

IN THE SUPREME COURT OF THE  
STATE OF NORTH DAKOTA

<p>Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP,</p> <p style="text-align:center">Plaintiffs and Appellees,</p> <p style="text-align:center">vs.</p> <p>Transform Operating Stores, LLC d/b/a Transformco Operating Stores, LLC; Transform SR Brands LLC d/b/a Transformco d/b/a Kmart; and Transform KM LLC,</p> <p style="text-align:center">Defendants and Appellants.</p>	<p>Burleigh County No.:</p> <p style="text-align:right">08-2021-CV-00240</p> <p>Supreme Court Case No.: 20220090</p>
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**BRIEF OF APPELLANT TRANSFORM OPERATING STORES, LLC d/b/a TRANSFORMCO OPERATING STORES, LLC; TRANSFORM SR BRANDS LLC d/b/a TRANSFORMCO d/b/a KMART; AND TRANSFORM KM LLC**

Appeal from Amend Judgment dated April 12, 2021, and Amended Judgment dated January 18, 2022, by the Burleigh County District Court, South Central Judicial District, the Honorable Bobbi Weiler presiding.

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**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF THE ISSUES**

1. Did the district court err in exercising jurisdiction as a summary eviction action?
2. Did the district court err in bifurcating the eviction action?
3. Did the district court err in finding a material breach of the written lease agreement?
4. Did the district court err in awarding sanctions for the turnover of the property?
5. Did the district court err in ordering Transform to turn over the property to Boutrous before the conclusion of the entire eviction proceeding?

## **STANDARD OF REVIEW**

[¶1] Statutory interpretation is a question of law, which is fully reviewable on appeal. Nelson v. Johnson, 2010 ND 23, ¶ 12, 778 N.W.2d 773. An action for eviction invokes a court’s equitable jurisdiction. In re Estate of Binder, 366 N.W.2d 454, 456 (N.D. 1985). “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after review of the evidence, this Court has a definite and firm conviction a mistake has been made.” Sweeney v. Sweeney, 2005 ND 47, ¶ 11, 693 N.W.2d 29, 33.

[¶2] Subject matter jurisdiction cannot be waived and may be raised at any time. Garaas v. Cass Cty. Joint Water Res. Dist., 2016 ND 148, ¶ 4, 883 N.W.2d 436. “When jurisdictional facts are not disputed, the issue of subject matter jurisdiction is a question of law, which we review de novo.” Spirit Prop. Mgmt. v. Vondell, 2017 ND 158, ¶ 7.

## **STATEMENT OF THE CASE**

[¶3] This eviction has been anything but expedited, inexpensive, nor simple. The action involves the interpretation of the Kresge Lease (hereinafter “Kmart Lease”) and the “Original of Ground Lease and Exhibit C of Kresge Lease” (“Ground Lease”) (collectively “the Leases”) in connection with an eviction (R359:11:¶¶17-20). Despite the explicit terms

of the Leases concerning notice and ability to cure, North Dakota's summary eviction statutes were used to circumvent the requirements of the Lease.

¶4 Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP (collectively "Boutrous") are the owners of real property located at 2625 State Street, Bismarck, North Dakota 58504. (the "Kmart Property"). (R1:2-3:¶9). Transform Operating Stores, LLC d/b/a Transformco Operating Stores, LLC; Transform SR Brands LLC d/b/a Transformco d/b/a Kmart; and Transform KM LLC (collectively "Transform") were, through their predecessors and assigns, long-time tenants of the Kmart Property.

¶5 Boutrous initiated an eviction action against Transform through the filing of an Action for Summary Eviction & Damages dated February 8, 2021. (the "Action") (R1). A Summons & Notice of Eviction Hearing was issued on February 8, 2021, specifying that a hearing was to be held on February 19, 2021, at 9:00 a.m. (R24). On February 12, 2021, the District Court issued the Notice to Parties Regarding February 19, 2021 Hearing that bifurcated the Action into one for eviction and another for damages, each with separate hearings. (R45). Transform filed a Expedited Motion to Dismiss for Lack of Subject Matter Jurisdiction on February 16, 2021, arguing that the Action was not appropriate under North Dakota's summary eviction statutes. (R64). The District Court issued an Order on February 17, 2021 that denied Transform's jurisdictional defense. (R70). On February 18, 2021, Transform filed an Answer denying Boutrous' claims, again raising the jurisdictional defense. (R82:1:¶3). Prior to the eviction hearing, Boutrous would file fifty (50) exhibits. (R1:2-19: ¶¶9-58). A daylong hearing, wherein Transform continued to object to jurisdiction, was held on February 19th. (R359:1:2;R359:2:1-3; R359:260:13).

¶6 On March 23, 2021, the Court issued its Findings of Fact, Conclusions of Law, and Order. (R122). The District Court concluded that Transform abandoned the property and that actual notice of the defaults were given by Boutrous to Transform on August 10, 2020, and thus eviction was proper. (R122:13:¶35). Judgment of Eviction was entered on March 23, 2021. (R125). Transform filed an Expedited Motion to Reconsider on March 25, 2021, as well as an Expedited Motion to Stay or Relief from Judgment (R129; R132). A hearing was held on May 3, 2021. (R137). The District Court issued an Order on March 25, 2021 granting a temporary stay of the Judgment until a hearing on the Motion to Reconsider and the Motion for Stay. (R138). A hearing was held on March 29, 2021 on the Motion to Stay. (R142). An Order was issued by the District Court on March 29, 2021 where a stay was ordered on the Judgment until after the reconsideration hearing could take place. (R144). The District Court issued an Order on Motion for Reconsideration on April 12, 2021, denying Transform's request and awarding Boutrous possession on April 14, 2021. (R183). An Amended Judgment of Eviction was entered on April 12, 2021. (R186)

¶7 On April 14, 2021, Transform filed a Motion to Stay Eviction on the basis that it would (1) maintain the status quo of Transform in possession as a rent-paying tenant, (2) allow the damages hearing to take place, and (3) allow Transform to file an appeal to the North Dakota Supreme Court. (R190). That same day, a Notice of Appeal was filed in the Office of the Clerk of the Supreme Court on April 14, 2021. (R199). A Motion for Issuance of Writ of Execution to Enforce Amended Judgment of Eviction was filed by Boutrous on April 16, 2021. (R203). Boutrous filed a Motion for Order to Show Cause on April 26, 2021. (R233). A hearing was held on May 18, 2021. (R237). On May 26, 2021, the District Court issued an Order on Motions to Stay Eviction, for Writ of

Execution, and for Order to Show Cause wherein the District Court denied Transform a stay, granted a issuance of a writ of execution, granted Boutrous' order to show cause, and found Transform in contempt of court. (R274). On June 3, 2021, the Supreme Court dismissed Transform's appeal as the eviction judgment was deemed not final. (R287, 288). On November 9, 2021, a hearing was held on damages. (R305). On January 13, 2021, the District Court issued its Order for Damages. (R329). An Amended Judgment for Eviction was entered on January 18, 2022. (R332). Transform filed the Notice of Appeal with the Supreme Court on March 18, 2022. (R346).

### **STATEMENT OF THE FACTS**

[¶8] The contractual relationship between Boutrous and Transform dates back to the original Ground Lease, dated September 27, 1969 (R4), and the Kmart Lease dated June 1970. (R5). The Lease was for an initial term of twenty-three (23) years. (R5:1:¶2). The Lease also contains ten (10) options of five (5) year terms. (R5:5-6:¶12(a)-(j)). For each of these options, there is no rent increase as it remains at \$5,000.00 per month. (R5:5:¶12(b)). All told, and why Boutrous waited and preyed to evict Transform, is that Transform holds options on this property until 2044 without any rent increases. (Id.).

[¶9] A Kmart retail store was operated on the Kmart Property for approximately fifty (50) years. On October 15, 2018, Sears Holdings Corporation and its debtor affiliates, including Kmart Corporation, filed a voluntary petition seeking bankruptcy protection under Chapter 11 of Title 11 of the United States Code.<sup>1</sup> In November 2018, the bankruptcy court entered an order which required certain notices be sent by the Debtors to the Debtor's landlords regarding its intent to assign its leases. On February 18, 2019, the bankruptcy

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<sup>1</sup> See In re Sears Holdings Corp., Case No. 18-23538-RDD (Bankr. S.D.N.Y.), ECF No. 816, 2507, 3298, 3850.



court entered an Order approving the Asset Purchase Agreement between the Debtors and Transform Holdco LLC, Transform's parent company.

[¶10] Boutrous had notice that Transform Operating Stores LLC was the proper party for purposes of sending any notices that Boutrous was required to send Transform under the Lease. On April 16, 2019, via certified mail, Transform Operating Stores LLC notified Boutrous of the extension of the Lease for an additional term of five (5) years until October 31, 2024. (R105). The letter was also sent via email to Michael Boutrous. (Id.). On April 19, 2019, Kmart Corporation filed its notice to assign the Lease to Transform Operating Stores LLC and Transform Operating Stores LLC assumed the Lease on May 13, 2019 (*i.e.*, the Assumption Date). From that time, Transform Operating Stores LLC has carried out routine maintenance to the Property and it, or Transform KM LLC the affiliated Transform business it licensed to operate the Kmart retail store, has paid rent. On or about February 3, 2020 (R1:5:¶21), the Kmart store was closed; however, Transform has continued to pay the rent and perform maintenance on the site. (R359:15:23). Transform was also in contact with Boutrous within a few days of the store closing to discuss future planning. (R359:175:4-10).

[¶11] On December 3, 2019, Boutrous claimed that Transform was in default of the Kmart Lease for partial nonpayment of rent. (R16). Despite receiving a clarification correspondence concerning the rent claim from Transform on January 6, 2020, Boutrous purported to terminate the Kmart Lease and requested Transform surrender the premises. Transform promptly responded on January 17, 2020 with further clarification that no rent remained unpaid, Boutrous had no right to try and terminate the Kmart Lease, and that Transform intended to continue to exercise the options under the Kmart Lease. (R17).

Boutrous, on February 5, 2020, again tried to claim that Transform was to surrender the premises due to the alleged rent dispute. (R19). Transform replied on February 17, 2020, to which Boutrous replied two (2) months later on April 16, 2020. (R20).

[¶12] Almost four (4) months later on August 10, 2020, Boutrous wrote Transform that Transform was in breach of the Kmart Lease and, therefore, “[Boutrous] is terminating [Transform’s] month-to-month tenancy, effective immediately. (R21). Boutrous, no longer alleging Transform had failed to pay its rent, instead claimed “negligent abandonment” as the reasoning and demanded immediate surrender of the Kmart Premises. (Id.). In response, Transform conducted its own inspection of the Kmart Property on September 1, 2020. (R87; R359:212:13-25). As a result, issues such as the parking lot grate, were then noted as repaired and others such as sign repair were put in queue to be done. (R359:214:12; R359:215:17). Minor items such as landscaping were also resolved. (R359:217:19-25). Transform then responded to Boutrous on September 3, 2020, addressing and disputing Boutrous’ claims concerning the interpretation of the Kmart Lease and the current condition of the property. (R22). It is undisputed that there was no further communications from Boutrous for more than five (5) months concerning the Leases, the property, or any of the alleged issues (R1:17-18:¶54)<sup>2</sup>.

[¶13] Boutrous issued a Notice of Intention to Evict on January 28, 2021. (R2). Boutrous then commenced the eviction Action, pursuant to N.D.C.C. §47-32-01, on February 8, 2021. (R1). Despite Boutrous’ previous claims that the Kmart Lease had already been terminated, the eviction requests that “Boutrous is entitled to an order providing for the immediate termination of Transform’s tenancy rights under the Lease, the immediate

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<sup>2</sup> Boutrous stated that any communications to Transform occurring after September 3, 2021, would be in the exhibits. (R359:161:13-23). There are no further communications in the exhibits.

eviction of Transform from the [Kmart Premises]...” (R1:22:¶69). Boutrous stated basis for the eviction, along with filing five (5) exhibits of news reports evidencing the store closing, was that “[T]he Kmart Lease very clearly provides that the building and operating of a Kmart store are the purposes contemplated by the parties.” (R1:4:¶15). Boutrous claimed that “Transform’s de facto abandonment of the Lease Premises and resultant nuisance and dangerous conditions therein...” justified the eviction action. (R1:8:¶29). However, Boutrous stated that the “failure to maintain the [Kmart Property] and to follow applicable ordinances and laws did not start in 2020...[o]n the contrary, the pattern of neglect began well prior, as reflected for example, by the Grueneich lawsuit concerning an injury that happened in 2013.”<sup>3</sup> (R1:13:¶39). Boutrous also pointed to issues which occurred before Transform even took possession of the property such as a proof of insurance dispute in 2016, a light pole damaged in 2018, a water bill from 2019, as bases for the lawsuit. (R1:14:¶44; R1:13-14:¶¶40-41; R1:6:¶23). Boutrous claimed that the required notice under the Lease came in August 2020 and “provided Transform with more than adequate opportunity to cure its many breaches.” (R1:17-18:¶54). Transform, upon receiving the eviction notice, hired a property inspector to examine the issues raised in the eviction notice. (R359:203:15-25; R359:204:1-17). A report was generated as a result of this inspection to investigate the alleged issues. (R359:204:9-17; R88:1-15).

[¶14] Boutrous’ Action for Eviction was twenty-four (24) pages long, accompanied by Boutrous’ pre-hearing filing of fifty (50) exhibits, caused the District Court to issue a Notice to the parties wherein the District Court bifurcated the hearing into one for possession and a separate hearing on damages. (R45:1:¶1). The District Court noted that

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<sup>3</sup> Frances Grueneich v. Kmart Operations LLC; Ted J. Boutrous, L.L.C., et. al, Civil No. 08-2018-cv-00347.

Transform had yet to appear in the action and based the decision solely on a review of Boutrous' filings. (Id.). Boutrous requested three (3) hours for the eviction hearing (R25) and that requested time limitation was awarded. (R43:1:¶1). Upon appearing in the action, Transform objected to the District Court's subject matter jurisdiction. (R64:1:¶1).

[¶15] Notably, a water line break in the Kmart Building that occurred on February 3, 2021, was *not* stated as a reason for an eviction in the Action filed on February 8, 2021. (R1; R76). However, Boutrous was aware of the issue prior to commencing the Action after observing a service provider of Transform cleaning up the water. (R27:55). Without amending the Action, Boutrous would then go onto supplement the record four days later with additional exhibits and videos concerning the pipe break. (R48). It is undisputed that it was Transform who discovered the broken water line, notified the Bismarck Fire Department, and performed the cleanup. (R359:72:12-21). It is also undisputed that it was a bitterly cold evening when the water line break occurred and that the building was heated. (R359:73:1-5, 17-20; R359:206:17-25). Boutrous would then again supplement the record, this time two (2) days before the hearing, about a second pipe break that occurred in the building as Transform was remediating the first break. (R71).

[¶16] On February 19, 2021, a day-long hearing was held concerning the eviction. (R359:2:1-3; R359:260:13). It is undisputed that the Action was not about rent. (R359:15:21-25; R359:16:1-4). Instead, Boutrous stated "we're seeking the eviction because of all the incidents that have been reported and, yes, I guess the pattern of what's gone on there, yes." (R359:53:4-6). Boutrous further confirmed that it "was these other issues that have had a cumulative effect that are the events of default." (R359:43:20-25). However, Boutrous admitted that it never sought to evict the Kmart store or terminate the

Lease for any of these issues that existed in the past. (R359:54:18-25; R359:55:1-5). Boutrous confirmed that when issues, such as proof of insurance and mowing, were brought to Transform they were rectified. (R58; R359:32:12-14; R359:55:6-23). Boutrous was unable to describe what “reasonable wear and tear” would be on the Kmart building, which was built in the 1970s. (R359:56:14-19). Transform agreed that it would be commercially reasonable to do remediation work on the Kmart Store concerning the pipe break and was doing just that at the time of the hearing. (R359:199:9-25; R359:200:9). At the time of the eviction hearing, Transform was paying over \$20,000 month in temporary heat until repairs could be made. (R359:209:6-25; R359:210:1-21). Evidence was also presented that over \$215,000 in repairs had been previously done to the parking lot within the past few years. (R359:222:4-8).

[¶17] To prove up its allegations of neglect, Boutrous relied upon the testimony and incident reports of a property manager (Albert Daou) it had hired. Daou was initially contacted by Boutrous in late May or early June 2020 and hired on June 9, 2020. (R359:104:11-25; R14:1:1). Daou was only to notify Transform “if expressly directed to do so by [Boutrous]...”. (R14:1,5(c)). Beginning on June 7, 2020, Daou began compiling incident reports concerning the Kmart Property. (R27:1-56). Daou stated that if there was an issue he observed, he created an incident report. (R359:137:10-15). Daou also stated that if he himself had addressed an issue, such as cleaning up debris, he would document it but not if someone else did the work. (R359:140:6-22). These incident reports were only sent to Boutrous. (R359:107:12-14). Daou never communicated with Transform and never sent any incident reports to Transform. (R359:134:4-13). Daou and Boutrous were also aware of a trash compactor door being ajar on January 6, 2021, of which they did not notify

Transform until January 18, 2020. (R27:53-54; R359:142:4-16). Daou also could not state whether, based upon his experience as property manager, the items identified in his incident reports were the grounds for an eviction. (R359:140:23-25; R359:141:1-18). Indicative of Boutrous and Daou conspiring to not notify Transform, and unbeknownst to Transform until the hearing, Daou had notified the Bismarck Police Department on July 22, 2020, that *his company* managed the Kmart Premises. (R41:6).

[¶18] On March 23, 2021, forty-three (43) days after the filing of the eviction action, the District Court issued its eviction Order and Judgment was entered. (R122; R125). The District Court concluded that “[a]lthough the Court does find that Transform had actual notice of the issues on August 10, 2020, the Court also finds that Transform should have been aware of the problems starting in March, 2020, when the police reports show issues at the property.” (R122:13:¶36). The evidence showed that the police reports requested and obtained by Daou as far back as July 22, 2020 were never sent to Transform. (R30). The District Court continued that “Transform seems to be content in collecting rent from McDonald’s and Arby’s, but abandoning the K-Mart Property and investing no money or time into protecting the property.” (Id.). The District Court also stated that, “[o]ne of the issues, taken alone, most likely would not have resulted in a material breach [.] [h]owever, the accumulation of the issues, is a material breach of the lease.” (R122:14:¶37).

[¶19] Transform filed a Motion for Reconsideration imploring the District Court to review and analyze the Kmart Lease terms as it pertained to notice requirements and other applications. (R129). Transform also filed a Motion for Stay because the Judgment required the vacating of the Kmart Premises within (3) days (R132), in which temporary relief was granted to allow for a hearing while requiring a temporary bond be secured in

favor of Boutrous (R138; R144). The District Court denied Transform's requested relief and gave Boutrous possession of the Kmart Premises on April 14, 2021, by way of Amended Judgment of Eviction. (R183; R186).

[¶20] On April 14, 2021, Transform contemporaneously filed to stay the eviction, along with an appeal to the North Dakota Supreme Court, requesting that the District Court stay the eviction pending the appeal. (R190; R199). Before the District Court could rule on Transform's motion, and before the Supreme Court could hear the appeal, Boutrous systematically began to try and obtain possession of the property through a letter writing campaign (R196), a request for writ of execution (R203), videos and affidavits (R207-210), and a Motion for an order to show cause. (R233). On May 26, 2021, the District Court denied Transform's Motion to stay the turnover of the Kmart Premises. (R274). Despite clear evidence that Transform had previously provided Boutrous in writing with everything it needed to access the property and that Transform would not be physically present for the turnover, the District Court found Transform in contempt and ordered Transform to pay daily sanctions until the Kmart Premises were surrendered. (Id.; R140, 211, 212). On June 1, 2021, Boutrous took possession of the Kmart Premises. (R309). On June 25, 2021, the Supreme Court dismissed the appeal of Amended Eviction Judgment. (R287). On January 18, 2022, and after a separate hearing on damages, final judgment was entered three hundred forty-four (344) days after the eviction was commenced. (R332). Transform now appeals from the judgment(s) evicting it from the Kmart Premises, as well as the District Court's contempt finding and award of sanctions.

## **LAW AND ARGUMENT**

### **I. The District Court Erred in Exercising Jurisdiction Over this Matter as a Summary Eviction Action**

[¶21] The District Court concluded upon review of Boutrous’ “24-page Complaint for summary eviction, and an extensive amount of exhibits”, and prior to any appearance or filing by Transform, that “...the damages being alleged by Boutrous appear to be complex and extensive.” (R45:1:¶1). The District Court, again noting the “apparent complexity and extensiveness of the damages being alleged by the Boutrous...” concluded that “...a summary eviction proceeding is inappropriate to fully and properly address the damages issues.” (R45:2:¶3). Accordingly, the District Court directed Boutrous to schedule a separate eviction hearing relating solely to damages. After Transform then appeared and brought the matter before the District Court via a subject matter jurisdiction motion, the District Court issued an Order that the “eviction was properly filed with the Court” but that “the matter of damages will be scheduled at a later date to allow for discovery and time to prepare.” (R70:1:¶2).

[¶22] “Eviction actions under N.D.C.C. Ch. 47–32 are designed as summary proceedings.” Spirit Prop. Mgmt. v. Vondell, 2017 ND 158, ¶ 4, 897 N.W.2d 334, 336. “The proceeding is limited to a speedy determination of the right to possession of the property, without bringing in extraneous matters[.]” and “[t]he purpose of the statute is to provide an inexpensive, expeditious, and simple means to determine possession.” Cheetah Props. 1, LLC v. Panther Pressure Testers, Inc., 2016 ND 102, ¶ 20, 879 N.W.2d 423, 429-430. In Riverwood Commercial Park, LLC v. Standard Oil Co., Inc., 2005 ND 118, 698 N.W.2d 478, the parties and their predecessors had enjoyed a long-term relationship of over fifty (50) years concerning the construction and use of a portion of the Mandan refinery. The lessee in that case moved for judgment on the pleadings and the District Court concluded that an eviction was not an available remedy under the summary evictions



statutes. *Id.* at ¶5. On appeal, the North Dakota Supreme Court affirmed and held that the eviction statutes are “...primarily designed to quickly place a landowner back in possession in certain circumstances when there is little or no dispute to his right to possession [and] [t]he expedited, summary procedure provides no meaningful opportunity for discovery and places the landowner back in possession within a matter of days of serving the summons and complaint. This remedy is particularly ill-suited to resolve complex legal and factual issues. Riverwood, 2005 ND 118, ¶ 12, 698 N.W.2d at 482-483. [¶23] Similar to Riverwood, this case involves an extremely long-term and complex relationship involving multiple parties wherein Transform was being asked to defend a summary eviction action without the benefit of discovery or motion practice. Boutrous used the summary eviction statutes as both a sword and a shield. For instance, Boutrous described an incident from 2013 wherein a party was allegedly injured in the parking lot. Despite that incident happening years prior, as well as the Transform not being a party to the subsequent personal injury action or even in possession of the property at that time, Boutrous spent a substantial portion of their allegations and affidavits in the Action focusing on this issue. (R1:6-7:¶¶22-26; R3:5:¶21). Likewise, Boutrous’ Action also references alleged incidents from 2016, 2018, 2019, and 2020 that were so inconsequential that Boutrous did *not* seek to evict when they actually occurred but now became noteworthy during this Action. However, Boutrous attempted to gloss over the fact that Transform succeeded Kmart’s interest in the lease sometime in or around 2020 and therefore would have no responsibility for alleged previous incidents. (R1:5:¶28). Boutrous used these alleged previous incidents as their sword right out of the gate, while at the same time utilizing the lack of discovery available and the shortened response time,

along with what was supposed to be a summary hearing, as the shield. In turn, Transform was unduly prejudiced as Boutrous was given months to prepare for the eviction, dredging up years' worth of allegations and exhibits to frontload the docket which Transform was then forced to try and defend within the expedited statutory time constraints; however, Boutrous was then subsequently given carte blanche of unlimited "discovery and time to prepare" for its damages hearing. (R70:1:¶2).

[¶24] After the eviction hearing, the District Court, perhaps subconsciously acknowledging the complex nature of the dispute before it, concluded:

"This was certainly not a typical eviction action. Most eviction hearings last 15-60 minutes and have a small number of witnesses and exhibits. The hearing in this case lasted approximately seven hours and had numerous witnesses and exhibits."

(R122:6:¶15). However, the District Court then just whitewashed the matter by stating in conclusory fashion that "[However], Boutrous properly served [Transform] and the eviction was properly before the Court." (R122:6:¶16). Simply put, under no circumstances was this case ever one involving simple possession of property and the District Court erred in allowing the matter to proceed under the eviction statutes.

## **II. The District Court Erred in Bifurcating the Eviction Proceedings from the Claim for Damages**

[¶25] The District Court action spanned three hundred forty-four (344) days between Boutrous' initial filing and the final judgment. (R1; R332). The District Court's very first action in this case was to bifurcate the action into two tracts, one concerning possession of the property (i.e.. eviction) and the other for damages resulting from the eviction. (R45:2:¶3). Boutrous was directed that they could schedule a damages hearing "...no earlier than 60 days after the date of this Order." (R45:2:¶5). By statute, Transform's

appearance “...may not be fewer than three nor more than fifteen days from the date on which the summons is issued.” N.D.C.C. § 47-32-02. The Judgment of Eviction was then entered on March 23, 2021, forty-four (44) days after the eviction action was commenced. (R125). However, the Judgment specifically “reserve[ed] the issues of damages, costs, disbursements, fees, and interest...” but that Transform “...shall vacate and surrender the said premises to [Boutrous] or their designee no later than Friday, March 26, 2021 at 12:00 p.m. (central time). As determined by the Supreme Court, the District Court’s eviction judgment was not appealable as “...none of the orders or judgments appealed from are final...”. (R287:2-3:¶6; R288:1:¶3). Instead, Transform was forced to wait until after judgment was entered on the damages portion of the eviction, entry of judgment that would not come until January 18, 2022. (R332).

[¶26] Nowhere does the text of Ch. 47-32, N.D. Cent. Code allow for the bifurcation of the eviction hearing from a damages hearing. To the contrary, once the “court finds for the plaintiff in the action, the court shall enter judgment that the plaintiff have *immediate* restitution of the premises.” N.D.C.C. § 47-32-04. Notably, “action” is singular throughout Ch. 47-32, while possession needs to be by way of “immediate restitution”. The District Court made its findings on March 23, 2021, over a month after the eviction hearing, but the Action did not conclude until Judgment was entered after the damages hearing that took place on January 13, 2022. Transform attempted as best it could to lawfully remain in possession of the property during the interim and before the damages hearing but was thwarted by the rulings of the District Court.

[¶27] N.D.C.C. § 47-32-02 expressly states that “[i]n any action for eviction the time specified in the summons for the appearance of the defendant may not be fewer than three

nor more than fifteen days from the date on which the summons is issued.” “If the court finds for the Boutrous in the action, the court shall enter judgment that the Boutrous have immediate restitution of the premises.” N.D.C.C. §47-32-04. “Upon a showing by the Transform that immediate restitution of the premises would work a substantial hardship on the Transform or the Transform's family, except in cases in which the eviction judgment is based in whole or in part on a disturbance of the peace, the court may stay the special execution for a reasonable period, not to exceed five days.” Id. Despite the statutory time constraints, calling for a singular action to be concluded within fifteen (15) days and Boutrous taking possession within a maximum of five (5) days of entry of judgment, the District Court unilaterally expanded the statutory language to an unknown number stretching out beyond sixty (60) days. (R45:2:¶5). Such an expansion of Ch. 47-32, N.D. Cent. Code, is completely contrary to precedent stating “[t]he purpose of the statute is to provide an inexpensive, expeditious, and simple means to determine possession.” Cheetah Props. 1, 2016 ND 102, ¶ 20, 879 N.W.2d at 429-430; Riverwood, 2005 ND 118, ¶ 12, 698 N.W.2d at 482-483; Fireman’s Fund Mortg. Corp. v. Smith, 436 N.W.2d 246, 247 (N.D. 1989) (North Dakota’s eviction statutes “... allows a person seeking possession of property to limit the defendant’s time to respond and answer in order to expedite the eviction proceeding”).

[¶28] Beyond improperly enlarging the statutory limitations for eviction actions, the District Court’s decision to bifurcate the matter into two separate hearings further unfairly prejudice Transform due to the domino effect of losing possession. Specifically, Transform effectively lost all ability and rights to the Kmart Property despite the fact that the Kmart Lease was still in effect and Boutrous’ was still accepting Transform’s monthly

\$5,000.00 rent payments. (R360:18). Boutrous' own witness testified that the Kmart Lease was still in effect and that Transform was still required to pay rent and maintain the property, which included paying property taxes. (R360:9:22-25; R360:10:1-2, 22-23). Once Boutrous took possession of the property via the eviction, Boutrous was then able to market and relet the property to someone else. (R360:11:11-14). All the while, Transform was forced to sit on the sidelines without possession or use of the property and await a final judgment from which to appeal from, while at the same time having all the responsibilities under the Lease.

### **III. The District Court Erred in Finding a Material Breach of the Lease Agreement**

[¶29] The District Court determined that there was a valid lease between Transform and Boutrous. (R122:2:¶8). The District Court cited to North Dakota law regarding how leases are to be construed and interpreted. (R122:6:¶17). The District Court identified what it felt were the relevant lease terms, summarizing the terms as “Repairs/Maintenance”, “Utilities”, “Local Laws/Ordinances”, and “Notice”. (R122:14:¶37). The District Court concluded that “[o]ne of the issues, taken alone, most likely would not have resulted in a material breach[.] [h]owever, the accumulation of issues, is a material breach of the lease.” (Id.). The District Court then concluded, and granted the eviction of Transform, due to a material breach of the lease. (Id.). Transform appeals these findings resulting in judgment.

[¶30] First and foremost, the North Dakota Supreme court “has consistently held a lease will ordinarily be construed most strongly *against the lessor*.” VND, LLC v. Leever Foods, Inc., 2003 ND 198, ¶ 34, 672 N.W.2d 445, 453, citing Ehrman v. Feist, 1997 ND 180, ¶ 10, 568 N.W.2d 747 (emphasis added). “Leases are subject to the rules of contract construction.” VND, 2003 ND 198, ¶ 34, 672 N.W.2d 445. If the parties' intent can be

ascertained from the language of the contract alone, the interpretation of the contract to determine its legal effect is a question of law. *Id.* The object of interpreting a contract is to give effect to the parties' mutual intention when the contract was executed. N.D.C.C. § 9-07-03. In interpreting a written contract, a court must first ascertain the intention of the parties from the writing alone, if possible. N.D.C.C. § 9-07-04. “A contract must be read and considered in its entirety so that all of its provision[s] are taken into consideration to determine the true intent of the parties.” Lario Oil & Gas Co. v. EOG Resources, Inc., 2013 ND 98, ¶ 5, 832 N.W.2d 49. “Words in a contract are construed in their ordinary and popular sense.” *Id.* Despite the District Court adopting this governing law, it was not applied to Transform. (R122, ¶19).

[¶31] In Abelmann v. Smartlease USA, L.L.C., 2014 ND 227, ¶ 10, 856 N.W.2d 747, 751. Illustrative, the district court noted the “commercial venture with significant value”, the benefits already received by the landlord, and most importantly the benefit of a successful eviction. The landlord in that case presented evidence about several other claimed material breaches of that lease term. The district court was reversed and the judgment remanded for purposes of “adequate findings on whether [tenant] failed to pay rent for three days after the rent was due, or violated a material term of the written lease agreement.” *Id.* at ¶22. Further, issue was found with the district court determining the “essence” of the lease, finding that “that determination, whether a finding of fact or a conclusion of law, ignores the clear and unambiguous provisions in the written lease spelling out the purpose and intent of the parties...”. *Id.* at ¶20.

[¶32] In the case of Zundel v. Zundel, 2017 ND 217, 901 N.W.2d 731, a family dispute resulted in an eviction attempt concerning alleged material breaches of the lease terms,

namely a failure to make certain repairs. The district court looked at the express term of the lease concerning repairs, concluding that “good condition and repair” was equated with “functional and operable” and noting the bin site was almost fifty (50) years old. *Id.* at ¶¶22-23. The Supreme Court noted the cosmetic nature of the repairs, the intended purpose, and the vindictive purpose of forcing an eviction. *Id.* at ¶24.

### **1. Lease History Pertinent to this Summary Eviction Attempt**

[¶33] Evidence “regarding the strained relationship is important in determining whether a material breach has occurred.” *VND*, 2003 ND 198, ¶ 13, citing, *generally*, *Restatement (Second) of Contracts* § 241 (1977). “A defendant may show the character of the parties’ possessory rights, evidence of a strained relationship having a bearing on whether a material breach has occurred, and affirmative defenses.” *H-T Enterprises v. Antelope Creek Bison Ranch*, 2005 ND 71, ¶6, 694 N.W.2d 691, 694-695, citing *VND*, 2003 ND 198, ¶ 12, 13. Clearly there was evidence of a strained relationship between Boutrous and Transform as evidenced by the numerous written communications between legal counsel which ended in September 2020. (R16-22; R34). In fact, Transform notified Boutrous that it was actually *Boutrous* who was in violation of the Lease by erecting a fence on the Premises, a fence that Transform demanded to be taken down. (R22). Further, evidence is clear that Boutrous hired a property management company to effectively monitor the property for grounds for an eviction but then never notified Transform on these issues. Despite evidence to the contrary, Boutrous went so far as to claim that they did not know *who* to send the required notices to. (R122:12:¶32). As became readily apparent, and despite the claims that this case was not about money, it has always been about money. Simply put, Transform is paying only \$5,000.00 a month rent with no rent increases in the

Lease; whereas Boutrous is allegedly losing out on \$81,000.00 month rent based upon market conditions as testified by their expert. (R360:26:7-14). When Transform, in attempting to show that Boutrous had attempted to buyout Transform’s interests in the Lease as evidence of the relationship between the parties, the District Court refused to allow such testimony. (R359:166:9-25; R359:167:1-25; R359:168:1-4). Despite what was clearly a contentious relationship rife with correspondence between legal counsel concerning obligations to the property, the District Court nonetheless stated “[t]he parties did not present evidence of a strained relationship at the hearing held on February 19, 2021.” (R138:4:¶12). Despite the strong written advocacy and contentions from both counsel concerning lease interpretation and whether an eviction was warranted, the District Court incredulously concluded that “the Court did not view the letters as proof of a strained relationship, but as notice of the property issues.” (R138:4:¶13). By failing to account for the strained relationship between Boutrous and Transform, the District Court ignored a motivating factor in the eviction.

## **2. Summary Eviction Basis.**

[¶34] Boutrous instituted summary eviction hearings by way of a *Notice of Intention to Evict*, dated January 28, 2021<sup>4</sup>, and only generically provided the alleged basis. (“Notice”). (R2) An eviction is maintainable if “the lessee violates a material term of the written lease agreement between the lessor and lessee.” N.D.C.C. §47-32-01(8). The Notice does not identify any specific provisions of the Lease that was allegedly materially violated. Boutrous’ *Action for Summary Eviction & Damages* is again vague but contain no identification on which provisions of the Lease were actually violated. (R1:21:¶66;

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<sup>4</sup> The Notice is couched as a seven (7) day notice under N.D.C.C. §§47-32-01, 47-32-02.



R1:22:¶¶67-68). If eviction actions concern “...little or no dispute to [tenant’s] possession”, as the District Court stated, how was it that Boutrous was not able to actually state which Lease provision was actually violated. (R122:6:¶14). Furthermore, at the eviction hearing Boutrous focused on the water break that occurred just days before the Action was commenced but that was not included in any pre-eviction notice. Despite not being plead, the District Court highlighted that the water break justified the eviction for purposes of abandonment under the Lease. (R122:9:¶¶24-25; R122:10¶26). Accordingly, and despite the statute requiring that a material term be violated, Boutrous was absolved of that requirement through generic pleadings and subsequent fluidity of justification.

a. **Applicable Lease Provisions.**

[¶35] The Lease expressly provided what Boutrous’ remedies were for any alleged breaches of the Lease. The Lease provided that:

...if Tenant shall be in default under any other provision of this lease *and shall remain so for a period of thirty (30) days after notice* to Tenant of said nonpayment or other default, then Landlord may, by giving notice to Tenant at any time thereafter *during the continuance of such default*, either (a) terminate this lease, or (b) re-enter demised premises by summary proceeding or otherwise, expel Tenant and remove all property therefrom....

**-and-**

If any default by Tenant (except nonpayment of rent) cannot reasonably be remedied within thirty (30) days after notice of default, *then Tenant shall have such additional time as shall be reasonably necessary to remedy such default* before this lease can be terminated or other remedy enforced by Landlord.

(R5:10:¶24) (emphasis added). The Lease, therefore, required that there be a (1) default, (2) that Landlord provides notice of, (3) of which default remains for a period of thirty (30) days, then (4) Landlord has to give notice during the continuance of the default. The Lease also provides an additional remedy period to remedy alleged defaults on a reasonable basis, presumably for such alleged defaults as temporarily fixing parking lots while the ground is

still frozen or temporary boiler repair during the dead of winter when a more thorough repair may be warranted. Under the terms of the Lease, Notice “shall be in writing and deemed to be properly served on receipt thereof if sent by certified mail or registered...to any subsequent address which Tenant shall designate for such purpose.” (R5:11:¶32).

[¶36] The District Court cited to standing North Dakota law that these provisions must be construed against Boutrous yet clearly that was not done. (R122:7:¶19). Although Boutrous subjectively identified, by way of Daou’s inspection reports, items that Boutrous felt justified an eviction due to an alleged material breach of a lease term, Boutrous unequivocally did not provide any notice of these alleged issues to Transform as expressly required in the Lease. The testimony was clear that none of these inspection reports were *ever* provided to Transform. The notice and ability to cure were required under the Lease and Boutrous failed to do so. (R5:10:¶24) (emphasis added). In the event there was any question concerning notice requirements, the District Court stated that these provisions must be construed against Boutrous. (R122:7:¶19). They were not.

[¶37] Instead, the District Court determined that on August 10, 2020, Transform had notice by way of the letter from Boutrous’ attorney. (R122:13:¶32-34). Of course, said communication was promptly replied to by Transform on September 3, 2020. (R21; R22). Further, and prior to this response from counsel, Transform conducted an inspection of the property on September 1, 2020 to investigate the alleged issues raised by Boutrous. (R87). The September 1<sup>st</sup> inspection and the September 3<sup>rd</sup> letter response were completely ignored and clearly not considered in the Court’s ruling as they are not mentioned by the District Court in the Findings of Fact. Instead, and in spite of the evidence that Transform did respond and investigate, and did or made plans to perform required maintenance, the

District Court concluded that “Transform cannot argue ignorance in order to avoid their responsibility in the lease and to the community.” (R122:13:¶36).

[¶38] The reality is that Boutrous, **without any notice, and certainly with no ability to cure afforded to Transform, *instituted these summary eviction proceedings over one hundred and forty (140) days after*** what the District Court deemed was notice given to Transform. It is undisputed that the majority of the issues Boutrous claims justified an eviction by way of a material breach no longer existed at the time of the eviction hearing. Items such as grass and weeds, water bills, and proof of insurance were long since resolved but the District Court still used them as a bases for the eviction, as part of the conclusion that the issues were an “accumulation”. Further, it is undisputed that no cure notice was ever given for any issues arising after August 2020, which would include a majority of the Daou inspection reports. As evidence of Boutrous’ concerted efforts to not provide Transform with any notice, the District Court pointed out that “...an alarm was going off for approximately two weeks without any action on the part of Transform.” (R122:9:¶24). However, the District Court failed to mention that Boutrous became aware of the alarm going off and doing nothing for approximately two (2) weeks without attempting to notify Transform so it could respond. (R122:9:¶24). In reality, and instead of providing the required notice to Transform under the Lease, Boutrous merely sat on the incident reports it was gathering and waited until it felt the time was right to start an eviction action. This included, in conjunction with police reports, explicitly telling the police that Daou was the one managing the property. (R41:6). Instead, the District Court absolved Boutrous of having to provide notice by reading into the Lease an accumulation clause.

[¶39] The District Court concluded that “[i]t appears that Transform wants the Court to interpret the Notice requirement as a babysitting provision in that Boutrous was required to diligently watch the property and give immediate notice to Transform of any issues at the property – essentially putting the burden on Boutrous to protect the property.” (R183:3-4;¶11). This is not what Transform was arguing; instead, Transform was arguing that the Lease terms are required to be applied if Boutrous intended to evict Transform. Transform had contracts in place for preventative maintenance, fire protection, security, landscaping, and snow removal. (R359:213:20-25; R359:214:1-4; R84; R85; R86). Transform notified Boutrous in applied detail of the Lease requirements, including that it was Boutrous who was in violation of the Lease. (R22). Instead, Boutrous chose to “babysit” the property by way of hiring a property manager and doing inspection reports not to benefit or protect the Premises but clearly to prepare for an eviction. The reality is Boutrous never provided notice of the objectionable items as they were required to do under the Lease terms because they knew Transform would investigate and take action; instead, the District Court absolved Boutrous of failing to follow the requirements of the Lease.

#### **b. Claim of Abandonment**

[¶40] Boutrous also attempted to invent a backdoor reason for the eviction action because the Kmart store was no longer in operation. Under the Ground Lease, the stated purpose was that the lessee “shall construct and sublease a shopping center on the property...”. (R5:1:¶1). Nowhere in the Lease or Ground Lease however are there any express terms requiring that the store always remain open. When questioned during the summary eviction hearing, Della Boutrous, a practicing attorney, was unable to identify any Lease or Ground Lease provisions requiring Transform to be continuously operating a Kmart or

any other store. To the contrary, the Lease provides that “[t]he Tenant may at any time raze the whole or any part of any building at any time standing upon the demised premises provided that...it will, without unnecessary delay, replace that which is demolished with a structure equal to or greater in value that the building razed.” (R5:7:¶15). Likewise, the Lease expressly contemplates a potential closing. (R5:8:¶18) The Lease also stated that “[t]he premises hereby demised shall not be used for any unlawful purpose.” (R5:9:¶21). While Transform believes the Lease are clear and that there was no requirement that the Kmart remain open, to the extent the terms are not clear, and as previously pointed out, the documents are to be construed against Boutrous. VND, 2003 ND 198, ¶ 34. In addition, attempting to read into the documents an “essence” when specific terms were not present were grounds for an appeal. Abelmann, 2014 ND 227, ¶ 20. Despite this legal guidance, the District Court determined that Transform had abandoned the property despite the fact that it was paying rent, paying exorbitant heating costs, and had further maintenance plans for when the weather improved.

[¶41] It cannot be understated that Transform has continuously paid rent and that this is not an eviction based upon a claim for failure to pay rent; in fact, Transform had tendered payments totaling \$59,823.00 to Boutrous that Boutrous did not even bother to cash, a fact that Boutrous tried to interject into the eviction proceedings to be used against Transform. (R1:22:¶71). Likewise, Transform introduced uncontested evidence that Transform had landscaping and snow plowing contracts in place for 2020-2021. (R87; R88). Transform also introduced evidence that Transform maintains insurance on the property. (R84). Finally, Boutrous introduced evidence that Transform was actively seeking a new tenant for the property. (R27:15). However, the District Court missed the relevancy of that

information. (R361:15:7-17). Despite it being Transform’s right under the lease to re-let the property, Boutrous clearly had financial motivation to evict Transform so that *Boutrous* could be the one to lease the property – an additional \$81,000.00 per month above and beyond what Transform is paying. (R360:13:3-12)

[¶42] Boutrous did not, and cannot, point to any specific Lease or Ground Lease term evidencing abandonment. To the contrary, Transform’s actions in paying rent, having maintenance plans in place now and in the future, maintaining insurance, etc. could only lead a reasonable person to conclude that Transform definitively did not abandon the premises.

### **c. Condition of the Property**

[¶43] The Lease provided that Transform was to “...carry out such repairs and maintenance *as it deems necessary* to keep the demised premises *in good order and repair...*”. (R5:7:¶14). The Lease, by its express terms, therefore, provides that repairs shall be (1) at Transform’s discretion, and (2) to maintain the property in good order and repair. This express term is how the summary eviction hearing *must* be judged, not the subjective and self-serving motives of Boutrous. Likewise, the fact that this property is over fifty (50) years old and that Transform was only in possession under the Lease for approximately two (2) years must be taken into account. The eviction was sought in February while the repairs that Boutrous complained of were outdoors. Ironically, the District Court would later take into consideration in Boutrous’ favor both the season (spring) and current weather (snow) after the eviction in conjunction with the damages hearing stating “[t]he Court does not find that waiting one month to start getting bids for work would cause a substantial hardship.” (R144:3:¶6).

[¶44] First and foremost, the previously discussed provision of the Lease provided that Boutrous is to provide notice to Transform of any alleged breaches of the Lease concerning maintenance. The testimony of Della Boutrous, Michael Boutrous, and Daou was that Boutrous did *not* provide Transform with any of the inspection reports. Instead, many of the issues identified in the inspection reports resolved themselves quickly such as long grass, unauthorized parking, and minor debris dumped by unknown parties. Both Daou and Mark Conway (on behalf of Transform) testified that either they or their representatives did such clean-up activities as it was necessary and discovered. A mere cursory review of Daou's inspection reports shows that an alleged issue would be on a report and then either noted as resolved or would resolve itself by the next incident report. Unless notice required by the Lease was given, Transform cannot be held to Boutrous' subjective and often minor complaints especially when the items no longer existed at the time of the Action.

[¶45] To the contrary, the testimony of Conway was uncontroverted concerning the maintenance and condition of the property under the standard set for in the Lease. In response to a correspondence from Boutrous alleging upkeep issues, Transform had its own inspection conducted on September 1, 2020, in which very few items were listed as needing immediate repairs. (R88). Transform notified Boutrous on September 3, 2020, that it unequivocally disagreed with Boutrous' contentions and allegations. (R22). Conway testified that Transform had vendor contracts in place for snow, landscaping, HVAC, and security monitoring entities. (R85; R86). This is supported by what is contained in the inspection reports, namely that no other landscaping issues remained, that photographs of the parking lot show the snow having been removed, garbage being removed, etc. Conway was contrite in admitting that the repair of the handicap parking sign was erroneously

thought to have been completed to which, upon learning of that fact via this lawsuit, had then been put on a work order to be replaced in the spring. Similarly, with the parking lot light issues – which were not raised by Boutrous’ own property manager until January 8, 2021 as shown in his inspection reports and not reported to Transform - as soon as Transform was made aware, Transform, being a good steward and learning that this was an issue, put the repair in the queue for replacement when the weather allowed.

[¶46] By allowing Boutrous to solicit testimony and present evidence into the record alleged maintenance deficiencies dating back to as far back as 2013 prejudiced Transform as Transform did not assume the Lease until 2019. If, however, the entire history of the property was considered, the alleged deficiencies need to be juxtaposed against Conway’s testimony concerning over \$215,000.00 worth of repairs having been made to the parking lot, light poles, and sewer castings under the Lease. (R82:3:¶25).

[¶47] As further proof the property was not abandoned, Transform was who discovered the pipe break via an inspection. (R88). Conway testified that he immediately arranged for a water cleanup service to dispatch to the site to remedy the problem and begin cleanup. Transform arranged for the fire department to come shutoff the water in order for cleanup to take place, which was done. (R76). Boutrous did not learn of the pipe break until February 4<sup>th</sup> when Daou was informed by a passerby. (R27:55). The testimony of both Conway and the fireman, along with the 2/02/21 inspection report, unequivocally provided that the heat was on and functioning within the building. (R88).

[¶48] Under unlucky circumstances, the boiler within the store failed shortly thereafter; as Conway testified to, Transform learned of the failure from its monitoring service. Conway immediately arranged for temporary heat sources consisting of exterior diesel



heaters mounted on trailers that cost over \$20,000.00 a month and that Transform was committed to operating these heaters until a permanent solution could be made. Conway's testimony was that a boiler specialist was being sought to diagnose and plan a repair. Boutrous' property manager documented the existence of and continuous operation of these temporary heaters in his inspection reports (R27; R73; R74).

### **1. Stacking of Issues**

[¶49] Boutrous conveniently utilizes issues that have no bearing on this summary eviction hearing due to untimeliness and not even involving Transform Operating Stores LLC, minor quibbles, or resolved matters. Boutrous complains of missed utility payments only to conveniently minimize the fact that Transform, upon learning of the utility bill, promptly made payment. (R1:14:¶42). Boutrous complains that regarding the alleged failure to provide proof of insurance, minimizing that one such issue occurred in 2016 and had nothing to do with the Transform, and that Boutrous did receive proof of insurance. (R1:14-15:¶44). As evidenced by the record, Transform has insurance on the property. (R84). Other complaints such as landscape issues, minor refuse and garbage (which did not belong to Transform), and unauthorized parking which, as apparent in the record and the investigation reports, were timely resolved and never to be spoken of again. (R1:14:¶43). Boutrous also solicited testimony, by way of introducing inspection reports, concerning evidence of homeless people being found on the exterior of the property. First and foremost, proper notice under the Lease was never given concerning this alleged problem. This is likely because the alleged problem was temporary and was resolved in the proper timely manner by the police – this is documented in both the police records and in Daou's inspection reports. Important to this eviction action is that there was

no testimony that the homeless issue was still present at the time of the eviction and the Action does not allege as much either. Despite evidence that these were all non-issues or resolved by the time of the eviction hearing, the District Court concluded that they were collectively a breach of a material term.

#### **IV. The District Court Erred in Awarding Sanctions Concerning the Turnover of the Property**

[¶50] On April 12, the District Court entered an Amended Judgment wherein Transform was to “vacate and surrender the same premises to Boutrous or their designee no later than Wednesday, April 14, 2021 at 12: p.m. (central time).” (R186). Boutrous sought a writ of special execution on April 16, 2021, to obtain possession of the Kmart Property. (R203). As part of that process, Boutrous completely misrepresented Transform’s alleged refusal to turnover possession of the Kmart Property. The District Court, finding that Transform intentionally did not comply with the eviction order, ordered that Transform pay daily sanctions of \$100 per day beginning on April 14, 2021, and continuing until Boutrous received possession of the Kmart Property. (R274:6:¶24). Boutrous, with a representative of Transform physically present, took possession of the Kmart Property on June 1, 2021. (R292). Accordingly, sanctions in the amount of \$4,100.00 would be due from Transform to Boutrous concerning the forty-one days that Boutrous did not take possession. However, this amount has never been reduced to judgment by Boutrous. Transform now appeals the sanctions award.

[¶51] Transform was merely asserting its legal rights under North Dakota law, and apprised Boutrous that it was doing so, yet the District Court awarded severe sanctions based upon alleged intentional conduct. The law is clear concerning Rule 62, N.D.R.Civ.P., and the process for seeking relief by staying the execution of a judgment. Out of stated

professional courtesy, Transform advised Boutrous the day before the date of turnover that Transform was appealing to both the District Court and the Supreme Court. (R212). Accordingly, Transform filed a Motion for Stay of Eviction (R190) and an appeal of the eviction judgment with the Supreme Court on April 14th, 2021. (R199). These legal filings, were filed two (2) days *prior* to Boutrous' motion.

[¶52] Transform seeking to stay the execution with a motion was decidedly *not* contempt of court. First of all, those seeking contempt of court sanctions are required to file a motion, along with notice and a hearing. N.D.Cent.Code §27-10-01.3. “A failure to follow the procedural dictates of N.D.C.C. § 27–10–01.3 is fatal to a court’s order of contempt and the resulting sanction.” Holkesvig v. Welte, 2012 ND 14, ¶ 11, 809 N.W.2d 32.3. Boutrous did not perform these procedural requirements.

[¶53] Further, Rule 8, N.D.R.App.P., all but required Transform first move for a stay in the District Court. (“A party must ordinarily move first in the district court for the following relief: (A) a stay of the judgment or order of a district court pending appeal.”). If Transform would have voluntarily complied with the eviction order without first seeking a stay, Boutrous undoubtedly would have raised the argument that Transform’s voluntary compliance waived the right of an appeal; likewise, if Transform failed to seek a stay with the District Court, the Appellate Rules would have barred an appeal of the eviction order. Alas, Transform’s actions were not only merited under the law, they were required. The District Court acknowledged the law (“The alleged contemnor has the burden to prove an inability to comply.”) but refused to then recognize Transform’s legal filings. (R269:2:¶3).

[¶54] Finally, “an alleged contemnor who feels that an order is erroneous has an adequate remedy to have it reviewed by way of appeal, and absent a stay, is required to comply

promptly with the order pending appeal.” Flattum–Riemers, 1999 ND 146, ¶ 11, 598 N.W.2d 499 ). In this case, Transform did just that by filing for a motion for stay, which at the time had yet to be decided by the District Court. See Dieterle v. Dieterle, 2016 ND 36, 875 N.W.2d 479 (stay request was denied and, thus, subject to contempt proceedings if failed to object to that order while appeal was pending). Until the motion for stay was decided, Boutrous’ argument for contempt was moot.

[¶55] Finally, Rule 70, N.D.R.Civ.P., regarding writ of executions, is derived from F.R.Civ.P. 70. N.D.R.Civ.P. 70, *Explanatory Note*. “A court may hold a party in civil contempt *only* when (1) the order the party allegedly failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the party has not diligently attempted in a reasonable manner to comply. S.E.C. v. Oxford Cap. Sec., Inc., 794 F. Supp. 104, 106 (S.D.N.Y. 1992). “The party seeking a civil contempt order “bears the burden of proving facts warranting such relief by clear and convincing evidence.” Jake's, Ltd., Inc. v. City of Coates, 356 F.3d 896, 899–900 (8th Cir. 2004). Completely ignored by the District Court were communications from Transform to Boutrous the month prior concerning turning over the Kmart Property. Specifically, Transform notified Boutrous of the “desire for this relationship to remain civil and so are willing to cooperate under protest and without waiver of any rights therein.” (R211:1:¶1). Transform further advised that it would not have anyone physically present at the turnover of the property but provided both the alarm code and the lock box code. (R11:1:¶2). The day prior Transform yet again reminded Boutrous. (R194).

[¶56] The District Court also overlooked the fact that this was, and had been for quite some time, a vacant building. As evidence, the District Court concluded as rationale for

the sanctions that “...Transforms failed to vacate and surrender the premises.” (R274:5:¶18). It is unknown what the District Court intended for Transform to do to vacate an already vacant building. Boutrous was present on site yet did not enter the Kmart Building despite having the alarm code and the lock box code. (R208). Awarding harsh and punishing sanctions for not participating in what amounted to Boutrous’ demand for livery of seisin is unwarranted by the record.

**V. The District Court Erred in Ordering The Turn Over the Property.**

[¶57] The District Court awarded sanctions against Transform for failing to voluntarily turn over the property to Boutrous. Transform had argued that because of the District Court’s decision to bifurcate the eviction action, Transform had no choice but to exhaust all potential legal remedies for fear that voluntarily turning over the property would destroy any appeal right. See DeMers v. DeMers, 2006 ND 142, 717 N.W.2d 545. In doing so, Transform sought to stay the eviction judgment so that (1) the then-pending appeal to the North Dakota Supreme Court could take place, or (2) the damages hearing could conclude and final judgment be entered. (R189). The District Court had previously granted a stay of the eviction judgment until after the motion for reconsideration was heard. (R144). However, and despite the then-pending appeal, this time the District Court denied Transform’s motion. (R274).

[¶58] Despite the fact that the Supreme Court appeal was pending, the District Court focused on the fact that Transform allegedly did not even attempt a “strong showing that [Transform] is likely to succeed on appeal.” (R274:2:¶8). In essence, the Bergstrom and Cass County factors would require a movant such as Transform to convince the District Court that *itself* was wrong and will be reversed or overturned on appeal.

[¶59] The District Court noted that “[t]he property has been vacant for over a year” and thus there would be no harm to Transform not being in possession of the premises. (R274:3:¶11). However, the District Court went on to chastise Transform for not having a potential lessee for the property (under the uncertainty of an eviction) as only causing speculative harm while at the same time concluding that if Boutrous were to find a lessee then Transform would ultimately have a claim for money damages. (Id.). Likewise, and despite Boutrous’ previous claims of a month-to-month tenancy (which would terminate upon eviction), the District Court concluded that “..the lease requires [Transform] to continue to perform those obligations whether the Court grants the stay or denies the stay.” (R274:3:¶11). Such erroneous findings only support that the status quo of Transform remaining in possession of the property pending the appeal alleviates both parties of substantial harm with no impact to the public. Instead, Transform was deemed to not have possessory rights in the Premises yet Transform had no availability to challenge that judgment until the damages judgment was entered. By ordering that Transform had to turn over the premises despite the pending appeal yet continuing to pay rent, the District Court prejudiced Transform.

#### **VI. Request for Oral Argument.**

[¶60] Appellant requests that the Court schedule oral argument pursuant to Rule 28(h) of the North Dakota Rules of Appellate Procedure. This case involves legal and factual issues and oral argument may assist the Court in its review.

#### **CONCLUSION**

[¶61] For the reasons stated above, as well as the complete record before the Court, Transform respectfully requests, after oral argument on the issues, that the district court's eviction of Transform, along with the award of sanctions, should be overturned.

Dated this 5<sup>th</sup> day of July, 2022.

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**CERTIFICATE OF COMPLIANCE**

[¶62] The undersigned, as attorneys for the Appellant in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure and upon Motion to the Court for Enlargement of Page Limitations, that the above brief was prepared with proportional type face and that the total number of pages in the above brief, excluding this certificate of compliance, exceeds thirty-eight (38) pages.

Dated this 5<sup>th</sup> day of July, 2022.

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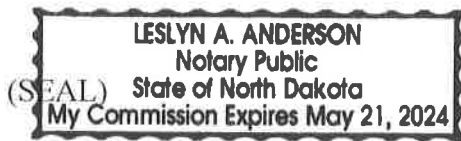




[¶2] To the best of affiant's knowledge, information and belief, such address as given above was the actual address of the party intended to be so served.

*A. Carroll*  
Ann Carroll

Subscribed and sworn to before me this 6<sup>th</sup> day of July, 2022.



*Leslyn A. Anderson*  
Notary Public

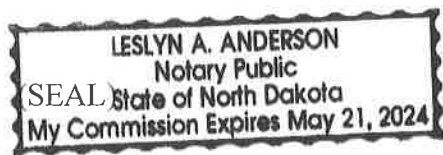


[¶2] To the best of affiant's knowledge, information and belief, such address as given above was the actual address of the party intended to be so served.

*Ann Carroll*

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Subscribed and sworn to before me this 6<sup>th</sup> day of July, 2022.



*Leslyn A. Anderson*  
Notary Public