

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.

**PETITION FOR REHEARING OF PLAINTIFF/APPELLANT CONSTELLATION
DEVELOPMENT, LLC**

**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**

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STATEMENT OF THE ISSUES

¶1] Whether the Supreme Court erred in denying Plaintiff Constellation Development, LLC's appeal of the district court's July 9, 2015 summary judgment order based upon a right of first offer, which was not the intent of the parties in entering the September 30, 2013 Purchase Agreement and which had never been identified in previous North Dakota Supreme Court decisions.

¶2] Whether the Supreme Court erred by relying on a finding of fact at the summary judgment stage.

STATEMENT OF THE CASE

[¶3] Plaintiff Constellation Development, LLC (“Constellation”) relies upon the Statement of the Case within its initial brief. (Constellation Br. p.6-7). Since that time, this Court has denied Constellation’s appeal of the District Court’s summary judgment order. Constellation Development, LLC v. Western Trust Co., 2016 ND 141. Constellation makes this petition for rehearing as this Court’s reliance on a supposed right of first offer is in error.

STATEMENT OF THE FACTS

[¶4] Constellation relies upon the Statement of Facts within its initial brief. (Constellation Br. p. 8-14). For the purposes of this Petition, however, it is important to note that in his Affidavit, James Pralle (“Pralle”), President of Constellation, indicated that Constellation intended that the September 30, 2013 Purchase Agreement include both a three-year purchase option and a five-year right of first refusal. (Appellant’s Appendix p. 167). In his Affidavit, Gary Hoffman (“Hoffman”), Trustee for Defendant Western Trust Company (“Western Trust”), indicated that Western Trust intended for the three-year purchase option to replace the five-year right of first refusal. (Appellant’s App. p. 204). Hoffman notes that the September 30, 2013 Purchase Agreement “did contain a first right of refusal on page 3 of the Agreement”. (Appellant’s App. p. 204). Neither of the contracting parties indicated that they intended for the September 30, 2013 Purchase Agreement to contain a right of first offer. (See Appellant’s App. p. 45-47; 166-172; 198-205). It is further important to note that the September 30, 2013 Purchase Agreement was drafted by either Hoffman or a third party at Hoffman’s request. (Appellant’s App. p. 166). Pralle did not draft this agreement nor did

anyone else draft the September 30, 2013 Purchase Agreement on behalf of Constellation. (Appellant's App. p. 166).

ARGUMENT

A. Standard of Review

[¶5] The North Dakota Supreme Court reviews a district court's summary judgment decision as a question of law, which is reviewed de novo on the entire record. Missouri Breaks, LLC v. Burns, 2010 ND 221, ¶ 8, 791 N.W.2d 33. North Dakota Rule of Appellate Procedure 40 allows a party to seek a petition for rehearing when the petitioner believes the Court has overlooked or misapprehended a point of law or fact. See N.D. R. App. Proc. 40(a)(2).

B. The Court's Opinion Ignores the Intent of the Contracting Parties

[¶6] N.D.C.C. § 9-07-03 states: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful." This Court has stated multiple times that: "We construe contracts to give effect to the parties' intent, which, if possible, must be ascertained by giving meaning to each provision of the contract." Reed v. University of North Dakota, 1999 ND 25, ¶ 25, 589 N.W.2d 880; see also Hillerson v. Bismarck Public School, 2013 ND 193, ¶ 18, 840 N.W.2d 65; Kuperus v. Willson, 2006 ND 12, ¶ 11, 709 N.W.2d 726; U.S. Bank, Nat. Ass'n v. Koenig, 2002 ND 137, ¶ 8, 650 N.W.2d 820; Gawryluk v. Poynter, 2002 ND 205, ¶ 8, 654 N.W.2d 400; Lenthe Investments, Inc. v. Service Oil, Inc., 2001 ND 187, ¶ 14, 636 N.W.2d 189; Haag v. Noetzelman, 1999 ND 157, ¶ 6, 598 N.W.2d 121; Circle B

Enterprises, Inc. v. Steinke, 1998 ND 164, ¶ 9, 584 N.W.2d 97; Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc., 541 N.W.2d 432, 433-34 (N.D. 1995).

[¶7] Simply put, the parties did not intend to create a right of first offer in the September 30, 2013 Purchase Agreement. This can be ascertained from the written terms of the Agreement, as it states several times that it is a first right of refusal. Beyond this, no prior North Dakota case has ever displayed a right of first offer. How can parties to a contract concerning North Dakota property agree to a contract provision which has no history of being used in North Dakota? On top of this, neither of the contracting parties refers to a right of first offer in any of their arguments before this Court or the District Court and neither of the contracting parties refers to a right of first offer in their affidavits. While an ambiguity must be found in order to review extrinsic evidence, in looking at the mutual intent of the parties, it has to be important that neither party considered the provision a right of first offer and the first time such a label was ever discussed was in this Court's decision.

[¶8] Even if the Court were to consider the provision a right of first offer, that still creates a contradiction and ambiguity in the provision, as the provision labels itself as a first right of refusal. It does this not only in the heading, but within the body of the paragraph itself. This clearly demonstrates an intent by the parties for the provision to be a right of first refusal. By ignoring the term "first right of refusal", which is stated twice in the body of the provision, the Court is giving the benefit of the ambiguity of this provision to Western Trust, the drafter of the provision. This is also contrary to North Dakota law. Northstar Founders, LLC v. Hayden Capital

USA, LLC, 2014 ND 200, ¶ 47, 855 N.W.2d 614 (“Ambiguous language must be construed against the drafter.”).

[¶9] The language of the provision, the lack of prior use in North Dakota, and the sworn testimony of the parties themselves demonstrate that it was not the mutual intent of the parties to include a right of first offer in the September 30, 2013 Purchase Agreement. The Court erroneously relied on labeling this provision a right of first offer and should reopen this matter for further hearing.

C. The Court’s Opinion Relies Upon a Right of First Offer, for Which There is No Prior Precedent with This Court

[¶10] As noted, Constellation has been unable to find any prior precedent from this Court for a right of first offer. In its opinion, the Court relies upon a case out of Washington, a case out of Vermont, two legal encyclopedias, and an academic journal. The Court does not explicate how notice of a right of first offer must be provided, how the terms of the offer must be communicated to the offeree, and the manner in which the offeree must either accept or deny the offer. The Court does not even state whether the offer made to the offeree must be the exact same offer made to third parties. Even if the Court relies on the terms of the September 30, 2013 Purchase Agreement for the right of first offer, it is undisputed that Defendant Dabbert Custom Homes, LLC (“Dabbert”) did not purchase the property under the same terms as were listed in the Agreement.

[¶11] In the Washington case relied upon by the Court, Kelly v. Ammex Tax and Duty Free Shops W., Inc., the Washington Court of Appeals specifically states that: “The landowner must, of course, sell or offer to sell to third parties at the same price and on the same terms and conditions at which the property was offered to

the grantee of the right of first offer.” 256 P.3d 1255, 1258 (Wash Ct. App. 2011). The terms of the September 30, 2013 Purchase Agreement required the property to be purchased at a price of \$18,000 per acre. (Appellant’s App. p. 29). It also required Constellation to enter into a Purchase Agreement within 14 days after Western Trust’s offer/decision to sell and to close the sale within 30 days. (Appellant’s App. p. 29). Dabbert, though, purchased the property under different terms.

[¶12] Dabbert paid a purchase price of \$19,000 per acre. (Appellant’s App. p. 179). While it is not clear how long Dabbert had between the offer and entering into the purchase agreement, Dabbert was not given 30 days to close on the property. Instead, Dabbert’s Purchase Agreement was dated October 29, 2014, and the closing date on the property was December 22, 2014. (Appellant’s App. p. 179). Thus, Dabbert had 54 days to close on the property. Not only did Dabbert receive different terms for purchasing the property than was offered to Constellation, but it received better terms, as Dabbert was given 24 more days to close on the property. Based upon the Kelly case out of Washington, even if the provision is a right of first offer, Western Trust violated the right of first offer by changing the terms of the offer from Constellation to Dabbert, thus breaching the September 30, 2013 Purchase Agreement.

D. The Court inappropriately relies on a finding of fact

[¶13] Constellation appealed a summary judgment decision of the district court. As such the Court “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.” Missouri Breaks, LLC

v. Burns, 2010 ND 221, ¶ 8, 791 N.W.2d 33. Despite this, in its opinion the Court stated:

Western informed Constellation in no uncertain terms that it had “decide[d]” to sell the property in the October 9, 2014, notice of termination of the purchase agreement by stating it would “begin[] efforts to sell the property described in the attached Purchase Agreement to other parties or entities.” This notice triggered the right of first offer, but Constellation did nothing to accept the offer.

Constellation Development, LLC v. Western Trust Co., 2016 ND 141, ¶15. This was an inappropriate finding of fact.

[¶14] The Court cannot say that “Constellation did nothing to accept the offer” without making a factual finding. Regardless, this finding is contradicted by the Affidavit of Pralle. Pralle stated that he spoke numerous times with Hoffman in October, November, and December 2014 to try and close the sale on the property. (Appellant’s App. p. 169). It is very likely he tried to close the sale on the terms set out in the September 30, 2013 Purchase Agreement. Similarly, Exhibit A to Pralle’s Affidavit shows that on October 10, 2014, one day after the letter relied upon by the Court, Pralle had three (3) phone calls with Hoffman. (Appellant’s App. 173). Very likely, Pralle was inquiring about the October 9, 2014 letter and trying to close on the sale at the terms set out in the September 30, 2013 Purchase Agreement. Either way, further development of the record is required to determine whether Constellation attempted to accept the offer consistent with the right of first offer, if it is determined that the provision was in fact a right of first offer. Without further factual development, the Court cannot find that “Constellation did nothing to accept the offer”.

CONCLUSION

¶15] The Court's July 7, 2016 opinion errs by ignoring the mutual intent of the parties, by relying upon a right of first offer, and by inappropriately making a finding of fact. Therefore, the decision should be reopened and set for further hearing.

Dated this 21st day of July, 2016.

/s/ Joshua M. Feneis

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AFFIDAVIT OF SERVICE BY E-MAIL

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

The undersigned, being first sworn, says upon her oath that on July 21, 2016, she delivered via e-mail a true and correct copy of each of the following:

PETITION FOR REHEARING OF PLAINTIFF/APPELLANT CONSTELLATION DEVELOPMENT, LLC

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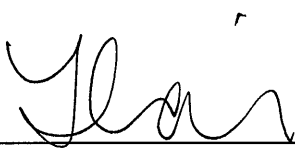
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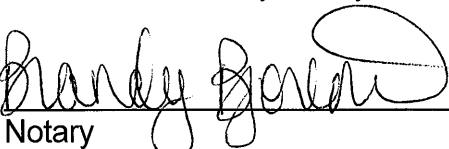
Dated this 21st day of July, 2016.



Liza A. Gion

Subscribed and sworn to before me this 21st day of July, 2016.

BRANDY BJOREM
Notary Public
State of North Dakota
My Commission Expires July 14, 2018



Notary