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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUN - 1 2016

STATE OF NORTH DAKOTA

In the Matter of the Estate of Steven H. Harris)
-----)
Bruce G. Harris, Petitioner and Appellant)
v.)
Mary K. Harris, Respondent and Appellee)

Supreme Court No. 20160084
Burleigh Co. No. 08-01-C-01442

In the Trust of Steven H. Harris Testamentary)
Trust)
-----)
Bruce G. Harris, Petitioner and Appellant)
v.)
Mary K. Harris, Respondent and Appellee)

Supreme Court No. 20160085
Burleigh Co. No. 08-10-P-00146

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
BURLEIGH COUNTY, NORTH DAKOTA
THE HONORABLE DAVID E. REICH

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STATEMENT OF THE ISSUE

[¶1] Whether the district court erred in denying relief under N.D.R.Civ.P. Rule 60.

STATEMENT OF THE CASE

[¶2] Bruce G. Harris (“Bruce”) served a Petition for Trust Accounting and for Appointment of Successor Trustee on Mary K. Harris, Trustee of the Steven H. Harris Testamentary Trust (“Trustee”) on or about July 27, 2010. Appendix (“App.”) 6-11. The Trustee filed its Return on or about August 25, 2010. App. 18-19. Bruce served an amended Petition on or about March 3, 2011. *Id.* at 12-17. Trial was set for December 11, 2013, but it was continued. Docket No. (“Dkt”) 25, 44.¹ The trial was rescheduled to begin December 2, 2014. Dkt. 62.

[¶3] On December 4, 2014, the parties entered into a stipulation in both matters (08-01-C-01442 and 08-10-P-00146). App. 22-27. The district court issued the order for judgment on the stipulation and the judgment on the stipulation on December 12, 2014. App. 28-37. Notice of entry of order was served on or about December 16, 2014. App. 38. The district court issued an order on the stipulation in Case No. 08-01-C-01442 on December 10, 2014; notice of entry of order was served on or about December 16, 2014. App. 206-208. On February 3, 2015, Bruce filed a Motion to Set Aside Stipulations and Certification of Trust Accountings and for Order on Relief—essentially a motion to vacate the Judgment. App. 57-86. A hearing on the motion was noticed for June 10, 2015. Dkt. 98. The Trustee filed a response in opposition to the motion to vacate on or about June 5,

¹ References to the Docket shall be to Case No. 08-10-P-00146 unless otherwise noted.

2015. App. 87-94. After the hearing on the motion, Bruce filed a reply brief in support of his motion to vacate on or about June 15, 2015. App. 95-99.

[¶4] The district court issued an Order on Rule 60(b) Motions denying the motion on December 21, 2015. App. 100-103. Notice of entry of order was served on or about January 4, 2016. App. 104. Notice of appeal was served by Bruce on or about March 4, 2016. App. 105.

STATEMENT OF THE FACTS

[¶5] Bruce is the son of Steven H. Harris, who died in 2001. App. 12-13. The Last Will and Testament of Steven H. Harris was probated; out of the Will, Part A of the Steven H. Harris Testamentary Trust was created.² *Id.*; App. 194-205. Mary K. Harris is the surviving spouse of Steven H. Harris. App. 12. Bruce is a beneficiary under the Trust. App. 13. Bruce believes the Trust was funded with valuable mineral interests in excess of \$600,000 at the time of Steven H. Harris's death. App. 14. But Bruce has been unable to account for what was placed into the Trust because of resistance from the Trustee in providing necessary and required information, to include all distributions from the Trust, a statement or listing of specific properties part of the Trust, a detailed statement as to the income and expenses of the Trust. App. 14-16, 53-55. Bruce challenged the appointment of Mary K. Harris as the trustee. App. 15, 52. The Trustee admitted at her deposition that she herself was not qualified to act as a trustee. Dkt. No. 52, at p. 20. Trust property was transferred to the Steven H. Harris Family Limited Partnership; Bruce claims that this was

² The district court considered Bruce's motion to vacate the judgment for both cases, 08-10-P-00146 and 08-01-C-01442. App. 108-09.

done improperly and contrary to the terms of the Trust as stated in the Will. App. 42, 54-55.

[¶6] Through the course of these proceedings, discussions have occurred while attempting to resolve the issues raised by Bruce. Bruce and the Trustee entered into a Stipulation on both cases on December 4, 2014. App. 22-27. Bruce was led to believe that certain Trust disbursement documents would be provided to him, and if they were not, he could object to the stipulation and essentially have it undone. App. 159-60. Bruce was presented with an affidavit of his brother, Terry Harris, which he relied on in signing the stipulation. App. 20-21, 147. Bruce discovered after that certain information was not correct. Bruce testified he relied on this information in Terry's affidavit in signing the stipulations. App. 58-60. Bruce also testified that he believed that if he did not sign the stipulations that he would be held in contempt of court. App. 134-35. Bruce objected within the set timeframe provided for at paragraphs 10 and 2 of the Stipulations as to the inadequacy of the financial information provided. App. 24, 26, 41-49, 129-30, 159-60.

[¶7] The action involves many different issues. These issues include a challenge to the appointment of the Trustee, appointment of a new trustee, improper disbursements from the Trust, improper transfers of trust assets and income, and accountings not being provided. One of the issues is the transfer of real property from the estate of Steven H. Harris into a Trust, to be administered per the terms included in the Will. Real property was transferred from the Trust into the Harris Family Limited Partnership. App. 54. There is no provision in the Will that permits this transfer. App. 194-205. Also, the Trust conveyed a portion of the corpus to Mary Harris. App. 54. There is nothing in the Trust or Will that permits this to be done. App. 194-205. And it is not accurate for the Trustee

to take the position that title to the properties owned by the family limited partnership are, and always have been, owned by the limited partnership. Property was transferred from the Trust into the family limited partnership. How the estate and Trust are being administered implicates N.D.C.C. chs. 47-04, 47-06, and 47-10.

[¶8] In order to ensure the real property that is to be held by the Trustee for the benefit of beneficiaries is fulfilled, Bruce brought this action. App. 50-56. Bruce maintains he has not received all disbursement documents needed to fully assess what the Trust has done. App. 50-56. While a “box of accountings” was delivered, they only contained summaries and IRS filings, not the specifically requested detailed disbursement accountings that were requested numerous times. App. 50-86, 126-29. The actual disbursement accountings have not been provided to date.

[¶9] Based on the misrepresentations to Bruce, he signed the stipulation. He did not consent, however, to the terms of the stipulation because of the misrepresentation. Bruce also understood that he could object to the stipulation within the time frame provided in the Stipulations. App. 129-30, 159-60. Bruce objected within this time frame. App. 41-49. Further, as a beneficiary, he was unduly influenced into executing the stipulations. The Court should reverse the district court’s decision not to grant Bruce’s motion to vacate and remand the matter for trial.

STANDARD OF REVIEW

[¶10] This Court has outlined the standard for review of a motion to vacate under N.D.R.Civ.P. Rule 60(b):

It is within the trial court’s discretion whether to grant or deny a motion to vacate. Absent an abuse of this discretion, we will not set aside the trial court’s decision on appeal. A trial court abuses its discretion if it acts in

an arbitrary, capricious, or unreasonable manner, or if it misinterprets or misapplies the law.

Filler v. Bragg, 1997 ND 24, ¶ 9, 559 N.W.2d 225. Rule 60 is to be interpreted to accomplish justice and it should be liberally construed. *City of Wahpeton v. Drake-Henne, Inc.*, 228 N.W.2d 324, 330 (N.D. 1975). Yet when “the judgment sought to be set aside is entered pursuant to a stipulation of the parties”: “the party challenging the judgment under Rule 60(b), N.D.R.Civ.P, has the additional burden of showing that under the law of contracts there is justification for setting the contract aside.” *Peterson v. Peterson*, 555 N.W.2d 359, 361 (N.D. 1996). And relief under Rule 60(b)(6) “is not to be used to relieve a party from free, calculated, and deliberate choices he has made.” *Drake-Henne, Inc.*, 228 N.W.2d at 330 (quoting *Hefty v. Aldrich*, 220 N.W.2d 840 (N.D. 1974)).

LAW AND ARGUMENT

[¶11] Bruce’s motion to vacate should have been granted for the following reasons: 1) lack of mutual assent, 2) misrepresentation by the opposing party, and 3) undue influence. Bruce moved to vacate under North Dakota Rules of Civil Procedure Rule 60(b)(3) and (6), which provide:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

* * *

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

* * *

(6) any other reason that justifies relief.

The motion was timely. N.D.R.Civ.P. Rule 60(c)(1).

[¶12] The rules governing contract formation and interpretation apply to settlement agreements. See *Kuperus v. Willson*, 2006 ND 12, ¶ 11, 709 N.W.2d 726 (“A

settlement agreement is a contract that either party may enforce, and the parties' rights and responsibilities are limited by the terms of the agreement."); *Bohlman v. Big River Oil Co.*, 124 N.W.2d 835, 837 (N.D. 1963) ("Where a controversy between parties is settled before trial, and where the settlement is fairly made, the stipulation takes on the character of a contract between the parties and is final and conclusive, and based on good consideration."). This Court has concluded that oral settlement agreements can be enforceable. *Bohlman*, 124 N.W.2d 835; *Matter of Estate of Hedstrom*, 472 N.W.2d 454 (N.D. 1991).

[¶13] However, the mere fact that settlement was discussed on the record does not make the agreement an enforceable contract. General contract principles apply to determine whether a record discussion of settlement created an enforceable contract. Assuming there is an enforceable settlement agreement, general contract interpretation principles apply to determine how that agreement should be construed. Here, under the applicable contract formation principles, no contract was formed because of lack of mutual assent, misrepresentation, and undue influence.

I. The Judgment Should Be Vacated For Lack of Mutual Assent

[¶14] A contract cannot be formed unless the parties mutually agree as to all of the essential terms of the contract. *Stout v. Fisher Indus., Inc.*, 1999 ND 218, ¶ 11, 603 N.W.2d 52. In *Stout*, this Court described the requirements for making a valid and enforceable contract as follows:

A contract requires parties capable of contracting, consent of the parties, a lawful object, and sufficient consideration. N.D.C.C. § 9-01-02. The parties' consent must be free, mutual, and communicated to each other. N.D.C.C. § 9-03-01. "Consent is not mutual unless the parties all agree upon the same thing in the same sense." N.D.C.C. § 9-03-16. "[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, *Delzer v. United Bank*, 459 N.W.2d 752, 758 (N.D. 1990), “so as to ascertain what is required of the parties,” *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. *Mag Constr. Co. v. McLean County*, 181 N.W.2d 718, 721 (N.D. 1970).

Stout, at ¶ 11.

[¶15] “[A]n agreement does not become a binding and enforceable contract until the requirements for the existence of a contract are met.” *Northern Oil & Gas, Inc. v. Creighton*, 2013 ND 73, ¶ 17, 830 N.W.2d 556. “A contract requires parties capable of contracting, [mutual] consent of the parties, a lawful object, and sufficient consideration.” *Ehlen v. Melvin*, 2012 ND 246, ¶ 9, 823 N.W.2d 780 (citing *Stout*, 1999 ND 218 at ¶ 11; and N.D.C.C. § 9-01-02). Consent must be mutual and it is “not mutual unless the parties all agree upon the same thing in the same sense.” N.D.C.C. § 9-03-16. “To form a contract, the offer and acceptance must express assent to the same thing.” *Ehlen*, at ¶ 11.

[¶16] The court trial transcript reflects Bruce voiced issues with the information/documentation he had requested from the Trustee not being provided when the district court questioned him over the stipulations:

The Court: And, Bruce, you are represented by Mr. Delmore. You can certainly ask him any questions, but you understand the terms of the stipulation, and you’re in agreement with the stipulation that’s been signed?

Mr. Harris: I understand the terms of it, yes. My concern was that I have not been provided records and requested repeatedly the information that we were provided was never the entire information related to the topic that we asked for, and it’s just been like pulling teeth to try get in, understand what’s happening, review.

The Court: Okay - -

Mr. Harris: We're all in the same business the three of us, and we're all in our areas of expertise recognize but my concern is that after repeated requests for accountings, repeated requests for things, they were not being provided even in discovery or what happened.

The Court: Without knowing or getting into the nature and extent of the types of records you're talking about, you do understand, I think everybody understands, that you do have a right to review the records under the stipulation.

Mr. Harris: Yes, I do. The problem in part is I live in Montana now. It's very expensive for me to come back here and after much trips back to do the reviews, I have not reviewed anything yet in spite of what's been represented by the other side.

The Court: Okay. Thank you. Well, based on those representations, the Court will accept the stipulations, and we'll grant the petition for an order approving accounting and then if you will prepare an appropriate order in both of these matters, I will sign those orders.

Dkt. 139, Transcript of Court Trial, pp. 12-13.

[¶17] The Court should read these statements in a liberal fashion as Bruce was essentially objecting to the Stipulations and insisted that issues that were relevant to the Petition against the Trust were not being addressed. Applying a liberal interpretation to the statements, certainly Bruce is not giving a glowing or affirmative review of the Stipulations in question. Also, Bruce understood he had little choice to sign the Stipulations because he understood from his attorney that he would be held in contempt of court if he did not execute them. App. 134-35.

[¶18] Bruce did not date the Stipulations and they were dated by the Trust's attorney. App. 130. Bruce testified he understood the Stipulations would not be provided to the Trustee until after the terms were fulfilled. *Id.* Instead, Bruce testified that the Trustee's attorney dated the stipulations and filed them with the district court. *Id.* This is evidence of lack of assent to a contract. And a judgment was signed before the period of

time to object expired. App. 33-37. And very soon after this occurred, Bruce objected by filing a motion to vacate and an objection to the trust accountings. App. 41-86.

[¶19] Bruce testified his understanding of the Stipulations was that he could object to them if after receiving the documentation required under paragraphs 10 and 2 was unsatisfactory. App. 24-26, 129-30, 159-60. Bruce did object within the time constraints. App. 41-49. While this objection occurred after the Stipulations were executed, Bruce was led to believe at the time the Stipulation was executed that this provision would allow the Stipulation to be invalidated if the required information was objectionable and unsatisfactory to Bruce. App. 129-30, 159-60.

II. The Judgment Should Be Vacated for Misrepresentation

[¶20] Bruce has requested information from the Trustee, but the replies received are that the documentation or information has previously been provided. There has been no specific statement by the Trustee as to when the full version of the IRS Form 706, inclusive of all attachments to the document, have been provided. Bruce continues to maintain he has not received this document. No evidence in response has been provided by the Trustee that he has received it—only general statements that prior attorneys were provided with the document. Bruce was induced into signing this stipulation based on misrepresentations by the Trustee that the requested information would be provided. It still has not been provided and this is grounds for rescission of a contract under N.D.C.C. 9-09-04.

[¶21] Bruce has outlined specific instances of fraud that induced him into signing the Stipulations. App. 50-56. The affidavit of Terry Harris, which Bruce relied on by signing the stipulation, contains incorrect statements. App. 58-60, 157. And the leasing

of Turmoil minerals by Twin City Technical, which is a company controlled by Terry Harris, is at least evidence that raises the specter of bias and untoward relations between the Trustee and other beneficiaries of the Trust. App. 157. The Stipulation provides at paragraph 4 that nothing has been sold, assigned, transferred, or conveyed. App. 23. The affidavit of Terry Harris states at paragraph 5 that he has no knowledge of any Trust interests being transferred from the corpus of the Trust, other than transfers to the family limited partnership and “minor ‘curative’ conveyances.” App. 21. But the leases from Turmoil to Twin City Technical do transfer assets of the Trust—which was addressed in briefing and through testimony of Bruce. App. 63, 157. The representation that no transfers have occurred is a misrepresentation and was relied on by Bruce in signing the Stipulations. Bruce has requested checks be provided to him, but the Trustee has not provided these checks to date. App. 128. Bruce did attempt to subpoena the Trustee’s CPA, but this was resisted by the Trustee. Dkt. 83-85. These representations were relied on and are the basis of Bruce’s claim of being fraudulently induced into executing the Stipulations.

III. The Judgment Should Be Vacated for Undue Influence

[¶22] North Dakota law presumes “[a] transaction between a trustee and the trust’s beneficiary during the existence of the trust . . . is presumed to be entered by the trust’s beneficiary without sufficient consideration and under undue influence.” N.D.C.C. § 59-18-01.1; *See, e.g., In re Estate of Bartelson*, 2015 ND 147, ¶ 16, 864 N.W.2d 441; *Dahly v. Anderson*, 2012 ND 183, ¶ 13, 820 N.W.2d 719. The burden is on the Trustee to rebut this presumption. Bruce has presented ample evidence by way of testimony and documentation in these proceedings in addition to the base presumption of invalidity of a

contract between a beneficiary and a trustee. The Trustee has not rebutted this presumption.

[¶23] Because of this statutory presumption, the Stipulations should be invalidated and the Judgment vacated pursuant to N.D.R.Civ.P. Rule 60(b)(3) or (6). This is especially true here because the Stipulations provide for adverse action to be taken against Bruce—for example, requiring Bruce to pay legal fees if he challenges the Trust and does not prevail. App. 24 (¶9). This is contrary to any provision in law and contrary to any provision in the Trust itself. The Stipulation would also automatically have a new Trustee named if the current Trustee was incapacitated or passes away, without further notice or adherence to the terms of the Trust, that are contained in the Will, or Century Code. App. 23 (¶ 7).

[¶24] The statutory presumption of undue influence is even greater when a contract contradicts state law. Bruce has on numerous occasions requested basic accountings from the Trust. This information is required to be provided pursuant to statute. *See* N.D.C.C. 59-16-13 (requiring Trustee to beneficiaries who request it a report of the trust property, liabilities, receipts, and disbursements, a list of trust assets and, if feasible, market values). Bruce should not have to actually make these requests over and over, as it should be provided to him as a beneficiary to the Trust pursuant to state law.

[¶25] Now, the Trustee has attempted to place additional encumbrances on Bruce receiving accountings provided in statute by contract. For example, the Trustee indicates Bruce will have to pay a security guard if he reviews Trust accountings, pay a fee to make copies, and have an accountant sign a confidentiality agreement to even review Trust documentation. Because Paragraphs 7 and 9 of the Stipulation are contrary to the

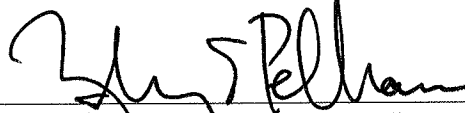
requirements under N.D.C.C. § 59-16-13, the entire contract is void because there is no severability clause. The Stipulation is void because it explicitly contravenes statute and the public policy elucidated by the Legislature. And it is further evidence of the undue influence presumed under N.D.C.C. § 59-18-01.1.

CONCLUSION

[¶26] For all the reasons set forth above, this Court should reverse the district court's decision to uphold the judgments entered under the stipulations and remand the matters for further proceedings.

Dated this 1st day of June, 2016.

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Mary K. Harris, Respondent and Appellee)

AFFIDAVIT OF SERVICE

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

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 1st day of June, 2016, she mailed a copy of the foregoing *Appellant's Brief* and *Appellant's Appendix* by placing a true and correct copy thereof in an envelope, addressed to the following:

Mr. David A. Tschider
Tschider & Smith
418 E. Rosser Ave., Ste. 200
Bismarck, ND 58501-4046

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Annette Kirschenheiter
Annette Kirschenheiter

Subscribed and sworn to before me this 1st day of June, 2016.

DAYNA BARONE
Notary Public
State of North Dakota
My Commission Expires October 10, 2018

Dayna Barone
Notary Public