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STATE OF NORTH DAKOTA

Supreme Court No. 20200345

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** and Appellant

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.

ORAL ARGUMENT REQUESTED

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ARGUMENT

A. THERE WAS NO AGREEMENT, WRITTEN OR VERBAL, BETWEEN THE CITY OF GLEN ULLIN AND KAREN AND JEROME SCHIRADO FOR THEIR USE OF CITY STREETS AND ALLEYS

[¶1] Defendants, Karen Schirado and Jerome Schirado ("Schirados") contend that more than fifteen years ago there was some form of agreement entered into between themselves and the City of Glen Ullin (the "City") whereby Schirados were contractually allowed use of certain City streets and alleys. This is without merit; no material facts or inferences from undisputed facts have been shown which would support the contention.

[¶2] Essentially, Schirados admit there was no valid written contract. The only written record of any agreement or consent in reference to the Schirados' use of land or keeping of horses 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. 48.

[¶3] The Schirados make a feeble argument that the minutes constituted a sufficient "note or memorandum" to overcome the Statute of Frauds. *Appellant's Brief*, ¶ 38. The Statute of Frauds, as contained in N.D.C.C. § 9-06-04, states in introduction that:

> "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."

[¶4] While the minutes could arguably constitute a "memorandum" (even if only a published newspaper item), there are no references whatsoever to Schirados' use of City streets and alleys. Further, even if it would have contained terms of a contract, it lacked the remainder of the statutory requirements to qualify for the exclusion, that being, "in writing

and subscribed by the party to be charged, or by the party's agent". The published minutes are clearly not a contract, and it was not subscribed by any party to be charged or by the party's agent.

[¶5] Apparently recognizing the fallacy of their claim of a written "memorandum" type agreement, Schirados next argue that they had an "unwritten agreement" for use of the City property. *Appellant's Brief*, ¶38. Taking a shotgun approach, Schirados offer a few possibilities for when this "unwritten agreement" was entered, and by whom. The first proposition was that it was entered into at the City Council meeting of May 12, 2003, as supposedly evidenced by the published minutes previously discussed. For the eventuality of that failing, Schirados offered two alternative times that a verbal agreement may have been entered for their use of City and Park District property. By one affidavit, Karen Schirado claimed an agreement was entered in 2003 or 2004 between Schirados and the City Council for their use of the City streets and Alleys. (Aff. of Karen Schirado, App. p. 44, ¶ 2) In a subsequent affidavit, Karen Schirado claimed that she met with City Council members in 2005, and that she and the City Council "reached an agreement that the Affiant could graze her horses on [the City's] land if she cleaned up and removed the garbage that had been left on [the City's] real property when it was used as dump grounds." (Aff. of Karen Schirado, App. p. 73, ¶ 4). In this affidavit, Karen Schirado goes on to claim that 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", and that she also hired seven laborers over the next seven years to assist in the cleanup. Id, at pp. 74-75. It is simply not credible that removal of garbage from a few city streets and alleys would require such an undertaking. Further, it is undisputed that the Schirados own property was laden with junk and garbage that needed cleanup.

[¶6] In sum, no competent admissible evidence was presented at any of the District Court proceedings to show that any legitimate contract, written or verbal, with specific terms and conditions, was ever entered into or executed by the parties for Schirados' use of City streets and alleys. Schirados arguments are based on conjecture and speculation.

[¶7] 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.*

[¶8] 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).

[¶9] Here, Schirados have only offered self-serving statements and hearsay from many years ago. It is suggested that additional testimony will provide proof for Schirados, but this is no more than speculation.

[¶10] Upon remand and briefing, the District Court issued its *Order Denying Defendants' Motion for a Trial*. The District Court determined that it had "all the relevant facts and

evidence necessary to make additional findings and rule on the issues remanded by the Supreme Court. There is no need for a trial." Id, ¶ 11. The Court went on to state:

> "With their two opportunities to present evidence to the District Court, the Defendants have failed to show that they were granted any authority by the Glen Ullin City Council to use the City property for their fences, horses, and to store personal property. There is no evidence that any form of a legal contract existed between the City and the Defendants. Defendants' allegations of partial performance of a contract are meritless." Id. at ¶12

[¶11] Schirados have not suggested any additional substantive evidence that could be brought into trial. 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. *BTA Oil Producers v MDU Res. Group, Inc.*, 2002 ND 55 (ND 2002), ¶ 49.

[¶12] 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 (minutes from meeting of May 12, 2003) presented at the hearing show that the City *did* grant permission to Schirados to keep and graze horses on their own land, but there was no documentation to suggest that the City gave Schirados any easement or leasehold authority to take over the streets and alleys in question.

[¶13] Karen Schirado claims to have met with City Council members and entered 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).

[¶14] 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). 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.

[¶15] 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. 48. This falls short of exhibiting a binding contractual lease agreement and only applies to Schirados' property. Beyond these minutes, the only evidence of purported legal agreement is the conclusory affidavits and testimony of Karen Schirado, and conflicting statements of her witness, Betty Delabarre.

[¶16] Betty Delabarre was a former City Council member. In an 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. 46-47. There is no date of meeting. Later, 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.

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

"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.

[¶17] Schirados had two opportunities to provide corroborating evidence of an alleged agreement with the City; first for the show cause hearing, then in 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] In their Brief in support of their Motion for Trial, Schirados state that they "would call Michael Fode, Jr., who does City Maintenance for the City of Glen Ullin." Doc. Id. #84. Schirados give no offers of proof as to what his testimony would be or prove, and thus is left to speculation. They also want to put into evidence "the ordinance the Plaintiff,

City of Glen Ullin, past (sic) limiting hay on her real property and the fact that the Plaintiff, City of Glen Ullin, tore down her fences and the cost of repair." There is no indication of what relevancy or materiality any of this purported evidence might be.

[¶19] Finally, Schirados assert that "Mrs. Schirado is also considering putting in more evidence on the things she did that would remove her case from the statute of frauds and calling as witnesses some of the people she hired to help her clean up the real property." Again, it is left to speculation as to what this purported evidence and testimony might add toward proving facts, or inferences from undisputed facts, that have not already been provided to the Court.

[¶20] A party opposing summary judgment 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 could only conclude that summary judgment was appropriate for the City of Glen Ullin.

B. THE ATTORNEY FEES FOR THE PARK DISTRICT WAS FAIRLY DETERMINED TO BE ONE-HALF OF THE FEES ORIGINALLY AWARDED

[¶21] Schirados appealed from the original Summary Judgment to the North Dakota Supreme Court. The Supreme Court concluded that the District Court erred when it applied res judicata to the claim concerning the City's property and reversed that part of the judgment granting relief to the City. *City of Glen Ullin v Schirado* 2020 ND 185, ¶7. The Court further concluded that violation of the 2013 judgment is a valid reason for a finding of contempt and award attorney's fees with respect to the Park District. However, the Court vacated the award of attorney's fees with instructions for the district court to explain

its rationale for the award, including which amount is a sanction for the contempt, and which portion is allocated to each plaintiff. Id. at ¶ 8.

[¶22] Upon remand, the District Court awarded attorney's fees only to the Park District, based on Schirados' contempt of the 2013 Judgment. Not being a part of the earlier action the City could not be awarded attorney's fees per the Supreme Court's ruling. In the Court's Amended Findings of Fact, Conclusions of Law, and Order for Judgment, the District Court ruled that "Plaintiffs are awarded their statutory costs and disbursements, as well as reasonable attorney's fees for the Park District for this proceeding in the amount of $5,553.42, one-half the amount submitted by Plaintiffs in its Statement of Costs and Disbursements and Attorney Fees." App. p. 124. A discrepancy exists between the Findings and the (Amended) Summary Judgment; in the Amended Judgment the attorney's fees were awarded in the amount of $5,460 ($10,920.00 x ½ = $5460.00). App. p. 128. It is apparent that a computing error occurred in the Findings, as it was based on one-half of the *total* of costs, disbursements and attorney fees ($11,106.85 x ½ = $5,553.42) submitted and approved in the initial Summary Judgment. The actual approved attorney fees was $10,920.00 (*see* Statement of Costs, Disbursements and Attorney Fees, App. p. 86). The City and Park District stipulate and agree that the amount of attorney fees awarded in the Amended Summary Judgment, $5460.00, is correct based on one-half of the original amount of attorney fees awarded.

[¶23] The City and Park District were represented by the same attorney, and all of the proceedings in this action have been on a parallel track. It is logical and reasonable that the Court would choose to assess one-half of the attorney's fees for the Park District to Schirados.

CONCLUSION

[¶24] The Schirados had no written contract with the City for the use of the City streets and alleys. Nor were there any legally binding verbal agreements. Schirados assert that partial performance of an oral contract may bar the assertion of the statute of frauds. Appellant's Brief, ¶ 41. There was no valid legal contract, and thus the question of the statute of frauds is moot.

[¶25] The Schirados were encroaching upon lands owned or controlled by the City without consent.

[¶26] The (Amended) Summary Judgment was properly granted, and the City and Park District respectfully request that the Judgment be affirmed.

[¶27] 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.

REQUEST FOR ORAL ARGUMENT

[¶28] The City and the Park District do not believe oral argument is necessary. In the event oral argument is granted, they request the opportunity to appear to answer any questions the Court may have and to further clarify their position on the issues.

[¶29] Dated this 5th day of February 2021.

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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 12 pages.

[¶2] Dated this 5th day of February, 2021.

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CERTIFICATE OF SERVICE

[¶3] 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

[¶4] Dated this 5th day of February, 2021.

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