

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20150319
Cass County District Court No. 09-2014-CV-03427

Constellation Development, LLC,

Plaintiff/Appellant,

v.

Western Trust Company, Gary G.
Hoffman, Trustee, and Dabbert Custom
Homes, LLC,

Defendants/Appellees.

BRIEF OF PLAINTIFF/APPELLANT

**Appeal from Memorandum Opinion and Order dated July 9, 2015 and
Judgment entered on September 22, 2015, in the District Court,
County of Cass, State of North Dakota,
The Honorable Steven L. Marquart, Presiding**

Michael L. Gust (ND ID 06468)
Joshua M. Feneis (ND ID 08169)
ANDERSON, BOTTRELL, SANDEN & THOMPSON
4132 30th Avenue SW, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
(701) 235-3300
mgust@andersonbottrell.com
jfeneis@andersonbottrell.com
Attorneys for Plaintiff/Appellant

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STATEMENT OF THE ISSUES

[¶1] Did the District Court err in granting Defendant Western Trust Company, Gary G. Hoffman, Trustee's partial motion for summary judgment on Plaintiff Constellation Development, LLC's claims of Breach of Contract, Equitable Estoppel, and Promissory Estoppel?

[¶2] Did the District Court err in determining that the September 30, 2013 Purchase Agreement between Plaintiff Constellation Development, LLC and Defendant Western Trust Company, Gary G. Hoffman, Trustee, was unambiguous?

[¶3] Did the District Court err in making a factual finding that Defendant Western Trust Company, Gary G. Hoffman, Trustee decided to sell property under the September 30, 2013 Purchase Agreement?

[¶4] Did the District Court err in failing to make findings on the oral extension granted by Western Trust to Constellation concerning the 2014 Purchase Agreement?

[¶5] Did the District Court err in granting Defendant Dabbert Custom Homes, LLC's motion for partial summary judgment on Plaintiff Constellation Development, LLC's claim of Tortious Interference with a Business Contract?

STATEMENT OF THE CASE

[¶6] Plaintiff Constellation Development, LLC (“Constellation”) filed a Complaint alleging Breach of Contract against Defendant Western Trust Company, Gary G. Hoffman, Trustee (“Western Trust”) on December 8, 2014. See Appellant’s App. at 1. Subsequently, Constellation filed and served its First Amended Complaint alleging claims of Breach of Contract, Equitable Estoppel, and Promissory Estoppel against Western Trust and alleging Tortious Interference with a Business Contract against Defendant Dabbert Custom Homes, LLC (“Dabbert”). See Appellant’s App. at 18-26. Both Defendants timely filed and served answers and made counterclaims against Constellation. See Appellant’s App. at 1-2.

[¶7] On May 19, 2015, Dabbert made a motion for partial summary judgment seeking to dismiss Constellation’s claim of Tortious Interference with a Business Contract. See Appellant’s App. at 2. On May 28, 2015, Western Trust made a motion for partial summary judgment seeking to dismiss Constellation’s claims against it. See id. Constellation timely responded to Dabbert’s motion for partial summary judgment on June 22, 2015. See Appellant’s App. at 3. Constellation timely responded to Western Trust’s motion for partial summary judgment on June 29, 2015. See Appellant’s App. at 4. Dabbert properly filed its reply in support of its motion for partial summary judgment on June 26, 2015. See Appellant’s App. at 4. In place of a reply brief, Western Trust improperly filed a brief it entitled a “Supplemental Brief” on July 6, 2015, in which it improperly raised new issues concerning its motion for partial summary judgment. See id. That same day, on

July 6, 2015, the District Court held its hearing on both Defendants' motions for partial summary judgment. See id.

[¶8] On July 9, 2015, the District Court entered an order granting both Defendants' motions for partial summary judgment and dismissing all of Constellation's claims. See Appellant's App. at 206-209. Constellation made a motion for reconsideration on July 20, 2015. See Appellant's App. at 4. The District Court denied Constellation's motion for reconsideration on August 6, 2015. See id.

[¶9] The parties entered a stipulation dismissing both Defendants' counterclaims on September 21, 2015. See Appellant's App. at 224-226. The District Court entered Judgment on all of the claims and counterclaims on September 22, 2015. See Appellant's App. at 229-230. Constellation made its Notice of Appeal on November 5, 2015. See Appellant's App. at 234.

STATEMENT OF THE FACTS

[¶10] On September 30, 2013, Constellation and Western Trust entered into a Purchase Agreement (“2013 Purchase Agreement”) for the purchase of approximately 24 acres of land in Horace, North Dakota. See Appellant’s App. at 166-167; 27-32. The 2013 Purchase Agreement was drafted by either Gary Hoffman (“Hoffman”), Trustee of Western Trust, or a third party at Hoffman’s request. See Appellant’s App. at 166. James Pralle (“Pralle”), President of Constellation, did not draft this agreement nor did anyone else draft the 2013 Purchase Agreement on behalf of Constellation. See id.

[¶11] As part of the 2013 Purchase Agreement, Constellation initially received a five-year right of first refusal to purchase additional land directly south of the 24 acres. See Appellant’s App. at 27-32. The land contained 63.944 acres (the “Property”). See Appellant’s App. at 33. Specifically, the 2013 Purchase Agreement stated:

FIRST RIGHT OF REFUSAL: The Seller [Western Trust] will grant and give to the Buyer [Constellation] the First Right of Refusal for 5 years on the additional 62 acres as shown on Exhibit “B” attached to this Agreement should the Seller decide to sell any more land. The purchase price in reference to the additional land will be at \$18,000.00 per acre if the Seller decides to sell additional land. If Seller decides to sell more land the Buyer will have 14 days to enter into a Purchase Agreement and 30 days to close the transaction or he will lose his First Right of Refusal.

See Appellant’s App. at 29 (emphasis added).

[¶12] Constellation had concerns about only having a right of first refusal on the Property. See Appellant’s App. at 167. Based upon these concerns, Constellation requested that, in addition to its right of first refusal, it also be granted a purchase

option on the Property. See id. Western Trust agreed to this and Hoffman handwrote a provision into the 2013 Purchase Agreement which stated, “This has changed to a three-year purchase option to run concurrently.” See Appellant’s App. at 29. Hoffman made clear that he has experience with written contracts and it is Western Trust’s customary practice, for nearly 30 years, to use specific written agreements. See Appellant’s App. at 199.

[¶13] Constellation understood, based upon the language added to the 2013 Purchase Agreement by Hoffman, that it had two rights with regards to the Property: 1) it could decide to purchase the Property itself and exercise its purchase option to do so within three years; or 2) if Western Trust received an offer on the Property within five years, Constellation had the right of first refusal to match the offer and purchase the Property. See Appellant’s App. at 167. Constellation understood that these rights ran concurrently. See id.

[¶14] In August 2014, Pralle wrote Hoffman and informed him that Constellation would be exercising its purchase option pursuant to the 2013 Purchase Agreement. See Appellant’s App. at 34; 167. On September 5, 2014, Constellation and Western Trust executed a Purchase Agreement for the 63.944 acres of land (“2014 Purchase Agreement”). See Appellant’s App. at 35-39; 167. The 2014 Purchase Agreement was scheduled to close October 13, 2014. See Appellant’s App. at 36. Pursuant to the 2014 Purchase Agreement, Constellation had to provide Western Trust with a \$2,500.00 non-refundable down payment at the execution of the agreement. See id. Constellation provided such a check to Western Trust, but it was later dishonored. See Appellant’s App. at 167-168. After

correcting an issue with its bank, Constellation obtained a cashier's check in the amount of \$2,500.00. See id. Constellation notified Hoffman of the error, informed him it had the \$2,500.00 in certified funds, and attempted to deliver the certified funds to Hoffman. See Appellant's App. at 168. Hoffman refused the certified funds. See id.

[¶15] On October 9, 2014, four (4) days before the option period was set to expire, Constellation received a "Notice Of Termination Of Purchase Agreement" from Roger Minch, attorney for Western Trust. See Appellant's App. at 41; 168. Pralle considered this odd because he had, and was continuing to have, multiple conversations with Hoffman regarding the sale of the Property to Constellation. See Appellant's App. at 168-169; 173-174. Indeed, leading up to and continuing after the date of the supposed termination of October 9, 2014, Pralle had at least seven phone calls with Hoffman discussing that he did have, and would continue to have, the same option to purchase the Property, even after the written closing date of October 13, 2014. See id. Such conversations occurred in October, November, and December 2014. See Appellant's App. at 169. Pralle could only specifically identify these seven phone calls as they were the only calls between Pralle and Hoffman that occurred on Pralle's cell phone. See Appellant's App. at 168-169. Pralle has been unable to retrieve records concerning his LAN line outgoing calls, but is confident that if additional discovery had been allowed, records of additional phone calls between Pralle and Hoffman which occurred on Pralle's LAN line would have shown up on Hoffman's cell phone records and Western Trust's phone records. See id.

[¶16] As Hoffman continued to tell Pralle that Constellation had an extension and the Property would be sold to Constellation whenever Constellation wanted it, Pralle continued to speak to Hoffman about the same. See Appellant's App. at 169. Based upon the conversations Pralle was having with Hoffman, in the four days from receiving the Notice of Termination until the last day to close pursuant to the 2014 Purchase Agreement, Constellation took no legal action to protect its rights. See id.

[¶17] Later, Pralle discovered that Western Trust sold the Property to Dabbert. See Appellant's App. at 172. Emails from Don Dabbert, President of Dabbert, show that Western Trust accepted the terms of an agreement between Western Trust and Dabbert on October 17, 2014. See Appellant's App. at 158-159. Pralle was surprised because Constellation had exercised its purchase option and Hoffman told him on multiple occasions that Western Trust would still be selling the Property to Constellation. See Appellant's App. at 168-169. Furthermore, on top of the two years remaining on its purchase option, Constellation maintained a right of first refusal for another four years on the Property. See Appellant's App. at 29. At no time prior to the sale to Dabbert was Constellation notified by Western Trust of Dabbert's offer and given the opportunity to exercise its right of first refusal. See Appellant's App. at 172. Had such notice been given, Constellation would have exercised its right of first refusal within 14 days and would have had 30 days to close the transaction. See Appellant's App. at 169-170. Western Trust and Dabbert, doing business as River's Edge Estates, entered into a Purchase

Agreement for the Property on October 29, 2014. See Appellant's App. at 179-185.

[¶18] Although Pralle was initially unaware of the sale to Dabbert, Dabbert knew that Constellation had contractual rights which would allow it to purchase the Property from Western Trust. See Appellant's App. at 171; 175-178. In June/July 2014, Pralle became aware of the fact that Dabbert was going to be required by the City of Horace to place a roundabout in Dabbert's new development in the City of Horace. See id. The City of Horace put Don Dabbert in contact with Pralle to discuss an easement that Dabbert may have needed on the Property. See Appellant's App. at 171. Don Dabbert and Pralle spoke and Pralle told Don Dabbert that Constellation did not own the Property, but had contractual rights to it. See id. In July 2014, Don Dabbert and Pralle exchanged emails discussing their land developments. See Appellant's App. at 171; 175-178. Dabbert had knowledge of Constellation's contract with Western Trust prior to its purchase of the Property from Western Trust. See id.

[¶19] At the hearing on both Defendants' motions for partial summary judgment, all three parties argued that the 2013 Purchase Agreement was unambiguous, albeit in completely contradictory ways. See Transcript at 4-6; 11-12; 19. Both Defendants argued that the 2013 Purchase Agreement was unambiguous in that the failure of the 2014 Purchase Agreement extinguished both the purchase option and the right of first refusal. See Transcript at 4-6; 19. Constellation, on the other hand, argued that the 2013 Purchase Agreement was unambiguous in that it granted both a purchase option *and* a right of first refusal, which ran concurrently

with the purchase option, and which was not extinguished by the failure of the 2014 Purchase Agreement as Western Trust never *decided* to sell the Property following Constellation's attempted exercise of its purchase option. See Transcript at 11-12. While both parties argued the 2013 Purchase Agreement was unambiguous, the Defendants and Constellation had different and contradictory interpretations as to why the 2013 Purchase Agreement was unambiguous. See Transcript at 4-6; 11-12; 19.

[¶20] In its July 9, 2015 order on Defendants' motions for partial summary judgment, the District Court determined that the 2013 Purchase Agreement was unambiguous in that the failure of the 2014 Purchase Agreement extinguished both the purchase option and the right of first refusal. See Appellant's App. at 206-209. The District Court determined that Western Trust did not breach the 2013 Purchase Agreement and dismissed all of Constellation's claims against Western Trust. See id. Similarly, since the District Court decided that no breach of the 2013 Purchase Agreement had occurred, the District Court also determined that Constellation could not prove an essential element of its Tortious Interference with a Business Contract claim against Dabbert and dismissed that claim as well. See id. Following Constellation's motion for reconsideration, the District Court further clarified its decision in its August 6, 2015 order by stating that:

Constellation argues that the "Right of First Refusal" language in the September 30, 2013 Purchase Agreement was never triggered in that Western Trust Company, the "Seller," never made a decision to sell the additional property to Constellation. The Court disagrees. When Constellation exercised its option, it resulted in the binding Purchase Agreement between Constellation and Western Trust Company. If Constellation had made the required payments under the agreements, Western Trust Company would have been

compelled to convey the property. The Purchase Agreement itself, as a matter of law, evidences the Seller's decision to sell additional land, and thus triggers the "Right of First Refusal" language in the September 30, 2013 Purchase Agreement.

See Appellant's App. at 221-222.

LAW AND ARGUMENT

A. Standard of Review

[¶21] The standard of review for summary judgment has been well-established by this Court:

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. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Missouri Breaks, LLC v. Burns, 2010 ND 221, ¶ 8, 791 N.W.2d 33.

[¶22] In interpreting contracts, “[w]hether a written contract is ambiguous is a question of law.” Hillerson v. Bismarck Public Schools, 2013 ND 193, ¶ 18, 840 N.W.2d 65. On appeal, this Court independently examines and construes a contract to “determine if the trial court erred in its interpretation of it.” Konrad ex rel. McPhail v. Bismarck Park Dist., 2003 ND 4, ¶ 6, 655 N.W.2d 411. “[A] contract is ambiguous when reasonable arguments can be made for different positions on its meaning.” Moen v. Meidinger, 547 N.W.2d 544, 547 (N.D.1996). “Where reasonable differences of opinion exist as to the terms of a contract, the contract is deemed ambiguous, and summary judgment is not appropriate.” Hillerson, 2013

ND 193 at ¶ 17 (citing Golden v. SM Energy Co., 2013 ND 17, ¶ 13, 826 N.W.2d 610 and Hunt v. Banner Health Sys., 2006 ND 174, ¶ 18, 720 N.W.2d 49).

B. The District Court Erred in Granting Western Trust’s Motion for Partial Summary Judgment

[¶23] The District Court erred in three respects in granting Western Trust’s motion for partial summary judgment and dismissing Constellation’s claims: (1) the District Court erred in determining, as a matter of law, that the 2013 Purchase Agreement was unambiguous in that failure of the 2014 Purchase Agreement resulted in Constellation losing both its purchase option and its right of first refusal; (2) the District Court erred in making a factual finding that Western Trust “decided” to sell the Property when Constellation exercised its purchase option; and (3) the District Court erred in failing to make any findings concerning the oral extension of the 2014 Purchase Agreement between Constellation and Western Trust.

1. The District Court Erred in Determining the 2013 Purchase Agreement was Unambiguous in Western Trust’s Favor

[¶24] The 2013 Purchase Agreement contained two separate and distinct legal rights concerning the Property: (1) a Purchase Option; and (2) a Right of First Refusal. The distinction between a purchase option and a right of first refusal has been well-described by the Georgia Supreme Court, “The holder of a purchase option for real property has the power to compel an unwilling owner to sell the property even when the property is not being offered on the market, while the holder of a right of first refusal has no such power but merely has the right to buy the property when the owner decides to sell it.” Robinson v. Gwinnett County, 722 S.E.2d 59, 61-62 (Ga. 2012). The Virginia Supreme Court has also weighed in on

the difference, providing a summary of treatises on the difference between purchase options and rights of first refusal:

The distinction between an option and a right of first refusal is discussed at length in several treatises on contracts:

While options and the so-called “right of first refusal” are sometimes confused, there is a clear and classic distinction: The option compels performance within the time limit specified, or if none is mentioned, then within a reasonable time, whereas the right of first refusal has no binding effect unless the offerer decides to sell.

The right of first refusal, or first right to buy, is not a true option but is a valuable prerogative. It limits the right of the owner to dispose freely of his property by compelling him to offer it first to the party who has the first right to buy.

11 S. Williston, Williston on Contracts § 1441A (3d ed. 1968).

Professor Corbin wrote that an option contract is one in which a seller makes an irrevocable offer to sell on specified terms and which creates in a buyer a power of acceptance. 1A A. Corbin, Corbin on Contracts § 261A (1963) (Corbin). He says that a right of first refusal differs in that it is a right that a buyer shall be given an option to purchase before an owner makes a contract to sell to another. Corbin § 261. Corbin adds that where a right of first refusal is involved, when an owner receives an offer the owner cannot accept that offer without first offering it to the holder of the right of refusal “on the same terms.” If he does not do this, the owner is in breach. Id.

Landa v. Century 21 Simmons & Co., Inc., 377 S.E.2d 416, 420 (Va. 1989).

[¶25] This Court provided a good description of a purchase option in In re Grengs, “An option to purchase creates in the option holder the power to compel the owner of the property to sell it at a stipulated price whether or not the owner is willing to sell.” 2015 ND 152, ¶27, 864 N.W.2d 424; see also Berry-Iverson Co. of North Dakota, Inc. v. Johnson, 242 N.W.2d 126, 130 (N.D. 1976) (“An option creates in the optionee a power to compel the owner of property to sell it at a stipulated price whether or not he be willing to part with ownership.” (quotations omitted));

Robinson, 722 S.E.2d at 61-62 (“[T]he holder of an option has the power to compel an unwilling owner to sell the property even when the property is not being offered on the market”); Advanced Recyc. Sys., LLC v. Se. Props. Ltd. P’ship, 787 N.W.2d 778, 783 (S.D. 2010) (“An option contract is an irrevocable offer by the owner to sell on specified terms and creates a power of acceptance in the optionee.”); 77 Am. Jur. 2d Vendor and Purchaser § 27 (2015) (“Within the terms and time limitations of an option contract to purchase real property, the property owner is bound by an irrevocable offer to sell the property, while the option holder is under no obligation to act.”).

[¶26] An option is thus distinguished from a right of first refusal, which also has been aptly described by this Court:

The holder of a right of first refusal on a piece of land only has the right to receive an offer to buy the land. Generally, it is a contractual right to preempt another because the right is conditional on the owner's decision that an offer from a third party is acceptable. More specifically, the right is subject to an agreed condition precedent, typically the owner's receipt of an offer from a third party and the owner's good-faith decision to accept it. Only then can the holder of the right decide whether or not to create a contract on the same terms that the owner is willing to accept from the third party. More precisely, the occurrence of these events (owner's receipt of an offer and the good-faith decision to accept it) satisfies the condition precedent, which “triggers” the right of first refusal that “ripens” into an option. The option then can be exercised like any other option contract.

Northern Plains Alliance, L.L.C. v. Mitzel, 2003 ND 91, ¶ 14, 663 N.W.2d 169 (quoting 3 Eric Mills Holmes, Corbin on Contracts § 11.3 (rev. ed.1996)).

[¶27] A right of first refusal cannot be exercised until the owner receives a bona fide offer from a third party and accepts that offer. See Creque v. Texaco Antilles Ltd., 409 F.3d 150, 152 (3rd Cir. 2005); Gleason v. Norwest Mortgage, Inc., 243

F.3d 130, 139 (3rd Cir. 2001) (holding that a right of first refusal “cannot be exercised until receipt of a bona fide third party offer”); Park–Lake Car Wash, Inc. v. Springer, 352 N.W.2d 409, 411 (Minn.1984) (holding that as a condition precedent to the exercise of a right of first refusal “the owner must have received a bona fide offer from a third party which he or she is willing to accept”). “Once the owner receives an acceptable offer and notifies the right-holder, the right of first refusal is triggered.” Dyrdal v. Golden Nuggets, Inc., 672 N.W.2d 578, 584 (Minn. Ct. App. 2003) (citing 3 Eric Mills Holmes, Corbin on Contracts § 11.3 (rev. ed. 1996)).

[¶28] The Minnesota Court of Appeals provided a good description of the notice required once the owner receives an offer from a third party:

The requirements for the notice that an owner must give to trigger the right of first refusal are generally specified in the parties' agreement. When the agreement is silent as to notice, however, most courts agree that any method that gives the right-holder notice of a potential sale and reasonably discloses the terms of the sale is sufficient to trigger the right of first refusal. John D. Stump & Assocs. v. Cunningham Mem'l Park, Inc., 187 W.Va. 438, 419 S.E.2d 699, 706 (1992) (stating that “[m]ost courts, without any elaborate discussion, require only that reasonable notice be given [to the holder of a first-refusal right]”). In most cases, a copy of the purchase agreement provides reasonable notice of a bona fide offer, even if the agreement does not disclose all of the terms of the sale. See Koch Indus. v. Sun Co., 918 F.2d 1203, 1212–13 (5th Cir.1990) (holding that even though holder of first-refusal right conceivably lacked information about rates refinery vendor's affiliate would continue to pay vendor for storage of crude oil, vendor reasonably disclosed terms of purchase offer by sending holder of right of first refusal copies of proposed sale and option agreements).

Id. It is clear that in order to trigger a right of first refusal, the owner must: 1) receive an offer from a third party; 2) make a decision to accept that offer; and 3) then notify the holder of the right of first refusal of the acceptance of that offer. See id.

[¶29] Constellation has consistently argued, and continues to argue that the 2013 Purchase Option is unambiguous in that the purchase option and the right of first refusal exist as two distinct rights running concurrently; the purchase option for three years and the right of first refusal for five years. In part, this is due to the handwritten language added to the 2013 Purchase Agreement by Gary Hoffman which specifically states that the two contractual rights were to “run concurrently.” See Black's Law Dictionary (10th ed. 2014) (defining concurrent as “Operating at the same time; covering the same matters”). Constellation urges this Court in its independent review of the 2013 Purchase Agreement to determine that the 2013 Purchase Agreement is unambiguous, but that it is unambiguous in giving Constellation two contractual rights, the purchase option and the right of first refusal.

[¶30] As the two contractual rights existed concurrently, even if the purchase option failed, Constellation maintained its right of first refusal. The right of first refusal could not be exercised until Western Trust received a third party offer and *decided* to sell the Property. Once that *decision* to sell occurred, Western Trust still would have needed to notify Constellation of the agreement with Dabbert in order to trigger the right of first refusal.

[¶31] No evidence in the record shows that Western Trust made such a notification to Constellation, as indeed no such notification occurred. The record displays that Western Trust accepted an agreement with Dabbert on October 17, 2014, eight days after the supposed “Notice Of Termination Of Purchase Agreement” letter Western Trust sent to Constellation and only four days after the

original expiration date of the 2014 Purchase Agreement. At that point, on October 17, 2014, Western Trust would have needed to notify Constellation of the accepted terms of the offer in order to trigger the right of first refusal. That would have started Constellation's 14-day window to match the terms of the accepted offer. No such notification occurred. Instead, on October 29, 2014, within that 14-day window, Western Trust and Dabbert entered into a Purchase Agreement on the Property. Again, the terms of the October 29, 2014 Purchase Agreement were not conveyed by Western Trust to Constellation. Western Trust breached the right of first refusal with Constellation by failing to notify Constellation of the accepted offer from Dabbert and failing to give Constellation the ability to match the terms of the offer.

[¶32] The right of first refusal existed concurrently with the purchase option, survived any potential failure of the 2014 Purchase Agreement as it was never triggered by an offer by a third party, and was breached when Western Trust failed to offer to Constellation the right to purchase the Property after receiving and accepting the offer from Dabbert. The District Court erred in deciding that no breach of the 2013 Purchase Agreement occurred and instead granting the motions for partial summary judgment.

[¶33] However, even if this Court is unwilling to interpret the 2013 Purchase Agreement as urged by Constellation, the District Court still erred as the 2013 Purchase Agreement is at least ambiguous as to the rights granted to Constellation. This Court recently decided In re Grengs, a case with strong similarities to this matter. 2015 ND 152, 864 N.W.2d 424. In Grengs, this Court

reversed a District Court's determination that the following language was unambiguous:

The deeds conveying the property set forth in paragraphs C, D, and E above shall contain a first option to purchase in favor of Greg Grengs and a second option to purchase in favor of Gary Grengs for so long as either, with respect to his option, is actively engaged in farming. Both first and second option to purchase shall expire at such time as the person holding the option is not actively engaged in farming as indicated by affidavit signed by him or his authorized agent, or December 31, 2030, whichever occurs first, and said right exercisable in the event any person holding title to said property should desire to sell the same as indicated in writing by him or her or an authorized agent, and said right exercisable at fair market value as determined by an appraisal. . . . The appraiser shall be agreed upon between my son purchasing the property, and the owner thereof. If both Greg Grengs and Gary Grengs decline, upon presentation, to exercise their options, then both options shall expire.

Id. at ¶ 24. This Court determined the language was ambiguous as “[t]he first sentence of paragraph F states the deeds conveying the property shall contain an option to purchase; however, the second sentence of the paragraph may be interpreted to condition the option to purchase on the landowner's desire to sell, which treats the option more like a right of first refusal,” id. at ¶26, meaning that “the provision contains language indicating an option to purchase and a right of first refusal, and is susceptible to more than one reasonable interpretation. . . . We conclude this provision of the will is ambiguous.” Id. at ¶ 28.

[¶34] The language of the 2013 Purchase Agreement at issue here similarly contains language supporting both a purchase option and a right of first refusal. The handwritten addition and the setting of the acreage price at \$18,000 indicate that the paragraph grants a purchase option. However, the typewritten paragraph itself begins by stating it is a right of first refusal and the paragraph states several

times that the right is triggered by a *decision* of Western Trust to sell. That indicates that the paragraph grants a right of first refusal. Pralle and Constellation understood the paragraph, as amended by the handwritten language, to grant both a purchase option and a right of first refusal. Either way, there are multiple ways a reasonable party could interpret the 2013 Purchase Agreement. A certainty that can be ruled out, though, is that the 2013 Purchase Agreement unambiguously granted only a purchase option, which was extinguished by the failure of the 2014 Purchase Agreement. As the District Court made that determination, while ignoring the reasonable interpretations that the 2013 Purchase Agreement grants a right of first refusal or both a purchase option and a right of first refusal, the District Court erred in granting the motions for partial summary judgment and its decision must be reversed and remanded for further fact finding on the proper interpretation of the 2013 Purchase Agreement.

2. The District Court Erred in Making a Finding of Fact that Western Trust “Decided” to Sell the Property

[¶35] In interpreting contracts, only once an ambiguity is found should the District Court make factual findings to determine the proper interpretation of the contract:

A determination of ambiguity is but the starting point in the search for the parties' ambiguously expressed intentions, since an ambiguity creates questions of fact to be determined with the aid of extrinsic evidence. When the terms of a contract are ambiguous, extrinsic evidence of the parties' intent may be considered and the terms of the contract and the parties' intent become questions of fact. As National Bank of Harvey [v. International Harvester Co.], 421 N.W.2d 799, 802 (N.D.1988) explained, the resolution of an ambiguity with extrinsic evidence requires the trier of fact to make a finding of fact.

Moen v. Meidinger, 547 N.W.2d 544, 547 (N.D.1996) (quotations and citations omitted). As noted above, at the summary judgment stage, all facts must be

interpreted in the light most favorable to the non-moving party, in this case, Constellation. See Missouri Breaks, LLC v. Burns, 2010 ND 221, ¶ 8, 791 N.W.2d 33.

[¶36] In this case, though, the District Court erred in two ways. First, the District Court attempts to disguise that it made a factual finding on Western Trust's "decision" by declaring the 2013 Purchase Agreement unambiguous. Second, the District Court did not interpret the disputed fact of Western Trust's "decision" in the light most favorable to Constellation.

[¶37] That the District Court made a finding on Western Trust's "decision" to sell is clear from its statement that, "The Purchase Agreement itself, as a matter of law, **evidences the Seller's decision** to sell additional land, and thus triggers the 'Right of First Refusal' language in the September 30, 2013 Purchase Agreement." (emphasis added). As the District Court declared the 2013 Purchase Agreement unambiguous, it should not be relying on such a factual finding to reach its decision on interpreting the 2013 Purchase Agreement. Instead, it should have declared the 2013 Purchase Agreement ambiguous. By not doing so, the District Court cannot rely on a factual finding to support its determination in granting summary judgment.

[¶38] In addition, the District Court erred in its factual finding. As noted, at summary judgment, the District Court must view the facts in the light most favorable to Constellation. It did not do so here. The District Court determined that Western Trust made a "decision" to sell the Property. Such a factual finding is not supported by law or the evidence in this case, which is disputed.

[¶39] The record undisputedly reflects that Constellation exercised its purchase option from the 2013 Purchase Agreement to purchase the Property. As the case law makes clear, such an exercise of a purchase option compels the seller, here Western Trust, to sell the Property consistent with the purchase option. At no point could Western Trust have made a “decision” to sell the Property after Constellation exercised its purchase option, as Western Trust was compelled to act.

[¶40] On top of this, a “decision” to sell, as such a decision applies to a right of first refusal, can only come after Western Trust received a bona fide offer from a third party. No bona fide third party offer came before the execution of the 2014 Purchase Agreement between Western Trust and Constellation. The only third party offer to Western Trust in the record, which came from Dabbert, came after the written closing date of the 2014 Purchase Agreement. The 2014 Purchase Agreement could not evidence a “decision” to sell by Western Trust, because it was triggered by Constellation’s exercise of its purchase option and not by Western Trust’s decision to accept a bona fide third party offer. Western Trust did not “decide” to sell the Property consistent with the right of first refusal granted to Constellation. Such a “decision” did not occur until Western Trust accepted the offer on the Property from Dabbert. As Western Trust never communicated the terms of the accepted offer to Constellation, it breached the right of first refusal granted in the 2013 Purchase Agreement.

[¶41] Since the District Court made a factual finding in support of its summary judgment decision, it needed to make such a finding in the light most favorable to Constellation. It did not do so. Had the District Court done so, it would have found

that Western Trust never “decided” to sell the Property, it was compelled by Constellation’s exercise of its purchase option to do so. It also would have found that Western Trust could not have made such a “decision” until after it received a bona fide offer from a third party, which undisputedly did not occur prior to the 2014 Purchase Agreement. By making a factual finding that the 2014 Purchase Agreement evidenced Western Trust’s decision to sell the Property, the District Court erred in granting summary judgment and this Court should reverse that decision and remand this case to the District Court.

3. The District Court Erred in Failing to Consider the Oral Extension Between Western Trust and Constellation Concerning the 2014 Purchase Agreement

[¶42] The record reflects that Constellation believed Western Trust granted it an oral extension to make its required payments under the 2014 Purchase Agreement, which occurred prior to the closing date of October 13, 2014. See Appellant App. at 168-169. Such oral extensions fall outside of the Statute of Frauds. See Triton Commercial Properties, Ltd. v. Norwest Bank Texas, N.A., 1 S.W.3d 814, 818 (Tex. App. 1999) (“As an exception to the general rule against oral modification of contracts covered by the Statute of Frauds, parties to a written contract may agree orally to extend the time of performance, so long as the oral agreement is made before the expiration of the written contract. . . . [W]hen the extension of time to make payment on an option contract has no such collateral effects on other rights under the underlying written contract, the exception applies to allow oral modification.”).

[¶43] Not only did Western Trust breach this oral extension by selling the Property to Dabbert, but Constellation reasonably relied, to its detriment, on the false representation of an oral extension by failing to seek an action to enforce its legal rights when it received the “Notice Of Termination Of Purchase Agreement” on October 9, 2014, four days prior to the scheduled closing date. See Dalan v. Paracelsus Healthcare Corp. of North Dakota, Inc., 2002 ND 46, ¶ 19, 640 N.W.2d 726 (holding that the elements of equitable estoppel include, “(1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are other than those which the defendant subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or will influence, the plaintiff; and (3) knowledge, actual or constructive, of the real facts.”); Miller v. Walsh County Water Resource Dist., 2012 ND 152, ¶ 26, 819 N.W.2d 526 (“The elements of promissory estoppel are: (1) a promise which the promisor should reasonably expect will cause a change of position by the promisee; (2) a substantial change in the promisee's position through action or forbearance; (3) justifiable reliance on the promise; and (4) injustice which can only be avoided by enforcing the promise.” (quotations and citations omitted)).

[¶44] The District Court made no findings concerning the oral extension. At the very least, disputed facts existed concerning the existence of the oral extension, the breach of the oral extension resulting from the sale from Western Trust to Dabbert, whether the oral extension was made falsely in an attempt to prevent Constellation from pursuing its rights, whether Constellation relied on the oral

extension to its detriment, and whether injustice would result from not enforcing the oral extension. The District Court erred by failing to consider all of these factors. The District Court's granting of Western Trust's partial motion for summary judgment on the claims of Breach of Contract, Equitable Estoppel, and Promissory Estoppel was inappropriate.

C. The District Court Erred in Granting Dabbert's Partial Motion for Summary Judgment

[¶45] Constellation brought one claim against Dabbert, Tortious Interference with a Business Contract. The elements of such a claim are: (1) the existence of a contract; (2) the breach of the contract; (3) instigation of the breach by the Defendant; and (4) that the Defendant instigated the breach without justification. Hilton v. N.D. Educ. Ass'n., 2002 ND 209, ¶ 24, 655 N.W.2d 60.

[¶46] The District Court granted Dabbert's partial motion for summary judgment solely because it determined that Constellation could not prove element two, as the District Court determined that there was no breach of contract between Western Trust and Constellation. As noted above, the District Court erred in deciding that no breach of the 2013 Purchase Agreement occurred as there is simply no evidence that Western Trust notified Constellation of the terms of the offer between Dabbert and Western Trust, thus violating Constellation's right of first refusal on the Property. Additionally, Western Trust breached its oral extension with Constellation. As the District Court relied solely on the lack of a breach of contract to dismiss Constellation's claim against Dabbert, this Court should reverse the District Court's determination and remand this claim to the District Court.

CONCLUSION

[¶47] The District Court's orders of July 9, 2015 and August 6, 2015, and Judgment dated September 22, 2015 should be reversed, and the case remanded.

Dated this 11th day of February, 2016.

/s/ Joshua M. Feneis

Michael L. Gust (ND ID 06468)
Joshua M. Feneis (ND ID 08169)
Anderson, Bottrell, Sanden & Thompson
4132 30th Avenue SW, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
(701) 235-3300
mgust@andersonbottrell.com
jfeneis@andersonbottrell.com
Attorneys for Plaintiff/Appellant

Word Count Approx. 6742

AFFIDAVIT OF SERVICE BY MAIL

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

The undersigned, being first sworn, says upon her oath that on February 15, 2016, she delivered via e-mail a true and correct copy of each of the following:

(Corrected) Brief and Appendix of Plaintiff/Appellant

A copy of the foregoing was securely e-mailed to the address(es) as follows:

Roger J. Minch
rminch@serklandlaw.com

Steven A. Johnson
sjohnson@vogellaw.com

Vanessa L. Anderson
vanderson@vogellaw.com

Mark J. Heley
mheley@heleyduncan.com

Brian W. Varland
bvarland@heleyduncan.com

To the best of Affiant’s knowledge, the e-mail addresses above given are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail on the 15th day of February, 2016.

Dated this 15th day of February, 2016.

/s/ Jennifer A. Ernst
Jennifer A. Ernst

Subscribed and sworn to before me this 15th day of February, 2016.

/s/ Brandy J. Bjorem
Notary Public
My commission expires: 7/14/18

AFFIDAVIT OF SERVICE BY MAIL

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

The undersigned, being first sworn, says upon her oath that on February 11, 2016, she delivered via e-mail a true and correct copy of each of the following:

Brief and Appendix of Plaintiff/Appellant

A copy of the foregoing was securely e-mailed to the address(es) as follows:

Roger J. Minch
rminch@serklandlaw.com

Steven A. Johnson
sjohnson@vogellaw.com

Vanessa L. Anderson
vanderson@vogellaw.com

Mark J. Heley
mheley@heleyduncan.com

Brian W. Varland
bvarland@heleyduncan.com

To the best of Affiant's knowledge, the e-mail addresses above given are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail on the 11th day of February, 2016.

Dated this 11th day of February, 2016.

/s/ Jennifer A. Ernst
Jennifer A. Ernst

Subscribed and sworn to before me this 11th day of February, 2016.

/s/ Brandy J. Bjorem
Notary Public
My commission expires: 7/14/18