20180420
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 3, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

RONALD SMITHBERG,	)	
Appellant,	)	**Supreme Court No. 2018-0420**
	)	
vs.	)	**District Court No.**
	)	**12-2016-CV-00042**
GARY SMITHBERG, JAMES	)	
SMITHBERG AND SMITHBERG	)	
BROTHERS, INC.	)	
Appellees.	)	

REPLY BRIEF OF APPELLANT RONALD SMITHBERG

APPEAL FROM THE DIVIDE COUNTY DISTRICT COURT'S OCTOBER 2, 2018 FINAL JUDGMENT, FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT ORDER DATED OCTOBER 1, 2018, FROM THE ORDER ON MOTION FOR SUMMARY JUDGMENT DATED JANUARY 25, 2018 AND FROM THE ORDERS DENYING RECONSIDERATION DATED APRIL 13, 2018 AND OCTOBER 1, 2018.

ORAL ARGUMENT REQUESTED

Joel M. Fremstad (ND # 05541)
FREMSTAD LAW
P.O. Box 3143
Fargo, ND 58108
Phone (701) 478-7620
Fax (701) 478-7621
E-Service: joel@fremstadlaw.com
ATTORNEYS FOR RONALD SMITHBERG

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases **Paragraph Number**

Statutes and Const.

Rules

Other

INTRODUCTION

[¶1] Jim and Gary's brief ignores their ongoing continuing wrongful conduct. After trial, they announced they would cease farming and auction off equipment. (Doc.270). They promised "formal corporate notice," but sent none. (Doc.273). Ron learned a sale of some equipment will occur April 3, 2019, but Jim and Gary are not selling their wrongfully purchased items. (Id.) Absent reversal, minority shareholders in family farming entities have no protection against malevolent shareholders.

ARGUMENT

I. JIM AND GARY ADMIT THE DISTRICT COURT ERRED.

[¶2] Ron's primary arguments in his brief were the District Court erroneously (1) barred his claims and (2) forced a §10-06.1-26 buyout. Jim and Gary's brief, however, does not meaningfully address these issues and as such, reversal is required.

II. JIM AND GARY MISTATE THE LAW.

[¶3] Jim and Gary's brief doesn't dispute Ron raised fact questions in his reconsideration briefs, but instead hides behind erroneous procedural arguments. They assert a 59(j) motion must be filed "'no later than 28 days' after entry of the order." (Br.¶35). The 28-day limitation, however, only applies to a "motion to alter or amend a judgment." They also advance Rule 60(b). (Br.¶38). However: "Rule 60(b) does not apply to interlocutory judgments and orders," Ceynar v. Barth, 2017 ND 286, ¶7, 904 N.W.2d 469, and such "may be revised or reconsidered any time before the final order or judgment is entered," Cody v. Cody, 2019 ND 14, ¶13, "upon motion by the parties." State v. Tibor, 373 N.W.2d 877, 884 (N.D. 1985).

[¶4] Dinger v. Strata Corp., 2000 ND 41, 607 N.W.2d 886 is determinative. Summary judgment was initially granted to some parties in 1997 and reconsideration was sought in 1999, after trial, but before judgment:

> Because the order granting summary judgment was not certified as a final judgment under Rule 54, Dingers' motion for reconsideration of the trial court's order granting summary judgment was proper. As we noted in Union State Bank v. Woell, 357 N.W.2d 234, 239 (N.D. 1984), the summary judgment, as an interlocutory order, "remains subject to revision by the court at any time before the entry of judgment adjudicating all claims between all parties." In Woell we also expressed the concern that trial of the undismissed claims could substantially undermine the validity of the decision on the motion for summary judgment. Id.

Id. at ¶11. As such: "Dingers properly moved for reconsideration of the summary judgment motion . . . relying on evidence heard at trial and submitted prior to the final judgment." Id.

[¶5] In this case, the District Court rejected Ron's motions for reconsideration, that were supported by citations to hundreds of pages and lines of deposition and trial testimony, deposition and trial exhibits, and discovery responses, without explanation. Such was error. Dinger, at ¶21 (reversing where court "denied the motion to reconsider without analysis on the merits," "adhered to its erroneous conclusion," and "failed to consider the evidence introduced at trial in the light most favorable to Dingers").

III. RON'S INITIAL BRIEF RAISED QUESTIONS OF FACT.

[¶6] Jim and Gary rest their hopes on appeal on flawed procedural arguments. While such is erroneous, even if the Court focuses solely on Ron's initial brief opposing summary judgment (Doc.69), reversal is necessary.

[¶7] In arguing against their breach of fiduciary duty, Jim and Gary admit Ron referenced "his responses to written discovery." (Br.¶21). Under Rule 56(c) discovery responses are sufficient to defeat summary judgment.

[¶8] Jim and Gary next argued Ron's response to their interrogatory 12 wasn't sufficient:

> If the Defendants felt I was still part of the corporation, then they are obligated to notify me of all meetings, discussions to borrow money, trade or buy equipment or vehicles, pay compensation, hired employees, dispense credit cards to non-owners and pay out rent bonuses. . . . (Plaintiff's Ans. to Int. 12).

(Doc.69, ¶150). As Ron explained: "The point of Plaintiff's Answer to Interrogatory Number 12 is that if Ron was still a member of the corporation, then it owed him a wide array of fiduciary duties . . . ." (Id. ¶151). They also ignored his response to Interrogatory 13, where he identified fiduciary breaches:

> Full time wages and benefits paid to Gary and James in excess of compensation paid when the corporation was farming more land, excessive wages paid to Karen, Jacob and Wayne Kucera; unapproved issuance and spending on credit cards given to Karen and Jacob, unapproved purchases of machinery, vehicles and equipment; mismanagement of the operation with large personal compensation, unnecessary capital purchases, inability to timely plant, maintain and harvest crops, no management ability with no financial statements ever prepared, inability to pay rent payments on time.

(Doc.69, ¶152). Ron continued:

> [I]in addition to these interrogatory answers, as set forth above, Ron has identified a broad array of facts that support the Defendants' breaches of fiduciary duties. **These include everything from Jim and Gary misusing corporate funds, paying themselves exorbitant sums without authorization, and freezing Ron out from any and all aspects of the Corporation.**

(Id.) Jim and Gary's argument appears to be Ron referred back to his opening factual recitation of deposition testimony and exhibits rather than trying to repeat the more than

100 paragraphs of facts. (Doc.69, ¶¶3-130). The specific discovery responses above were themselves sufficient. That said, when Ron referred back to prior facts set forth in the brief, he made it clear to the District Court which facts he was referring to, i.e. "everything from Jim and Gary misusing corporate funds, paying themselves exorbitant sums without authorization, and freezing Ron out from any and all aspects of the Corporation." (Id.) The District Court did not have to "scour" the "record," but the record was so saturated with facts in favor of Ron, it took more than a 100 paragraphs to outline them and provide citations in his brief. (Doc.69, ¶¶3-130).

[¶9] Ron's brief also addressed Jim's usurpation of corporate opportunity as a breach of fiduciary duties. (Doc.69, ¶¶156-159). Ron emphasized his position "was supported by the interrogatory responses and deposition testimony set forth above." (Id. ¶157). Jim also admitted his actions "seem like an interested transaction." (Doc.49, ¶22). This alone raised an inference in Ron's favor given the Smithberg Brothers' Articles. Kortum v. Johnson, 2008 ND 154, 755 N.W. 432.

[¶10] Jim and Gary argued they didn't violate their fiduciary duties when they removed Ron as a director because he set the "corporate practice" after Craig died. (Id.) Ron's response referenced the applicable law, the Smithberg Brothers' Bylaws, and his deposition testimony denying he set a corporate practice, because he didn't "switch anything; someone died." (Id. ¶162 (citing Ron Depo. 97, ll.11, Doc.4)).

[¶11] Jim and Gary assert Ron didn't raise a fact question regarding damages in his initial opposition brief, (Br.¶21), but ignored Ron's deposition:

> Damages I've suffered? I had no income from $600,000 of value, causing me to use up some of my savings through stepdaughter's cancer and surgeries afterwards; have damages, I get nothing for a pretty good-sized asset, zero.

(Doc.69, ¶166 (Ron Depo. 89, ll.1-5, Doc. 54)).

[¶12] Jim and Gary argue "Ron failed to identify any 'oppressive' conduct and failed to identify damages flowing therefrom. (Br.¶23). Their underlying brief didn't raise this issue. (Doc.49, ¶37). Thus, Jim and Gary never met their initial burden of proof and required no response. Davis v. Enget, 2010 ND 34, ¶5, 779 N.W.2d 126.

[¶13] Jim and Gary argue Ron didn't support his accounting claim in his initial brief. (Br. at ¶24). Ron's response brief referred back to his factual recitation and his deposition: "Ron has illustrated that he has been denied access to financial information and that there has been all sort of 'extravagant personal spending, purchase of machinery, compensation' that need to be addressed as part of any accounting. (Ron Depo. at 92, 15-19 [Doc. 54])." (Doc.69, ¶172). Ron also cited Jim and Gary's discovery responses, that failed to provide requested documents. (Id.) As Ron noted: "Defendants must not be allowed to manipulate the results in this case by their wrongful actions . . . ." (Id.) Ron's deposition raised questions of fact and their refusal to provide discovery further supported an inference. In addition, the fact questions supporting breach of fiduciary duty and oppression also support an accounting. Grinaker v. Grinaker, 553 N.W.2d 200 (N.D. 1996).

[¶14] Jim and Gary focus solely on Ron's initial summary judgment brief in regards to Derivative Claims, Direct Claims, Removal of Directors, Illegal Distributions, Dissenting Shareholder Rights, Conversion, and Deceit/Fraud. (Br.¶25). Jim and Gary had the initial burden of proof to show there were no genuine questions of fact, but failed. They addressed all of these claims in two paragraphs, did not cite to any evidence in the record, and made no legal arguments that required a specific response. (Doc.49, ¶¶48-49). These claims all arose of the same facts as Ron's other claims, that he had briefed in detail and supported

with more than a 100 paragraphs of facts, and as such: "As set forth above, however, there is substantial evidence supporting Ron's claims, much of it coming from the Defendants' own testimony." (Doc. 69, ¶189). Absent any specific legal frailty, the facts detailed by Ron raised questions of fact and supported an inference in Ron's favor.

[¶15] In opposing unjust enrichment, Jim and Gary admitted they "would purchase personal items with a Smithberg Brothers credit card." (Doc.69, ¶180). This admission permitted an inference of unjust enrichment, and Ron emphasized: "As detailed extensively above, however, there is evidence that these procedures were not authorized and that they didn't properly deduct such from their wages. As also detailed above, there is substantial evidence that their wage rates themselves were simply made up and a tool by which they could ensure that Ron never received any distributions." (Id. ¶181).

[¶16] Ron responded to the specific breach of contract issue they raised, that certain buyout interest paid by Ron was just a loan: "This again is just Defendants asking the Court to agree with their evidence, while disregarding Ron's evidence of an agreement. As detailed extensively above, there is substantial evidence that the payment to Ron was for buyout interest and was not simply a loan. Not only did Ron testify to this fact but there were multiple documents sent to Defendants that support Ron's position. (See, e.g. Fremstad Aff., Ex. 2 (Smithberg Depo. Exs. 23, 25, 26)." (Doc.69, ¶184). In addition: "As detailed above, Gary and Jim both admit that from 2012 forward they wholly excluded Ron from every facet of the farm. As such, the only inference that can be reached is that they had agreed to buy Ron out." (Id. ¶185).

IV. THE DISTRICT COURT ERRED IN DETERMINING "FAIR PRICE."

[¶17] Ron requested a valuation date of January 1, 2012 because he had received nothing since that date. (Br.¶88). Jim and Gary do not dispute this and as such it's inequitable to use any other date. They also argue Ron's expert was neither reliable nor relevant. Section 10-06.1-26 requires a fair price be determined using federal gift tax law, and IRS Revenue Ruling 59-60, 1959-1 C.B. 237 (Doc.156) is the seminal authority. (Br. ¶¶77-82). Ron's expert and report were consistent with the Revenue Ruling, but their expert's wasn't and he had no valuation credentials. (Br.¶82).

CONCLUSION

[¶18] This Court must reverse and remand for an accounting and jury trial before a different judge on all issues.

CERTIFICATE OF COMPLIANCE

[¶19] The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32 in that the brief was prepared with Times New Roman, size 12-point font, proportional typeface and that the total number of words does not exceed 2,000 from the portion of the brief entitled "Introduction" through the signature block. The word count was calculated using "Microsoft Word" word processing software, which also counts abbreviations as words.

[¶20] Dated: April 3, 2019.

/s/ Joel M. Fremstad
Joel M. Fremstad (ND # 05541)

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

RONALD SMITHBERG,	)	
Appellant,	)	**Supreme Court No. 2018-0420**
	)	
vs.	)	**District Court No.**
	)	**12-2016-CV-00042**
GARY SMITHBERG, JAMES	)	
SMITHBERG AND SMITHBERG	)	**AFFIDAVIT OF SERVICE**
BROTHERS, INC.	)	
Appellees.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Maggie Burlingame, being first duly sworn, deposes and says that she is of legal age and that on April 3, 2019, she served the following:

- **REPLY BRIEF OF APPELLANT RONALD SMITHBERG**

were served electronically with the Clerk of the Supreme Court. A true and correct copy of the documents were electronically served on the following:

(Name)	(E-mail address)
Sheldon A. Smith	ssmith@smithporsborg.com
David J. Smith	dsmith@smithporsborg.com
Tyler J. Malm	tmalm@smithporsborg.com

M. Burlingame
Maggie A. Burlingame

Subscribed and sworn to me this 3rd day of April, 2019.

Marlene Schumacher
Notary Public

MARLENE SCHUMACHER
Notary Public
State of North Dakota
My Commission Expires April 24, 2020

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

RONALD SMITHBERG,	)	
Appellant,	)	**Supreme Court No. 2018-0420**
	)	
vs.	)	**District Court No.**
	)	**12-2016-CV-00042**
GARY SMITHBERG, JAMES	)	
SMITHBERG AND SMITHBERG	)	**AFFIDAVIT OF SERVICE**
BROTHERS, INC.	)	
Appellees.	)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

Maggie Burlingame, being first duly sworn, deposes and says that she is of legal age and that on April 1, 2019, she served the following:

- **REPLY BRIEF OF APPELLANT RONALD SMITHBERG**

were served electronically with the Clerk of the Supreme Court. A true and correct copy of the documents were electronically served on the following:

(Name)	(E-mail address)
Sheldon A. Smith	ssmith@smithporsborg.com
David J. Smith	dsmith@smithporsborg.com
Tyler J. Malm	tmalm@smithporsborg.com

M. Burlingame
Maggie A. Burlingame

Subscribed and sworn to me this 1st day of April, 2019.

Marlene Schumacher
Notary Public

MARLENE SCHUMACHER
Notary Public
State of North Dakota
My Commission Expires April 24, 2020