

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.: 08-2021-CV-00240</p> <p>Supreme Court Case No.: 20220090</p>
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**REPLY 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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LAW AND ARGUMENT

I. The District Court Erred in Applying the Terms of the Lease.

[¶1] Boutrous concedes that (1) the Lease terms required that specific notice of the default, with an opportunity to cure, be given, and (2) both Boutrous and the District Court determined that the sole notice given under the Lease was the August 10, 2020 written correspondence (“Notice Correspondence”). (Appellee Brief at ¶¶54-55). The Notice Correspondence, by its own terms, was not to provide Transform with notice and an opportunity to cure under the Lease but instead Boutrous attempting to terminate the Lease and calling for “immediate surrender” of the property. (R21). Accordingly, and because the defects in the Notice Correspondence were cured and/or not in existence at the time of the eviction proceedings, Boutrous must acknowledge that it did not follow the terms of the Lease as it never gave Transform both notice and then time to cure the new allegations found in the Complaint. By failing to follow the procedure required in the Lease, both Boutrous and the District Court circumvented the contractual agreement between the parties. In an attempt to absolve Boutrous of failing to provide the required written notice under the Lease, the District Court in effect found that any required notice need only be superficial. (R122:13:¶36) (“...the Court also finds that Transform should have been aware of the problems starting in March, 2020...”).

[¶2] Boutrous then argues that it was “entitled to send Transform a notice of eviction ‘at any time’ after the 30-day cure period lapsed on September 9, 2020.” (Appellee Brief at ¶57). Boutrous, much like the District Court, blatantly ignores the fact that Transform timely responded on September 3, 2020 to the Notice Correspondence. (R22). Specifically, Transform responded to Boutrous’ notice by noting that “[y]ou then list some alleged minor

maintenance issues, as well as some alleged trespassers and/or activity on the premises that Transformco certainly was not aware of and most decidedly does not condone” and that “Transformco is in the process of investigating the alleged claims concerning the condition of the premises and will address any issues found as contemplated in the Lease.” (R22:3-4). The District Court admitted that these issues identified in August 2020 on their own would not be a material breach, then came over the top and stated by January 2021 “[h]owever, the accumulation of the issues, is a material breach of the lease.” (R122:14:¶37).

¶3 The Lease expressly provides that there must be a “...continuance of such default...” of an item(s) addressed in the previous notice as a prerequisite to the eviction. (R5:10:¶24). As it expressly notified Boutrous that it would do, Transform investigated the issues raised in the Notice Correspondence, which included commissioning an inspection and corresponding report. (R87). Transform was also getting reports from vendors and Grounds Control on site. (R350:239). The District Court relied on the inspection reports of Albert Daou, which is undisputed were never provided to Transform prior to the eviction, as the basis for justifying Transform’s eviction. It is undisputed that Daou did not generate a report from August 25, 2020 to October 20, 2020, evidencing in fact that Transform did rectify any alleged issues raised by the Notice Correspondence. (R27). Likewise, the Bismarck Police Department only had two (2) reports for the remainder of the year after the cure period expired on September 9th, both for minor issues. (R50:9-10). Further, Boutrous concedes “not every trespasser and loiterer remained on the Property...” and that “trash and debris was removed prior to the eviction hearing.” (Appellee Brief, ¶62). Accordingly, the evidence shows that Transform did respond and

address the issues in the Notice Correspondence and, to the extent issues remained, they were minor and were resolved. From then on, Boutrous never gave written notice for any perceived defaults but instead, waited to start an eviction action.

[¶4] Boutrous wrongly states that “Boutrous had no obligation pursuant to the Kmart Lease or otherwise to continuously monitor the Property and alert Transform to every issue.” (Appellee Brief, ¶58). The terms of the Lease expressly provided that it was at Transform’s discretion to “carry out such repairs and maintenance as it deems necessary to keep the demised premises in good order and repair...”. (R5:7:¶14). Transform expressly told this to Boutrous in responding to the Notice Correspondence. (R22:3) (“Instead of notifying Transformco, Landlord circumvented the Lease and is now attempting to cast blame upon Transformco for alleged issues that Landlord found objectionable.”). Transform has never claimed that it expected Boutrous to babysit the property, however the Lease required that Boutrous provide notice and a cure period for items that Boutrous was seeking to evict on. Boutrous did not provide notice under the Lease, let alone any communications to Transform, of issues occurring after September 9, 2020, instead electing to secretly document the perceived defaults over the course of 152 days between September 9th, and January 28, 2021 “[h]oping that Transform would finally start paying attention to the property.” (Appellee Brief, ¶57). The fact that Boutrous chose, on its own volition and both outside of the Lease requirements and after Transform objected, to erect a fence and hire a property inspector was their right to do but certainly not something that can be imported into increasing the responsibilities of Transform under the Lease. (R22).

II. The District Court Erred In Requiring Transform to Turn Over the Property Before the Eviction Had Concluded.

[¶5] Boutrous blanketly contends that Transform was not prejudiced when the District Court ordered the Property to be turned over. (Appellee Brief, ¶73). First and foremost, Transform was assessed sanctions for an alleged “contempt and engaged in the contempt intentionally[.]” in allegedly refusing to voluntarily hand over the Property. (R274:5:¶20). Devoid in the record is any support for the District Court’s whitewashed statement that Transform was content to just “wait for another hearing” in refusing to hand over the property. (R274::5:¶ 20 and 6:¶24) To the contrary, Transform respectfully explained to the District Court that everything necessary for Boutrous to regain possession of the empty building had already been provided to Boutrous to access the empty building and that there was nothing more for Transform to do to aid that process, noting that Transform’s original appeal was pending with the Supreme Court. (R362:80:10-25; R362:81:1-15). Boutrous even informed the District Court that Transform wished to do a remote handover, stating “[Transform] gave us a very responsible remote turnover, so we get to unlock the key box.” (R360:27).

[¶6] N.D.C.C. § 28–05–10 provides that “[a] civil action in a district court is deemed to be pending from the time of its commencement until its final determination upon appeal or until the time for appeal has passed, unless the judgment is sooner satisfied.” Once an action is no longer pending under N.D.C.C. § 28–05–10, a court is without jurisdiction unless a motion is made to reinvoke jurisdiction. Fichter v. Kadrmas, 507 N.W.2d 72, 75 (N.D.1993). An eviction judgment was entered in this case (R186) and so Transform doing anything that could be construed as “satisfying” said judgment could have destroyed any appeal rights. See Real Estate Equity Strategies, LLC v. Jones, 720 N.W.2d 352, 355 (Minn. App. 2006) (discussing eviction appeals and tenant’s voluntary surrender of the

property). This Court has held, in cases other than family law cases despite Boutrous' claim otherwise, that "payment of the judgment was voluntary and constituted a waiver of the right to appeal." (Appellee Brief, ¶73); See Mr. G's Turtle Mountain Lodge, Inc. v. Roland Twp., 2002 ND 140, ¶ 14, 651 N.W.2d 625, 631. As it appears that an eviction involving two separate judgments, one for eviction and one for damages, is one of first impression, Transform could not risk doing anything akin to satisfying the eviction judgment. See Ted J. Boutrous, L.L.C. v. Transform Operating Stores, LLC, 2021 ND 100, ¶ 12, 960 N.W.2d 801, 805 (Jensen, C.J., concurring) ("This separate is not intended to express how those unraised issues should be resolved, but is intended to note the potential issues associated with the bifurcation of summary eviction proceedings.").

[¶7] Finally, Transform being forced to turn over the Property divested Transform of the right to access and possess the Property, yet still required Transform to pay rent while awaiting a damages hearing. In effect, the District Court's bifurcation created a domino effect wherein Transform was evicted yet required by the Lease to pay rent on the Property despite not having any further access or enjoyment to the Property, all based upon a summary eviction hearing.

III. Evidence of a Strained Relationship Was Rampant.

[¶8] Boutrous incredulously states that no strained relationship existed between it and Transform, and thus the relationship had no bearing on a determination concerning a material breach. (Appellee Brief, ¶63). This coming after the District Court prohibited Transform from introducing evidence that Boutrous sought to buy out the Lease after the Kmart closed and, when rebuffed, Boutrous began the process of documenting the property up until the eviction. (R359:166-168). Contrary to the claims of the District Court that the

parties' relationship did not matter and was positive, Boutrous started this eviction action relying entirely on the negative history between landlord/tenant at the Property, stating "...the pattern of neglect began well prior...concerning an injury that happened in 2013". (R1:13:¶39). It is readily apparent Boutrous' clear motivation was the closing of the Kmart store. (R1:18:¶57). At that time, communications between the parties were done entirely between legal counsel. (R17; R18; R19; R20; R21; R22). After the store had closed and during the COVID-19 pandemic, Boutrous in one correspondence called for Transform to surrender the premises, then switched course in the next correspondence and called for Transform to remain in possession on a month-to-month tenancy. (R19:2; R20:2; R359:238-239). The later Notice Correspondence, despite the District Court's finding that it was providing notice and an opportunity to cure the default under the Lease, actually demanded the month-to-month tenancy was terminated and Transform was to again surrender the Property. (R21:2). Within all this confusion and rhetoric Transform, in trying to maintain civility, expressly stated that "I want to take this opportunity to clarify the parties' current relationship to extinguish any hostilities and return this to a productive relationship[.]" and "[Transform] intends to continue to be a professional business partner with Landlord and wishes to end any hostilities that may exist from Landlord." (R22:1, 4). Boutrous conceded the terms of the letters ("I think the letters say what they say") and the District Court claimed it would take into account Transform's written responses. (R359:62). Despite what is clearly written therein, and that Boutrous effectively spied on the property with Daou in preparing their case, the District Court evidently ignored Transform's written correspondence evidencing hostility as the Court "did not view the letters as proof of strained relationship, but as notice of the property issues." (R183:4:¶13).

This too after Boutrous went so far as to call Transform “rotten.” (R360:27). For the District Court to not factor in the openly hostile relationship between Transform and Boutrous as the impetus for the eviction must be considered error.

IV. Request for Oral Argument.

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

CONCLUSION

[¶10] 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. Accordingly, the amended judgment (R332) against Transform for eviction damages would be rendered moot.

Dated this 18th day of August, 2022.

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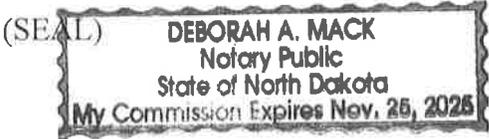
CERTIFICATE OF COMPLIANCE

[¶11] 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, 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, does not exceed twelve (12) pages.

Dated this 18th day of August, 2022.

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Subscribed and sworn to before me this 18th day of August, 2022.



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