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STATE OF NORTH DAKOTA

Supreme Court No. 20200075

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Morton Co. Court No. 2019-CV-01009

City of Glen Ullin and Park District of the City of Glen Ullin,	**Plaintiffs and Appellees**
v.	
Karen Schirado,	**Defendant and Appellant**
and	
Jerome Schirado,	**Defendant**

APPEAL FROM SUMMARY JUDGMENT

APPELLEE'S BRIEF

On behalf of Plaintiffs and Appellees City of Glen Ullin and Park District of City of Glen Ullin.

FILED BY:

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STATEMENT OF THE FACTS

[¶1] Plaintiffs City of Glen Ullin (the "City) and Park District of the City of Glen Ullin (the "Park District") brought an action seeking injunctive relief to stop Defendants Karen Schirado and Jerome Schirado ("Schirados") from fencing, keeping personal property, and otherwise encroaching on their property. Complaint, App. p. 11, ¶ 3 and ¶ 4.

[¶2] Schirados did not dispute that they were fencing and using the City and Park District property but claimed that their use was allowed by a verbal agreement with the City that was entered, depending on which affidavit, in 2003 or 2004 (Aff. of Karen Schirado, App. p. 38, ¶ 2), or in 2005 (Aff. of Karen Schirado, App. p. 70, ¶ 4).

[¶3] The only record of any agreement or consent by the City relating to the Schirados was the published minutes of a Glen Ullin City Council meeting of May 12, 2003, which stated in part, "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." App. p. 46.

[¶4] This situation was previously before the District Court in Case No. 30-2013-CV-00632. In that action, the Park District sought injunctive relief against Karen Schirado based on essentially the same factual circumstances. On February 7, 2014, the Court granted judgment in favor of the Park District, ordering that "[the Park District] is awarded permanent injunctive relief, ordering that [Karen Schirado], her agents, and all persons claiming by or under [Karen Schirado] be perpetually enjoined and restrained from placing any obstructions or personal property on the above described property, or in any manner interfering with the use and occupation of the land by the [Park District] or the public.". App. p. 15, ¶ 1.

[¶5] In the present action, the City and Park District filed with the Complaint a request for an ex parte temporary restraining order, or, alternatively, an order to show cause requiring Schirados to show cause why preliminary injunctive relief should not be granted. App. pp. 18-19. Pursuant to the request, a show cause hearing was held on August 26, 2019. Schirados appeared personally and Karen Schirado gave testimony. Representatives of the City and the Park District were also present and testified.

[¶6] Following the show cause hearing the trial court issued a Memorandum Opinion and Order granting the City and Park District preliminary injunctive relief. The Order allowed Schirados 60 days from September 30, 2019 to remove their fences and property, and if not accomplished within that time, Plaintiffs were authorized to do so with the assistance of the Morton County Sheriff's Department. App. p. 49, ¶ 14.

[¶7] The City and Park District then moved for summary judgment. The trial court issued its Memorandum Opinion and Order granting summary judgment on January 17, 2020, having determined that "Plaintiffs have met their burden of demonstrating that the Defendants have, without consent of Plaintiffs, trespassed and encroached upon real property owned or under the management of Plaintiffs, and have ignored Plaintiffs' requests to remove their fences, horses and other personal property." App. p. 2, ¶ 4. Summary Judgment was entered accordingly. App. pp. 91-93.

ARGUMENT

Issue: Whether the trial court erred in granting Plaintiffs' Motion for Summary Judgment.

[¶8] Schirados admitted to encroaching and trespassing on real property controlled or managed by the City and the Park District. They claimed to have the right to do so based

on some easement or lease based on an agreement from 15 or more years ago, but no documentation or other credible evidence of such agreement has presented. This matter was previously litigated and decided by Judgment in 2014 with respect to the Park District, and Schirados have been in flagrant contempt of that Order.

[¶9] Summary judgment is appropriate when there is no dispute as to either the material facts or the inferences to be drawn from the undisputed facts, or whenever only a question of law is involved. *Rooks v Robb* 2015 ND 274 (ND 2015), ¶ 10. Under North Dakota Rules of Civil Procedure, Rule 56, the movant for summary judgment has the burden of showing that there is no genuine issue of material fact and the party opposing the motion will be given all favorable inferences which may be reasonably drawn from the evidence. *Id.* The party resisting the motion may not simply rely on the pleadings but must present competent admissible evidence and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact. *Swenson v. Raumin*, 1998 ND 150 (ND 1998), ¶ 9, 583 N.W.2d 102 (internal citations omitted). The nonmoving party cannot rely on speculation. *Beckler v. Bismarck Pub. Sch. Dist.*, 2006 ND 58, ¶ 7, 711 N.W.2d 172 (ND 2006).

[¶10] In the case at bar, the Schirados have conceded that they were fencing and encroaching on land owned or controlled by the City and Park District. In Karen Schirado's argument on appeal, the only claim of defense is that the Schirados were authorized to do so pursuant to an alleged contract with the City, of vague terms and with no specific start or end date. The arguments are based almost entirely on the affidavits and testimony of Karen Schirado.

[¶11] Affidavits offered in opposition to a motion for summary judgment must set forth specific facts showing there is a genuine issue for trial. Affidavits containing conclusory statements unsupported by specific facts are insufficient to raise a material factual dispute. Mere speculation will not defeat a motion for summary judgment. *BTA Oil Producers v MDU Res. Group, Inc.*, 2002 ND 55 (ND 2002), ¶ 49.

[¶12] By affidavits and testimony, Karen Schirado claimed an agreement was entered in 2003, 2004, or 2005, whereby Schirados were granted an easement or lease agreement from the City and Park District for the properties at issue. Schirados seem to imply that the burden thus shifted, and the City and Park District must prove that there was *not* an agreement. When a party has the burden of proving or disproving a fact for which there is no evidence—for example, proving that something did not happen—the party is not required to proffer evidence. Rather, the party may merely point to the absence of evidence. *Rooks, supra,* ¶ 11. In *Black v. Abex Corp.*, 1999 ND 236, ¶ 19, 603 N.W.2d 182 (ND 1999), the North Dakota Supreme Court discussed this issue—the difficulty of proving a negative—while explaining the often cited *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986):

> The Supreme Court's holding [in Celotex] is a recognition of the difficulty of proving a negative. If the record, after discovery, contains no evidence to support an essential element of the plaintiff's claim, there is no "evidence" the defendant can point to in support of its assertion there is no such evidence. In such a case the rule allows the defendant to put the plaintiff to its proof, without the necessity of a full trial, by merely "pointing out" to the trial court the absence of evidence to support the plaintiff's case.
> *Black*, at ¶ 19.

[¶13] At best, Schirados provided evidence of some verbal understanding between themselves and some of the City Council members, albeit mostly via hearsay evidence.

A verbal understanding with individual council members falls far short of an enforceable municipal contract. The City records presented at the hearing make it fairly clear that the City *did* grant to Schirados permission to keep and graze horses on their own land, but there was no documentation to indicate that the City gave Schirados any easement or leasehold authority to build fences, run horses, and keep personal property on City streets and alleys and the Park District lots.

[¶14] Karen Schirado claims to have met with City Council members and made an agreement. City Council members have no authority to make agreements outside of the strictures of municipal government powers. It is a well-established legal maxim that persons dealing with city officers must at their peril ascertain the officers' scope of authority, and a municipal corporation is not estopped by the acts of its officers when they exceed their powers. *Dacotah Hotel v City of Grand Forks*, 111 NW2d 513, 516 (ND 1961).

[¶15] A municipality is a creature of statute. In entering into a contract, a municipal corporation must keep within the scope of its powers to contract, and it may not violate statutory restrictions which establish its powers. *Satrom v City of Grand Forks*, 163 NW 2d 522, 527 (ND 1968). Pursuant to North Dakota statute, "all bonds, contracts, and conveyances of a municipality, except as otherwise provided, shall be signed by the executive officer and countersigned by the auditor or clerk, as the case may be." N.D.C.C. § 40-01-06. No such approved and executed contract was entered or shown to exist here.

[¶16] Clearly, the City in 2003 gave permission to Schirados to "graze horses on the Schultz [ultimately Schirado] land located on the extreme north side of Glen Ullin." App. p.

46. This falls far short of exhibiting a binding contractual lease agreement and more importantly, only applies to Schirados' property. Beyond these minutes, the only evidence of a purported legal agreement is the self-serving affidavits and testimony of Karen Schirado, and the statements of her witness, Betty Delabarre.

[¶17] Schirados had two opportunities to provide corroborating evidence of an alleged agreement with the City; first at the show cause hearing, then for the summary judgment proceeding. No credible evidence was provided, and it is apparent that nothing further would be found through discovery. The Schirados did not invoke N.D.R.Civ.P. 56(f), to seek a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken. The possibility that discovery will yield evidence favorable to a party opposing summary judgment is not a ground to deny summary judgment where the party opposing summary judgment has failed to invoke the procedures under N.D.R.Civ.P. 56(f) to submit affidavits stating a need for discovery or to request a continuance in order to present further affidavits or depositions in opposition to summary judgment. *Larson v. Baer*, 418 N.W.2d 282, 288-289 (N.D. 1988).

[¶18] The Schirados' purported oral agreement was a moving target, with vaguely defined terms. Schirados came nowhere close to proving the essential elements of a valid contract, such as meeting of the minds, consideration, term, etc.

[¶19] In her initial affidavit filed in advance of the show cause hearing, Karen Schirado claimed that she and her husband entered into an agreement with the City "in 2003 or 2004" whereby they could use certain streets in town if they cleaned up the garbage, and that they were not using Park District property. Affidavit of Karen Schirado, App.. pp 38-39. The only documentation of any agreement with the City was the minutes from a City

Council meeting of May 12, 2003, showing that the City granted Schirados permission to graze horses on the Schultz land on the extreme north side of Glen Ullin. App. p. 46. There was no motion or other action indicating an agreement was entered for use of the streets, alleys, or Park District property.

[¶20] The only non-party witness called by Schirados to testify was a former City Council member, Betty Delabarre. In her affidavit, Delabarre stated that the City Council "made a motion and it passed regarding A., B., C., and D. above." Affidavit of Betty Delabarre, App. pp. 44-45. There is no date of meeting indicated. At the show cause hearing on August 26, 2019, Delabarre testified as follow:

> "A. [**Delabarre**] The agreement was made with [Karen Schirado] 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." Tr. P. 19, l. 8-12.

[¶21] This testimony was consistent with the permissive use granted for the Schirados own land. Delabarre testified further regarding her understanding of the City action as follows:

> "Q. ...what it refers to here, it looks like [Karen Schirado] could graze her horses on the Schultz land, which apparently is the land they purchased. Is that your understanding?
> A. [**Delabarre**] That's my understanding, sir.
> Q. So the agreement basically was she could keep the horses on her land if she kept them fenced in and contained?
> A. [**Delabarre**] That's right."
> Tr. p. 20, l. 4-11.

[¶22] Also at the show cause hearing, the City Auditor, Vicki Horst, testified that she looked through the City Council minutes for anything relating to the Schirados. The only item she could find was the minutes of the meeting of May 13, 2003, when the Council allowed Schirados to graze horses on [Schirados'] land. Tr. P. 22, l. 3-21.

[¶23] After the hearing, Karen Schirado submitted a second affidavit, dated December 31, 2019, in resistance to the summary judgment motion. She now claimed that she met in 2005 with four named members of the City Council, and that they made an agreement that she could use the City lands if she cleaned up and removed the garbage. App. pp. 70-71. It is not asserted that this was at a City meeting, and again, there is no documentation of such City meeting. Further, the allegation relies entirely on hearsay.

[¶24] Even if, arguendo, they could prove some oral agreement was entered binding the City and Park District, Schirados would still have to overcome the statute of frauds. N.D.C.C. § 9-06-04 states, in applicable part:

> 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:
>
> ...
>
> 3. An agreement for the leasing for a longer period than one year, or for the sale, of real property, or of an interest therein. Such agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing subscribed by the party sought to be charged.

[¶25] Schirados argue that the statute of frauds does not apply because of partial performance of a valid oral contract, relying on *Klein v Sletto*, 2017 ND 26, 889 NW2d 918 (ND 2017). This reliance is misplaced. As quoted in Appellant's Brief, the Court stated in *Klein* that: "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*.'' *Id,* at ¶ 11 (*emph. added*).

[¶26] Here, the likelihood of there being a valid oral agreement is specious at best. No alleged act of partial performance has been shown that unmistakably points 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." *Id.* No easement or lease type of agreement was entered for City and Park District property, and the logical "other hypothesis" here is that permission was given for Schirados to keep horses on their (Schirados') property if they cleaned it up and kept it tidy. This was borne out when the Park District took legal action in 2013, due to Schirados' fences, horses and garbage encroaching onto Park District property.

[¶27] Even if a valid oral agreement had been proven, Karen Schirado's allegations in support of her claim of partial performance are not credible. In her December 31, 2019 Affidavit, she claimed to have "worked about 7 months each year from 2005 to 2012 getting the loads ready to haul to the new dump in Glen Ullin." App. p.71, ¶ 13. She "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." App. p. 72, ¶ 14. This would total 12,740 hours for a few city streets and alleys, which is implausible. (*see* Plat, Exhibit 1, App. p. 13.)

[¶28] Karen Schirado does not dispute that Schirados were encroaching on City property. At the show cause hearing Karen Schirado testified as follows:

> Q. And you don't dispute that your fences are crossing some alleys and streets?
> A. [**K. Schirado**] It's about two feet onto an alley, yes.
> Q. And this one crosses the street here a little lower?
> A. [**K. Schirado**] Yes, that does back here. But that's part of the streets that I made the deal on, because that's where all the garage (sic) was.
> Tr. p. 12, l. 9-15

[¶29] Likewise, Karen Schirado could not dispute that they were again encroaching upon Park District land. On cross examination, she conceded that "[m]y horses cross some of (the Park District's] property". Tr. p. 39, l. 2-4. This was verified by Shane Hellman, President of the Park District. Hellman personally viewed the premises the morning of the hearing, and testified that, yes, there were still fences of Schirados that were located on Park District property. Tr. p. 30, l. 11-21.

[¶30] Schirados were aware that the City and Park District objected to their encroachment upon City and Park District lands. The matter was previously before the District Court for essentially the same factual circumstances in 2013, in Case No. 30-2013-CV-00632. In that case the court granted the Park District permanent injunctive relief against Karen Schirado. Karen Schirado's actions have been in blatant contempt of that Order.

[¶31] In this case, the court is the finder of fact. There is no right to demand a jury trial in a statutory action in the nature of an equitable proceeding. *General Elect. Credit Coop. v Richman*, 338 NW2d 814, 817 (ND 1983).

[¶32] Schirados had opportunities to submit credible evidence of an issue of material fact at the show cause hearing and for the summary judgment proceedings but provided nothing more than self-serving conclusory statements. A party seeking summary judgment bears the initial burden of showing no genuine dispute regarding a material fact exists. The opposing party may not simply rely on unsupported and conclusory allegations or denials in the pleadings. Instead, the party must set forth specific facts illustrating there is a genuine issue for trial. *Twogood v Wentz*, 2001 ND 167, ¶11 (ND

2001) Here, a reasonable person, and the court, could only conclude that summary judgment was appropriate and merited.

[¶33] The trial court properly found that the Schirados were encroaching upon the premises of the City and Park District, and there was no consensual or contractual basis for them to do so.

CONCLUSION

[¶34] The Appellant's arguments are based on the flawed assumption that an oral contract for some type of easement or lease existed between the Schirados and the City and Park District. Leapfrogging from this faulty assumption, Appellant asserts that partial performance of an oral contract may bar the assertion of the statute of frauds. Appellant's Brief, ¶ 43. There was no valid legal contract, and thus the question of the statute of frauds is moot. The formation of a contract with a municipality must be clear and definitive, and persons dealing with the municipality are charged with knowledge of authority of the employee (or Council Members). *Firefighters Local 642 v City of Fargo*, 321 NW2d 473, 477 (ND 1982).

[¶35] Schirados were encroaching upon lands owned or controlled by the City and the Park District, without consent. The issue was previously litigated, without appeal, and no supposed oral agreement from many years ago excuses their actions.

[¶36] Summary judgment was properly granted, and the City and the Park District respectfully request that the Judgment be affirmed.

[¶37] The appeal of this matter is frivolous, and pursuant to N.D.R.App.P. Rule 38, the City and the Park District respectfully request that they be awarded single or double costs, including reasonable attorney's fees.

[¶38] Dated this 21st day of May 2020.

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CERTIFICATE OF COMPLIANCE

[¶1] This Appellee's Brief complies with the page limit of 38 for the Brief set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, as the Brief consists of 16 pages.

[¶2] Dated this 21st day of May 2020.

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CERTIFICATE OF SERVICE

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

a. Appellee's Brief

by email at the below address(es) upon:

Benjamin Pulkrabek
pulkrabek@lawyer.com

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[¶2] Dated this 21st day of May 2020.

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