

APR 13 2017

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

Gary Kramlich and Glory Kramlich,)
)
Plaintiffs, Appellants and Cross-Appellees,) Supreme Court No. 20160386
)
-vs-) District Court No. 51-2014-CV-00478
)
Robert Hale and Susan Hale, individually,)
Somerset Court Partnership, Bullwinkle)
Builders, LLC, Somerset-Minot, LLC,)
Vision Management Services, LLC)
and ~~Spectrum Care, LLC~~)
)
Defendants, Appellees and Cross-Appellants.)

BRIEF OF APPELLANT-CROSS APPELLEES

Appeal from the District Court Order Dated November 8, 2016
In and for the County of Ward, State of North Dakota
North Central Judicial District
Honorable Douglas L Mattson, Judge of the District Court, Presiding

Michael M. Ward, ND Bar ID #02830
Martin Law
Heritage Place
201 South Main Street, Ste. 200
Minot, ND 58701
(701) 852-4837
Mike.9273@yahoo.com
Attorney for Appellants-Cross Appellees

TABLE OF CONTENTS

Table of Authorities	Page 3
Statement of the Issues	Paragraph 1
Statement of the Case	Paragraph 3
Statement of Facts	Paragraph 6
Argument and Authorities	Paragraph 7
Conclusion	Paragraph 22

TABLE OF AUTHORITIES

Cases:	Paragraph:
<u>Barry v. Truax</u> , 13 ND 131, 99 NW 769 (1904)	¶18, ¶19
<u>City of Bismarck v. Altevogt</u> , 353 NW 2d 760 (ND 1984)	¶19
<u>Grynberg v. Dome Petroleum Corp.</u> , 1999 ND 167, 599 NW 2d 261	¶13
<u>Interest of R.Z.</u> , 415 NW 2d 486, (ND 1987)	¶19
<u>Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc.</u> , 541 NW 2d 432, (N.D. 1995)	¶13
<u>Ohio Farmers Ins. Co. v. Dakota Agency, Inc.</u> , 551 NW 2d 564, (ND 1996)	¶13
<u>Riemers v. Eslinger</u> , 2010 ND 76, 781 NW 2d 632	¶17
<u>Schwarz v. Gierke</u> , 2010 ND 166, 788 NW 2d 302	¶9, ¶11, ¶13
<u>Smith v. Kunert</u> , 17 ND 120, 115 NW 76 (1907)	¶18, ¶19
<u>State ex rel. Stenehjem v. Philip Morris, Inc.</u> , 2007 ND 90, 732 NW 2d 720	¶13
<u>26th Street Hospitality v. Real Builders</u> , 2016 ND 95, 879 NW 2d 437	¶12
 Constitutions:	
North Dakota Constitution Article I Section 13	¶18, ¶19
North Dakota Constitution Article I Section 7 (1889)	¶18, ¶20
 Statutes:	
N.D.C.C. Chapter 32-29.3	¶10
N.D.C.C. § 32-29.3-06(2).	¶10
N.D.C.C. § 9-07-03	¶13
N.D.C.C. § 9-07-04	¶13
N.D.C.C. § 9-07-06	¶13
N.D.C.C. § 9-07-09	¶13

STATEMENT OF THE ISSUES

- [¶1] Whether the District Court erred as a matter of law in extending a binding arbitration agreement in the Appellee business entities to Somerset Court Partnership when said agreement was not stated, specified, or included in the formation documents of Somerset Court Partnership—which entity contained the majority of Appellants’ investment?

- [¶2] Whether the District Court has violated the Plaintiffs’ right to a trial by jury in this matter in dismissing the instant case into binding arbitration?

STATEMENT OF THE CASE

[¶3] This matter comes before the Court on direct appeal of the lower court's Order dated November 8th, 2016, (ROA #248; App. p.10), which addressed a number of pending motions made by the Appellees including a motion to dismiss this matter into binding arbitration.

[¶4] A timely Order for Transcripts and Notice of Appeal, dated November 23rd, 2016, were filed with the Clerk of the District Court in and for Ward County on November 30th, 2016, respectively. (ROA #249 and #250: App. p. 10)

[¶5] A Motion for Enlargement of Time, dated February 24th, 2017, was submitted by Michael M. Ward, ND Bar ID #04636, to the Clerk of the Supreme Court and docketed on February 27th, 2017, at docket entry # 19, allowing until March 31st, 2017, for the preparation and filing of Appellants' Brief and Appendix.

REVISED STATEMENT OF FACTS

[¶6] The parties hereto have essentially stipulated, on April 7, 2015, that the filings made by them prior to that date at the motion hearing before the Court would serve as the factual evidentiary basis for consideration of the oral arguments that were presented on April 7 and 8, 2015 and on August 12, 2016. (App. p. 69, l. 18-25; p.70, l. 11-18), the latter of which resulted in the lower court's order on appeal before this Court. As such, Appellants rest on the facts as set forth in the lower court's Order vis-à-vis the issues on appeal. (App. pp. 57 - 66)

[¶6 (a)] The essence of the matter on review before the Court turns on the non-existence of a binding arbitration clause in the entity Somerset Court Partnership. While the lower court acknowledged this non-existence, (App. p. 62, paragraph 22), it still acted to impose arbitration upon the parties over the dispute regarding this particular business entity. Appellants acknowledge that arbitration clauses existed in the operating agreements for some of the other entities, but stand on the absence of the same for Somerset Court Partnership.

[¶6 (b)] Further, Somerset Court Partnership is the entity that holds title to the vast majority of the assets at stake in the instant case, in excess of ninety percent (90%), and to impose arbitration where it was not contracted for by the parties in that particular entity is comparable to the tail wagging the dog. (App. p. 63, paragraph 29).

[¶6 (c)] Finally, the Appellants exercised their right to a trial by jury in the instant case by properly stating the same in the Complaint herein. ((ROA #5, App. p. 28).

ARGUMENT AND AUTHORITIES

[¶7] 1. The District Court erred as a matter of law in extending a binding arbitration agreement in the Appellee business entities to Somerset Court Partnership when said agreement was not stated, specified, or included in the formation documents of Somerset Court Partnership—which entity contained the majority of Appellants’ investment.

[¶8] Despite the existence of over two hundred and sixty-plus docket entries in the instant case, the matters on appeal before this Court are relatively straightforward. It may well have been the sheer amount of motions, arguments and documentation presented below that resulted in a decision that simply resolved the matter insofar as the lower court was concerned.

[¶9] The lower court decided to take an Alexandrian approach to the Gordian knot that the instant case presented in the interlocking business entities with their different contractual provisions and cut to the quick by ruling that the parties hereto would be required to undergo binding arbitration, even while acknowledging that one entity particular—Somerset Court Partners-Minot—“does not contain an arbitration provision.” Appendix p. 62, paragraph 22. In doing so, the lower court relied upon this Court’s holding in the case of Schwarz v. Gierke, 2010 ND 166, 788 NW2d 302, which provided that:

[¶10] [¶11] Chapter 32-29.3, N.D.C.C., contains the North Dakota Uniform Arbitration Act. **When an arbitration clause is at issue, “[t]he court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.”** N.D.C.C. § 32-29.3-06(2). (Emphasis added).

[¶11] Counsel contends that the lower court read this language too broadly, not in interpretation of an ambiguous provision of the agreement of the parties, but in the imposition of a provision that did not exist at all in the formation documents of the entity

at issue. There was no arbitration clause at issue in Somerset Court Partnership, the lower court “bootstrapped” this Court’s holding in Schwarz, supra, in order to impose a contractual provisions that was not agreed to by the parties at the formation of the business entity.

[¶12] Counsel submits that the action of the lower court more squarely fits with the fact pattern and rationale this Court set forth in the case of 26th Street Hospitality v. Real Builders, 2016 ND 95, 879 NW 2d 437, wherein the Court stated that:

[¶13] [¶11] **An order granting a motion to compel arbitration is reviewed de novo on appeal, unless the district court's decision was based on factual findings, which will only be reversed on appeal if they are clearly erroneous.** See Schwarz v. Gierke, 2010 ND 166, ¶ 11, 788 N.W.2d 302. In this case, the district court's decision **does not rest upon any factual findings; rather, it is based on the court's interpretation of the Partnership Agreement. The interpretation of a written contract to determine its legal effect is a question of law, which is fully reviewable on appeal.** *Id.* We have summarized the rules for construing contracts: Contracts are construed to give effect to the **mutual intention of the parties at the time of contracting.** N.D.C.C. § 9-07-03; Lire, [Inc. v. Bob's Pizza Inn Restaurants, Inc., 541 N.W.2d 432, 433-34 (N.D. 1995)]. **The parties' intention must be ascertained from the writing alone, if possible.** N.D.C.C. § 9-07-04; Lire, at 434. A contract must be construed as a whole to give effect to each provision if reasonably practicable. N.D.C.C. § 9-07-06; Lire, at 434. . . . Words in a contract are construed in their ordinary and popular sense, unless used by the parties in a technical sense or given a special meaning by the parties. N.D.C.C. § 9-07-09. If the parties' intention in a written contract can be ascertained from the writing alone, the interpretation of the contract is a question of law for the court to decide. Ohio Farmers Ins. Co. v. Dakota Agency, Inc., 551 N.W.2d 564, 565 (N.D. 1996). State ex rel. Stenehjem v. Philip Morris, Inc., 2007 ND 90, ¶ 14, 732 N.W.2d 720 (quoting Grynberg v. Dome Petroleum Corp., 1999 ND 167, ¶ 10, 599 N.W.2d 261). (Emphasis added).

[¶14] The lower court did not make a factual finding of the existence of a binding arbitration provision in the Somerset Court Partnership formation documents—in fact the contrary was expressly found in that Somerset Court Partners-Minot—“does not contain an arbitration provision.” Appendix p. 62, paragraph 22. There was no mutual intention

of the parties expressed in the formation agreement to submit to binding arbitration—the lower court just included one *sua sponte*. The lower court did not stay within the bounds of the formation agreement—it imposed a provision of binding arbitration where one simply did not exist.

[¶15] 2. The District Court has violated the Plaintiffs' right to a trial by jury in this matter in dismissing the instant case into binding arbitration.

[¶16] The Appellants had specifically exercised their right to a trial by jury in this matter, demanding a jury of nine (9) at the conclusion of the Complaint herein. (ROA #5, App. p. 28). The actions of the lower court, in dismissing this matter into binding arbitration absent the prior agreement of the parties to the same in the contract or formation documents of Somerset Court Partnership, has violated the Appellants right to have the factual matters herein determined through the adversary process before a fair and impartial jury.

[¶17] This Court has had occasion to speak of the importance of such a demand, and of the primacy of the right to a trial by jury in our judicial system. In the case of Riemers v. Eslinger, 2010 ND 76, 781 N.W.2d 632, this Court stated that:

[¶18] [¶8] The Constitution of North Dakota provides: "The right of trial by jury shall be secured to all, and remain inviolate." N.D. Const. art. I, § 13 (formerly § 7). This provision deprives the legislature **and courts of all authority "to destroy by legislation or by judicial construction any of the substantial elements of the right of jury trial . . ."** Barry, 13 N.D. 131, 99 N.W. at 770. "[T]he framers of the Constitution intended by the adoption of said provision to preserve and perpetuate the right of trial by **jury as it existed by law at and prior to the adoption of the Constitution.**" Smith v. Kunert, 17 N.D. 120, 115 N.W. 76, 77 (1907). See also Barry, at 771 ("The fact that the Constitution secures 'the right of trial by jury' by simply declaring it . . . is significant . . . of an intent [by the drafters] to merely perpetuate the right as it then existed and was known to the people who gave to the Constitution their approbation."). (Emphasis added).

[¶19] [¶9] As a result, "the right of trial by jury which is secured by the Constitution is the right of trial by jury with which the people who adopted it were familiar . . . as defined by the statutes which existed prior to and at the time of the adoption of the Constitution." Barry, 99 N.W. at 772. See also Interest of R.Z., 415 N.W.2d 486, 488 n.1 (N.D. 1987) ("We have said that [a]rt. I, § 13 **preserves the right to jury trial in all cases in which there was a right to jury trial at the time our constitution was adopted.**"); City of Bismarck v. Altevogt, 353 N.W.2d 760, 764 (N.D. 1984) (stating art. I, § 13 "preserves the right of trial by jury as it existed at the time of the adoption of our state constitution"); Smith, 17 N.D. 120, 115 N.W. at 78 (providing courts must construe the constitutional right of trial by jury "in the light of the existing practice as established by law at the time of [the state constitution's] adoption . . ."). (Emphasis added).

[¶20] While this rationale was expressed by Court in extending the right to a trial by jury in a non-criminal traffic case, it is important to note that there is no distinction drawn between the right to a jury trial in a civil action—as opposed to a criminal or traffic matter, save in the number of jurors that the Constitution of North Dakota required under the then-section 7 of the 1889 version of the document. "The right to trial by jury shall be secured to all and remain inviolate; **but a jury in civil cases, in courts not of record, may consist of less than twelve men, as prescribed by law.**" (Emphasis added).

[¶21] Counsel submits that the numerical distinction above does not serve to reduce the primacy of the right to a trial by jury under the North Dakota Constitution, and that right was violated by the actions of the lower court in the instant case. Absent a knowing, voluntary, and intelligent waiver by the Appellants of that right say—for example—by a specific binding arbitration agreement in the formation documents, the right to a trial by jury remains invoked in the instant case.

CONCLUSION

[¶22] Appellants did not agree to the inclusion of a binding arbitration agreement in the originating documents of Somerset Court Partnership. Absent that provision and the consent of the parties thereto, the lower court did not stay within the bounds of the formation agreement—it imposed a provision of binding arbitration where one simply did not exist. This is not a matter of a finding of fact supporting the actions of the lower court, but on its interpretation of the agreement which is fully reviewable by this Court on appeal. Dismissal into arbitration of the Somerset Court partnership issue was erroneous and should be overturned based upon the arguments and authorities cited herein.

[¶23] Even if this Court should somehow deem the actions of the lower court correct, there remains that the fact that the Appellants had invoked their right to a trial by jury herein, a right that cannot be destroyed by ...”by legislation or by judicial construction.” The lower court, in imposing a contractual provision that did not exist or that was even in question in the Somerset Court Partnership, has destroyed the Appellants’ right in a clear case of judicial construction. The decision of the lower court should be overturned, and the matter remanded for a trial by jury.

[¶24] Respectfully submitted this 31st day of March, 2017.

[¶25] /s/Michael Ward
Michael M. Ward, ND Bar ID #02830
Martin Law
Heritage Place
201 South Main Street, Ste. 200
Minot, ND 58701
(701) 852-4837
Mike.9273@yahoo.com

CERTIFICATE OF SERVICE

[¶ 1] The undersigned hereby certifies that true and correct copies of the above and foregoing document were, on the 13th day of April, 2017, emailed and mailed to:

Lynn M. Boughey, ND Bar ID 04046
Attorney at Law
Boughey Law Firm
Box 836
Bismarck, ND 58502-0836
701-751-1485
lynnboughey@midconetwork.com

Ms. Penny L. Miller, Esq.
Clerk of the Supreme Court
Supreme Court
Judicial Wing, 1st Floor
600 E. Boulevard Ave., Dept. 180
Bismarck, ND 58505-0530
supclerkofcourt@ndcourts.gov