

IN THE SUPREME COURT OF THE
STATE OF NORTH DAKOTA

Louise Broten & Linda Schuler,)
in their individual capacity & as)
Co-Personal Representatives of the)
Estate of Helen Broten, deceased,)
))
Plaintiffs and Appellees,)
))
vs.)
))
James Broten, in his individual capacity,)
& as Personal Representative of the)
Estate of Olaf Broten, deceased,)
))
Defendant and Appellant.)

Supreme Court File No. 20160151

Appeal from the District Court’s Second Amended Judgment dated February 26, 2016, by
the Barnes County District Court, Southeast Judicial District, The Honorable Jay Schmitz
presiding.

APPELLANT’S REPLY BRIEF

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INTRODUCTION

[¶1] The district court erred when it concluded Defendant James Broten (“James”) had not shown he was entitled to restitution for the payments of living expenses and in-kind interest payments to Olaf Broten (“Olaf”) and Helen Broten (“Helen”) (collectively, the “Parents”). James has proven the elements of unjust enrichment and is entitled to restitution. The district court’s order is not support by the record and lacks legal support. This Court should reverse the district court and order \$342,054.52 be deducted from the Second Amended Judgment.

LAW AND ARGUMENT

I. James is entitled to restitution for the payments of personal expenses and interest.

[¶2] A party barred by the Statute of Frauds from recovering on a contract may be entitled to restitution. Smestad v. Harris (“Smestad II”), 2012 ND 166, ¶ 13, 820 N.W.2d 363. “Where an implied-in-law contract is asserted, the question is not merely what is or is not the case but, rather, what in equity ought to be the case.” Matter of Estate of Zent, 459 N.W.2d 795, 800-01 (N.D. 1990) (citations omitted). The elements of unjust enrichment are (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4) absence of a justification for the enrichment and impoverishment, and (5) an absence of a remedy provided by law. Smestad II, 2012 ND 166, ¶ 16; 820 N.W.2d 363. When recovery is barred by the statute of frauds, the losing party is entitled to restitution because it would be “unjust to permit [the landowner] to

retain payments or services that he has received and to transfer nothing in return.”

Montanaro Bros. Builders v. Snow, 460 A.2d 1297, 1301 (Conn. 1983).

[¶3] In this case, James is entitled to restitution for all of the payments made to or on behalf of his Parents. Olaf and Helen received significant benefits and payments from James. It would be unjust to allow Helen’s Estate to retain these payments and to receive the full fair market value for the land without also giving James restitution.

A. Olaf and Helen were enriched by James’s payments.

[¶4] The enrichment element focuses on whether the recipient received a valuable benefit. See, e.g., Zent, 459 N.W.2d at 800 (discussing the benefit decedent received through care of a friend). Olaf and Helen were enriched because James paid a majority of their living expenses for thirty years. Olaf and Helen had other income and could have paid these expenses, but they did not have to because James did. They were also enriched by the in-kind interest payments. Therefore, Olaf and Helen received a benefit from these expense and interest payments.

1. James has proven he paid Olaf and Helen’s expenses and proven a reasonable amount of those expenses.

[¶5] Louise attacks James’s evidence of the payment of his Parents’ living expenses. However, she relies on the same misstatements from the record as the district court. Exhibit D-1 summarized the living expenses James paid and was supported by other documentary evidence and testimony. Louise conceded at trial that she had reviewed Helen’s checking account statements and that Helen had not paid the expenses for which James is claiming restitution. (6/17/13 Trial Tr., p. 93, ll. 17-20; p. 96, ll. 14-25; p. 97, ll.

14-24). As explained in paragraphs 27 through 30 of James's Appellant's Brief, the district court's criticism of Exhibit D-1 relies on misstatements of the record.

[¶6] Louise states the Court made no finding that James made actual payments. This statement is incorrect. At trial Louise conceded that Helen's bank statements did not show payment of any of the living expenses for which James has claimed restitution. (6/17/13 Trial Tr., p. 93, ll. 17-20; p. 96, ll. 14-25; p. 97, ll. 14-24). The district court found James paid his Parents' living expenses but did not find what amount. (App. 64-65, ¶¶24, 26). This Court affirmed that finding. Brotten v. Brotten, 2015 ND 127, ¶ 23, 863 NW2d 902. James's testimony and exhibits were the only evidence in the record of the amount James paid.

2. James may receive restitution for the in-kind interest payments he made to Olaf.

[¶7] With respect to the interest payments, Louise relies on the same misstatement of the record as the district court: James and Olaf "moved things around." James did not testify he and Olaf "moved things around." James testified he and Olaf "moved inventory around." (App. 21-22; Deposition of James Brotten, [11/29/11] pp. 32-34). James did not make actual cash payments because he moved inventory to Olaf. (App. 21-22; Deposition of James Brotten, [11/29/11] pp. 32-34). He would sell his grain in Olaf's name or give the grain to Olaf to sell, (6/17/13 Trial Tr., p. 172, ll. 16-25; p. 173, l. 1), and he would sell hay and have the money paid to Olaf. (6/17/13 Trial Tr., p. 173, ll. 21-25). These inventory transfers were not cash payments but were income and were reported as interest for the land on their tax returns. Louise does not explain why in-kind

payments rather than cash cannot be reimbursed through restitution. In-kind payments would be within the broad remedial purpose of restitution.

3. The transfers from Helen’s bank account do not preclude restitution.

[¶8] Louise claims Olaf and Helen were not enriched because James transferred money between Helen’s bank accounts and his own, which Louise characterizes as “egregious.” (Appellee’s Brief at ¶ 19). Louise conceded at trial these transfers were with Helen’s knowledge and consent. (6/17/13 Trial Tr., p. 85, ll. 2-5); (App. at 64, ¶ 23). These transfers cannot be “egregious” if they were made with Helen’s knowledge and consent and do not preclude restitution. The transfers were less than payments James made for Olaf and Helen’s benefit. At most, the unpaid portion of the transfers would be an offset against James’s restitution. The transfers do not mean Olaf and Helen did not receive a benefit.

B. James has been impoverished by the payments to his Parents.

[¶9] As in Smestad II, James’s in-kind payments and payment of living expenses meant James no longer had the benefit of his property and money, which is an impoverishment. Louise contends James is not accounting for the benefits he received. Louise’s argument is contrary to Smestad II.

1. Any assistance James may have received from his Parents does not preclude restitution.

[¶10] Louise argues the transfers James made from Helen’s bank account and James’s use of Helen’s CDs as loan collateral preclude any restitution because James received a

benefit. Her argument is not supported by any authority. The transfers from Helen's account would at most reduce James's restitution.

[¶11] Helen argues James was not impoverished because, "James had use of the Subject Property since June 16, 2010, and kept all income derived therefrom which should have been paid to the Estate of Helen Broten." (Appellee's Brief at ¶ 20). James has been ordered to pay \$103,054 rent for that time period. (App. 72 at ¶4). Helen's Estate has been compensated for James's use of the land.

[¶12] Any benefits James may have received from farming with his father also benefitted Olaf and does not prohibit restitution. James and Olaf shared each other's equipment. (6/17/13 Trial Tr., p. 244, ll. 3-9). James also contributed labor that helped with Olaf's operation. (6/17/13 Trial Tr., p. 245, ll. 1-4). This shared work offsets and does not prohibit James from receiving restitution.

2. James was impoverished by the in-kind interest payments he gave to Olaf.

[¶13] Louise argues the in-kind payments were not an impoverishment because James "had no idea how they came up with the number of \$12,000." (Appellee's Brief at ¶ 21). Louise is taking James's testimony out of context. James testified that his attorney prepared the written Contract for Deed and that he did not know why his attorney structured the written Contract for Deed with \$12,000 interest payments. (6/17/13 Trial Tr., p. 123, ll. 18-20). Although James did not know why his attorney included this amount of interest James and Olaf used this amount for their in-kind payments, and these payments support the connection of the in-kind payments to the land.

3. Louise’s reliance on a claimed partnership between Olaf and James does not preclude restitution.

[¶14] Louise argues James was not impoverished because of the purported farm partnership he had with Olaf. James disputes he was part of a partnership with Olaf. The district court noted during oral argument on remand that Olaf and James’s work together was “not in partnership, that’s too strong a word” (12/18/16 Tr., p. 42, l. 13). A de facto partnership was the alternative hypothesis on which the district court relied when holding James had not shown an oral contract under the doctrine of part performance. (App. 67, at ¶ 29(c)). The district court acknowledged Olaf and James were not partners but still provided James no restitution.

[¶15] Furthermore, a partner does not generally pay the personal living expenses of another partner. James should not be expected to pay Olaf’s personal living expenses while Olaf retained the income from his farming operation. James was providing a benefit to his Parents by paying their expenses and additional in-kind payments above and beyond what would be expected of a partner.

C. Olaf and Helen’s enrichment and James’s impoverishment are connected with no other justification.

[¶16] The enrichment and impoverishment are connected. If James had not paid the living and home expenses, Olaf and Helen would have had to pay them or choose going without. James testified he paid Olaf and Helen’s expenses contemplating it was for the land. (6/17/13 Trial Tr., p. 127, ll. 18-23).

[¶17] For the in-kind payments, Olaf and Helen’s tax returns indicate the interest payments were connected to the land and were from James. (App 43, 51, 59). The

\$12,000 amount is also consistent with the \$12,000 interest payments required in the Contract for Deed, showing the payments are connected to the land. (App. 26-29).

[¶18] The enrichment and impoverishment cannot be justified by any other reason. There is no evidence in the record indicating James's ongoing payments to Olaf and Helen were a gift. The district court acknowledged James and Olaf were not part of a partnership. (12/18/16 Tr., p. 42, l. 13). It would be fundamentally unfair for Olaf and Helen to receive the benefit of these expenses and in-kind payments without James receiving credit for the value of these benefits.

D. James has no other remedy at law.

[¶19] The operation of the statute of frauds leaves a party without a remedy at law. Smestad II 2012 ND 166, ¶ 18, 820 N.W.2d 363. Not awarding restitution to James will permit Olaf and Helen to retain James's payments, to receive the full fair market value of the land, and to give up nothing in return. This is unfair and contrary to the law regarding restitution.

[¶20] As in Smestad II, James's claim for restitution arose after the district court found the transfer of the land was barred by the statute of frauds. James would not seek restitution from his Parents when he thought he would receive the land. Louise argues James had other remedies at law: (1) Olaf's probate; (2) a claim against Helen's Estate; and (3) a lawsuit against his Parents. However, these proceedings would not have been ripe. If James had prevailed in this case under the doctrine of part performance, he would not receive restitution. James has litigated restitution throughout this case as noted by this Court. James has no remedy other than the equitable restitution.

CONCLUSION

[¶21] For the reasons set forth above, James Broten asks this Court reverse the district court's Memorandum Opinion and Order and order \$342,054.52 be deducted from the Second Amended Judgment.

Dated this 9th day of September, 2016.

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**CERTIFICATE OF SERVICE
BY ELECTRONIC MEANS**

I, RACHEL STALLMAN, hereby certified that on the 9th day of September, 2016, I served the following document on appellee by electronic means by forwarding it to appellee's attorney at dsmith@smithbakke.com:

APPELLANT'S REPLY BRIEF

/s/ Rachel Stallman

Rachel Stallman