

In the Supreme Court
State of North Dakota

No. 20140431

The City of Moorhead, a political subdivision of the State of Minnesota,

Plaintiff and Appellee,

v.

Bridge Company,

Defendant and Appellant,

and

The City of Fargo, a political subdivision of the State of North Dakota,

Defendant and Appellee.

Appeal from the Amended Judgment of the Cass County District Court,
East Central Judicial District,
Honorable Frank L. Racek, Presiding
Civil No. 09-2013-CV-01502

BRIEF OF APPELLEE

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I. STATEMENT OF THE ISSUES

[¶1] Whether the district court’s determination that the Bridge Company had to donate the Bridge to the City of Fargo and the City of Moorhead is clearly erroneous when no qualifying debt existed on February 5, 2014.

II. STATEMENT OF THE CASE

[¶2] The City of Moorhead (“Moorhead”) brought this case against the Bridge Company (“the Bridge Company”) and City of Fargo (“Fargo”) claiming that the Bridge Company had no “qualifying debt” concerning the toll bridge (“Bridge”) as of February 5, 2014. (App. P. 40). Fargo’s position to the district court was the Moorhead and Fargo needed to exercise a joint option to assume the indebtedness of the Bridge Company and have the Bridge Company convey the Bridge to Fargo and Moorhead. (Doc. # 187).¹

[¶3] However, Fargo also took the position that if the court determined there was no original debt remaining and no debt for major maintenance and repairs on the Bridge, then the Bridge should be immediately conveyed to Fargo and Moorhead with the Bridge Company responsible to convey the Bridge free and clear of any liens, including Cass County and Clay County tax liens which remained unpaid. *Id.* The court ultimately determined the term of the agreement ended on February 5, 2014, and there was no debt remaining as of February 5, 2014. (App. P. 54, 55).

III. STATEMENT OF THE FACTS

[¶4] In 1986, Fargo, Moorhead, and the Bridge Company entered into an agreement which allowed the Bridge Company to operate a private toll bridge in north Fargo. (App. P. 72). The Bridge Company’s ability to operate the Bridge was governed

¹ The reference cite to (Doc. # 187) is a citation to Fargo’s post-trial brief. The post-trial brief is not being included in the appendix pursuant to N.D. R. App. P. 30(a)(2).

by a May 19, 1986, Agreement between the Bridge Company, Fargo, and Moorhead. Id.

The relevant terms of the Agreement provide:

6. TERM AND OTHER PROVISIONS OF AGREEMENT.

6.1. Term. The term of this Agreement shall be for a period of twenty (20) years commencing with the day the Bridge commences operations. At the expiration of 25 years from the day the Bridge commences operations one of the following shall occur:

- a) In the event the original debt incurred for the construction of the Bridge, including any refinancing or renegotiation of such debt, and any debt incurred for major maintenance and repairs to the Bridge, have been fully paid, the Company shall donate the Bridge to the Cities free and clear from any liens, and the Cities shall accept the Bridge for public use to be operated by the Cities as they may determine. It is expressly understood and agreed by and between the parties that any refinancing or additional financing which constitutes a lien or encumbrance on the Bridge which may be obtained more than five years after the original financing for the construction of the Bridge, shall be subject to the approval of the Cities. The amortization of any refinancing may not extend beyond 25 years from the commencement of the operation of the Bridge and the Company agrees it will not default on any loan secured by the Bridge. It is further agreed the Company will not permit or cause to be filed any lien or encumbrance on the Bridge other than a first lien for permanent financing and such liens or encumbrances as are necessary to secure interim construction financing.
- b) In the event any portion of the original debt incurred for the construction of the Bridge, including any refinancing or renegotiation of such debt approved in advance by the Cities, or any portion of any debt incurred for major maintenance and repairs of the Bridge remains unpaid, the Cities shall have the option to either:
 1. To pay or assume such outstanding indebtedness and, in such event, the Company shall convey the Bridge to the Cities; or

2. Grant the Company the right to continue to operate the Bridge under the terms of this Agreement for an additional term of five (5) years, and upon the expiration of such extended term the Company shall donate the Bridge to the Cities free and clear from any liens and the Cities shall accept the Bridge for public use to be operated by the Cities as they may determine.

Id. at 82 (emphasis added). Thus, the Agreement expressly provides that if no qualifying debt remains unpaid at the expiration of the 25-year term, then the Bridge Company had to donate the Bridge to the Fargo and Moorhead free and clear of all liens. Id.

IV. STATEMENT OF THE STANDARD OF REVIEW

[¶5] Findings of fact are subject to the clearly erroneous standard of review. Hill v. Weber, 1999 ND 74, ¶ 12, 592 N.W.2d 585. A finding of fact is clearly erroneous “if, although there is some evidence to support it, a reviewing court, on the entire record, is left with a definite and firm conviction that a mistake has been made, or if it was induced by an erroneous view of the law.” Id. The interpretation of a written contract to determine its legal effect is a question of law that is subject to a de novo standard of review. Tweeten v. Tweeten, 2009 ND 164, ¶ 11, 772 N.W.2d 595, 598

[¶6] The question of whether qualifying debt existed on February 5, 2014, is a question of fact which is subject to the clearly erroneous standard of review. The question of whether the forced majeure clause extended the term of the Agreement to February 5, 2014, is a question of law subject to the de novo standard of review.

V. LAW AND ARGUMENT

- A. **The district court’s determination that qualifying debt existed on February 5, 2014, is not clearly erroneous and, therefore, the district court correctly determined to require the Bridge Company to donate the Bridge.**

[¶7] Section 6.1 of the Agreement states that if there is no original debt or debt incurred for major maintenance and repairs of the bridge at the expiration of 25-years from the day the Bridge commences operations the Bridge Company must donate the Bridge to Fargo and Moorhead free and clear from any liens. The 25-year term ended on February 5, 2014. No qualifying debt existed on February 5, 2014. As such, the district court correctly determined the Bridge Company had to donate the Bridge to Fargo and Moorhead free and clear of any liens.

1. The Agreement’s 25 year term ended on February 5, 2014.

[¶8] The Bridge commenced operations on June 1, 1988. Twenty-five years after June 1, 1988, is June 1, 2013. However, Section 6.4 of the Agreement suspends obligations to perform for “reasons beyond the reasonable control of the [Bridge] Company, or by reason or acts of God, or force majeure, strikes, lock outs, labor troubles, or unavailability of building materials” and “the time for performance shall be extended for a period equal to the delays so caused.” (App. P. 84). Pursuant to Section 6.4 of the Agreement, the Bridge Company’s time for performance was extended by 249 days due to delays outside of their reasonable control (i.e., primarily flooding). *Id.* at 54; (Trial Transcript, at 50). Two-hundred forty-nine days after June 1, 2013, is February 5, 2014. (App. P. 54). Therefore, the district court’s determination that February 5, 2014, is the end of the 25-year term is not clearly erroneous.

2. No qualifying debt existed on February 5, 2014.

[¶9] The Bridge Company paid off all of its debts prior to February 5, 2014. (COF App. P. 5). Therefore, the Bridge Company did not have any qualifying debt on

February 5, 2014. The district court's determination that no qualifying debt existed on February 5, 2014, is therefore not clearly erroneous.

3. The Bridge Company had to donate the Bridge since there was no qualifying debt associated with the Bridge on February 5, 2014.

[¶10] Section 6.1 of the Agreement governs the term of the Agreement. Section 6.1 provides, "In the event the original debt incurred for the construction of the Bridge, including any refinancing or renegotiation of such debt, and any debt incurred for major maintenance and repairs to the Bridge, have been fully paid, the Company shall donate the Bridge to the Cities free and clear from any liens." (App. P. 82) (emphasis added). Because there was no debt remaining on the Bridge on February 5, 2014, the Bridge Company was required to donate the Bridge under Section 6.1.

VI. CONCLUSION

[¶11] Fargo respectfully requests this Court affirm the district court's decision.

Dated this 25th day of February, 2014.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellees in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 1,430.

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AFFIDAVIT OF SERVICE BY EMAIL

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

The undersigned, being first duly sworn, deposes and says that she served the attached:

**BRIEF OF APPELLEE and
APPENDIX OF APPELLEE**

on February 25, 2015, by email as follows, to-wit:

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Subscribed and sworn to before me this 25th day of February, 2015.

/s/ Robyn L. Tande
Notary Public, Robyn L. Tande
Cass County, North Dakota
My Commission Expires: 10.09.2018