

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Rodney Brossart, Susan Brossart and)	
Thomas Brossart,)	
)	Supreme Court No.: 20190236
Plaintiffs and Appellants,)	Civil No.: 32-2017-CV-00059
)	
vs.)	
)	APPELLANTS' REPLY BRIEF
Kelly Janke, Individually and in his)	
Official Capacity as Sheriff for Nelson)	
County, Eric Braathen, Individually and in)	
his Official Capacity as Deputy Sheriff for)	
Nelson County, and Nelson County,)	
North Dakota,)	
)	
Defendants and Appellees.)	

THE APPELLANTS and PLAINTIFFS

SUBMIT AN APPEAL FROM ORDERS

REGARDING A MOTION TO COMPEL AND FOREIGN JUDGMENT FILING

IN THE NORTHEAST CENTRAL JUDICIAL DISTRICT

COUNTY OF NELSON

STATE OF NORTH DAKOTA

BEFORE THE HONORABLE LOLITA G. HARTL ROMANICK

Dated: January 30, 2020

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Rule 60, N.D.R.Civ.P. 2, 10

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Rule 1.5, N.D. Rules of Professional Conduct 6

STATEMENT OF THE ISSUES

[1] The following issues are presented for review by the Court:

a. Did the lower court misapply the law in this case regarding the enforcement of a foreign judgment?

b. Whether the lower court misinterpreted the law regarding the number of interrogatories, including subparts, in its Order granting a motion to compel?

c. Did the district court abuse its discretion by awarding attorney fees after granting a motion to compel?

STATEMENT OF THE CASE

[2] This case is appealed from Nelson County in the Northeast Central Judicial District pursuant to motions filed by the parties, one a Motion to Compel by the Appellees (“Judgment Creditors”) and the other a Motion for Relief from Judgment from the Appellants (“Brossarts”). In its Memorandum Order, the lower court denied the Motion for Relief from Judgment and granted the Motion to Compel. This case involves the Uniform Enforcement of Foreign Judgments Act as codified under NDCC, Chpt. 28-20.1. It also involves violations under North Dakota’s Rules of Civil Procedure.

ARGUMENT

1. The trial court misapplied the law in determining whether Attorney Lamb represented the Brossarts in the foreign judgment matter at the time of filing the judgment, which is critical in this case.

[3] The timeline in this matter is undisputed and supported by the court docket. It is well briefed in the Appellants’ Brief and will not be recopied here. The chief argument

that trumps this case is that Attorney Lamb did not represent the Brossarts at the time of the filing of the foreign judgment for the purpose of defending them in this state case.

[4] If there is evidence that Attorney Lamb did represent the Brossarts for the purpose of defending their interests in the foreign judgment in a state case; then, since Lamb was noticed of the filing of the foreign judgment, the outcome of this case favors the Judgment Creditors. However, since there is no evidence that Attorney Lamb was representing the Brossarts in this case at the time of the filing of the foreign judgment and the clerk of court failed to give notice of the foreign judgment to the Brossarts, the Brossarts were not given proper notice of the filing of the foreign judgment on September 12, 2017.¹ (Doc. 1) It wasn't until on or about February 1, 2019 (eighteen months later), when Attorney Lamb received interrogatories in the assistance of enforcing the foreign judgment, did the Brossarts have any idea there was a foreign judgment filed. Shortly afterwards, Lamb filed a Notice of Representation on May 8, 2019. (Doc. #23) Then, the Nelson County Clerk of Court filed and served the Notice of Filing Foreign Judgment on 5/10/19. (Doc. #33)

[5] This issue may indeed be one of first impression for this Court, since it is so unique and unusual. First, the Judgment Creditors did not confirm that Attorney Lamb was representing the Brossarts when they filed the foreign judgment and noticed him more than 14 days after the filing. (Doc. #5) Second, the Judgment Creditors did not check to ensure the clerk of court issued a Notice of Filing Foreign Judgment, which would have been sent directly to the Brossarts, at the time of the filing in September 2017. So, like perfecting a

¹ There is compelling evidence that supports this proposition in the Appellants' Brief, at page 15, ¶25, fn 5. There, it shows that the foreign judgment did not register as superior in a security interest on the Brossarts' farmland, which was refinanced through the Bank of North Dakota after the judgment was filed. The Brossarts knew nothing about the judgment and did not disclose it as a liability, since they did not receive notice of it.

deed or mortgage by recording it, the foreign judgment in this case was not perfected until May 10, 2019, when the clerk of court issued the Notice of Filing Foreign Judgment. Therefore, any attempt to enforce the foreign judgment would be invalid due to the fact that the instrument was not, in effect, perfected. There is really no authority to support this “once-in-a-career” situation, but the Beck Court did address it in a wholly different type of case and situation, which is well briefed in the Appellants’ Brief. Beck v. Smith, 296 N.W.2d 886 (N.D. 1980).

[6] It should be noted that pursuant to Rule 1.2, N.D. Rules of Professional Conduct, if a lawyer is not under contract for the specific case, which identifies the scope of representation and allocation of authority between the client and attorney, there can be no implied representation in this case. There is no evidence of an attorney-client agreement in this instance to represent the Brossarts at the time of the filing of the foreign judgment. To presume there was an attorney-client representation does not comport with any authority. In addition, pursuant to Rule 1.5, N.D. Rules of Professional Conduct, the Brossarts would have to have agreed to pay reasonable attorney fees in advance of Attorney Lamb’s representation of this matter. To assume Attorney Lamb was representing the Brossarts at the time of the filing without confirming this fact then is a stretch that makes this argument unfathomable.

[7] The Uniform Enforcement of Foreign Judgments Acts as codified under NDCC § 28-20.1 assumes that notice is properly given. Otherwise, any effort to enforce it is stayed until the notice error is corrected. That was essentially the Beck Court ruling.

[8] It only makes common sense. If the judgment debtor is unaware of the foreign judgment filed against them, then attempting to enforce it by demanding answers to

interrogatories to assist in its enforcement would be met with confusion and frustration to say the least. Again, this matter is one of first impression, and this Court should consider the practical implications of its ruling and public policy impact. If the Judgment Creditor failed to properly ensure that valid notice was given to the judgment debtors, the Brossarts, then there should not be an award to enable that gross oversight. The Brossarts should prevail under the circumstances in this case.

[9] Therefore, the trial court misapplied the law and abused its discretion in its Order granting the Motion to Compel, and this Court should reverse it.

2. The lower court abused its discretion by awarding attorney fees to the Judgment Creditors after granting a Motion to Compel.

[10] This was not a frivolous or meritless Rule 60 Motion for Relief brought by the Brossarts as clearly evidenced by the arguments presented. Thus, the trial court's award of \$2,340.00 in attorney fees to the Defendants/Appellees is an abuse of discretion.

CONCLUSION

[11] For the reasons stated above, the Court should reverse the lower court's decision in all things.

Dated this 30th day of January, 2020.

RESPECTFULLY SUBMITTED,

/s/ Timothy C. Lamb

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CERTIFICATE OF COMPLIANCE

I, Timothy C. Lamb, ESQ., hereby certify that the number of pages contained in this Appellants' Reply Brief complies with Rule 32(a)(8)(A), N.D.R.App.P., regarding page limitation not exceeding 12 pages. The principle brief contains 4 pages.

Dated this 30th day of January, 2020.

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CERTIFICATE OF SERVICE

I, Timothy C. Lamb, ESQ., a licensed attorney in the State of North Dakota and officer of the court, do hereby certify that on this date a true and correct copy of the following:

Appellants' Reply Brief,

was served by e-file to the opposing party to the name and address as follows:

Howard D. Swanson
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Dated this 30th day of January, 2020.

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