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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dennis and Charlene Deckert,	)	
Plaintiffs - Appellants,	)	
	)	
v.	)	**Supreme Court No.: 20140151**
	)	
Margaret L. McCormick and,	)	
Judy Hertz,	)	
Defendants - Appellees.	)	

Appeal from the Order Dated December 5, 2013 and the Judgment Entered on March 19, 2014 of the District Court South Central Judicial District Burleigh County, North Dakota Civil No.: 08-2013-CV-01583 Honorable Cynthia M. Feland, Presiding

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JOINT BRIEF OF APPELLEES MARGARET L. MCCORMICK AND JUDY HERTZ

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TABLE OF CONTENTS

Paragraph No.

[1] TABLE OF AUTHORITIES

CASES

NORTH DAKOTA CENTURY CODE

RULES

OTHER AUTHORITIES

[2] STATEMENT OF THE ISSUES

I. **Whether the Trial Court Erred When it Granted Margaret's and Judy's Motions for Summary Judgment When Margaret Properly Withdrew the *Option* Prior to Acceptance by the Deckerts, and Therefore There Was No Contract to Enforce.**

II. **Whether the Trial Court Abused its Discretion When it Denied The Deckerts' Motion for an Extension of Time in Order to Conduct Additional Discovery when the Deckerts Could Not Explain How the Information Sought Would Preclude Summary Judgment or Why the Information Sought Had Not Been Previously Obtained.**

[3] STATEMENT OF THE CASE

[4] This appeal was taken from the order denying Dennis and Charlene Deckert's ("the Deckerts") *Motion for an Extension of Time to File a Response to Defendants' Motions for Summary Judgment* and the summary judgment entered in favor of Margaret McCormick ("Margaret") and Judy Hertz ("Judy") by the Honorable Cynthia M. Feland on December 5, 2013 and April 8, 2014, respectively. App. 35, 46[1].

[5] On February 6, 2013, the Deckerts commenced this lawsuit against Margaret and Judy. App. 6-7; Doc. 3. The Deckerts prayed for a declaratory judgment and specific relief relating to an option to purchase ("*Option*") executed by Margaret on March 7, 2006. *Id*. On July 16, 2013, the Deckerts, without conducting any discovery, served their motion for summary judgment. Doc. 7, 8. On July 29, 2013, Margaret and Judy separately served their *Answers* and *Counterclaims*. App. 13-21. On August 15, 2013, Margaret and Judy served and filed their responses to the Deckerts' motion for summary judgment. Docs. 32, 41. On September 10, 2013, Margaret filed her *Supplemental Response to Plaintiffs' Brief in Support of Motion for Summary Judgment*. Doc. 51.

[1] References to the joint appendix will be made with "App. ___"; references to the docket will be made with "Doc. ___" or "Docs.____."

[6] A hearing on the Deckerts' motion for summary judgment was held on September 11, 2013. On September 20, 2013, the Deckerts' filed their *Post-Argument Brief in Support of Motion for Summary Judgment*. Doc. 54. On September 30, 2013 the Court issued its *Order Denying Motion for Summary Judgment*. App. 29. In part, the Court held that the undisputed facts, mainly that the Deckerts' failed to tender the purchase price to Margaret to exercise the *Option*, did not warrant summary judgment in favor of the Deckerts. *Id*. at 32.

[7] Thereafter, on October 31, 2013 and November 11, 2013, respectively, Margaret and Judy served their motions for summary judgment. Docs. 59-60, 64-65. On or about November 26, 2013, 293 days after the commencement of the case, the Deckerts served their discovery requests.

[8] On December 2, 2013, one day prior to the Deckerts response to Margaret's motion for summary judgment being due, the Deckerts moved the court for an order to extend the time to file a response to Margaret's motion. Docs. 69-70. The Deckerts argued that they needed time to conduct discovery to ascertain the intent of Margaret as it related to the exercise of the *Option*. *Id*. On December 3 and 5, 2013, Margaret and Judy responded and resisted the Deckerts' motion. Docs. 73, 77. Judy argued, "It is fair to conclude that [the Deckerts] elected, as a matter of strategy, to forego discovery and to seek an expedited resolution by a motion for summary judgment. However, the strategy was not successful and the [Deckerts] now seek a 'second bite of the apple.' [The Deckerts'] motion should be denied." *Id*.

[9] On December 5, 2013, the Court issued its order denying the Deckerts' motion. App. 35. The trial court found that there was no ambiguity in the *Option*, and

thus allowing discovery as to Margaret's intent in an attempt to preclude summary judgment was improper. *Id*.

[10] On December 16, 2013, the Deckerts filed their brief opposing the summary judgment motions. Doc. 80. On December 23, 2013, Margaret filed her reply to the Deckerts' opposition to her and Judy's motions for summary judgment. Doc.106.

[11] On March 30, 2013, the trial court issued its *Order Granting Defendants' Motions for Summary Judgment*. App. 37. The trial court found, that despite the statement of consideration set forth in the *Option*, the Deckerts did not pay to McCormick $10.00 nor did they provide any other consideration to Margaret for the *Option*. *Id*. at 43. The trial court further found that because the transaction lacked consideration, Margaret could revoke it at any time prior to acceptance. *Id*. at 43-44. To accept the *Option*, the trial court concluded that the Deckerts had to deliver the purchase price to Margaret. ("To exercise the Option, Buyers [Deckerts] shall tender the full purchase price in cash to Margaret L. McCormick, or her successors or assigns, at any time prior to December 31, 2014.") *Id*. at 43. The trial court ultimately concluded that the Deckerts did not tender the purchase price to Margaret and that on October 1, 2013, she unequivocally revoked the *Option*. On April 8, 2014, the clerk of court issued the trial court's *Judgment*. App. 46-47. On April 8, 2014, judgment was entered. App. 48. The Deckerts filed their *Notice of Appeal* on April 25, 2014. App. 49.

[12] STATEMENT OF THE FACTS

[13] Margaret is a resident of Menoken, Burleigh County, North Dakota. Doc. 38. Margaret and her late husband, Harold McCormick, have five children, namely, Judy Hertz, Janice Eide, James McCormick, Charlene Deckert, and Donald McCormick. *Id*.

[14] Prior to 2006, Margaret was the sole owner of twelve quarter sections of property in Burleigh County, North Dakota. *Id*. Since 1947, Margaret and Harold farmed the property and operated a cattle ranch. *Id*. In September 1999, Harold passed away, leaving Margaret as his sole heir. *Id*. Margaret continued to run the farm and cattle operation until 2006. *Id*.

[15] In March, 2006, Margaret hired Attorney David Tschider to assist her with her estate planning. *Id*. Margaret elected to transfer two-quarter sections of property to each child through a quit claim deed. From each transfer, Margaret reserved a life estate. App. 59; *see also* Docs. 33-36. With Margaret's reserved life estate, she has the responsibility of paying taxes, but also receives rental income and has control and possession of the premises. *Id*.

[16] Particular to this action are the documents executed in regard to the following property:

> **North Half (N ½) of Section Five (5), Township One Hundred Forty-one (141) North, Range Seventy-six (76) West of the Fifth Principal Meridian.**

("Subject Property").

[17] On March 7, 2006, Margaret executed a quit claim deed for the Subject Property. App. 59. Margaret quit claimed the Subject Property to her daughter, Judy. Directly below the language granting a remainder interest to Judy, the following language appears:

> RESERVED LIFE ESTATE
>
> Grantor does hereby reserve, for the balance of her natural life, a life estate in and to the Subject Property which shall include the right to possess, occupy and control the premises and to collect rents therefrom during the Grantors (sic) natural life. Grantor shall pay any and all costs

> and expenses necessary to maintain the premises and any and all real estate taxes assessed against the premises…
>
> Subject to a Farm Lease between Grantor and Donald A. McCormick and Ronda McCormick…which lease expires on December 31, 2015. Subject to an Option to Purchase granted to Charlene Deckert and Dennis Deckert, which expires on December 31, 2015.

Id. Judy's remainder interest in the Subject Property is therefore subject to the *Option* and therefore her continued interest in the property is dependent upon Margaret's title.

[18] In addition to the above referenced deed, on March 7, 2006, Margaret also executed the *Option* at issue here. App. 51. The *Option* provides:

> To exercise the Option, [the Deckerts] shall tender the full purchase price, in cash, to Margaret L. McCormick, or her successors or assigns, at any time prior to December 31, 2015. Margaret L. McCormick, or her successors or assigns, as Owner, shall be responsible to deliver to [the Deckerts] abstracts of title to the subject premises, which abstracts shall be updated at Buyer's sole cost and expense.

Id.

[19] At the time that Margaret executed the *Option*, the Deckerts were wholly unaware of Margaret's intentions with the property. App. 82. Margaret did not inform the Deckerts of the *Option* until sometime after it was executed. *Id*. Charlene acknowledged that she was unaware of the *Option* until one to two weeks after its execution. App. 53.

[20] Because the Deckerts were unaware of the *Option* prior to it being executed, the parties did not negotiate the purchase price of the Subject Property or the consideration exchanged for the granting of the *Option*. Although no consideration was exchanged, the instrument sets forth a statement of consideration of "Ten Dollars ($10), and other good, valuable and legally sufficient consideration…". App. 51, 82-83; *see also* App. 43 ("[I]t is clear based on acknowledgement by both parties that no money was

paid by the Deckerts to McCormick as consideration for the *Option to Purchase*. Thus, the *Option to Purchase* was given without consideration.").

[21] On or about July 20, 2012, during a conversation with Charlene at Margaret's residence, Charlene demanded that Margaret release to her the abstract for the Subject Property. App. 81. Margaret informed Charlene that she would not be turning over the abstract and that she did not want Charlene to exercise the option, thus withdrawing it. *Id*. On or about October 22, 2012, counsel for the Deckerts notified Margaret that the Deckerts "decided to exercise [the] option." App. 66. The purchase price was not made in conjunction with the mailing of the letter as required by the *Option*. *Id*; *see also* App. 51. On or about October 23, 2012, Margaret responded *pro se* to the October 22, 2012 letter. App. 67. Margaret informed the Deckerts' counsel that she would not "sign off on my reserved life estate." *Id*. By her letter, Margaret revoked the Deckerts' *Option* on or about October 23, 2012.

[22] Further correspondence ensued between the Deckerts' counsel and Margaret and Judy after Margaret's October 23, 2012 response. App. 69-70, 72-73, and 76-77. The Deckerts ultimately ordered a new abstract for the Subject Property. App. 75. Thereafter, on or about February 6, 2013, Margaret was served with the *Summons* in this matter.

[23] On July 16, 2013, 160 days after service, and without conducting any discovery, the Deckerts moved the trial court with their motion for summary judgment, arguing that there was no question as to any material fact and therefore they were entitled to judgment as a matter of law. Doc. 8. This motion was resisted by Margaret and Judy. Docs. 32, 41. On September 30, 2013 the trial court issued its *Order Denying Motion for*

Summary Judgment. App. 29. The trial court held it was apparent that there was no disputed issues of material facts. *Id*. at 32. However, the undisputed facts did not warrant summary judgment in favor of the Deckerts. *Id*. The trial court went on to rule that the Deckerts had not delivered to Margaret the purchase price in accordance with the *Option* and thus had not properly exercised the *Option. Id*. at 32-33.

[24] Thereafter, on October 1, 2013, Margaret mailed to the Deckerts a certified letter stating that it was her intention on July 20, 2012 and October 23, 2012 to withdraw the *Option* and that by sending the letter she was unequivocally withdrawing it. App. 78. Margaret and Judy then moved the trial court with their motions for summary judgment on October 31, 2013 and November 7, 2013, respectively. Docs. 60, 65. After the Deckerts' motion for an extension of time to respond to the summary judgment motions was denied (App. 35), they filed and served their response to Margaret's and Judy's motions for summary judgment. Doc. 80.

[25] On March 19, 2014, the trial court issued its *Order Granting Defendant's Motion for Summary Judgment*. App. 37. The trial court found that there was no consideration for the option and that "On October 1, 2013, McCormick sent a letter to [the Deckerts] revoking and withdrawing the *Option to Purchase*. As the *Option to Purchase* was withdrawn prior to acceptance, there is nothing [for this court] to enforce. Therefore, McCormick's and Hertz's *Motions for Summary Judgment* are GRANTED." *Id*. at 44. On April 25, 2014 the Deckerts filed their *Notice of Appeal*. App. 49.

[26] STANDARD OF REVIEW

[27] "Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or

inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law." *Finstad v. Ransom-Sargent Water Users, Inc.*, 2011 ND 215, ¶ 17, 812 N.W.2d 323. Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." N.D.R.Civ.P. 56(c).

[28] The party moving for summary judgment must show that no genuine issues of material fact exist and that the case is appropriate for judgment as a matter of law. *Finstad*, 2011 ND 215, ¶ 17, 812 N.W.2d 323. In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion, and that party must be given the benefit of all favorable inferences which can be reasonably drawn from the evidence. *Riverside Park Condominiums Unit Owners Ass'n v. Lucas*, 2005 ND 26, ¶ 8, 691 N.W.2d 862. Summary judgment is appropriate against a party who fails to establish the existence of a factual dispute on a essential element of her claim on which she will bear the burden of proof at trial. *Skjervem v. Minot State Univ.*, 2003 ND 52, ¶ 6, 658 N.W.2d 750. Whether the trial court properly granted summary judgment is a question of law which this Court reviews de novo on the entire record. *Id*. at ¶ 7.

[29] A decision made pursuant to N.D.R.Civ.P 56(f) is within the trial court's discretion and will not be reversed on appeal unless the trial court abused its discretion. *Choice Fin. Grp. v. Schellpfeffer*, 2006 ND 87 ¶ 9, 712 N.W.2d 855. A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, or if it misinterprets or misapplies the law. *Id.*

[30] LAW AND ARGUMENT

[31] I. The Trial Court Did Not Err When it Granted the Motions for Summary Judgment Because Margaret Properly Withdrew the *Option* Prior to Acceptance by the Deckerts, Thus There is No Contract to Enforce.

[32] This Court has long recognized that a person may give an option to purchase real estate. *Pifer v. McDermott*, 2013 ND 153, ¶ 11, 836 N.W.2d 432. An option agreement is a contract by which the owner of property gives another the right to buy the property at a fixed price within a specified time on agreed terms. *Wessels v. Whetstone*, 338 N.W.2d 830, 832 (N.D. 1983). By such an agreement the owner does not sell the property, nor does she at the time contract to sell. *Id*. She does, however, sell to the other party the right, at his election or option, to demand the conveyance in the manner specified in the contract. *Id*.

[33] Because options are contracts, they must contain the requirements of a valid contract, which include (1) parties capable of contracting; (2) the consent of the parties; (3) a lawful object; and, (4) sufficient cause or consideration. N.D.C.C. § 9-01-02. If the contract is reduced to writing, "[t]he language of [the] contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." N.D.C.C. § 9-07-02. In this case, the trial court properly found that "the language of the purchase option is clear and unambiguous." App. 36. Accordingly, the parties' intentions must be ascertained from the provisions of the written contract alone. N.D.C.C. § 9-07-04; *see also Pamida, Inc. v. Meide*, 526 N.W.2d 487, 490 (N.D. 1995) (holding that if executed documents are unambiguous, parol evidence is not admissible to contradict the terms of the written agreement).

[34] Margaret has overcome the presumption that consideration existed when she granted the *Option* and the Deckerts have not, and cannot show, that they properly accepted the *Option* prior to it being withdrawn. As such, the trial court did not err when it granted Margaret's and Judy's motions for summary judgment.

[35] A. No Consideration was Received by Margaret from the Deckerts, Therefore the *Option* was Revocable at Any Time Prior to Acceptance.

[36] Despite the Deckerts' inconsistent argument as to consideration, there is no question that Margaret did not receive consideration from the Deckerts in exchange for the granting of the *Option*.

[37] Good consideration is defined as:

> Any benefit conferred or agreed to be conferred upon the promisor by any other person to which the promisor is not entitled lawfully, or any prejudice suffered or agreed to be suffered by such person, other than such as that person, at the time of consent, is lawfully bound to suffer as an inducement to the promisor, is a good consideration for a promise.

N.D.C.C. § 9-05-01. Alternatively, "consideration is something (such as an act, a forbearance, or a return promise) bargained for and received by a promisor from a promisee…" *Black's Law Dictionary*, 134 (3d Pocket Edition 2006). The issue of whether or not consideration was provided is a question of law, whereas whether or not consideration has passed is a question of fact. *See Harrington v. Harrington*, 365 N.W.2d 552, 555 (N.D. 1985) (existence of consideration is a legal issue); *Farmers Union Oil Co. v. Maixner*, 376 N.W.2d 43, 47 (N.D. 1985) (whether consideration failed is a question of fact).

[38] If no consideration is given for an option to purchase, the option "may be withdrawn at any time before acceptance." *Dole v. Hanson*, 238 N.W.2d 58, 61 (N.D.

1975); *see also* 14 R. Powell & M. Wolf, *Powell on Real Property* § 81.01[2][b], at 81-11 (2013) ("If the option is given gratuitously, without payment or other consideration from the prospective purchaser, the 'option' constitutes merely an offer to sell that the seller can withdraw at any time."); III *American Law of Property* § 11.17, at 47 (1952) ("If given gratuitously, [an option] amounts merely to an offer and may be withdrawn at any time prior to acceptance."). An option to purchase real property given without consideration is valid and enforceable only if "the option agreement was unconditionally accepted within the time prescribed therein and no attempt was made to withdraw it before acceptance." *Alfson v. Anderson*, 78 N.W.2d 694, 698 (N.D. 1956).

[39] In addition, a written instrument, as here, is presumptive evidence that there was consideration for it. N.D.C.C. § 9-05-10. The recitals in a deed[2] as to the consideration are not conclusive evidence of consideration, but the true and actual consideration may be shown by parol evidence. *Fraley v. Bentley*, 46 N.W. 506, 507 (Dakota.Terr. 1874). Furthermore, the recital of a nominal consideration in a deed is insufficient to establish valuable consideration. *Anderson v. Anderson*, 435 N.W.2d 687, 689 (N.D. 1989). The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it. N.D.C.C. § 9-05-11.

[40] In this case, the recitals of the *Option* contain the following language:

> For and in consideration of the sum of Ten Dollars and other good, valuable and legally sufficient consideration, in hand paid by [the Deckerts] to [Margaret L. McCormick], Margaret L. McCormick, does herein and hereby grant to [the Deckerts], or the survivor thereof, an option to purchase the following described property pursuant to the terms and conditions of the Option…

[2] Although the *Option* is not a deed, the two instruments are similar in nature because they both relate to the conveyance of land, both require a statement of consideration, and both documents must be notarized and signed by the grantor prior to recordation.

Although the recitals contain a statement of consideration, no such consideration was received by Margaret from the Deckerts. *See* App. 40.

[41] In early 2006, Margaret hired Attorney Tschider to assist her with her estate planning. Doc. 38. The majority of Margaret's planning centered around the real property that she owned and none of her children were present during the conferences with Attorney Tschider. *Id*. On March 7, 2006, Margaret executed a series of quit claim deeds relating to her Burleigh County property. *Id*. Margaret's children were unaware of the estate planning documents that were executed by Margaret on March 7, 2006. *Id*. The Deckerts' signatures do not appear on the *Option*. Doc. 9. Presumably if any monetary consideration was paid by the Deckerts to Margaret, it would have been given to her when Margaret delivered the option to the Deckerts. However, the Deckerts were wholly unaware of the *Option* until sometime after the execution of the agreement. App. 40.

[42] In their motion for summary judgment, the Deckerts argued that they would "have provided the agreed-upon consideration but-for the defendants' anticipatory repudiation." Doc. 8. This argument, however, confuses the issue of consideration for the *granting of the option* with the issue of consideration for the *actual purchase* of the Subject Property. Consideration for the granting of an option and consideration for the actual purchase of the real property are separate and distinct.

[43] The trial court properly found that the "Deckerts did not give McCormick the sum of Ten Dollars ($10.00) for and in consideration of the *Option to Purchase*." App. 40. The record contains no evidence whatsoever that the Deckerts paid consideration of $10.00 as outlined in the recitals to the *Option* and in fact, the Deckerts

acknowledge that they did not provide the consideration outlined in the instrument. App. 43.

[44] In addition to the lack of monetary consideration, there is no evidence in the record that the Deckerts provided "other good, valuable, and legally sufficient consideration" to Margaret. After their motion for summary judgment was denied, for the very first time, the Deckerts argued that that they provided labor, equipment and supplies to Margaret and these were all "provided and *should now* stand as good consideration." Appellants' Brief at 17 (emphasis added). Many of the Deckerts' statements regarding this alleged consideration are conclusory statements unsupported by specific facts and thus are insufficient to raise a material factual dispute which would require this Court to reverse this case. *See BTA Oil Producers v. MDU Res. Group, Inc.*, 2002 ND 55, ¶ 12, 642 N.W.2d 873.

[45] The Deckerts argue that "for years leading up to and beyond the time of the *Option*, the Deckerts provided their labor, equipment, and supplies to the cattle operation owned by McCormick" and that Charlene provided numerous rides for Margaret to doctors' appointments in Bismarck. Appellants' Brief at 17. In support of their argument, they provided pictures of the work that they allegedly did for Margaret without providing specific details of how the granting of the *Option* was in exchange for the labor, equipment and supplies that they provided. Although Margaret does not dispute that from time to time the Deckerts did provide labor and equipment for her cattle operation, the work was provided prior to the *Option* being executed by her on March 7, 2006, and any work that was performed after the execution of the *Option* was work done for her son, Donald, and his wife, Ronda. Margaret retired from her cattle operation in

2006. Doc. 38. Donald and Ronda took over Margaret's cattle operation. Any work that was performed by the Deckerts after the granting of the *Option* was help provided to Donald and Ronda McCormick, not Margaret.

[46] Even if this Court finds that the Deckerts provided labor, equipment and supplies after the granting of the *Option*, these items were not bargained for in exchange for the granting of the *Option*. In *Estate of Jorstad v. Yates*, Maynard Jorstad and Marvin Jorstad wished to exercise their "exclusive right to purchase … real estate … for the sum of $70,000," that was granted to them through an option by their parents. 447 N.W.2d 283, 284 (N.D. 1989). Other heirs, who were the beneficiaries of Martin Jorstad's residuary estate, argued that the option was not supported by consideration and was revoked, therefore the land should pass to the residuary heirs. *Id*. at 285.

[47] This Court held that Maynard and Marvin provided good consideration to their parents by refraining to leave the farm in exchange for the option. Maynard testified that prior to his parents' executing the option, he told them he would have to leave unless arrangements were made "to get things right so that I would have something to work for." *Id*. The Court found that Maynard had a legal right to leave his parents' farm and go wherever his dreams might take him. *Id*. He refrained from doing so because his parents promised to reward him if he stayed and worked on the farm, thus there was consideration for the option. *Id.*

[48] The bargained for consideration present in *Jorgstad*, is not present in this case. There is no evidence contained in the record that Margaret agreed to grant the *Option* in exchange for the Deckerts providing labor, equipment, and supplies to Margaret; there was no bargained for consideration. The Deckerts seem to concede that

the labor, equipment and supplies were not bargained for in exchange of the *Option*, but they simply state that because the items were provided, they should now stand as good consideration for the granting of the *Option*.

[49] In this case, the trial court did not error when it found that the *Option* was given without consideration. App. 43. The Deckerts statements that they provided labor, equipment and supplies are conclusory statements unsupported by specific facts and were entered in to evidence in an attempt to create a material factual dispute. Furthermore, the granting of the *Option* was not in exchange for the labor, equipment and supplies provided by the Deckerts. Because no consideration was received by Margaret from the Deckerts, Margaret had the right to revoke the *Option* prior to acceptance by the Deckerts. Accordingly, the Deckerts cannot prove an essential element of their claim and therefore the trial court did not error in grant Margaret's and Judy's motions for summary judgment.

[50] B. The Deckerts Failed to Properly Accept the *Option* Pursuant to the Terms Outlined in the Instrument.

[51] Even though the *Option* was given without consideration it remains enforceable until it is either unconditionally accepted within the time prescribed in the instrument or it is withdrawn prior to acceptance. *Pifer*, 2013 ND 153, ¶ 10, 836 N.W.2d 432. In this, case the *Option* provides that the purchase price was to be made coincident with the exercise of the option. App. 51. The Deckerts argue that the "Option is binding because the Deckerts accepted the offer before McCormick attempted to withdraw it and the acceptance of the offer (Option) is separate and distinct from exercising it." The Deckerts argument is without merit.

[52] The exercise of an option, just like acceptance of an offer, must be unconditional. *Mason v. Haakenson*, 303 N.W.2d 557, 558 (N.D. 1981). As to the mode of acceptance, "[i]f a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to..." N.D.C.C. § 9-03-18. An optionee must exercise the option within the time and *upon the terms and conditions provide in the agreement*. *Mason*, 303 N.W.2d at 558 (emphasis added). An attempt to exercise an option that deviates from the terms of the option acts as a rejection of the option and a counteroffer. *Id.* "…[A]ny counter proposition or any deviation from the terms of the offer contained in the acceptance is deemed to be in effect a rejection, and not binding as an acceptance on the person making the offer, and no contract is made by such qualified acceptance alone." *Beiseker v. Amberson*, 17 N.D. 215, 116 N.W. 94 (1908); *see also Greenber v. Stewart*, 236 N.W.2d 862 (N.D. 1975).

[53] In this case, the plain language of the *Option* requires the Deckerts to tender the purchase price of $64,000 in order to exercise the option. As noted by the trial court, it is undisputed that the Deckerts did not tender $64,000 to Margaret. Furthermore, Margaret has on numerous occasions notified the Deckerts that the *Option* was revoked and without a doubt revoked the *Option* on October 1, 2013. App. 78.

[54] The Deckerts rely on *Northern Plains Alliance, LLC v. Mitzel*, 2003 ND 91, 663 N.W.2d 169, *Horgan v. Russell*, 140 N.W. 99 (N.D. 1913), and *Kuhn v. Hamilton*, 117 N.W.2d 81 (N.D. 1962) to support their contention that acceptance of the *Option* is separate and distinct from the exercise thereof. Although this notion is correct, it does not apply to this case because the option at issue here gives a clear and direct method of how the Deckerts were to exercise it.

[55] In *Northern Plains Alliance*, this Court explained:

> Acceptance of an option for the sale of land within the time allowed and according to its terms converts the option into a binding executory contract of sale. Acceptance of the option, which results in a contract of purchase and the performance of the contract itself are distinct. As we have noted, "*[w]here the exercise of the option to purchase does not provide for payment of the purchase price coincident with the optionee's exercise of the option, the payment of the purchase price is merely an incident of performance of the bilateral contract created by the exercise of the option*.

Northern Plains Alliance, 2003 ND 91, ¶16, 663 N.W.2d 169 (internal citations omitted) (emphasis added). The Court in *Northern Plains Alliance* ultimately found that the plaintiff was confusing the exercise of the option with performance of the contract. *Id*. at 15. The Deckerts, here, are confusing the clear direction on how the *Option* was to be accepted.

[56] The *Option* provides that "[t]o exercise the Option, [the Deckerts] shall tender the full purchase price [of $64,000], in cash, to Margaret L. McCormick, or her successors or assigns, at any time prior to December 31, 2015." In *Matrix Props. Corp v. TAG Invs.*, 2000 ND 88, ¶17, 609 N.W.2d 737, the Court noted, "[w]here the exercise of the option to purchase does not provide for payment of the purchase price coincident with the optionee's exercise of the option, the payment of the purchase price is merely an incident of performance of the bilateral contract created by the exercise of the option." The Deckerts assert that the "Option did not prescribe any mode as to the communication of acceptance." Appellants' Brief at 10. A clear reading of the instrument indicates that the mode of acceptance under the contract was to "tender the full purchase price, in cash" to Margaret. The payment of the purchase price was to be made coincident with the Deckerts' exercise of the rights under the *Option*. App. 99.

[57] The Deckerts assertion that the offer was accepted when they notified Margaret of their *intent* to exercise the *Option*, and therefore Margaret could not revoke the option, fails. By no means does the *Option* indicate that the Deckerts could accept it by notifying Margaret of their intent to exercise.

[58] In *Horgan v. Russell*, 140 N.W. 99 (N.D. 1913), Haas granted to I. A. Smith and J. E. Horgan an option to purchase property in McLean County, North Dakota. Haas subsequently sold the property to Russell within the time period of the option. *Id*. Under the terms of the option, Horgan and Smith were required to signify their intention to take or reject the option by sending written notice within the time specified in the agreement. *Id*. Counsel for Smith and Horgan sent a written notice to Haas of their intent to exercise the option, but further set forth payment terms and a request for the abstract and deed for the property. *Id*. Russell argued that Smith and Horgan added terms to the acceptance and thus the acceptance was not unconditional. *Id*. at 101.

[59] This Court held that the written notice provided for both the acceptance and subsequent performance, but did not invalidate Smith and Horgan's acceptance of the option. *Id*. This Court further held:

> The only fixed rule regarding the manner of the exercise of an option, under a contract granting it, is to discover from the language of the instrument . . . the intent of the parties with reference thereto. *It may be made that under the terms of a given option the only proper and binding method of election or acceptance is by the payment or a tender of the purchase price*. On the other hand, there are many cases where the option may be exercised in parol or by any other method indicating an election to take the land; the payment of the purchase price and the making of the deed being subsequent matters in performance of a binding contract. *In the one case there is an election to sell upon payment of the purchase price, which is a condition precedent to the foundation of the contract*; and on the other, there is an election to take the land upon the terms proposed; payment of the purchase price being a condition subsequent, or rather the performance of an executory contract theretofore entered into. It is

> important in such cases to distinguish that which pertains to the performance of a contract from that which pertains to its making.

Id. at 102; *citing Breen v. Mayne*, 118 N.W. 441, 443 (Iowa 1908) (emphasis added).

[60] The *Option* here is not silent as to acceptance. For the Deckerts to accept the offer, they must have tendered $64,000 to Margaret. The Deckerts did not tender payment but instead requested the abstract to the property. In this case, the payment is *not* merely incident or a condition subsequent to the acceptance of the *Option*; it is the method of acceptance and a condition precedent. *See Northwestern Bell Tel. Co., v. Cowger*, 202 N.W.2d 791, 795 (N.D. 1981) (holding that where the exercise of the option to purchase does not provide for payment of the purchase price coincident with the optionee's exercise of the option, the payment of the purchase price is merely an incident of performance of the bilateral contract created by the exercise of the option). The "only proper and binding method of election or acceptance" is by the Deckerts tendering $64,000 to Margaret. *See Horgan* at 102.

[61] Throughout the record, the Deckerts argue that they put Margaret on notice of their *intent* to exercise the *Option* by requesting the abstract, and now argue that "providing the abstract was a condition precedent to tendering the purchase price." The requirement of Margaret delivering the abstract prior to her receiving $64,000, would be to add terms to an unambiguous, workable contract. The Deckerts argue that if that language was not read into the contract, then the *Option* would be unworkable without the production of the abstract. However, this argument presupposes that the Deckerts would need to obtain financing for the purchase of the property. Although the written terms are not usual or customary in the business (delivery of cash instead of financing), this Court should not add in terms that are unnecessary, provided the *Option* is still

exercisable pursuant to its written terms. The Deckerts contradict their own argument that the delivery of the abstract was a condition precedent to the contract because they ultimately ordered a new abstract for the Subject Property. App. 75.

[62] This Court has held on numerous occasion that an optionee must exercise the option within the time and upon the terms and conditions provide in the agreement. *Mason*, 303 N.W.2d 557, 558 (N.D. 1981); *see also* N.D.C.C. § 9-03-18. The proper mode of acceptance was for the Deckerts to tender the purchase price. The Deckerts did not do this and thus Margaret could revoke the *Option*.

[63] C. Because Margaret Revoked the *Option* Prior to Acceptance, There is No Longer a Contract to Enforce.

[64] Margaret has revoked the option to purchase at issue here. This Court recently held that "[I]f no consideration is given for an option to purchase real property, the option 'may be withdrawn at any time before acceptance.'" *Pifer*, 2013 ND 153, ¶11, 836 N.W.2d 432; *citing Dole v. Hanson*, 238, N.W.2d 58, 61 (N.D. 1975). As discussed above, there is no dispute that the Deckerts failed to accept the *Option* by tendering the purchase price to Margaret. What is also not in dispute is that Margaret legally revoked the *Option*.

[65] On July 20, 2012, during a conversation with Charlene at Margaret's residence, Charlene demanded that Margaret release to her the abstract for the Subject Property. Margaret informed Charlene that she would not be turning over the abstract and that she did not want Charlene to exercise the option, thus withdrawing it. Doc. 61. Furthermore, on October 23, 2012, Margaret informed the Deckerts' counsel that she would not furnish the abstract for the property, thus withdrawing the *Option*. *Id*. Finally, on October 1, 2013, Margaret mailed to the Deckerts a letter, by certified mail, stating

that it was her intention on July 20, 2012 and October 23, 2012 that the *Option* was withdrawn and could no longer be accepted by the Deckerts. App 78.

[66] It is undisputed that no consideration was given to Margaret from the Deckerts for the *Option*. In addition, there is no dispute that the Deckerts did not accept the *Option* by tendering the purchase price. Finally, there is no dispute that Margaret has unequivocally revoked and withdrew the *Option* prior to acceptance. Thus, Margaret and Judy were entitled to summary judgment because there are no disputes as to any genuine issue of material fact.

[67] D. The Deckerts Did Not Argue at the Trial Court that the *Option* Was a Gift and Therefore Cannot Raise that Issue to this Court.

[68] The Deckerts next argue that if this Court "determines that no consideration existed, the Option was a gratuitous gift that the Deckerts accepted prior to any attempt by McCormick at revoking it." Appellants' Brief at 19-22. However, the Deckerts did not raise this argument at the trial court and therefore cannot raise it now. However, if the Deckerts did in fact raise this issue at the trial court, this argument is still without merit because the gift was uncompleted and revocable.

[69] In *Spier v. Power Concrete, Inc.*, the Spiers argued for the first time in their appellate brief that there was one continuous contract between a subcontractor and the defendant as it related to an action for quiet title. 304 N.W.2d 68, 73 (N.D. 1981). This Court held that "the record shows [the issue of one continuous contract] was not raised by the Spiers' pleadings or affidavits. We have said many times that a party may not raise an issue for the first time on appeal." *Id*; *see also Scientific Application, Inc. v. Delkamp*, 303 N.W.2d 71 (N.D. 1981).

[70] Similarly here, the Deckerts now raise, for the first time, the contention that Margaret granting the *Option* was a gratuitous gift that the Deckerts accepted prior to any attempt by Margaret to revoke it. Appellants' Brief at 19. An examination of the Deckerts' pleadings and their briefs show that they did not raise the issue of gift until the present appeal. In fact, the Deckerts affirmatively denied that the *Option* was a gift.

[71] On February 5 and 6, 2013 this action was commenced against Margaret and Judy, respectively. Doc. 3. In the Deckerts *Complaint*, they did not plead gift. App. 7-10. On July 29, 2013, Margaret filed and served her *Answer and Counterclaim*. App. 17-20. In her counterclaim, Margaret alleged that the *Option* was a future gift that was revocable at any time prior to delivery of the gift. App. 19. Similarly, Judy stated that the *Option to Purchase* was only a gratuitous promise by Margaret, not supported by consideration of any type, to make a gift at a future date. App. 15. However, the Deckerts, in their answer to Margaret's counterclaim affirmatively denied that that the *Option* was a gift. App. 27. ("As to Paragraph 15, deny that the Option was a future gift and further deny that the Option was revocable at any time prior to delivery."). The Deckerts never amended their complaint to plead gift and they did not argue in their summary judgment motion or their responses to Margaret's and Judy's motions for summary judgment that the *Option* was an irrevocable gift. The Deckerts cannot now argue on appeal that the *Option* granted by Margaret was an irrevocable gift.

[72] If this Court finds that the Deckerts properly raised this issue at the trial court, the granting of the *Option* was an uncompleted gift, thus revocable. A valid gift made during the donor's lifetime must satisfy certain requirements – donative intent, delivery, actual or constructive, and acceptance by the donee. *Makedonsky v. North*

Dakota Dep't of Human Srvs., 2008 ND 49, ¶ 11, 746 N.W.2d 185. Actual or constructive delivery must be "of a nature sufficient *to divest the owner of all dominion over the property* and to invest the donee therein." *In re Kaspari's Estate*, 71 N.W.2d 558, 567 (N.D. 1955) (emphasis added)). A donor's intent is a question of fact. *Doeden v. Stubstad*, 2008 ND 165, ¶ 12, 755 N.W.2d 859.

[73] In *Lindvig v. Lindvig*, this Court affirmed the requirement that the donor relinquish all control over the property as a prerequisite to a finding of a valid gift by stating:

> There must be an intention on the part of the donor to relinquish the right of dominion on one hand and to create it on the other hand, and the delivery must be not only of possession but also of the dominion and control of the property. To have the effect of a valid gift, therefore, the transfer of possession and title must be absolute and go into immediate effect, so far as the donor can make it so by intent and delivery, and must be so complete that if he again resumes control over it without the consent of the done he becomes liable as a trespasser.

385 N.W.2d 466, 470 (N.D. 1986).

[74] In this case, Margaret never took affirmative steps to "deliver" the subject property to the Deckerts or "divest herself" of "the title, dominion, and control" over the Subject Property. In the deed at issue here, Margaret retained unto herself a life estate. App 59. This life estate allowed Margaret to possess, occupy and control the premises and collect rents therefrom for the balance of her natural life. *Id*. Margaret certainly did not divest herself of control over the Subject Property. Because Margaret did not divest herself over all dominion and control over the Subject Property, she could, and did revoke the *Option*.

[75] II. The Trial Court Did Not Abuse its Discretion When it Denied The Deckerts' Motion for an Extension of Time in Order to Conduct Additional Discovery because the Deckerts Could Not Explain How the Information Sought Would Preclude Summary Judgment or Why the Information Had Not Been Previously Obtained.

[76] At issue is whether the trial court erred when it denied the Deckerts' motion for an extension of time in order to conduct additional discovery. N.D.R.Civ.P. 56(f) provides:

> If a party opposing [a summary judgment] motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or any other discovery to be undertaken; or
> (3) issue any other just order.

A decision on a Rule 56(f) motion is within the trial court's discretion, and will not be reversed on appeal unless the court abused its discretion. *Choice Fin. Grp*, 2006 ND 87, ¶ 9, 712 N.W.2d 855. A court abuses its discretion if it acts in an arbitrary, unreasonable, or conscionable manner, or if it misinterprets, or misapplies the law. *Id*. This Court has cautioned:

> It is not enough, however, for a party invoking N.D.R.Civ.P. 56(f) to merely recite conclusory, general allegations that additional discovery is needed. Rather, N.D.R.Civ.P. 56(f)requires that the party, preferably by affidavit, identify with specificity what particular information is sought, and explain how that information would preclude summary judgment and why it has not previously been obtained.

Vicknair v. Phelps Dodge Indus., Inc., 2011 ND 39, ¶ 19, 794 N.W.2d 746.

[77] The trial court did not abuse its discretion here because there was no explanation by the Deckerts or their counsel as to how the additional information that would be discovered would preclude summary judgment or why the information had not

been previously obtained. In this case, the Deckerts argue that the *Option* is ambiguous and thus they should have been allowed more time to discover how the *Option* was to be accepted or exercised because Margaret executed a similar option in favor of her son, Donald. However, the trial court found that the *Option* here was unambiguous as to the method of acceptance. "To exercise the Option, [the Deckerts] shall tender the full purchase price, in cash, to Margaret L. McCormick, or her successors or assigns, at any time prior to December 31, 2015." App. 51. The trial court, relying on N.D.C.C. § 9-07-04, which requires that the intentions of contracting parties be ascertained from the provisions of the written contract alone, properly found that the *Option* was "clear and unambiguous." App. 36. Accordingly, the trial court did not abuse its discretion.

[78] Furthermore, the Deckerts or their counsel did not show to the trial court why the discovery had not previously been obtained. The Deckerts commenced this action on February 6, 2013. Doc. 3. N.D.R.Civ.P. 33 provides that the Deckerts could have served discovery requests after service of the summons and complaint. The Deckerts did not do this, and 160 days after the service of the *Summons* and *Complaint,* they moved the trial court with their motion for summary judgment. The Deckerts did so without conducting any discovery. One hundred ninety days after commencement of the suit, Margaret and Judy answered the Deckerts motion for summary judgment. A fair reading of Margaret's response brief would clearly show that the issue of the exercise of the *Option* was a point of contention.

[79] On or about November 26, 2013, 293 after the commencement of the case, the Deckerts served discovery requests, and one day prior to the Deckerts' response to Margaret's motion for summary judgment was due, the Deckerts filed their brief in

support of additional time to conduct discovery. Doc. 70. The Deckerts did not argue that the exercise of the option was ambiguous but argued that they needed to determine Margaret's intent when she issued similar options. *Id.*

[80] However, the Court properly found, "As there is no ambiguity in the language of the purchase option for exercising the purchase option, it would be improper for this Court to consider evidence outside of the express written language of the provisions of the purchase option." App. 36. The Deckerts provided no explanation as to why they had insufficient time to conduct discovery, they did not state how the information sought would have precluded summary judgment, and they did not explain why the information was not previously obtained. The Deckerts made a strategic decision to conduct no discovery prior to moving for summary judgment. They cannot now ask for a "second bite at the apple." Therefore, the trial court did not abuse its discretion when it denied the Deckerts' motion.

[81] CONCLUSION

[82] For the foregoing reasons, Margaret and Judy respectfully request that this Court affirm the trial court's decision.

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Respectfully submitted this 23rd day of July, 2014.

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Dennis and Charlene Deckert,	)	
Plaintiffs - Appellees,	)	
	)	
v.	)	**Supreme Court No.: 20140151**
	)	
Margaret L. McCormick and,	)	
Judy Hertz,	)	
Defendants - Appellants.	)	

Appeal from the Order Dated December 5, 2013 and the Order Dated March 19, 2014 of the District Court South Central Judicial District Burleigh County, North Dakota Civil No.: 08-2013-CV-01583 Honorable Cynthia M. Feland, Presiding

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AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

Erica Pullen, being first sworn, deposes and says that she is of legal age and that on the 23rd day of July, 2013 she served the attached **Joint Brief of Appellees Margaret L. McCormick and Judy Hertz** in this matter upon the following by e-mailing a copy to the addresses below:

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Subscribed and sworn to before me
this 23rd day of July, 2013.

Micheal A. Mulloy, Notary Public
Burleigh County, North Dakota

MICHEAL A. MULLOY
Notary Public
State of North Dakota
My Commission Expires February 8, 2020