

Filed 06/29/20 by Clerk of Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2020 ND 140

Dale Exploration, LLC, Bakken HBT, II LP, Dale
Exploration, LP, and Dale Lease Acquisitions, LP, Plaintiffs

v.

Orville G. Hiepler, Florence L. Hiepler, Defendants

and

Mark Hiepler, as successor trustee of the
Orville G. Hiepler and Florence L. Hiepler
Family Trust dated January 9, 1997, Defendants and Appellants

and

Hefner Company, Inc., Defendant

and

Bill L. Seerup and Hurley Oil Properties, Inc., Defendants and Appellees

No. 20190338

Appeal from the District Court of Williams County, Northwest Judicial
District, the Honorable Joshua B. Rustad, Judge.

AFFIRMED.

Opinion of the Court by Tufte, Justice.

Jonathan T. Garaas, Fargo, North Dakota, for appellants.

Adam M. Olschlager, Billings, Montana, for appellees.

Dale Exploration v. Hiepler
No. 20190338

Tufte, Justice.

[¶1] Mark Hiepler, as the trustee of the Orville G. Hiepler and Florence L. Hiepler Family Trust (“Trust”), appeals from a judgment ordering him to transfer certain Trust property to Bill Seerup and from an order denying his motion to dismiss. Mark Hiepler argues the district court erred in ordering him to convey the property to Seerup because the court did not have jurisdiction to enter a judgment against the Trust, the claims abated upon Orville Hiepler’s death, and he could not be substituted as a party for Orville Hiepler. We affirm.

I

[¶2] In 1997, Orville and Florence Hiepler created the “Orville G. Hiepler and Florence L. Hiepler Family Trust Dated January 9, 1997.” The Hieplers conveyed most of their mineral interests to themselves as co-trustees of the Trust in September 1997. The conveyance was recorded in March 1998. The Trust was fully revocable. The Hieplers were the grantors, co-trustees, and beneficiaries under the Trust. The trust document gave a settlor the power to add and remove any property from the Trust at any time, without requiring notice to or actions by a trustee.

[¶3] On April 7, 2007, Orville and Florence Hiepler deeded 150 net mineral acres in Williams County to Bill L. Seerup in exchange for \$15,609. The mineral deed did not refer to the Trust or Orville and Florence Hiepler’s role as co-trustees. When the deed was executed, Orville Hiepler individually owned only 7.3636 mineral acres. The remaining 142.6 mineral acres were owned by the Trust. Nine days after receiving the mineral deed from Orville and Florence Hiepler, Seerup conveyed 135 mineral acres to Hurley Oil Properties, Inc.

[¶4] In 2014, Dale Exploration, LLC, filed suit to quiet title to the 150 net mineral acres conveyed in the mineral deed from Orville and Florence Hiepler to Seerup. Seerup and Hurley Oil also brought a claim for breach of contract against Orville and Florence Hiepler, individually and as co-trustees,

requesting specific performance or, alternatively, money damages if specific performance was not ordered.

[¶5] Florence Hiepler died in 2015. After her death, Orville Hiepler amended and restated the Trust to recognize Orville Hiepler as the sole settlor and designate Orville Hiepler and his son, Mark Hiepler, as co-trustees.

[¶6] In 2017, the district court dismissed Dale Exploration's claims on summary judgment, finding there was no evidence that Dale Exploration had an interest in the property. A bench trial was held on the remaining issues. The court found the Hieplers own the mineral interests in fee simple as trustees, not as individuals. The court also found the Hieplers breached the mineral deed to Seerup and the proper remedy was damages, not specific performance. The court awarded damages in the amount of \$20,147.96.

[¶7] On appeal, this Court reversed the judgment and remanded for further proceedings. *Dale Expl., LLC v. Hiepler*, 2018 ND 271, ¶ 23, 920 N.W.2d 750. We said it was clear Seerup and Hurley Oil requested specific performance, and the Hieplers had the burden to prove monetary damages were adequate once Seerup and Hurley Oil showed the inadequacy of damages and pled for specific performance. *Id.* at ¶¶ 10, 13. We said Orville Hiepler was the settlor of the Trust, he reserved the right to add and remove property from the Trust, he was in a position to remove property from the Trust as an individual, he had constructive notice of what property was included in the Trust when he sold the minerals to Seerup, and therefore the mineral deed is enforceable against Orville Hiepler "as an individual and as settlor of the Trust." *Id.* at ¶ 21. We reversed the district court judgment and remanded for further proceedings consistent with the opinion. *Id.* at ¶ 23. The mandate was entered on January 23, 2019.

[¶8] Orville Hiepler died on March 17, 2019, after this Court's judgment and mandate were issued. Before Orville Hiepler's death, Seerup and Hurley Oil filed a proposed order and judgment. On March 21, 2019, Orville Hiepler and Mark Hiepler, as co-trustees, responded, arguing specific performance was impossible, Seerup and Hurley Oil never showed inadequacy of damages,

reformation of the deed was impossible, and the pleadings did not adequately assert specific performance.

[¶9] Seerup and Hurley Oil moved to substitute Mark Hiepler, as successor trustee, in place of Orville and Florence Hiepler. The Trust opposed the motion, arguing the judgment was final as to the Trust and there was no pending action against the Trust. Orville and Florence Hiepler's attorney moved to dismiss, arguing neither of their personal representatives had been substituted and the action abated upon their deaths.

[¶10] The district court ordered substitution of Mark Hiepler as successor trustee in place of Orville and Florence Hiepler as trustees. The court granted Seerup and Hurley Oil's claim for specific performance of the mineral deed, and ordered Mark Hiepler to execute a mineral deed conveying the property to Seerup. Judgment was entered and the court denied the motion to dismiss.

II

[¶11] Mark Hiepler argues the district court erred in ordering him to execute a mineral deed conveying the property to Seerup.

A

[¶12] Mark Hiepler argues the district court did not have jurisdiction to alter the final judgment as to the Trust because the Trust's ownership interest was not the subject of the prior appeal, this Court did not reverse the portion of the judgment quieting title to the property in the Trust, and that part of the judgment is final. He also argues this Court remanded for further proceedings to determine whether specific performance was appropriate and Seerup and Hurley Oil failed to plead specific performance and prove the inadequacy of damages. He claims the district court does not have jurisdiction to enter a judgment against the Trust when state law prohibits specific performance to procure the act or consent of any third person.

[¶13] Mark Hiepler's arguments involve the law of the case doctrine and the mandate rule. We have explained the law of the case doctrine and mandate rule:

Generally, the law of the case is defined as the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same. In other words, [t]he law of the case doctrine applies when an appellate court has decided a legal question and remanded to the district court for further proceedings, and [a] party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal or *which would have been resolved had they been properly presented in the first appeal*. The mandate rule, a more specific application of law of the case, requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the appellate court's mandate into effect according to its terms. . . . and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms.

Johnston Land Co., LLC v. Sorenson, 2019 ND 165, ¶ 11, 930 N.W.2d 90 (quoting *Viscito v. Christianson*, 2016 ND 139, ¶ 7, 881 N.W.2d 633).

[¶14] In the prior appeal, we noted the Trust owns the property at issue and Seerup and Hurley Oil requested specific performance as a remedy for their breach of contract claim. *Dale Expl.*, 2018 ND 271, ¶¶ 3, 10, 920 N.W.2d 750. We reversed the judgment and held: (1) the district court erred by failing to apply the statutory presumption that monetary damages are inadequate for the breach of an agreement to transfer real property; (2) the Hieplers had the burden to prove monetary damages were adequate; (3) the mineral deed was enforceable against Orville Hiepler as an individual and as settlor of the Trust; and (4) the court erred in awarding damages instead of awarding specific performance. *Id.* at ¶¶ 13, 21-22. We held:

[Orville Hiepler's] ability to remove Trust property by himself, along with his constructive notice of what property was and was not included in the Trust when he sold the mineral rights to Seerup in 2007, makes the Mineral Deed enforceable against Orville Hiepler as an individual and as settlor of the Trust.

The district court erred in finding that Seerup was entitled to \$20,147.96 in damages for the breach of the covenant of seizin instead of awarding specific performance. By awarding damages instead of specific performance, the district court failed to apply the N.D.C.C. § 32-04-09 presumption that damages are inadequate to remedy a breach of an agreement to transfer real property. The district court also erred in finding that Orville Hiepler as an individual was not liable for his conveyance of Trust property. . . . Orville Hiepler was a settlor with the power to remove property, who at least constructively knew what property was owned by him individually and by the Trust. The district court erred in finding that absence of the Hiepler Family Trust name on the Mineral Deed somehow changed the individual power held by Orville Hiepler.

Id. at ¶¶ 21-22. We held the court erred by awarding damages instead of specific performance, and we reversed the judgment and remanded for proceedings consistent with our opinion. *Id.* at ¶¶ 22-23.

[¶15] The Trust’s interest in the disputed minerals and whether the court could order specific performance were at issue in the prior appeal. We held the district court erred by awarding money damages. *Dale Expl.*, 2018 ND 271, ¶ 22, 920 N.W.2d 750. We reversed the judgment and remanded for the court to order specific performance. *Id.* We conclude the district court had jurisdiction to order the trustee to convey the Trust property on remand.

[¶16] To the extent Mark Hiepler argues Seerup and Hurley Oil did not plead specific performance, his argument is without merit. Seerup and Hurley Oil’s answer and cross-claim state, “Orville G. Hiepler and Florence L. Hiepler as Co-Trustees of the [Trust] have the authority or the influence to cause a deed to be issued from the trust which would fulfill the terms of the Contract as evidenced by the Mineral Deed.” Seerup and Hurley Oil specifically requested an order directing Orville and Florence Hiepler to transfer title in the minerals from the Trust to Seerup to fulfill the terms of the contract. The pleadings sought specific performance from the trustees, and this Court recognized specific performance was requested in the prior appeal. *Dale Expl.*, 2018 ND 271, ¶¶ 10, 18, 920 N.W.2d 750.

[¶17] Any arguments about whether Seerup and Hurley Oil proved the legal remedy of damages was inadequate or other arguments about the availability of specific performance as a remedy in this case could have been raised in the prior appeal and are barred by the law of the case doctrine. *See In re Estate of Johnson*, 2017 ND 162, ¶¶ 11-13, 897 N.W.2d 921. The request for specific performance was made before the prior appeal, the issue was tried, and the trustee had an opportunity to make these arguments at that time. On remand, there was no need for further evidence or trial on that issue.

B

[¶18] Mark Hiepler argues Orville Hiepler's death precludes specific performance from the Trust property because the trust became irrevocable upon his death, the appointment of a successor trustee does not allow for the remedy of specific performance, and all proceedings abated upon Orville Hiepler's death.

[¶19] We do not have to determine whether the Trust became irrevocable upon Orville Hiepler's death. In the prior appeal, citing N.D.C.C. § 59-13-05, we concluded North Dakota law allows a revocable trust to be subject to the claims of the settlor's creditors, the revocable trust is treated as the grantor's property, and the settlor may not use the trust to hide from creditors. *Dale Expl.*, 2018 ND 271, ¶ 20, 920 N.W.2d 750. We noted Orville Hiepler, as settlor and trustee, had the right to add and remove property from the Trust, there were no restrictions placed on this power, the Hieplers were treated as owning the property in their individual capacity for purposes of taxation and day-to-day use, and the Trust appeared to be an estate planning tool under Orville Hiepler's control. *Id.* at ¶ 21. Citing *Walgren v. Dolan*, 276 Cal. Rptr. 554, 555 (Cal. Ct. App. 1990), in support, we held the mineral deed was enforceable against Orville Hiepler as an individual and as settlor of the Trust. *Dale Expl.*, at ¶ 21.

[¶20] Section 59-13-05(1), N.D.C.C., provides:

During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors to the extent that the

property would be subject to creditors' claims if the property had not been placed in the trust. . . . After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable immediately before the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances.

This provision of the Uniform Trust Code "recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges." Unif. Trust Code § 505 Comment (2000). The Trust was a revocable trust immediately before Orville Hiepler's death, and therefore the Trust continues to be subject to the claims of Orville Hiepler's creditors to the extent his probate estate is inadequate to satisfy the claims.

[¶21] In *Walgren v. Dolan*, 276 Cal. Rptr. 554, 555 (Cal. Ct. App. 1990), the plaintiff claimed the contract for the purchase of property signed by the deceased settlor was enforceable against the trustees and the trust holding the property because the decedent, when he was alive, retained full authority to dispose of trust property by an express provision in the trust. The court held the plaintiff had a viable theory for recovery of specific performance. *Id.* The court concluded the contract would have been specifically enforceable against the deceased settlor and his trustee absent the settlor's death. *Id.* at 559. The court explained the settlor agreed to convey the trust property, the settlor had the power by the terms of the trust to require conveyance of the property by the trustee, and therefore specific performance should be available. *Id.* at 557. The court also noted California probate law permits creditors to reach trust property over which the settlor has retained the power of revocation, even after the settlor's death. *Id.* at 558. The court further concluded the settlor's death did not affect whether specific performance could be ordered. *Id.* at 559. The court explained the enforceability of a contract survives the death of a

contracting party and an action for specific performance had to be brought against the trustees as the successors to the title of the real property. *Id.*

[¶22] The death of Orville Hiepler does not change our analysis. This Court previously held the district court erred by failing to apply the presumption that specific performance is an appropriate remedy in this case and the contract was specifically enforceable against Orville Hiepler as an individual and as settlor of the Trust. *Dale Expl.*, 2018 ND 271, ¶¶ 13, 21, 920 N.W.2d 750. Orville Hiepler's death does not affect whether specific performance can be ordered. Under N.D.C.C. § 59-13-05(1), the Trust property is subject to the claims of Orville Hiepler's creditors, even after his death. The mineral deed continues to be enforceable against the trustee of the Trust. The Trust holds the title to the minerals, and therefore an action for specific performance was required to be brought against the trustee. Specific performance continues to be an available remedy, and the trustee may be ordered to convey the property to Seerup.

[¶23] Mark Hiepler also argues the district court erred by ordering specific performance on remand because the action abated upon Orville Hiepler's death and the appointment of a successor trustee precludes specific performance. He contends the district court does not have jurisdiction to substitute him, as successor trustee, for a deceased individual, Orville Hiepler, and the court violated due process by ordering substitution without giving the new trustee the opportunity to present his defenses to the action against the Trust.

[¶24] Rule 25(a), N.D.R.Civ.P., provides for substitution after the death of a party, stating:

(1) Substitution if the Claim is not Extinguished. If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion for substitution is not made within 90 days after service of a statement noting the death, the action by or against the decedent may be dismissed.

(2) Continuation Among the Remaining Parties. After a party's death, if the right sought to be enforced survives only to or against

the remaining parties, the action does not abate, but proceeds in favor of or against the remaining parties. The death must be noted on the record.

(3) Continuation After Judgment. If a party dies after a verdict is rendered or an order for judgment is made, the action does not abate, and substitution of parties must be allowed.

[¶25] This Court held the mineral deed was enforceable against Orville Hiepler as settlor of the Trust. *Dale Expl.*, 2018 ND 271, ¶ 21, 920 N.W.2d 750. The Trust owned the property, and the trustee is the only party that could convey the property to Seerup. The claim for breach of contract and specific performance was not extinguished.

[¶26] The terms of the Trust included a provision stating:

Each successor Trustee serving under this instrument, whether corporate or individual, will have all of the title, rights, powers, and privileges granted to the initial Trustees named under this instrument. In addition, each successor Trustee will be subject to all of the restrictions imposed upon, as well as to all discretionary and ministerial obligations and duties given to the initial Trustees named under this instrument.

An obligation of the original trustee flows to the successor trustee, and the successor trustee is bound by the acts of his predecessor within the scope of his authority. *See* 90A C.J.S. *Trusts* § 346 (2020). The successor trustee has the power to convey the property to Seerup.

[¶27] Mark Hiepler was the successor trustee of the Trust. Generally, a trust is not considered personal to the trustee, and the death of the trustee does not terminate the trust. *See* George Gleason Bogert, George Taylor Bogert, & Amy Morris Hess, *Bogert's The Law of Trusts and Trustees* § 529 (2019). The district court had jurisdiction to substitute Mark Hiepler, as the successor trustee, for Orville Hiepler in his capacity as trustee.

[¶28] Orville and Florence Hiepler were sued individually and in their capacity as trustees for the Trust. The claims, including the request for specific performance, were against Orville and Florence Hiepler, individually and as

co-trustees. The trustee was a party to the action before the prior appeal. The trustee had the opportunity to present defenses against the specific performance claim as it related to the Trust. We conclude due process was not violated.

[¶29] Because the property at issue was owned by the Trust, a trustee was the only party that could carry out specific performance of the contract. Mark Hiepler, as the successor trustee, was properly substituted as a party for Orville Hiepler, as trustee. The action did not abate upon Orville Hiepler's death. Orville Hiepler's death did not preclude specific performance from the Trust property.

[¶30] We conclude the district court fully carried out the mandate and did not err in ordering Mark Hiepler, as trustee, to convey the property to Seerup.

III

[¶31] We have considered the remaining issues and arguments and conclude they are either unnecessary to our decision or are without merit. We affirm the judgment.

[¶32] Jerod E. Tufte
Lisa Fair McEvers
Daniel J. Crothers
Gerald W. VandeWalle
Jon J. Jensen, C.J.