
 IN THE SUPREME COURT OF NORTH DAKOTA

City of Glen Ullin and)	
Parks District of the City of Glen Ullin,)	Supreme Court File No.
)	20200075
Plaintiff and Appellee,)	
)	Morton County No.
v.)	30-2019-CV-1009
)	
Karen Schirado, et al.,)	APPELLANT'S BRIEF
)	
Defendant and Appellant.)	

Appeal from the Civil Judgment in Morton County District
Court, South Central Judicial District, Glen Ullin, North Dakota,
February 3, 2020, the Honorable Thomas J. Schneider presiding

ORAL ARGUMENT REQUESTED

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant’s written arguments on their merits.

Transcript References:

The Order to Show Cause hearing for this matter was conducted on August 26, 2019. The transcript of the hearing is referred to as [Tr.] in this Brief.

STATEMENT OF THE ISSUE

[¶1] **ISSUE I. Did the trial court err when it granted Plaintiff's Motion for summary judgment?**

NATURE OF THE CASE

¶2 This case involves real property in the City of Glen Ullin (City) and the Parks District of the City of Glen Ullin (Parks). The Defendants are Karen Schirado and Jerome Schirado (Schirado). The Schirados have, according to City & Parks, been on their real property, erecting fence, and storing their personal property.

¶3 City and Parks started this action to get the Schirados to stop using their real property and get Schirados' fences and personal property off the City and Parks' real property.

¶4 City and Parks filed an Order to Show Cause on 08/02/2019.

¶5 Schirado filed a response to City and Parks' Order to Show Cause on 08/21/2019.

¶6 A hearing on the Order to Show Cause was held in 08/26/2019.

¶7 The court issued a Memorandum Opinion and Order on the Order to Show Cause hearing on 09/25/2019.

¶8 The City and Parks filed a Motion for Summary Judgment on 12/04/2019.

¶9 Schirado responded to City and Parks Motion for Summary Judgment on 12/31/2019.

¶10 The court filed a Memorandum Order on City and Parks' Motion for Summary Judgment on 01/17/2020.

¶11 The Findings of Facts, Order for Judgment, and Judgment were filed on 02/04/2020.

¶12 Schirado filed a Notice of Appeal and Order for Transcript on 03/10/2020.

¶13 A Notice of Filing the Notice of Appeal was filed on 03/10/2020.

¶14 An Amended Notice of Filing the Notice of Appeal was filed on 04/13/2020.

¶15] This matter is now before the North Dakota Supreme Court.

STATEMENT OF FACTS

¶16] In the case now before the court there are two Plaintiffs. They are the City of Glen Ullin, North Dakota (City) and the Parks District of the City of Glen Ullin (Parks). City and Parks are both represented by the same attorney, John Mahoney. Attorney Mahoney plead the two plaintiff's cases in such a way that each Plaintiff must win on all the issues plead for the Plaintiffs to prevail on their motion in this case for Summary Judgment.

¶17] The Plaintiffs' Motion for Summary Judgment requests Summary Judgment for each Plaintiff for all the same reasons.

¶18] Schirados, in their Resistance to Plaintiff's Motion for Summary Judgment, their Brief in support of the Resistance, Karen Schirado's affidavit claiming that an oral agreement with the City and partial performance of that oral agreement removes this case from the Statute of Frauds

¶19] The affidavit of Karen Schirado that sets out all the partial performances she has done is found in the Appendix pages 70 – 72 and in ¶[34] and ¶[39] below.

¶20] Prior to Schirado's Resistance, Brief supporting that Resistance, and Karen Schirado's affidavit, the Court had an Order to Show Cause hearing. Prior to that hearing both Defendant Karen Schirado and Betty Delabarre filed with the Court affidavits that support the oral agreement and partial performance done by Karen Schirado because of that oral agreement.

¶21] A plat has been recorded in the Morton County Court house for the real property involved in this law suit. The lots in the part of that plat that is involved in this lawsuit are owned by Karen Schirado and Jerome Schirado (Schirado). The streets and alleys in the

part of the plat involved in this law suit are owned by the City of Glen Ullin North Dakota and Park District of the City of Glen Ullin.

[¶22] The real property involved in this law suit has never been developed. There is nothing on the real property that shows where any of the streets or alleys are located.

[¶23] The City claims:

1. That Schirado is damaging the City's real property by allowing their horses to walk on and eat the grass where the city streets and alleys are located.
2. That public has suffered because the public can't drive on the City's streets and alleys that aren't marked.
3. That the City has a problem with Schirado's fences blocking city streets and alleys that aren't marked and Parks claim that Schirados has fences on their land.

[¶24] Schirado admits that their horses have been on most of the real property involved in this law suit. Horses in North Dakota are allowed to use and be on streets and allies.

[¶25] After commencing this action the Plaintiffs have brought an Order to Show Cause and a motion for summary judgment. The court ruled in favor of the Plaintiffs on the Order to Show Cause and the motion for Summary Judgment.

[¶26] Schirado has appealed the Summary Judgment. Therefore, this matter is now before the North Dakota Supreme Court.

ISSUE I. Did the trial court err when it granted Plaintiff's Motion for Summary Judgment?

ARGUMENT

[¶27] The standard of review to determine whether Summary Judgment was appropriately granted is set out in Klein v. Sletto 889 N.W.2d 918 (N.D. 2017):

“[¶7] In *Hamilton v. Woll*, 2012 ND 238, ¶ 9, 823 N.W.2d 754 (quoting *Wenco v. EOG Res., Inc.*, 2012 ND 219, ¶ 8, 822 N.W.2d 701), we explained the well-established standard for reviewing summary judgments:

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. We have explained:

If the moving party meets its initial burden of showing the absence of a genuine issue of material fact, the party opposing the motion may not rest on mere allegations or denials in the pleadings, but must present competent admissible evidence by affidavit or other comparable means to show the existence of a genuine issue of material fact. Rule 56[, N.D.R.Civ.P.,] requires the entry of summary judgment against a party who fails to establish the existence of a material factual dispute as to an essential element of the claim and on which the party will bear the burden of proof at trial. When no pertinent evidence on an essential element is presented to the trial court in resistance to the motion for summary judgment, it is presumed that no such evidence exists. This Court has repeatedly cautioned that mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim. *Riemers v. Hill*, 2016 ND 137, ¶ 21, 881 N.W.2d 624 (quoting *Barbie v. Minko Constr., Inc.*, 2009 ND 99, ¶ 6, 766 N.W.2d 458).

In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record. *Hamilton*, at ¶ 9 (quoting *Wenco*, at ¶ 8).”

[¶28] There is no written agreement in this case allowing Schirados an easement to be on, use, and erect fences on the city platted streets and allies.

[¶29] In Exhibit #1, appendix page 46, which was the record of a regular meeting of the Glen Ullin City Counsel on May 2, 2003, the following appears:

“Karen Schirado was present to inquire if she can graze horses on the Schultz land located on the extreme north side of Glen Ullin. The Council determined that this is permissible.”

[¶30] The explanation of how the Schultz Land relates to this case is found in Transcript page 6, lines 4 – 9:

“Q. Now, the land that the City is talking about, who did you get that from?

A. We bought it from a pair of Schultz brothers.

Q. And that, looking at Exhibit 1, you read that. It does have your name in there and mentions the Schultz land?

A. Yes, it does.”

[¶31] In the case before the court, Schirados, according to an oral agreement with the City, have certain terms that require the Schirados to continually do things and if they don't the oral agreement could end.

[¶32] The Statute of Frauds, North Dakota Century Code §9-06-04 in the parts relevant to this case states:

“9-06-04. Contracts invalid unless in writing - Statute of frauds.

The following contracts are invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged, or by the party's agent:

1. An agreement that by its terms is not to be performed within a year from the making thereof.”

[¶33] The above Statute of Frauds causes a problem for the case now before the court because the oral agreement in this case can't be performed in one year. Should the city claim the Statute of Fraud applies to the case now before the court, Schirados' response is that they have done partial performance under the oral agreement. The effect of partial performance is discussed in Klein:

“[¶11] However, this Court has held partial performance of an oral contract may bar the assertion of the statute of frauds, if an agreement between the parties exists. Constellation Dev., LLC v. Western Trust Co., 2016 ND 141, ¶ 19, 882 N.W.2d 238. Section 47-10-01, N.D.C.C., states real property can be transferred only by operation of law or by an instrument in writing, but " [t]his does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof." A person alleging the statute of frauds does not apply to an oral agreement must establish " an act of partial performance that unmistakably point[ed] to the existence of the claimed agreement, that was consistent only with the terms and existence of the alleged contract, and that could not be accounted for on some other hypothesis." Bloomquist v. Goose River Bank, 2013 ND 154, ¶ 13, 836 N.W.2d 450 (quoting Kohanowski v. Burkhardt, 2012 ND 199, ¶ 16, 821 N.W.2d 740).”

[¶34] The terms of the agreement between the city and Schirado that were testified to at the Order to Show Cause hearing are set out below. The testimony below until [¶35] was given by Defendant Karen Schirado:

Transcript page 7, line 12 - page 8, line 1:

“Q. And as far as when you -- from your affidavit you had some kind of -- reached some kind of an agreement with the City?

A. Yes, I did.

Q. And what was that agreement?

A. After I started cleaning up back there and cleaning the area, I noticed that all the -- where all the streets would be was all garbage. There was cars and tractor parts, combine parts, old shop parts, stoves, refridges, beds, all just buried into the dirt and everywhere. I realized just -- that it wasn't just garbage on the top of the soil.

Q. Did you remove most of that stuff?

A. I spent eight years hiring kids and we hauled garbage out one to two times a week every summer for the eight years, and I paid the City to take back their own garbage.”

Transcript page 8, line 6 to line 16:

“Q. Okay. Hold it. Now, is there any terms that – what did you have to do with the horses?”

A. I have to keep them in. I have to --

Q. And have the horses gotten out since you've done this?

A. No. Not unless somebody had opened a gate, no.

Q. And as far as there was something about letting people down to get minnows. Could you explain that to us, please?

A. I had to keep it opened enough for people to set their minnow traps and stuff. And I do, I let people back there to get their minnows. I could have brought it -- one or two of the people in now that have minnow traps back there.”

Transcript page 9, line 6 to page 10, line 1:

“Q. At this time do you think you have reason to be on the land?”

A. Yes, I do.

Q. And what is that reason?

A. My agreement with the City when I cleaned those streets was that the streets came with it unless they put new streets in. So my understanding is, I spent eight years cleaning up all that garage and did all the work so that breaking up those streets wouldn't break up my land to take out my well.

Q. Now, the City, as I understand, is concerned about when this lease that you have with them would end. And do you have any understanding as to when it would end?

A. Well, the first time I went to check on the land before we bought it, I made sure that I would still be grandfathered in for a pasture, because that's what I was buying it for. Because without water, sewer, electricity, streets or gas, I would be raising mosquitoes if I couldn't have my horses.

Q. And when is that going to end, I mean?

A. I suppose -- well, they told me it would end if I sold it or if it went out of my family, is what they told me, is my understanding for it.”

[¶35] All testimony below was given by Betty Delabarre, Transcript page 19, lines 6 – line 12:

“Q. And did she -- was that part of any arrangement with the City for her to remove the garbage?

A. The agreement was made with her that she keep the horses in, fence the horses in and keep them there, clean up the garbage, keep the grass low so that there would be no extra rodents or anything running around. But yeah, that was part of the agreement.”

Transcript page 19, lines 20 – 23:

“Q. And as far as the agreement that you know of, that you recall between Mrs. Schirado, Mr. Schirado and the City, do you think she's done anything to violate that agreement?

A. Not that I know of, sir.”

[¶36] The court in its memorandum and order of September 25, 2019 at paragraph [7] said:

“Schirados claim that they are allowed to use the City’s property based on an agreement with the City. Admitted into evidence, Exhibit 1, are the minutes of the Glen Ullin City Counsel for the Regular Meeting of May, 12, 2003. The minutes show that Karen Schirado was present and inquired about grazing horses on the Schultz land located on the extreme north side of Glen Ullin. The Counsel at the meeting determined that the grazing is permissible.”

[¶37] The two affidavits of Karen Schirado are found in the appendix. The first affidavit is found in the appendix page 38 – 39 and 42 – 43 and the second affidavit is found in the appendix page 70 – 72.

[¶38] The August 15, 2019 affidavit of Karen Schirado in the appendix page 38 – 39 and 42 – 43 at paragraph [3] states:

“That agreement was as follows:

A. All of the above described land could be used by she and her husband as pasture land.

- B. That there was a lot of garbage on the above land and if she cleaned it up she and her husband could use the platted streets and alleys as part of their pasture land.
- C. That she has cleaned up the garbage.”

[¶39] The December 31, 2019 affidavit of Karen Schirado in the Appendix page 70 - 72 states at [4] through [20]:

“[4] That in 2005 Affiant met with the following members of the Glen Ullin City Counsel; Betty Delabarre, Randy Martivich, Thomas Schirado, and Marie Schaff to discuss whether or not Affiant could make an agreement with the City of Glen Ullin which would allow Affiant to use the platted streets and alley in the above description along with her adjoining real property to graze her horses in exchange for Affiant cleaning up the garbage that had been deposited on Plaintiff’s real property when that real property was used as a garbage dump.

[5] Affiant and the City of Glen Ullin reached an agreement that the Affiant could graze her horses on Plaintiff’s land if she cleaned up and removed the garbage that had been left on Plaintiff’s real property when it was used as dump grounds.

[6] This agreement was never reduced to writing but Affiant put in about seven (7) years cleaning up Plaintiff’s real property.

[7] That in order to clean up Plaintiff’s property Affiant had to use her equipment, such as her truck and tractor, to assist her in cleaning up Plaintiff’s real property.

[8] That Affiant had to also hire others to help her clean up Plaintiff’s real property.

[9] That the following are some of the laborers she hired over the next seven (7) years: Matt Gartner, Jordan Joshua, Dion, Stephan Hoar, Natalia Fode, Michael Fode Jr., Wesley Fode, Michael Rathjen, and Jean Fode.

[10] That these individuals were paid according to the loads they hauled and she provided meals for them during the days they worked. Other individuals she hired were in 2005 and 2006 for one day each year. A log cutter named James Coggins. In the last year to haul 5 vehicles she hired Vance Herman and Bruce Hintz.

[11] That Affiant had to have loads of garbage hauled from Plaintiff’s real property to the new Glen Ullin dump and the cost of each load was determined by the size of the load.

[12] That Affiant spent approximately \$18,000.00 on all of the above.

[13] That Affiant also worked about 7 months each year from 2005 to 2012 getting the loads ready to haul to the new dump in Glen Ullin.

[14] That Affiant worked about ten (10) hours per day and six (6) days per week for seven (7) years in the cleaning up of Plaintiff's real property.

[15] That \$10.00 per hour for ten (10) hours per day amounts for \$100.00 per day.

[16] That figuring twenty-six (26) work days per month times \$100 comes to \$2,600.00 per month and \$18,200.00 per year.

[17] That seven (7) years times \$18,200.00 comes to \$127,400.00.

[18] That in the years 2005 and 2006 Affiant attended school and only worked 40 hours per week during the months of June and July in those years.

[19] That figuring forty (40) hours times 10 is only \$400 per week and is \$200.00 per month less than what she normally would earn.

[20] That because of summer school in those years \$800.00 should be deducted from \$127,400 and Affiants total wages should be \$126,600.00.

[¶40] The affidavit of Betty Delabarre states in [5] through [8], Appendix Page 44-45:

“[5] That the Schirados wanted to use that platted land as a horse pasture.

[6] That the City Counsel when she was on it had no objection to the Schirados using the land for a horse pasture and made the following agreement with the Schirados regarding that land:

A. The Schirados could use the land as a horse pasture and keep their horses on said land.

B. That while the Schirados horses were on the land they had to keep it fenced so their horses wouldn't get out.

C. That while the Schirados were on the platted land they had to keep all the platted land clean and remove the garbage that had been dumped there.

D. That the Schirados had to allow the public to go on the land to catch minnows from the creek.

[7] That the city counsel made a motion and it passed regarding A., B., C., and D. above.

[8] That to her knowledge the Schirados have done all that was required in the above agreement with the City of Glen Ullin to allow them to use the platted land as a horse pasture and that there is no reason the Schirados should not be allowed to use the land as a horse pasture.”

[¶41] The terms of the oral agreement in this case are set out in the above paragraphs.

[¶42] The acts of partial performance that Schirado is claiming are set out in the above paragraphs and any one of these paragraphs standing alone may not establish a partial performance unmistakably pointing to the existence of a claimed agreement but when all acts of partial performance are considered there so no doubt all of these acts of partial performance and only consistent with the existence of the claimed oral agreement between Schirado and the City.

CONCLUSION

[¶43] The North Dakota Supreme Court has held partial performance of an oral contract may bar the assertion of the Statute of Frauds if an agreement exists between the parties. Therefore, according to Klein, if a factual situation exists that establishes an agreement and partial performance of the agreement, any District Court in North Dakota can compel the specific performance of the sale of real property in the case of part performance thereof.

[¶44] Schirado’s claim the above language in Klein can be applied to oral agreements to give an easement over land and when that oral agreement has been partially performed.

[¶45] Schirado believes that from what they have said above they have proved that the act of partial performance that Karen Schirado has done unmistakably point to the existence of the agreement and said acts can’t be accounted for on some other hypothesis.

[¶46] Klein requires viewing the evidence and testimony regarding the oral agreement and partial performance in the light most favorable to the part opposing the Summary Judgment Motion. In this case that party is Schirado. Klein also requires that Schirado be given the benefit of all favorable inferences that can reasonably be drawn from the records. When the two above requirements are applied to the case now before the court it is apparent the ruling of the District Court granting Summary Judgment must be reversed.

[¶47] Therefore the ruling of the District Court granting Plaintiff City and Parks' Summary Judgment must be reversed and an Order should be issued to the district court:

1. Reversing the district court granting City and Parks' Summary Judgment.
2. Requiring the district court to have a court trial to determine whether or not Schirado has, because of the oral agreement, an easement over the streets and allies located on Plaintiff City and Parks' real property and the duration of that easement.

Dated this 22nd day of April, 2020

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)	Morton County No.
v.)	30-2019-CV-1009
)	
Karen Schirado, et al.,)	CERTIFICATE OF COMPLIANCE
)	
Defendant and Appellant.)	

[¶1] This Appellant’s Brief and Appendix complies with the pages limit of 38 for the Brief and 100 pages for the Appendix set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, as the Brief consists of 16 pages and Appendix consists of 108 pages. Payment in the amount of .50 per page in excess of 100 has been made to the North Dakota Supreme Court.

Dated this 22nd day of April, 2020

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)	
Karen Schirado, et al.,)	CERTIFICATE OF SERVICE
)	
Defendant and Appellant.)	

¶1 The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Appendix
Appellant's Brief

By email at the below address upon:

John Mahoney
Attorney for the Plaintiffs
service@mahoney-legal.com

North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

And by placing a true and correct copy of said items in a sealed envelope with USPS mail

to:

Karen and Jerome Schirado
411 S. 2nd Street
Glen Ullin, ND 58631

Dated this 22nd day of April, 2020

/S/ Cassy Larson
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