

**IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA**

Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP, Plaintiffs and Appellees, vs. 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, Defendants and Appellants.	Supreme Court Case No. 20220090 Burleigh County No. 08-2021-CV-00240
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**BRIEF OF APPELLEES
TED J. BOUTROUS, L.L.C. AND THE BOUTROUS GROUP, LLP**

Appeal from Amended 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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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1]

1. Was this case properly brought and heard as a summary eviction action?
2. Was it proper for the District Court to bifurcate the eviction and damages actions?
3. Did the District Court properly find a material breach of the lease agreement?
4. Was it proper for the District Court to award sanctions?
5. Was eviction proper prior to conclusion of the damages action?

II. STANDARD OF REVIEW

[¶2] Whether a tenant has breached a lease agreement is reviewed on appeal as a finding of fact. VND, LLC v. Leever Foods, Inc., 2003 ND 198, ¶31, 672 N.W.2d 445, 453. “In an appeal from a bench trial, the district court’s findings of fact are reviewed under the clearly erroneous standard of review, and its conclusions of law are fully reviewable.” McCarvel v. Perhus, 2020 ND 267, ¶9, 952 N.W.2d 86, 89. “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 reviewing all of the evidence, the Court is convinced a mistake has been made.” *Id.* “Findings of the trial court are presumptively correct.” *Id.*

III. STATEMENT OF THE CASE

[¶3] This is an appeal of an eviction and damages judgment in a summary eviction action. Plaintiffs and Appellees Ted J. Boutrous, L.L.C. and The Boutrous Group, LLP (collectively, “Boutrous”) are local, family companies whose principals inherited a few parcels of real estate from their fathers. (R359:6:8-11). In 2018, Defendants and Appellants, Transform Operating Stores, LLC d/b/a Transformco Operating Stores, LLC; Transform SR Brands LLC d/b/a Transformco d/b/a Kmart; or Transform KM LLC

(collectively, “Transform”), purchased the assets of Sears Holding Corporation and its debtor affiliates, including Kmart Corporation, out of bankruptcy and now hold a national real estate portfolio made up of sites on which Sears and Kmart stores were previously operated. (Appellants’ Brief:8-9:¶9; R11; R12).

[¶4] This case came about because Transform “essentially abandoned” the premises it was leasing from Boutrous and allowed it to deteriorate. (R122:13:¶35). Transform was given many months’ notice of numerous lease defaults prior to Boutrous finally bringing an eviction action. (R122:13:¶36). While Transform contends that this case should not have been heard as a summary eviction under N.D.C.C. ch. 47-32, the lease agreement specifically allows Boutrous to pursue eviction by “summary proceedings or otherwise” and this case falls squarely within the eviction statute. (R5:10:¶24; N.D.C.C. §47-32-01(8).) Additionally, Transform was given much more process than due under the summary eviction statute and had every opportunity to make its case. Regardless of the length of this case, it is at bottom a routine commercial lease dispute, and the District Court’s judgment is more than supported by the factual record, to which this Court must give great deference under its own standard of review.

[¶5] Boutrous is the owner of the property at issue, located at 2625 State Street, Bismarck, North Dakota (the “Property”). (R1:4-5:¶17). Boutrous’ predecessors-in-interest, Theodore J. Boutrous and Floyd N. Boutrous, on September 27, 1969 entered into a Ground Lease (the “Ground Lease”) with Paul O. Moore, as lessee (“Moore”), which contemplated that Moore would construct a “shopping center” on the Property and sublease it to S.S. Kresge (“Kmart”). (R4:1:¶II). On June 8, 1970, Moore and Kmart

entered into a commercial Lease (the “Kmart Lease”) by which Moore leased to Kmart the Property and the building to be constructed by Moore. (R5:1).

[¶6] Boutrous was the landlord under the Kmart Lease, and one of the Transform entities, Transform Operating Stores LLC, became the tenant sometime in 2018 or 2019 as part of the Kmart Corporation bankruptcy case. (R122:2:¶8). The Ground Lease terminated years ago and Boutrous became the direct landlord to Kmart Corporation and then Transform. (R7:5:¶17). The Kmart Lease was the operative lease agreement between the parties. (R359:11:17-25; R359:12:1-8).

[¶7] Kmart Corporation operated a Kmart store on the Property for many years, until Transform assumed the lease and permanently closed the store in February of 2020. (R8-10). Shortly after the store closed, it became clear that Transform was failing to maintain and secure the Property, and Boutrous grew increasingly concerned about the effect on its Property, its adjacent tenants, and the public. (R20:2; R359:27:20-25; R359:28:1-5).

After notifying Transform of multiple defaults on August 10, 2020, on January 28, 2021 Boutrous served upon Transform a Notice of Intention to Evict. (R2). Pursuant to Section 24 of the Kmart Lease, which specifically grants Boutrous the right to pursue eviction by “summary proceedings,” and N.D.C.C. ch. 47-32, Boutrous filed an action for summary eviction on February 8, 2021. (R1). That same day, a Summons & Notice of Eviction Hearing was filed and served, notifying Transform that an eviction hearing would be held in eleven days. (R24).

[¶8] On February 12, 2021, the District Court issued a notice that the hearing would address only the right to possession and that a hearing on damages would be scheduled later to “provide [Transform] time to respond to the alleged damages claimed.”

(R45:2:¶3). Transform filed an Expedited Motion to Dismiss for Lack of Subject Matter Jurisdiction on February 16, 2021, which the District court denied the next day. (R64; R70). Transform filed its answer on February 18, 2021. (R82).

[¶9] The eviction hearing was held on February 19, 2021. (R359). On March 23, 2021, the District Court issued its Findings of Fact, Conclusions of Law, and Order, finding that Transform had proper notice of numerous material defaults under the Kmart Lease and had “essentially abandoned” the Property. (R122:12-13:¶¶33-35). Judgment of Eviction was entered on March 23, 2021 and Transform was ordered to surrender the Property to Boutrous no later than March 26. (R125). Transform filed an Expedited Motion to Reconsider on March 25, 2021, along with an Expedited Motion to Stay or Relief from Judgment, and a hearing was held on March 29. (R129; R132; R360). That same day, the District Court ordered a stay on the judgment until the reconsideration hearing. (R144).

[¶10] The District Court issued an Order on Motion for Reconsideration on April 12, 2021, denying Transform’s request and ordering that Boutrous was entitled to possession of the Property on April 14, and an Amended Judgment of Eviction was entered. (R186; R183).

[¶11] On April 14, 2021, Transform filed a Motion to Stay Eviction and a Notice of Appeal. (R190; R199). Two days later, Boutrous filed a Motion for Issuance of Writ of Execution to Enforce Amended Judgment of Eviction, and ten days later filed a Motion for Order to Show Cause as a result of Transform’s refusal to obey the Amended Judgment of Eviction. (R203; R233). A hearing was held on May 18, 2021. (R362). On May 26, 2021, the District Court issued an order denying Transform’s motion for a stay, granting a writ of execution, granting Boutrous’ motion for order to show cause, finding

Transform in contempt for refusing to obey the Amended Judgment of Eviction, and ordering Transform to pay sanctions of \$100 for every day it refused to surrender the Property. (R274). A Writ of Execution was issued and Transform finally surrendered the Property on June 1, 2021. (R282). On June 3, 2021, the Supreme Court dismissed Transform's first appeal, finding the eviction judgment was not final. (R287; R288). [¶12] On November 9, 2021, a damages hearing was held. (R363). On January 13, 2022, the District Court issued its Order for Damages in the amount of \$139,987.74. (R329). An Amended Judgment for Eviction was entered on January 18, 2022. (R332). Transform filed a Motion to Stay Judgment and Approval of a Supersedeas Bond on March 2, 2022 and a hearing was held on May 17, 2022 (R336; R351). On May 19, 2022, the District Court issued an order granting a stay as to the collection of damages and ordering Transform to post a bond in the amount of \$146,787.74, which represents the amount of the damages judgment, the amount of sanctions, and an estimated amount of interest. (R357). Transform filed a Notice of Appeal on March 18, 2022. (R346).

IV. STATEMENT OF THE FACTS

[¶13] Pursuant to the Kmart Lease, Kmart Corporation for many years operated a Kmart store on the Property. (R4; R5). Transform apparently succeeded to tenant's interest under the Kmart Lease sometime in April of 2019, although the exact date is unclear, as Transform did not provide notice to Boutrous. (R122:2-3:¶9). Transform permanently closed the Kmart store on or about February 3, 2020. (R8-10).

[¶14] Shortly after the Kmart store closed, Boutrous became concerned about the maintenance and security of the Property and in a letter to Transform from its legal counsel dated April 16, 2020 asked for information regarding Transform's plans "to keep

the demised premises secured and in good order and repair.” (R20:2). Boutrous did not receive a response to that letter. (R359:38:20-25; R359:39:1).

[¶15] In the meantime, it became clear to Boutrous that Transform was allowing the Property to sit vacant with no maintenance or security. Between March of 2020, shortly after the Kmart store closed, and February 2021, the month of the eviction hearing, there were at least 23 reports by the Bismarck Police Department regarding issues at the Property, including:

- (i) various trespassers, many of whom appeared to be intoxicated by alcohol and/or illegal drugs, some of whom were observed in physical altercations, and many of whom were sleeping on the Property;
- (ii) numerous abandoned vehicles located on the Property (at least one of which the police suspected might be stolen or involved in a crime);
- (iii) multiple people actually living in vehicles on the Property; and
- (iv) an alarm sounding at the rear of the building that continued for approximately two weeks. (R122:3:¶11; R:50).

[¶16] One police report noted that the Property “has become a breeding ground for homeless [people] to hang out” and recommended that it might need to be checked by nightly patrol. (R50:14). Another officer noted he was “concerned that the Kmart parking lot is becoming a place for homeless people to sleep in their cars, etc.” (R50:21).

[¶17] Because Transform was obviously failing to provide even minimal security and maintenance for the Property and never responded to Boutrous’ request for information on those issues, Boutrous, at its expense, was forced to hire Integrity Property Management to keep an eye on the Property and erect a security fence and “no

trespassing” signs around the Property. (R122:3-4:¶11). In addition to the numerous issues set forth in the police reports, Integrity Property Management provided periodic incident reports between June of 2020 and February of 2021 noting various issues at the Property, including:

- (i) numerous unauthorized vendors selling merchandise;
- (ii) homeless people and loiterers at the rear of the building and on the sidewalk adjacent to the building;
- (iii) people camping in their cars with makeshift tents assembled next to vehicles;
- (iv) multiple cars parked with “For Sale” signs;
- (v) in one single incident which required a police response, at least five people sleeping in their vehicles;
- (vi) an accumulation of mattresses, scrap wood and other garbage;
- (vii) an abandoned vehicle with no license plates parked behind the building near the loading dock;
- (viii) weeds and grass over 3-feet tall;
- (ix) a parking lot drain cover dislodged;
- (x) various depressions and potholes forming in the parking lot;
- (xi) a bollard and sign tipped over, presumable having been hit by a car;
- (xii) a homeless camp behind the dumpster at the back of the building;
- (xiii) water damage and deterioration to the exterior finishes of the building;
- (xiv) a homeless camp in the trash compactor at the rear of the building;

- (xv) an alarm sounding near the trash compactor at the rear of the building which continued for approximately two weeks and was caused by someone trying to break into the building through the compactor door;
- (xvi) multiple exterior and parking lot lights burnt out;
- (xvii) wind damage including flashing blown off the building;
- (xviii) the security fence being opened on numerous occasions and ran through with a car on at least one occasion; and
- (xix) water flooding inside the building and out of the front door of the building due to a pipe bursting. (R27).

[¶18] On August 10, 2020, Boutrous' legal counsel sent a letter notifying Transform it was in default under the Kmart Lease for (i) abandoning the Property and failing to keep the Property in a safe and good condition; (ii) failing to perform basic maintenance and repairs; (iii) allowing transient persons to live in vehicles and makeshift shelters on the Property; (iv) allowing transient people to engage in illegal drug use on the Property; (v) allowing multiple unauthorized vendors on the Property; (vi) allowing garbage and abandoned vehicles on the Property; and (vii) failing to secure and protect the Property. (R122:3-4:¶11(E); R21). As the District Court found, this letter constituted sufficient notice of the defaults pursuant to Section 24 of the Kmart Lease. (R122:12:¶33).

[¶19] From the date of the default notice through the date of the eviction hearing, there were several police reports and incident reports documenting that the various defaults were not cured. (R122:12-13:¶33-34). Any claim by Transform that it addressed the various defaults after August 10, 2020 is contrary to the facts found by the District Court. The most Transform can point to is that it hired a property inspector to inspect the

Property, generate a report, and deal with “minor items,” while others “were put in queue to be done.” (Appellants’ Brief:10-11:¶¶12-13). That is a far cry from actually remedying the numerous and serious issues that continued for months after Transform was notified.

[¶20] After months of watching its Property deteriorate due to Transform’s failure to fulfill its obligations under the Kmart Lease, Boutrous was forced to serve the Notice of Intention to Evict upon Transform on January 28, 2021. (R2). Boutrous commenced the eviction action on February 8, 2021, a full year after the Kmart store closed. (R1).

[¶21] Transform apparently thinks the length of Boutrous’ complaint and number of exhibits it filed are evidence that this case was too complicated for summary eviction. (Appellants’ Brief:6 and 11:¶¶5 and 14). In fact, the length of the complaint and the number of exhibits simply reflect the sheer number of issues caused at the Property by Transform’s various defaults. (R122:1-2:¶¶6-7). A tenant should not be allowed to use summary eviction as a shield by claiming that its many defaults render the case too complicated. (R122:1-2:¶¶6-7).

[¶22] Transform tries to deflect attention from its numerous defaults by claiming Boutrous is solely motivated by money, as Transform admittedly pays a relatively low rental rate. (Appellants’ Brief:8:¶8). That allegation is laughable coming from a company that purchased a 59.8 million square foot real estate portfolio out of bankruptcy. (Appellants’ Brief:8-9:¶9; R11; R12; R359:149:8-18). Transform’s only possible motivation is money. On its own website Transform describes itself as primarily a company holding a valuable nationwide real estate portfolio. (R11). Transform acquired various Kmart properties with the intention to profit from the underlying tenant rights. (R3:5:¶20; R:11; R:12). Since the closing of the Kmart store in February of 2020,

Transform has simply sat on the real estate asset with hopes of selling its tenancy rights or subleasing the Property at a profit.

[¶23] All the while, Boutrous was forced to watch its family inheritance deteriorate and become a public nuisance. While Boutrous certainly would welcome an increased rental rate from a new tenant (as any landlord would), it has motivations far beyond that.

Boutrous acted to protect an asset that has been in its family for two generations, protect its longtime adjacent tenants who were suffering adverse effects as the Kmart Property deteriorated, and prevent a public nuisance and eyesore in their own community.

(R37:6:¶23; R359:96:2-5; R359:44:5-11). Boutrous has great affinity for Bismarck, having called it home for three generations, and had serious concerns about public safety at the Property. (R359:18:13-23). Finally, Boutrous' name and reputation are at stake – it did not want to be associated with the squalor that resulted from Transform's defaults, especially given the prominent location of the Property on one of the busiest streets in Bismarck. (R37:2:¶4).

[¶24] The District Court was not swayed by Transform's attempt to deflect attention from its numerous defaults, making extensive findings of fact to support an eviction. (R122:8-12:¶¶21-31). The District Court also found that despite its main argument to the contrary, Transform (i) had notice of the various defaults as of August 10, 2020; (ii) should have been aware of various problems at the Property starting in March, 2020; and (iii) had plenty of time to remedy the defaults, which continued through the date of the eviction hearing. (R122:12-13:¶¶32-36). Had Transform not "essentially abandoned" the Property after closing the Kmart store, it would have noticed all the problems at the Property. (R122:13:¶35).

[¶25] The District Court found, and Transform admitted through the testimony of one of its own employees, that Transform was obligated under the Kmart Lease to keep up the maintenance and security at the Property. (R122:3:¶10). It failed to do so even after being notified by Boutrous of numerous issues and admitted in the eviction hearing “that they had no one regularly checking on the property.” (R122:13:¶¶34-35). Transform’s main witness at the eviction hearing, Mark Conway, Director of Facilities/Maintenance, admitted he had not visited the Property since 2013, and even that was “just a drive-by inspection” on his way to Montana. (R359:225:18-21). Transform’s other witness, Daryl Penn, Real Estate Asset Manager, admitted he has never been to North Dakota, much less the Property. (R:359:187:24-25; R359:188:1).

[¶26] The District Court’s findings of fact show the extent to which Transform’s abandonment of the Property caused numerous issues, including: rough spots, cracks, deep potholes, and lighting issues in the parking lot; a frozen pipe that burst causing extensive water damage on two occasions; numerous break-ins, homeless encampments, illegal activity, unauthorized vendors, and used cars for sale at the Property; garbage and debris strewn about the Property; and a failure to perform basic maintenance such as mowing the grass. (R122:8-12:¶¶21-31). The District Court noted that there were “too many incidents for the Court to document every one of them in its decision” and incorporated the police reports and incident reports into its findings by reference. (R122:10-11:¶¶27-29). The District Court also found that Transform violated a number of Bismarck City Ordinances and failed to pay utilities when due, both of which were material defaults under the Kmart Lease. (R122:11-12:¶¶30-31; R122:14:¶37(B) and (C)).

[¶27] Given the overwhelming evidence, the District Court found that Transform was in material breach of the Kmart Lease, having failed to (i) keep the Property in good order and repair; (ii) pay all utility charges when due; and (iii) observe and comply with all local laws and ordinances. (R122:14:¶37).

V. ARGUMENT

A. **The District Court’s exercise of jurisdiction over this case as a summary eviction action was proper.**

[¶28] Section 24 of the Kmart Lease provides that if Transform is in default, Boutrous, after giving proper notice as the District Court found it did, may “re-enter [the] demised premises by *summary proceedings* or otherwise.” (R5:10:¶24) (emphasis added). Courts must interpret a lease, like any contract, in a way that will make it “capable of being carried into effect.” N.D.C.C. §9-07-08. Courts must give effect to a clear contractual provision that reflects the “mutual intention of the parties as it existed at the time of contracting.” Freidig v. Weed, 2015 ND 215, ¶10, 868 N.W.2d 546, 549 (citing N.D.C.C. §9-07-03). Indeed, this Court has recognized that North Dakota has a “major public policy of freedom to contract on terms not specifically prohibited by statute.” Markwed Excavating, Inc. v. City of Mandan, 2010 ND 220, ¶16, 791 N.W.2d 22, 28. An action under N.D.C.C. ch. 47-32 is “a summary proceeding to recover possession of real estate” which is exactly what the parties agreed to in the Kmart Lease. Anderson v. Heinze, 2002 ND 60, ¶11, 643 N.W.2d 24, 28. Transform’s argument that this case was inappropriate for summary eviction is foreclosed by the plain language of the Kmart Lease.

[¶29] Even if the Kmart Lease did not explicitly provide for summary eviction, the District Court’s exercise of jurisdiction over this case as a summary eviction action was nonetheless proper. An action of eviction is maintainable in district court when at least

one of the eight specific factual grounds set forth in the statute applies, one of which is that “[t]he lessee violates a material term of the written lease agreement between the lessor and lessee.” N.D.C.C. §47-32-01(8). The statute also requires that “three days’ written notice of intention to evict must be given to the lessee” and that the hearing “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 District Court found that Transform breached more than one material term of the Kmart Lease. (R122:14:¶37). The Notice of Intention to Evict was served upon Transform on January 28, 2021 and the Summons & Notice of Eviction Hearing was served on February 8, 2021. (R2; R43; R46). The eviction hearing was held on February 19, 2021. (R359:1). Boutrous’ eviction action falls squarely within the statute’s substantive and procedural requirements.

[¶30] In its brief, Transform relies exclusively on one case to support its contention that this case was improperly handled as a summary eviction. (Appellants’ Brief:16:¶22). In Riverwood Commercial Park, LLC v. Standard Oil Co., Inc., 2005 ND 118, 698 N.W.2d 478, both the district court and this Court did indeed find that summary eviction was improper, but the reasons for doing so in no way support Transform’s argument in this case. Riverwood involved a dispute over a sewer pipeline running from the oil refinery in Mandan to the Heart River pursuant to a written permit. Riverwood, 2005 ND 118, ¶2. Plaintiff brought a summary eviction action to force removal of the pipeline. *Id.* at ¶4. The Court found that none of plaintiff’s claims fell within the eight factual grounds set forth in N.D.C.C. §33-06-01. *Id.* at 8. (N.D.C.C. ch. 33-06 was re-codified “without substantial changes” as N.D.C.C. ch. 47-32; see Gasic v. Bosworth, 2014 ND 85, ¶6, 845 N.W.2d 306, 307-308). A party seeking to employ summary eviction must demonstrate

“that one of those eight subsections is applicable.” Riverwood, 2005 ND 118, ¶8. The Court also found plaintiff’s claim that defendant breached a material term of the lease unpersuasive, as the document at issue was not a lease at all, but merely a permit. *Id.* at ¶11. Finally, the Court noted that summary eviction was “particularly ill-suited to resolve complex legal and factual issues arising from an underground sewer line which has been in place for half a century.” *Id.* at ¶12.

[¶31] Unlike Riverwood, this case involves an actual lease, and Boutrous’ claims fall directly within N.D.C.C. §47-32-01(8) and within the remedies granted to Boutrous under Section 24 of the Kmart Lease. Furthermore, while the dispute in Riverwood was over a permit for a pipeline, the operation and potential removal of which are inherently complicated, this case is a traditional commercial lease dispute between a landlord and tenant. While the Kmart Lease was executed years ago, longevity does not make it more complicated than any other commercial lease. Transform tries to portray the Kmart Lease as a “complex relationship involving multiple parties,” but it is in fact a fairly standard commercial lease. (Appellants’ Brief:17:¶22). The Kmart Lease contains provisions commonly found in commercial leases and the question was simply whether Transform was in breach. The District Court itself failed to see “where the complexity of this lease is any different than” other eviction cases and noted that “[t]he lease and facts in this case were not overly complex.” (R361:4:22-25; R183:3:¶10). Indeed, summary eviction was particularly straightforward in this case, as Transform was not even occupying the Property, having closed the Kmart store one year prior to the eviction hearing. (R122:13:¶35; R8-10).

[¶32] Even if one assumes, for the sake of argument, that the District Court erred in exercising jurisdiction over this case as a summary eviction, that error was harmless. Transform claims it was forced to defend this case “without the benefit of discovery or motion practice.” (Appellants’ Brief:17:¶22). The record shows, however, that Transform had more than ample time for motion practice, having filed a motion to dismiss prior to the eviction hearing and another six motions thereafter. (R64, 129, 132, 146, 190, 301, 336). Transform makes the bare assertion that it did not benefit from discovery but fails to explain how discovery would have mattered in this case. (Appellants’ Brief:17:¶22). The question for the District Court was simply whether Transform breached the Kmart Lease. It is hard to imagine how discovery would have shed any more light on that issue than the witnesses and exhibits produced at the eviction hearing.

[¶33] Transform’s complaint about the length of this case is essentially a complaint that Transform was granted much more process than it was actually due under the summary eviction statute. (Appellants’ Brief:17:¶22). The District Court allowed Transform a full opportunity to present its defense. Transform filed numerous motions and briefs and managed to retain possession of the Property for months after the initial eviction judgment, despite the clear statutory command that Boutrous was entitled to “immediate restitution of the premises.” N.D.C.C. §47-32-04. Transform filed a motion to dismiss and supporting brief; had the benefit of a daylong hearing in which it was entitled to bring any evidence and witnesses it wished; filed multiple motions for reconsideration, stay, and relief from judgment; presented multiple witnesses and exhibits at a damages hearing; presented a motion to stay once again; and is appealing to this Court for the second time. (R64; R645; R359; R129; R132; R190; R336; R199; R363). While

Transform was entitled to take full advantage of any procedures available in the District Court, it should not now be allowed to attack the proceedings for taking too long, when much of the delay is attributable to Transform's own litigation strategy (as well as the District Court's own schedule, which was complicated due to the COVID-19 pandemic).

B. The District Court's decision to bifurcate actions was proper.

[¶34] On February 12, 2021, the District Court issued a notice that the February 19th hearing would address only the right to possession and that a hearing on damages would be scheduled for a later date. (R45:2:¶¶3). Noting "the apparent complexity and extensiveness of the damages being alleged" (but not the breach allegations) the Court concluded "a summary eviction proceeding is inappropriate to fully and properly address the damages issues" and directed that "a separate hearing will need to be scheduled." *Id.*

[¶35] Importantly, the District Court decided to bifurcate the eviction and damages actions to "provide Defendants time to respond to the alleged damages claimed," to which Transform raised no objection. (R45:2:¶¶3). The District Court later noted that "the matter of damages will be scheduled at a later date to allow for discovery and time to prepare," to which, yet again, Transform raised no objection. (R70:1:¶2). While Transform now claims that decision was prejudicial, it gave Transform ample time to defend against the damages claim, and Transform never objected to bifurcation.

[¶36] The District Court's decision to handle the eviction and damages claims separately was reasonable. By bifurcating the damages claim from the eviction claim, the District Court was ensuring that the eviction hearing was "limited to a speedy determination of the right to possession of the property, without bringing in extraneous matters." Spirit Prop. Mgmt. v. Vondell, 2017 ND 158, ¶4, 897 N.W.2d 334, 336.

Because the relevant statute is primarily intended to ensure the speedy determination of possessory rights, it was reasonable for the District Court to focus on that issue within the statutory timelines. N.D.C.C. §47-33-02. That is especially true given Boutrous' right to "summary proceedings" under the Kmart Lease. (R5:10:¶24).

[¶37] The text of the eviction statute supports the District Court's decision to bifurcate the claims. The statute provides that "[a]n action of eviction cannot be brought in a district court in connection with *any other action*, except for rents and profits accrued or for damages arising by reason of the defendant's possession." N.D.C.C. §47-32-04 (emphasis added). The statute does not say that an action of eviction may "include" or "be combined with" an action for damages. Rather, the statute provides that an action for eviction may not be brought "with any other action" of the types specified, which rather plainly suggests that the action for eviction and action for damages are distinct and separate actions. *Id.* If considering the separate actions together defeats the statutory purpose of providing "a speedy determination of the right to possession of the property, without bringing in extraneous matters," it is eminently reasonable for the District Court to consider the two actions separately. Spirit Prop. Mgmt., 2017 ND 158, ¶4.

[¶38] Furthermore, because the statute plainly contemplates separate actions, the relevant statutory timelines only apply to the action for eviction itself and not the separate action for damages. The statute provides 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." N.D.C.C. §47-32-02 (emphasis added). The statute applies those timelines only to the "action for eviction" and not "any other action" allowed later in the statute. N.D.C.C.

§47-32-04. If the Legislature had intended for the timelines to apply to both, it clearly could have said so by providing that an “action for eviction and any other action properly brought pursuant to Section 47-32-04” are subject to the statutory timelines. The Legislature did not do so, and it is not the job of this Court to amend the statute as Transform implicitly suggests.

[¶39] The only relevant question for this Court is whether the District Court’s decision to bifurcate the actions was prejudicial to Transform. The crux of Transform’s argument is that because the District Court bifurcated the eviction and damages actions, Transform was “forced to wait [to appeal] until after judgment was entered on the damages portion of the eviction” (Appellants’ Brief:19:¶25). However, Transform had an available judicial remedy for what it now complains was prejudicial. As this Court pointed out in dismissing Transform’s first appeal, “[a] judgment or order of eviction is not final unless all of the claims brought pursuant to N.D.C.C. ch. 47-32 are adjudicated, *or the district court certifies the judgment as final under N.D.R.Civ.P. 54(b).*” Ted J. Boutrous, L.L.C. v. Transform Operating Stores, LLC, 2021 ND 100, ¶6, 960 N.W.2d 801, 804 (emphasis added). Transform “did not seek Rule 54(b) certification” from the District Court. *Id.* Transform could have asked the District Court for an “entry of final judgment” as to the eviction judgment, but it did not. *Id.* Even after the first appeal was dismissed and this Court had essentially provided Transform with a roadmap for how to appeal the eviction judgment, Transform still did not seek a Rule 54(b) certification. If Transform thought bifurcation created a prejudice or hardship, it should have presented that argument to the District Court in a Rule 54(b) motion. Having failed to do so, Transform’s claim that bifurcation was prejudicial deserves no serious consideration.

[¶40] Transform’s failure to seek a Rule 54(b) certification is just one of many instances in which it showed a distinct lack of interest in a speedy outcome. Transform did not object to bifurcation or move the District Court to schedule the damages hearing sooner. And Transform is the only party that filed a motion to delay the proceedings below, asking to reschedule the damages hearing originally scheduled for August 6, 2021 to September 17, 2021, which was then pushed out even further to November 9, 2021 because of the District Court’s schedule. (R285:1:¶1; R305; R301).

[¶41] Transform did not actually suffer any harm by the amount of time this case has taken. Transform ceased operation of the Kmart store over a year before Boutrous finally regained control of the Property, so there was no loss of revenue or disruption of operations at the Property while this case progressed. (R8-10; R282). The only way Transform can claim to have been prejudiced by the bifurcation of claims and length of the proceedings is by mischaracterizing the relationship between the parties since Transform’s eviction. Transform’s assertion that “Boutrous’ [*sic*] was still accepting Transform’s monthly \$5,000.00 rent payments” is not accurate, as it implies that Boutrous is somehow reaping a financial benefit from Transform even though Transform is no longer in possession of the Property. (Appellants’ Brief:20¶28). The Kmart Lease provides that even after a summary eviction “*Tenant shall remain liable for the equivalent of the amount of all rent reserved herein less the avails of reletting, if any...*” (R5:10:¶24) (emphasis added). As such, Transform is no longer paying rent under the Kmart Lease. Since Boutrous regained possession of the Property, Transform has been paying contractual damages in an amount equal to the previous monthly rent amount as required by the Kmart Lease. *Id.* That contractual obligation would have remained

regardless of how long the eviction action proceeded, subject only to Boutrous' duty to mitigate damages. *Id.* Transform would have been in the same financial position whether the District Court bifurcated the claims or not. (Appellants' Brief:21:¶28; R5:10:¶24).

[¶42] Despite Transform's assertion to the contrary, the payment of monthly damages is the only obligation that remains in effect after eviction pursuant to the Kmart Lease.

(R5:10:¶24). Boutrous has allowed one of Transform's contractors on the Property since the eviction, solely for the purpose of inspecting and repairing damage caused by Transform during its time of possession that Transform still had not repaired as of the time of eviction. (R364:37:14-23). In other words, Boutrous was simply mitigating damages by allowing Transform to repair "damages arising by reason of [Transform's] possession." N.D.C.C. §47-32-04. To the extent Transform was performing any other obligations under the Kmart Lease since it was evicted, it was doing so without notifying or obtaining authorization from Boutrous (R364:20:20-25).

[¶43] If any party was harmed by the District Court's bifurcation of claims and the resulting length of the proceedings, it was Boutrous. Despite the requirement in N.D.C.C. §47-32-04 that the prevailing plaintiff is entitled to "immediate restitution of the premises," Boutrous did not regain possession of the Property until June 1, 2021, more than two months after the District Court issued its Judgment of Eviction and more than three months after the eviction hearing. (R125; R282). Boutrous was denied its clear contractual and statutory right to a speedy summary eviction and has been left in legal limbo for over a year as the Property remains encumbered by the ongoing litigation.

C. The District Court's conclusion that Transform materially breached the Kmart Lease was proper and supported by its findings.

[¶44] As noted above, the question of whether a tenant has breached a lease agreement is reviewed on appeal as a finding of fact and subject to the clearly erroneous standard of review. VND, LLC, 2003 ND 198, ¶31; McCarvel, 2020 ND 267, ¶9. In addition, the District Court’s “choice between two permissible views of the weight of the evidence is not clearly erroneous” and this Court does not “reweigh conflicts in the evidence.” Brandt v. Somerville, 2005 ND 35, ¶12, 692 N.W.2d 144. This Court is not entitled to reverse the District Court even if it may “have viewed the evidence differently.” *Id.*

[¶45] After hearing from all the witnesses and reviewing the evidence produced by both sides during the eviction hearing, the District Court made extensive findings of fact and concluded that because of the “accumulation of issues” at the Property, Transform was in material breach of multiple provisions of the Kmart Lease. (R122:14:¶37; R122:8-12:¶¶21-31).

[¶46] The Kmart Lease requires that Transform “carry out such repairs and maintenance as it deems necessary to keep the demised premises in good order and repair.” (R5:7:¶14). Transform focuses on the phrase “as it deems necessary” and argues that all of the issues the District Court found do not constitute a breach because Transform had complete discretion whether to deal with them or not. (Appellants’ Brief:30:¶43). The important point, however, is that any discretion given to Transform under the repair clause is qualified and must be exercised “to keep the demised premises in good order and repair.” (R5:7:¶14). Transform essentially is arguing that having no one regularly check on the Property, providing virtually no operable security, and allowing homeless persons and other loiterers on the Property at their will, were all perfectly fine under the Kmart Lease. In other words, Transform is arguing it had the discretion to essentially

abandon the Property as the District Court found it had, and Boutrous had no recourse as the Property owner. (R122:13:¶35). Transform’s interpretation of the repair clause is unreasonable and contrary to the findings and conclusions of the District Court.

[¶47] The District Court found, and Transform admitted through the testimony of one of its own employees, that Transform was responsible under the Kmart Lease for the maintenance and security of the Property. (R122:3:¶10). Transform failed to maintain and secure the Property even after being notified by Boutrous of numerous issues and admitted in the eviction hearing “that they had no one regularly checking on the property.” (R122:13:¶¶34-35). Again, Transform’s main witness, Mark Conway, had not visited the Property since 2013, and even that was “just a drive-by inspection” on his way to Montana, and his job at the time was limited to Americans With Disability Act compliance issues. (R359:225:18-21; R359:225:1-4). Transform’s other witness admitted he had never been to North Dakota, much less the Property. (R:359:187:24-25; R359:188:1). Conway further testified that since the Kmart store closed there were no facilities managers in the North Dakota region with oversight of the Property and that it is Transform’s practice to “handle everything from corporate at this point.” (R359:230:22-25; R359:231:1-8).

[¶48] The District Court’s findings of fact show the extent to which Transform’s failure to maintain and secure the Property caused numerous issues (R122:8-12:¶¶21-31). There were rough spots, cracks, deep potholes, and lighting issues in the parking lot, none of which were resolved at the time of the eviction hearing. (R122:9:¶22).

[¶49] On or about February 4, 2021, the Bismarck Fire Department was notified that water was flowing out of the building and into the parking lot. (R122:9:¶25). The water

leak was caused by frozen pipes and sprinkler heads after the compactor door was broken into, which Transform did nothing about as the alarm blared for two weeks.

(R122:9:¶¶24-25). As of the eviction hearing, there was still water standing inside the building from a subsequent leak. (R122:10:¶26; R359:79:11-17). Even though Transform remained in possession of the Property for months after the water leak, the extensive damage had not been cleaned up and repaired, the cost of which was included in the damages awarded to Boutrous. (R329:7:¶A). Transform now wants credit for providing temporary heat to the building after the leaks, but it glosses over the fact that the leaks were caused by its own failure to maintain and secure the building. (Appellant's Brief:32:¶48).

[¶50] As for the numerous break-ins, homeless encampments, illegal activity, unauthorized vendors, used cars for sale at the Property, and garbage, trash and debris strewn about the Property, the District Court noted that there were “too many incidents for the Court to document every one of them in its decision.” (R122:10-11:¶¶27-29). The District Court reviewed the various police reports and incident reports and incorporated them into its findings. *Id.* Transform argued that most of these problems were issues for the police, and that Transform “did not think they needed to [do] anything more after Boutrous hired Integrity and put up a fence” (even though Transform's counsel threatened legal action against Boutrous for doing so). (R122:11:¶28; R22:2). Transform was perfectly content to leave all these problems for others to deal with, even though its own witness admitted, and the District Court found, that it was Transform's responsibility to deal with the maintenance and security. (R122:3:¶10; R122:14:¶37). The District Court

also noted that while Transform blamed local police, it did not bother to check on the Property or hire a security or property management company. (R122:13:¶¶34-36).

[¶51] The District Court also found that Transform was failing to perform the most basic of maintenance – mowing the grass – which resulted in Boutrous receiving a notice from the City of Bismarck. (R122:11:¶30; R13). Transform also failed to pay the water bill even when the Kmart store was still operating, despite the requirement in the Kmart Lease that “Tenant shall pay all charges for utility services furnished to the demised premises.” (R5:7:¶16). Boutrous received a notice from the City of Bismarck regarding the unpaid water bill and ended up paying it. (R122:11:¶30; R38).

[¶52] Finally, the District Court found that Transform violated a number of Bismarck City Ordinances in breach of the Kmart Lease, which required Transform to “observe and comply with all rules, orders and regulations of all duly constituted public authorities.” (R122:11:¶31; R122:14:¶37; R5:7:¶17). Those ordinances included prohibitions on abandoned vehicles and the accumulation of junk, refuse, scrap or similar items outside of a building in any commercially zoned district. (R122:12:¶31).

[¶53] Given the overwhelming evidence, the District Court found that because of the accumulation of issues caused by Transform’s neglect and abandonment of the Property, Transform was in material breach of the Kmart Lease, having failed to (i) keep the Property in good order and repair; (ii) pay all utility charges when due; and (iii) observe and comply with all local laws and ordinances. (R122:14:¶37).

[¶54] In the face of all these facts, Transform’s main argument at the eviction hearing was that it did not have notice of the numerous issues at the Property. (R122:12:¶32). The Kmart Lease provides:

“If the rent reserved in this lease, or any part thereof, shall remain unpaid for a period of thirty (30) days or if Tenant shall be in default under any other provisions 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 proceedings or otherwise...” (R5:10:¶24).

[¶55] Boutrous sent Transform a notice of various defaults on August 10, 2020, which the District Court found constituted proper notice under Section 24 of the Kmart Lease. (R122:12:¶33). The District Court also found that Transform had constructive notice of the various issues at the Property as early as March of 2020, shortly after the Kmart store ceased operations, when police reports showed issues at the Property.” (R122:13:¶36).

[¶56] After the notice of default, Transform had 30 days to remedy the problems under the Kmart Lease, which provides that if any default “cannot reasonably be remedied within thirty (30) days” then tenant may have additional time as reasonably necessary. (R5:10:¶24). Transform never indicated that the defaults could not be cured in 30 days and never asked for more time to cure. As the District Court found, Transform failed to remedy the defaults. (R122:13:34). Between August 10, 2020, the date of the default notice, and the February 19, 2021 eviction hearing, “there were several police reports and Integrity Reports documenting the same issues that were documented in the letter sent on August 10, 2020” all of which were incorporated into the findings of fact. *Id.*

[¶57] Boutrous was entitled to send Transform a notice of eviction “at any time” after the 30-day cure period lapsed on September 9, 2020. (R5:10:¶24). Hoping that Transform would finally start paying attention to the Property after receiving the default notice, Boutrous waited until January 28, 2021 to serve the Notice of Intention to Evict, a full

152 days after it was contractually entitled to do so. *Id.* Transform had six months to cure the various defaults, despite being entitled to only 30 days under the Kmart Lease. *Id.*

[¶58] In its brief, Transform accuses Boutrous and its property manager of “conspiring to not notify” Transform and not sharing the police and property manager reports with Transform. (Appellants’ Brief:13-14:¶17). Boutrous was under no obligation to share any police and inspection reports with Transform, and the former are public records that Transform could have obtained on its own. As the District Court found, Boutrous provided proper notice of the defaults to Transform, which was all the notice that was required under Section 24 of the Kmart Lease. (R122:12:¶33). Transform thinks it was Boutrous’ job to notify Transform of each and every issue at the Property on a continual basis, which as the District Court found would treat the notice requirement in the Kmart Lease “as a babysitting provision...essentially putting the burden on Boutrous to protect the property.” (R183:3-4:¶11). Transform either does not comprehend how the notice provision in the Kmart Lease (or any commercial lease, for that matter) actually works, or is simply trying to detract from its own failures to maintain and secure the Property. Boutrous had no obligation pursuant to the Kmart Lease or otherwise to continuously monitor the Property and alert Transform to every issue. Indeed, it was Transform who should have been monitoring the Property and dealing with the various issues, which it failed to do. (R122:3:¶10; R5:7:¶14).

[¶59] Transform cites two cases in its brief but fails to explain how they apply to this case. (Appellants’ Brief:22:¶¶31-32). Perhaps that is because they actually support both Boutrous’ argument and the findings of the District Court. In Abelmann v. SmartLease USA, L.L.C., 2014 ND 227, 856 N.W.2d 747 (N.D. 2014), the landlord presented

evidence of several claimed breaches by tenant, including failure to pay rent and failing to maintain the property. *Id.* at ¶9. The Court found that “the district court did not make sufficient findings of fact under N.D.R.Civ.P. 52(a) and its findings are inadequate to permit appellate review.” *Id.* at ¶21. This case presents no comparable problem, as the findings of fact are more than adequate to allow this Court to “understand from them the factual basis for the district court’s determination.” Gross v. Sta-Rite Industries, Inc., 322 N.W.2d 679, 682 (N.D. 1982). The District Court made extensive findings regarding the various breaches by Transform and tied them to specific provisions in the Kmart Lease in concluding that there was a material breach. (R122:9-12:¶¶21-31; R122:14-15:¶37).

[¶60] In Zundel v. Zundel, 2017 ND 217, 901 N.W.2d 731, the landlord claimed that tenant breached a bin site lease by failing to make certain repairs. The district court found, and this Court agreed, that some of the repairs demanded by Tenant were wholly cosmetic in nature and others were “patently unreasonable and absurd.” *Id.* at ¶24. The Court upheld the district court’s determination that, despite the breaches claimed by landlord, the tenant maintained the bin site “in good condition by making repairs, as needed, to keep the site in functional working condition.” In the instant case, the District Court found that Transform “essentially abandoned” the Property leading to a litany of issues as set forth in its findings of fact. (R122:13:¶35; R122:9-12:¶¶21-31). Unlike the tenant in Zundel, Transform did nothing to maintain and secure the Property after the Kmart store closed, despite receiving notice of numerous problems.

[¶61] Unable to show that the District Court’s findings are clearly erroneous or point to any relevant case law, Transform tries to relitigate other issues, some of which were

considered and rejected by the District Court or not even raised by Transform, and others that simply misconstrue the District Court's findings.

[¶62] Transform claims that “the majority of the issues Boutrous claims justified eviction...no longer existed at the time of the eviction hearing.” (Appellants’ Brief:27:¶38). The District Court disagreed, finding the same issues set forth in Boutrous’ August 10, 2020 default notice continued through the eviction hearing, as evidenced by the police reports and inspection reports incorporated into its findings. (R122:13:¶34). Granted, not every trespasser and loiterer remained on the Property until the eviction hearing, but that is because Boutrous’ property manager was frequently monitoring the Property and asking them to leave, with the last occurrence less than two weeks before the notice of intention to evict. (e.g. R27:1, 3, 6, 7, 24, 32, 39, 40, 45, and 49; R2). To the extent some of the trash and debris was removed prior to the eviction hearing, it was because Boutrous’ property manager was removing it (e.g. R26: 28, 34, and 38).

[¶63] Transform claims the District Court failed to consider evidence of a “strained relationship” between the parties including “numerous written communications between legal counsel.” *Id.* It is true that “a defendant may show...evidence of a strained relationship having a bearing on whether a material breach has occurred.” H-T Enterprises v. Antelope Creek Bison Ranch, 2005 ND 71, ¶6, 694 N.W.2d 691 (internal quotations and citations omitted). However, Transform did not specifically raise the issue of a “strained relationship” during the eviction hearing, as the District Court pointed out in its Order on Motion for Reconsideration. (R183:4:¶12). In fact, Transform’s own witness, Daryl Penn, testified that he had a “congenial” conversation with Della Boutrous after the Kmart store closed and the District Court noted “that it was a good

conversation” and that “[t]here was no other testimony presented of communication between Transform and Boutrous.” (R359:176:6; R183:4:¶12-13). It was only after the eviction hearing, during a subsequent hearing on Transform’s motion to reconsider, that Transform raised the issue. (R361:16:12-15). The District Court determined that the “evidence” Transform was now arguing for was actually “evidence of a good relationship” as there were various communications between landlord and tenant over the years and various issues were resolved. (R361:18:3-6). During the eviction hearing, Transform did try to question a witness about buyout negotiations between Boutrous and Transform’s predecessor which occurred years before Transform became the tenant under the Kmart Lease. (R359:166:24-25; R359:167:1-25; R359:168:1-4). However, Transform did not specifically attempt to pursue that issue as evidence of a “strained relationship” as the hearing transcript makes clear. *Id.* Transform argued at the eviction hearing that the District Court should only consider issues between Boutrous and Transform, and not the whole lease history prior to Transform becoming tenant. (R361:16:16-22). The District Court did exactly as Transform argued, even noting in its findings of fact that it “did not consider any issues of the property prior to April 16, 2019...which is the only date this Court has suggesting when Transform took over the lease.” (R361:16:16-22; R122:8:¶21).

[¶64] Transform also contends that evidence of the water leaks that first occurred days before Boutrous filed its complaint should not have been considered by the District Court. (Appellants’ Brief:25:¶34). The water leak was just one of myriad facts found by the District Court, and it was an ongoing problem at the time of the eviction hearing (R359:117:12-16). Transform did not object to testimony and evidence about the water

leaks during the eviction hearing. (R359:69:1-25; R359:70:1-25; R359:71:1-25; R359:72:1-3; R359:107:15-16). The onus is on a party, not the judge, to object to offered evidence, and Transform's failure to object to evidence and testimony about the water leaks during the eviction hearing "is a waiver upon appeal of any ground of complaint against its admission." State v. Tresenriter, 2012 ND 240, ¶9, 823 N.W.2d 774, 778.

[¶65] Finally, Transform erroneously claims that it was evicted for ceasing to operate the Kmart store. (Appellants' Brief:28:¶40). That is a curious issue to raise on appeal, as one will search the District Court's findings in vain for any evidence that closing the Kmart store was grounds for eviction. What the District Court did find, however, is that after closing the Kmart store, Transform "essentially abandoned" and had no one checking on the Property. (R122:13:¶35). That abandonment is what led to the various breaches of the Kmart Lease as documented by the District Court. (R122:8-12:¶¶21-31). Transform seems to think that continuing to pay rent after the Kmart store closed, having maintenance contracts in place, and maintaining insurance, are sufficient to show they were very much on top of things at the Property. (Appellants' Brief:30:¶42). But those are merely paperwork exercises and not a substitute for actually physically maintaining and securing the Property, which the District Court found Transform utterly failed to do. (R122:13:¶35). The maintenance contracts that Transform thinks are dispositive covered (i) the fire suppression system, HVAC systems, landscaping, and snow removal, none of which prevented the numerous defaults at issue in this case; and (ii) an ADT security contract, which obviously was of little value given the alarm that was blaring for two weeks as a result of an attempted break-in through the trash compactor. (R359:213:24-25; R359:214:1-4). Transform's witness, Mark Conway, also admitted that between the

closing of the Kmart store in February of 2020 and Transform’s receipt of the default notice in August of 2020, Transform did not perform any inspections of the Property, despite the Kmart store sitting empty and Boutrous having already expressed concerns about maintenance and security in a letter dated April 16, 2020. (R359:239:7-11; R20:2).

[¶66] Transform is trying to relitigate the case in this Court by bringing up irrelevant issues and complaints, while completely ignoring the overwhelming evidence for material breach found by the District Court. The findings of fact are presumptively correct and only to be overturned if clearly erroneous, which based on the record, they most certainly are not. McCarvel, 2020 ND 267, ¶9.

D. The District Court’s imposition of sanctions was proper.

[¶67] On March 23, 2021, the District Court entered a Judgment of Eviction, ordering Transform to “vacate and surrender the said premises” to Boutrous “no later than Friday, March 26, 2021 at 12:00 p.m.” (R125:1:¶1). On March 25, 2021, the District Court issued an Order granting a temporary stay of the Judgment until a hearing could be held on Transform’s Motion to Reconsider and Motion for Relief from Judgment. (R138:1:¶1). Boutrous objected to that Order by a letter to the Court. (R140:1). On March 29, 2021, the District Court issued an Order Regarding Stay in which it reiterated that the stay would remain in place until a hearing on Transform’s Motion to Reconsider. (R144:3:¶8). On April 12, 2021, the District Court issued an order denying Transform’s motion and ordering that Boutrous was entitled to possession by April 14 and entered an Amended Judgment of Eviction (R183:5:¶¶19-20; R186:1:¶1). Transform yet again filed a Motion to Stay, while Boutrous filed a Motion for Issuance of Writ of Execution and For Order to Show Cause, and the District Court scheduled a hearing on both motions on

May 18, 2021 (R226:1:¶¶1-2). The District Court issued an order on May 26, 2021 denying Transform’s motion for a stay, granting Boutrous’ motion for a writ of execution, and imposing sanctions on Transform of \$100 for every day Transform refused to turn over possession of the Property. (R274:6:¶¶21-24). The District Court imposed the “remedial sanction” on Transform for its “willful and inexcusable conducted [sic] which intentionally defied the Amended Judgment of Eviction.” *Id.* at ¶24. The District Court issued a Writ of Execution on May 28, 2021 and Transform finally turned over possession of the Property to Boutrous on June 1, 2021. (R282).

[¶68] Boutrous moved the District Court for an order to show cause “why Defendants, and/or each of them, should not be held in contempt and otherwise sanctioned for refusal to obey the Amended Judgment of Eviction.” (R233:1:¶1). That was more than sufficient under state law, which provides that a court on its own motion or the motion of one of the parties may impose remedial sanctions. N.D.C.C. §27-10-01.3(1)(a). “Under N.D.C.C. §27-10-01.3(1)(a), a district court may impose a remedial sanction for contempt only after notice and hearing.” Holkesvig v. Welte, 2012 ND 14, ¶11, 809 N.W.2d 323, 327 (internal quotations and citations omitted). The District Court provided notice on April 21, 2021, and the hearing was held on May 18, 2021. (R226; R362).

[¶69] “To warrant a remedial sanction for contempt, there must be a willful and inexcusable intent to violate a court order.” Harger v. Barger, 2002 ND 76, ¶14, 644 N.W.2d 182, 186. Transform’s delay in turning over possession of the Property despite multiple orders to do so, was clearly intentional as the District Court found (R274:5:¶20). The party against whom contempt sanctions are sought has the burden to prove an inability to comply with the court’s order. Krueger v. Krueger, 2013 ND 245, ¶18, 840

N.W.2d 613, 619. The only excuse offered by Transform was the desire to wait for another hearing. (R274:5:¶20).

[¶70] A party to whom an order is issued is required to comply, even if it feels the order was erroneous. Bertsch v. Bertsch, 2007 ND 168, ¶15, 740 N.W.2d 388, 392; Flattum-Riemers v. Flattum-Riemers, 1999 ND 146, ¶11, 598 N.W.2d 499, 502. Transform had ample opportunity to challenge the order of eviction, as the foregoing procedural history clearly shows. Transform obtained a stay and it expired, and Transform had no further justification for delay in turning over possession. If Transform was concerned that complying with the District Court’s orders would jeopardized its right to appeal, it could have sought a Rule 54(b) certification of the judgment. N.D.R.Civ.P. 54(b).

[¶71] Yet again, Transform was given much more process than it was due. State law provides that in a summary eviction action, a successful plaintiff is entitled to “immediate restitution of the premises” and only allows the court to “stay the special execution for a reasonable period, *not to exceed five days*.” N.D.C.C. §47-32-04 (emphasis added).

Despite this statutory mandate, Transform received a stay from March 25, 2021 until the court denied its motion to reconsider on April 12, 2021. (R138:1:¶1; R183:5:¶¶19-20).

[¶72] Finally, despite Transform’s characterization of the sanctions, which starts at “severe” and eventually reaches the hyperbolic crescendo of “harsh and punishing,” the sanctions were obviously quite modest, amounting in the aggregate to less than one month’s rent under the Kmart Lease. (Appellants’ Brief:34:¶51; Appellants’ Brief:37:¶56).

E. The District Court’s order that Transform turn over the Property was proper.

[¶73] There was no prejudice to Transform as a result of the District Court ordering Transform to turn over possession of the Property. First, Transform once again mischaracterizes the relationship between the parties post-eviction by claiming it was “continuing to pay rent.” In fact, Transform is paying damages to Boutrous in an amount equal to the monthly rent, subject to Boutrous’ duty to mitigate, which leaves Transform in the exact same financial position as before the eviction. (R5:10:¶24). Second, Transform relies on one case to support its contention that “voluntarily turning over the property would destroy any appeal right.” Appellants’ Brief:37:¶57. That case, however, held that “individuals that unconditionally, voluntarily and consciously *accept a substantial benefit from a divorce judgment* waive the right to appeal the judgment.” Demers v. Demers, 2006 ND 142, ¶27, 717 N.W.2d 545, 555 (emphasis added). Boutrous is unaware of any case law applying that rule beyond divorce cases.

VI. CONCLUSION

[¶74] Based on the foregoing brief as well as the complete record before the Court, Boutrous respectfully requests that the District Court’s judgment be affirmed.

Dated this 4th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

[¶75] The undersigned, as attorney for the Plaintiffs and Appellees in the above matter, and as the author of the foregoing brief, hereby certifies, in compliance with Rule 32(d) of the North Dakota Rules of Appellate Procedure, that the foregoing brief, excluding this certificate of compliance, does not exceed thirty-eight (38) pages.

Dated this 4th day of August, 2022.

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