IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

LEON KARELITZ, individually and as Trustee of the Leon and Lee T. Karelitz Trust,

DOCKET NO. 31,235

Plaintiffs-Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF NEW MEXICO, et al.;

Defendants-Appellees.

REPLY BRIEF

IN DIRECT APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
COLFAX COUNTY, NEW MEXICO CAUSE NO. 2005-51-CV
THE HONORABLE SHERI A. RAPHAELSON, PRESIDING

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ARGUMENT

I. THE EXPRESS TRUST WAS NOT SUPERCEDED BY THE PARTIES' 1994 AGREEMENT TO ESTABLISH LEE AND LEON KARELITZ CHAIR OF EVIDENCE AND PROCEDURE

Basically, Appellee's argument is having produced four documents, the 1994 agreement, the 2002 amendment, the 2003 working paper and the 2004 amendment, which they claim through argument make up the agreement between Karelitz and UNM, UNM is therefore entitled to summary judgment. The motion for summary judgment was not supported by an an affidavit. Appellees have not met the burden of a prima facie case and are not entitled to judgment as a matter of law. Gantt v. L & G Air Conditioning, 101 N.M. 208, 680 P.2d 348 (Ct.App. 1983); Wilson v. Galt, 100 N.M. 227, 668 P.2d 1104 (Ct.App. 1983); Rule 1-056 NMRA 2011. The four documents relied on my UNM refer to and are based on other documents and communications between the parties. For instance, the 1994 agreement (SRP 44-48) refers specifically to the 1991 agreement (SRP 19-20) and the 2002 amendment (SRP 77-84), the 2003 working paper (RP 368-371), and the 2004 amendment (RP 425-426) are amendments or further explanation of the 1991 agreement. The 1991 agreement clearly created a Trust. The evidence produced by Karelitz, his affidavit and the other documents, communications and letters, clearly raise genuine issues of material fact making summary judgment improper. Vive v. Verzino, 2009-NMCA-083, 146 N.M. 673, 213 P.3d 823.

Appellees' recitation of facts and argument as to interpretation of the facts emphasizes that summary judgment is improper as there are material facts in dispute. Appellees assert, without explanation or analysis that the 1991 Letter Agreement (SRP 19-20) was superseded by the 1994 Agreement to Establish Lee and Leon Karelitz Chair of Evidence and Procedure (SRP 44-48). However, a close examination of both the 1991 and 1994 documents makes it clear that Plaintiff's intent to establish a charitable trust was not affected or otherwise changed by the 1994 agreement. The 1991 Letter Agreement signed by Lee and Leon Karelitz and T. Joseph McKay, Director of Trusts and Bequests for the UNM Foundation, specifically provides that all lifetime cash contributions are to be held in trust and paid over to the prinicipal of the testamentary trust set forth in the 1987 Will of the survivor of Lee or Leon Karelitz (SRP 4-20).

The claim that the express trust established by Lee and Leon Karelitz in 1991 was superseded by the 1994 Agreement to Establish Lee and Leon Karelitz Chair of Evidence and Procedure (SRP 44-48) is contrary to the actual language of the 1994 agreement. While paragraph 1B of the 1994 agreement contains the words, "Donors are desirous that the provisions of this agreement supersede the Letter Agreement and govern the use of any lifetime contribution made to the Foundation by the Donors". The provisions of the 1994 agreement make it clear that there was no intent to supersede, and no action taken to supersede, Lee and Leon Karelitz' establishment of a

charitable trust. Paragraph 4 of the 1994 agreement provides:

> 4. All lifetime gifts made by Donors to the Foundation shall continue to be governed by the Letter Agreement except that the Letter Agreement is hereby amended and superseded as follows:
>
> A. All lifetime contributions made to the Foundation by the Donors or the surviving Donor, will be invested, reinvested, and accumulated by the Foundation until the death of the last to die of the Donors.
>
> B. Upon the death of the last to die of the Donors, all lifetime contributions and any accumulations thereon shall be added to the bequest to the Foundation being made by the Donors under the Trust Agreement and shall be utilized for the uses and purposes set forth in paragraph 5 below. In the event the bequest to the Foundation set forth in the Trust Agreement is lawfully revoked and no substitute gift to the Foundation is made by Donors by will, trust or otherwise, then upon the death of the last Donor to die, the lifetime contributions made by the Donors and any accumulations thereon if less than $250,000 shall be provided by the Foundation to the Law School for the use by the Dean of the Law School to foster and enrich the teaching of evidence and procedure as he may from time to time see fit; PROVIDED, HOWEVER, if the lifetime contributions made by the Donors and any accumulations thereon are $250,000 or more then only the income thereon shall be utilized for the above designated purpose.

It is clear the parties had no intention of superseding the 1991 agreement establishing a trust. The only provisions of the 1991 letter agreement that were superseded were concerned with when the funds could be spent and the manner in which additional funds would later be transferred to the charitable trust. Due to the poor health of Lee Kareltiz, Leon Karelitz requested Ken Leech to prepare the Leon and Lee T. Kareltiz Trust (SRP 21-43) to insure that a trustee named in that document would be able to pay for the

care of Lee Karelitz, who was in a nursing home. The 1994 Agreement to Establish Lee and Leon Karelitz Chair of Evidence and Procedure (SRP 44-48) was executed to recognize that additional funds might later be distributed by trust and not the 1987 wills as originally contemplated by the 1991 letter agreement. The 1994 agreement said nothing with respect to superseding or revoking the existing charitable trust, and those provisions in the 1991 letter agreement remained in effect according to the express language of the 1994 agreement.

The parties' intention with respect to what portions of the 1991 letter agreement were superseded by the 1994 agreement was a question of fact that prevented the Trial Court from granting Defendants' motion for summary judgment. See, Rule 1-056 NMRA 2011. The plaintiff expressly stated in his affidavit that he had no such intention (KA 28):

> The trust arrangement was not superseded; only the transfer on death, by Will probated giving authority to the personal representative to effect such transfer, was replaced by the device of an out-of-court authorization to a named Successor Trustee; and that alone was the scope of the activity placed upon Mr. Leach's shoulders to perform, and there never was a suggestion, in his doing that work, over a period of about 6 months, to the contrary.

Following the 1994 Amendment Karelitz repeatedly referred 1) to his intention that his gifts were in trust, 2) the duties of the UNM defendants as trustees, and 3) that his funds must be invested as trust funds, (see his letter of October 4, 1996 (RP 340-343), his letter of July 24, 1997 (RP 347-349) and his letter dated December 31, 2002 (SRP 131)). There was never a word from the UNM

defendants that they would not accept the contributions if plaintiff intended a charitable trust. (See President Peck's letter of December 5, 1996 (RP 345-346), the letter of D.F. Swan, President of UNM Foundation dated June 7, 1999 (RP 354) and the letter of Judy Jones of January 6, 2003 (RP 357)).

Appellant established that there were genuine issues of material fact making summary judgment improper.

II. THE PAROL EVIDENCE RULE DOES NOT BAR THE ADMISSION OF EXTRINSIC EVIDENCE

The UNM Defendants argue that, since the 1994 Agreement to Establish Lee and Leon Karelitz Chair of Evidence and Procedure (SRP 44-48) does not specifically refer to trust, extrinsic evidence cannot be used to contradict an unambiguous document(Answer Brief at 26); however, the claim that extrinsic evidence is not admissible is not supported by New Mexico law. It is the 1991 Letter Agreement (SRP 19-20) that establishes the parties' intent to create a charitable trust. Subsequently, the 1994 agreement provided, All lifetime gifts made by Donors to the Foundation shall continue to be governed by the Letter Agreement except A) the duration lifetime gifts were to be invested, reinvested, and accumulated for the life of the surviving Donor and B) the source of other funds for the trust would be from the Karelitz Trust instead of the 1987 wills. There is no reference in the 1994 document or the documents attached to the motion for

summary judgment that any of the agreements superseded or replaced the express intent to create a charitable trust. The absence of reference to the parties' intent to create a trust or revoke the trust previously created suggests that the 1991 agreement to create a trust was not superseded by the 1994 agreement. This case is similar to Mark V, Inc. v. Mellekas, 114 N.M. 778, 782, 845 P.2d 1232 (S. Ct. 1993) wherein the Court determined that the document which contained the phrase "all obligations agreed to are hereby canceled" could not be held to be unambiguous without review of the context in which the agreement was created.

The Supreme Court in Mark V. at 781 cited C.R. Anthony for its holding:

> [t]hat even if the language of the contract appears to be clear and unambiguous, "a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance," in order to decide whether the meaning of a term or expression contained in the agreement is actually unclear. 112 N.M. at 508-09, 817 P.2d at 242-43.

While it is true that the 1994 agreement (SRP 44-48) and the Agreement Amending in Part, the Agreement to Establish the Lee and Leon Karelitz Chair of Evidence and Procedure (SRP 77-84) did not say that the intention of the parties was or was not to establish a charitable trust, the extrinsic evidence makes it clear that Plaintiff intended such a trust. And, both were based on and continued the 1991 agreement specifically establishing a trust arrangement.

The fact that the UNM Defendants never said anything to contradict the Plaintiff's assertions of trust, until after Plaintiff transferred security entitlements to the UNM Defendants worth approximately 2.2 million dollars suggests the reason why such a denial was not made by UNM. The UNM Defendants cannot avoid accepting this gift in trust through their silence, because courts will not give effect to a party's undisclosed intentions; Ponder v. State Farm Mut. Auto. Ins. Co., 2000-NMSC-033, ¶¶13-14, 129 N.M. 698, 12 P.3d 960.

Given the clear statements made by the Plaintiff concerning his intention that his donations were a charitable trust, the UNM Defendants had every reason to know what he intended. In such a case, the Plaintiff's intention controls the parties' agreement. See Chisos, Ltd. v. JKM Energy, L.L.C., 2011-NMCA-026, ¶16, 150 N.M. 315, 258 P.3d 1107 where the New Mexico Court of Appeals held:

> {16} When the parties attach different meanings to the same terms, we apply the test from the Restatement (Second) of Contracts § 201 (1981) (Restatement) to determine their meaning. . The Restatement provides that
> (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
> (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
> (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

Whether the silence of the UNM Defendants was calculated or indifferent, when the Plaintiff repeated his claims of trust, the

UNM Defendants had reason to know his intention, and the parties' agreement is interpreted in light of Plaintiff's stated intention. Chisos, *supra*.

The Trial Court erred in granting the UNM Defendants' Motion for Summary Judgment without considering the evidence produced by Karelitz as to his intention to create a charitable trust. The trial court also erred by interpreting the agreement in light of the Defendants' undisclosed intentions concerning the trust established by the parties' letter agreement of 1991 (SRP 19-20). See, Chisos, supra.

III. THE UNM DEFENDANTS FAILED TO MEET THEIR INITIAL BURDEN

The UNM Defendants failed to meet their burden of showing there was no genuine issue of material fact and that movant was entitled to judgment as a matter of law. If, and only if, that burden is met, the party resisting the motion must produce evidence establishing a genuine issue of material fact. See, Goodman v. Brock, 83 N.M. 789, 498 P.2d 676 (1972).

In the present case the UNM Defendants moved for summary judgment asserting, that it was uncontroverted that four documents existed and they were entitled to summary judgment because four of the five documents attached to their motion made up the whole agreement of the parties. (See Answer Brief at Pgs. 16-17). There was no affidavit supporting the motion for summary judgment. The UNM Defendants did not meet their burden of establishing their prima facie case. There was no evidence that the four documents were the

only documents, agreements or communications. The response to the motion was supported by an affidavit with 20 documents, letters, communications and agreements attached and identified. The UNM Defendants did not counter with an affidavit or evidence. The UNM Defendants never met their burden of establishing their prima facie case and were not entitled to summary judgment dismissing Karelitz' claims. See, Goodman, *supra*.

The UNM Defendants did not move to strike the affidavit of Leon Karelitz nor did they object to the Court considering the affidavit. The trial court had the pleadings, the documents attached to the motion, the documents attached to the response, the documents attached to the reply and the affidavit of Leon Karelitz as evidence to consider, but apparently considered only the 1994 agreement, the 2002 amendment, the 2003 working paper and the 2004 amendment. (TR 2/15/11 @ 3:20:58 - 3:24:50).

In cases such as this the question of admissibility of the affidavit must first be raised and then must be resolved before determining whether or not unresolved questions of fact exist. See, Chavez v. Ronquillo, 94 N.M. 442, 612 P.2d 234 (Ct.App. 1980). In Chavez v. Ronquillo the Court stated:

> Then "... the threshold issue of admissibility must be resolved before determining whether or not unresolved questions of fact exist." United States v. Hanger One, Inc., 563 F.2d 1155, 1157 (5th Cir. 1977). A party must move to strike an affidavit that violates Rule 56(e). Lacey v. Lumber Mut. Fire Ins. Co. of Boston, 554 F.2d 1204 (1st Cir. 1977).

For purposes of determining whether unresolved questions of fact existed, the affidavit was properly before the Court. The trial court admitted that there were facts contained in the affidavit (TR 2/15/11 @ 3:24:40 - 3:24:50) as do the Appellees (Answer Brief at 14).

It is clear from the Affidavit and the documents, letters and communications referred to that Plaintiff Karelitz repeatedly said you get the money in Trust, and up until the transfer of almost 2.2 million dollars, UNM's position was we don't care as long as we get it.

The UNM Defendants now ask this Court to ignore Karelitz' disclosed intent and UNM's failure to tell him you are wrong.

IV. PRESERVATION OF ISSUES

This appeal was taken following the granting of summary judgment. Appeal from the grant of summary judgment presents a question of law. The standard of review is de novo. Bartlett v. Mirabel, 2000-NMCA-036, 128 N.M. 830, 999 P.2d 1062. Appellee argues in the Answer Brief that appellant has failed to specify how the specific issues were preserved. As stated in the Docketing Statement each of the issues and arguments were preserved by the motion for summary judgment (RP 196-231), the response thereto (RP 251-276), the affidavit (RP 277-336), and the argument before the trial Court. This Court should note that appellant's argument was cut off by the trial court. The trial court made its ruling without allowing full argument, and, we believe, with the mistaken belief

that the bulk of the money had transferred to UNM in 1994. (TR 2/15/11 @ 3:20:58 - 3:22:05). See, Rule 1-046 NMRA 2011.

In any event the issue before this Court is whether there were genuine issues of material fact precluding summary judgment. Appellant preserved the issue by its response to the motion, the affidavit of Leon Karelitz, and its argument.

CONCLUSION

Summary Judgment was improper. The UNM Defendants did not meet their burden of showing they were entitled to judgment as a matter of law. The Plaintiff has shown that there are no genuine issues of material facts in dispute, making summary judgment improper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned herewith certifies that a true and correct copy of the foregoing was mailed this 26th day of January, 2012, by depositing the same in the United States mail, postage pre-paid and addressed to:

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