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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Debra Heitkamp, as Personal Representative for the Estate of Nick Lyons, Appellant, vs. Kevin Kabella, Appellee.	Richland Co. No.: 39-2017-CV-00100 Supreme Court No.: 20180288

APPELLANT'S REPLY BRIEF

Appeal from Summary Judgment Granted in Favor of Appellee
Honorable Bradley A. Cruff, Judge of District Court
Case No. 39-2017-CV-00100
Richland County, North Dakota
Southeast Judicial District

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¶1 SUMMARY

¶2 This is a case where the landowner, Kevin Kabella (hereinafter “Kabella”), wants an outcome that is diametrically contrary to the clear language of the Agreement that he entered into with Nick Lyons (hereinafter “Lyons”). The Agreement dictates one outcome (that Lyons would have perpetual possession of the Property with the eventual right to purchase at the agreed upon sum of $72,345.00) whereas Kabella is seeking a separate one (the Agreement terminates on March 29, 2017, and that he no longer has any obligation to sell the Property to Lyons).

¶3 The purpose of a written contract is to clearly and explicitly define the parties’ intentions at the time they execute the contract. There is no ambiguity as to the parties’ intent in drafting and executing this Agreement. Kabella’s proposed interpretation violates the parties’ Agreement.

¶4 Further, this Agreement is not offensive to § 47-16-02 of the North Dakota Century Code in that the Agreement does not reserve rent for any period of time nor does it reserve payments, rent or otherwise, for a period greater than 10 years as required by this statute.

¶5 ARGUMENT

¶6 Kabella has adopted Appellant’s statement of the facts with a couple of exceptions. Appellant will respond only to the first exception: that Kabella did not intend to eventually sell the Property to Lyons. Although the language of the Land Rent Contract (hereinafter the “Agreement”) does not explicitly state as much, the only reasonable interpretation makes it clear that at some future date

the Property would be conveyed to Lyons. Any claim to the contrary is inconsistent with the parties' use of the phrase "in perpetuity." To the extent that Kabella argues he could gift or bequeath the Property, the Agreement is binding on his heirs, successors, and assigns and was recorded; placing the entire world on notice that Lyons had first right to the Property if it were ever to be conveyed.

¶7 Kabella then raises several arguments as to why the Agreement must be limited under § 47-16-02 of the North Dakota Century Code to a ten year period. Kabella is incorrect.

¶8 **A. The Payments under the Agreement were Not Rent Payments.**

¶9 The first argument raised by Kabella is that Lyons' payments constitutes rent. However, Kabella fails to provide any support for this argument and instead appears to be arguing that because the Agreement called for multiple payments, rather than a lump sum payment at the time of execution, they must be rent payments. This ignores both the form and the language of the Agreement which clearly demonstrates that the parties anticipated that Kabella would receive "the total sum of $20,670.00". (Land Rent Contract, App. p. 5). That this "total sum" happened to be split up over multiple payments does not change their characterization from installment payments to rent payments. The Wegner Court favorably cited language to this effect from a New York case: "consideration may be payable all at once, or by installments . . . ." Wegner v. Lubenow, 95 N.W. 442, 444-45 (N.D. 1903) (citing Stephens v. Reynolds, 6 N.Y. 454 (1852)).

¶10 The fact that the first payment is double that of the remaining payments is an indicator that these payments were not rent payments. The timing of the

payments is also particularly relevant in showing the parties' intention as to how these payments should be viewed. Each payment is due on or before June 1 of their respective years. This deviates from the expected arrangement wherein rent payments are typically due prior to planting, after the harvest, or some combination thereof. Instead, June 1 is squarely in the middle of the farming season, after Lyons would have expended a significant amount of time and effort in planting his crops and before he would have had the chance to harvest and market them.

¶11 Perhaps the most relevant factor to consider is that the installment payments terminate on or before June 1, 2011, when the final payment was to be made. As the Wegner Court noted, rent "must . . . issue yearly." Id. at 445. Because Lyons was to remain in possession of the Property while not being required to make further payments, the payments he did make cannot be said to have been "rent" payments. All of the above supports an interpretation that the parties did not intend for the payments to constitute rent payments. Because the Agreement did not reserve any rent, it does not violate § 47-16-02.

¶12 **B. The Agreement Does Not Violate the Statutory Language of § 47-16-02.**

¶13 Next, Kabella discusses the interpretation of the statutory language of § 47-16-02. In doing so, he acknowledges that the language of the relevant statute was changed in 1943. (Appellee's Br. at ¶ 21). He also acknowledges that the Blixt Court interpreted this statute in 1955 while, in essence, applying the statutory language as it existed prior to the 1943 revisions. (Appellee's Br. at ¶ 24) (citing Anderson v. Blixt, 72 N.W. 2d 799 (N.D. 1955)). It is Appellant's

position that the Blixt Court's decision was perhaps overbroad and not supported by the statutory language as it existed at that time.

¶14 The Blixt case, on which Kabella relies, specifically reserved annual rent. Anderson v. Blixt, 72 N.W. 2d 799, 803 (N.D. 1955). As such, the rule adopted by the Blixt Court was appropriate in determining the outcome of the Blixt case and, realistically, the majority of leases to which the Blixt test might be applied.

¶15 The Blixt analysis simply does not hold up to the facts of this case. The Agreement reserves no rent or services of any kind. Even if the payments were to be classified as rent, they were to be paid entirely in the first five years of the Agreement. Since the Agreement reserves no rent or services for a period of longer than ten years, it does not violate § 47-16-02.

¶16 Appellant's principal brief demonstrated:

> The weight of authority elsewhere holds that, absent a statutory prohibition, a perpetual lease or a right to a perpetual renewal of a lease does not violate the rule or create a restraint on alienation."

Camerlo v. Howard Johnson Co., 710 F.2d 987, 991 (3rd Cir. 1983) (citing Lonergan v. Connecticut Food Store, Inc., 168 Conn. 122, 357 A.2d 910, 913 (1975)); St. Regis Paper Co. v. Brown, 247 Ga. 361, 276 S.E.2d 24, 26 (1981); Keogh v. Peck, 316 III. 318, 147 N.E. 266, 271 (1925); 5 R. Powell, Powell on Real Property § 771[2] at 71-72 (1981); Abbot, "Leases and the Rule Against Perpetuities," 27 Yale L.J. 878 (1918); Restatement (Second) of Property, Landlord and Tenant § 1.4, Reporter's Note to Section 1.4 (1977)). Since the Agreement does not violate § 47-16-02, the Court should give effect to the

parties' intention, as stated in the Agreement, and find that the Agreement will continue into perpetuity.

¶17 Kabella cites several rules of statutory interpretation from Chapter 1-02 of the North Dakota Century Code. However, Kabella fails to apply any analysis whatsoever as to how these rules do, or should, apply to the statutory language of § 47-16-02. First, Kabella claims that clerical and typographical errors are to be disregarded. There is no indication that any such clerical or typographical errors exist. As such, this analysis is irrelevant and unnecessary.

¶18 Second, Kabella notes that under §1-02-25, earlier versions of a statute are to be used in interpreting a statute to the extent that they are "substantially the same as previously existing statutes." (Appellee's Br. at ¶ 29) (citing N.D.C.C. § 1-02-25). The two versions of the statute are not substantially the same. The relevant statutory language prior to 1943 read as follows: "No lease or grant of agricultural land for a period longer than ten years, in which shall be reserved any rent or service of any kind, shall be valid." Wegner v. Lubenow, 95 N.W. 443 (N.D. 1903). It currently reads "No lease or grant of agricultural land reserving any rent or service of any kind for a longer period than ten years shall be valid." N.D.C.C. § 47-16-02.

¶19 Shifting the language clearly changes what is being measured and prohibited. Under the pre-1943 statutory language, the Blixt analysis would be valid if the Agreement reserved rent, which Appellant denies, because the Agreement would then reserve rent **and** be for a period longer than ten years.

However, after 1943, the thing that is being measured is not the length of the lease but rather the amount of time that rent or services are being reserved.

¶20 Kabella fails to recognize the presumption that "when the legislature amends an existing statute, it indicates its intent to change the statute's meaning in accord with its new terms." State v. Beilke, 489 N.W.2d 589, 592 (N.D. 1992) (citing Bostow v. Lundell Mfg. Co., 376 N.W.2d 20 (N.D. 1985)); Linington v. McLean County, 161 N.W.2d 487 (N.D. 1968)). "The legislature is presumed to act with purpose and not perform useless acts." Id. citing State Bank of Towner v. Edwards, 484 N.W.2d 281 (N.D. 1992). Arguably, this presumption should be granted even greater weight as the statutory language upon which North Dakota's original statute was derived (New York's Constitution of 1846) had been in place for nearly 100 years.

¶21 Kabella then notes the presumption that the legislature, among other things, intends a "just and reasonable result" and that "public interest is favored over any private interest." (Appellee's Br. at ¶ 29, citing N.D.C.C. § 1-02-38). This appears to be an argument that Appellant's interpretation of the statute would create an unjust and unreasonable result. However, Kabella does not explain why. The parties entered into an agreement that granted to Lyons, and his successors, the use of the Property "in perpetuity". (Land Rent Contract, App. p. 5). In exchange for this, as well as other concessions, Lyons paid Kabella the sum of $20,670. Any other interpretation would contravene the parties' intentions, which would create a more unjust result than enforcing it.

¶22 Kabella's argument regarding the application of § 1-02-39 is inapplicable and unnecessary. Appellant denies that § 47-16-02 is ambiguous and, in fact, has argued from the beginning that it is clear.

¶23 Finally, Kabella acknowledges that there are any number of leases that fall outside of the prohibition contained in § 47-16-02 and similar statutory schemes. Those cases demonstrate that not all leases that extend beyond ten years are prohibited. Rather, it is only those very specific types of leases described in § 47-16-02. Because this particular Agreement does not fall within that statutory prohibition, § 47-16-02 does not apply to, or limit, this Agreement.

¶24 CONCLUSION

¶25 Appellant respectfully requests that the Court reverse the district court's findings that the Agreement terminated on March 29, 2017; reverse the district court's money judgment in favor of Kabella and against the estate in the amount of $12,589.48; and find that the estate has possession of the Property until such time as Kabella or his successors, heirs, and assigns offer to sell the Property to the estate for the agreed upon sum of $72,345.

Dated: December 31, 2018

/s/ Asa K. Burck

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