of March, 2014.

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