20150319
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 14, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Constellation Development, LLC, Plaintiff, vs. Western Trust Company, Gary G. Hoffman, Trustee, and Dabbert Custom Homes Defendant	)	**Supreme Court No.: 20150319**

Appeal from the District Court
Cass County Case No. 09-2014-CV-03427, East Central Judicial District
The Honorable Steven L. Marquart, Presiding

BRIEF OF DEFENDANT/APPELLEE WESTERN TRUST COMPANY, GARY G. HOFFMAN, TRUSTEE

Roger J. Minch (ND Id. 03501)
SERKLAND LAW FIRM
10 Roberts Street
PO Box 6017
Fargo, North Dakota 58108-6017
T/N: (701) 232-8957
F/N: (701) 237-4049

ATTORNEYS FOR DEFENDANT/APPELLEE WESTERN TRUST COMPANY, GARY G. HOFFMAN, TRUSTEE

TABLE OF CONTENTS

Paragraph No.

TABLE OF AUTHORITIES

Paragraph No.

STATE CASES

STATUTES

Paragraph No.

MISCELLANEOUS

Paragraph No.

I. STATEMENT OF THE ISSUES

[¶1] Whether the district court erred in dismissing Constellation Development, LLC's breach-of-contract claim against Western Trust Company.

[¶2] Whether the district court erred in dismissing Constellation Development, LLC's promissory estoppel and equitable estoppel claims against Western Trust Company.

II. STATEMENT OF THE CASE

[¶3] Plaintiff Constellation Development, LLC ("Constellation") entered into a 2013 purchase agreement with Defendants Western Trust Company, Gary G. Hoffman, Trustee ("Western"), for 24 acres of property which also included a three-year purchase option for approximately 64 acres of property. (App. 11-14). Constellation later exercised its option to purchase the 64 acres and the parties entered into a second purchase agreement. (App. 35-39). There is no dispute that Constellation breached this second purchase agreement by failing to make the requisite payments to Western. (App. 207).

[¶4] Nevertheless, on or about December 8, 2014, Constellation brought its original complaint against Western claiming breach-of-contract concerning the purchase option. (App. 8-10). Thereafter, Constellation brought its First Amended Complaint which again asserted a breach-of-contract claim concerning the purchase option and added claims of equitable estoppel and promissory estoppel against Western. (App. 18-26). The First Amended Complaint also asserted a claim for the tortious interference with a business contract against Dabbert Custom Homes, LLC ("Dabbert"). Id. All of the Defendants timely answered and asserted counterclaims against Constellation. (Appellee App. 1-10; 14-20).

[¶5] 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. (Doc. #42). On May 28, 2015, Western made a motion for partial summary judgment seeking to dismiss all of Constellation's claims against it. (Doc. #54). On July 6, 2015, the district court held a hearing on all of the Defendants' motions for partial summary judgment. (App. 2).

[¶6] On July 9, 2015, the district court entered an order granting all of the Defendants' motions for partial summary judgment and dismissing all of Constellation's claims. (App. 206-209). Constellation made a motion for reconsideration on July 20, 2015. (Doc. #118). The district court denied Constellation's motion for reconsideration on August 6, 2015. (App. 221-222). The parties then entered into a stipulation dismissing all of the Defendants' counterclaims on September 21, 2015. (App. 224-226). The district court entered Judgment on all of the claims and counterclaims on September 22, 2015. (App. 229-230). Constellation filed its notice of appeal on November 5, 2015. (App. 234).

III. STATEMENT OF THE FACTS

[¶7] On September 30, 2013, Constellation and Western entered into a purchase agreement ("2013 Purchase Agreement") which provided that Constellation was purchasing 24 acres of land in Horace, North Dakota, from Western for a sum of $432,000 ($18,000 per acre). (App. 207). The 2013 Purchase Agreement included the following provision:

> FIRST RIGHT OF REFUSAL: The seller will grant and give to the Buyer the First Right of Refusal for 5 years on the additional 62 acres as show 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.

(App. 207). The parties then included a handwritten statement next to the above paragraph which states "This has changed to a three-year purchase option to run concurrently." (App. 207) (emphasis added).

[¶8] On August 26, 2014, the president of Constellation, James M. Pralle ("Pralle"), wrote a letter to Western which stated that Constellation was exercising its option to purchase the balance of the real estate referenced in the 2013 Purchase Agreement at $18,000 per acre or for a sum of approximately $1,150,992.00. (App. 34). The letter states that First Community Credit Union will be the lender of record and that Constellation expected to close on or before October 13, 2014. (App. 34). But First Community Credit Union had never approved any financing for the purchase of the approximately 64 acres. (Doc. #45). In fact, First Community Credit Union had great concerns over the proposed purchase due to lack of security, the size of the loan, whether Pralle could afford the monthly payments and special assessments, and the short closing period. Id. As such, First Community Credit Union never agreed or did in fact loan money to Constellation in order for Constellation to purchase the remaining property. Id.

[¶9] As Constellation elected to exercise its option found in the 2013 Purchase Agreement, the parties entered into a second purchase agreement on September 5, 2014 ("2014 Purchase Agreement), for the approximate 64 acres of land. (App. 35-39). The 2014 Purchase Agreement contained the following terms:

> (1) A $2,500.00 herewith is a non-refundable payment at the execution of this Agreement with the said check to be made payable to First Bank and Trust of Brookings, South Dakota, who is the Seller's

> 1031 Exchanger. The remaining balance of $1,148,492.00 is to be paid on or before October 13, 2014.
>
> (1a) Because this is a 1031 Exchange, the said closing shall be on or before October 13, 2014.

(App. 36).

[¶10] There is no dispute that Constellation breached the 2014 Purchase Agreement by failing to make the $2,500 non-refundable payment at the execution of the 2014 Purchase Agreement on September 5, 2014. (App. 207). In fact, Constellation twice provided Western with a check for $2,500 which bounced due to insufficient funds. (App. 201). Finally, on October 8, 2014, more than a month after Constellation was obligated to provide a simple $2,500 payment, and only five days before the scheduled closing, Constellation for a third time attempted to offer Western a $2,500 payment. Western refused the check because it was already more a month late and because it wanted a larger amount to ensure that Constellation would be able to purchase the property. (Doc. #45).

[¶11] Meanwhile, Western came to learn that First Community Credit Union, the lender which Constellation identified as providing it with the funds to complete the purchase, was not willing to provide funding to Constellation and Pralle to perform the 2014 Purchase Agreement. (App. 61). Since Constellation had breached the 2014 Purchase Agreement by failing to tender the $2,500 non-refundable payment upon execution of the 2014 Purchase Agreement and because Constellation did not have any funding to actually perform under the 2014 Purchase Agreement; Western sent an October 9, 2014, letter to Constellation which provided notice of termination of the 2014 Purchase Agreement. (App. 61). However, contrary to Constellation's assertions to this Court, this letter plainly still

provides that if Constellation provides the full payment of $1,150,992.00 by October 13, 2014, Western will honor and abide by the 2014 Purchase Agreement. (App. 61). In other words, Western was willing to perform the 2014 Purchase Agreement, despite Constellation's earlier breach, as long as Constellation performed its obligation to provide full payment by October 13, 2014. (App. 61). Furthermore, the letter states that if Constellation fails to make their obligated payment, Western will be terminating the 2014 Purchase Agreement and will proceed to sell the property to other parties or entities. (App. 61).

[¶12] There is no dispute that Constellation did not make the full payment of $1,150,992.00 or any other payment on or before October 13, 2014. (App. 207). Thereafter, in order to mitigate any damages incurred because of Constellation's multiple breaches of the 2014 Purchase Agreement, Western executed a warranty deed which transferred the property to Dabbert. (Doc. #16). However, instead of being grateful that Western mitigated its damages by selling the subject property to a third-party, Constellation brought suit against Western.

[¶13] Constellation's entire original complaint revolves around the issue of whether "[d]efendant failed to comply with the purchase option clause in the September 30, 2013 Purchase Agreement, thereby breaching the parties' agreement and proximately causing Plaintiff's damage." (App. 10). Constellation's complaint makes no claim that Western breached the 2013 Purchase Agreement by failing to honor an alleged first right of refusal held by Constellation. (App. 8-10). On or about January 14, 2015, Constellation brought its First Amended Complaint which added Dabbert as a party and asserted claims for equitable and promissory estoppel against Western. (App. 18-26). The First Amended

Complaint still makes no claim that Western violated the 2013 Purchase Agreement but instead only concerns the breach of a purchase option and the damages which flowed from this alleged breach. (App. 18-26, see ¶11, 12, 13, 20, 29, 30, 31, 32, 35, 37, 38, 40, 42, 44, 47, 49, and 55). In fact, everything about Constellation's First Amended Complaint demonstrates that with respect to the 64 acres, any first right of refusal was changed and replaced by a purchase option. (App. 18-26, ¶9, 35, 55). Furthermore, the breach of contract claim consists of only two paragraphs:

> 37. Western Trust failed to comply with the purchase option in the September 30, 2013 Purchase Agreement and the terms of the September 5, 2014 Purchase Agreement, thereby breaching the parties' agreement and proximately causing Constellation's damages.
> 38. Constellation is entitled to damages as a result of Western Trust's breach, together with interest and costs.

(App. 23).

[¶14] The First Amended Complaint also asserted a tortious interference with a business contract claim against Dabbert. This claim also solely revolved around Constellation's "purchase option." (App. 25). Likewise, the wherefore clause only concerns a claim for breach of a purchase option. (App. 25).

[¶15] The claims for promissory and equitable estoppel against Western seemingly revolve around vague allegations that Constellation only needed to worry about the earnest money payment of $2,500 and that there would be some sort of extension agreement which extended the closing date, originally selected by Constellation, past October 13, 2014. (App. 23-24). However, there is no specificity to these conclusory allegations. There is no written extension or other agreement which supports Constellation's claims. There is no allegation that any consideration was provided for these alleged promises. There is no allegation describing the specific terms of the alleged promises. There is no explanation as to how a

gratuitous oral extension would not directly contradict the written agreements, and especially the written notice of termination of October 9, 2015, which plainly contradicts Constellation's self-serving conclusory allegations. There is also no allegation that Constellation would be able to pay the approximate $1.15 million purchase price. Most importantly, at no time during the course of this litigation has Constellation ever provided any admissible evidence in support of its vague and baseless conclusory allegations, or a loan commitment.

[¶16] On May 19, 2015, Dabbert brought a motion for partial summary judgment against Constellation. (Doc. #42). On May 28, 2015, Western and Hoffman brought a motion for partial summary judgment against Constellation. (Doc. #54). Throughout the litigation, Constellation's defense principally relied upon the mistaken belief that Constellation could have entered into any number of purchase agreements, breaching all of them along the way, as long as it performed one of the purchase agreements within the 3-year option period. Constellation has seemingly finally dropped this meritless argument on appeal.

[¶17] Instead, Constellation now relies upon a claim that was never alleged in the complaint or amended complaint, but rather first appeared in response to the motions for summary judgment. In response to the motions for summary judgment, for the very first time, Constellation changed its earlier position concerning a first right of refusal changing to a purchase option to argue that it had both a first right of refusal and purchase option concerning the subject property.

[¶18] On July 6, 2015, the Honorable Steven Marquart heard arguments on the motions for summary judgment. On July 9, 2015, Judge Marquart issued his Memorandum

Opinion and Order which granted both Dabbert's and Western's motions for partial summary judgment. (App. 206-209). Judge Marquart found that even assuming Constellation had a first right of refusal and a purchase option, Western and Hoffman did not breach the 2013 or 2014 Purchase Agreements by not selling the property to Constellation.

[¶19] On July 20, 2015, Constellation brought a motion to reconsider. (Doc. #118). On August 6, 2015, the district court entered its memorandum opinion and order denying Constellation's motion to reconsider. (App. 221-222) On September 21, 2015, the Defendants stipulated to dismissing their counterclaims against Constellation. (App. 224-225). On or about November 5, 2015, Constellation filed its notice of appeal which appeals the district court's memorandum opinion and order dated July 9, 2015, and the district court's judgment entered on September 22, 2015. (App. 234).

IV. STATEMENT OF THE STANDARD OF REVIEW

[¶20] Whether the district court granted summary judgment is a question of law which is reviewed de novo on the entire record. Green v. Mid Dakota Clinic, 2004 ND 12, ¶ 5, 673 N.W.2d 257. This Court has outlined the relevant standards governing summary judgment in Hasper v. Center Mut. Ins. Co., 2006 ND 220, 5, 723 N.W.2d 409 (citations omitted):

> 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.

[¶21] A party opposing summary judgment cannot "merely rely on the pleadings, briefs, or unsupported and conclusory allegations." Beckler v. Bismarck Public School Dist., 2006 ND 58, ¶ 7, 711 N.W.2d 172. "Factual assertions in a brief do not raise an issue of material fact" sufficient to satisfy the burden of the opposing party. Zuger v. State, 2004 ND 16, ¶ 8, 673 N.W.2d 614. This Court has stated:

> The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.

Schmitt v. MertiCare Health System, 2013 ND 136, ¶ 8, 834 N.W.2d 627 (citation omitted).

[¶22] Summary judgment must be entered "against a party who fails to establish the existence of a material factual dispute as to an essential element of the claim" on which they will have the burden of proof at trial. Johnson v. Bronson, 2013 ND 78, ¶ 9, 830 N.W.2d 595. "When no pertinent evidence of an essential element is presented to the trial court in resistance to a motion for summary judgment, it is presumed no such evidence exists." Hysjulien v. Hill Top Home of Comfort, Inc., 2013 ND 38, ¶ 12, 827 N.W.2d 533.

V. LAW AND ARGUMENT

A. Constellation's breach of contract claims fail as a matter of law because Constellation, not Western/Hoffman, breached the purchase agreements.

[¶23] Constellation's breach of contract claim against Western is solely based on the false allegation that "Western failed to comply with the purchase option in the

September 30, 2013 Purchase Agreement and the terms of the September 5, 2014 Purchase Agreement, thereby breaching the parties' agreement and proximately causing Constellation's damages." (App. 23). The district court correctly determined that it was Constellation, not Western that failed to comply with the purchase option in the 2013 Purchase Agreement and the terms of the 2014 Purchase Agreement and therefore correctly dismissed Constellation's breach of contract claim against Western. (App. 206-209).

[¶24] Western is entitled to summary judgment on Constellation's breach of contract claim because (1) Constellation, not Western breached the Purchase Agreements; (2) Constellation had a single option, not an unlimited number of options to exercise during the three-year period; (3) Constellation has never pled that Western breached the 2013 Purchase Agreement by failing to honor an alleged first right of refusal; (4) even if Constellation had pled such a claim, Constellation did not possess a first right of refusal; and (5) even assuming arguendo that Constellation possessed a first right of refusal, it lost the first right of refusal due to its own actions/inaction.

1. Constellation breached the 2013 and 2014 Purchase Agreements by failing to make the required payments.

[¶25] There is no dispute that the Constellation had a three-year option in the 2013 Purchase Agreement to purchase approximately 64 acres of land at $18,000 per acre. There is no dispute that Constellation exercised its option on August 26, 2014, when it provided notice to Western that it was exercising its option and would close the transaction by October 13, 2014. There is no dispute that Constellation and Western entered into the 2014 Purchase Agreement on September 5, 2014, which required Constellation to make an immediate payment of $2,500 upon execution of the 2014 Purchase Agreement. There is no dispute that Constellation breached the 2014 Purchase Agreement by failing to do so. There

is no dispute that the 2014 Purchase Agreement required that Constellation to make full payment of approximately $1.15 million by October 13, 2014. There is no dispute that Constellation failed to make this payment by October 13, 2014. The district court was plainly correct in determining that Constellation, and not Western, was the party that breached the purchase agreements.

2. Constellation had the option to enter into a single purchase agreement to purchase the subject property which it did and then breached the agreement.

[¶26] The district court correctly found that it was Constellation, not Western, that failed to comply with the purchase option in the 2013 Purchase Agreement and the terms of the 2014 Purchase Agreement and therefore dismissed Constellation's meritless breach of contract claim against Western and Hoffman. (App. 206-209).

[¶27] To the extent Constellation is still claiming that it could exercise its option to purchase the land any number of times during a three-year period, Constellation's claim fails as a matter of law. "Acceptance of an option for the sale of land within the time allowed and according to its terms converts the option into a binding executory contract of sale." Northern Plains Alliance, L.L.C. v. Mitzel, 2003 ND 91, ¶16, 663 N.W.2d 169; Horgan v. Russell, 140 N.W. 99, 102 (N.D. 1913); see also 77 Am. Jur. 2d, Vendor and Purchaser, §45 (providing "an option is transformed into a contract of purchase and sale when there is an unconditional, unqualified acceptance by the optionee of the offer in harmony with the terms of the option and within the time span of the option contract"). Furthermore, as North Dakota has a long history of considering law from California, it is noteworthy that California law is that exercising an option converts the option into a binding purchase agreement. Steiner v. Thexton, 226 P.3d 359, 365 (Ca.

2010)(California Supreme Court stating "[a]n option is transformed into a contract of purchase and sale when there is an unconditional, unqualified acceptance by the optionee of the offer in harmony with the terms of the option and within the time span of the option contract."). Here, Constellation unequivocally exercised its option to purchase the land by executing the 2014 Purchase Agreement which stated it was exercising its option. Once Constellation exercised its option, the option converted into a contract for the purchase and sale of land.

[¶28] Furthermore, under N.D.C.C. § 9–07–02, the language of an option is to govern its interpretation if the language is clear and explicit and does not involve an absurdity. North Dakota law directs that courts ascertain contractual intent from examination of words used in a contract, giving them their "plain, ordinary, and usual meaning. Schwarz v. Gierke, 2010 ND 166, ¶16, 788 N.W.2d 302. Here, Constellation had an option, not option**s** to purchase the land. Constellation wants to interpret the word "option" to include an unlimited amount of options to purchase the land in a three year period. This is not what the 2013 Purchase Agreement provides and the intent must be taken from an examination of the word "option" and it must be given its plain, ordinary and usual meaning. Option is singular and hence means a single option to purchase the land. Once that option is exercised, further options are precluded.

[¶29] Finally, the cardinal principle of contract interpretation is to ascertain the intention of the parties and to give effect to that intent. Schwarz, 2010 ND 166, ¶16, 788 N.W.2d 302. Contract terms are read as a whole to determine the intentions of the parties and are given their plain, ordinary, and usual meaning. Id. Each term of a contract is construed to avoid rendering other terms meaningless. Id. 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. Id. 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. Extrinsic evidence may not be introduced to vary or contradict the terms of an unambiguous agreement or to create an ambiguity. Id. Here, the 2014 Purchase Agreement plainly states the closing date and the purchase price. Nothing was paid. The deadline is past and there is no remaining purchase option and the purchase agreement is in default and has been terminated.

3. Constellation failed to plead a breach of contract claim for any alleged failure by Western/Hoffman to abide by a first right of refusal.

[¶30] Constellation's Complaint and First Amended Complaint bring a claim for breach of contract against Western based solely on the allegation that "Western failed to comply with the purchase option in the September 30, 2013 Purchase Agreement and the terms of the September 5, 2014 Purchase Agreement." (App. 23). The Complaint and First Amended Complaint allege no claim for breach of a first right of refusal. "The purpose of Rule 8(a), N.D.R.Civ.P., is to put the defendant on notice as to the nature of the plaintiff's claim." Williams Et al. v. State of North Dakota, 405 N.W.2d 615, 621 (N.D. 1987). A complaint must be "sufficient to inform and notify both the adversary and the court of the pleader's claim." Id.

[¶31] Here, the Complaint and First Amended Complaint plainly fail to sufficiently inform and notify Western and the district court that Constellation would be asserting a breach of contract claim against Western on the basis that Western did not

abide by the terms of an alleged first right of refusal. Instead, the First Amended Complaint plainly provides that the breach-of-contract claim concerns Western's alleged failure to abide by the purchase option in the 2013 Purchase Agreement and the terms of the 2014 Purchase Agreement. Only after realizing that any claim for breach concerning the option contract was meritless did Constellation began to argue it also had a first right of refusal in its summary judgment responses. However, Constellation has never amended its Complaint to assert such a claim. As such, pursuant to Rule 8(a), N.D.R.Civ.P., any claim for breach-of-contract concerning a first right of refusal was not properly pled and was not before the Court.

4. The 2013 Purchase Agreement plainly provides that the first right of refusal was changed to an option to purchase.

[¶32] In North Dakota, written parts of contracts always control the printed parts. See N.D.C.C. § 09-07-16 ("written part of contract controls printed part"); N.D.C.C. § 41-03-14 (if an instrument contains contradictory terms, typewritten terms prevail over printed items, handwritten terms prevail over both). As such, any handwritten terms on a contract always control. In its first amended complaint, Constellation states:

> [¶9] A handwritten amendment to the Right of First Refusal [sic.] Clause was added prior to execution of the Purchase Agreement. The amendment states that "This has changed to a three-year purchase option to run concurrently."
>
> [¶10] The handwritten amendment was added by Hoffman and was initialed by Hoffman and James M. Pralle, ("Pralle") the President of Constellation.

(Doc. #5, ¶¶ 9-10). In short, Constellation admits that the parties changed the first right of refusal to a three-year purchase option before the 2013 purchase agreement was executed.

As such, Constellation and Western never executed any agreement in which they agreed to a first right of refusal.

[¶33] Furthermore, the handwritten language plainly provides that the paragraph is "chang[ing] to" a three-year purchase option. Had the parties wished to provide both a three-year purchase option and a first right of refusal, the provision would have used words like "change to include…," "change to provide that in addition…," "change to provide both…". However, here the provision plainly provides that the paragraph is changing to only include a three-year purchase option. For all of these reasons, Constellation did not have a first right of refusal in the 2013 Purchase Agreement.

5. Even assuming that Constellation had a first right of refusal in the 2013 Purchase Agreement, Constellation failed to abide by the terms of the first right of refusal.

[¶34] Even assuming arguendo that the first right of refusal originally written in the 2013 Purchase Agreement was not changed to a 3-year purchase option, Constellation breached the first right of refusal by failing to close the transaction.

[¶35] The 2013 Purchase Agreement originally included a paragraph which states:

> FIRST RIGHT OF REFUSAL: The seller will grant and give to the Buyer the First Right of Refusal for 5 years on the additional 62 acres as show 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.**

(App. 207).

[¶36] Thereafter, there is no dispute that the parties made a handwritten change which stated that "[t]his has changed to a three-year purchase option to run concurrently."

(App. 13). At the very minimum, by including this language, Western decided to sell the subject property to Constellation at any point in the three-year time frame for $18,000 per acre. As the district court correctly determined, the purchase option and 2014 Purchase Agreement exhibit Western's decision to sell and Constellation's decision to purchase the land. By the terms of 2013 Purchase agreement, Constellation had 14 days to enter into a purchase agreement (which it did) and 30 days to close the transaction which it did not. As a result, there can be no dispute that the district court correctly determined that Constellation lost any first right of refusal it may have had.

[¶37] Furthermore, even assuming arguendo that Constellation somehow had a first right of refusal because of the 2013 Purchase Agreement, the first right of refusal merged and was replaced by the 2014 Purchase Agreement. See 52 C.J.S. Landlord and Tenant § 133 (stating a first privilege of purchasing may be lost); see also Spindler v. Valparaiso Lodge of Benevolent & Prot. Order of Elks, 59 N.E.2d 895, 897 (Ind. 1945) (holding a lessee lost a first right to purchase by entering into a new lease for the same property). Here, if Constellation had a first right of refusal, it lost such right when it entered into the September 5, 2014 Purchase Agreement. There is no dispute that Constellation entered into and then failed to perform the 2014 Purchase Agreement.

B. The district court correctly dismissed Constellation's baseless promissory and equitable estoppel claims against Western.

[¶38] In its First Amended Complaint, Constellation attempts to assert some vague accusations that Western promised an extension for the 2014 Purchase Agreement despite no promise ever being placed in writing, no allegation concerning the duration of the extension, no allegation concerning alleged consideration, no allegation concerning how Constellation could ever pay, and no explanation about why Western had its attorney

send a notice of termination if any of their conclusory allegations were true. As a matter of law, Constellation's promissory estoppel and equitable estoppel claims fail.

1. Constellation failed to properly plead its promissory and equitable estoppel claims under North Dakota Rule of Civil Procedure 8(a).

[¶39] North Dakota Rule of Civil Procedure 8 is derived from and is for practical purposes identical to the corresponding federal rule. See Fed.R.Civ.P. 8. "[F]ederal court interpretations of a corresponding federal rule of civil procedure are highly persuasive in construing our own rule." Choice Financial Group v. Schellpfeffer, 2006 ND 87, ¶12, 712, N.W.2d 855; see also Gerhardt v. D.L.K., 327 N.W.2d 113, 114 (N.D. 1992) (this Court gives great deference to federal case law on a corresponding rule).

[¶40] The United States Supreme Court has held that Rule 8 demands "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Id. "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

[¶41] "[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. "When a complaint pleads facts

that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Id.

[¶42] "[T]he tenant that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Id. Rule 8 does "not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Id. at 678-79. Furthermore, a complaint must state a plausible claim for relief. Id. at 679. Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the court to draw on its judicial experience and common sense. Id. In fact, "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." Id.

[¶43] Constellation argues that despite exercising the purchase option and then breaching the resulting 2014 Purchase Agreement, Constellation expected an extension of time to remedy its breach of the 2014 Purchase Agreement. Constellation does not plead any facts regarding consideration given for such an extension and does not plead any facts concerning when such alleged oral conversations took place, disclose who participated in such conversations, or the essential terms of any such conversations. This is not a plausible position, especially in light of the fact it defies common sense, and is supported by no actual factual allegations, and would not be permitted by law as it is both oral and without consideration. As such, this is exactly the type of alleged claim that Rule 8 is supposed to protect against. State courts should have the same rights as federal courts to be initial gate-keepers of which complaints proceed and which do not.

2. The statute of frauds bars any claim for promissory or equitable estoppel.

[¶44] The statute of frauds is codified as N.D.C.C. § 9-06-04. North Dakota Century Code provision 9-06-04(3) invalidates contracts for the sale of real property, or an interest in real property, unless written and signed by the party against whom the claim is made. N.D.C.C. § 9-06-04(3); Jones v. Barnett, 2000 ND 207, ¶13, 619 N.W.2d 490. An agreement for the sale of real property is invalid unless there is a contract, note, or memorandum in writing. Johnson Farms v. McEnroe, 1997 ND 179, ¶16, 568 N.W.2d 920 (holding that an oral agreement for the purchase of real property did not satisfy the statute of frauds).

[¶45] Furthermore, not only does the statute of frauds invalidate any alleged oral agreement in this matter, the parol evidence rule provides that the execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument. N.D.C.C. § 9-06-07. The parol evidence rule is a rule of substantive law and parol evidence cannot be used to vary or contradict the terms of a complete, written contract adopted as a definite expression of the parties' agreement. Golden Eye Resources, LLC v. Gasnke, 2014 ND 179, ¶17, 853 N.W.2d 544.

[¶46] Furthermore, the statute of frauds also applies to any alleged modification to the 2014 Purchase Agreement. If an original agreement was required to comply with the statute of frauds, any material modification of that agreement must also conform to the statute of frauds. See N.D.C.C. § 9-06-04(3); Restatement (Second) of Contracts § 149 (1981) ("The Statue [of Frauds] may, however, apply independently of the original terms to a contract to modify a transfer of property"); 10 A.L.R. 923 (1936)(providing

that if original agreement was required to comply with statute of frauds, any material modification of that agreement must also conform to statute of frauds). As such, any alleged modification of the 2014 Purchase Agreement had to be in writing. Constellation's alleged oral modification of the 2014 Purchase Agreement is not sufficient as a matter of law to effectively modify the 2014 Purchase Agreement.

[¶47] The only two written agreements between Constellation and Western are the 2013 Purchase Agreement and 2014 Purchase Agreement. Any other alleged agreements which concerned the sale of the real property, or concerning an interest in the real property, must be in writing to satisfy the statute of frauds. As such, any oral agreements which Constellation claims exists between itself and the Defendants are not enforceable. Furthermore, any attempt by Constellation to use alleged oral promises to contradict the 2013 or 2014 purchase agreements is barred by the parol evidence rule.

3. Any alleged oral agreement to extend the deadline to close the transaction under the 2014 Purchase Agreement must be supported by consideration.

[¶48] There is no dispute that Western contracted to and desired to close the transaction by October 13, 2014, the date chosen by Constellation, because the sale of the property was part of a 1031 exchange. Nevertheless, Constellation has made some vague claim that Western orally agreed to extend the closing to some unknown date in the future despite Western's need to promptly close the transaction for 1031 exchange purposes. Even assuming arguendo that this was true, any such extension agreement would need to be supported by consideration.

[¶49] All contracts must be supported by sufficient cause or consideration. N.D.C.C. § 09-01-02(4). "[W]hen parties to a contract subsequently agree to modify or

alter the terms of their original contract, the agreement to modify ordinarily must be supported by new or additional consideration. Farmers Alliance Mut. Ins. Co. v. Hulstrand Const. Inc., 2001 ND 145, ¶12, 632 N.W.2d. 473. Additional consideration is only not required when the subsequent agreement is intended only to clarify or explain the terms of the original agreement. Id. Here, the alleged oral modification of the 2014 Purchase Agreement is to alter and change the original terms of the agreement, not to clarify or explain. Constellation claims that Western orally agreed to change extend the date for Constellation to perform. Any such modification must be supported by consideration. Here, Constellation has failed to identify any benefit that was conferred upon Western under the alleged modification to which Western was not already entitled. As such, no new consideration was offered for any alleged oral modification of the 2014 Purchase Agreement and any promissory or equitable estoppel argument fails.

4. Constellation's alleged oral agreement to extend the 2014 Purchase Agreement closing date is vague, indefinite and uncertain.

[¶50] "[C]ourts will not enforce a contract which is vague, indefinite, or uncertain, nor will they make a new contract for the parties." Tobias v. North Dakota Dep't of Human Svcs., 448 N.W.2d 175, 179 (N.D. 1989). To be valid and enforceable, a contract must be reasonably definite and certain in its terms so as to ascertain what is required of the parties. Delzer v. United Bank, 459 N.W.2d 752, 758 (N.D. 1990); In re Estate of Hill, 492 N.W.2d 288, 293 (N.D. 1992). "An agreement which is so uncertain and incomplete as to any of its essential terms that it cannot be carried into effect without new and additional stipulations between the parties is not enforceable." Stout v. Fisher Industries Inc., 1999 ND 218, ¶11, 603 N.W.2d 52

[¶51] Constellation has failed to describe the essential terms of any oral modification to the 2014 Purchase Agreement. For instance, Constellation has failed to identify the parties to the oral modification, the consideration, the real property involved, or even the length of the alleged gratuitous oral extension. Constellation is essentially asking the Court to draft a written modification to the 2014 modification without informing it of any of the alleged terms. Such request is wholly inappropriate. As Constellation has, at best, alleged an oral, vague, indefinite, and uncertain modification which does not include any of the alleged material terms, never mind all of the essential terms, the Court should not grant Constellation's request to write Constellation an entirely new contract.

VI. CONCLUSION

[¶52] Western respectfully requests this Court affirm the district court's order granting partial summary judgment in favor of Western.

Dated this 14th day of March, 2016.

/s/ Roger J. Minch
Roger J. Minch
SERKLAND LAW FIRM
10 Roberts Street
PO Box 6017
Fargo, North Dakota 58108-6017
Telephone No.: (701) 232-8957
rminch@serklandlaw.com
MN License: 007360X
ND License: 03501
ATTORNEYS FOR DEFENDANT WESTERN TRUST COMPANY, GARY G. HOFFMAN, TRUSTEE

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 6,404.

By: */s/ Roger J. Minch*

Roger J. Minch
SERKLAND LAW FIRM
10 Roberts Street
PO Box 6017
Fargo, North Dakota 58108-6017
Telephone No.: (701) 232-8957
rminch@serklandlaw.com
MN License: 007360X
ND License: 03501
ATTORNEYS FOR DEFENDANT WESTERN TRUST COMPANY, GARY G. HOFFMAN, TRUSTEE

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

Supreme Court No. 20150319

Constellation Development, LLC,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

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

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

BRIEF OF APPELLEE *and*
APPENDIX OF APPELLEE

on March 14, 2016, by email as follows, to-wit:

Anderson, Bottrell, Sanden & Thompson **Michael L. Gust** **mgust@adnersonbottrell.com** **Joshua M. Feneis** **jfeneis@andersonbottrell.com**	**Heley, Duncan & Melander, PLLP** **Brian W. Varland, Esq.** **bvarland@heleyduncan.com**

To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be so served. The above documents were emailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

/s/ Lesha Ladwig
Lesha Ladwig

Subscribed and sworn to before me this 14th day of March, 2016.

/s/ Pamela Burman
Notary Public, Pamela C. Burman
Cass County, North Dakota
My Commission Expires: 03.06.2020