

In the
Supreme Court
for the
State of North Dakota

SUPREME COURT CASE NO.: 20200147
DISTRICT COURT CASE NO.: 09-2020-CV-00082

JAMES B. LUND,

Plaintiff-Appellant,

vs.

LELAND A. SWANSON AND OPEN ROAD TRUCKING, LLC,

Defendants-Appellees.

Appeal from Amended Order Denying Plaintiff's Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment and Judgment Dated May 14, 2020, County of Cass, by the Honorable John C. Irby, East Central Judicial District

BRIEF OF APPELLEES

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I. STATEMENT OF ADDITIONAL FACTS

[¶1] This appeal represents the latest in a series of attempts by Appellant James B. Lund (“Lund”) to escape liability for his fair share of business debts imposed upon him by this Court’s ruling in *Open Road Trucking, LLC v. Swanson*, 2019 ND 295, 936 N.W.2d 32. There, a court-ordered satisfaction of judgment was reversed to the extent that it prevented direct enforcement of contribution against a judgment co-debtor. *Id.* at ¶ 27. As this Court explained, “[t]he judgment may be used by the paying debtor to recovery proportionate amounts from his or her co-debtors, and the paying debtor may enforce the judgment by execution or other lawful means.” *Id.* at ¶ 25.

[¶2] The *Open Road Trucking* decision came down while the parties to this action, Lund, Leland A. Swanson (“Swanson”) and Open Road Trucking, LLC (“ORT”) were negotiating a settlement of other litigation. The District Court acknowledged that Lund and Swanson “are parties in and/or have been involved in a number of lawsuits over the past two years, . . .” (Appellant’s Appendix, p. 47, ¶ 9). Negotiations broke down after the *Open Road Trucking* decision because the parties disagreed as to how the reinstated judgment was to be handled. Lund claims his share of the *Open Road Trucking* contribution judgment was to be forgiven. Swanson and ORT disagree.

[¶3] In order to more fully explain the circumstances behind the settlement negotiations, a more complete summary of the lawsuits between the parties is set

forth below. Those lawsuits should be grouped into two categories – ongoing litigation and post-judgment proceedings.

A. Swanson/Lund Ongoing Litigation.

1. *Swanson, et al, vs. Lund, et al, Cass County, North Dakota District Court Case No. 09-2018-CV-01447 (“Fargo Cargo Lawsuit”)*

[¶4] The Fargo Cargo Lawsuit involves two over-the-road trucking business entities, Fargo Cargo, LLC and Fargo Logistics, LLC (“the LLCs”), jointly owned by Swanson and Lund. Swanson asserts claims derivatively on behalf of the LLCs against Lund and an over-the-road trucking business he owns separately known as Cross The Line, LLC (“CTL”). The suit alleges that Lund, individually and through his operation of CTL, grossly mismanaged the LLCs and took opportunities from them without authorization. It asserts claims for breach of duties of good faith and loyalty, breach of fiduciary duties, conversion, unjust enrichment, usurpation of opportunities, and gross mismanagement, and requests damages, injunctive relief, constructive trust, disgorgement of profits, and attorneys’ fees. (*See, Fargo Cargo Lawsuit. Case No. 09-2018-CV-01447, Index # 1 – Complaint*).

[¶5] Lund and CTL counterclaimed against Swanson and the LLCs alleging that Swanson somehow breached fiduciary duties by failing “to provide adequate management and supervision over the affairs of [the LLCs]” leaving Lund and others to manage the LLCs, and that the LLCs breached payment contracts to CTL. (*Fargo Cargo Lawsuit. Case No. 09-2018-CV-01447, Index # 12, ¶¶ 42-61*)

Lund also asserts a third-party complaint for contribution against the minority owner and operations manager of the LLCs, Joel Anderson, claiming that any mismanagement responsibility alleged by Swanson should fall upon Anderson. (Fargo Cargo Lawsuit. Case No. 09-2018-CV-01447, Index # 12, ¶¶ 62-72).

[¶6] A jury trial in the case was set to commence before the Honorable Tom Olson on August 24, 2020, but the action was stayed by order of the District Court pending the outcome of this appeal. (Fargo Cargo Lawsuit. Case No. 09-2018-CV-01447, Index # 94).

2. *Swanson vs. Lund vs. Combined Asset Management, LLC, Cass County, North Dakota District Court Case No. 09-2018-CV-01448 (“CAM Lawsuit”)*

[¶7] In the CAM Lawsuit, Swanson individually sued Lund for contribution of Lund’s fair share of a joint business debt paid by Swanson. Combined Asset Management, LLC (“CAM”) is another business entity owned by Swanson and Lund. During the course of business operations, Swanson and Lund had personally guaranteed loans to CAM and had co-signed individual loans for CAM funds from First International Bank in Fargo. Swanson and Lund were equally responsible for the loans.

[¶8] The loans went into default and First International Bank took a little over \$4.5 million of Swanson’s personal funds on deposit there in payment of the joint and several indebtedness. The CAM Lawsuit asserts a contribution claim against Lund for his half of that amount. (See, CAM Lawsuit. Case No. 09-2018-

CV-01448, Index # 1, Complaint).

[¶9] Lund denied responsibility for any contribution and counterclaimed against Swanson alleging that Swanson breached fiduciary duties and took improper distributions by using CAM funds to pay debts. Lund also asserted by a third-party complaint that CAM should be dissolved. (CAM Lawsuit. Case No. 09-2018-CV-01448, Index # 7).

[¶10] A jury trial in the case was set to commence before the Honorable Susan Bailey on December 3, 2019. As Lund points out, it was this looming trial that prompted the meeting of the parties on December 2, 2019, where settlement discussions were initiated. Accordingly, the trial was initially postponed but then was stayed by order of the District Court pending the outcome of this appeal. (CAM Lawsuit. Case No. 09-2018-CV-01448, Index # 63 – Stay Order)

B. Swanson/Lund Post-judgment Proceedings.

[¶11] The fundamental breakdown in the settlement negotiations occurred over the differing views as to how the business-debt judgment reinstated against Lund by *Open Road Trucking, LLC v. Swanson, supra*, is to be treated. Lund asserts there was an agreement to forgive the judgment. Swanson disagrees. The history of the judgment is described below.

1. *Open Road Trucking, LLC v. Swanson*, 2019 ND 295, 936 N.W.2d 72.

[¶12] *Open Road Trucking, LLC v. Swanson, supra*, arose from a Cass County District Court case originally titled *Western State Bank vs. Leland A.*

Swanson and James B. Lund, Case No. 09-2018-CV-03168 (“Western Bank Lawsuit, Case No. 09-2018-CV-03168”). The case involved business loans totaling over \$1.3 million to Fargo Cargo, LLC that were personally guaranteed by Swanson and Lund. Fargo Cargo, LLC defaulted and the bank sued Swanson and Lund jointly and severally on their guaranties. (See, Western Bank Lawsuit, Case No. 09-2018-CV-03168, Index # 1 – Complaint).

[¶13] Rather than answering the bank’s complaint, both Swanson and Lund consented to the entry of a joint and several judgment against them in favor of the bank for the full amount claimed due. (Western Bank Lawsuit, Case No. 09-2018-CV-03168, Index ## 11 & 22). Swanson then paid off the entire amount due to the bank, took an assignment of the judgment, that he re-assigned to ORT (“ORT Judgment”), for the purpose of enforcing contribution from Lund for his undisputed one-half share of joint and several judgment amount. (Western Bank Lawsuit, Case No. 09-2018-CV-03168, Index ## 26 & 28).

[¶14] When ORT attempted to enforce contribution from Lund through the assigned judgment, Lund resisted asserting that the judgment had been fully satisfied by Swanson’s payment and that assignee-ORT’s only remedy was to bring a new separate action for contribution. (*Open Road Trucking, supra*, 2019 ND 295 at ¶ 12). This Court disagreed, holding that the assigned judgment remained fully enforceable as a contribution judgment against Lund. *Id.* at ¶ 24. The matter was remanded to the District Court for enforcement of contribution from Lund under the

existing judgment. *Id.* at ¶27.

[¶15] Significantly, on remand, Lund made the same arguments he is making here to request a stay in the enforcement of the ORT Judgment. (Western Bank Lawsuit, Case No. 09-2018-CV-03168, Index ## 85-90). Also significantly, the District Court considered and rejected Lund’s argument that the ORT Judgment was to be forgiven under a claimed settlement agreement. Instead, the District Court honored the Supreme Court’s mandate and refused to stay any enforcement efforts. The District Court ordered that the judgment be amended to reflect the exact amount of contribution enforceable against Lund and the Judgment was amended accordingly. (Western Bank Lawsuit, Case No. 09-2018-CV-03168, Index ## 103 & 105). In addition, the District Court signed charging orders against Lund’s transferable interests in various business entities. (Western Bank Lawsuit, Case No. 09-2018-CV-03168, Index ## 96-99).

[¶16] Lund refers to this matter as the “First Open Road Trucking Lawsuit”. (See, Appellant’s Brief, ¶ 11, Item 3). This is a misnomer because there was no “lawsuit.” It had been reduced to a judgment and the only question was whether or not the judgment had been satisfied.

2. *Open Road Trucking, LLC vs. Lund, Cass County, North Dakota District Court Case No. 09-2019-CV-00666 (“ORT Lawsuit”).*

[¶17] The ORT Lawsuit is a separate new proceeding for the contribution claim derived from the Western Bank Lawsuit. It was commenced after Lund claimed Western Bank judgment was satisfied and that ORT’s only means to

enforce contribution from him was to start a new action. The ORT Lawsuit was stayed pending the outcome of *Open Road Trucking, LLC v. Swanson, supra*. (ORT Lawsuit, Case No. 09-2019-CV-00666, Index # 39). In light of the ruling in *Open Road Trucking, LLC v. Swanson, supra*, and the amended judgment that followed, the ORT Lawsuit is now moot.

3. *Open Road Trucking, LLC vs. Lund, Becker County, Minnesota District Court Case No. 03-CV-19-258 (“ORT Foreign Judgment”)*.

[¶18] The ORT Foreign Judgment is the assigned Western Bank Lawsuit judgment registered in Minnesota under its Uniform Enforcement of Foreign Judgments Act in order to levy on assets held by Lund in Minnesota. The enforcement of the judgment was stayed pending outcome of *Open Road Trucking, LLC v. Swanson, supra*, and ORT has now requested lifting of the stay. Lund opposed the lifting of the stay on the grounds he is asserting here – that the settlement contemplated forgiveness of the ORT Judgment. A motion to lift the stay is currently pending and awaiting hearing scheduling before the District Court in Becker County, Minnesota.

II. ARGUMENT

[¶19] At its core, Appellees position is that during the December 2019, settlement negotiations, the parties were primarily concerned with the CAM Lawsuit trial that was to have commenced on December 3, 2019, and, secondarily, the Fargo Cargo Lawsuit trial scheduled for the following summer. No activity was occurring with respect to the ORT Judgment because, until the *Open Road*

Trucking decision came down from this Court, the judgment had been deemed satisfied and no longer viable for purposes of collecting contribution from Lund. The contribution claim itself remained viable and the ORT Lawsuit had been commenced to pursue the claim depending upon the outcome of *Open Road Trucking*. Lund's position that the *Open Road Trucking* reinstated should be forgiven changed the dynamics of the negotiations so much that the whole thing fell apart.

A. No Settlement Was Actually Reached in the Swanson/Lund LLC Litigation.

[¶20] As Lund acknowledges, no written settlement was ever signed by any of the parties. Accordingly, Lund's claim rests upon his assertion that the December 2, 2019, meeting resulted in a complete and definite global settlement of all of the various claims related to the various entities Swanson and Lund had interests in.

[¶21] The District Court concluded:

At best the parties had an agreement to agree. This is not an enforceable agreement. The acceptance of the agreement by the Defendants had to be an unconditional acceptance. The anticipated agreement never reached that level. The anticipated agreement was never reached.

(Appellant's Appendix, p. 51, ¶ 22).

[¶22] In *Tarver v. Tarver*, 2019 ND 189, ¶¶ 912, 931 N.W.2d 187, this Court expressed its reluctance to enforce alleged oral settlement agreements even where the settlement intentions were announced in open court, explaining:

‘Courts will not enforce a contract which is vague, indefinite, or uncertain, nor will they make a new contract for the parties.’ (Citation omitted). An oral contract can be enforced only when the parties have agreed on its essential terms. (Citation omitted). ‘An agreement which is so uncertain and incomplete as to any of its essential terms that it cannot be carried into effect without new and additional stipulations between the parties is not enforceable.’ (Citation omitted) ‘Indefiniteness as to any essential element of the agreement may prevent the creation of an enforceable contract.’ (Citation omitted). ‘*An agreement to agree in the future which is not sufficiently definite to enable a court to give it an exact meaning is not an enforceable obligation.*’ (Citation omitted).

Here, the district court found the stipulations read into the record were not a final settlement agreement and the Tarvers were unable to finalize an agreement after further negotiation. The court found ‘that the parties were hopeful that a final settlement would be reached,’ that both parties requested another trial date ‘if a final agreement could not be reached,’ that ‘[m]ore negotiations were necessary, and ‘[a]n agreement was not reached.’

In *Aaker*, parties orally submitted an agreement during a hearing . . . [and] requested the court's approval . . . [and that] the district court constructively accepted the stipulation and neither party denied the existence of a valid stipulation. (Citation omitted). Similarly, in *Aanderud v. Aanderud*, the parties testified the stipulation at issue did not leave any matter unresolved. (Citation omitted).

Unlike the present case, the parties in *Aaker* and *Aanderud* were clearly submitting a final agreement to the court. *Here, the parties' agreement was conditional on the parties agreeing to essential terms at a later date.* (Citation omitted). . . . While ‘[a]n agreement to agree is enforceable if its terms are reasonably certain and definite,’ no certainty existed here. (Citation omitted). (Emphasis added).

See also, Hageness v. Hageness, 1998 ND 147, ¶ 17, 582 N.W.2d 661 (“Because the contract was an unenforceable agreement to agree, we hold the district court properly dismissed Shirley Hageness's separate action for breach of a stipulated contract”).

[¶23] Here, the very reason the draft agreement (Appellant’s Appendix Pp.

24-32) was not executed is because additional essential terms had to be worked out. That is also apparent from the fact that the CAM Lawsuit, with its looming trial, and the Fargo Cargo Lawsuit were not dismissed but merely stayed. The draft was an initial effort to formalize terms for the resolution of several complicated business, real estate, and other dealings between Swanson, Lund. It also addressed – but did not dismiss -- ongoing litigation cases between the parties.

B. The ORT Judgment Was Not Satisfied

[¶24] Other legal concepts, including the statute of frauds and collateral estoppel, preclude the enforcement of any alleged oral agreement to satisfy the ORT Judgment.

1. The statute of frauds prevented enforcement of any alleged oral forgiveness of the ORT Judgment.

[¶25] The District Court held:

No final written settlement agreement was reached. The statute of frauds exists to prevent the very types of disputes that have arisen in this case. The Defendant's word is not his bond unless it is written. N.D.C.C. § 9-06-04. The terms being negotiated would include debt forgiveness and interests in real property.

[¶26] N.D.C.C. § 9-06-04, the statute of frauds states in relevant 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 sale, of real property, or of an interest therein. . . .

5. An agreement or promise to alter the terms of repayment or forgiveness of a debt that is in an aggregate amount of twenty-five

thousand dollars or greater.

[¶27] An oral settlement agreement that violates the statute of frauds is unenforceable even if the agreement that contemplates the execution of documents at a later time. *Chaganti & Assocs., P.C. v. Nowotny*, 470 F.3d 1215, 1221 (8th Cir. 2006).

a. The negotiations involved the exchange of real estate.

[¶28] Here, the negotiations contemplated the transfer of various real estate interests, including CAM and WeDak properties. The draft documents still required additional legal description and other information to precisely describe the property interests to be conveyed. (Appellant’s Appendix, p. 36). No agreement subscribed by either party was ever completed. For this reason alone no settlement agreement could have been reached because the real estate transfers represented a significant consideration for any agreement.

b. Lund seeks an invalid forgiveness of debt.

[¶29] Lund also asserts there was a promise to dismiss what he calls “the First Open Road Trucking Lawsuit. (Appellant’s Brief, ¶ 61). That would necessarily require the forgiveness of the ORT Judgment amounting to more than \$6.5 million. Lund’s own arguments, however, contradict that assertion. In Appellant’s Brief at ¶¶ 34-35, Lund states:

This Court should reverse [the District Court] because, at the time the parties entered into the oral settlement on December 2, 2019, any debt owed by Lund to ORT was already satisfied. . . . In [*Open Road Trucking*] the district court entered an Order providing for satisfaction

of the judgment against Lund ORT appealed that Order to this Court, *but on December 2nd, there was no debt owed by Lund to ORT.*

At best, at the time of the oral settlement, ORT had a claim against Lund. *While ORT's claim was ultimately recognized by this Court, that does not change the fact that there was no forgiveness of debt included in the parties' oral settlement because the debt had already been satisfied by the district court.* (Emphasis added).

[¶30] Thus, by Lund's own admission, there was no "forgiveness of debt included in the parties' oral settlement" because the debt did not exist at that point in his mind. He was not contemplating forgiveness of the ORT Judgment during the settlement negotiations. Any such "forgiveness" would have to be after the fact and an additional new term to which there clearly has been no agreement.

[¶31] Moreover, any such promise, even if made would violate the statute of frauds unless memorialized in a writing signed by ORT. There simply is no such writing as no agreement was signed by anyone, not even Lund. Accordingly, any alleged oral agreement, even if it existed, is unenforceable.

c. Lund's assertion of injustice is specious.

[¶32] In Appellant's Brief at ¶¶ 46-50, Lund argues that the application of the statute of frauds to this case would promote an injustice. That is an absurd position. So far, Lund has not paid one penny towards the millions of dollars of business debts he and Swanson jointly guaranteed or for which they were otherwise jointly responsible. Swanson paid more than his share of the debts and he seeks to compel Lund to pay his fair share. No other property contemplated in the settlement negotiations has been exchanged so the only injustice has been to

Swanson. Swanson alone was forced to bear the brunt of the joint debt burdens and it would be unjust to now release Lund from the ORT Judgment debt, which by his own admission was not contemplated at the time of the settlement negotiations.

2. Collateral estoppel effect of the post-appeal proceedings in the *Open Road Trucking*.

[¶33] “Collateral estoppel, or issue preclusion, forecloses relitigation of issues of either fact or law in a second action based on a different claim, which were necessarily litigated, or by logical and necessary implication must have been litigated, and decided in the prior action.” *Holkesvig v. Grove*, 2014 ND 57, ¶ 12, 844 N.W.2d 557. As further explained in *Great Plains Royalty Corp. v. Earl Schwartz Co.*, 2019 ND 124, ¶ 13, 927 N.W.2d 880:

Collateral estoppel is a branch of the broader law of res judicata, but it is not the same. (Citation omitted). ‘[C]ollateral estoppel, or issue preclusion, generally forecloses the relitigation, in a second action based on a different claim, of particular issues of either fact or law which were, or by logical and necessary implication must have been, litigated and determined in the prior suit.’ (Citation omitted). We have said an issue must satisfy a four-part test for collateral estoppel to bar relitigation of the issue:

- (1) Was the issue decided in the prior adjudication identical to the one presented in the action in question?;
- (2) Was there a final judgment on the merits?;
- (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and
- (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue? (Citation omitted).

[¶34] On remand from the *Open Road Trucking* appeal, Lund fully briefed and argued the same case he is making hear – that the December 2, 2019, settlement

negotiation resulted in a forgiveness of the ORT Judgment. (See, Western Bank Lawsuit, Case No. 09-2018-CV-03168, Index ## 85-90 & 94).¹ In briefing on a motion for stay of enforcement of the ORT Judgment, Lund made the very same arguments he is making here that the December 2, 2019, settlement negotiations resolved the ORT Judgment

Lund has now started a new action - Case No. 09-2020-CV-00082 ('New Action') - seeking a judgment from the District Court specifically enforcing the terms of the settlement agreement negotiated by the Parties on December 2, 2019. (Citation omitted). As alleged in Lund's Complaint in the New Action, following the December 2nd meeting, counsel for Swanson provided a proposed Settlement Agreement that memorialized the terms of the Parties' verbal settlement agreement. The proposed Settlement Agreement provided for the dismissal of this action, along with the others listed in Paragraph 4 above.

However, Lund's Complaint in the New Action alleges Swanson and Open Road Trucking, LLC failed to abide by the terms of the verbal settlement agreement reached on December 2nd and contained in the proposed written Settlement Agreement when the North Dakota Supreme Court entered a decision in their favor in this case on December 10, 2019. Basically, once Swanson and Open Road Trucking, LLC learned they won the appeal, they decided to no longer abide by the terms of the settlement reached on December 2nd. Lund's Complaint in the New Action specifically seeks specific performance of the settlement agreement between the Parties, *including dismissal of the above-captioned action*, or, as an alternative, an award of damages. (Emphasis added).

(See, Western Bank Lawsuit, Case No. 09-2018-CV-03168, Index # 87, ¶¶ 6-7).

[¶35] Lund also stated that he had:

started a new action to enforce the settlement agreement due to the

¹ Appellees request, pursuant to Rule 201 of the North Dakota Rules of Evidence that this Court take judicial notice of pleadings identified and referenced in this brief as filed in the Western Bank Lawsuit, Cass County, North Dakota District Court Case No. 09-2018-CV-03168.

existence of multiple affected matters pending before multiple judges. Had the settlement only affected the present case, Lund would have filed a motion to enforce settlement herein.

(Western Bank Lawsuit, Case No. 09-2018-CV-03168, Index # 87, ¶ 6, fn1).

[¶36] The district court there denied the stay. (Western Bank Lawsuit, Case No. 09-2018-CV-03168, Index # 103). The refusal to grant Lund’s request for a stay of the enforcement of the ORT Judgment means that the issue of any settlement of that judgment “by logical and necessary implication must have been, litigated and determined” against Lund. *Holkesvig, supra*, 2014 ND 57 at ¶ 12. The ORT Judgment is now final and law of the case and collateral estoppel now applies to preclude that issue from being re-decided.

III. CONCLUSION

[¶37] The District Court correctly dismissed this action and the judgment should be affirmed in all respects.

Dated this 8th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief For Appellant complies with the page limit requirements imposed by Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. The Brief For Appellant contains 18 pages.

Dated this 8th day of October, 2020.

/s/ **Bruce A. Schoenwald**

Bruce A. Schoenwald

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify pursuant to Rule 25 of the North Dakota Rules of Appellate Procedure that I served the following:

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