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APRIL 15, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20200282

Michael McDougall and Bonita McDougall, Plaintiffs and Appellees,

v.

AgCountry Farm Credit Services, PCA, Defendant, Third-Party Plaintiff and Appellant,

and

Any person in possession, and All persons unknown, claiming any estate or interest in, or lien or encumbrance upon, the real estate described in the Third Party Complaint, Third-Party Defendants.

APPELLANT AGCOUNTRY FARM CREDIT SERVICES, PCA'S REPLY BRIEF

APPEAL FROM JUDGMENT, DATED OCTOBER 23, 2020, OF THE DISTRICT COURT OF TOWNER COUNTY, NORTH DAKOTA, NORTHEAST JUDICIAL DISTRICT, THE HONORABLE DONOVAN FOUGHTY PRESIDING

ORAL ARGUMENT REQUESTED

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[¶3] **SUMMARY OF ARGUMENT**

[¶4] The District Court's conclusion that unjust enrichment occurred cannot be sustained by the record in this matter or by the prior litigation that has occurred to date and must be reversed. First, the District Court ignored the fact that the claimed representations specifically contradict the written loan documents, that there is a lack of connection between impoverishment and any gain to AgCountry, and that the McDougalls did not protect their own interests. Notably, the McDougalls' briefing to this Court does not cite to the factual record in support of their arguments, almost exclusively citing to the District Court's decision. Second, the District Court's conclusions of unjust enrichment are not in line with North Dakota case law. Third, prior litigation in this action should preclude relief to the McDougalls. Finally, the District Court erred in its award of prejudgment interest.

[¶5] **ARGUMENT**

[¶6] **I. The District Court's conclusion that AgCountry was unjustly enriched is incorrect.**

[¶7] The McDougalls argue that the District Court's findings were not clearly erroneous and also that its conclusions that the McDougalls met the elements of unjust enrichment were correct. The McDougalls argue that factual findings made by the District Court are subject to the clearly erroneous standard but the ultimate determination that the plaintiff has met the burden of showing unjust enrichment is fully reviewable, citing Tornabeni v. Wold, 2018 ND 253, ¶ 16, 920 N.W.2d 454. However, the correct standard that whether the state of facts support a finding of unjust enrichment is fully reviewable on appeal. Twete v. Mullin, 2019 ND 184, ¶ 35, 931 N.W.2d 198; Northstar Founders, LLC v. Hayden Capital USA, LLC, 2014 ND 200, ¶ 53, 855 N.W.2d 614. Finally, "A finding of fact is clearly erroneous if there is no evidence to support it, or if, based on the entire record, [this

court is] left with a definite and firm conviction a mistake has been made." Broten v. Broten, 2017 ND 47, ¶ 10, 890 N.W.2d 847. A district court's findings may be clearly erroneous, and its conclusions regarding unjust enrichment in error, when the district court does not adequately address or explain countervailing evidence. Id. ¶¶16-19.

[¶8] A. The District Court's conclusions regarding the McDougalls' claimed impoverishment are erroneous.

[¶9] The District Court's findings and conclusion on this point are that the McDougalls only transferred the Home Quarter to continue the Kent and Erica McDougall farming operation and that there was not an intent to gift this property to Kent and Erica McDougall. This is not supported by the entire record or the steps in the transaction at issue.

[¶10] The McDougalls testified that they gave the Home Quarter to Kent and Erica McDougall for no consideration without any arrangements for payment. (Trial Tr. Trial Tr. 542:11-13.) The face of the April 5 Deed also has no restrictions on it. (App. 147-148.) On April 5, 2016, the McDougalls fully intended to grant all the rights they had in the Home Quarter to Kent and Erica McDougall with receiving nothing in return. There was no evidence of a written agreement regarding an obligation between Kent and Erica McDougall on the one hand McDougalls on the other hand besides the April 5 Deed and the April 7 Deed. See Apache Corp. v. MDU Res. Grp., Inc., 1999 ND 247, ¶ 15, 603 N.W.2d 891 ("Where the impoverishment results from a valid contractual arrangement made by a party, the result is not contrary to equity.").

[¶11] Michael McDougall testified that he had no intention of deeding this land to Kent and Erica McDougall for only an extension of time. (Trial Tr. 542:11-19; 545:19 to 546:9.) However, in cross examination Michael McDougall also testified he did not do anything to verify the transaction with AgCountry that Kent and Erica McDougall had entered just

days before, such as attempting to speak with anyone at AgCountry or by reviewing any of Kent and Erica McDougalls' existing loan agreements. (Trial Tr. 547:7 to 549:21.) Kent McDougall also testified he did not tell his father that he would in fact get a refinance or operating money for the new land. (Trial Tr. 508:5-16.) Kent McDougall testified he did not read any of the loan documents he signed on March 31, 2016 and did not discuss them with Michael McDougall. (Trial Tr. 515:25 to 517:9.) Kent McDougall never discussed his finances or this transaction with his mother Bonita McDougall. (Trial Tr. 524:24 to 525:8.)

[¶12] This Court has held that there is no impoverishment when the result is from a valid contractual arrangement. Northstar Founders, LLC, ¶ 57. Here, the District Court's determination that the McDougalls were impoverished is incorrect. The record indicates that the face of all the deeds at issue did not place any restrictions on the transfer of the property. (App. 147-150.) The McDougalls did not undertake any investigation as to whether Kent and Erica McDougall would in fact receive operating money or a restructure. The McDougalls had the ability to meet with AgCountry personnel and review the loan documents prior to signing. Rather than doing so, the McDougalls chose to simply give the Home Quarter to their son as a gift. Kent McDougall even testified that he was willing to "risk" a quarter of section of land based only on the assertion that it looked promising to get a refinance done – not that a refinance was finalized or approved. (Trial Tr. 508:5-16.) Likewise, Michael McDougall acknowledged that there was risk in gifting the land to Kent McDougall, but he did not undertake to verify any of the risk by reviewing the written loan instruments with AgCountry. (Trial Tr. 538:13 to 539:9.)

[¶13] The District Court's conclusion that the McDougalls were impoverished cannot be sustained. Their impoverishment resulted from their free choice to deed the property to

Kent and Erica McDougall without any conditions. Their claimed impoverishment resulted from their failure to ask any questions of Kent and Erica McDougall concerning the recent loan transaction that Kent and Erica McDougall had just entered with AgCountry or meeting with or discussing the matter with AgCountry. Ultimately, the McDougalls intended to gift this Home Quarter to Kent and Erica McDougall to use as collateral and that is exactly what occurred. Two fact finders have now found the mortgage granted to AgCountry by Kent and Erica McDougall was not obtained through fraud or deceit. (App. 61-88; 162-164.) Accordingly, the impoverishment claimed is a result of valid contractual relationships all around and cannot form the basis of an unjust enrichment claim. Northstar Founders, LLC, ¶ 57.

[¶14] B. The District Court's conclusions that there was no connection between the claimed impoverishment and enrichment of AgCountry must be reversed.

[¶15] The McDougalls' failure to investigate Kent and Erica McDougalls' financial relationship with AgCountry also shows a lack of connection between impoverishment and any enrichment to AgCountry. The McDougalls argue that Thimjon Farms P'ship v. First International Bank & Trust, 2013 ND 160, ¶ 21-22, 837 N.W holds that there is no need for direct communications for unjust enrichment to apply. However, the portions of Thimjon cited by McDougalls only relate to this Court's analysis of the deceit claims in that case. The jury in this case held AgCountry did not commit deceit. (App. 162-164.) Accordingly, the McDougalls' arguments based on Thimjon are not instructive to the present issue. Here, the record shows that there is no direct connection between McDougalls and AgCountry. The McDougalls could have made that connection and prevented their claimed damages by having met with AgCountry personnel and reviewing the existing loan documents, but the McDougalls did not do that. Instead, they chose to

deed the property to Kent and Erica McDougall based on the feeling of how things were going that was only filtered through what Kent McDougall was telling his father. The impoverishment to McDougalls resulted from Kent and Erica McDougall having violated their warranties contained in the April 7 Deed. Here, the exchange of the Home Quarter occurred between McDougalls and Kent and Erica McDougall. The benefit to AgCountry of gaining the mortgage on the Home Quarter was indirectly given, like in Thimjon. The mere fact AgCountry benefited by the contract between McDougalls and Kent and Erica McDougall evidenced by the April 5 Deed does not support the District Court's conclusions on unjust enrichment.

[¶16] C. The District Court's conclusions that there was no justification for AgCountry's enforcement of its mortgage must be reversed.

[¶17] The McDougalls argue that the District Court correctly determined that there was a lack of justification for AgCountry's retention of the proceeds of the Home Quarter, citing Midland Diesel Service & Engine Co. v. Sivertson, 307 N.W.2d 555 (N.D. 1981) and Schroeder v. Buchholz, 2001 ND 36, ¶ 16, 622 N.W.2d 202. Each of those cases are distinguishable and not instructive in these circumstances.

[¶18] First, AgCountry has already distinguished the circumstances in Midland from those in the present case in its principal brief. In Midland, the defendant was the one who directly induced the plaintiff into entering the transaction at issue and essentially converted the engine at issue, installing it into property solely owned by the defendant. Id. at 556. The plaintiff in Midland did not deal with a third party who later transferred the engine to the defendant. Cf. Thimjon, ¶ 22. Second, Schroeder does not involve any allegation that the retention of a benefit was pursuant to a valid contractual relationship. Id. ¶¶ 17-18. In fact, this Court noted that there was no contractual relationship between the parties in

Schroeder, the parties rather having informally pooled and jointly improved property they both lived on over several years. Id. Here, the justification for AgCountry's retention of any enrichment is directly because of its written loan agreements with Kent and Erica McDougall. These loan agreements have been found to be valid and enforceable by both the Bankruptcy Court in the prior litigation as well as by the District Court in the prior foreclosure judgment that was affirmed by this court. (App. 61-88; 102-114; 162-164.)

[¶19] Here, there is ample justification for AgCountry's retention of any benefits received. The contractual arrangements were all entered without fraud or deceit, as shown by the results of the prior litigation. (App. 61-88; 102-114; 162-164.) Additionally, the District Court's findings regarding AgCountry's intent does not square with the entire record or with the jury's finding that AgCountry did not commit deceit. Integral to the analysis of whether any restructuring would be possible was the role of Turtle Mountain State Bank ("TMSB"). Dean Aanderud testified that TMSB never gave an indication of what amount of paydown would be required for TMSB to re-advance operating money to Kent and Erica McDougall. (Trial Tr. 265:2-21.) There were also no imposition of default interest rates and Kent and Erica McDougall were given additional time to work with TMSB or explore alternative lending sources. (Trial Tr. 246:6-12; 260:21 to 261:8; 265:2 to 266:7; 270:16 to 271:17.) The District Court's analysis, and the arguments of the McDougalls, flies in the face of the record that shows Kent McDougall knew the restructure was not finalized or assured. (Trial Tr. 508:12-16; 526:19-21.) It also does not ask the question or analyze why Kent and Erica McDougall did not read through the loan documents or why the McDougalls did not read through the loan documents or even speak with anyone from AgCountry. Here, this Court should follow its precedent that unjust

enrichment does not lie when any impoverishment has "resulted from a valid contractual arrangement" Thimjon, ¶ 22, particularly when the McDougalls and Kent and Erica McDougall did nothing to protect their own interests.

[¶20] D. The District Court erred in concluding the McDougalls lack an adequate remedy at law.

[¶21] The District Court held that the McDougalls lacked an adequate remedy at law because their deceit claim was denied by the jury and the McDougalls' could not legally compel Kent and Erica McDougall to repay the value of the Home Quarter due to Kent and Erica McDougall's bankruptcy discharge. The District Court did not analyze why or how the McDougalls might have pursued an exception to discharge of their claims in the Kent and Erica McDougall bankruptcy. The McDougalls have argued to this Court that AgCountry has the burden to show that the McDougalls have an adequate remedy at law.

[¶22] First, the McDougalls bear the burden of production and persuasion on their unjust enrichment claim. See Thimjon, ¶ 20 ("Unjust enrichment requires a plaintiff to show . . . ."). Next, North Dakota case law shows that when a claim is available against a third party, and that claim is not pursued by the plaintiff pleading unjust enrichment, the plaintiff has an adequate remedy at law.

[¶23] In Lochthowe v. C.F. Peterson Estate, 2005 ND 40, ¶ 13, 692 N.W.2d 120, this court held the plaintiff could not pursue an unjust enrichment claim because the plaintiff had settled legal contract claims against third parties that were related to the unjust enrichment claim. This Court held that where the plaintiff "had a legal remedy for breach of contract against [third parties], but settled with them before trial" that the plaintiff "had an adequate legal remedy which precluded him from pursuing an unjust enrichment action against [the defendant] as a matter of law." Id. ¶¶ 13-14. Here, the record reflects that the

McDougalls filed claims against Kent and Erica McDougall and did not pursue in any manner excepting to discharge of those debts. (Doc. ## 270-273.) The Kent and Erica McDougall bankruptcy discharge was in essence an attempted settlement like in Lochthowe. The McDougalls do not truly want to attempt to have Kent and Erica McDougall repay them for the gift of this Home Quarter and were content to allow this debt to be discharged without taking further action. As shown in Lochthowe, the party claiming unjust enrichment must demonstrate it lacks legal remedies and in fact must actually pursue those against third parties in a meaningful way.

[¶24] II. The District Court erred in denying AgCountry relief under principles of res judicata.

[¶25] The McDougalls argue that res judicata does not apply in this case because the prior bankruptcy litigation should not apply to them or their claim for unjust enrichment. The McDougalls' position is wrong for two main reasons. First, the McDougalls are in privity with Kent and Erica McDougall in the bankruptcy court litigation. The McDougalls fully participated in the prior litigation. As pointed out previously, the same attorney represented McDougalls in this litigation that represented Kent and Erica McDougall in the bankruptcy court litigation, the McDougalls helped pay for that representation, and were advancing the same interest in that prior litigation.

[¶26] Second, the claims made in both litigations are substantially identical as to the factual allegations in this case. Collateral estoppel does not require that all the elements of a precluded cause of action be identical, but rather, whether the factual issues in dispute are identical. Norberg v. Norberg, 2017 ND 14, ¶ 14, 889 N.W.2d 889. Here, that standard was met, because the bankruptcy court determined that as a factual matter the mortgage at issue was not induced by fraud and was a good and valid lien on the Home Quarter. (App.

61-88.) This is in direct contradiction of the District Court's findings related to AgCountry's intent. The principles of res judicata preclude the McDougalls from relitigating this issue.

[¶27] III. The District Court erred in awarding prejudgment interest from April 6, 2016 because the McDougalls did not have a liquidate vested right on that date.

[¶28] The McDougalls argue that the District Court was within its discretion to award interest under North Dakota Century Code section 32-03-05. This ignores the on-point case law of Midland that holds recovery under unjust enrichment is not a vested right that ordinarily should only provide for post-judgment interest. See Midland, 307 N.W.2d at 558; United Hosp. v. D'Annunzio, 514 N.W.2d 681, 686 (N.D. 1994). Further, in this case, the starting of the award of prejudgment interest from April 6, 2016, is wholly unrelated to the benefit conferred to AgCountry. AgCountry was not able to monetize the collateral granted to it until it was able to enforce the assignment of rents or until it was able to re-sell the Home Quarter following the Sheriff's Sale. This occurred well after April 6, 2016. Further, as noted before, the McDougalls raised equitable claim of unjust enrichment as a defense to AgCountry's foreclosure counterclaim but chose not to appeal that decision.

Conclusion

[¶29] For the forgoing reasons, this Court should reverse the judgment of the District Court and remand for the matter for a judgment of dismissal in favor of AgCountry.

Respectfully submitted April 15, 2021

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APPELLANT AGCOUNTRY FARM CREDIT SERVICES, PCA'S CERTIFICATE OF COMPLIANCE

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), the text of Appellant AgCountry Farm Credit Services, PCA's Reply Brief, does not exceed 12 pages.

[¶2] The Brief of Appellant has been prepared in a proportionally spaced typeface using Microsoft Office 365 word processing software in Times New Roman 12-point font.

Respectfully submitted April 15, 2021

/s/ John D. Schroeder

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CERTIFICATE OF SERVICE

[¶1] I hereby certify and declare that on April 15, 2021 the following documents:

(1) Appellant AgCountry Farm Credit Services, PCA's Reply Brief;

(2) Appellant AgCountry Farm Credit Services, PCA's Certificate of Compliance;

(3) And this Certificate of Service

were filed electronically with the North Dakota Supreme Court and that copies of the foregoing were sent via electronic mail via the Supreme Court's E-filing Portal to the following:

Kip M. Kaler (#03757), kip@kaler-doeling.com, attorney for appellees

Patrick J. Sinner (#08345), patrick@kaler-doeling.com, attorney for appellees

[¶2] I declare, under penalty of perjury under the law of the State of North Dakota, that the forgoing is true and correct.

Signed on April 15, 2021, at Grand Forks, North Dakota.

/s/ John D. Schroeder

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