

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Watford City Lodging, LLC

Plaintiff and Appellant,

Supreme Court No.
20180339

Christopher Dean Miskin,

Civil No. 27-2017-CV-00617

Defendant and Appellee,

BRIEF OF APPELLEE

APPEAL FROM ORDER DENYING MOTION TO AMEND
JUDGMENT DATED AUGUST 23, 2018

THE HONORABLE DANIEL S. EL-DWEEK, DISTRICT COURT
STATE OF NORTH DAKOTA, MCKENZIE COUNTY
NORTHWEST JUDICIAL DISTRICT

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STATEMENT OF ISSUES

- 1. Whether the district court has subject matter judgment of all law and equity issues presented to it.**
- 2. Whether the district court abused its discretion in considering evidence of a fraud on the court by Watford City Lodging's eviction proceeding.**
- 3. Whether the district court correctly heard evidence regarding Watford City Lodging's claim of rents and costs during the motion to vacate default eviction judgment.**
- 4. Whether the district court abused its discretion by denying the false lessor's R60 motion to amend judgment.**

Statement of the Case

[¶ 1] Watford City Lodging brought an eviction action against Miskin with notice of hearing as a R16 scheduling conference, but the hearing date was beyond the 15- day limit of the eviction statute. Watford City Lodging's first attorney had notice of appearance of Miskin's attorney on or about August 23, 2017, but WCL's second attorney served the R16 notice of hearing on only Miskin. Miskin's attorney discovered the R16 notice and telephoned and emailed the court before the hearing on December 11, 2017 to appear, but could not get past the answering machine to inform the court there was no lease, but instead a purchase agreement until after the court had ordered default eviction judgment and awarding \$8,200.00 in fictional rent and costs due to the fraud on the court. The court did not discover that Miskin had retained counsel who attempted to appear for what was represented to be a scheduling conference until later that day after the default judgment was filed and the judge was back in chambers.

[¶ 2] Miskin next noticed up an in-person evidentiary hearing to WCL's third and fourth lawyers on Feb. 7, 2018 on his motion to vacate default eviction judgment to be held on March 16, 2018 for 3 hours. Watford City Lodging's third and fourth attorneys appeared by telephone without witnesses or exhibits. The court ruled the eviction to be wrongful after both sides put in their cases and then vacated the eviction order and put Miskin back in possession.

[¶ 3] Watford City Lodging later moved to amend the March 16, 2018 judgment which the court denied with supporting findings and conclusions.

[¶ 4] Watford City Lodging appeals from that judgment.

Statement of the Facts

[¶ 5] Miskin here states relevant facts not fully mentioned in WCL's statement of facts.

[¶ 6] ROC 3.2 requires notice of hearing for evidentiary/oral argument versus submission on briefs. Miskin gave notice of motion to Watford City Lodging on Feb. 7, 2018 in accordance with the Form 14, NDR CivR Appendix of Forms and ROC 3.2 for personal appearance to try the motion issues of wrongful eviction, jurisdiction, lack of Due Process, and fraud on the court on Dec. 11, 2017. (App. p. 34-35) Watford City Lodging had 37 days to apprise itself that the court had scheduled 3 hours to hear and determine the issues which necessarily had questions of fact and of law requiring evidence proving the motion to vacate the default eviction judgment of Dec. 11, 2017. The docket index directly states that 3 hours were blocked by the court. (App. p. 2, Docket No. 39-40)

[¶ 7] Miskin, his wife and minor children were wrongfully evicted by force at gunpoint on Dec. 14, 2017 and put out in the snow with the clothes on their backs, and without all of the children's pet animals. (Sheriff's Return, App. p 27) WCL caused this abuse of process to happen with full knowledge that the eviction was wrongful.

[¶ 8] The purchase agreement stated the purchase price is \$84,800.00, not \$80,000.00. (App. p. 11)

[¶ 9] Watford City Lodging, LLC's sole member Ken Hartog refused to sign the deed or attend the purchase agreement closing on June 10, 2017 (Major Mortgage letter, App.p 38; ND Guaranty and Title email, App. 39; real estate agent email App. p. 37) and then claimed Miskin's \$8,000.00 down payment was forfeit, that Miskin had breached the contract by failing to close, and that Watford City Lodging would only go to closing if Miskins agreed to pay \$120,000.00

instead of the agreed \$84,800.00 by demand letter from first attorney Jordon Evert of Furuseth Law Firm. (App. pp. 29,40)

[¶ 10] Evert or WCL's agents then served a defective 3-day notice to evict on Aug. 18 (App. p. 20), followed by Evert's corrected notice to evict on Aug. 23 (App. p. 31-32). Miskin ignored them as fraudulent and invalid because of breach of contract, not a lease.

[¶ 11] Miskin's real estate agent thereafter referred the matter to attorney Greg W. Hennessy, Hennessy Law Office P.C. who contacted Evert on or about Aug. 23, 2017, entered his appearance and alleged breach of contract by the sole member of Watford City Lodging, Ken Hartog, for failure to sign and deliver the deed at closing on June 10, 2017 in order to extort Miskin and create leverage to jack up the sales price after-the-fact.

[¶ 12] Hartog/Watford City Lodging thereafter retained second attorney Derek Thooft, Sand Law Firm, Watford City and St. Paul, to pursue the eviction case at issue without notifying or terminating first attorney Evert.

[¶ 13] Attorney Hennessy contacted attorney Thooft immediately that day after the supposed R16 hearing on Dec.11, 2017 and laid out the fact history for him of the breach of purchase agreement, the lack of any lease agreement and of Evert's representation of Hartog/Watford City Lodging and Hennessy's prior appearance for Miskin and negotiations with Evert.

[¶ 14] Upon Thooft's confirmation of the full fact history he was terminated by Hartog/Watford City Lodging, effective Jan. 10, 2018, and appearances were entered by third and fourth attorneys Rick Sand and Tim Prindiville, Sand Law Firm, Watford City and St. Paul.

[¶ 15] Miskin e-served Sand and Prindiville with a Motion to Vacate Default Judgment (App. 35) referencing the issues to be tried and Notice of Motion (App. 34) on Feb. 7, 2018 for

an evidentiary hearing on March 16, 2018 at 1:30 pm blocked by the court for 3 hours, McKenzie County Courthouse (App.2; Dock.No. 39-40).

[¶ 16] Miskin commenced the required bifurcated wrongful eviction damages case on Feb. 9, 2018 by e-service upon Sand and Prindiville and separately by certified mail, return receipt upon Hartog in New York City because Sand and Prindiville said they didn't have authority to admit service Hartog/WCL on that matter. All services of process were completed and perfected. The complaint in Miskin et al. v. Watford City Lodging et al. Civ. No. 27-2018-CV-00096 included claims for specific performance and breach of purchase agreement, and treble damages for wrongful eviction.

[¶ 17] At hearing, 37 days after Sand and Prindiville were served notice and motion to vacate default eviction judgment, they claimed they were surprised while appearing by telephone from St. Paul when Miskin called his first witness.

[¶ 18] The court heard their objection and overruled it. (Tr.4:9-10; Tr.5:15-6:22; Tr. 43:23-44:15) on the basis that they knew or should have known it was evidentiary hearing.

[¶ 19] Hartog/Watford City Lodging terminated Sand and Prindiville on March 23, 2018 and retained fifth Attorney William C. Black, Larson Latham Law Firm on April 26, 2018.

LAW AND ARGUMENT

Issue 1: Whether the district court has subject matter judgment of all law and equity issues presented to it.

[¶ 20] Watford City Lodging/Hartog misperceives the subject matter jurisdiction of the district court and is chasing his own tail with a repetitive circular logic that Justice Jensen debunked and explained at length in Dockter v. Dockter 2018 ND 219, ¶13; citing Peterson v. Peterson 1997 ND 14, ¶14:

“Subject matter jurisdiction is not determined by whether the court correctly applies a statute to a particular claim because to hold otherwise, would vest subject matter jurisdiction in the court subject to divestment upon an erroneous ruling. *Rott v. Connecticut General Life Ins. Co.*, 478 N.W. 2d 570, 574 (N.D. 1991). The trial court’s misapplication of a statute may be grounds for appeal, but it neither implicates subject matter jurisdiction nor personal jurisdiction. *Matter of Estate of Hansen*, 458 N.W.2d 264, 268 (N.D. 1990).” Peterson at supra.

[¶ 21] Further to the point, the Jensen opinion goes on in ¶15 to discuss whether the district court gathered sufficient “necessary proof” “to determine the appropriate relief”. (citations omitted)

[¶ 22] Here, Watford City Lodging conversely complains that the district court gathered too much necessary proof while determining appropriate relief. NDCC 27-05-06 and ND Const. Art. VI, §8 give the district court plenary, 360° jurisdiction of all matters of law and equity before it, and all civil actions, including common law, even though we are a code state.

[¶ 23] NDRCivP 54(c) states that every judgment excepting a default judgment should grant all the relief to which a party is entitled even if it is not requested by a party.

[¶ 24] WCL’s entire appeal incorrectly states that the only issue for the court was summary possession while ignoring all the statute law and case law stating that a claim for rent and costs opens the scope of the hearing to setoff claims by the tenant. NDCC 47-32-04 “rents, profits, damages from possession...excepting setoff to a demand for rents...”; Gasic v. Bosworth 2014 ND 85, ¶7; Cheetah Properties v. Panther Pressure Testers 2016 ND 102, ¶20; Spirit Property Management v. Vondell 2017 ND 158, ¶4

[¶ 25] The district court had subject matter jurisdiction of the possession and damages elements of the original eviction matter, but for the statutorily untimely eviction hearing, and overriding seamless, superseding subject matter jurisdiction of those issues outside of the statute as well as the breach of purchase agreement, specific performance, and wrongful eviction treble damages which are the underlying questions of fact and law.

[¶ 26] Watford City Lodging's tactical decision to sit on their hands for 37 days and do nothing except file an answer brief and appear by telephone without Hartog in order to preclude his cross-examination testimony to the court effectively abandoned the field to Miskin's evidence of Hartog's misdeeds in misrepresenting a breach of purchase agreement as a breach of lease, or better stated: missing deed. WCL having waived every claim and defense, excepting the immortal issue of subject matter jurisdiction, now argues jurisdiction as the only surviving issue it has remaining.

Issue 2: Whether the district court abused its discretion in considering evidence of a fraud on the court by Watford City Lodging's eviction proceeding.

[¶ 27] The short answer is that there was no abuse of discretion by the district court because it did nothing arbitrary, capricious or irrational based on a mistake of law.

[¶ 28] The district court has explained itself to the fullest degree with the specific findings this appellate court has demanded by NDRCivP 52(a) and repeatedly pounded into many opinions that its review function cannot operate without complete, specific findings of fact.

[¶ 29] The district court here as trier of fact set aside a substantial amount of court time, 3 hours, to hear the facts underlying Miskin's motion to vacate default eviction judgment. That is 2 hours 10 minutes longer than this appellate court allows for a full oral argument on questions of law. A reasoning mind, prudent businessman or woman, or a practicing lawyer with 37 days' notice would know or should have known that an evidentiary hearing was in plain view on the docket scheduled for 3 hours. (App. p. 2, Dock. Index No. 39-40)

Issue 3: Whether the district court correctly heard evidence regarding Watford City Lodging's claim of rents and costs during the motion to vacate default eviction judgment.

[¶ 30] Yes, the district court admitted evidence offered on the breach of purchase agreement wrongfully represented to the court as a lease agreement with rent owed because Watford City Lodging opened the door in claiming \$8,000.00 rent plus costs against Miskin in the Dec. 11 eviction hearing when there was no lease, Gasic supra at ¶7, Cheetah supra at ¶20, Spirit supra at ¶4.

[¶ 31] It defies all understanding how the district court could ever ever get to the bottom of the true facts, if the motion to vacate default eviction judgment was going to be restricted to briefing and oral argument without further evidence being offered, cross-examined, and admitted. Watford City Lodging's disingenuous motions to gut the vacation findings of fact are against the Rules of Civil Procedure at Rule 52(a) and the weight of the North Dakota case law to make detailed, specific findings of fact allowing for reasoned conclusions of law, and thereby allowing functional appellate review when requested, NDCC 27-05-06(3).

[¶ 32] The district court findings of fact stand unless clearly erroneous under NDRCivP 52(a) and the rule in Nelson v. Johnson 2010 ND 23 at ¶31, i.e. mistake of law, no evidence to support the findings, or the record as a whole gives a definite conviction of mistake, cited in Cheetah Properties supra at ¶9.

[¶ 33] The cases and annotations to NDCC 32-03-29 make clear that the mere threat of eviction without physical force is sufficient to award treble damages for wrongful eviction for over a century, Wegner v. Lubenow 95NW 442 (ND 1903), Livingood v. Balsdon 2006 ND 11. Here, we have a mother, father, and four minor children subjected to sheriff's deputies breaking in

their door with guns drawn and forcibly ejecting them due to WCL's wrongful acts. (Sheriff's Return, App. p. 27)

Issue 4: Whether the district court abused its discretion by denying the false lessor's R60 motion to amend judgment.

[¶ 34] The district court did not abuse its discretion or clearly err in denying Watford City Lodging's motion to vacate judgment reversing the wrongful eviction and its motion to amend the judgment so as to disembowel it because the district court had found fact basis and then made reasonable conclusions of law in denying all of Watford City Lodging's subsequent motions, Cheetah supra at ¶¶ 10, 16-17.

Conclusion

[¶ 35] The district court judgment to vacate default eviction judgment and the judgment denying WCL's motion to amend that judgment should be affirmed so that the damages setoff on the wrongful eviction can be heard and determined.

[¶ 36] Respectfully submitted this 25th day of January 2019.

/s/ _____
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CERTIFICATE OF SERVICE

[¶ 37] I hereby certify that on January 25, 2019, I filed and served the foregoing document on the following by electronic mail transmission, pursuant to Rules 25 and 31 of the N.D.R.App.P.:

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CERTIFICATE OF SERVICE

[¶ 37] I hereby certify that on January 31, 2019, I filed and served the foregoing document on the following by electronic mail transmission, pursuant to Rules 25 and 31 of the N.D.R.App.P.:

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