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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

26th Street Hospitality, LLP,	)	
	)	Supreme Court No. 20150259
Plaintiffs-Appellants,	)	Burleigh County No. 08-2013-CV-02544
	)	
vs.	)	
	)	
Real Builders, Inc.; Joel J. Feist, individually and as Managing Partners of 26th Street Hospitality, LLP,	)	
	)	
Defendants-Appellees,	)	
	)	

APPEAL

CIVIL NO. 08-2013-CV-02544

BRIEF OF APPELLANT 26TH STREET HOSPITALITY, LLP

Randall J. Bakke #03898
Bradley N. Wiederholt # 06354
SMITH BAKKE PORSBORG SCHWEIGERT & ARMSTRONG
122 E. Broadway Ave.
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
rbakke@smithbakke.com
bwiederholt@smithbakke.com

Attorneys for Appellant,
26th Street Hospitality

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I. JURISDICTIONAL STATEMENT

(1.) The district court had jurisdiction over this matter pursuant to N.D. Const. Art. VI, §§ 1 and 8, and N.D.C.C. § 27-05-06. This Court has jurisdiction to hear the appeal from *Order Granting Motion Compelling Arbitration And Stay Of Further Proceedings*, dated February 21, 2014 (App 307); *Order Denying Request To Reconsider And Or Clarify Order Compelling Arbitration And Stay of Further Proceedings*, dated July 10, 2014 (App 398); *Order Lifting Stay; Confirming Arbitration Award; Entering Judgment; and Awarding Post-Judgment Interest*, dated July 29, 2015 (App 440), *Judgment*, entered September 2, 2015, (App 442), and Arbitration Award of Arbitrator Gary Cole, dated May 7, 2015, in the arbitration entitled, In the Matter of the Arbitration between Joeleon Holdings, LLP, Joel J. Feist as a Managing Partner of 26th Street Hospitality, LLP, and Real Builders, Inc. v. 26th Street Hospitality, LLP, Case No. 01-14-0000-0398 (App 446), under N.D. Const. Art. VI, §§ 1 and 2, N.D.C.C. § 28-27-01, N.D.C.C. § 28-27-02, N.D.C.C. § 32-29.3-28, and/or pursuant to Title 9 U.S.C. § 16(a)(1)(D) & (a)(3). Lest the Appellees argue no appeal is possible at this stage, the following standard demonstrates such an argument would be without any merit:

> The rule we adopt today for our own State procedure, that an order compelling arbitration in an embedded proceeding is not appealable, is consistent with the policy favoring arbitration endorsed by the Congress and this Court's recent precedents. This pro-arbitration policy discourages delays in the onset of arbitration and "requires that, with respect to embedded actions, the party opposing arbitration must bear the initial consequence of an erroneous district court decision requiring arbitration. *Filanto,* 984 F.2d at 61. This issue is reviewable once the arbitration is completed and the district court has rendered a final disposition, but the present order compelling arbitration is an embedded proceeding and is not appealable.

Superpumper, Inc. v. Nerland Oil, Inc., 1998 ND 144, ¶ 23, 582 N.W.2d 647, 652-53 (quotations omitted). The Court has jurisdiction to hear the present appeal under this holding, and under the legal authority set forth above.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

(2.)

1.Whether the district court erred in concluding issue of outright fraud in the formation of the construction agreement (signed by Joel Feist alone as both a representative of Real Builders and as managing partner of the Partnership) was issue for arbitrator, not the jury, where Partnership introduced totally unopposed evidence in support of fraud claim and defendants introduced no contrary evidence whatsoever.

2.Whether the district court erred in refusing to summarily decide, whether by jury or otherwise, the issue of fraud in the formation of the construction agreement as outlined in the Federal Arbitration Act and/or North Dakota's Uniform Arbitration Act.

3.Whether the district court erred by determining Partnership's fraud claims, equitable claims, and consequently all construction claims were issues for the arbitrator, not a jury.

4.Whether the district court erred in refusing to specify which claims were and which were not subject to mandatory arbitration.

5.Whether the district court erred by compelling arbitration of all Partnership claims, on basis all such claims were subject to the mandatory arbitration provision in Partnership Agreement.

6. Whether the district court erred in awarding post judgment interest at 18% per annum based on a contract interest rate the Partnership never agreed to and/or which is not allowed by applicable law.

III. STATEMENT OF THE CASE

(3.) Under both North Dakota's Uniform Arbitration Act (UAA) and the Federal Arbitration Act (FAA), a party opposing arbitration who raises an issue concerning the invalidity of the agreement containing a mandatory arbitration provision is entitled to have the validity of the agreement summarily decided by the court, and if a jury has been demanded, by the jury. Neither the UAA nor the FAA allows the arbitrator to make such determinations. State law contract defenses are available to show the agreement is in fact invalid, and therefore no agreement to arbitrate was made. It is the district court's duty, and not that of the arbitrator, to rule on the validity of such an agreement where undisputed evidence is presented the agreement was procured through outright fraud/deceit. The Partnership in fact raised this issue which goes to the heart of the validity of the agreement to arbitrate. Although the Partnership presented the district court with unopposed evidence that the construction agreement was procured fraudulently and/or deceitfully and made specific lawsuit claims asserting same and requesting the district court and not the arbitrator decide the issue, the district court refused to do so. Further, although the Partnership expressly asserted construction, fraud/deceit, and other claims that were not subject to mandatory arbitration, the district court essentially sent the entire lawsuit to the arbitrator to decide the validity of the construction agreement, thereby abrogating its responsibility under the UAA and/or the FAA and committing clear error. In fact, rather than allow the a jury to summarily decide

the issue of the validity of the construction agreement as provided for in both the UAA and the FAA as requested by the Partnership, the district court ordered the parties to arbitrate essentially all claims and was even unwilling to specify which claims were not subject to arbitration. The claims the district court erroneously ordered to be arbitrated included (1) the construction claims, fraud/deceit claims, contract and negligence claims concerning the construction project, equitable claims concerning the construction project, and the judicial determination claims, as well as (2) the breach of partnership duty claims. The district court's decision was made on the erroneous basis a mandatory arbitration provision within a wholly separate Partnership Agreement encompassed all of those claims, which was also clear error. The Partnership never agreed to arbitrate any claims except those arising out of or related to the Partnership Agreement, claims which were not raised or at issue in the instant lawsuit.

(4.) As part of its lawsuit, the Partnership also seeks a judicial declaration under North Dakota's Uniform Declaratory Judgment Act, that the construction agreement (including its arbitration and interest provisions) are invalid, unenforceable, and of no effect due to the clear fraud by Feist and his construction company Real Builders, Inc. The Partnership further requested leave of the court to amend the complaint to state a claim for judicial determination under North Dakota's Uniform Partnership Act, requiring partners Joeleon Holdings, LLP and DARAJ, LLC be expelled as partners due to the fraudulent activity associated with the construction agreements and fraudulent activity during construction. The district court denied the motion to amend, stating those types of claims could be taken care of in arbitration rather than in court. As a matter of law, an arbitrator is incapable of any such *judicial* declaration, and those claims should have been decided by

the district court, or in the alternative, the district court should have specified those claims were not subject to any agreement to arbitrate based on the Partnership Agreement. Only one small part of the Partnership's lawsuit dealt with the Partnership Agreement, and that concerned allegations Joeleon Holdings and Joel J. Feist breached their statutory obligations owed to the Partnership and to their partners. The district court swept all of the Partnership's construction, fraud, and equitable claims - having nothing to do with the Partnership Agreement – into arbitration on the basis those claims arose out of or were related to the Partnership Agreement. This too was clear error. Although the Arbitration Award awarded damages to both the Partnership and to the Feist Defendants, the net result of the Arbitration Award and Judgement entered thereon is that the Partnership would be obligated to pay the Feist Defendants damages in the net amount of $356,698.10. (App 446). The district court furthermore ordered the Partnership to pay the Feist Defendants 18% interest on the judgment amount, which is a rate never agreed to by the Partnership and is contrary to the post-judgment statute. (App 440).

IV. STATEMENT OF STANDARD OF REVIEW

(5.) The Court reviews the district court's orders staying the litigation and compelling arbitration, the district court's order confirming the arbitration award, and the final judgment under the de novo standard of review. *See* Schwarz v. Gierke, 2010 ND 166, ¶ 11, 788 N.W.2d 302, 306 (reviewing order denying motion to compel arbitration under *de novo* standard); State ex rel. Stenehjem v. Philip Morris, Inc., 2007 ND 90, ¶ 13, 732 N.W.2d 720, 726 (same); *see also* Pleasants v. Am. Exp. Co., 541 F.3d 853, 857 (8th Cir. 2008) (reviewing "*de novo* the district court's decision to compel arbitration" where party

seeking to avoid arbitration asserted unconscionability contract defense under Missouri law); Pro Tech Indus., Inc. v. URS Corp., 377 F.3d 868, 870 (8th Cir.2004) (holding same *de novo* standard of review).

(6.) The Court reviews the district court's construction of the arbitration provision in the Partnership Agreement, holding all claims were subject to mandatory arbitration, under the *de novo* standard of review. Likewise, the Court reviews the district court's refusal to construe the mandatory arbitration provision found in the fraudulent Construction Agreement, under the same *de novo* standard of review:

> "[C]onstruction of a written contract to determine its legal effect is a question of law, fully reviewable on appeal." *Id.* at ¶ 13; *see also Peoples State Bank of Truman, Inc. v. Molstad Excavating, Inc.,* 2006 ND 183, ¶ 19, 721 N.W.2d 43. Further, recognizing a strong state and federal public policy favoring the arbitration process, this Court resolves any doubts concerning the scope of arbitrable issues in favor of arbitration when there is a broad arbitration clause and no exclusion clause. *See Philip Morris,* at ¶ 14; *Gratech Co. Ltd. v. Wold Eng'g, P.C.,* 2003 ND 200, ¶ 14, 672 N.W.2d 672; *State v. Stremick Constr. Co.,* 370 N.W.2d 730, 732 (N.D.1985); *see also AT & T Techs. Inc. v. Commc'n Workers of Am.,* 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986); *Dunn Indus. Group, Inc. v. City of Sugar Creek,* 112 S.W.3d 421, 429 (Mo.2003); *McCracken v. Green Tree Servicing, LLC,* 279 S.W.3d 226, 228 (Mo.Ct.App.2009).

Schwarz v. Gierke, 2010 ND 166, ¶ 11, 788 N.W.2d 302, 306.

V. STATEMENT OF RELEVANT FACTS & PROCEDURAL BACKGROUND

(7.) 26th Street Hospitality, LLP ("the Partnership") sued the Feist defendants[1] and Solid, LLC in state district court in relation to the MainStay Suites Hotel (Williston) construction project that took place approximately from 2011 to 2013 ("the project" or

[1] The "Feist Defendants" include Joel J. Feist, his construction company Real Builders, Inc., and Joeleon Holdings, LLP. Feist is part owner of Joeleon Holdings, LLP, through which he holds partial ownership in 26th Street Hospitality, Limited Liability Partnership ("the Partnership"). Feist is one of the three originally named managing partners of the Partnership.

"the hotel"). (App 008). The Partnership is the owner of the project, and the Feist Defendants and Solid, LLC ("Solid") constructed the project. (*Id.*)[2] The Partnership continues to own the hotel. As set forth in the Complaint, the project came in substantially over budget and the hotel opened late due to the abandonment of the project by the general contractor Real Builders, Inc. ("Real Builders"), and construction manager Solid. (*Id.*) As identified in the Complaint, Real Builders and Solid are furthermore responsible for numerous construction defects, repairs, damages, replacements, lost revenues and profits, and cost overruns, all resulting from their misconduct and neglect on the project. (*Id.*) Additionally as set forth in the Complaint, Feist, Real Builders, and Solid used the project as a vehicle to commit wholesale fraud on the Partnership in order to enrich themselves to the detriment of the Partnership. Just two examples of the outright fraud perpetrated on the Partnership are the formation of the non-guaranteed maximum price construction agreement ("non-GMP agreement") entered into solely by Joel J. Feist ("Feist") as both owner and contractor - never agreed to or signed by the Partnership (App 028) – and the formation of the construction management agreement between the general contractor Real Builders (Feist's company) and construction manager Solid, also without a guaranteed maximum price, and never agreed to or signed by the Partnership ("non-GMP construction management agreement") (App 140). These two purported contracts are written agreements made by Feist and Tappe alone without the knowledge or consent of the Partnership. The Partnership Agreement (App 092), a wholly separate document, was on the other hand, made with the knowledge and consent of all the partners.

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[2] Solid is owned by Mike Tappe and his wife Colleen Tappe, who also owns DARAJ, LLC, through which Colleen Tappe holds an ownership interest in the Partnership.

(8.) Through the non-GMP agreement, Feist unilaterally assigned to himself and was paid a fee of 12.1% of the total cost of construction (with some exceptions) although he had in truth negotiated a much lesser fee of 8.5% with the Partnership. (App 047 & 050). This was done without the authority or knowledge of the Partnership. (*Id.*) The non-GMP construction management agreement created by Tappe contained a percentage fee to Solid of a further 6.5% on top of the 12.1%, which was included in that agreement signed months before the Partnership was even formed and totally unbeknownst to the Partnership. (App 140). The total fees billed to the project and paid by the Partnership are in excess of 18.6%, a percentage fee that is simply unheard of in the construction industry in this area or any other area, and which was never agreed to or negotiated with the Partnership at all. (App 042, 047 & 050) In addition to the exorbitant construction fees included in secret by Feist and Solid in their respective agreements, and enriching Feist and Solid, the non-GMP agreement included an express mandatory arbitration provision, which the Partnership also never agreed to and would not have agreed to. (App 028).

(9.) The Partnership presented evidence to the district court of the foregoing misconduct, neglect, fraudulent construction agreements, and fraud on the project, in the form of sworn affidavits of two of the managing partners of the Partnership, Robert "Bob" Dora and Dan Schmaltz. (App 047 & 050). The above described fraud and other specific examples of fraud, negligence, and misconduct are clearly set forth in those affidavits and in the allegations made in the Complaint. (*Id.*). Conversely, none of the defendants presented any evidence whatsoever to the district court attempting to explain, oppose or contradict the evidence of construction defects, fraudulent formation of

construction agreements, or the wholesale fraud that took place during the construction of the project. (App 001). The register of actions contains no evidence whatsoever from Defendants. (*Id.*) The Defendants presented only argument by legal counsel to the district court, which is not considered evidence at all. (*Id.*).

(10.) As provided below, the legal standards under both the North Dakota Uniform Arbitration Act ("UAA") and the Federal Arbitration Act ("FAA"), provide for a summary disposition of express claims or defenses asserting the contract (and any arbitration agreement therein) was procured through fraud. And where a jury is demanded, the summary disposition is a summary trial by jury. Evidence that would invalidate the contract is required. In its Complaint allegations and through the only evidence presented to the district court, the Partnership expressly raised the issue of fraud/deceit in the formation of the non-GMP agreement entered into unilaterally by Feist with himself. The Partnership requested relief from the Court from the fraudulent non-GMP agreement through requested money damages in its Complaint, through a requested judicial declaration of invalidity in the same Complaint (App 008), in briefing to the Court (App 213, 313 & 328), in oral argument before the court (App 342 & 400), and as a defense to the Feist Defendants' Counterclaim (App 200).

(11.) The Partnership vigorously opposed Defendants' motion to stay litigation and compel arbitration. Oral argument was held before the district court once the matter was fully briefed. (App 342). Following the hearing, the district court ruled the entire controversy must be stayed and compelled arbitration of essentially all of the Partnership's claims, apparently without giving any consideration to the relevant legal standard under the UAA and/or the FAA, and giving no consideration to the unopposed

evidence concerning the Feist defendants' and Solid's fraud in the procurement of the non-GMP construction agreements (unilaterally assigning 18.6% construction fees), fraud and other misconduct during the project, and numerous construction defect issues. (App 307). The district court was apparently unwilling to fulfill its duties under the UAA or the FAA, and rather allowed the arbitrator to determine the arbitrability of all of the claims. The district court ruled in this fashion on the basis the arbitration provision found within the Partnership Agreement mandated binding arbitration of all claims and controversies related to or arising out of the Partnership Agreement, as follows: "any claim or controversy arising out of or relating to this Agreement, or a breach of it, shall, upon the request of any party involved, be submitted and settled by arbitration in accordance with the rules of the American Arbitration Association…" (App 307). The district court went on to state that claims made in the Complaint were encompassed in the broad form arbitration provision:

> The arbitration provision is a broad provision by nature of the wording, "any claim or controversy arising out of or relating to this Agreement." . . . The Court finds 26th Street's complaint does contain allegations related to or arising out of the Partnership Agreement and as such the Partners agreed to arbitrate when the agreement was entered into by all partners. There may be certain aspects of the litigation that cannot be resolved in arbitration and those matters will have to be stayed pending the resolution of any arbitration.

(*Id.*). It is clear the district court based its decision ordering arbitration of the Partnership's claims solely on the Partnership Agreement and the court in no way entertained the unopposed evidence provided by the Partnership and never review or analyzed the fraudulent non-GMP agreement at all. In fact in its order the Court only discussed the Partnership Agreement, and never discussed at all the fraudulent non-GMP agreement that the Feist Defendants asserted controlled the construction project, and

through which wholesale fraud was committed against the Partnership. (*Id.*).

(12.) Following the district court's initial order staying the lawsuit and compelling arbitration, the Partnership requested reconsideration and/or clarification. (App 313). In its initial order, the district court indicated not all claims were subject to the Partnership Agreement's mandatory arbitration provision, where it stated: "There may be certain aspects to the litigation that cannot be resolved in arbitration and those matters will have to be stayed pending the resolution of any arbitration." (App 307). Based on the district court's order indicating not all claims were subject to arbitration, the Partnership requested reconsideration and clarification on which claims were subject to arbitration and which were not. Importantly, the Partnership called attention to the terms of the FAA and the UAA that require the courts to rule on contract defenses that would serve to invalidate the contract containing an arbitration provision. In its briefing the Partnership stated,

> Although as the Court is aware the AIA Contract contains an arbitration provision, this provision is part and parcel of RBI and Feist's fraud foisted upon the Partnership, which is the type of conduct that should not be rewarded. As the Court is aware, both the FAA and UAA provide a legal mechanism for the Court and not the arbitrator to decide issues of the validity of the underlying contract, which Partnership has requested the Court to decide in its Complaint. *See Great Earth Companies, Inc. v. Simons*, 288 F.3d 878, 888-89 (6th Cir. 2002) (under FAA, courts review underlying agreement "upon such grounds as exist at law or in equity for the revocation of any contract.") (citation omitted)); *Superpumper, Inc. v. Nerland Oil, Inc.*, 1998 ND 144, 582 N.W.2d 647, 651 (under UAA, "generally applicable contract defenses may be applied to invalidate arbitration agreements." (citations omitted)(emphasis added)). The evidence before the Court as to the AIA Contract is clearly that it was obtained fraudulently/deceitfully, and Partnership requests the Court proceed with the judicial process of deciding the issue of validity. As a matter of black letter North Dakota law, this is not an issue that can be decided by Arbitration.

(App. 313). The Partnership's reply brief also directed the district court's attention to

those very same procedures outlined in the UAA and the FAA. (App 328). However, despite being presented at least twice in briefing with the applicable legal standard that required the district court to decide the fraud issue in the judicial forum prior to compelling arbitration, the district court refused to address the unopposed fraud and construction defect evidence, and further refused to provide any specificity as to what was meant by "There may be certain aspects to the litigation that cannot be resolved in arbitration". (App 398). In fact, the district court's order suggests it refused even to read Partnership's follow up reconsideration/clarification briefing at all:

> The Court has ruled in this matter and the Plaintiff appears to desire to bring the matter back before the Court. The Court will not relook at the matter. Arbitration has been ordered. Anything that cannot be arbitrated is stayed pending the arbitration. This includes motions made to amend the complaint or add parties filed after the request to Arbitrate was filed. Plaintiff's motion is denied in its entirety."

(App 398). The Court simply refused to follow the procedure outlined in both the UAA and the FAA where Partnership's contract defenses were expressly made and backed up with evidence of fraud in the formation of the construction agreement, which evidence served to invalidate the agreement.

(13.) As part of Partnership's Complaint, Partnership specifically requested a ruling from the court that the non-GMP agreement be declared invalid, unenforceable, and of no legal effect given it was procured without the Partnership's permission, knowledge or authority and by fraud and/or deceit. (Complaint at ¶¶ XXI et seq. [App 008]). Partnership also requested leave of the district court to amend the Complaint to seek a

judicial determination under N.D.C.C. § 45-16-05 and N.D.C.C. § 45-18-01[3] that partners Joeleon Holdings and DARAJ be expelled from the Partnership for their misconduct and fraud. (App 269). The Court refused to address the requested judicial determinations at all, and rather simply ordered the claims into arbitration for the arbitrator to sort out. Only a court would be capable of issuing a "judicial determination" under either North Dakota's Declaratory Judgment Act (N.D.C.C. Chapter 32-23) or under the Uniform Partnership Act.

(14.) Once AAA arbitration was compelled, the Partnership still did not concede that its construction claims, fraud claims, and judicial determination claims were subject to the arbitrator's jurisdiction. The Partnership again fully briefed that issue, this time in the context of AAA arbitration, which was ultimately decided by the arbitrator adversely to the Partnership under the extremely loose and deferential standard provided in the AAA Rules. In other words, the arbitrator decided all claims between the Feist defendants and the Partnership were within the purview and jurisdiction of AAA arbitration. It was only when the Partnership had no other recourse that it filed an Answer and Counterclaim in the AAA, asserting fraud and construction defect causes of action in addition to the

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[3] The North Dakota Partnership statutes provide a remedy to the Partnership to seek a "judicial determination" that a partner be expelled. In this regard, N.D.C.C. § 45-18-01(5) holds:

> 5. On application by the partnership or another partner, the partner's expulsion by <u>judicial determination</u> because:
>
> > a. The partner engaged in wrongful conduct that adversely and materially affected the partnership business;
> >
> > b. The partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under section 45-16-04; or
> >
> > c. The partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner.

N.D.C.C. § 45-18-01 (emphasis added).

breach of partner duty claims. Solid was not a party to the arbitration and none of the claims against Solid were decided as part of the arbitration. (App 446). As a matter of black-letter law, none of the fraud claims, construction defect claims, contract claims, or equitable claims was subject to mandatory arbitration, and it was manifest error for the district court to order arbitration in the face of the uncontroverted fraud and construction defect evidence. The Feist defendants were simply not entitled to sweep the fraud and construction defect claims into arbitration, on the invalid basis those claims constituted a dispute among the partners under the Partnership Agreement.

VI. ARGUMENT

A. Both The Federal Arbitration Act And North Dakota's Uniform Arbitration Act Require the Courts And Not The Arbitrator To Determine The Validity of the Contract Containing An Arbitration Provision, Where The Party Opposing Arbitration Puts The Validity Of That Contract In Issue.

(15.) The following statutory provision contained in the Federal Arbitration Act control where a party puts an agreement to arbitrate at issue:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> *   *   *
>
> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be

> served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Title 9 U.S.C. §§ 2 & 4 (emphasis added). The United States Supreme Court has recognized the validity of the above statutory provision allowing the courts to determine generally applicable contract defenses where one of the parties places the validity of the agreement at issue:

> Section 2 of the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Repeating our observation in *Perry,* the text of § 2 declares that state law may be applied "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." 482 U.S., at 492, n. 9, 107 S.Ct., at 2527, n. 9. Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. See *Allied-Bruce,* 513 U.S., at 281, 115 S.Ct., at 843; *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 483-484, 109 S.Ct. 1917, 1921-1922, 104 L.Ed.2d 526 (1989); *Shearson/American*

> *Express Inc. v. McMahon,* 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 (1987).

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 686-87, 116 S. Ct. 1652, 1656, 134 L. Ed. 2d 902 (1996); *see also* Great Earth Companies, Inc. v. Simons, 288 F.3d 878, 888-89 (6th Cir. 2002) (analyzing judicial review of underlying agreement and arbitration provisions in context of FAA and stating, "[w]hen asked by a party to compel arbitration under a contract, a federal court must determine whether the parties have agreed to arbitrate the dispute at issue.").

(16.) North Dakota's UAA has a similar procedure:

> 1. On motion to a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
> a. If the refusing party does not appear or does not oppose the motion, the court shall order the parties to arbitrate; and
> b. **If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.**

N.D.C.C. § 32-29.3-07 (emphasis added); *see* Superpumper, Inc. v. Nerland Oil, Inc., 1998 ND 144, 582 N.W.2d 647, 651 ("generally applicable contract defenses may be applied to invalidate arbitration agreements, but states cannot invalidate arbitration agreements with laws applicable *only* to arbitration provisions." (citations omitted)); *see also* Schwarz v. Gierke, 2010 ND 166, ¶ 11, 788 N.W.2d 302, 306 (stating, "Chapter 32-29.3, N.D.C.C., contains the North Dakota Uniform Arbitration Act. When an arbitration clause is at issue, [t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." (citation omitted)). There can be no doubt the Partnership placed the construction agreement at issue in the district court.

(17.) The legal standard to construe the above federal and State statutes is as follows:

> "The primary purpose of statutory interpretation is to determine legislative intent." *Teigen v. State,* 2008 ND 88, ¶ 19, 749 N.W.2d 505 (citing *Estate of Elken,* 2007 ND 107, ¶ 7, 735 N.W.2d 842). In doing so, "[t]he Legislature's intent must be sought initially from the statutory language." *District One Republican Comm. v. District One Democrat Comm.,* 466 N.W.2d 820, 824 (N.D.1991) (citation omitted). "If the language of a statute is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit because the legislative intent is presumed clear from the face of the statute." *Stutsman Cnty. v. State Historical Society,* 371 N.W.2d 321, 325 (N.D.1985) (citations omitted). "Words ... in a statute are to be understood in their ordinary sense, unless a contrary intention plainly appears...." N.D.C.C. § 1–02–02. But, if the statute is ambiguous or of doubtful meaning, we may look to extrinsic aids to interpret the statute. *Teigen,* at ¶ 19; *District One Republican Comm.,* 466 N.W.2d at 825.

Olson v. Job Serv. N. Dakota, 2013 ND 24, ¶ 5, 827 N.W.2d 36, 40, reh'g denied (Apr. 4, 2013). Under the plain language of both statutes and consistent with legislative intent, the court was required to provide a summary judicial forum to the Partnership to determine the validity of the non-GMP agreement. Nevertheless, the district court refused to provide for such a process and rather compelled arbitration, leaving for the arbitrator the decision the district court should have made.

(18.) The district court was clearly on notice the Partnership had raised and presented undisputed evidence of fraud, and had specifically raised the issue as a basis to invalidate the non-GMP agreement (thereby avoiding the requested binding arbitration of the fraud and other construction claims). Yet, the district court largely ignored the above provisions of the UAA and the FAA providing a summary disposition process as requested by the Partnership. The Partnership was entitled to a summary decision by a jury under both the FAA and the UAA. Rather, the district court stayed the lawsuit and compelled arbitration, refusing to take into account the unrebutted and unopposed fraud evidence provided by the Partnership. The Partnership is entitled to the summary procedure that must take place within the judicial forum as outlined in the UAA and/or in

the FAA with respect to the Feist defendants' fraud and/or deceit, and relating to the other construction claims which are not governed by the Partnership Agreement.

(19.) In moving for arbitration of essentially all Partnership claims, the Feist Defendants pointed to the case of Fallo v. High-Tech Institute, 559 F.3d 874 (8th Cir. 2009) ("Fallo"), for the proposition that arbitrability is for the arbitrator rather than the court. (Feist Defendants' Brief (App 119). It is anticipated the Feist Defendants will again argue the holding in Fallo controls and supports the district court's decision compelling arbitration. However, the district court did not cite to Fallo in its order compelling arbitration. Rather, the court specifically cited to the following statutory language from North Dakota' UAA, "[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." (App 307). Once the court laid down the applicable legal standard, the court took it upon itself decide whether the controversy is subject to an agreement to arbitrate, stating, "Now, is the controversy subject to the agreement to arbitrate?" (App 307). Citing Section 32-29.3-06(2) of North Dakota's UAA rather than the FAA, the court concluded, "This Court finds 26th Street's complaint does contain allegations related to or arising out of the Partnership Agreement and as such the Partners agreed to arbitrate when the agreement was entered into by all partners." (*Id.* at ¶ 14). The order suggests the district court determined North Dakota's UAA applied rather than the FAA (thereby ignoring the Fallo holding). While the district court applied the correct statutory provision when the court determined whether an agreement to arbitrate had been made, the error by the district court occurred when it nevertheless ignored the Partnership's undisputed fraud evidence, namely the non-GMP agreement (App 028). The court properly rejected application of

the Fallo decision to the case at bar. The district court's error was in refusing to even look at the fraudulent non-GMP agreement evidence. And as discussed below the court further ignored the fact that only one of the claims made potentially involved the Partnership Agreement, the breach of Partnership duties claim. All of the other claims by the Partnership involved an entirely separate construction contract not agreed upon or entered into by the Partnership (the fraudulent contract [App 028]), or other negligence and breach of contract claims against the Feist defendants, which were completely unrelated to the Partnership Agreement.

B. The Partnership's Construction Defect And Other Claims Are Not Subject To Binding Arbitration Under the Partnership Agreement.

(20.) The Defendants were largely successful in persuading the district court that the construction dispute was in fact nothing more than a partnership dispute. This was done in order to push all of the claims into their chosen forum, arbitration with the AAA. The district court construed the arbitration provision found in the Partnership Agreement, and concluded the broad provision encompassed essentially all of the claims in the Complaint. This was erroneous even under the relevant legal standard that is generally deferential to arbitration:

> "The cardinal principle of contract interpretation is to ascertain the intention of the parties and to give effect to that intent." *Dunn Indus. Group,* 112 S.W.3d at 428 (citing *Butler v. Mitchell-Hugeback, Inc.,* 895 S.W.2d 15, 21 (Mo.1995)). Contract terms "are read as a whole to determine the intentions of the parties and are given their plain, ordinary, and usual meaning." *Dunn Indus. Group,* at 428; *Butler,* at 21; *City of Harrisonville v. Public Water Supply Dist. No. 9 of Cass County,* 49 S.W.3d 225, 231 (Mo.Ct.App.2001). "[E]ach term of a contract is construed to avoid rendering other terms meaningless." *Dunn Indus. Group,* at 428 (citing *City of Harrisonville,* at 231). "A construction that attributes a reasonable meaning to all the provisions of the agreement is preferred to one that leaves some of the provisions without function or sense." *Dunn Indus. Group,* at 428. "Where the language of a contract is

> unambiguous, the intent of the parties is to be gathered from the contract alone, and a court will not resort to construction where the intent of the parties is expressed in clear, unambiguous language." *Id.* at 428-29. "Extrinsic evidence may not be introduced to vary or contradict the terms of an unambiguous agreement or to create an ambiguity." *Id.* at 429 (citing *Helterbrand v. Five Star Mobile Home Sales, Inc.,* 48 S.W.3d 649, 658 (Mo.Ct.App.2001)).
>
> Further, "[i]n construing arbitration clauses, courts have categorized such clauses as 'broad' or 'narrow.' " *Dunn Indus. Group,* 112 S.W.3d at 428 (citing *McCarney v. Nearing, Staats, Prelogar & Jones,* 866 S.W.2d 881, 889 (Mo.Ct.App.1993)). "A broad arbitration provision covers all disputes arising out of a contract to arbitrate; a narrow provision limits arbitration to specific types of disputes." *Dunn Indus. Group,* at 428.

Schwarz v. Gierke, 2010 ND 166, ¶¶ 16-17, 788 N.W.2d 302, 307-08.

(21.) The relevant Arbitration provision found within the Partnership Agreement holds:

> 3. Unless otherwise provided in this Agreement, any claim or controversy arising out of or relating to this Agreement, or a breach of it, shall, upon the request of any part involved, be submitted to and settled by arbitration in accordance with the rules of the American Arbitration Association (or any other form of arbitration mutually acceptable to the parties involved) then obtaining in the State of North Dakota. The decision make [sic] pursuant to such arbitration shall be binding and conclusive on all parties involved; and judgment upon such decision may be entered in the highest court of any forum, Federal or state, having jurisdiction.

(*See* Partnership Agreement [App 092] Paragraph 3 (pages 15 & 16)). North Dakota law applies to the construction of the Partnership Agreement. The Partnership Agreement requires the "construction, enforcement and interpretation of this Agreement and the rights and liabilities of the parties hereto shall be determined in accordance with the Act and other relevant laws of the State of North Dakota." (*See* Partnership Agreement [App 092] at **Article XIV. Miscellaneous Provisions**, Paragraph 6 [App 106-107]). Under the plain language of the above provision, only claims or controversies "arising out of or relating to" the agreement "or a breach of it" are subject to binding arbitration. (*Id.*). The Partnership never brought any action for a breach of the Partnership Agreement, so there

are no claims subject to arbitration on that basis. (App 008). And it is the Partnership's contention the construction related claims, equitable claims, and fraud claims – all of which arise out of and relate to the construction project *and not the Partnership Agreement* – were simply not within the intentions of the parties to the Partnership Agreement and cannot arise out of or relate to that agreement.

(22.) While the arbitration provision found within the Partnership Agreement may in fact be fairly categorized as somewhat broad, it is not so broad as to force into arbitration non-parties to the Partnership Agreement and claims not involving the Partnership Agreement. Those types of claims were not and could not have been within the intention of the parties who entered into the Partnership Agreement. It should go without saying the intentions of non-parties to the Partnership Agreement could not have been to arbitrate any claims. For example, claims against Real Builders and Solid, neither of which is a partner, cannot be subject to arbitration as no one ever intended they be so subject, and there is no agreement by and between the Partnership, Real Builders and Solid to arbitrate claims. What the district court apparently did not recognize was that most of the parties and claims in the lawsuit were simply not subject to binding arbitration under the Partnership Agreement at all, and therefore it was error for the district court to force those claims into binding arbitration. The district court's ruling was not only contrary to the above arbitration legal standard, but also contrary to basic contract principles. Under North Dakota law, "[t]he elements required for existence of an enforceable contract include:

1. Parties capable of contracting;
2. The consent of the parties;
3. A lawful object; and

> 4. Sufficient cause or consideration.
>
> N.D.Cent.Code § 9–01–02 (1975). Courts will not enforce a contract when its terms are vague, indefinite and uncertain. *Hughes Realty Company v. Breitbach,* 98 N.W.2d 374, 376 (N.D.1959). Nevertheless, the law does not favor destruction of contracts and, if at all feasible, courts will construe an agreement so as to carry into effect the reasonable intention of the parties. *Hughes Realty Company,* 98 N.W.2d at 377."

In re Sunset Mem'l Gardens, Inc., 49 B.R. 817, 821 (Bankr. D.N.D. 1985). The Partnership's claims against non-parties to the Partnership Agreement, Real Builders and Solid, could not be subject to arbitration as there is a total failure of at least three essential elements that would make up a valid contract, parties capable of contracting, consent of the parties, and sufficient consideration. In fact, there was no contract with any agreement to arbitrate concerning these parties. Under basic North Dakota contract law, the Partnership's claims against Real Builders and Solid could not have been encompassed under the Partnership Agreement.

(23.) The Partnership is entitled to have its fraud, equitable and construction related claims decided by a jury in the North Dakota courts rather than in arbitration, as those claims are not claims or disputes arising out of or related to the Partnership Agreement. In the court below, the Feist Defendants disingenuously described the "gravamen" of the Partnership's claims as involving Feist's authority as a Managing Partner of the Partnership, and on that basis requested all claims be arbitrated. The district court bought into that argument in compelling arbitration. In reality the central thrust of the Partnership's claims and the actual gravamen of the lawsuit was the construction work and fraud/deceit arising prior to and out of the construction of the hotel. The Partnership's claims focus on the fraudulent non-GMP agreement and the enrichment of the general contractor Real Builders and construction manager Solid during the project, at

the direct expense of the Partnership. These are not the types of claims that could fairly be categorized as arising out of the Partnership Agreement, especially since the targets of those claims were non-parties to the Partnership Agreement, Real Builders and Solid. Tellingly, the Feist Defendants never raised the fraudulent non-GMP agreement and its arbitration provision as a basis to compel arbitration in the district court. (App 119, 167, 248, 322). This demonstrates Defendants knew on the front end the arbitration provision contained in the non-GMP agreement was invalid, and Defendants knew the proper procedure in the face of the Partnership raising the invalid agreement was summary disposition of that issue in court. Therefore, the Defendants avoided arguing arbitration could be compelled on the basis of that agreement. The total avoidance of the fraudulent non-GMP agreement by the Defendants further illustrates the error of the district court's own disregard of that issue in deciding essentially all of the claims were subject to binding arbitration on the basis of the Partnership Agreement.

C. <u>District Court's Award Of 18% Judgment Interest Based On Fraudulent Construction Agreement Is Error.</u>

(24.) The district court erroneously ordered the Partnership to pay 18% interest on the arbitration award. (App 440). The interest award is based on an interest provision contained in the fraudulent non-GMP agreement the Partnership never agreed to and is furthermore contrary to express North Dakota law. The only applicable post-judgment interest rate in this situation would be 6.5%, which is currently set by the State Court Administrator pursuant to N.D.C.C. § 28-20-34. Assuming arguendo Section 28-20-34 provides for 18% interest in this case, which is denied, the fraudulent non-GMP agreement is not and was not "the original instrument upon which the action resulting in the judgment is based", which is a requirement of awarding a higher rate of interest on a

judgment under N.D.C.C. § 28-20-34. Not only is 18% interest contrary to the controlling North Dakota interest statute, but the fraudulent non-GMP agreement was never mentioned by the district court in its orders compelling arbitration of the Partnership's claims. (App 307). In fact, the only agreement the district court mentioned in compelling arbitration was the Partnership Agreement. (App 307 & 398). It was on the basis of the existence of the Partnership Agreement alone that the Court compelled arbitration. Yet the Partnership Agreement provides for no interest whatsoever. (App 092). The district court's award of 18% judgment interest is erroneous.

VII. CONCLUSION

(25.) Partnership respectfully requests the Court remand this case to the district court for a summary trial by jury pursuant to the FAA and/or the UAA concerning Partnership's claims of fraud in the formation of the non-GMP agreement. Partnership further respectfully requests the Court to declare the fraud claims, contract claims, construction defect claims, equitable claims, and judicial determination claims are not subject to binding arbitration, whether under the non-GMP agreement or under the Partnership Agreement. In the alternative, Partnership respectfully requests the Court reverse the Court's order awarding 18% post-judgment interest.

Dated this 21st day of October, 2015.

SMITH BAKKE PORSBORG
SCHWEIGERT & ARMSTRONG

By: *s/ Randall J. Bakke*
Randall J. Bakke (#03989)
Bradley N. Wiederholt (#06354)
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

rbakke@smithbakke.com
bwiederholt@smithbakke.com

Attorneys for Plaintiff,
26th Street Hospitality, LLP

CERTIFICATE OF COMPLIANCE

(26.) The undersigned, as attorneys for the Plaintiffs/Appellants in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that 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 certificate of compliance totals 7,694.

Dated this 21st day of October, 2015.

SMITH BAKKE PORSBORG
SCHWEIGERT & ARMSTRONG

By: *s/ Randall J. Bakke*

Randall J. Bakke (#03989)
Bradley N. Wiederholt (#06354)
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630
rbakke@smithbakke.com
bwiederholt@smithbakke.com

Attorneys for Plaintiff,
26th Street Hospitality, LLP

CERTIFICATE OF SERVICE

(27.) I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLANT 26TH STREET HOSPITALITY, LLP** was on the 21st day of October, 2015, emailed to the following:

ATTORNEY FOR REAL BUILDERS, INC. AND JOEL J. FEIST

Matthew T. Collins
Julia Douglass
Fabyanske Westra Hart & Thomson
800 LaSalle Avenue, Suite 1900
Minneapolis, MN 55402
mcollins@fwhtlaw.com
jdouglass@fwhtlaw.com

ATTORNEY FOR SOLID, LLC

Paul T. Meyer (#06960)
Larkin Hoffman Daly & Lindgren, Ltd.
8300 Norman Center Drive, Suite 1000
Minneapolis, MN 55437-1060
pmeyer@larkinhoffman.com

By: *s/ Randall J. Bakke*
RANDALL J. BAKKE