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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Rocket Dogs K-9 Aquatics, & Wellness Center, LLC, Plaintiff and Appellant, vs. Derheim, Inc., a North Dakota corporation d/b/a My Aquatic Services and Troy Derheim, an individual, Defendants and Appellees.	**SUPREME COURT NO. 20220246** Civil No. 09-2022-CV-01009

ON APPEAL FROM ORDER GRANTING DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AND JUDGMENT

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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LAW AND ARGUMENT

I. The question of whether a valid, enforceable settlement agreement exists is a question for the jury.

[¶1] In continuing to posture its Motion as an equitable request for specific performance of a contract, Defendants Derheim, Inc. and Troy Derheim (collectively "Derheim") ignore the fact that before a district court may consider whether specific performance is appropriate, there must be a determination that a contract actually exists – and that question is for the *jury*.

[¶2] Derheim's request for specific performance is not a straightforward equitable request. Derheim's Motion presumes there is a valid contract for the district court to enforce. However, the record is replete with genuine fact questions regarding whether a valid contract even exists. Whether a contract exists is a question of fact for the jury. "It is 'generally a question of fact for the jury whether or not a contract … actually exists.'" *Pereida v. Wilkinson*, 209 L. Ed. 2d 47, n. 6, 141 S. Ct. 754, 765 (2021) (citation omitted). *See also Aaland v. Lake Region Grai Co-op., Devils Lake, N.D.*, 511 N.W.2d 244, 246 (N.D. 1994) ("Generally, whether a contract exists is a question of fact").

[¶3] While specific performance of a contract may be an equitable request which a court can consider, the question of validity of the underlying contract is a fact question for the jury. Nevertheless, the district court usurped Plaintiff Rocket Dogs K-9 Aquatics, & Wellness Center, LLC's ("Rocket Dogs") right to have a jury determine whether it authorized its former counsel, Ashley Champ ("Champ"), to settle on its behalf, whether the parties had a meeting of the minds with regard to settlement terms, and thus, whether a valid, enforceable settlement agreement was reached. The district court erred in simply holding that all questions pertinent to Derheim's Motion were equitable in nature and

within its power to determine. Rather, the question of whether a contract exists should have first been determined by a jury before the district court considered whether it could be enforced.

[¶4] Contrary to Derheim's contentions, the underlying legal questions at issue clearly distinguish this case from *Cowger*. The corporate plaintiff in *Cowger* brought an action for specific performance and damages related to an option to purchase property clause contained in a lease. *Nw. Bell Tel. Co. v. Cowger*, 303 N.W.2d 791, 793 (N.D. 1981). Unlike Derheim, the plaintiff did not seek specific performance by motion in a pending action. The plaintiff in *Cowger* ultimately abandoned its claim for damages, thus the remaining issues focused on whether the option to purchase under the lease had been exercised. *Id*. at 794. On appeal, this Court found that the plaintiff was not entitled to a jury trial "because all of the issues tried in the case were equitable." *Id*. Importantly, though, there were no disputes in *Cowger* regarding whether the parties actually entered into a lease or whether a valid lease even existed. *Cowger* is distinguishable from the present case, as it did not involve preliminary questions on contract validity that needed to be addressed before the district could consider a request for specific performance.

[¶5] Under North Dakota law, a district court errs when it usurps the province of the jury by first deciding an equitable claim and depriving the jury its right to decide legal claims. *Schumacher v. Schumacher*, 469 N.W.2d 793, 799 (N.D. 1991). Derheim attempts to distinguish the present case from *Schumacher* by stating that *Schumacher* involved "complex" issues and claims that were "inextricably intermingled," but fails to explain how that differs from the present case. *See* Appellees' Brief, at ¶ 38. Moreover, noticeably absent from *Schumacher* is a qualification that this Court's holding on equitable versus

legal claims only applies to "complex" cases. Such is not the standard in North Dakota. Rather, this Court was clear in stating that "[w]here issues in a case are so intertwined or the error below permeates the entire case, it is appropriate to reverse and remand for a trial of all issues anew." *Schumacher*, 469 N.W.2d at 800. Here, the district court erred in determining the questions of attorney authority and contract validity and usurping the jury's right to make those determinations. This error permeated the entirety of this case and warrants reversal.

II. The district court's findings of fact were clearly erroneous based on the entirety of the record.

A. Rocket Dogs did not authorize Champ to settle this action.

[¶6] It is clear, based upon the entirety of the record, that the district court was mistaken in determining not only that Rocket Dogs expressly authorized Champ to settle on its behalf, but also that Rocket Dogs did not disavow the alleged settlement agreement. Under the clearly erroneous standard, this Court should reserve. *See Great Plains Royalty Corp. v. Earl Schwartz Co.*, 2022 ND 156, ¶ 13, 978 N.W.2d 715, 719.

[¶7] It was Derheim's burden to prove by clear and convincing evidence that Rocket Dogs expressly authorized Champ to settle this case on its behalf. *See G.I. Sportz, Inc. v. Valken, Inc.*, 2018 WL 3105414, at *4 (D.N.J. June 25, 2018); *Lakkis v. Lahovski*, 2016 WL 4059672, at *3 (M.D. Pa. July 27, 2016); *Gomez v. Jones-Wilson*, 294 P.3d 1269, 1273-74 (N.M. Ct. App. 2012); *Architectural Network, Inc. v. Gulf Bay Land Holdings II, Ltd.*, 989 So. 2d 662, 663 (Fla. Dist. Ct. App. 2008). It is far from clear or convincing that that ever happened, as Rocket Dogs repeatedly informed Champ, and testified before the district court, that it would not settle this action absent a money offer from Derheim. *See*

R23:¶¶ 12-15; R65: 74:23-25, 75:16-22, 77:6-11, 77:18-78:24, 85:21-86:15, 87:7-11, 113:20-114:6, 122:2-13; R39 at 2:40-2:55.

[¶8] The timeline of events and communications that the district court found occurred, and upon which Derheim now relies, ignores critical facts and explanations provided by Rocket Dogs that dispel any suggestion that Rocket Dogs expressly authorized Champ's actions. Notably, the email exchange between Rocket Dogs' owner, Julie Saatoff ("Saatoff"), and Champ that took place on February 7, 2022 (which the district court relied heavily on) did not indicate that authorization had been given. *See* R46:1. Saatoff specifically testified that it was her understanding at that point that Champ was going to get draft settlement paperwork for her to review and then she could decide whether she would agree. *See* R23:¶¶ 13-15; R65:93:9-22, 105:25-108:3. Saatoff further explained that she asked Champ whether there would be any funds left over because she was planning to retain new counsel. *See* R65:75:5-15, 93:15-94:9. Derheim's speculation that these emails "were not simply about a retainer" (*see* Appellees' Brief, at ¶ 45) has no merit compared to Saatoff's testimony about what she interpreted her own email to mean. Moreover, Derheim's argument that Saatoff's email is inconsistent with Rocket Dogs giving authority to Champ to settle for payment from Defendants is irrelevant, as Rocket Dogs has made it clear that it did not authorize Champ to settle *at all*. *See* Appellees' Brief, at ¶ 45.

[¶9] Champ's lack of authority is further evidenced by the fact that the settlement paperwork that she and Derheim's counsel contemplated had not even been drafted yet when Saatoff sent the February 7, 2022 email that the district court erroneously labeled as "consistent with a settlement." *See* R65:144:1-13. What's more, when Derheim's counsel finally sent the paperwork to Champ, he asked her to review it with Rocket Dogs to confirm

it was satisfactory. *See* R45:1. Champ then repeatedly referred to it as a "draft" proposed settlement to Rocket Dogs that was still subject to revision and was "not final." *See* R39 at 1:59-2:37; R46:1; R65:36:10-24, 133:7-17. Rocket Dogs could not have authorized a final settlement prior to Champ's February 7, 2022 email to Derheim when the proposed agreement was still subject to revision at least ten days later. *See* R39. Clearly, Saatoff's correspondence with Champ is not "consistent with a settlement" as the district court mistakenly found.

B. Rocket Dogs repeatedly informed Champ that it would not accept Derheim's offer to settle.

[¶10] The district court improperly relied on the few instances where Saatoff chose not to challenge Champ further on the purported settlement agreement as somehow evidence that it expressly authorized Champ to settle. Here too, Derheim and the district court continue to ignore Saatoff's challenges to Champ and her explanations for not pushing back at various times. Again, during the February 17, 2022 recorded phone call between Saatoff and Champ, Saatoff very clearly stated multiple times that she <u>did not</u> authorize Champ to settle, that Rocket Dogs <u>did not</u> agree to the terms of the proposed settlement agreement, and that she <u>would not</u> sign the proposed agreement. *See* R39 at 0:00-0:23, 1:46-1:59; 2:40-2:55. Derheim acknowledges Saatoff's refusal to sign the proposed settlement paperwork, but mischaracterizes it as a refusal to sign a "memorialization" of "the parties' agreement to settle the case." *See* Appellees' Brief, at ¶¶ 16-17. As has been made clear, though, Rocket Dogs never authorized Champ to settle. In other words, there was nothing to memorialize as there was never an agreement in the first place. What could the parties have possibly memorialized when the proposed agreement was not final, and still subject to revision, as Champ emphatically stated during the February 17 phone call.

[¶11] During the evidentiary hearing, Saatoff explained to the district court why she did not challenge Champ's inaccurate assertions regarding the purported settlement agreement at certain times. Champ became angry with Saatoff after Saatoff told her she would not agree to a settlement worth no money. *See* R39 at 0:00-6:17. Saatoff's attempts to explain her decision to Champ were met with anger, so at that point Saatoff made the decision to disengage in an extended argument with Champ. *See* R65:111:3-112:10 (Saatoff: "I wasn't going to engage in an argument with her at that point"). Saatoff's decision to disengage in argument and her attempts to wrap up heated conversations (both over the phone and via email) are far from clear and convincing evidence that Saatoff authorized the purported settlement. Rather, Saatoff was consistently clear to Champ that Rocket Dogs would not accept Derheim's offer to settle. *See* R39 at 0:00-0:23, 1:46-1:59; 2:40-2:55.

[¶12] The Court is not being asked to re-weigh the evidence in this case as Derheim suggests. *See* Appellees' Brief, at ¶ 49. Rather, it is up to this Court to determine if, "after reviewing all of the evidence," the district court made a mistake. *Great Plains Royalty Corp.*, 2022 ND 156 at ¶ 13 (emphasis added). Here, there is no written evidence of Rocket Dogs ever giving Champ authorization to settle, nor is there a recording of the disputed conversation in which Champ alleges such authorization was given. *See* R65:32:24-33:5. There is, however, ample evidence establishing that Rocket Dogs did not provide any such authorization, including the recorded phone call from February 17, 2022 in which Saatoff indisputably expresses her rejection of Derheim's offer and in which Champ repeatedly states the draft agreement was not final, was subject to revision, and that Saatoff did not have to sign it. *See* R39.

[¶13] The weight of <u>all</u> of the evidence of record does not support the district court's erroneous finding that Champ had express authority to bind Rocket Dogs to the alleged settlement, nor that Rocket Dogs failed to disavow the purported settlement agreement. Accordingly, the district court's findings and conclusions must be reversed.

III. The emails exchanged between Champ and Derheim's counsel do not create a binding, enforceable settlement agreement under North Dakota law.

[¶14] The district court clearly erred in finding that the brief emails exchanged between Champ and Derheim's counsel created a binding, enforceable settlement agreement between the parties. It is unsurprising that the district court held that the terms of the purported agreement were "pretty simple," because in reality the emails exchanged by counsel failed to address numerous essential terms that Rocket Dogs would have included had it actually entered into an agreement with Derheim. *See* R65:146:5-10.

[¶15] Derheim suggests that the "objective manifestations" of the parties' alleged agreement appear in the emails between Champ and Derheim's counsel, but ironically points out the exact flaws in its arguments and the district court's findings in the very next sentences of its brief: "A court will not enforce a contract that is 'vague, indefinite or uncertain.' *Stout v. Fischer Industries*, 1999 ND 218, ¶ 11, 603 N.W.2d 52. A court can enforce an oral contract 'when the parties have agreed on its essential terms." *Tarver v. Tarver*, 2019 ND 189, ¶ 9, 931 N.W.2d 187 (citation omitted)." *See* Appellees' Brief, at ¶ 52. It is clear, based on the record, that neither of these requirements are met.

[¶16] The district court held that the essential terms of the purported agreement were a mutual dismissal and mutual walkaway, and that, after counsels' February 7, 2022 emails, "[t]here wasn't anything left open to be decided at a later date." *See* R65:146:5-10. This is completely contrary to the evidence, including Champ's own testimony. Not only did these

emails take place *before* Derheim's counsel drafted the proposed settlement paperwork as he and Champ had agreed, but Champ was clear that she was still going to review it with Rocket Dogs thereafter. *See* R46:1. Then, Champ repeatedly told Saatoff during the recorded February 17, 2022 call that there was no final agreement, that the proposed agreement was still subject to revision, and that Saatoff did not have to sign it. R39 at 1:59-2:37. If that is the case, how could there possibly be a final agreement as the district court erroneously found. This is clear evidence that there was not a final and binding agreement.

[¶17] In its brief, Derheim fails to respond whatsoever to the fact that the February 7, 2022 emails between Derheim's counsel and Champ exclude essential contract terms, including the Mutual Non-Disparagement Clause. *See* R36:10-11. The Mutual Non-Disparagement Clause is an essential term that Rocket Dogs, as the Plaintiff in this matter suing for faulty construction work, undoubtedly would have wanted to consider prior to agreeing to settle, but it was not mentioned once in the emails the district court relies on. Only when Derheim's counsel provided a draft agreement did that clause first appear. According to Derheim and the district court, however, that provision is somehow not a part of the enforceable agreement. This is not permissible under North Dakota law. *See Tarver*, 2019 ND 189 at ¶ 9.

[¶18] Like *Schumacher*, Derheim attempts to distinguish this case from *Lohse v. Atl. Richfield Co.*, 389 N.W.2d 352 (N.D. 1986) and *Burruss v. Wyoming Casing Serv., Inc.*, 2020 WL 13300241 (D.N.D. Aug. 21, 2020) because the two cases again involved "complex" facts. *See* Appellees' Brief, at ¶¶ 55-56. However, Derheim fails to cite any authority supporting its suggestion that whether a purported contract contains all essential terms depends on the complexity of the underlying action. Neither case stands for such a

position, nor do their complexities have any bearing on what terms of a settlement agreement would be essential for Derheim and/or Rocket Dogs in this particular construction action. They do, however, support the fact that the district court erred in enforcing an alleged agreement that, to this day, is missing essential terms. *See Stout*, 1999 ND 218 at ¶ 11 (“An agreement which is so uncertain and incomplete as to any of its essential terms that it cannot be carried into effect without new and additional stipulations between the parties is not enforceable”); *Tarver*, 2019 ND 189 at ¶ 9 (same).

[¶19] A contract is not final until it’s final. A contract is not final under North Dakota law if it lacks clear, certain, and definite terms, or if it’s missing essential terms. *Stout* at ¶ 11; *Tarver* at ¶ 9. The district court clearly erred in finding the emails exchanged on February 7, 2022 between Derheim’s counsel and Champ created a valid, binding, and enforceable agreement to settle as they lacked finality and definiteness, and omitted essential terms. And, as Champ told Saatoff during their phone call and emails, was subject to revision and not final. Considering the same, the district court’s erroneous findings must be reversed.

Respectfully submitted this 20th day of January, 2023.

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CERTIFICATE OF COMPLIANCE

[¶1] Pursuant to Rule 32 of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 12 pages.

Dated this 20th day of January, 2023.

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CERTIFICATE OF SERVICE

[¶1] I hereby certify that on January 20th, 2023, I served the following documents:

Plaintiff/Appellant's Reply Brief

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