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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

James B. Lund, Plaintiff/Appellant, v. Leland A. Swanson and Open Road Trucking, LLC, Defendants/Appellees.	Supreme Court No.: 20200147 Cass County Case No.: 09-2020-CV-00082

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

APPELLANT'S REPLY BRIEF

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LAW AND ARGUMENT

[¶ 1] This Court should conclude the district court erred as a matter of law as to both its denial of Lund's motion for summary judgment and grant of summary judgment in Defendants' favor. This Court should reverse and remand the district court's decision, directing the district court to enter an order for specific performance of the Settlement Agreement. Alternatively, this Court should conclude granting Defendants' summary judgment motion was in error, as genuine disputes of material fact exist as to the terms of the parties' agreement.

I. The Parties Reached an Enforceable Settlement Agreement on All Essential Terms.

[¶ 2] Defendants rely on *Tarver v. Tarver*, 2019 ND 189, 931 N.W.2d 187, to argue this Court is reluctant to enforce oral settlement agreements. However, in doing so, Defendants ignore the long precedents of this Court concluding "agreements to agree" are indeed enforceable under North Dakota law when the essential terms are definite. *See Lonesome Dove Petroleum, Inc. v. Nelson*, 2000 ND 104, ¶ 18, 611 N.W.2d 154 ("Where the parties have agreed on the essential terms of a contract, the fact they contemplated a further writing memorializing the agreement does not prevent enforcement of the contract."); *Lenthe Investments, Inc. v. Service Oil, Inc.*, 2001 ND 187, ¶¶ 10-12, 636 N.W.2d 189 (concluding the terms of a lease were definite based upon the facts presented to the district court and the agreement was not merely an unenforceable "agreement to agree"); *Kuntz v. Kuntz*, 1999 ND 114, ¶¶ 14-16, 595 N.W.2d 292 (concluding the district court correctly concluded an uncle and his nephews came to an agreement on the essential terms of an agreement to sell farming assets, where there was no written agreement fully executed but a combination of written offers and oral acceptance); *Lire, Inc. v. Bob's Pizza Inn Restaurants, Inc.*, 541

N.W.2d 432, 434-35 (N.D. 1995) (determining a non-competition agreement contained all essential terms and was an enforceable "agreement to agree"); *see also* Am. Jur. Contracts § 35 ("the court will enforce a contract if the parties have completed negotiating the essential elements, even when the parties have expressly left other elements for future negotiation and agreement.").

[¶ 3] Importantly, this Court has also held "the burden of establishing that a contract otherwise sufficient was not to be considered as complete until reduced to writing and signed rests upon him who on that account denies the obligations thereof." *Metzler v. O.J. Barnes Co.*, 226 N.W. 501, 503 (N.D. 1929). The parties' intent must be ascertained based upon the status at the time of contracting. *See Kuperus v. Willson*, 2006 ND 12, ¶ 11, 709 N.W.2d 726.

[¶ 4] Defendants inaccurately state: "Lund's claim rests upon his assertion that the December 2, 2019, meeting resulted in a complete and definite global settlement." Appellees' Brief, ¶ 20. However, as clearly articulated in and evidenced by the submissions to the district court, Lund's claim rests upon the undisputed evidence showing the parties (1) came to an oral agreement at their December 2, 2019 meeting, (2) the oral agreement was memorialized into a writing by Defendants' counsel as to all of its essential terms, and (3) Plaintiff's counsel did not object to any essential terms memorialized in such writing. Here, like in *Kuntz*, there was a combination of written and oral agreements which ultimately resulted in a complete agreement with all of its essential terms. Plaintiff Lund submitted evidence in support of this conclusion, which Defendants failed to rebut.

[¶ 5] Defendants cite to *Hageness v. Hageness*, 1998 ND 147, ¶ 16, 582 N.W.2d 661, to support their position. Notably, in *Hageness*, the only agreement stated that the matter "will

be resolved by the parties without court intervention." *Id.* This Court called that a "vague statement of future intention" containing "no enforceable terms." *Id.* Further, in *Tarver*, this Court specifically stated it would not enforce a contract where the parties have not agreed to its "essential terms." 2019 ND 189, ¶ 12, 931 N.W.2d 187. In *Tarver*, the parties read a stipulation into the record before the district court, but made qualifying statements to the district court including that they "may have reached an agreement" and "put on the record what they believed to be their mutual understanding." *Id.* at ¶ 2. Most distinguishable from this matter, the parties in *Tarver* noted they had not reached agreements on all issues and specifically requested the court maintain the trial date. *Id.* at ¶ 3. This Court concluded the *Tarver* stipulation was conditional, decided not all terms were definite, and declined to determine it was enforceable. *Id.* at ¶ 13. In contrast, in this case, the parties' settlement was not conditional, as demonstrated by Defendants' counsel memorializing the terms of the parties' oral settlement agreement and their joint cancellation of the trial scheduled to begin the following day in the CAM Lawsuit.

[¶ 6] The *Tarver* opinion also cites to *Aaker* and *Aanderud*, two cases in which the parties did not dispute the existence of an agreement and provided testimony on the matter. In *Aaker v. Aaker*, this Court concluded the stipulation was read into the record and orally accepted by the parties. 338 N.W.2d 645, 647 (N.D. 1983). No written stipulation was submitted to the district court. *Id.* This Court concluded "We believe that settlement of disputes should be encouraged whenever possible and, accordingly, the judicial process should be conducted to accomplish this whenever possible," and went on to remand the judgment to reflect the terms of the stipulated agreement. *Id.* at 647-48.

[¶ 7] In *Aanderud v. Aanderud*, the parties also entered into an oral stipulation on the record. 469 N.W.2d 154, 155 (N.D. 1991). When the district court added a new requirement in the judgment not agreed-upon by the parties, this Court reversed and remanded to remove that additional requirement. *Id.* at 155-56. This Court concluded the one party testified that "the stipulation did not leave any matter unresolved." *Id.* at 155.

[¶ 8] Here, the parties agreed to all of the essential terms of the agreement. Defendants' counsel drafted the agreement that memorialized the parties' understanding of their agreement which included all essential terms. As this Court can see through the correspondence between counsel memorializing the agreement, there was no disagreement as to the essential terms until this Court issued its opinion in the First Open Road Trucking Lawsuit. As openly acknowledged by Defendants in their pleadings, "Negotiations broke down after the *Open Road Trucking* decision." Appellees' Brief, ¶ 2. While the Defendants acknowledge the decision was the intervening factor that prevented the parties from executing the written Settlement Agreement, they still do not identify what terms purportedly remained to be determined as part of the global settlement agreement. Specifically, Defendants' brief simply claims "essential terms had to be worked out" but does not specify or identify any specific essential term that had not been worked out. Appellees' Brief, ¶ 23. Without identification of such undetermined settlement terms, much less "essential" undetermined terms, this Court should reject the Defendants claim that the parties were still engaged in negotiations. Similarly, the district court's decision did not identify any "essential" terms the parties had not yet agreed upon.

[¶ 9] There is also no testimony or evidence in the record from Defendants stating there was no agreement or that Defendants disagreed as to some essential element which their

counsel provided in the written agreement. In a situation opposite to *Hageness*, here, Defendants' counsel drafted a full settlement agreement which recited the essential terms of the parties' agreement and was much more than a vague statement of future intentions. Further, unlike in *Tarver* and *Hageness*, the message relayed to the district court was solely that the parties had resolved the matter in full, not that the trial date should be kept on the calendar or that they would resolve the matter at a later date. *See* App. p. 20. Accordingly, this Court should conclude the district court erred in concluding the parties did not enter into an enforceable agreement, as all essential terms had been agreed upon, and the undisputed evidence shows the parties intended this resolution to be a global settlement of all matters between these parties.

II. The Statute of Frauds Does Not Apply.

[¶ 10] This Court should conclude the district court erred as a matter of law by concluding the parties' verbal Settlement Agreement violated the statute of frauds because (i) the agreement did not involve the "sale" of real property; and (ii) the agreement did not involve debt forgiveness.

A. The Settlement Agreement did not involve the "sale" of real property, but rather a transfer of property interests.

[¶ 11] Defendants argue the agreement violates the statute of frauds because it "required additional legal description and other information to precisely describe the property interests to be conveyed." Appellees' Brief, ¶ 28. Based upon the Settlement Agreement, it is clear the parties sufficiently identified the properties subject to transfer, as the agreement all of CAM's mineral interests being transferred to Appellant Lund. *See* App. 25-26.

[¶ 12] However, in the event this Court considers whether the mention of transfers of real property places the Settlement Agreement in the statute of frauds, N.D.C.C. § 9-06-04(3) provides that an agreement "for the *sale*, of real property, or of an interest therein" is invalid unless in writing. (Emphasis added). The statute of frauds applies only to the "sale" of real property, not the transfer of real property pursuant to a settlement agreement or otherwise. The settlement did not contemplate the formal "sale" of real property and instead negotiated the transfer of real property as part of the settlement and resolution of the claims between these parties, which included the winding down of jointly-owned businesses and distribution of assets. Additionally, as discussed in Appellant's principal brief, the portion of the agreement which related to real property involved the CAM Lawsuit only, it was reduced to writing, and it was partially performed by cancellation of trial in the CAM Lawsuit. Therefore, this Court should conclude the district court erred in determining the statute of frauds applied due to real property.

B. The Settlement Agreement does not contemplate debt forgiveness.

[¶ 13] Next, Defendants continue to argue and complicate the status of the First Open Road Trucking Lawsuit at the time the parties came to the Settlement Agreement. The judgment in the matter had been fully satisfied by the district court and was no longer viable against Plaintiff Lund, and the appeal was pending before this Court at the time the parties reached the Settlement Agreement. As Defendants' state, "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*." Appellees' Brief, ¶ 19.

[¶ 14] Contrary to this position, Defendants argue the dismissal of the First Open Road Trucking Lawsuit (as agreed to by Defendants in the settlement agreement their attorney drafted), "would necessarily require the forgiveness of the ORT Judgment amounting to more than $6.5 million." First, it is unclear how Defendants have calculated a "debt" of $6.5 million from a judgment which this Court is aware was approximately $670,952.24. *See Open Road Trucking, LLC v. Swanson*, 2019 ND 295, ¶ 3, 936 N.W.2d 72.

[¶ 15] Next and more importantly, as provided by N.D.C.C. § 9-06-04(5), an agreement "to alter the terms of repayment or forgiveness of a debt that is in an aggregate amount of twenty-five thousand dollars or greater" must be in writing. Here, Defendants admit there was no viable judgment to collect upon – and therefore no existing debt – at the time of the parties entered into the settlement. Accordingly, there was no "debt forgiveness" to which the statute of frauds could theoretically apply.

[¶ 16] The parties were represented by counsel and knew the legal status of each proceeding specifically identified in the Settlement Agreement. To say the parties ignored or were not considering the case pending with this Court is, frankly, misleading. It was unjust and unwarranted under these facts to conclude that a judgment revived only after the parties agreed to the essential terms of their settlement justifies bringing the agreement into the statute of frauds. The district court's conclusion promotes an injustice under the statute of frauds in allowing a party to avoid its obligations under a fully-formed agreement based upon the timing of this Court's opinion. *Nelson v. TMH, Inc.*, 292 N.W.2d 580, 584 (N.D. 1980) ("[T]he statute of frauds should not be allowed to be used to perpetrate a fraud or to promote an injustice.").

[¶ 17] Again, as stated above, Defendants did not provide any evidence to the district court to contradict this interpretation of the Settlement Agreement and its terms, and this Court should conclude the statute of frauds does not apply under these undisputed facts.

III. Collateral Estoppel Does Not Apply.

[¶ 18] As a final note, Defendants' arguments regarding collateral estoppel are irrelevant to this appeal. The district court did not rely on collateral estoppel in making its decision, and Defendants did not cross-appeal on the issue. *See Kolling v. Goodyear Tire & Rubber Co.*, 272 N.W.2d 54, 59-60 (N.D. 1978) (concluding a party failed to file and perfect a cross-appeal on an issue and that this Court then lacked jurisdiction to consider the issue). Therefore, this Court need not reach Defendants' arguments regarding collateral estoppel.

[¶ 19] Further, this Court should conclude Defendants' request to take judicial notice of another district court file which is not in this record on appeal is inappropriate. Defendants have not moved this Court to supplement the record on appeal. *See* N.D.R.App.P. 10; N.D.R.Evid. 201; *Solid Comfort, Inc. v. Hatchett Hospitality Inc.*, 2013 ND 152, ¶ 31, 836 N.W.2d 415 (noting "the content of filings in other court proceedings would not be subject to judicial notice as evidence offered for the truth of the matter asserted" and denying a motion to supplement the record). The district court did not indicate it was taking judicial notice of the contents of the related files in this matter. Therefore, the content of filings in the other related files are not in this record, nor should the pleadings in those files be considered evidence.

[¶ 20] Even if this Court considers the other district court actions where Plaintiff Lund sought stays, this Court should conclude collateral estoppel does not apply. No other court has been asked to determine the validity of this Settlement Agreement. In any event, this

Court need not take judicial notice of the other files and should limit its review to the record that was before the district court. Accordingly, this Court should decline to address collateral estoppel as requested by Defendants.

CONCLUSION

[¶ 21] This Court should reverse the district court's decision denying Plaintiff Lund's motion for summary judgment and granting summary judgment in Defendants ORT and Swanson's favor.

Dated this 20th day of October, 2020.

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/s/ *Sean. T. Foss*

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CERTIFICATE OF COMPLIANCE

[¶ 1] The undersigned hereby certifies the Appellant's Reply Brief is in compliance with N.D.R.App.P. 32 and contains 12 pages.

Dated this 20th day of October, 2020.

O'KEEFFE, O'BRIEN, LYSON & FOSS, LTD.

/s/ *Sean. T. Foss*

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AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

[1] I, Tricia A. Fossen, hereby states that she is of legal age and that on October 20, 2020, she served the following:

APPELLANT'S REPLY BRIEF

by sending a true and correct copy thereof VIA E-MAIL to the parties listed below:

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[2] To the best of affiant's knowledge, information and belief, such address as given above was the actual address of the party intended to be so served.

[3] I declare under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Signed on the 20th day of October, 2020 at Fargo, North Dakota, USA.

/s/ Tricia A. Fossen
Tricia A. Fossen