

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jacob Ebel, John Ebel, and Ordeen Ebel,

Plaintiffs, Appellants, and
Cross-Appellees,

vs.

Yvonne Engelhart, as Personal
Representative of the Estate of Mark Lee
Engelhardt, Mary DePuydt d/b/a DePuydt
Law Office,

Defendants, Appellees,

and

Tom Gross,

Defendant, Appellee, and
Cross-Appellant.

Supreme Court No. 20230116

Civil No. 26-2021-CV-00053

**APPEAL FROM ORDER DATED APRIL 19, 2023, AND
JUDGMENT ENTERED APRIL 19, 2023,
MCINTOSH COUNTY DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
HONORABLE BRADLEY A. CRUFF PRESIDING**

**APPELLEE YVONNE ENGELHART'S, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF MARK LEE ENGELHARDT, AMENDED BRIEF**

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STATEMENT OF THE ISSUES

[¶1] Whether the district court erred in dismissing the Plaintiffs' Amended Complaint in full and specifically Plaintiffs' claim for breach of contract against Yvonne Engelhart, as Personal Representative of the Estate of Mark Lee Engelhardt.

STATEMENT OF THE CASE

[¶2] The Appellants Jacob Ebel, John Ebel, and Ordeen Ebel (the "Ebels" or "Plaintiffs") and the Cross-Appellant/Appellee Tom Gross ("Gross") have provided statements of the case which sufficiently set forth the procedural background of the matter.

STATEMENT OF FACTS

[¶3] Yvonne Engelhart was appointed the personal representative for the estate of Mark Engelhardt ("Mark" or the "Estate"). (R:135, ¶ 2). At his death, Mark owned real property in McIntosh County, North Dakota. Id. The Estate retained attorney Mary DePudyt as the Estate' attorney. Id. The Estate hired DePudyt to handle the probate of the Estate including the sale of the real property. Id.

[¶4] Upon Ms. DePudyt's advice, the Estate decided to sell the real property by a bidding process. (R:148 – Tr: 69:14-16). Rather than sell the real property (which consisted of four sections of land) at a public auction, the Estate, upon the advice of Ms. DePudyt, decided to sell via a bidding process in which the Estate provided notice to contiguous property owners and known interested parties. (R:148 – Tr: 69:14-25). As such, the Estate, with Ms. DePudyt's assistance, sent out a letter regarding bidding for the sections of real property to contiguous property owners and other interested parties. (R118:1-2; R:135, ¶ 3). The Ebels and Gross received the letter. (R:135, ¶ 3). The letter called for the bids to be opened at 2:00 p.m. on December 17, 2021. (R118:1-2). The Estate

turned over all responsibilities for the bidding process and sale to DePuydt. (R:148-Tr:84:3-8).

[¶5] On December 17, 2021, at around 1:20 p.m., Gross arrived at DePuydt's office. (R:135, ¶ 5). Gross handed DePuydt four copies of soil maps for the properties being sold and handwrote a bid of "x4000" next to the printed acreage amount and also handwrote the total dollar amount on each map. Id. Gross testified that he believed DePuydt hand recorded his bids and went to sit with the rest of the bidders for the 2:00 p.m. opening. Id. At approximately, 1:30 p.m., the Ebels arrived and provide their written bids to DePuydt's secretary. (R:135, ¶ 6). The Ebels' top bids for the four sections of real property being auctioned ranged from \$1,100.00 to \$2,002.00 per acre – well below Gross's \$4,000.00 per acre. (R:135, ¶ 7).

[¶6] At 2:00 p.m. DePuydt opened and recorded the written bids in her possession. (R:135, ¶ 7). Depuydt initially announced the Ebels as the winners of the four sections of real property. (R:135, ¶ 8). DePuydt then asked if anyone wanted to see the document on which she had recorded the bids. Id. Gross stated he did. Id. Upon reviewing the document, Gross asked "What about my bid?" Id.

[¶7] DePuydt responded with something to the effect of "Oh yea" and had Gross sign and date his bids. (R:135, ¶ 9). DePuydt then made the decision to accept Gross's bids and declared him the high bidder for the four sections of property. (R:135, ¶ 9). As the Estate entrusted DePuydt with the sale, the personal representative did not raise any objection to DePuydt declaring Gross as the high bidder. Id.

[¶8] Five days later, the Ebels commenced this action. (R:1). In their Amended Complaint, the Ebels asserted the following claims: (1) declaratory judgment against

Yvonne Engelhart and Gross; (2) injunctive relief against Yvonne Engelhart; (3) breach of contract against Yvonne Engelhart; and (4) tortious interference with contract against Gross. (R:76).

[¶9] At trial, the Ebels requested that they be declared as being the high bidders and sought the Court to order the Estate to enter into contracts with the Ebels for the sale of the real property. (R:133). Conversely, Gross requested he be declared the high bidder. (R:132). After the conclusion of a one-day bench trial, the district court entered its Order which provides that neither the Ebels or Gross entered into a binding and enforceable contract with the Estate as the Estate did not enter into any written contracts with any party which was sufficient to satisfy the statute of frauds. (R:135). As such, it is the Estate's understanding that – pending appeal – it is free to now sell the land as it wishes. If the district court's order is affirmed, the Estate will likely sell the real property at a public auction.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE ESTATE DID NOT BREACH ANY CONTRACT WITH THE EBELS

[¶10] After a bench trial, the district court determined to dismiss the Ebels' Amended Complaint in full with prejudice. Additionally, the district court determined that neither the Ebels nor Gross entered into a binding and enforceable contract with the Estate because the statute of frauds would bar any alleged oral contract which existed between the Estate and the Ebels or Gross.

[¶11] There is no evidence in front of this Court that the Estate ever entered into a written agreement with the Ebels or Gross. Pursuant to the letter sent from the Estate to prospective bidders, such a written contract was to be executed by January 1, 2022. (R:118,

1-2). As detailed above, the Ebels sued the Estate and Gross on or about December 22, 2021, to prohibit the Estate from entering into a written contract with Gross and to order the Estate to enter into a written contract with the Ebels.

[¶12] Whether a party breached a contract is a finding of fact. WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶ 13, 730 N.W.2d 841. “A breach of contract is “the nonperformance of a contractual duty when it is due.” Id. at ¶ 13. The elements of a prima facie case for breach of contract are (1) the existence of a contract, (2) the breach of the contract, and (3) damages flowing from the breach. Id.

[¶13] The district court correctly dismissed the Plaintiffs’ claim for breach of contract against the Estate. The Estate – through their attorney – declared Gross the high bid for each section of property. There was no rational basis for the Estate to then enter into a contract with the lower bids. However, even assuming the Estate desired and/or was obligated to enter into a contract with the Ebels – the Ebels sued the Estate and Gross prior to providing any written contract for the Estate to consider and/or execute. In other words, the Estate could not have “nonperformed” as the contractual duty never became due.

[¶14] Had the district court declared the Ebels as the high bids and determined that the Estate was obligated to enter into a written contract with Ebels, the Estate stood ready to execute said contracts. Conversely, had the district court declared Gross as the high bid and determined the Estate was obligated to enter into a written agreement with the Gross, the Estate stood ready to execute said contracts. However, the district court determined that the Estate had not entered into a binding and enforceable agreement with the Ebels or Gross. As such – pending appeal – it is the Estate’s desire to now sell the

property at a public auction. Regardless, there is no basis for the Ebel's breach of contract claim against the Estate and the district court's Order should be affirmed.

CONCLUSION

[¶15] For the aforementioned reasons, the Estate respectfully requests the Court affirm the district court's order and specifically affirm the district court's dismissal of the breach of contract claim against the Estate.

/s/ Ian R. McLean

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32 of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 8 pages.

/s/ Ian R. McLean

Ian R. McLean (#07320)

CERTIFICATE OF SERVICE

I, Ian R. McLean, declare under penalty of perjury that on August 18, 2023, I electronically filed the following document:

**APPELLEE YVONNE ENGELHART'S, AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF MARK LEE ENGELHARDT, BRIEF**

with the Supreme Court of the State of North Dakota through the Supreme Court E-Filing Portal. The foregoing document will also be electronically served through the Supreme Court E-Filing Portal on the following:

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