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Steel Farm, Inc. v. Croft & Reed, Inc. Clerk's Record v. 7 Dckt. 37776

Vol. 7 of 8

IN THE supplemental volume

LAW CLERK

SUPREME COURT

OF THE

STATE OF IDAHO

STEEL FARMS, INC.,

Plaintiff -Counterdefendant

and

Appellant

vs.

CROFT AND REED, INC.,

Defendant-Counterclaimant

and

Respondents

Appealed from the District Court of the Seventh *Judicial*

District of the State of Idaho, in and for Bonneville *County*

Hon. Joel E. Tingey, *District Judge*

DeAnne Casperson, Esq,

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Attorney for Appellant

FILED - COPY

SEP 16 2010

Supreme Court Court of Appeals

Entered on ATS By:

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Attorney for Respondent

Filed this _____ *day of* _____, *20*____.

COPY

_____ *Clerk*

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By _____ *Deputy*

IN THE SUPREME COURT OF THE STATE OF IDAHO

STEEL FARMS, INC.,

Plaintiff-Counterdefendant-Appellant,

v

CROFT & REED, INC.,

Defendant-Counterclaimant-Respondents

* * * * * * * * * * * * * *

Supplemental

CLERK'S RECORD ON APPEAL

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Appeal from the District Court of the
Seventh Judicial District of the State of Idaho,
in and for the County of Bonneville

HONORABLE Joel E. Tingey, District Judge.

* * * * * * * * * * * * * *

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DISTRICT COURT SEVENTH JUDICIAL DISTRICT BONNEVILLE COUNTY IDAHO

STEEL FARMS, INC. Plaintiff, vs. CROFT & REED, INC., Defendant.	Case No.: CV-08-7912 CROFT & REED, INC.'S MEMORANDUM IN SUPPORT OF ITS AMENDED MOTION FOR SUMMARY JUDGMENT
CROFT & REED, INC. Counterclaimant, vs. STEEL FARMS, INC.; DOUG STEEL, individually; and KEVIN STEEL, individually, Counterdefendants.	

Defendant/Counterclaimant, Croft & Reed, Inc. (Croft & Reed), by and through counsel of record, Beard St. Clair Gaffney PA, submits the following memorandum in support of its Motion for Summary Judgment. This memorandum is supported by the affidavits of counsel, Nathan M. Olsen, Virginia R. Mathews, and Russell J. Mathews filed herewith.

INTRODUCTION

The Plaintiff, Steel Farms, Inc. (Steel Farms), has filed a complaint to enforce an option to purchase (Option) Croft & Reed's real property located in Bonneville County. A 2004 four-year written lease agreement (Lease) between the parties purports to contain an enforceable purchase Option. However, Steel Farms is prevented from exercising the Option for any of the following reasons:

1) The Lease only allows exercise of the Option during the period of the lease or any "extension" of the lease. The Option cannot occur during a "holdover" period. The Lease expired on March 1, 2008, and was never extended. Steel Farms was therefore unable to exercise the Option after March 1, 2008. The clear language of the Lease prevents exercise of the Option during the initial period of the lease essentially makes the Option illusory unless and until the lease would be extended.

2) The Lease strictly and broadly prevents Steel Farms from selling, assigning or encumbering its interest under the Lease without the written consent of Croft & Reed, the violation of which voids the Option. This provision of the Lease was violated when Steel Farms entered into a written option agreement with a third party to purchase Croft & Reeds property without Croft & Reed's written consent.

3) Even if the Option is valid, Steel Farms is also prohibited from exercising the Option because they are in default under the Lease, having violated the law.

The 2004 Lease and Option was drafted by Steel Farms' attorney and negotiated with Croft and Reed's president Richard "Dick" Reed six days before his death in April

of 2004. As construed against the drafter, the Option could not be exercised without an extension to the lease. The agreement cannot be reformed because the principal parties for Croft & Reed are no longer alive and therefore any alleged mistakes and/or the intent behind the terms of the agreement cannot ever be known or proven with clear and convincing evidence. The Option portion of the contract is therefore invalid and Croft & Reed's motion should be granted.

MATERIAL FACTS

Generally

On or about April 22, 2004, Croft & Reed entered into a four year written Lease with Steel Farms for agricultural land owned by Croft &Reed and farmed by Steel Farms approximately 10 miles west of Idaho Falls, Idaho on HWY 20. (V. Mathews Aff. ¶ 6, Ex. B) The lease was drafted by Steel Farms attorney, Greg Ehardt. (Cite) Croft & Reed's president and stockholder, Dick Reed, died six days after signing the agreement. (*Id.* at ¶ 4). Croft & Reed's other stockholder at that time, Venna Reed, passed away on November 1, 2007. (*Id.* at ¶ 5). Croft & Reed alleges that certain errors in the Lease invalidates an option to purchase provision found in the agreement because of a lack of the "meeting of the minds" or a failure to meet the writing requirements of Idaho's Statute of Frauds. (See Defendant's and Counterclaimant's Answer and Counterclaims). Croft & Reed also believes that parties involved in the 2004 transaction may have lacked proper capacity to bind Croft & Reed to the Lease. (*Id.*) However, for the purpose of this summary judgment motion only, Croft & Reed will assume Steel Farm's position that the Lease is a valid and binding agreement between the parties is legally correct

1. Holdover and Option Terms of the Lease

The Lease indicates that the term and possession of the Lease commenced on the effective date of the agreement, April 22, 2004, and ended on the 1st day of March, 2008. (V. Mathews Aff. ¶ 6, Ex. B. Lease Sec. 3.1). The agreement further states that rent during the term (*or any holdover*) shall be $40,000 per year. (*Id.* at Sec. 4.1 of Lease. See also Olsen Aff. Ex. A "Modified Lease" at Sec. 4.1). The first page of the Lease consists of a summary of certain lease provisions. (*Id.* Page 1 of Lease and Modified Lease). The lease term is stated as four years. (*Id.*) Steel Farms has judicially admitted the four year term of the Lease in its verified complaint. (See Complt. ¶¶6, 8)

Section 19 of the Lease consists of a provision purporting to grant Steel Farms an option to purchase the premises upon certain terms and conditions. (V. Mathews Aff. Ex. B at Sec. 19 of Lease. See also Olsen Aff. Ex. A "Modified Lease" at Sec. 19). Section 19.9.1. of the Lease requires that to exercise the option, Steel Farms must give written notice to exercise the option to Croft & Reed:

> *[S]ubsequent* to the maturity of this option on July 15, 2008, *and* during the Term of this lease (including any agreed extension or exercised option term *but excluding any holdover term).*
>
> ***
>
> *Any attempt* to exercise the Option *that does not strictly comply with this paragraph is void* and does not constitute an effective exercise (of) the option.
>
> (*Id.*) (emphasis added)

As the Lease was written and signed in 2004, the Option could not be exercised during the period of the Lease. In order for the Option to be validly exercised, the parties would have been required to extend the Lease in such manner as prescribed under the Lease and under the appropriate authority prescribed under Croft & Reed's bylaws. Section 20.4 of the Lease provides that the agreement may be:

[A]altered, amended or revoked only by an instrument in writing signed by both (Croft & Reed) and (Steel Farms.)

(*Id.* at Sec. 20.4).

On December 28, 1961, Croft & Reed approved bylaws for the management of the corporation. (V. Mathews Aff. Ex. B.) These bylaws were in effect in November of 2007. (V. Mathews Aff. ¶ 9) Article III, Section 1 of these bylaws requires the President to approve all corporate "contracts and instruments" in writing which must have been "first approved by the Board of Directors." (*Id.* Ex B.) Article VI of the bylaws provides that "no contract by any officer of the company shall be valid without the previous authorization or subsequent ratification of the President of the Board of Directors." (*Id.*)

The Lease was never extended according to either Section 19.19.1 of the Lease or Croft & Reed's bylaws. Certain notations that were made on the Lease in approximately April 2006 were not made in accordance with the provisions of the Lease nor Croft & Reed's bylaws and were therefore insufficient to modify or extend the Lease.

The Lease contains the following provision in Section 20.11 in regard to holdovers:

> If (Steel Farms) remains in possession of all or any part of the Premises after the expiration of the term hereof, *with or without the express or implied consent of (Croft & Reed)*, such tenancy shall be from month to month only, *and not a renewal hereof or an extension for any further term*, and in such case rent, including percentage rent and other monetary sums due hereunder, shall be payable in the amount and at the time specified in this Lease and *such month tenancy shall be subject to every other term, covenant and agreement contained herein.* (*Id.* at Sec. 20.11) (emphasis added)

2. Unauthorized encumbrance of interests

The Lease contains the following provision in Section 19.13 with regard to the assignment or transfer of the Option:

> Assignment or Transfer prohibited. (Steel Farms) shall not sell or contract to sell or assign or contract to assign or otherwise transfer or hypothecate or assign as security or pledge or otherwise encumber (Steel Farm's) interest in the Option or

the Premises or any part thereof separate from this lease without first obtaining the written consent of Croft & Reed. (*Id.* at Sec. 19.13)

In direct violation of this provision, Steel Farms entered into a written "Option to Purchase Real Property" agreement with Walker Land & Cattle, LLC (Walker Land) on or about April 6th 2006. (Avondet Dec. 2009 Aff. Ex. A) This agreement provides an option to Walker Land to purchase Croft & Reed's property "prior to the expiration" of Steel Farms' lease with Croft & Reed. (*Id.* at "Recitals") Under the terms of the agreement, Walker Land agreed to pay Steel Farms $832,830 "upon the exercise of the option and at such time as (Steel Farms) shall own fee simple title to the Property." (*Id.* at Sec. 4) The agreement is signed by representatives from Steel Farms and Walker Land, but not Croft & Reed. In fact, Croft & Reed was not aware that the written agreement existed until it was provided in written discovery after Steel Farms filed its lawsuit in January of 2009.[1]

3. Sublease

On or about April 3, 2006, Steel Farms entered into a written sublease (Sublease) with Walker Land & Cattle, LLC (Walker Land) in regard to the property that is subject to the Lease. (*Id.* at 9). This agreement was sent at Venna Reed's request by Steel Farms to Croft & Reed's attorney for review and was signed by the parties on April 3, 2006. (*Id.*) The Sublease allowed Walker Land to take over operations of the property subject to the provisions of the Sublease and the Lease. (*Id.* At Ex. C Sec. 1 of Sublease). The Sublease further provides that Walker Farms "shall not take any action which shall constitute a default or violation of the terms and provisions of the Lease." *Id.* The term of the Sublease was from February 15, 2006 through February 14, 2007. The agreement

[1] It is now clear that the genesis of this lawsuit seeking specific performance is the agreement between Steel Farms and Walker Farms.

allows for two additional one year extensions of the Sublease. (*Id.* at Sec. 3 of Sublease). The Sublease further provides that: "It is understood and agreed that (Walker Farms) is subleasing the premises hereinafter described from (Steel Farms) as a *sublessee subject to the terms and provisions of the Lease*.") (emphasis added) (*Id.* at Sec. 1 of the Sublease.) Section 2 of the Sublease states the following:

> It is specifically understood and agreed that Sublessee (Walker Farms) shall not acquire any greater rights in the Premises than that which is held by Sublessor (Steel Farms) *pursuant to the terms and provisions of the Lease*. (emphasis added.) (*Id.*).

4. Lawful and Environmental use Requirements

The Lease contains the following terms and conditions in regard to the use of the property:

a. Page 1 of the Lease indicates the tenant's use of the property as "any lawful purpose."

b. 7.3.1. of the Lease requires the tenant to keep the property in "*a clean and wholesome condition*, free of any objectionable noises, odors or nuisances.

c. 7.3.3. of the Lease prohibits the tenant from "doing" or "*permitting*" the property being used "*for any unlawful or objectionable purposes*" or "commit or *suffer to be committed* any waste in or upon the premises."

d. 7.3.4. of the Lease provides that the tenant "not use the Premises or *permit* anything to be done in or about the premises which will in any way conflict with any law, statute, ordinance or governmental rule or regulation or requirement of duly constituted public authorities now in force or which may hereafter be enacted or promulgated." The section further provides that "tenant at its sole cost and expense shall promptly comply with all laws, statutes, ordinances and

governmental rules, regulations or requirements now in force or which may hereafter be in force."

(V. Mathews aff. Ex. B "Lease"; see also Olsen Aff. Ex. A. "Modified Lease).

5. Default Provisions of Lease

The Lease provides the following relevant provisions constituting "material default" by the tenant:

a. 17.1.2. The repudiation of this Lease by Tenant, any action by Tenant *which renders performance by Tenant of its obligations under this lease impossible*, or any action by Tenant *which demonstrates an intent* by Tenant *not to perform an obligation* under this lease or *not to continue with the performance of obligations under this lease.* (Emphasis added).

b. 17.1.4. A failure by Tenant to observe and perform any other provision of this lease to be observed or performed by Tenant or any provision of the obligations to be observed or performed by tenant, where such failure continues for thirty (30) days after written notice thereof by landlord to tenant.

c. As a remedy to the default, Croft & Reed is entitled to "terminate tenant's right to possession" of the property and to recover damages for the tenant's default. (17.3.1. and 17.3.2).

d. In regard to the Option, the Lease indicates in Section 19.9.4 that Steel Farm's right to exercise such option is "*suspended*" and that Steel Farms "shall not have the right to exercise the Option while (Steel Farms) is in default in performing any of the provisions of this lease to be performed by (Steel Farms) *whether or not a notice of default has been served by the (Croft & Reed) specifying such defaults.*"

This section further states that Steel Farm's "*right to exercise the Option is cancelled in the event of the termination of the cancellation of the term as herein provided.*"

Id. (emphasis added.).

6. Lease Violations

On or about November 25, 2008, and again on December 6, 2008, Croft & Reed conducted an inspection of the leased property and discovered several major violations of the Lease. (V. Mathews Aff. ¶¶ 16-20; R. Mathews Aff. ¶¶ 4-10). Croft & Reed agents discovered and photographed a man-made pit where solid waste was being deposited. In the pit were various trash items, including used drums, fuel containers and piping. (*Id.*) Croft & Reed also discovered and photographed several containers that were overflowing with used oil. (*Id.*) Croft & Reed also found and photographed a water pump that was leaking oil and other hazardous materials into the ground. (*Id.*) Croft & Reed also observed that several of the facilities on the property belonging to Croft & Reed were neglected and in disrepair. (*Id.*) It was apparent to Croft & Reed that these activities by their nature had been occurring for quite a while, and perhaps through much of the term of the lease. (*Id.*) After internally discussing these activities and reviewing the provisions of the Lease, Croft & Reed subsequently sent Steel Farms a "Notice of Termination of Lease" dated December 29, 2008, citing such defaults, and sent the same notice to Walker Land on January 13, 2009. (*Id.* Olsen Aff. Ex. B).

Croft & Reed's attorney, Nathan Olsen, sent a letter dated December 29, 2008, to counsel for Steel Farms informing them of these material defaults and that Steel Farms was therefore prohibited from exercising the option pursuant to 19.9.4 of the Lease. (*Id.* Ex. C). Olsen urged Steel Farms to remove a "Notice of Option" that had been recorded

in Bonneville County by Steel Farms on December 3, 2008, which was in effect preventing Croft & Reed from marketing the property for sale. (Olsen Aff. Ex. C). Notwithstanding their full awareness of their default under the Lease, Steel Farms did not remove the Notice of Option, and instead proceeded with the underlying legal action against Croft & Reed, which has further clouded the title to the property and prevented Croft & Reed from marketing or even leasing the property. (V. Mathews Aff. ¶ 21).

Croft & Reed has conducted follow up inspections of the property. Neither Steel Farms nor Walker Farms took any action to address any of the defaults within 30 days of receiving notice of the default. (V. Mathews Aff. ¶¶ 16-20; R. Mathews Aff. ¶¶ 4-10).

Croft & Reed also inspected the property on April 24, 2009. (R. Mathews Aff. ¶ 10.) Several canisters were found strewn about the premises. (Id.) Upon closer examination, Croft & Reed noticed that the canisters were a highly toxic and hazardous pesticide substance called "Fumitoxin." The label on the canister contains several strict warnings about the hazardous nature and proper storage of the toxin, including the possibility of serious injury or death if such warnings are not strictly adhered to. (Id.)

SUMMARY JUDGMENT STANDARD

A motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." IDAHO R. CIV. P. 56(c); *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 516-17 (Idaho 1991). It is recognized that when assessing the motion for summary judgment, the court must draw all facts and inferences in favor of the non-moving party. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho at 517; *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874 (Ct. App. 1994); *Haessley v. Safeco Title Ins. Co. of Idaho,* 121

Idaho 463 (Idaho 1992).

The moving party bears the burden of establishing the lack of a genuine issue of material fact. *Tingly v. Harrison*, 125 Idaho 86, 89 (Idaho 1994). The non-moving party must establish a genuine issue of material fact regarding the elements challenged by the moving party's motion. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720 (Idaho 1990) (*citing Celotex v. Catrett*, 477 U.S. 317 (1986)); *see also Badell v. Beeks*, 115 Idaho 101, 102 (Idaho 1988).

ARGUMENT

I. The Lease should be enforced as written.

Croft & Reed's legal basis for its motion is the basic legal doctrine that valid contracts should be enforced as written. Contracts create a "legal duty in the promisor" and a "right in the promise" which therefore provides a "right to enforce the contract." *Steiner Investments v. Ziegler-Tamura LTD., CO.*, 138 Idaho 238, 243 (Idaho 2002), *World Wide Lease, Inc. v. Woodworth*, 111 Idaho 880 (Ida. App. 1986).

Furthermore, in the basic tenets of contract law, it is established that contract language "should be interpreted most strongly against the drafting party." *Morgan v. Firestone Tire and Rubber Co.*, 68 Idaho 506, 201 P.2d 976 (1948). In addition, "a contract will be construed most strongly against the party whose attorney drew or prepared it." *Underwood v. Sterner*, 63 Wash. 2d 360, 387 P.2d 366 (1963). Thus, since Steel Farms employed its own attorney to draft the lease document, it should be construed most strongly against Steel Farms, including provisions that might nullify and invalidate certain parts of the contract.

II. Steel Farms is expressly prohibited from exercising the option during a holdover period.

A. The Lease term was four years.

The Lease which was set to expire on March 1, 2008, was never extended, therefore disallowing Steel Farms from exercising the option. The Lease signed in 2004 between Croft & Reed and Steel Farms was clearly and unambiguously set to expire on March 1, of 2008. The date of the term in the type written agreement is stated as being from the effective date of the agreement, April 22, 2004, to March 1, 2008. (See Sec. 3.1 of Lease). The term of the lease was further affirmed on the summary page of the agreement which is stated as "four years." (Page 1 of Lease).

Moreover, Steel Farms admitted in its verified complaint that the term of the Lease was four years. (See Steel Farms Cmplt. ¶¶ 6 and 8) Statements made in a verified complaint are judicial admissions of acts conclusively established and admissible in evidence, *Swanson v. State of Idaho,* 83 Idaho 126, 129; 358 P.2d 387, 288 (1960) The pleadings may be relied upon by the court for purposes of summary judgment. *Esser Electric v. Lost River Ballistics Technologies, Inc.* Idaho Supreme Court Slip Opinion May 15, 2008 ID – 1w080516124. The combination of Steel Farms' admission, as concurred by Croft & Reed makes it is undisputable that the parties entered into nothing more than a four year lease.

Of further note, Steel Farms' verified complaint is dated December 22, 2008. The alleged Lease with certain notations made by Kevin Steel and Virginia Mathews in April 2006 is also attached and incorporated with the Complaint. Thus, from the outset of this case, notwithstanding any hand written notations or modifications to the Lease, Steel Farms has admitted that the Lease was four years – ending in March of 2008, not 2009.

B. The Lease anticipates a holdover period and prevents Steel Farms from exercising the option during the holdover period.

The Lease anticipates the distinct possibility of a holdover period indicating that the annual rent during the term of the agreement *or any holdover* to be $40,000. (Sec. 3.1 Of Lease) The contract also defines what constitutes holdover – as when the tenant (Steel Farms) "remains in possession of the premises after the expiration of the term . . . *with or without the express or implied consent of the landlord* (Croft & Reed). (Sec. 20.11 of Lease). This provision further makes clear that such a consent shall not be construed as a "*renewal or an extension for any further term.*" (*Id.*)

The Lease strictly prohibits Steel Farms from exercising an option to buy the property during a holdover period. The agreement only allows Steel Farms to exercise the option during the term of the lease or any extension of the lease, and specifically states that this opportunity is excluded during any holdover term. (Sec. 19.9.1 of Lease). At no point have the parties agreed to an extension of the Lease beyond March 1, 2008. Croft & Reed may have allowed Steel Farms to remain on the property after March 1, 2008, but such express or implied consent does not amount to an extension of the term.

C. The Lease has never been extended thus preventing Steel Farms from exercising the Option.

Pursuant to Section 20.4 of the Lease, any alterations to the agreement can only occur in a separate "instrument in writing" signed by the parties. In addition, Croft & Reeds bylaws during the relevant periods required that an "instruments" or "contracts" regarding the corporation must be approved in writing by Croft & Reed's president and the board. In Idaho, corporate bylaws provide the rules and designated authority to bind and protect the interests of the corporation. IDAHO CODE ANN. § 30-1-841 (2008)

Thus, according to Section 20.4 of the Lease, Croft & Reed's bylaws, and Idaho law any scribbled modifications made by Virginia Mathews and Kevin Steel in April of

2006 were not valid. Moreover, Virginia Mathews was not an authorized director or agent for Croft & Reed with signature authority at the time the notations were made. Her mother, Venna Reed, was at that time still living and the sole Director and President of corporation.[2] Kevin Steel's perception or interpretation of what he thought Virginia Mathew's authority was does not change the requirements and protections provided under Section 20.4 of the Lease, Croft & Reed's bylaws and Idaho statute as to what was necessary for a modification to the Lease.

As according to the written contract, the period after March 1, 2008, in which Steel Farms occupied the property, can only be construed as a holdover period. Steel Farms is expressly forbidden by Section 19.9.1 of the Lease to exercise the option during the holdover period. The Court has a duty to enforce the contract as written. *Steiner Investments v. Ziegler-Tamura LTD., CO.*, 138 Idaho 238, 243 (Idaho 2002), *World Wide Lease, Inc. v. Woodworth*, 111 Idaho 880 (Ida. App. 1986). There is no material dispute over whether the Lease was extended pursuant to the requirements of Section 20.4 of the lease and therefore Croft & Reed's motion for summary judgment should be granted. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720 (Idaho 1990) (*citing Celotex v. Catrett*, 477 U.S. 317 (1986)); *see also Badell v. Beeks*, 115 Idaho 101, 102 (Idaho 1988).

D. Steel Farm's Sublease with Walker Land is not an extension of the lease.

Steel Farms cannot argue that the 2006 Sublease between Steel Farms and Walker Land was an extension of the Lease term. Although the Sublease allows Walker Land an

[2] During the same month (April 2006) that Virginia Mathews and Kevin Steel made the hand written notations to the Lease, Venna Reed – the actual authorized representative for Croft & Reed – signed and notarized the Sublease with Walker Land and Steel Farms. Thus, Steel Farms was perfectly aware that Venna was available and the authorized person to sign documents.

option to extend their sublease through March 1, 2009, Section 1 of the Sublease states that the sublease it is subject to the Lease.

The Sublease does not expressly absolve Steel Farms from any of their obligations under the Lease. Nor does the Sublease alter any provisions found in the Lease, including expressly extending the term of the Lease. In fact, the Sublease expressly provides that: "It is understood and agreed that (Walker Farms) is subleasing the premises hereinafter described from (Steel Farms) as a sublessee subject to the terms and provisions of the Lease.") (Sec. 1 of the Sublease.)

Moreover, the Sublease specifically limits the rights of Sublease to the rights held in the Lease, in declaring that:

> It is specifically understood and agreed that Sublessee (Steel Farms) *shall not acquire any greater rights* in the Premises than that which is held by Sublessor (Steel Farms) *pursuant to the terms and provisions of the Lease*. (emphasis added.)
>
> (*Id* at Sec. 2.)

Although Croft & Reed acknowledged the Sublease, the Sublease only deals with rights and obligations belonging to Steel Farms, not Croft & Reed. Croft & Reed's rights and obligations are preserved in the Lease, and Steel Farms cannot contract Croft & Reed's rights and obligations away. Any interpretation of the Sublease that would interfere with or alter Croft & Reed's rights under the Lease would be invalid. Therefore, notwithstanding the Sublease, there was still no extension of the Lease and no right for Steel Farms to exercise the option.

E. The parties merely agreed to a lease with an option to purchase that could only occur if the lease term was extended, a purpose that Steel Farms must accept and the Court must enforce.

"The court's objective in constructing a contract is to ascertain and give effect to the intent of the parties." *George v. University of Idaho*, 121 Idaho 30, 35, 822 P. 2d 549, 554 (Ct. App. 1991). "If the contract is clear and unambiguous, the court gives effect to the language employed according to its ordinary meaning." *Dille v. Doerr Distributing Co.*, 125 Idaho 123, 125 (Ct. App. 1993). In construing unambiguous terms of a contract, the court ascertains the parties' intent from the language contained in the contract. *George*, 121 Idaho at 35. The Lease, as agreed in writing by the parties, simply did not allow Steel Farms to exercise the Option unless the term of the lease was extended. In effect, the Lease was nothing more than a four your lease with an option to purchase that could only occur if Croft & Reed agreed in writing to extend the lease.

Moreover, because Steel Farms attorney drafted the Lease, its terms must be construed most strongly against Steel Farms. *Underwood v. Sterner*, 63 Wash. 2d 360, 387 P.2d 366 (1963). As the drafter of the agreement, Steel Farms and its attorney have the ultimate control and bargaining power to draft the document to their advantage. They must therefore bear the burden for any provisions in the contract that may in the end as written cannot be construed as they had intended. In essence, Steel Farms and/or its attorney must suffer the consequences for any alleged errors they made in a contract they drafted, not Croft & Reed.

It would also be inappropriate for Steel Farms to urge the Court to alter the contract, particularly since it has admitted to the Court that the lease term was four years, a fact that is now indisputable. Further, "for over 100 years, the (Idaho) supreme court has held that a contract for the sale of real property must speak for itself and that a court may not admit parol evidence to supply any terms of the contract." *Ray v. Frasure*, 145 Idaho 625, 628; 200 P.3d 1174, 1177 (2009). The Lease itself disallows parol evidence

to interpret the agreement. (Sec. 20.4) In essence, the Lease (with its Option or purchase contract) speaks for itself, and the Court must enforce the agreement as it is written.

In addition, Steel Farms cannot make the extraordinary request that the agreement be modified because of "mutual mistake." Again, the parties have already mutually agreed that the lease was four years. In any case, Steel Farms bears the burden of proving by clear and convincing evidence that the mistake was made by both parties. *O'Connor v. Harger Constr., Inc.*, 145 Idaho 904, 909, 188 P.3d 846, 851 (2008). This is simply an impossible task for Steel Farms because the original persons involved with the contract for Croft & Reed, Dick and Venna Reed are deceased and not available to testify.

It is entirely conceivable that Dick Reed's intent was to establish a lease only, with the possibility of an option to purchase in the event that the lease was extended. This would have 1) assured that an annual income stream would continue to support his widow Venna after Dick's death, but yet 2) empowered Croft & Reed to ultimately determine whether Steel Farms could exercise the Option by granting Steel Farms an extension on the lease. In the end, it does not matter. Dick and Venna's intent accompanied them to the grave. The only reliable evidence in regard to alleged mistakes or intent that remains is the written agreement, which speaks for itself, and which bars Steel Farms from exercising the Option because the lease was never extended. Croft & Reed's motion for summary judgment should be granted.

III. Steel Farm's violation of the assignment or transfer prohibitions of its interests voids the Option.

Regardless of whether the Lease was ever extended, the Lease explicitly and broadly prevents Steel Farms from transferring or burdening its interests under the Lease

or Option. Steel Farms agreed under Section 19.13 of the Lease that it would not "sell or contract to sell or assign or contract to assign or otherwise transfer or hypothecate or assign as security or pledge or otherwise encumber (Steel Farms') interest in the Option or the Premises or any part thereof separate from this lease without first obtaining the written consent of (Croft & Reed.)" The violation of this provision results in the immediate termination of the Option. (Id.)

Steel Farms clearly breached this provision on April 18th of 2006, when it entered into an "Option to Purchase Real Property" (Walker Option) with Walker Land. Pursuant to Steel Farms' interest provided in its Option with Croft & Reed, the Walker Option commits Steel Farms to sell the leased property to Walker Land for $832,830. The Walker Option was signed by both Steel Farms and Walker Land, but not Croft & Reed.[3] By entering into this contract with Walker Land, Steel Farms encumbered both its interest in the Option and the property in direct violation of Section 19.13 of the Lease. The consequence – as agreed to by the parties in the written agreement – is the immediate termination of the Option. The Court should enforce the contract by nullifying the Option. *Steiner Investments v. Ziegler-Tamura LTD., CO.*, 138 Idaho 238, 243 (Idaho 2002), *World Wide Lease, Inc. v. Woodworth*, 111 Idaho 880 (Ida. App. 1986)

IV. Steel Farm's Lease default has cancelled the right to an option and has damaged Croft & Reed.

[3] It should be disconcerting to the Court about how the various transactions were conducted by Steel Farms in April, 2006. Steel Farms attempted to have the Lease modified by handwritten initials in the front hallway of Virginia Mathews home, notwithstanding the fact that Venna Reed was available and had undergone the formal process of the legal review and notarized signing of the Sublease with Walker Land. Steel Farms then entered into a separate formal and fully notarized agreement with Walker Land to encumber its interests in the Option, without any notice or signed authorization from either Venna Reed or Virginia Mathews. This conduct suggests the distinct possibility that Steel Farms was aware of and was intentionally subverting the restrictions and authorization requirements of the Lease for its own gain and to the detriment of Croft & Reed. Steel Farms' improprieties should not be rewarded.

Whether or not the Lease was extended beyond March 1, 2008, Steel Farms defaulted on the Lease by permitting unlawful acts on the property. The Lease's holdover provision provides that notwithstanding a holdover period, "such tenancy shall be subject to every other term, covenant and agreement contained herein." (Sec. 20.11 of Lease). On November 25, 2008 and December 6 2008, Croft & Reed inspected the property being leased by Steel Farms and discovered several violations of the Lease.

A. Unlawful environmental actions and conditions found on the property.

Steel Farms permitted several violations of U.S. and Idaho laws in regard to the storage and management of waste and hazardous materials. I.C. 31-4410 prohibits the "throwing away, dumping, discarding, any type or nature of solid waste" on the "private land of another." I.C. 31-4410 A violation of this law subjects the offending person to civil and even criminal penalties. *Id.* "Solid waste" under Idaho statute includes any "discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations and from community activities . . . " I.C. 31-4401 (50).

Croft & Reed clearly found solid waste dumped or discarded on their property in violation of I.C. 31-4401. As evidenced by the photographs taken of the property, various types of waste and perhaps hazardous waste were deposited in a man-made pit. This waste included used drums, fuel containers, pipes and furniture. These wastes were the result of commercial and/or agricultural activities on the property, and were either caused or permitted by the tenant Steel Farms. These violations are serious, and warrant possible civil and criminal consequences.

There are also strict requirements imposed by the U.S. Environmental Protection Agency (EPA) and enforced by the State of Idaho in regard to the storage and use of oil and fuel. Part 112 of the EPA's regulations on the protecting the environment and water pollution contains provision in regard to oil pollution prevention. 40 CFR 112.1 et al. Part 112.7 of those regulations contains general regulations for oil "spill prevention, control, and countermeasure plans." *Id.* Part 279 of these regulations contain requirements for the "management of used oil." 40 CFR 279.1 et al...

The EPA's environmental regulations as well as additional Idaho regulations are implemented by the Idaho Department of Environmental Quality (DEQ) through the "Environmental Protection and Health Act" (EHPA) I.C. 39-117, et al... and the Hazardous Waste Management Act (HWMA) I.C. 39-4415 et al . . . These Acts provide DEQ with the authority to monitor and enforce both civil and criminal penalties for activities which violate environmental protection laws or threatens the environment. *Id.*

One of DEQ's "basic environmental regulations" is the storage and disposal of hazardous waste and used oil. See, "Basic Environmental Regulations: What Every Facility Needs to Know" published by the Idaho DEQ, and found on www.deq.idaho.gov. lists DEQ's relevant prohibited activities and/or requirements for these hazardous agents are as follows (See Olsen Aff. Ex. D):

1. Hazardous materials must be stored and disposed of properly.

2. Disposal of hazardous waste by burning, spilling on or burying in the ground or by evaporation is prohibited.

3. Storage containers must be in good condition and properly labeled, with lids closed, and open to inspection from all sides.

4. Used oil must be stored only in tanks or containers that are in good condition and do not leak.

5. "Used Oil" must be clearly marked and visible on all above-ground storage tanks, containers, and fill pipes for underground tanks.

6. Disposal of used oil in a surface impoundment such as a ditch, pond or low spot is prohibited.

7. All releases or spills of used oil must be cleaned up within 24 hours. *Id.*

It appears that all of these environmental requirements were violated. As evidenced by Croft & Reed's observations and photographs of the site, used oil was stored in containers what were in poor condition and were leaking. This oil was not clearly marked. It appears that some oil was disposed in a low spot (the pit). The spilled oil was not cleaned up within 24 hours. It is also apparent from the photographs taken by Croft & Reed that hazardous waste, i.e. fuel and other fluids, were allowed to spill onto the ground from the water pump.

B. Steel Farms' material breaches and default of the Lease.

Both the open garbage dump and the oil and hazardous waste violations were clear violations of the law and therefore violations of the Lease. Steel Farms failed to keep the property in a "clean and wholesome condition" as required by Section 7.3.1. of the Lease. Moreover, Steel Farms permitted the property from being used "for any unlawful or objectionable purpose, and "suffered to be committed" waste on the property in violation of 7.3.3. of the Lease. Moreover, Steel Farms permitted activities on the property which conflicted with the laws, statutes, and or governmental regulations. (Sec. 7.3.4 of Lease).

These defaults essentially made performance by Steel Farms of its obligations impossible or are a clear demonstration of intent by Steel Farms not to perform or continue in the performance of their obligations under the Lease. (Sec. 17.1.2 of Lease). This warranted an immediate termination of the Lease by Croft & Reed. Nevertheless, after receiving notice of these violations on December 29, 2008, Steel Farms failed to take any action to remedy these violations, thus terminating the Lease pursuant to Section 17.1.3.

C. The termination and default under the Lease cancels Steel Farm's right to the option.

Pursuant to 19.9.4 of the Lease, Steel Farms is prohibited from exercising the option when the lease is terminated. The lease has been terminated and Steel Farms therefore has no right to purchase Croft & Reed's property. In any case, Section 19.9.4 of the Lease "suspends" Steel Farm's right to the option when they are in default of the Lease – *whether or not they received notice of default.*

Croft & Reed learned of Steel Farm's default on November 25, 2008. Steel Farms recorded a Notice of Option (Notice) in the public record on December 3, 2008, even though they had no right to such option. This Notice should have been immediately removed when Steel Farms was notified of their default and termination of lease on December 29, 2008. Nevertheless, Steel Farms not only failed to remove the Notice, they took no action to address the Lease violations. Moreover, they took the additional step of initiating this action against Croft & Reed knowing full well of their violations of the Lease and cancelled option rights.

Whether or not Steel Farms believes that a cancellation of the option is "fair" or warranted, the terms of the Lease make it clear that they cannot exercise the option when

they are in default of the Lease. Pursuant to long standing principles of contract law, and assuming Steel Farm's position that the Lease is valid, the terms of the contract preventing the exercise of the option should and must be enforced. *Steiner Investments v. Ziegler-Tamura LTD., CO.*, 138 Idaho 238, 243 (Idaho 2002), *World Wide Lease, Inc. v. Woodworth*, 111 Idaho 880 (Ida. App. 1986). Given the strong and compelling evidence of the unlawful activities and Lease violations occurring on the property, there is no material dispute over whether Steel Farms was in default of that Lease and therefore are prohibited from exercising the option. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720 (Idaho 1990) (*citing Celotex v. Catrett*, 477 U.S. 317 (1986)); *see also Badell v. Beeks*, 115 Idaho 101, 102 (Idaho 1988).

V. Steel Farms' violations of the Lease have damaged Croft & Reed.

Steel Farm's recording of the Notice and its subsequent actions have damaged Croft & Reed, and slandered the title to its property. Croft & Reed has been unable to proceed with the marketing of the property. Croft & Reed has also been unable to lease the property because of the cloud of uncertainty cause by Steel Farms.

Moreover, Steel Farms is liable for its breach of contract, i.e. via the unlawful activities and environmental harms. Such breaches may have devalued the property and will result in significant clean up and repair costs. Croft & Reed is entitled to damages, the amount to be determined in a later proceeding.

CONCLUSION

Because of the aforementioned facts and law, which are not in dispute, Croft & Reed's Motion for Summary Judgment should be granted. Steel Farms' Notice should be removed and Steel Farms should be held liable for damages caused by its breach of contract and slander of Croft & Reed's title.

DATED: December 30, 2009

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CERTIFICATE OF SERVICE

I certify that I am a licensed attorney in the State of Idaho and that on December 30, 2009, I served a true and correct copy of the CROFT & REED, INC.'S MEMORANDUM IN SUPPORT OF ITS AMENDED MOTION FOR SUMMARY JUDMGNET upon the following by the method of delivery designated:

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