

20130223

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

DEC 02 2013

STATE OF NORTH DAKOTA

Fred M. Hector,
Individually and on behalf of all
Landowners specially assessed for
Special Assessment Project 5314,

Plaintiff-Appellant,

Supreme Court No. 20130223

vs.

District Court No. 09-2009-CV-04474

City of Fargo, a municipal corporation,

Defendant-Appellee.

REPLY BRIEF OF PLAINTIFF-APPELLANT

APPEAL FROM THE JUDGMENT OF THE SAID DISTRICT COURT
ENTERED ON JUNE 13, 2013 [PREDICATED UPON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT RESULTING IN THE
MEMORANDUM OPINION AND ORDER DATED MAY 30, 2013]

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE STEVEN L. MARQUART

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ISSUES ON APPEAL

Without expressing dissatisfaction with Appellant Fred M. Hector's ["HECTOR"] statement of the issues pursuant to N.D.R.App.P. 28(c), Appellee City of Fargo ["FARGO"] seemingly rejects the six issues presented by the only appealing party – HECTOR.

FARGO fails to directly address all of HECTOR'S issues.

STATEMENT OF THE CASE

Without expressing dissatisfaction, FARGO seemingly rejects the simple two (2) paragraph statement of the case. Instead, FARGO adds extraneous statements, some incorrect, but none altering HECTOR'S simple account.

It is not accurate for FARGO to assert that "(a)ll of the class action and individual claims arise from the allegedly inappropriate special assessment procedures and assessments of Special Assessment District 5314." FARGO'S Brief, ¶ 7. HECTOR'S basis for the class action and individual claims have both constitutional and statutory basis [state and federal], equally ignored by FARGO, and the lower court. FARGO accurately states, "(t)hrough this lawsuit Hector seeks to prove that the 2009 certification was wrong." FARGO'S Brief, ¶ 14.

STATEMENT OF FACTS

Without expressing dissatisfaction, FARGO asserts the existence of other relevant facts, none of which challenge HECTOR'S factual account. Appellant's Brief, pages 2-15. More than once, FARGO falsely asserts that Hector presented no evidence to support his allegations [FARGO'S Brief, ¶s 33, 39, and 46]. FARGO does not directly seek to challenge HECTOR'S factual account establishing the following:

A. FARGO'S auditor falsely asserted municipal construction costs of

\$17,234,716.92 when FARGO'S actual cost of construction could not exceed \$15,222,493.44 -- a disparity of \$2,012,223.48. Specifically, Appellant's Brief, page 4; footnote 1; and Appellant's Brief, page 7, citing FARGO'S sworn discovery responses establishing the actual municipal cost of \$15,222,493.44. Only the real construction costs may thereafter be subject to payment by special assessment. Hector v. City of Fargo, 2012 ND 80, ¶ 37, 815 N.W.2d 240.

B. FARGO'S auditor's false certification of \$17,234,716.92 in construction costs included \$2,444,615.00 of construction known to have been paid with federal city urban funds. Appellant's Brief, pages 4-7. Only the real construction costs may thereafter be subject to payment by special assessment. Id., ¶ 37.

C. FARGO never produced a single document evidencing payment of \$1,199,854.40 of interest, nor did it ever identify the basis for paying any interest – ever. Appellant's Brief, pages 7; 14.

D. FARGO never produced a single document evidencing payment of \$2,039,923.51 of City administration/engineering. Appellant's Brief, page 7.

E. FARGO never challenged HECTOR'S allocations based upon FARGO'S sworn discovery responses establishing municipal over-assessment based upon:

1. Over-assessment resulting in a "profit" favoring FARGO in the amount of **\$397,688.19** for Phase II - Overpass and Frontier Road. Appellant's Brief, pages 9-10.
2. A minimum "profit" favoring FARGO in the amount of **\$1,524,994.36** for Phase II - North Frontage Roads. Appellant's Brief, pages 10-11. As to

Phase II - it will never be less than \$525,650.21 of excess assessment even if the interest charges accruing from an non-existent debt are somehow judicially legitimated. Appellant's Brief, page 14.

3. Missing promised municipal funding of **\$515,215.45** after payment of all of FARGO'S claimed project costs. Appellant's Brief, page 13.
4. Known federal funds and SRF funds totaling **\$1,912,247.40** which were not properly credited to landowners. Appellant's Brief, page 15.

FARGO fails to comprehend that this action is predicated upon a 2009 assessment which resulted in a 2009 assessment, albeit wrongfully done for the reasons advanced by HECTOR. In 2012 or 2013, neither FARGO'S Auditor, nor its engineer, nor even its attorneys, have the right to change the city auditor's 2009 certification of "the items of the total cost thereof" to the chairman of the special assessment commission for assessment as mandated by N.D.C.C. § 40-23-05. FARGO'S Brief, ¶s 25; 41. FARGO'S proclivity to manufacture numbers is even evident in FARGO'S Brief, at ¶ 25, claiming "total project costs on October 13, 2009, (of) \$26,255,716.56" [referencing App., p. 92], while now trumpeting, at ¶ 50, that Docket # 23 in Hector v. City of Fargo, Civil No. 09-2009-CV-04473, says something significantly different [*\$3,428,635.56 different, to be exact*] -- "(a)s of October 2009 the documents show that the City had already spent \$22,827,081." HECTOR stipulates that the record will not support the city auditor's false certification of costs.

Without challenge to HECTOR'S evidence, FARGO discriminated against HECTOR in violation of Fargo's Infrastructure Funding Policy in either of two (2) ways: (1) assessing

HECTOR for costs for interstate overpass structures when 100% of the structure were to be paid by FARGO [no possibility of assessment], and (2) assessing HECTOR for 100% of the frontage roads when the “caps” should have limited the assessment to approximately one fourth (1/4th) of that amount [presuming the “costs” were accurate, which they were not].

LAW AND ARGUMENT

Standard of Review

POINT 1. Standard of Review.

Without expressing dissatisfaction with HECTOR’S recital of the applicable standard of review pursuant to N.D.R.App.P. 28(c), FARGO cites case law that precludes upholding the lower court’s grant of summary judgment – the undisputed evidence, and not just an inference to which HECTOR is also entitled, discloses a false certification of municipal costs, missing promised monies, federal expenditures not properly credited, municipal profits, and assessment discrimination against HECTOR.

POINT 2. Neither Res Judicata nor Collateral Estoppel can bar Hector’s lawsuit.

When FARGO cites Skogen v. Hemen Township, 2010 ND 92, ¶ 17, 782 N.W.2d 638, to stand for the legal theorem, “(w)hen a final judgment exists from a court of competent jurisdiction, it is conclusive with regard to claims raised, or those that could have been raised and determined as to their parties and the privities in all other actions”, it recognizes why the summary judgment should be reversed.

In the prior proceedings, the city auditor’s certification of costs was presumed to be accurate. The Special Assessment Commission was legally required to accept the auditor’s numbers [N.D.C.C. § 40-23-11], as was the Fargo City Commission, as well as all appellate

courts reviewing the underlying decisions. All prior review was limited by law [N.D.C.C. § 40-23-15]. The truth of the city auditor's certified numbers is now at stake in this judicial "action", but now, without statutory constraint(s). The unchallenged facts disclose the auditor's certification was false -- by millions of dollars, and established by the documents provided by the City in sworn discovery.

Res judicata does not apply to decisions of the Special Assessment Commission acting as a legislative tribunal, with limited powers. Incredibly, FARGO does not mention, nor attempt to distinguish a well-established legal principle that administrative res judicata is generally applicable only when an administrative body acts in a judicial capacity with trial-like procedures. Appellant's Brief, page 19, citing Muscatell v. North Dakota Real Estate Com'n, 546 N.W.2d 374, 379 (N.D. 1996); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107 (1991); and Cridland v. North Dakota Workers Comp. Bureau, 1997 ND 223, ¶ 19, 571 N.W.2d 351.

POINT 3. A special assessment can still be assailed for fraud or other grounds justifying equitable interference with a special assessment.

FARGO proffers the specious argument that no action for equitable relief based on "fraud 'or other grounds'" is possible because N.D.C.C. § 40-26-01 only provides for an appeal with the procedure provided in N.D.C.C. § 40-26-01. FARGO'S Brief, ¶ 48. FARGO overlooks at least three (3) legal facts compelling a different result: (1) N.D.C.C. § 40-26-07 allows for an equitable action for a judicial action to "determine the true and just amount which any property attempted to be specially assessed for a special assessment should pay to make uniform with other special assessments for the same purpose"; (2) the

Fourteenth Amendment to the Constitution of the United States ; and (3) Article I, § 9, of the Constitution of North Dakota.

The Due Process Clause of the Fourteenth Amendment [and Article I, § 9, of the Constitution of North Dakota] requires all States to provide meaningful backward-looking relief¹ to rectify any unconstitutional deprivation that occurs when a State requires a taxpayer to pay a tax without an opportunity to challenge whether the tax is illegal before payment. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990); *Service Oil, Inc. v. State*, 479 N.W.2d 815, 821 (N.D.1992); and *Mann v. North Dakota Tax Commissioner*, 2007 ND 119, 736 N.W.2d 464.

Only if a meaningful judicial action is allowed will it be possible for FARGO to utilize the special assessment procedures. To say no action is possible is tantamount to stating North Dakota's special assessment process results in an unconstitutional deprivation of property. HECTOR is prepared to so stipulate, just as HECTOR will stipulate that a claim for false costs is fraudulent and deceitful.

POINT 4. HECTOR has a cause of action, under 42 U.S.C. § 1983, for the proper application of federal highway funds, and the deprivation of Fourteenth Amendment constitutional rights.

FARGO falsely asserts that HECTOR has raised the issue of him being an intended beneficiary of the federal highway program for the first time on appeal. FARGO'S Brief, ¶

¹ "To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' *O'Connor*, 223 U.S., at 285, 32 S.Ct., at 217, for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." *Id.*, page 39.

58. Paragraphs 50-54 of the Complaint [App., ps. 31-33] belies FARGO'S statements. HECTOR specifically alleged that FARGO'S actions were undertaken under the color of State law to deprive HECTOR of his right and privilege to share in federal funds, secured by federal statutes, for regional and other urban roads. Specifically, Complaint paragraph 52.

An assessment based upon false numbers is not transformed into a legal assessment when there exists a deferral -- the deferral merely postpones until later the impact of an illegal assessment. FARGO'S argument that, "as a result of the 10 year deferral agreements, Hector has suffered no injury, harm or deprivation of right", is specious and illogical.

HECTOR'S claims are based upon violations of "substantive due process"; HECTOR'S prior litigation had basis within violations of "procedural due process". FARGO'S assessments based upon false representations of fact are arbitrary, capricious, and in violation of state law.

FARGO asserts for the first time the right to ignore the Fargo Infrastructure Funding Policy, *and exercise unequal protection of the law*, when it now claims, "(t)he City had a rational basis for any dissimilar treatment Hector may have received based on the amount and location of land he owned." FARGO'S Brief, ¶ 65. No assessment for the interchange overpass structure was even possible, and the frontage roads should have been "capped" [possibly at \$528,000 {west of I-29} plus something less than \$528,000 {east of I-29} instead of the \$5,123,087.44 actually assessed; see Appellant's Brief, pages 24-25] if the law was equally applied. HECTOR'S case is made by FARGO'S admission of unequal application of its law(s).

POINT 5. FARGO'S duty can be likened to a trustee.

FARGO fails to recognize the existence of N.D.C.C. § 40-24-18 imposing a fiduciary responsibility upon a city auditor, and instead looks to Connecticut for protection. FARGO'S Brief, ¶ 54, citing Candlewood Hills Tax District v. Medina, 74 A.3d 421, 430-431, 143 Conn.App. 230. The Candlewood Hills decision actually buttresses HECTOR'S argument based upon North Dakota law – we have placed *special trust and confidence* in the city auditor [as compared to a governing body] to fulfill statutory duties, and the other comparable statutes created to protect landowners subject to special assessment. See Complaint pleadings, App., ps. 25-27, and reliance upon N.D.C.C. § 59-18-01 for restoration or damages.

POINT 6. Questions of fact remain to be resolved by the jury.

FARGO appears to have overlooked Point 6.

CONCLUSION

A wrong decision should be righted – the action is righteous.

Respectfully submitted this 2nd day of December, 2013.

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AFFIDAVIT OF MAILING

State of North Dakota
County of Cass

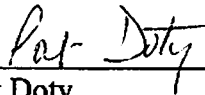
Pat Doty, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

On the day of 2nd day of December, 2013, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: REPLY BRIEF OF PLAINTIFF-APPELLANT.

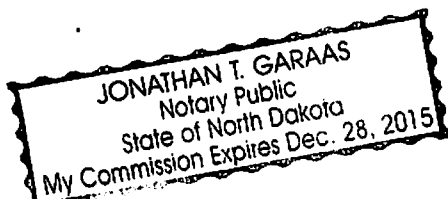
The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:


Jane L. Dynes
Serkland Law Firm
P O Box 6017
Fargo, ND 58108-6017

To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.


Pat Doty

Subscribed and sworn to before me this 2nd day of December, 2013.




Notary Public