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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Biological & Environmental Solutions, LLC, Plaintiff, vs. TMD Technologies Group, LLC; Go Green Bioproducts, LLC; Go Green Plastics, LLC; T.M. "Chuck" Davis; and The Moody Company, LLC, Defendants.	Case No. 09-2014-CV-3386 **PETITION FOR A SUPERVISORY WRIT**

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T.M. "Chuck" Davis

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I. Introduction

[1] The original four defendants ("defendants") request a supervisory writ. They paid a $950,000 promissory note required by a settlement agreement in full with interest by tender of a cashier's check in open court. Nevertheless the district court granted Biological & Environmental Solutions, LLC's ("B&E") motion to void the agreement based on "breach of contract" after B&E itself had earlier sought to specifically enforce the agreement and after B&E accepted the benefits of the agreement including delivery of the note, and payment of $250,000. The district court has left B&E in the position of obtaining immediate and unrecoverable multiple recoveries of $950,000 because of interim, non-final judgments entered against TMD Technologies Group, LLC ("TMD") for $354,264.32 and Go Green Bioproducts, LLC ("GGB") for $2,011,742.62, the separate note it still holds, the judgment liens and other collection options. And with its most recent order, the district court has allowed B&E to name and serve a new defendant and allowed B&E to seek punitive damages in what started out as a simple contract-promissory note case.

[2] So instead of being paid a total of $950,000 with interest tendered on October 16, 2017, the full amount due under the note required by the agreement, B&E has received $250,000 because of a security interest that did not survive the agreement, has, or has had the benefit of a note for $950,000 it presumably still holds; as well as large unsatisfied non-final judgments against two of the defendants which continue as judicial liens on real property and will result in further

unrecoverable collections. And now, there will be a new defendant and the defendants and the new defendant face punitive damages.

[3] The district court disregarded the agreement by making a sua sponte conclusion that the agreement had not been fairly entered into. The agreement was done in the midst of hard fought litigation while B&E was represented by prior counsel, Todd Zimmerman, from the Fargo office of Fredrikson & Byron, described by B&E's new counsel at the hearing as being a "smart guy." B&E never claimed the agreement was not fairly entered into. Since the issue never came up, there is no support for the court's conclusion. B&E had sought to compel the defendants to perform the agreement. B&E accepted the promissory note and $250,000, thus accepting the benefits of the agreement. No party argued that the agreement was not fairly entered into, and the agreement itself recites that it was "fully negotiated . . . among sophisticated parties," after B&E "consulted with counsel." B&E only sought to void the agreement because of "breach of contract." B&E presented no evidence about the circumstances under which the agreement was made, and no evidence of any damages for breach of contract. Because the agreement was fairly entered into by litigation counsel, the doctrine of merger applied, and all rights of the parties became defined by the agreement and the separate note it required, which note has been paid in full.

[4] Copies of the agreement, note, cashier's check to pay the note, the district court's opinion vacating the settlement agreement and its order allowing B&E to name and serve a new defendant and to seek punitive damages are contained in the appendix filed with this petition and the supporting brief.

II. The Relief Sought

[5] The defendants request a supervisory writ directing the district court to dismiss with prejudice the litigation below, order B&E to satisfy its non-final judgments against defendants TMD and GGB, conditioned on GGB retendering a cashier's check to B&E for $725,205.80 to replace that tendered in open court on October 16, 2017, order B&E to return the note to GGB marked "paid", an order B&E to release and terminate any security agreements and interests and financing statements it has concerning the defendants.

III. The Harm To Be Prevented

[6] This petition is filed pursuant to N.D. Const. art. VI, §2, Rule 21, N.D.R. App. P. and NDCC § 27-02-04. It invokes this Court's superintending control over inferior courts. State ex rel. Lemke v. District Court, 49 N.D. 27, 186 N.W. 381, 1921 N.D. LEXIS 133 (N.D. 1921); State ex rel. Shafer v. District Court of Third Judicial Dist., 49 N.D. 1127, 194 N.W. 745, 1923 N.D. LEXIS 55 (N.D. 1923); State ex rel. Johnson v. Broderick, 75 N.D. 340, 27 N.W.2d 849, 1947 N.D. LEXIS 72 (N.D. 1947). The rule applies to both criminal and civil proceedings. State ex rel. Jacobson v. District Court, 68 N.D. 211, 277 N.W. 843, 1938 N.D. LEXIS 99 (N.D. 1938); State ex rel. Johnson v. Broderick, 75 N.D. 340, 27 N.W.2d 849, 1947 N.D. LEXIS 72 (N.D. 1947). It is the duty of this Court to determine when a proper case is presented for exercise of its superintending control. State ex rel. Shafer v. District Court of Third Judicial Dist., 49 N.D. 1127, 194 N.W. 745, 1923 N.D. LEXIS 55 (N.D. 1923); State ex rel. Johnson v. Broderick, 75 N.D. 340, 27 N.W.2d 849, 1947 N.D. LEXIS 72 (N.D. 1947); Stormon v. District Court, 76 N.D. 713, 38 N.W.2d 785, 1949 N.D. LEXIS 91,

1949 N.D. LEXIS 92 (N.D. 1949). This power over inferior courts can be used to control the course of litigation and prevent injustice where the remedy by appeal is inadequate. Patten v. Green, 369 N.W.2d 105, 1985 N.D. LEXIS 335 (N.D. 1985). It is enough if there is no adequate, alternative remedy, and the harm sought to be avoided cannot be "unmade." W. Horizons Living Ctrs. v. Feland, 2014 ND 175, 853 N.W.2d 36, 2014 N.D. LEXIS 179 (N.D. 2014).

[7] This Court has just held: "Supervisory jurisdiction is generally not exercised where the proper remedy is an appeal." "We exercise our authority to issue supervisory writs rarely and cautiously, and only to rectify errors and prevent injustice in extraordinary cases in which there is no adequate alternative remedy." Rath v. Rath, 2018 ND 98, citing Roe v. Rothe-Seeger, 2000 ND 63, ¶5, 608 N.W.2d 289.

[8] B&E obtained two non-final judgments against TMD and GGB. The agreement settled those judgments and all other claims. Punitive damages claims will be heard at the jury trial scheduled in the district court for August 21, 2018, through August 25, 2018. There is no appeal until a final judgment is entered after the August jury trial. N.D.R. Civ. P. 54(b).

[9] Meanwhile, B&E, having refused full payment of the $950,000 note required by the agreement, by tender of a cashier's check in open court, is left free to collect the full amount of the judgments, after already collecting $250,000, and serving a garnishment summons on defendants' counsel. It can seek punitive damages and will likely try to conduct discovery on the relative wealth of the parties leading to disclosure of much confidential and proprietary information. This Court

has granted a supervisory writ to prevent disclosure of privileged or protected information where to disclose the information could not be unmade by a later appeal. W. Horizons Living Ctrs. v. Feland, 2014 ND 175, 853 N.W.2d 36, 2014 N.D. LEXIS 179 (N.D. 2014). Meanwhile, the judgments continue as judicial liens to encumber any interest in real property of TMD and GGB.

[10] The ongoing litigation is a pending actual claim against each of the defendants requiring disclosure under FASB Accounting Standards Codification (ASC) 450, contingencies, impairs their ability to borrow money, operate their businesses, and otherwise engage in business and personal activities. Credit ratings, Dun & Bradstreet ratings, and personal and business reputations continue to suffer to the great detriment of the defendants. All of the defendants continue to expend attorney's fees. They each suffer ongoing opportunity costs.

[11] The $250,000 B&E has already received, along with additional recoveries it may have already received by selling, or encumbering the note, have no doubt been or will be distributed widely, among its investors, over a multi-state area.

[12] Thus, it would be impossible for the defendants, after a punitive damages jury trial and an appeal, to recover what B&E has already received and distributed, and what it likely will receive and distribute between now, the August jury trial, an appeal, and a likely remand. These bells cannot be unrung.

IV. The Issues Presented

[13] The issues presented are:

[14] Whether the agreement calling for the note that has been paid in full was fairly entered into;

[15] Whether B&E's prior judgments and other rights merged into the agreement calling for the note;

[16] Whether B&E gave timely notice that it sought to rescind the agreement;

[17] Whether B&E, in order to rescind the agreement, returned to the defendants everything of value it had received because of the agreement;

[18] Whether B&E also sought to or did return, revoke or rescind the separate note delivered to it and paid in full by the cashier's check tendered in open court;

[19] Whether B&E is prohibited from rescinding the agreement because it accepted the benefits of it;

[20] Whether a supervisory writ is necessary to prevent multiple recoveries for B&E under circumstances where the recoveries could not be recovered by the defendants after a trial occurs and an appeal from the final judgment entered after the trial is completed; and

[21] Whether a supervisory writ is necessary to prevent disclosure of proprietary information, confidential financial information about the wealth of the defendants and the prejudice a punitive damages claim will have with the jury.

V. <u>The Facts Necessary to Understand the Issues.</u>

[22] B&E fairly entered into an agreement on the advice of litigation counsel calling for, among other things, B&E to receive a no-interest promissory

note for $950,000 due April 14, 2017. The agreement settled judgments B&E had obtained against TMD and GGB, because of two earlier promissory notes and the note required by the agreement was paid in full with interest on October 16, 2017.

[23] When the agreement was entered into, B&E was represented by the Fargo office of Fredrikson and Byron and attorney Todd Zimmerman, described by B&E in court on October 16, 2017 as a "smart guy."

[24] The agreement itself recites that it was "fully negotiated . . . among sophisticated parties," after B&E "consulted with counsel."

[25] Because of the doctrine of merger, the prior judgments, and all of the rights of B&E, including fraud or punitive damages claims, were merged into the agreement, and only the defendants' obligations under the agreement remained.

[26] These rights were to receive the promissory note, a letter of credit to assure its payment, and retain its judgments until the note was paid when the judgments would be satisfied, and releases would become effective.

[27] The defendants delivered the signed agreement to B&E, along with the original promissory note payable by GGB to B&E for $950,000.

[28] B&E sought to specifically enforce the agreement, which also called for it to receive a letter of credit, to insure the payment of the note.

[29] The district court correctly held that B&E is judicially estopped from claiming that no agreement was entered into.

[30] GGB delivered the original note to B&E, which accepted the same, and has never returned it, revoked it nor rescinded it.

[31] The note is a negotiable instrument that B&E may have or may attempt to sell, transfer, or otherwise continue to collect.

[32] B&E accepted the original note, as well as another $250,000 from GGB. B&E no longer had any interest in the $250,000 as collateral proceeds. The agreement did not preserve security interests.

[33] B&E moved to void the agreement because, according to its motion, notice of motion and brief, there had been a "breach of contract."

[34] In its notice of motion, motion, and brief, B&E refers to "breach of contract," "breached," "breach," and "continuing breach" at least 16 times and "void" or "not valid" at least eight times B&E does not mention the word "rescission" once.

[35] Breach of contract damages are money damages for breach, do not include unilateral and unconditional rescission, and do not include punitive damages.

[36] B&E did not mention the term "rescission" until its reply brief, and then in unauthorized post-hearing letter briefs to the court, one of which had an underlined purpose to prejudice the court against the defendants because of an email between the undersigned and B&E's prior counsel to get the note paid on time, and show the efforts defendants' counsel was making to get it paid.

[37] B&E's reply brief only says the court should "void and rescind" the agreement and has the power to do so, but provides no proof that B&E rescinded either the agreement or the separate note.

[38] The hearing on B&E's motion to have the agreement determined void for breach of contract occurred on October 16, 2017. At that hearing GGB tendered a

cashier's check to B&E for $725,205.80, the remaining amount due on the $950,000 note, taking into account the $250,000 B&E received on July 12, 2017, thus curing any breach of contract and fully performing the agreement.

[39] Approximately five weeks after B&E received that $250,000 payment it partially satisfied its judgment against TMD on August 24, 2017.

[40] The note for $950,000 was due April 14, 2017. The note provided, "There shall be no interest accruing on this Note.

[41] Nevertheless, the cashier's check tendered to B&E on October 16, 2017, included the entire remaining amount due of the $950,000 principal balance, taking into account the $250,000 payment, together with interest at the legal rate of six percent per annum, from April 14, 2017, through the date of tender on October 16, 2017.

[42] B&E refused the tender saying it had rescinded the agreement, but not mentioning the note.

[43] The defendants confirmed at the hearing that they had delivered the promissory note and that B&E had never returned it.

[44] The court took the matter under advisement but then vacated the agreement saying that it had not been fairly entered into, reinstated the judgments that had been merged into the agreement and left B&E in possession of the note given because of the agreement and paid by tender in full with interest.

[45] B&E could not have rescinded and never rescinded the agreement itself, nor the separate note.

[46] In its notice of motion, motion, and brief B&E only sought to void the settlement agreement because of "breach of contract." It did not raise the issue of rescission until its reply brief, and its unauthorized post hearing letter briefs. Matters not raised until the first time in a reply brief cannot be considered by the North Dakota Supreme Court, and the same rule should apply in district court, as a matter of fairness, and due process.

[47] Even if B&E had properly noticed and briefed the issue of rescission, it was not entitled to rescission because it never gave notice of rescission and had not returned everything of value it received because of the settlement agreement. This is the price of electing rescission as a remedy. B&E did not return the $250,000 it received in July 2017. It did not and has never returned the $950,000 note, paid in full by tender by the cashier's check on October 16, 2017. For all the defendants know, and the record knows, B&E may have already sold the note and may no longer be in possession of it. Meanwhile, it is still able to collect $2,116,006.94 in unsatisfied judgments against two of the defendants, and seek punitive damages, against the defendants and a new defendant.

[48] The agreement and the note are separate things. The note has been paid by a full tender with interest. B&E never returned, revoked nor rescinded the note. B&E never argued that it had rescinded the note. It suggested, for the first time in its reply brief, that it had rescinded the agreement. But it never gave the defendants notice of rescission. It never returned everything of value it received because of the agreement. B&E never did, and cannot now argue that by somehow

rescinding the agreement, it also rescinded the note, a separate thing, which it accepted, and never returned, revoked or specifically rescinded.

[49] So now, B&E has received $250,000, full payment on the remaining amount due, with interest, because of the $950,000 note; and it still has possession of the note, and, according to the district court, can now continue to try to collect the judgments of $2,011,742.62 with accruing interest.

[50] This error in fairness, notice, fact, and law will result in consequences, multiple recoveries, losses, disclosure of proprietary and confidential financial information and prejudice with the jury that cannot be undone on appeal or otherwise.

[51] B&E's judgment liens remain enforceable. B&E still may have possession of the original $950,000 promissory note if it has not already sold or encumbered it. That note produced a full payment tender in open court, thus the note was and is a very valuable thing.

[52] The note is a negotiable instrument, and B&E may have or may attempt to sell the note to a third party, and according to the district court, keep the proceeds, continue its trial preparation, and continue to attempt to collect the judgments merged into and settled because of the agreement.

[53] The defendants have no ability to control B&E's collection efforts nor see to it that the note is not sold to or encumbered to a third party. As far as the defendants and the record knows, this may have already occurred.

[54] The likelihood exists that B&E will be able to make and perhaps already has made a recovery far greater than the tender to pay the note, and there is

no assurance that the defendants will ever be able to recover the difference, after a trial, final judgments are entered, and an appeal is completed. A trial, and an eventual appeal will be too late. B&E likely has and will divide recoveries among multiple investors over a multi-state area.

[55] Public policy and thus courts should encourage settlement discussions and settlement agreements entered into between competent parties, represented by excellent counsel, particularly where the sole object of the agreement, as in this case, was actual payment of a $950,000 note, something that was done with interest by tender of a cashier's check at the hearing on October 16, 2017, exactly what the letter of credit would have insured.

VI. The Reasons Why the Writ Should Issue

[56] The writ should issue not just so that the law of merger, breach of contract, rescission, settlement, and payment is respected, along with due process rights; but also so this Court can avoid an eventual appeal or appeals, and to make sure that B&E does not achieve more than full payment of the $950,000 promissory note, with interest, under circumstances where the defendants would never be able to recover the surplus, after a trial, possible punitive damages award and an appeal or appeals years in the future, and all the attorney's fees, incurred along the way.

[57] Other issues in any appeal would include the district court's denial of the defendants' motion to dismiss for improper venue because they have no connection with the State of North Dakota, other than the fact that defendant Davis was lured to North Dakota once, at his own expense, at the request of Bruce Hager, a convicted felon and unlicensed security seller, to help B&E solicit investors; the

district court's sua sponte dismissal of the defendants' fact laden counterclaims so they would not stand in the way of the judgments, and its most recent order allowing a punitive damages claim in a simple contract case resulting in judgments on two promissory notes settled with an agreement calling for a third note that has been paid in full by tender of certified funds in open court, with interest.

VII. Procedure Going Forward

[58] An appeal is not the proper remedy. There is no final judgment from which an appeal can be made, along with a motion for a stay pending appeal, where the defendants could post a bond and protect themselves from multiple recoveries that would be unrecoverable because they will likely be paid to B&E's investors over a multi-state area. The petition can rectify clear errors such as the district court's sua sponte ruling that the agreement was not fairly entered into. This is an extraordinary case because the action started as a simple suit to collect two promissory notes. The agreement settled those notes and the resulting judgments by requiring another note which was paid in full with interest. There is every factual, legal, public policy, judicial, equitable and fairness reason why the defendants are entitled to the relief sought.

[59] This Court ". . . may act on a petition without a response." "Otherwise, the Court will fix a time for a response and may set a hearing." Rule 21(b)(1) N.D.R. App. P. Thus, until the Court rules, no response by any party is allowed. This petition is filed in respect of the district court's scheduling order fixing April 13, 2018, as the deadline for filing dispositive motions, although there is no stated deadline for filing

petitions, and the district court's dispositive motion deadline is not binding on this Court.

[60] The district court has control over its decisions, can overlook irrelevancies, and might well moot this petition. Even if it does not, it, as well as B&E, should be allowed to respond to the petition, and be heard.

[61] The substantial public policy issues also suggest a response and a hearing. Parties need to know that if they enter into an agreement, under the advice and assistance of litigation counsel, the agreement will be honored if its sole object is attained and, as here, there has been payment in full.

Respectfully submitted this 12th day of April, 2018.

/s/ Roger J. Minch
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