

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

AE2S Construction, LLC,

Plaintiff-Appellee,

-vs-

Hellervik Oilfield Technologies LLC
d/b/a Hellervik RDO

Defendant-Appellant,

and

Whiting Oil and Gas, Corporation,

Defendant.

Supreme Court No. 20200180

Williams County District Court
53-2019-CV-01518

Northwest Judicial District

Honorable Josh B. Rustad

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
FOR JUDGMENT DATED MAY 12, 2020 (DKT. NO. 55)

REPLY BRIEF OF APPELLANT
HELLERVIK OILFIELD TECHNOLOGIES LLC
D/B/A HELLERVIK RDO

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LEGAL ARGUMENT

I. HELLERVIK SATISFIED THE REQUIREMENT OF STATING A PRESUMABLY MERITORIOUS DEFENSE.

[¶1] AE2S argues Hellervik failed to adequately state a meritorious defense and therefore was not entitled to relief under Rule 60(b). This argument is not supported by the record in this case. AE2S ignores the specific responses made by Hellervik in its proposed Answer and Counterclaim, and then characterizes the affirmative defenses as boilerplate and conclusory. Hellervik stated defenses with sufficient specificity in accordance with North Dakota law.

[¶2] A party responding to a pleading must “state in short and plain terms its defenses to each claim asserted against it.” N.D. R. Civ. P. 8(b)(1)(A). On a motion to vacate a default judgment, “[o]nce a default judgment is determined to be voidable, the district court examines the moving party’s answer to determine if it contains ‘on its face a presumably meritorious defense.’” Discover Bank v. Bolinske, 2020 ND 228, ¶ 16 (quoting Perdue v. Sherman, 246 N.W.2d 491, 495 (N.D. 1976)). Filing a proposed answer and counterclaim with a motion to vacate is procedurally sufficient for raising the meritorious defenses. See Perdue, 246 N.W.2d at 495 (the defendant filed a proposed answer and counterclaim with a motion to reopen a default judgment and this Court concluded the proposed pleading on its face contained a presumably meritorious defense).

[¶3] AE2S argues this Court should impose a heightened burden by citing federal case law, but the standard is already clear in North Dakota – the moving party must state in the proposed pleading a presumably meritorious defense. Hellervik submitted a proposed Answer and Counterclaim with its motion to vacate filed on November 12, 2019.

(Dkt. #31). In the Answer and Counterclaim, Hellervik asserted defenses and specifically responded to AE2S' allegations as follows:

. . . Hellervik further responds that the labor and materials provided by Plaintiff were deficient. Hellervik further responds that the Plaintiff failed to complete its work in a suitable time frame and that the engineering and electrical control scheme was not able to perform according to its intended use and purpose.

Id. at ¶ 21. Hellervik also responded by alleging the services performed by AE2S were rejected by the electrical inspector of the North Dakota State Electrical Board. Id. at ¶¶ 24, 27. These defenses were set out in direct response to the claims asserted by AE2S. The responses also clearly relate to the affirmative defense of failure of consideration stated in paragraph 30 of the Answer and Counterclaim. Hellervik also alleged the claims by AE2S failed to satisfy conditions precedent, e.g. the services were deficient and the electrical control scheme did not perform to its purpose and therefore Hellervik was not obligated to pay for those services and materials. Id. at ¶ 31. Hellervik also asserted the materials were inadequate and the services were not rendered in a good and workmanlike manner. Id. at ¶ 33.

[¶4] These responses and defenses to payment were facially adequate. Hellervik stated its defenses in “short and plain terms” as required under North Dakota law. N.D. R. Civ. P. 8(b)(1)(A). The Answer and Counterclaim contained adequate allegations to satisfy the requirement of stating presumably meritorious defenses. The district court abused its discretion by ignoring the proposed Answer and Counterclaim filed by Hellervik and concluding Hellervik waived any defense to payment. (App. 29-31).

II. HELLERVIK DID NOT WAIVE DEFENSES BY SIGNING A FINANCIAL AUDIT LETTER FOR THE BENEFIT OF AE2S OR TRYING TO REACH AN AGREEMENT ON TERMS OF REPAYMENT.

[¶5] The district court adopted AE2S' argument that Hellervik failed to state a meritorious defense because Hellervik signed a financial audit letter verifying the amount invoiced by AE2S to Hellervik. (App. 30-31). The district court, without analysis, also summarily concluded Hellervik's efforts to reach a compromise with AE2S in February 2019 were not protected under N.D. R. Evid. 408 and constituted an admission of liability. (App. 31). The district court abused its discretion by concluding Hellervik lacked a meritorious defense and admitted liability by negotiating with AE2S in February 2019.

[¶6] Waiver is a voluntary and intentional relinquishment of a known existing advantage, right, privilege, claim, or benefit. Tormaschy v. Tormaschy, 1997 ND 2, ¶ 19, 559 N.W.2d 813. Whether a waiver occurred presents a question of fact. Id. The facts of each case must be considered to determine whether a party waived any rights. In re Peterson's Dogs, 2008 ND 225, ¶ 11, 758 N.W.2d 749.

[¶7] AE2S argues Hellervik waived any and all defenses because Gary Minard ("Minard") of Hellervik signed a financial audit letter verifying the total amount invoiced by AE2S to Hellervik. The audit letter states: "PLEASE NOTE THAT THIS IS NOT A REQUEST FOR PAYMENT." (Dkt. #45). It also provides by signing the letter Hellervik "agrees with [AE2S'] records as of 12/31/18." Id. AE2S's argument and the conclusion of the district court ignores the Affidavit of Gary Minard explaining his reasoning for signing the audit letter. Minard stated he signed the audit letter because he understood the confirmation was for a year-end financial audit and that by signing the letter "Hellervik was not admitting or conceding that Hellervik would pay the amount in full." (Dkt. #49, ¶ 4). Minard understood the letter "was to confirm the amount invoiced to Hellervik by

AE2S.” Id. On these facts there was no voluntary and intentional relinquishment of any rights or defenses by Hellervik.

[¶8] AE2S argues Hellervik also waived any and all defenses because it attempted to settle with AE2S by proposing a repayment plan. Hellervik and AE2S never reached an agreement on repayment. (Dkt. #49, ¶ 5). AE2S conceded it never received any payment from Hellervik after the parties discussed a repayment plan. (Dkt. #44, ¶ 10). It defies logic that Hellervik could have admitted liability and waived all defenses when no agreement was reached between the parties and Hellervik made no payments. These negotiations should not have been considered or construed against Hellervik. N.D. R. Evid. 408 (evidence of offers or promises made in attempting to compromise a claim are not admissible to prove the validity or amount of a disputed claim). It was erroneous for the district court to conclude Hellervik could not state a meritorious defense when no agreement was ever reached between the parties, Hellervik never made a payment to AE2S, and the emails were clearly offers made in an attempt to compromise.

[¶9] The district court abused its discretion in concluding the signing of a financial audit letter and engaging in settlement discussions resulted in Hellervik foregoing any and all defenses.

III. HELLERVIK’S INITIAL REPRESENTATION BY COUNSEL AFTER AE2S RECORDED THE LIEN SHOULD BE SUFFICIENT TO NECESSITATE NOTICE PRIOR TO THE ENTRY OF DEFAULT JUDGMENT.

[¶10] This Court should conclude Hellervik made a sufficient appearance in June 2019 when its counsel spoke by phone with counsel for AE2S after AE2S recorded a well construction lien, which later became the subject of this lawsuit. AE2S does not dispute that Hellervik was represented by counsel in June 2019 when the phone call happened.

Hellervik was represented by counsel who discussed the lien with counsel for AE2S, but later Hellervik's counsel discovered a conflict and could not continue the representation. This communication between counsel for the parties should be deemed sufficient to at least warrant notice to Hellervik before the entry of default judgment.

[¶11] “If a party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with a motion for judgment.” N.D. R. Civ. P. 55(a)(3). “A party who has appeared is entitled to written notice of the application for a default judgment.” State by Workers Comp. Bureau v. Kostka Food Service, Inc., 516 N.W.2d 278, 280 (N.D. 1994). The term “appearance” is to be construed broadly in North Dakota. Fed. Land Bank of St. Paul v. Lillehaugen, 370 N.W.2d 517, 519 (N.D. 1985). Whether particular conduct is sufficient to constitute an “appearance” is a question of law. Hatch v. Hatch, 484 N.W.2d 283, 286 (N.D. 1992).

[¶12] Hellervik was represented by counsel for a period of time in the summer of 2019. The representation was after AE2S recorded a well construction lien to secure the amount it claimed to be owed by Hellervik. (Dkt. #34). Hellervik's counsel had a phone call with counsel for AE2S on June 11, 2019. AE2S does not dispute that on June 11, 2019, the Fredrikson & Byron firm was legal counsel for Hellervik. The record is not clear about the details of the discussion between counsel, but as a result of the call counsel for AE2S sent Hellervik's counsel a copy of the recorded well construction lien.

[¶13] On July 12, 2019, Hellervik's counsel sent an email advising AE2S' counsel of a conflict. He also asked to be contacted if a new attorney did not make contact and wanted to make sure there were “open lines of communication.” Id. It makes little sense that Hellervik's former counsel would request to be notified if a new attorney did not

contact counsel for AE2S by the following week if Hellervik did not intend to dispute the well construction lien and related claims. It makes less sense that Hellervik's former counsel would want to "make sure there are open lines of communication" if Hellervik did not intend to contest the lien and related claims. The contact between Hellervik's former counsel and counsel for AE2S in the summer of 2019 should be deemed sufficient to have required notice before the entry of default judgment.

[¶14] Hellervik should have been provided notice of the request for default judgment made by AE2S. The district court erred in concluding there was no appearance and that Hellervik was not entitled to notice.

CONCLUSION

[¶15] Hellervik respectfully asks this Court to reverse the district court's order denying Hellervik's Motion to Vacate Default Judgment. This case should be remanded to the district court to allow Hellervik to file its proposed Answer and Counterclaim and this case should be decided on the merits.

Dated this 25th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Appellant Hellervik Oilfield Technologies LLC d/b/a Hellervik RDO in the above-captioned matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(5) and Rule 32(8)(a) of the North Dakota Rules of Appellate Procedure, that the above Reply Brief of Appellant was prepared with proportional typeface and the total number of pages in the above brief is 9.

Dated this 25th day of November, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2020, the following document:

**REPLY BRIEF OF APPELLANT
HELLERVIK OILFIELD TECHNOLOGIES LLC
D/B/A HELLERVIK RDO**

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