20170324
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 19, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Key Energy Services, LLC, Plaintiff-Appellee, vs. Ewing Construction Co. Inc.; Defendant-Appellant, And Bridger Construction Services Inc.; Jensen & Son Construction, Inc.; Oil-Well Lubricant Dispense Systems, Inc.; Crane-Tec, Inc.; The Sherwin-Williams Company; Harper Ready Mix Company; Gaston Engineering & Surveying, P.C.; Selid Plumbing and Heating, Inc.; Distribaire, Inc.; Alliance Steel, Inc.; Ahern Rentals, Inc.; Cal's Carpet Inc.; Wagner Concrete Corp.; Fargo Glass & Paint Company; Alpha Overhead Door, Inc.; Warner Enterprises, Inc. d/b/a Energy Electrical Distribution Co.; KLE Construction LLC; C4, LLC; Dakota Fire Protection, Inc.; WE Integrage, LLC; James Dean McMains d/b/a D & M Steel Buildings; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the complaint, Defendants,	)	Supreme Court No. 20170324 Williams Co. No. 53-2015-cv-00113

APPEAL FROM ORDER DENYING DEFENDANT EWING CONSTRUCTION CO., INC.'S MOTION FOR RELIEF FROM DEFAULT JUDGMENT, DATED JULY 28, 2017.

THE DISTRICT COURT OF WILLIAMS COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE BENJAMEN J. JOHNSON, PRESIDING

REPLY BRIEF OF APPELLANT

Scott K. Porsbrog (ND Bar ID 04904)
sporsborg@smithporsborg.com
Austin T. Lafferty (ND Bar ID 07833)
alafferty@smithporsborg.com
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

John T. Runde (Bar ID #P01960)
jrunde@husemanstewart.com
615 N. Upper Broadway, Ste. 2000
Corpus Christi, TX 78401
(361) 883-3563

Attorneys for Defendant- Appellant, Ewing Construction Co. Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Paragraph Number

STATUTES:

RULES:

I. ARGUMENT

A. The Court did not have Personal Jurisdiction over Ewing, Due to Improper Service of Process

[¶1] Key Energy relies on an incomplete Return of Officer. Key Energy argues Ewing has submitted no facts showing the falsity of the return that service was properly made on Ewing, and indeed "Mr. Ewing does not flat-out deny that was served with process. . ." citing a single quotation from Mr. Ewing's affidavit. Focusing on this single quotation ignores the rest of Mr. Ewing's affidavit. While Key Energy is correct in quoting Mr. Ewing as stating he was "[u]nable to locate formal proof of service of the Lawsuit in the records of Ewing Construction," he also clearly states "I have not been properly served" and that he does not recall or remember being served whatsoever. Further, in its brief, Ewing argues it was not properly served, as the return provided by Key Energy does not indicate the summons and complaint were served upon Ewing, as required by the Rules of Civil Procedure. It is clear Ewing denies service.

[¶2] Key Energy next argues that even if its error-filled proof of service is insufficient, "such irregularity is immaterial." "While the North Dakota rules require filing of proof of service, *see* N.D.R.Civ.P. 4(i)(1), it is the actual service, not the proof of service, that provides a court with jurisdiction." Appellee's Br. ¶ 23. Key Energy makes this statement about North Dakota law and proceeds to cite several cases to support this argument. However, the supportive case law comes from Idaho, Maine, Wisconsin, Minnesota, Iowa, Wyoming, Utah, and the 9th Circuit. Key Energy cites only one North Dakota case to support its argument about what constitutes appropriate proof of service in North Dakota. Each of the cases cited by Key Energy is distinguishable, but due to space constraints, Ewing will focus on the only binding case, Nonweiler v. Retetinger, 259 N.W. 500, 501 (N.D. 1935).

[¶3] While North Dakota may choose to look to other states when its own rules and laws are unclear, that is not the case here. N.D.R.Civ.P. 4 is clear as to what is required, and Key Energy did not meet these requirements. The one North Dakota case cited, Nonweiler v. Rettinger, 259 N.W. 500, 501 (N.D. 1935), is easily distinguishable. First and foremost, it is worth noting that Nonweiler was decided in 1935, prior to the adoption of the current North Dakota Rules of Civil Procedure. Furthermore, Nonweiler deals with a completely different issue than the present case. The Court in Nonweiler was deciding a mortgage foreclosure that was initially dismissed because "the plaintiff had failed to comply with the provisions of chapter 131, Laws 1919 (section 8099a, 1925 Supplement)." 259 N.W. 500 (N.D. 1935). This statute required an affidavit of proof of service of the notice be filed with the clerk of court. Id. "There [was] no claim that the required notice was not served in the manner provided by the statute." Id. Key Energy improperly relies on Nonweiler as precedent, when in fact, the issue in Nonweiler was not whether service had properly been provided to the opposing party, but whether service had properly been filed with the court. There is a very clear difference between not filing a document and not serving a document. When a document is served, but not filed, the opposing party still has notice. But when a document is filed, but not served, the opposing party has no notice or opportunity to defend itself. Key Energy has provided no reliable proof it served Ewing with the summons and complaint.

[¶4] Furthermore, Ewing reiterates the arguments made in its previous brief; that the proof of service provided by Key Energy is severely lacking and does not constitute proof of service as required by law. Again, the Return of Officer is riddled with problems. It was not notarized, despite an obvious space calling for notarization. The document only claims to deliver "this Citation" to Bill Ewing Jr., together with an "accompanying copy of _____." North Dakota and Texas law both require service of the pleadings upon the defendant, and proof of

service does not show pleadings were delivered. Additionally, words are scribbled out and replaced with indecipherable writing, and the serving Deputy's signature is illegible, and does not match the name of the constable who stamped the document as served.

[¶5] Key Energy cannot prove it served the pleadings upon Mr. Ewing, and without that proof, no service exists, and no jurisdiction exists. It now attempts to piggyback upon another party's cross-claim, assuming that if Mr. Ewing was served by one, it was served by the other. Key Energy cannot take advantage of another party's proper service and ability to follow the Rules of Civil Procedure to cover its own deficiencies. The cross-claim and third party complaint filed by Selid Plumbing and Heating, Inc. has nothing to do with this judgment, and should be ignored.

[¶6] Key Energy now attempts to pass off a "corrected" proof of service, which is wholly ineffective. A review of the "corrected" return shows it is a completely new document, which appears to be copied from the original, only now the blanks are filled and the document is notarized. Key Energy clearly read Ewing's brief, and has now "fixed" the problems, in an attempt to make its proof of service acceptable.

[¶7] The Court cannot allow this to stand. The public policy implications of allowing a party to correct deficiencies in service two years later are simply too problematic. If Key Energy wishes to correct the deficiencies of service and proof of service, they may either re-serve Ewing Construction, or they can petition the court. See Cahoon v. North Dakota Workers Compensation Bureau, 482 N.W.2d 865 (N.D. 1992); see also McDonald v. North Dakota Com'n on Medical Competency, 492 N.W.2d 94 (N.D. 1992). These cases both stand for the idea that "a party who otherwise files a proof of service within the required time limits, but fails to file a document which accurately reflects the actual service which took place, may, **with leave of court**, file a corrected proof of service." McDonald, 492 N.W.2d 94, 96 (N.D. 1992). "[A]n inaccurate but timely filed

proof of service may be the basis for a hearing to determine the actual facts surrounding the service upon proper motion." Cahoon, 482 N.W.2d 865, 868 (N.D. 1992). Thus, the "corrected" proof of service cannot stand. It was not filed with leave from the Court. Further, these cases show this Court did not have jurisdiction to issue default judgment, but merely to hold a hearing as to the issue of proof of service.

B. Default Judgment should be Vacated because it was the Result of Excusable Neglect

i. Ewing Promptly Responded to the Default Judgment

[¶8] "What constitutes a reasonable time varies from case to case and must be determined in each instance from the facts before the court." Meier v. Meier, 2014 ND 127, ¶ 7, 848 N.W.2d 253. N.D.R.Civ.P. 60(c) states that for mistake, inadvertence, surprise, or excusable neglect, a motion must be made no more than a year after a default judgment has been entered. Ewing moved for relief from judgment within a year of default judgment being entered. Ewing therefore acted in a timely fashion, and promptly responded.

ii. Ewing Demonstrated Excusable Neglect

[¶9] Ewing disagrees that it incorrectly relies on Beaudoin. In Beaudoin, the defendant, through its own mistake and neglect, was eventually found in default and sought relief from this default alleging excusable neglect. Beaudoin v. South Texas Blood & Tissue Center, 2005 ND 120, 699 N.W.2d 421 (2005). The Supreme Court found that this neglect, even though it was neglect on behalf of the defending party, was excusable. Id. Ewing's case mirrors Beaudoin. Ewing maintains that it was not properly served, but if the Court finds it was properly served, it cannot change the fact that Ewing cannot find any copy of the supposedly served documents in its records. Any documents that were served upon Ewing were clearly lost within the company's records. This is excusable neglect. Key Energy's arguments rest upon their own misreading and

misinterpretation of Ewing's brief and affidavit. Key Energy argues that Ewing has not provided evidence of its excusable neglect, but Ewing is unaware of what evidence it could provide in this instance. It has searched its records, and has no record of this alleged service. This, if anything, proves that Ewing was not properly served. If it had been, there would be record and documentation of said service.

[¶10] Key Energy's reliance on US Bank Nat. Ass'n v. Arnold is misplaced. Arnold argued he suffered from clinical depression but did not support this with medical evidence. 2001 ND 130, ¶ 25, 631 N.W.2d 150. This Court found that the district court's rationale was clear in that "Arnold – the party with the burden – did not satisfactorily demonstrate the multiple misfortunes he suffered led to excusable neglect." Id. Arnold claimed excusable neglect and did not provide evidence proving said neglect. That is not the case here. Ewing claims excusable neglect and provides a sworn affidavit that supporting its claim. The documents in question are not in Ewing's files. Beaudoin is analogous, and Ewing has met its burden.

iii. Ewing Presented a Meritorious Defense

[¶11] Key Energy's sole position regarding Ewing's meritorious defense is to argue "Ewing is prohibited from asserting a counterclaim or meritorious defense against Key Energy . . ." Appellee's Br. ¶ 39. Key Energy makes this assertion based on N.D.C.C. § 43-07-02(1), which reads as follows:

> A person may not engage in the business nor act in the capacity of a contractor within this state when the cost, value, or price per job exceeds the sum of four thousand dollars, nor may that person maintain any claim, action, suit, or proceeding in any court of this state related to the person's business or capacity as a contractor without first having a license as provided in this chapter.

N.D.C.C. § 43-07-02(1).

[¶12] Key Energy clearly misreads section 43-07-02(1). A review of section 43-07-02 in its entirety, and not simply subsection 1, shows a section of century code concerned with

individuals acting in the capacity of a contractor without a license, and construction fraud. N.D.C.C. § 43-07-02. The statute clearly indicates that a party must be licensed when acting as a contractor in order to maintain a claim. Ewing was licensed as a contractor at the time of construction, and then let its license lapse when its business in North Dakota was concluded. Key Energy's argument fails. Ewing is not maintaining any claim, action, suit, or proceeding, it is merely attempting to defend against Key Energy's claim.

[¶13] Second, the case law cited by Key Energy does not support the argument it makes. In Preference Personnel, Inc. v. Peterson, Preference Personnel, Inc. was not licensed, at the time it entered into a contract with Peterson. 2006 ND 35, ¶ 4, 710 N.W.2d 383 (2006). In Haugen v. City of Berthold, Haugen was not licensed when he made his bid. 267 N.W.2d 198 (1978). These both support Ewing's readings – that one must be licensed at the time of the incident the suit involves. Ewing's interpretation of 43-07-02(1) thus stands – the contractor must be licensed at the time of the incident causing the suit. Ewing meets this requirement.

II. CONCLUSION

[¶14] For the foregoing reasons, Ewing requests the Court overturn the default judgment, and allow the case to be heard on its merits.

Dated this 19th day of February, 2018.

SMITH PORSBORG SCHWEIGERT
ARMSTRONG MOLDENHAUER & SMITH

By */s/ Scott K. Porsborg*
Scott K. Porsborg (ND Bar ID 04904)
sporsborg@smithporsborg.com
Austin T. Lafferty (ND Bar ID 07833)
alafferty@smithporsborg.com
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
(701) 258-0630

And

HUSEMAN & STEWART

John T. Runde (Bar ID #P01960)
jrunde@husemanstewart.com
615 N. Upper Broadway, Ste. 2000
Corpus Christi, TX 78401
(361) 883-3563

Attorneys for Defendant-Appellant, Ewing Construction Co., Inc.

CERTIFICATE OF SERVICE

[¶15] I hereby certify that on the 19th day of February, 2018, a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** was served as follows:

Key Energy Services LLC
Caren C. Stanley — cstanley@vogellaw.com
Attorney at Law
P.O. Box 1389
Fargo, ND 58107-1389

Jensen & Son Construction, Inc.
c/o Northwest Registered Agent Service, Inc.
3003 32nd Avenue South, Suite 240
Fargo, ND 58103-6118

Crane-Tec, Inc.
12041 East Miami River Road
Cincinnati, OH 45252

The Sherwin-Williams Company
c/o Corporation Service Company
1709 N 19th St. #3
Bismarck, ND 58501-2121

Harper Ready Mix Company
Mark C. Sherer — mark@covenantlegalgroup.com
Attorney at Law
38 2nd Ave E
Dickinson, ND 58601

Selid Plumbing and Heating Inc
H. Malcolm Pippin — Malcolm@pippinlawfirm.com
Daniel J. Vondrachek II — daniel@pippinlawfirm.com
Attorneys at Law
111 E Broadway
Williston, ND 58801

Cal's Carpet, Inc.
c/o Clayton Unruh
2457 States Boulevard
Dickinson, ND 58601

Wagner Concrete Corp.
c/o Michelle Wagner
P.O. Box 1718
Buckley, WA 98321

Fargo Glass and Paint Company
c/o Dan Martinson
1801 7th Avenue N
Fargo, ND 58102-3203

Alpha Overhead Door, Inc.
c/o Richard Sargent
711 14th Street W
Williston, ND 58801-4031

KLE Construction, LLC
c/o David A.Tschider dtschider@tschider-smithlaw.com
Attorney at Law
418 E Rosser Ave #200
Bismarck, ND 58501

C4 LLC
c/o David Maszk
980 Lindsey Ln
Grand Forks, ND 58201-7016

Dakota Fire Protection, Inc.
c/o Teresa K. Washburn
1710 Highway 81 North
P.O. Box 5327
Grand Forks, ND 58206-5327

WE Integrate, LLC
c/o Derek Bieri
525 20th Avenue SE
Minot, ND 58701-6636

Ebel, Inc
d/b/a Ebel Electric
2407 2nd Ave W
P.O. Box 2201
Williston, ND 58802-2201

By */s/ Scott K. Porsborg*
SCOTT K. PORSBORG