20140151
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 8, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dennis and Charlene Deckert, Plaintiffs and Appellants, vs. Margaret L. McCormick and Judy Hertz, Defendants and Appellees.	**SUPREME COURT NO. 20140151**

REPLY BRIEF OF APPELLANTS DENNIS AND CHARLENE DECKERT

APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE CYNTHIA M. FELAND
DISTRICT COURT CASE NO. 08-2013-CV-01583

PEARCE & DURICK
ZACHARY E. PELHAM, ND #05904
BENJAMIN W. KEUP, ND #07013
314 East Thayer Avenue
P. O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890
Attorneys for Appellants
Dennis and Charlene Deckert

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

NORTH DAKOTA CENTURY CODE

OTHER AUTHORITIES

LAW AND ARGUMENT

I. There was adequately recited consideration and McCormick has failed to rebut the presumption that it existed.

The recited consideration in the Option resulted in a binding, irrevocable contract. App. at 51. McCormick and Hertz (collectively "McCormick") cite to *Anderson v. Anderson*, 78 N.W.2d 694, 689 (N.D. 1956) to support the argument that the recital of a nominal consideration is insufficient to establish valuable consideration. However, in *Anderson* this Court was differentiating between a nominal consideration and the establishment of a valuable consideration when determining whether a party is a good faith purchaser. *Id*. There is no dispute here as to whether the Deckerts are good faith purchasers or if the consideration was nominal. Rather, Deckerts are claiming to have accepted the Option prior to it being withdrawn and contend that "[a]n offer is binding . . . if it is in writing and signed by the offerror, recites a purported consideration . . . and proposes an exchange on fair terms with a reasonable time." Restatement (Second) of Contracts, § 87(1)(a) (1981). The Restatement also explains that the recital of nominal consideration is a formal function only, where *the signed writing is what is of vital significance*. *Id*. (emphasis added). The fact that McCormick went to an attorney, had the Option drafted, and then confirmed the existence of consideration by signing herself it proves that the consideration was present and valid. App. Br. at ¶ 41; *see also* App. 51. McCormick's attempt at rebutting this point is in direct contradiction of this Court's statement in *Four Seasons Healthcare Center, Inc. v. Linderkamp*, 2013 ND 159, ¶ 13, 837 N.W.2d 147, which held that the "effect of [a] consideration clause . . . is to estop the grantor from alleging that the deed was executed without consideration." Using the

rebuttable presumption argument due to a change of heart is totally unjust and goes against the purpose of N.D.C.C. § 9-05-10 and the rationale stated in *Linderkamp*.

II. McCormick did not withdraw the *Option* prior to the Deckerts' acceptance of it; therefore, the *Option* became irrevocable and remains binding on both parties.

McCormick's withdrawal of the Option came long after the Deckerts accepted it. The withdrawal was ineffective and the Option remains binding.

McCormick argues in their brief ("Appellee Br.") they overcame the presumption that consideration existed and, as a result, the Option was revocable and was withdrawn prior to acceptance. Appellee Br. at ¶ 64-66. To the contrary, McCormick made no statement that the Option was revoked when she responded to multiple verbal requests by Charlene Deckert and multiple written requests by Deckerts' counsel. App. 55-57, 60-65. Instead, McCormick made mere requests that Deckerts not exercise it at that time. App. 55-57, 64. McCormick only attempted to make an actual withdrawal in her October 1, 2013, letter—fourteen months after Deckerts' initial acceptance of the Option. App. 61, 78.

McCormick correctly states that the Option "remains enforceable until it is either unconditionally accepted within the time prescribed in the instrument or it is withdrawn prior to acceptance." Appellee Br. at ¶ 51 (*citing Pifer v. McDermott*, 2013 ND 153, ¶ 10, 836 N.W.2d 432). Before admitting that "acceptance of the Option is separate and distinct from the exercise thereof," McCormick relies on *Mason v. Haakenson*, 303 N.W.2d 557, 558 (1981), to emphasize that an optionee must accept the option unconditionally without deviating from the terms of the option. Appellee Br. at ¶ 52-54. In *Mason*, the optionee had altered the number of acres being purchased, payment terms,

and included interest to be paid—all deviations from the option's terms. *Id*. at 559. This Court ultimately determined that the alterations were counteroffers. *Id*. The same determinations were made in the other cases cited by McCormick, *Beiseker v. Amberson*, 17 N.D. 215, 116 N.W. 94 (N.D. 1908) and *Greenberg v. Stewart*, 236 N.W.2d 862 (N.D. 1975), where the optionees added conditions and deviated from their respective options. Here, Deckerts did not deviate whatsoever: they told McCormick that they were going to exercise the Option and requested the abstract, which she was obligated to provide pursuant to the Option's terms. App. at 51. This was not a qualification because the Option specifically provided that McCormick "*shall be responsible* to deliver to Buyer abstracts of title." *Id*. (emphasis added).

McCormick's analysis of *Northern Plains Alliance, LLC v. Mitzel*, 2003 ND 91, 663 N.W.2d 169, as not applicable is incorrect. When there is not the necessity of payment coincident with exercising an option, payment is a resulting performance required by the "binding executory contract of sale" that the option was converted into. *Id*. at ¶ 16. Here, the Option states that the payment was to be made "at any time prior to December 31, 2015." App. at 51. "[A]t any time" is when the actual exercise of the Option can take place. However, the acceptance of the Option triggered the primary requirement of providing the abstract so that marketable title could be proven and the tender of the purchase price could be made. It is as simple as this: (1) accept; (2) provide the abstract; (3) prove marketable title; and, (4) tender payment in exchange for a warranty deed. As stated in *Northwestern Bell Tel. Co. v. Cowger*, 303 N.W.2d 791, 792 (N.D. 1981), where the defendants failed to provide an abstract of title in accordance with the terms of the contract, "Northwestern Bell could not be expected to tender the

purchase price of the property until they had determined that title to the property was marketable." *Id*. at 795. The Court further stated that "the payment of the purchase price for the property was not a condition precedent to the exercise of the option and was an incident of performance of the contract to purchase, as distinct from its formation." *Id*. Strikingly similar in this case, Deckerts notified McCormick several times that they were exercising the Option, thereby accepting it and causing it to be irrevocable. App. 53, 60, 63, 66, 69, 70, 76. Also similar, it is not absolute that the tender be *coincident* with the acceptance of the Option. App. 51. Rather, the Option provides absolutely that McCormick "*shall* be responsible to deliver to Buyer abstracts of title" and that Deckerts had to tender the payment *any time* before the deadline. *Id*. (emphasis added). McCormick failed to provide the abstract to be used to prove marketable title, which was an absolute requirement under the clear and explicit language of the Option. *Id*.; App. 6-12, 55-57, 60, 64, 72, 73, 81. Like in *Cowger*, the Deckerts could not be expected to have furnished the purchase price until they were assured that the title was marketable. Therefore, although McCormick argues that an option must be accepted in accordance with its terms, that the Deckerts didn't do so and, thus, she withdrew the Option, it is McCormick herself who admittedly failed to perform an obligation of her own under the Option.

III. The issue of gift was raised by McCormick in her Brief Opposing Summary Judgment and was also argued at oral argument.

The alternative argument of whether the Option is a gift was argued at the district court. In McCormick's Brief Opposing Summary Judgment, she argued that the pending *Pifer* case should have been decided before Deckerts' motion for summary judgment was decided. *See* Docket ID # 32 at ¶ 42. As well, McCormick's accompanying affidavit to

that brief explicitly stated that the Option was meant to be a gift, thereby raising the issue herself. App. at 93. Additionally, counsel for the Deckerts acknowledged at the oral argument on their motion for summary judgment that it was possible that the Option would be controlled by gift law in the event the district court determined there was no consideration. Tr. at 14-15. Further, McCormick's counsel admitted to raising the issue at the same hearing. Tr. at 23-24, 31 ("[W]e raised the issue of gift."). Also, when discussing the issue of consideration in Section A of the Appellee Brief, McCormick quotes from treatises that state that an option, when given *gratuitously*, is revocable until accepted, conceding that the gift issue is present here. Appellee Brief at 38. Finally, as the district court pointed out at oral argument, the Deckerts' prayer for relief included a prayer for "such other and further relief as the Court deems just and proper." App. at 7; *see also* Tr. at 24; *see also* 61B Am. Jur. 2d Pleading § 889 ("a court in equity may grant relief consistent with the pleadings even though such relief is not specifically included in the prayer for relief."). Therefore, the gift issue was a mutually exclusive alternative argument that is fully reviewable.

IV. Alternatively, additional discovery should have been allowed.

Alternatively, if the Court rejects Deckerts' prior arguments, the case should be remanded to allow additional discovery. Additional discovery should have been allowed in order to determine the intent of McCormick and to learn how identical prior options were treated. McCormick correctly states in her brief that a decision on a Rule 56(f) motion is within the trial court's discretion. Appellee Br. at ¶ 76. McCormick alleges that the Deckerts provided no explanation as to how additionally discovered information would preclude summary judgment. *Id*. at ¶ 77. This is contrary to the Deckerts' Brief in

Support of Motion for Extension of Time and Affidavit of Deckerts' counsel. *See* Docket ID #70 and #71. Deckerts' Brief in Support of Motion for Extension of Time and accompanying affidavit explained that the additional information would show how McCormick's son, Donald McCormick, completed the process of exercising identical options to purchase that were granted to him by McCormick on other properties. *See* Docket ID #70 at ¶ 5; *see also* Docket ID #71 at ¶¶ 5-10; *see* also Tr. at 28, 30, 33 (counsel for McCormick and Hertz suggesting discovery could explain McCormick's true intent). Despite this explanation, the district court concluded, prior to Deckerts' Brief Opposing Summary Judgment even being submitted, that the Option was clear and unambiguous and that considering additional evidence would be improper. *See* Docket ID #79. Disallowing any other evidence had the effect of denying the Deckerts the ability to present to the district court another possible reading of the Option

McCormick also seeks to make an issue of the number of days that had elapsed between the service of the Summons and Complaint and the Deckerts' motion for summary judgment. McCormick cites to no statute or case that determines the number of days allowed in which to conduct discovery, or at what point during the proceedings discovery must take place. North Dakota Rule of Civil Procedure 26(f)(1) states that "any party's attorney or a self-represented party *may* request in writing a meeting on the subject of discovery . . . ." (Emphasis added). In this case, there was neither a meeting request by either party or the court nor a scheduling order in place. Discovery was still open and taking depositions and requesting documents should have been allowed. *See* Docket. The outcome here should be the same as when this Court concluded in *Reidlinger v. Steam Brothers, Inc.*, 2013 ND 14, ¶ 26, 826 N.W.2d 340, that "rational

arguments can be made for both parties' interpretations" and that "[t]he resolution of the parties' intent is a question of fact which is inappropriate for summary judgment." The request for additional time in order to determine McCormick's intent should have been allowed and the denial of such was an abuse of discretion.

CONCLUSION

For the reasons set forth above and those submitted in Deckerts' initial brief, the Option should be determined to have been accepted prior to any withdrawal attempted by McCormick. It follows, then, that the Option should remain binding and still effective, whether deemed a contract or a gift. Alternatively, this case should be remanded to allow Deckerts to conduct discovery to determine the intent of McCormick on how the Option was to be exercised.

Dated this _____ day of August, 2014.

PEARCE & DURICK

By_____

Zachary E. Pelham, ND #05904
Benjamin W. Keup, ND #07013
314 E. Thayer Ave.
P.O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

Attorneys for Plaintiffs
Charlene and Dennis Deckert

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dennis and Charlene Deckert, Plaintiffs and Appellants, vs. Margaret L. McCormick and Judy Hertz, Defendants and Appellees.	**SUPREME COURT NO. 20140151** **FILED** IN THE OFFICE OF THE CLERK OF SUPREME COURT AUG 08 2014 STATE OF NORTH DAKOTA

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 8th day of August, 2014, she mailed a copy of the foregoing *Reply Brief of Appellants Dennis and Charlene Deckert* by placing a true and correct copy thereof in an envelope, addressed to the following:

Michael A. Mulloy
BLISS & STEBBINS
400 E. Broadway Ave. Ste. 308
P.O. Box 4126
Bismarck, ND 58502-4126

James J. Coles
COLES LAW FIRM, PC
400 E. Broadway Ave., Ste. 301
P.O. Box 2162
Bismarck, ND 58502-2162

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Annette Kirschenheiter
Annette Kirschenheiter

Subscribed and sworn to before me this 8 day of August, 2014.

Laurie Weigel
Notary Public

LAURIE WEIGEL
Notary Public
State of North Dakota
My Commission Expires September 20, 2018