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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Skaw ND Precast, LLC, Plaintiff/Appellee, vs. Oil Capital Ready Mix, LLC, Agape Holdings, LLP, Scott Dyk and Samuel Dyk, Defendants/Appellants.	**Supreme Court Case No.: 20190138** **District Court Case No.: 53-2017-CV-01410**

ON APPEAL FROM THE FROM THE JUDGMENT (DOC #115) ENTERED IN THIS ACTION ON THE 4TH DAY OF MARCH, 2019, IN THE DISTRICT COURT, COUNTY OF WILLIAMS, CASE NO.: 53-2017-CV-01410, BY THE HONORABLE PAUL JACOBSON

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES 3

II. LAW AND ARGUMENT

A. APPELLANTS DID NOT WRONGFULLY CONVERT THE PERSONAL PROPERTY OF APPELLEE .....¶1

B. WHETHER THE SKAW-TIOGA AGREEMENT WAS A LEASE OR A LICENSE IS NOT IRRELEVANT .....¶7

C. APPELLEE OFFERS NO ARGUMENT TO SUPPORT THE AWARD OF COSTS FOR THE "INVESTIGATOR" .....¶13

III. CONCLUSION.....¶14

IV. CERTIFICATE OF COMPLIANCE.....¶15

TABLE OF AUTHORITIES

STATE CASES

Diocese of Bismarck Trust v. Ramada, Inc., 553 N.W.2d 760, 766 (N.D. 1993).....¶11

EOG Resources, Inc. v. Soo Line R. Co., 2015 ND 187, ¶ 24, 867 N.W.2d 308 .....¶11

Kipp v. Lipp, 495 N.W.2d 56, 57-58 (N.D. 1993) .....¶2

Lee v. North Dakota Park Serv.,
262 N.W.2d 467, 470 (N.D. 1977) .....¶9

Paxton v. Wiebe,
1998 ND 169, ¶29, 584 N.W.2d 72 .....¶5

Riverwood Commercial Park, LLC v. Standard Oil Co., Inc.,
2005 ND 118, ¶ 10, 698 N.W.2d 478 .....¶¶9, 10, 12

Thimjon Farms Partnership v. First Intern. Bank & Trust, 2013 ND 160,
¶ 27, 837 N.W.2d 327.....¶8

STATUTES

Chapter 47-32, N.D.C.C.....¶8

§ 47-16-01, N.D.C.C.....¶11

LAW AND ARGUMENT

A. APPELLANTS DID NOT WRONGFULLY CONVERT THE PERSONAL PROPERTY OF APPELLEE

[¶1] To find there was any conversion, the Court had to go beyond the pleadings to find a valid lease, which did not exist for many reasons as set forth below. This is the gravamen of this appeal and to find a valid lease was reversible error. Many of Appellee's arguments suggesting a conversion claim require a finding of a "lease," as well as a finding of wrongful self-help eviction. It should be noted that there never was a "lease", and to the extent one had existed, it was modified by the access agreement executed by both parties. See App. Index #4, pg. 31-36.

[¶2] Appellee relies on Kipp v. Lipp where this Court held a landlord changing the locks on leased property and denying the tenant access to the leased premises and property resulted in landlord being liable for conversion. Kipp v. Lipp, 495 N.W.2d 56, 57-58 (N.D. 1993). Notably, the issues on appeal in Lipp were (1) whether a landlord who illegally changed the locks was entitled to damages relating to cleaning up the property, (2) whether tenant could testify as to diminution of the value of the property, and (3) the proper assessment of exemplary damages, none of which are at issues in this case. Id. Again, Lipp is predicted on a valid lease, which did not exist in this case.

[¶3] Appellee argues that by removing the haphazardly organized inventory, pads and block to a location directly adjacent to the office building located on the property that Appellants wrongfully converted Appellee's property. In addition, Appellee points to the construction of an earthen berm around the two-acre tract, in which Appellee formerly used to produce pre – cast concrete products, in effect resulted in Appellants "changing the

locks." Because the Tioga/Skaw agreement is a license[1] and not a lease, these arguments cannot support a claim for conversion. Appellants simply moved the items to a location more readily accessible to Appellee. Appellants did not refuse Appellee access to its property, in fact, Appellants organized the property and invited Appellee to retrieve what was left behind. Much of the disagreement between the parties stemmed from what rights Appellee had to the two-acre tract, and not whether Appellee could retrieve its property.

[¶4] The first instance of Appellee demanding to retrieve their property rather than demanding entry and for Appellants to honor the Tioga/Skaw agreement came on April 8, 2016, when Attorney Chad Anderson requested at least sixty days to remove Appellee's property. See App. Index #29, pg. 93-95. A follow-up email sent April 14, 2016 from Attorney Chad Anderson indicated an inventory list was completed and Appellee would only need thirty days to remove the inventory. See App. Index #35, pg. 111. The parties negotiated an "access agreement" on April 21, 2016, that allowed until May 20, 2016, for Appellee to retrieve its inventory. See App. #41, pg. 133-136. A "Schedule A" was attached to the agreement itemizing all of the property Appellee wished to remove. Id. Appellee retrieved its inventory, and Attorney Dan Frisk indicated a willingness to gift any remaining blocks not included in "Schedule A", as Appellants maintained no interest in possessing any of the inventory on the property. See App. Index #47, pg. 144-148.

[¶5] Appellants direct the Court's attention to Paxton v. Wiebe in which this Court affirmed a lower court finding that conversion did not exist. Paxton v. Wiebe, 1998 ND 169, ¶ 37, 584 N.W2d 72. "The trial court essentially found that Wiebes did not exercise the necessary dominion or control over the personal property so as to deprive or

[1] See Section B.

interfere with Paxton's possessory rights to an actionable degree." Id. at ¶ 30. The Court concluded that Wiebes repeated requests, after Paxton expressed the intent to move, for Paxton to retrieve her property, resulted in the Wiebes never prohibiting Paxton from retrieving her property. Id. at ¶ 36.

[¶6] This case is analogous, if not identical to Wiebe. Here, the discussions between the parties up and until April 8, 2016, concerned Appellee's right to enter the property to conduct business in a manner consistent with the Tioga/Skaw agreement. It was not until Attorney Chad Anderson indicated a desire to resolve the disagreement that Appellee demanded to remove its inventory. See App. Index #29, pg. 93-95. Following that request, an access agreement detailing exactly what Appellee wished to retrieve was executed and Appellee removed its inventory. See App. Index #41, pg. 133-136. Further, the Appellants had offered to allow for the return of the blocks, even during trial. Appellee had several opportunities to retrieve its blocks, and failed to even include the blocks on the list of inventories. It is firm and definite that the trial court erred in finding that by moving the inventory to a location adjacent to the offices located on the property Appellants converted Appellee's property to a degree necessitating a forced sale.

B. WHETHER THE SKAW-TIOGA AGREEMENT WAS A LEASE OR A LICENSE IS NOT IRRELEVANT

[¶7] Appellee identifies eight facts to support the lower Court's determination that Appellants are liable for conversion of Appellee's personal property. The first fact identified is the lower Court's finding that Appellants engaged in a self-help eviction of Skaw from the land purchased by Appellant.

[¶8] This Court defines "conversion" as "the wrongful exercise of dominion over the personal property of another in a manner inconsistent with, or in defiance of, the owner's rights." Thimjon Farms Partnership v. First Intern. Bank & Trust, 2013 ND 160, ¶ 27, 837 N.W.2d 327. This definition is important because it lays the foundation for why the categorization of the Tioga/Skaw agreement as either a lease or license matters. In an attempt to achieve a showing of wrongful exercise or dominion of Skaw's personal property, Appellee points to the alleged self-help eviction of Skaw from the two-acre tract of land. For Appellants to engage in an eviction not authorized by Chapter 47-32, N.D.C.C., a lease must exist between the two parties.

[¶9] Appellants assert that the Court erred in finding the Tioga/Skaw agreement was in fact a lease that passed from Tioga to Appellants following the sale of real property. In Lee v. North Dakota Park Serv., this Court articulated the difference between a lease and a license stating, "a lease confers exclusive possession against the world and owner, unless otherwise provided, grants exclusive possession and profits, grants a corporeal hereditament or an estate in the land; whereas a license merely grants permission to use the land under certain conditions and restrictions." Lee v. North Dakota Park Serv., 262 N.W.2d 467, 473 (N.D. 1997); see also Riverwood Commercial Park, LLC v. Standard Oil Co., Inc., 2005 ND 118, ¶ 10, 698 N.W.2d 478. Appellee argues Appellants point to no evidence concerning the elements of lease, specifically whether Appellee retained the exclusive right of possession and profits of the land. An examination of the agreement reveals that Appellee is restricted to a narrow set of activities it may perform on the two-acre tract. See App. Index #4, pg. 31-36. The agreement itemizes only six uses available to Appellee. Id.

Id. Additionally, the two-acre tract is referred to as "[a]n area for production" consistent with the limitations on the use of the land. Moreover, this "area for production" is described within the agreement as "Tioga Ready Mix's manufacturing site." Id. The agreement lists that Tioga had cement bases in inventory and Appellee "may move this inventory to an out of the way location if need be." Id. Again, this language is consistent with the agreement's specified limitations on Appellee's use of the land, as well as demonstrative of Tioga's ability to retain the use of the land for storage of inventory.

[¶10] The "license" versus "lease" debate was examined in Riverwood Commercial Park, LLC v. Standard Oil Co., Inc. as well. This Court examined an agreement authorizing Standard Oil permission to "construct, operate and maintain" a sewer pipeline. Riverwood commercial Park, LLC v. Standard Oil Co., Inc., 2005 ND 118, ¶ 2, 698 N.W.2d 478. The Court found that Riverwood could not make use of eviction proceedings as a remedy to resolve its claims against Standard. Id. at ¶ 12. The Court reasoned the agreement did not grant Standard exclusive use and possession of any part of the land; rather, the agreement "merely permitted non-exclusive use of a portion of [the] land for the specific, limited purpose of maintaining a sewer pipeline." Id. at ¶ 11.

[¶11] Here, the Tioga/Skaw agreement specifically identifies that "Tioga Ready Mix's 2 acre manufacturing site will be used by Skaw's… to manufacture pre – cast concrete products." Id. The agreement does not reference the term "lease" and merely refers to the agreement as just that, an "agreement". Id. There are two notable uses of language that support a finding of license. First, the Tioga/Skaw agreement identifies the land to be used by Appellee as "Tioga Ready Mix's 2 acre manufacturing site." Id. "Under N.D.C.C. § 47-16-01, a real property lease is a 'contract by which one gives to another the

temporary possession and use of real property for reward and the latter agrees to return such possession to the former at a future time.'" Diocese of Bismarck Trust v. Ramada, Inc., 553 N.W.2d 760, 766 (N.D. 1993). "A real property lease is generally considered a contract and a conveyance of an interest in land." Id. Typical conveyance language generally indicates an intent to convey land in a specified capacity. See EOG Resources, Inc. v. Soo Line R. Co., 2015 ND 187, ¶ 24, 867 N.W.2d 308. The agreement contains no language indicating an intent to grant Appellee a possessory interest in the two-acre tract, in fact, the agreement specifically lists Appellee's limited use of "**Tioga Ready Mix's** 2 acre manufacturing site." Id. (emphasis added).

[¶12] The second instance of notable language is the above-referenced itemization of the specific uses for which Tioga authorized Appellee to use its land. Id. Much like the agreement examined in Riverwood, the Tioga/Skaw agreement merely permits the non-exclusive use of Tioga Ready Mix's two-acre manufacturing site for the specific, limited purpose of "manufactur[ing] pre – cast concrete products" as well as other miscellaneous provisions related to the manufacture of pre – cast concrete products. Riverwood, 2005 ND 118, ¶ 11, 698 N.W.2d 478, See App. Index #4, pg. 31-36. Because the Tioga/Skaw agreement contains no language conveying a possessory interest in land to Appellee, and the agreement specifically restricts Appellee's use of the land, it cannot be said that Appellee was granted exclusive possession against the world and owner, granted exclusive possession and profits, granted a corporeal hereditament or an estate in the land; rather, the agreement merely granted permission to use the land under certain conditions and restrictions. Therefore, the Court erred in finding, as a matter of fact and law, that the Tioga/Skaw agreement was a "lease," as well as erred in any finding of conversion based

upon the alleged self-help eviction of Appellee and any action supporting a finding of self-help eviction.

C. APPELLEE OFFERS NO ARGUMENT TO SUPPORT THE AWARD OF COSTS FOR THE "INVESTIGATOR"

[¶13] Lastly, the Appellee does not and cannot offer any evidence or rebuttal to the arguments set forth in Appellant's brief relating to the costs awarded for the investigator. Appellee does not do so, because there is no evidence or valid reason why these costs were given. In fact, the Court offers no explanation either, and as set forth in Appellant's initial brief, this "investigator" did nothing for this case and actually frustrated the efforts of the parties to resolve this matter.

CONCLUSION

[¶14] The Tioga/Skaw agreement was not a lease and, as such, any finding of self-help eviction resulting in conversion of Appellee's property is erroneous. Additionally, the moving of inventory from the two-acre tract to a location adjacent to the office building on the same property cannot rise to the level of tortious interference with Appellee's ownership right of personal property to a degree necessitating a forced sale. Thus, the trial courts finding of conversion is erroneous, and Appellants respectfully request this Court to overturn that decision.

Dated: August 20, 2019

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CERTIFICATE OF COMPLIANCE

[¶15] I, Mark A. Schwab hereby certify that the Reply Brief of Defendants/Appellants containing a total of 11 pages complies with N.D.R.App.P, Rule 32(8)(e).

Dated: August 20, 2019

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[¶1] I hereby certify that on the 20th day of August, 2019, the following documents:

APPELLANTS' REPLY BRIEF

were served, via email, upon the following:

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Dated: August 20, 2019

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