20190236

FILED
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MAY 20, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Rodney Brossart, Susan Brossart and Thomas Brossart, Plaintiffs and Appellants, vs. 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.	Supreme Court No.: 20190236 Civil No.: 32-2017-CV-00059 **PETITION FOR REHEARING**

THE APPELLANTS and PLAINTIFFS

SUBMITTED 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: May 20, 2020

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STATEMENT OF THE ISSUES

[1] The following issues were 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.

ARGUMENT

1. The Court overlooked material facts and misapprehended the law as it applies in this case?

A. It was a mistake by this Court to find that the time of the district court's ruling was the time to determine whether the stay pending notice had been violated, rather than the time when the process began with the service of interrogatories in this matter.

[3] With all due respect, there were key factors overlooked in this case and law misconstrued that – if given the proper analysis – would affect the outcome of the Court's

decision in this case. Hence, this Petition for Rehearing pursuant to Rule 40, N.D.R.App.P, is submitted for the Court's review.

[4] In reviewing the Court's Opinion, the Court ruled that the lower court misinterpreted the law with respect to notice given to the Brossarts because they should have been given direct notice of the filing of the foreign judgment at the time it was filed. Opinion, ¶20. But confounding to that reasoning is this: "Because the Brossarts were informed of the proceedings against them and had an opportunity to respond prior to the court issuing it order, the Brossarts suffered no prejudice from the failure to promptly comply with § 28-20.1-03(2)." Opinion, ¶19. Further, the Court states: "The Brossarts were not prejudiced from the failure to promptly comply with § 28-20.1-03(2). Therefore, the district court did not abuse its discretion by ordering the Brossarts answer the interrogatories." Opinion, ¶20. This reasoning does not rationally follow, since the Brossarts were not given proper notice of the foreign judgment until after they were served with interrogatories. So, the outcome does not comport with the sequence of actions in this case because the Court found that "enforcement proceedings are **stayed** until the notice procedures provided in § 28-20.1-03(2) are adequately complied with." Opinion, ¶17, emphasis added. Of significant note, the notice procedure under the statute was not complied with at the time the Brossarts were served with the interrogatories, which led to a motion to compel, despite the fact that they would be deemed invalid under this stay criteria. By logical extension, it would be like serving interrogatories before service of a summons and complaint, then after service and filing of the papers, filing a motion to compel discovery on the out-of-sequence interrogatories.

[5] Even more confounding is the Court's reasoning with the 10-day rule as cited in Beck v. Smith, 296 N.W.2d 886, 892 (N.D. 1980) (Justice Vande Walle concurring in part and dissenting in part). In Beck, this Court found that a foreign judgment is automatically stayed for 10 days to afford the judgment debtor an opportunity to exercise any rights in defense of the enforcement. *Id.* If this rule is properly applied in this case, the interrogatories served on the Brossarts would be null and void, since they were served on February 1, 2019, and not given actual notice until May 10, 2019, by the Clerk of Court of Nelson County; and not given constructive notice until at least 10 days after February 1, 2019, in accordance with Beck. *Id.* Any effort to compel discovery of the invalid interrogatories is not consistent with the Beck precedent, nor this Court's Opinion in this case.

[6] Interrogatories in the Aid of Execution of Judgment, under Rule 69(b), N.D.R.Civ.P., which were served on the Brossarts is an act of enforcement and is part of a legal process, so it follows that they must be served timely, not before proper notice of the foreign judgment is given. They were not served timely under any standard of application of the statute and Beck.

In Beck, the Court established the precedent for this case, which found:

> [T]he enforcement of the [foreign judgment in this case] under Section 14-14-15, N.D.C.C., was not accomplished in compliance with Chapter 28-20.1, N.D.C.C. [The petitioner] was not notified of the filing of the foreign decree in this state as required under Section 28-20.1-03(2), N.D.C.C., nor was a ten-day period allowed to elapse prior to enforcement of the decree as required under Section 28-20.1-03(3), N.D.C.C.

Beck, *supra*, at 893, emphasis added.

[7] Of particular note, and one the Court may have overlooked in this case, is the fact that in Beck the statute (§ 28-20.1-03(2)) was slightly different regarding the 10-day rule. *Cf.* § 28-20.1-03(2) in 1980 to present day:

> Pursuant to Section 14-14-15(1), N.D.C.C., upon filing a certified copy of a foreign custody decree with the clerk of a district court, the foreign custody decree is given the same effect as a custody decree rendered by a court of this state. The commissioners' comment to this section describing the effect to be given a foreign custody decree indicates that it was derived from the Uniform Enforcement of Foreign Judgments Act which has been adopted by this state and codified as Chapter 28-20.1, N.D.C.C. Section 28-20.1-01, N.D.C.C., of that act defines a "foreign judgment" as ". . . any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state." We believe that enforcement of a foreign custody decree under Section 14-14-15, N.D.C.C., of the Uniform Child Custody Jurisdiction Act must be accomplished in compliance with the provisions of Chapter 28-20.1, N.D.C.C., which encompasses procedure for enforcement of all foreign judgments. Compliance with Chapter 28-20.1, N.D.C.C., requires the following procedure, among other things, to enforce a foreign judgment:
>
> > (1) Prompt mailing of notice to the judgment debtor at his last known post-office address of the filing of the foreign judgment; and
> >
> > (2) Automatic stay of execution or other process of enforcement of the foreign judgment until 10 days after the date the judgment is filed.

Beck at 892, emphasis added, footnote 2 in original omitted.

[8] The same statute at the time the Brossarts were served the effectively void interrogatories read as follows:

"No execution or other process for enforcement of a foreign judgment filed hereunder may issue until ten days after the date the judgment is filed." NDCC, § 28-20.1-03(3), emphasis added. Since proper notice triggers a proper filing of a foreign judgment, otherwise it is stayed until proper notice is given as this Court found in this case. Then, it follows that any "other process" such as serving interrogatories in aid of execution of judgment is invalid. So, they must be served after proper notice is given as explained by

the Court in this case. This Court found: "[a] judgment creditor [defendants in this case] may not execute on or commence other processes for enforcement of a foreign judgment until the notice procedures provided in § 28-20.1-03(2) have been satisfied." Opinion, ¶ 12, emphasis added. Therefore, the interrogatories were a commencement of "other processes" and thus ignored this rule. So, the outcome should be reexamined in this case.

[9] By overlooking these facts and misapprehending the law, the Court came to an outcome that does not heed the law. The Court properly found, "Adhering to our decision in Beck, we also agree the Brossarts' contention that enforcement proceedings are stayed until the notice procedures provided in § 28-20.1-03(2) are adequately complied with." Opinion, ¶17. Instead of applying the date the interrogatories were served to nullify the district court's order granting a motion to compel – which was premised on the supposition that the Brossarts had notice at the time of the filing of the foreign judgment on September 12, 2017, since attorney Lamb was representing them in the federal litigation from whence the judgment in question came from – this Court applied the date of the district court's order in July 2019.[1] That does not follow rational reasoning, and the outcome of this case is effectively hanging out to dry on this oversight. The period of the stay of the proceedings should begin at the time of any proceedings pursuant to enforcement of the foreign judgment, which would be the service of the interrogatories. Beck at 892, NDCC § 28-20.1-03(2), (3). How can the district court compel discovery of invalid interrogatories? That's the errant reasoning in this case, since, of course, given the premise that a stay is in

[1] The Court's Opinion states: "Whether enforcement proceedings were stayed for a period of ten days from February 1, February 19, or May 10 is immaterial because the court did not issue its order until more than ten days after the Brossarts were provided notice, whether it be constructive notice or actual notice pursuant to § 28-20.1-03(2)." Opinion, ¶ 18.

effect until proper notice is given, then interrogatories served in violation of the stay are void. That argument was made by the Brossarts in their motion for relief, and was thoroughly discussed during oral argument. It is a finer point of law. It is not frivolous.

[10] Further, the Court premised its finding in this case on the proposition that: "The Brossarts' entire basis for refusing to answer the defendants' interrogatories was their belief that improper notice rendered the federal judgment invalid or unenforceable." Opinion, ¶ 29. This overlooks the facts. As stated above, the Brossarts' argument is based on the premise that the any process for enforcement of the judgment was stayed until proper notice was given, which effectively invalidated the interrogatories served on them during the period of stay. That argument was agreed with by this Court. *Infra.* If this rule of law was known at the time of the lower court's ruling, a different result would have occurred. Likewise, if this rule of law was known by the defendants at the time they served the interrogatories and received the response by the Brossarts, they would have most likely reconsidered their position in filing a motion to compel. It is also likely the district court, by applying this rule of law, would have denied the motion to compel discovery.[2]

B. The attorney fees granted for a frivolous action has a chilling effect.

[11] Finally, given these circumstances, the Court overlooked and misapprehended the law in affirming the district court's decision in finding these fine points of law were presented in a frivolous manner. That is not the case here. The Brossarts presented

[2] With respect to the dicta relating to defenses available to the Brossarts to support an argument that the full faith and credit clause under the Uniform Enforcement of Foreign Judgments Act does not apply if: 1) a violation of the due process clause in the rendering state was violated; 2) the rendering state lacked jurisdiction; or 3) the judgment was procured by fraud; none of those defenses apply in this case. Opinion, ¶ 28, citations omitted. The district court did not address this issue, nor did either of the parties in this matter.

arguments that were sound and well-reasoned, as stated herein and in previous briefs. The effect of awarding attorney fees only acts as a chilling effect to dissuade litigants from raising bonifide issues in our judicial system – a fair, impartial and unbiased institution.

CONCLUSION

[12] For the reasons stated above, the Court should reconsider its Opinion and grant Appellants' Petition for Rehearing.

Dated this 20th day of May, 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' Petition for Rehearing complies with Rule 40(b), N.D.R.App.P., regarding page limitation not exceeding 10 pages. The principle brief contains 7 pages.

Dated this 20th day of May, 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:

Petition for Rehearing,

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 20th day of May, 2020.

/s/ Timothy C. Lamb

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