

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Supreme Court No. 20230116

Jacob Ebel, John Ebel, and Ordeen Ebel,

Case No. 26-2021-CV-00053

Plaintiffs, Appellants
and Cross-Appellee

v.

APPELLEE BRIEF

Yvonne Engelhart, as Personal Representative
of the Estate of Mark Lee Engelhardt; Mary
DuPuydt d/b/a DuPuydt Law Office and
Tom Gross,

Defendants and Appellees

and

Tom Gross,

Defendant, Appellee, and
Cross-Appellant.

Appeal from the district court's Order, entered April 19, 2023, and Judgment entered on
April 19, 2023, which were issued by the Honorable Bradley A. Cruff, District Court
Judge, McIntosh County, Southeast Judicial District.

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

[¶1] This is an appeal and cross appeal from the Order and Judgment dated April 19, 2023. (R135)

STATEMENT OF THE ISSUES

[¶2] The issues as determined by Appellee/Cross Appellant are as follows:

[¶3] 1. Whether the District Court erred in not determining that the Estate's attorney had authority as agent of the Estate to enter into a contract between the Estate and Appellee.

[¶4] 2. Whether the District Court erred in not specifically determining that the Personal Representative and the Personal Representative's Agent modified the bidding conditions and/or waived any irregularities in the bidding process and awarding the bid to Appellee.

[¶5] 3. Whether the statute of frauds applies.

[¶6] 4. Whether Appellee tortiously interfered with a purported contract between the Estate and the Appellants.

STATEMENT OF THE CASE

[¶7] Appellant, (hereinafter "Ebels") commenced a civil proceeding in the Southeast Judicial District against the Personal Representative of the Estate of Mark Lee Engelhardt, the attorney for the Estate and Appellee, (hereinafter "Gross") seeking a determination that Ebels had a valid contract as to certain estate property awarded by the Estate to Gross. (R2)

[¶8] The Personal Representative answered the Complaint on January 24, 2022. (R6) Gross answered the Complaint on February 2, 2022. (R21)

[¶9] The attorney for the Estate was dismissed from the action by Court Order on June 14, 2022 (R33)

[¶10] Ebels amended their Complaint on December 14, 2022 to assert a claim of tortious interference with contract against Gross. (R76) Gross answered the Amended Complaint on December 22, 2022 (R79)

A bench trial was held on March 28, 2023

The District Court issued its Order on April 19, 2023 (R135)

Ebels filed its Notice of Appeal on May 1, 2023 (R139)

Gross filed his Cross-Appeal on May 4, 2023 (R142)

STATEMENT OF FACTS

[¶11] Decedent, Mark Engelhardt, died on December 7, 2020. (R2:2)

[¶12] Yvonne Engelhardt (hereinafter “PR”) was appointed personal representative of the Estate on January 12, 2021. (R135: ¶2)

[¶13] Attorney Mary DePuydt, Wishek, ND was appointed by the Personal Representative as the attorney for the Estate (hereinafter “attorney”). (R135:2)

[¶14] At the time of his death, the Decedent owned certain tracts of farmland in McIntosh County, ND, namely,

Section 1: South 107.24 acres of the SW1/4

Section 11: E1/2NE1/4

Section 12: NE1/4

Section 13: NE1/2SE1/4

Section 24: NE1/4

All in Township 129 North, Range 72 West.

(R135:12)

[¶15] The sale of the farmland was not publicly advertised. Notification of sale was forwarded only to contiguous property owners and interested parties. (R119) Gross' farmland is contiguous to decedent's farmland. The Ebels own farmland which is not contiguous to decedent's farmland. However, they represented to the Personal Representative that they were interested parties.

[¶16] The PR left it upon Estate attorney to establish bidding process and to conduct the sale. (R150:72:22) The PR had nothing to do with the sale. (R150:72:25) As to the bidding process, bid opening and award of the bid, the PR deferred to Estate attorney. (R150:77:19-25;78:1-2) The attorney for the Estate was exclusively responsible for the bid opening. (R148:12:23-25)

[¶17] The bidding was not a public bidding process as only adjacent landowners and anybody showing interest was notified. (R150:69:24-25;71:6-7;80:25;81:1-2) Bids arrived to interested and contiguous property owners just a day before the bidding process. (R150:83:14-18) As noted by the attorney for the Estate, the correspondence sent to interested parties and contiguous property owners was more of a notification than an advertisement. (R148:30:2-4)

[¶18] One of the bidders was James Engelhart. He is the brother of the PR of the Estate. (R150:87:15) He reached out to the attorney for the Estate prior to any written communication being sent to prospective interested parties. (R150:90:11-12) Mr. Engelhart communicated his bid verbally. (R150:91:4-5) The attorney for the Estate did not state that it needed to be submitted in writing and gave him no other conditions. (R150:91:10-14)

[¶19] Gross was the first prospective purchaser at the bid opening. (R150:73:10-16) He had written his bid down on soils maps to the specific property he was bidding upon. (R150:111:4-6 and R127-130) The soil maps constituting his written bid were handed to the attorney for the Estate. (R150:112:14-17) He was not told prior to the bid opening that his signature was required as part of the bid. (R150:113:17-18) The soil maps representing Gross' bid were handed to the attorney for the Estate prior to the 2 p.m. deadline date established by the attorney for the Estate. (R148:11:16-18) The attorney for the estate reasonably concluded that Gross was submitting a bid. (R150:12:2-4) The attorney for the Estate did not instruct Gross prior to the bid opening that he needed to sign his bid, that it needed to be dated or that it needed a phone number. (R148:12:7-14) The only relevance for a telephone number was for those bidders who didn't attend the bid opening process. (R148:10:23-25)

[¶20] All the bidders were in attendance. Gross was not originally announced as the successful bidder until such time as he inquired with the attorney for the Estate, "what about my bid?" (R148:16:18-24) He did not threaten the personal representative, did not interfere with the bidding process and didn't force the attorney for the Estate to change him as the winning bid. (R148:16:25;17:1-8) Only after he was awarded the bid was he asked to sign and date it. (R150:117:5-14) Otherwise, his bid contained material terms identifiable by the attorney for the Estate. (R148:30:14-25;31:1-4)

[¶21] According to Gross, the attorney for the estate did not feign surprise or confusion about his submittance of a bid or that his award of the bid was erroneous or in error. (R150:118:12-18). Although the notification sent to interested parties and contiguous parties provided language that a bid can be disregarded [if improperly

formatted], the attorney for the Estate did not disregard his bid. (R148:30:5-8) Right after the award of the bid to Gross, the attorney for the Estate handed him the abstracts to the subject properties. (R150:119:4-7)

[¶22] Upon awarding the bid and purchase to Gross, the attorney for the Estate explained to everyone in the room what had occurred, asked if there were any objections and there were none at that time. (R148:18:6-12)

[¶23] The PR did recall that she didn't say anything to Gross that he wasn't in compliance with the bidding process. (R150:85:4-6)

[¶24] By not objecting to the bid winner, the PR acknowledged her assent to her attorney's award of the bid to Gross. (R150:78:18-25;79:1-5) Gross recalls the attorney for the Estate turning to the PR for her approval and the PR responded in a "yeah" manner. (R150:117:23-25) The PR understood that although she turned the bidding process over to estate attorney that she still had a fiduciary responsibility to the estate and heirs. (R150:84:9-11)

[¶25] Mr. Engelhart, as a prospective bidder, was present at the bid opening. According to Mr. Engelhart it was clear that the attorney for the Estate was aware of Gross' bid and took it into account. (R150:106:23-25;107:1-6) The attorney for the Estate did not inform Gross that his bid was too late or not in compliance with the bidding process. (R150:107:1-6)

[¶26] It was obvious from PR intentions that she would have liked to keep the property in the family. (R150:82:1-10)

LAW AND ARGUMENT

Standard of Review

[¶27] A trial court’s findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a) and its conclusions of law are fully reviewable. Ewing v. Ewing (In re Ewing), 2023 ND 124, ¶17. Issues regarding interpretation and application of statutes are questions of law and are fully reviewable on appeal. Lund v. Swanson, 2021 ND 38, ¶13, 956 N.W.2d 354. This Court reviews a district court’s determination of discretionary matters under an abuse of discretion standard. Kauk v. Kauk, 2017 ND 118, ¶10, 895 N.W.2d 295.

I The District Court erred in not determining that the Estate’s attorney had authority as agent of the Estate to enter into a contract between the Estate and Appellee.

[¶28] Gross finds himself in a position of agreeing with Ebels that a contract was created by the Estate. However, declaratory relief under NDCC Chapter 32-23 wasn’t appropriate at the outset because the Court needed to determine which party the Estate created a contract with. (R100:12) The case was not ripe for declaratory relief without a trial. Kauk v. Kauk, 2017 ND at ¶9. In this case, the contract was formed between Gross and the Estate. The initial declaration of Ebels as being the successful bidder was erroneous and corrected by the attorney as an agent for the Estate. The attorney for the Estate was in a position to bind the Estate but not as an auctioneer. The District Court did correctly conclude that the sale was not an auction. (R135:5:¶13)

[¶29] Under N.D.C.C. §30.1-18-15(6), a personal representative has the specific authority to “dispose of an asset, including land . . . at public or private sale.” See, In the Matter of the Estate of Francis HASS v. DeKrey, 2002 ND 82, ¶13, 643 N.W.2d 713.

This was not a public event. An auction is typically a public event that involves open and competitive bidding. The bidding in this case was a closed bidding process.

[¶30] The PR granted the attorney for the Estate the authority to bind the Estate as her agent at the sale of the real property. A misstatement doesn't create a binding contract. In this case, there wasn't a meeting of the minds until the attorney for the Estate concluded Gross as the successful bidder. "Mutual assent to a contract is indeed required, but that assent must be evidenced in some way, and if the evidence is clear enough, the contract will be binding. . ." North Central Jobbers v. Snortland, 329 N.W.2d 614, 617 (N.D. 1983), citing Amann v. Frederick, 257 N.W.2d 436, 439 (N.D. 1977). Ebels acknowledge that a binding contract requires mutual acceptance. Appellant Brief ¶35. In this case, the attorney for the Estate immediately corrected her misstatement and awarded the bid to Gross.

II. The District Court erred in not specifically determining that the Personal Representative and the Personal Representative's Agent modified the bidding conditions and/or waived any irregularities in the bidding process and awarding the bid to Appellee.

[¶31] It wasn't an auction performed by the Estate. The Estate accepted bids in a private sale. The sale wasn't publicly advertised. Only contiguous property owners and parties expressly showing an interest were invited to bid on the property. The Court correctly noted that the attorney for the Estate only performed a single act or isolated transaction in the selling of the real property of the Estate. (R135:¶13) This allowed her to modify the process or to forgive irregularities. In denying summary judgment, the District Court determined amongst the factual issues in dispute were whether the PR or her attorney modified the bidding process or waived any irregularities of bids. (R100:8).

[¶32] Gross satisfied all material conditions for submitting a bid and such that his signature was later secured by the attorney for the Estate is not fatal to his bid and constitutes a valid modification of the bidding process. Because of the broad statutory authority granted PRs, there is little legal authority on the authority of the PR or its agent to modify a bidding process. Other authorities have addressed similar issues. In the context of a public bid opening, the fact that a bid may have been tendered and received a few minutes late is not fatal. Nielsen v. City of St. Paul and Another, 252 Minn. 12, 88 N.W.2d 853 (1958). Again, in the public context, a board (the bid opener) may waive bid defects. Telephone Associates, Inc. v. St. Louis County Board, 364 N.W.2d 378 (Minn. 1985). In this case, it can be deemed a waiver on the part of the attorney for the Estate based upon her awarding Gross the winning bid.

[¶33] Gross substantially complied with the bidding process. It is not up for contestation whether he was the highest bidder. The doctrine of "substantial compliance" provides that the law does not mandate in all cases strict and literal compliance with all procedural requirements. City of Minneapolis v. Wurtele, 291 N.W.2d 386, 391 (Minn. 1980) Technical defects in compliance, which do not reflect bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be protected by the procedures will not suffice to overturn governmental action. In this case, all bidding parties knew that the highest bidder would be awarded the property.

[¶34] Pursuant to N.D.C.C. §30.1-18-15(6) the PR has the power to acquire or dispose of an asset including last for sale at a public or private sale. With that broad authority is the presumption that the PR or her agent can establish and modify the processes and waive any irregularities at their discretion. N.D.C.C. §30.1-18-15(6).

III. Appellee prevails on the statute of fraud issue.

[¶35] “We have often stated that part performance of an oral contract, promissory estoppel, or equitable estoppel may bar the assertion of the statute of frauds under N.D.C.C. § 9-06-04 if, in fact, there is an oral agreement between the parties.” Constellation Development, LLC v. Western Trust Company, 2016 ND 141 ¶19, 882 N.W.2d 238. The difference between the Ebels and Gross is that the attorney for the Estate, charged with the sale of the Estate property, ultimately by oral agreement, awarded the property to Gross. The Personal Representative’s notification letter to contiguous property owners and interested parties established the Estate’s attorney’s authority to conduct the sale and the basic processes. Gross’ plat map bid contained the description of the property, the purchase price per acre and the purchaser. To be sufficient memorandum under the statute of frauds, a writing must be complete in itself. It must contain all the essential elements or material facts of the agreement. Curtis Construction Co. v. American Steel Span, Inc., 2005 ND 2018 ¶9, 707 N.W.2d 68; Klipfel v. Brandenburger, 156 N.W.2d 774, 777 (N.D. 1968).

IV. Appellee did not tortiously interfere with any purported contract between the Estate and the Appellants.

[¶36] “In order to establish a prima facie case of tortious interference with contractual relations, the plaintiff must show that: (1) a contract existed; (2) the contract was breached, (3) the defendant instigated the breach; and (4) the defendant did so without justification.” Red River Wings, Inc. v. Hoot, Inc., 2008 ND 117, ¶53, 751 N.W.2d 206; Bismarck Realty Company v. Folden, 354 N.W.,2d 636 (N.D. 1984).

[¶37] Even if a contract existed between the Estate and the Ebels, Gross did not instigate the PR for the Estate or her attorney to breach a contract with Ebels. Gross was

a bidder at the sale just like the Ebels and the PR and her agent had a fiduciary duty to award the bid to the highest bidder which was Gross. It cannot be said that any winning bidder at any sale instigated a breach by the seller to other bidders. Gross was a legitimate bidder and had just as much right to seek an award of the bid to purchase the Estate property as any other bidder.

[¶38] Gross did not influence the PR of the Estate or her attorney to award him the bid nor did he prevent the PR of the Estate or her attorney to fulfill any contract with Ebels. Posing a question to the Estate's attorney does not rise to the level of instigating a breach of contract. The Estate's attorney didn't feel threatened or forced to do anything due to the actions of Gross. Gross had every reason to question the result. In fact, he was more than justified to inquire. He didn't wait a day or a week or a month. He immediately brought the matter to the attention of the Estate's attorney when all the bidders and the Personal Representative were still present.

[¶39] The fact of the matter is that Ebels were simply not the highest bidder. For Gross' part, all he did was inquire as to consideration of his bid.

[¶40] Ebels do not have sustainable damages. Even if they did, the proper relief would be from the Estate and not Ebels.

REQUEST FOR ORAL ARGUMENT

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

CONCLUSION

[¶42] For the reasons outlined above, this Court should reverse and remand the matter to the District Court with instructions to direct the Estate to sell the subject property to Gross; and, affirming the District Court’s dismissal of Ebel’s declaratory judgment and tortious interference with contract claims.

Dated this 9th day of August, 2023.

HILL LAW OFFICE, PLLC

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Attorney for Appellee
TOM GROSS

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Appellee, in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, the above brief was prepared with proportional type face and does not exceed 38 pages.

Respectfully submitted this 9th day of August, 2023.

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Attorney for Appellee
TOM GROSS

CERTIFICATE OF SERVICE Y ELECTRONIC MEANS

[¶1] I, ASHLEY ANDERSON, hereby certify that on the 9th day of August, 2023, I served the following document on Appellants and co-defendant, by electronic means by forwarding them to Appellants' attorney, Drew J. Hushka, at dhushka@vogellaw.com and upon Defendants, by electronic means through attorneys, James Maring, jmaring@serklandlaw.com and Lance E. Shurtleff, lance.shurtleff@dinsmore.com through ND Supreme Court Efile Portal.

Appellee Brief

I declare under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Dated this 9th day of August, 2023 in the County of Cass, State of North Dakota.

/s/ Ashley Anderson

ASHLEY ANDERSON

CERTIFICATE OF SERVICE Y ELECTRONIC MEANS

[¶1] I, ASHLEY ANDERSON, hereby certify that on the 9th day of August, 2023, I served the following document on Appellants and co-defendant, by electronic means by forwarding them to Appellants' attorney, Drew J. Hushka, at dhushka@vogellaw.com and upon Defendants, by electronic means through attorneys, James Maring, jmaring@serklandlaw.com and Lance E. Shurtleff, lance.shurtleff@dinsmore.com through ND Supreme Court Efile Portal.

Appellee Brief

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Dated this 9th day of August, 2023 in the County of Cass, State of North Dakota.

/s/ Ashley Anderson
ASHLEY ANDERSON