

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SWMO, LLC, a North Dakota Limited Liability
Company,

Plaintiff/Appellant,

vs.

Eagle Rigid Spans, Inc, the General Contractor;
Mon-Dak Plumbing and Heating, Inc.; Ronald J.
Koch d/b/a RK Electric; Creative Image
Concrete, Inc., and all other persons unknown,
claiming any estate or interest in, or lien or
encumbrance upon, the real estate described in
the complaint,

Defendants/Appellees.

Supreme Court No.: 20180407
District Court Case No.: 53-2015-CV-
00749

ON APPEAL FROM THE FROM THE (1) ORDER GRANTING PARTIAL SUMMARY
JUDGMENT TO RONALD J. KOCH, D/B/A RK ELECTRIC AND (2) ORDER GRANTING
PARTIAL SUMMARY JUDGMENT TO MON-DAK PLUMBING AND HEATING, INC.,
ENTERED IN THIS ACTION ON THE 20TH DAY OF MARCH, 2018, IN THE DISTRICT
COURT, COUNTY OF WILLIAMS, CASE NO.: 53-2015-CV-00749, BY THE
HONORABLE PAUL JACOBSON

APPELLANT'S REPLY BRIEF

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N.D.R.Civ.P. Rule 60(b)(2)	¶8
N.D.R.Civ.P. Rule 60(b)(3)	¶7, ¶8 and ¶10

INTRODUCTION

¶1 Appellant, SWMO, LLC, served and filed its *Brief of Appellant* on January 22, 2019, asserting several issues on appeal. This *Reply Brief* will address the arguments raised by RK Electric, MonDak, and Eagle Rigid Spans, Inc. in their respective briefs.

LAW AND ARGUMENT

I. Granting RK Electric’s Summary Judgment Motion was Improper as Issues of Material Fact were Present

¶2 It is well settled that a summary judgment motion requires no genuine issues of material fact or inferences that can be reasonably drawn from undisputed facts. Clausnitzer v. Tesoror Ref. & Mktg. Co., 2012 ND 172, ¶ 7, 820 N.W.2d 665. “The party opposing the motion may not rest on mere allegations or denials in the pleadings but must present competent admissible evidence by affidavit or other comparable means to show the existence of genuine issues of material fact.” Barbie v. Minko Const., Ind., 2009 ND 99, ¶ 6, 266 N.W.2d 458. The information available to the district court guides this Court in its decision on appeal of whether the district court properly granted summary judgment, which is a question of law to be reviewed de novo. Poppe v. Stockert, 2015 ND 252, ¶ 4, 870 N.W.2d 187. Concisely put, the specified amounts owed by Eagle Rigid Spans, Inc., to RK Electric was unequivocally disputed; thus, RK Electric was not entitled to judgment as a matter of law. The final amount due and owing for electrical work was \$15,075 as evidenced by Eagle Rigid Spans’ certified payment applications, yet RK Electric was demanding \$114, 242.32 in their summary judgment motion. The differing amounts claimed to be owed was nearly in excess of \$100,000.

¶3 Despite SWMO asserting that the payment applications were materially misrepresented, the true amount owed, as demonstrated through competent and reliable

evidence (Eagle's Payment Applications), was anything but undisputed. It is accurate to describe the amount to which SWMO is alleged to owe as unknown, or at the worst disputed. This information was available to the district court at the time of its decision regarding the RK Electric summary judgment motion. It cannot be said that RK Electric met its burden of demonstrating an absence of genuine issues of fact.

[¶4] RK Electric asserts that SWMO must choose whether the exhibits it offered in opposition of the summary judgment motion be either false and misleading or raise a genuine issue of fact, and that the exhibits provided no nexus to any defects in RK's billing and payment information. SWMO does not see it so, as despite the exhibits offered being deliberately misleading, the documents nonetheless raise a genuine issue of fact best determined by a fact-finder. RK Electric claims to be owed a set dollar amount, and opposing documents suggest another. Even if suggested to be misleading, the amounts are disputed. The district court erred in favoring one value over the other, when it is more appropriate for a fact-finder to weigh the credibility of witnesses and documents to determine the actual value owed to RK Electric by Eagle Rigid Spans, Inc. Ultimately, whether by lien, breach of contract, or unjust enrichment, the dollar amount RK Electric was demanding was wholly contested by competent evidence provided by SWMO at the time of RK Electric's *Motion for Summary Judgment*. Therefore, the district court erred in its decision granting RK Electric's motion.

II. Granting MonDak's Summary Judgment Motion was Improper as Issues of Material Fact were Present

[¶5] MonDak asserts essentially the same argument that RK Electric relies on in contesting this appeal. Relying on the law pertaining to summary judgment cited above, it is clear that the trial court erred in its decision. Again, SWMO provided the court with evidence demonstrating a dispute as to the values owed to RK Electric and MonDak. There are several conflicting documents that reference to wildly different dollar amounts alleged to be owed to RK Electric and MonDak. The evidence was provided by way of payment applications prepared by Eagle Rigid Spans and by way of affidavit. This demonstrated a genuine issue of material fact as it placed into question, without forcing the district court to seek out facts, the very amount of money to be awarded at the finale of this action. In the same instance, as was argued against RK Electric, the trial court erred in its decision granting summary judgment when it ignored the evidence presented by SWMO establishing factual disputes.

a. MonDak Cannot Seek an Unjust Enrichment Claim while Simultaneously Seeking Enforcement of its Mechanic's Lien

[¶6] There is no question that MonDak's unjust enrichment claim is without merit as a claim under unjust enrichment requires that there be no other remedy at law for those seeking unjust enrichment claims. MonDak has filed a mechanic's lien for the amount they are seeking under unjust enrichment. That mechanic's lien is a remedy at law for MonDak; thus, an unjust enrichment claim cannot be established. Moreover, MonDak contracted with Eagle Rigid Spans and has not been paid as agreed to in that contract. Therefore, MonDak has available to them a remedy under breach of contract for Eagle Rigid Spans' failure to comply with the agreed contractual terms, and not against SWMO.

III. SWMO's Rule 60 Motion for Reconsideration is Appropriate as the Facts Support a Finding for Relief Under (b)(2)-(3)

[¶7] Under Rule 60, N.D.R.Civ.P, the court, on motion, “may relieve a party or its legal representative from a final judgment, order or proceeding.” When reviewing a district court decision on a Rule 60(b) motion this Court applies an abuse of discretion standard, and will not overturn said decision absent a showing of abuse of discretion. Follman v. Upper Valley Special Educ. Unit, 2000 ND 72, ¶ 10, 609 N.W.2d 90. “Required in that showing is that the trial court acted in an arbitrary, unconscionable, or unreasonable manner, or [that] its decision is not the product of a rational mental process leading to a reasoned determination.” Id. (Citing Grinaker v. Grinaker, 553 N.W.2d 204, 207 (N.D. 1996)). “The moving party bears the burden of establishing sufficient grounds for disturbing the finality of the decree, and relief should be granted only in exceptional circumstances.” Id. (Citing First Nat’l Bank of Crosby v. Bjorgen, 389 N.W.2d 789, 796 (N.D. 1986)).

[¶8] In First Nat. Bank and Trust Co. of Williston v. Scherr, this Court articulated the requirements to be shown under Rule 60(b)(2)-(3) stating:

The failure to disclose or produce materials within the scope of a discovery request or order constitutes “misconduct” within the meaning of Rule 60(b)(3), F.R.Civ.P.³ Anderson v. Cryovac, Inc., 862 F.2d 910 (1st Cir.1988); Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir.1978). In order to constitute “misconduct,” the failure to disclose need not be intentional. Anderson, supra. The moving party must first demonstrate “misconduct” by clear and convincing evidence and must then show that that “misconduct” prevented the losing party from fully and fairly preparing or presenting its case. Rozier, supra. Unlike Rule 60(b)(2) which has been

construed to require the newly discovered evidence to be such that it would probably change the result, Rule 60(b)(3) has not been construed to require the withheld information to be of a nature as to alter the result. *Anderson, supra; Rozier, supra*. Instead, the focus is on whether or not the withheld information prevented the losing party from fully and fairly preparing or presenting its case.

First Nat. Bank & Tr. Co. of Williston v. Scherr, 456 N.W.2d 531, 533 (N.D. 1990). The facts at issue in the *Motion for Summary Judgment* filed by RK Electric, in which RK Electric was seeking payment for its “contract” with Eagle, were directly related to the nature and price of the work performed. As stated in SWMO’s brief on appeal, it was discovered three days after the trial court’s decision on the summary judgment motion “that the increase in price of electrical work on this project incorporates the kickback that is believed to have been contemplated to Eagle Rigid Spans, Inc.’s salesman.” Interrogatory No. 11 (Doc ID #153). Specifically, an email and a 1099 tax form indicate that an employee of Eagle Rigid Spans was receiving unapproved payments personally from RK Electric for work completed and the fee would be included in the price of the contracted job.

[¶9] “Summary judgment is appropriate, if, after viewing the evidence in the light most favorable to the party opposing the motion, there are no genuine issues of material fact or conflicting inferences that can reasonably be drawn from undisputed facts or if the only issues to be resolved are questions of law.” Darby v. Swenson Inc., 2009 ND 103, ¶ 16, 767 N.W.2d 147. Considering the trial court must find a showing of no disputed fact, and view the evidence in light most favorable to the party opposing the motion, when ruling on a summary judgment, this newly discovered evidence directly negates any finding of

undisputed fact, as well as supports an inference that SWMO's alleged liability in amount would be significantly lower or non-existent. Certainly, evidence demonstrating an artificial inflation of an amount alleged to be owed by SWMO would hinder the trial court from deciding in favor of summary judgment. Therefore, it can be said that the outcome of the *Motion for Summary Judgment* would likely have been different had this evidence been discovered beforehand.

[¶10] Additionally, under Rule 60(b)(3), N.D.R.Civ.P, this Court has held that the “focus is on whether or not the withheld information prevented the losing party from fully and fairly preparing and presenting its case.” Scherr, 456 N.W.2d 531, 533 (N.D. 1990). Misconduct, whether intentional or unintentional, is required to be shown by clear and convincing evidence that the losing party was prevented from fully and fairly preparing or presenting its case. Id. Failure to disclose or produce materials within the scope of a discovery request constitutes misconduct. Id. The evidence, discovered after the trial court granted the *Motion for Summary Judgment*, was within the scope of discovery as it was requested by SWMO through interrogatories and requests for production. Specifically, Interrogatory No. 24 requested identification of any person who has personal knowledge relevant to the subject matter of the action, as well as a to provide a statement of the facts of said person's knowledge. The dispute between the parties includes the alleged liability of SWMO as to the monies owed to each defendant in the action. The later discovered evidence, which was not presented to SWMO despite the request, was withheld from SWMO resulting in misconduct. As stated above, this evidence directly relates to the price quote to which SWMO is alleged to owe. Therefore, when faced with opposing a summary judgment

motion, it is clear that SWMO was prevented from fully and fairly preparing and presenting its case in opposition.

CONCLUSION

[¶11] SWMO presented competent and reliable evidence demonstrating several genuine issues of material fact. The trial court disregarded the evidence presented; thus, it was error to grant the summary judgment motions filed by RK Electric and MonDak. Additionally, based on the arguments above, the Rule 60 motion filed by SWMO was appropriate.

Dated March 7, 2019

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CERTIFICATE OF SERVICE

Supreme Court No.: 20180407
District Court Case No.: 53-2015-CV-00749

[¶1] I hereby certify that on the 7th day of March, 2019, the following documents:

APPELLANT'S REPLY BRIEF

was served, via email, upon the following:

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Dated: March 7, 2019

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