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IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

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Stockman Bank of Montana, a
Montana banking corporation,

Supreme Court No. 20060174

Plaintiff and Appellant,

vs.

AGSCO, Inc., a North Dakota corporation, and Capital Harvest. Inc., d/b/a Capital Harvest Finance Company, a North Dakota corporation, individually and as agent for AGSCO.

Defendants and Appellees,

Farmers Union Oil Company of Williston, a North Dakota cooperative association, Mon-Kota, Inc., a Montana corporation, Betaseed, Inc., a Minnesota corporation, Central Insurance Agency, a North Dakota corporation, Steven D. Cayko, a/k/a Steve Cayko, Perry Elletson, a/k/a Perry E. Elletson, Ron Gross, a/k/a Ronnie Gross, Edward P. Ochs, a/k/a Eddie Ochs, Tom Ochs, Mark Brunelle, Kelly Brunelle, and Bill Sheldon,

Defendants.

and

Farmers Union Oil Company of Williston, a North
Dakota cooperative association,

Third-party Plaintiff,

vs.

Hardy Farm, Inc., and Jim Hardy,

Third-party Defendants.

APPEAL FROM (1) ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT, (2) JUDGMENT UPON ORDER GRANTING MOTION FOR FINAL SUMMARY JUDGMENT IN FAVOR OF AGSCO/CAPITAL HARVEST ON ITS PRIORITY AGRICULTURAL LIEN DATED JANUARY 27, 2006, AND (3) ORDER DENYING PLAINTIFF'S MOTION TO COMPEL RETURN OF FUNDS, DENYING PLAINTIFF'S REQUEST FOR SANCTIONS, DENYING PLAINTIFF'S MOTION TO STAY ENFORCEMENT OF JUDGMENT, DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT, DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT, AND DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT OR ORDER DATED MAY 24, 2006.

MCKENZIE COUNTY DISTRICT COURT,
NORTHWEST JUDICIAL DISTRICT,
CIVIL NO. 2003-C-012

THE HONORABLE GERALD RUSTAD PRESIDING

REPLY BRIEF OF APPELLANT

Garth H. Sjue (03873)
Ken G. Hedge (05684)
CROWLEY, HAUGHEY, HANSON
TOOLE & DIETRICH, P.L.L.P.
111 East Broadway
P.O. Box 1206
Williston, ND 58802-1206
Telephone No. 701-572-2200
Facsimile No. 701-572-7072
Attorneys for the Plaintiff-Appellant

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I. STATEMENT OF FACTS

The Plaintiff-Appellant, Stockman Bank of Montana (the "Bank"), seeks to clarify in this portion of its Reply Brief a certain statement of fact made in the Appellees' Brief. AGSCO, Inc. ("AGSCO") and Capital Harvest. Inc. ("Capital Harvest") state in its Answer Brief that Hardy Farm, Inc. ("Hardy Farm") failed to pay the balance due on each monthly statement. (Appellees' Br. 1. at ¶ 2). The context in which the statement is made leads one to believe that the AGSCO monthly statements were not paid timely which is untrue. (Appellees' Br. 1 at ¶2). The Hardy Farm trade receivable of AGSCO was always paid with an advance on the Capital Harvest loan extended to Hardy Farm until the entire $500,000.00 under the line of credit was fully advanced. (App. 124-64). For example, on May 20, 2002, AGSCO made chemical sales to Hardy Farm in the amount of $7,000.00 and $101,456.42. (App. 131-33). On May 21. 2002, Capital Harvest made two advances in the amounts of $66,273.42 and $42,183.00 on the Hardy Farm line of credit to pay off the trade receivable represented by the two AGSCO sales. (App. 133). The monthly statement recites that the amounts represent payments from Capital Harvest under the $UPPLIT and Agsco Advantage financing programs. (App. 133). The Capital Harvest transaction statement for Hardy Farm confirms the advances on the line of credit. (App. 621, 623).

The Revolving Charge Agreement states that the balance of principal and interest on the loan shall be paid no later than the maturity date disclosed in the Approval Letter from Capital Harvest. (App. 529-30, 532-33). The Approval Letter provides that no payment was due by Hardy Farm to Capital Harvest on its loan before the maturity date of December 1, 2002. (App. 532). Nothing in the discovery undertaken to date suggests that Capital Harvest demanded payment of its loan prior to maturity. Further, none of the loan documents provide for any payments of either principal or interest prior to the maturity date. (App. 529-30, 532-33). When Hardy Farm exceeded its $500,000 credit

limit with Capital Harvest. AGSCO continued to sell chemical to Hardy Farm on a trade receivable basis. (App. 622, 624, 666-675). AGSCO eventually filed a North Dakota agricultural suppliers lien for the unpaid balance of $35.142.61 owed by Hardy Farm at the time the North Dakota lien was filed by it. (App. 71).

II. ARGUMENT

A. The District Court Committed Reversible Error in Determining That AGSCO and Capital Harvest Had an Agency Relationship, as to Provide a Basis for Capital Harvest's Claimed Lien.

Whether summary judgment has been properly granted is a question of law which the Supreme Court reviews *de novo*. Wahl v. Country Mutual Ins. Co., 2002 ND 42, ¶ 6, 640 N.W.2d 689. This Court also reviews the evidence in the light most favorable to the party opposing the motion for summary judgment, giving that party the benefit of all inferences that reasonably can be drawn from the evidence. Abel v. Allen, 2002 ND 147, ¶ 8, 651 N.W.2d 635.

AGSCO/Capital Harvest attempts to establish for purposes of this appeal that a finding of agency is subject to the clearly erroneous standard of review by citing Argabright v. Rodgers. 2003 ND 59, ¶ 6, 659 N.W.2d 369, but they incorrectly apply it to this case. There, after a trial on the merits, the district court found that that an agency relationship existed and on appeal, this Court applied the clearly erroneous standard of review. Id. at ¶¶ 3, 6 (emphasis added). The case has no applicable here because it was not decided on a motion for summary judgment. Here, AGSCO/Capital Harvest's motion for summary judgment was granted and thus *de novo* review applies.

Viewing the evidence in the light most favorable to AGSCO/Capital Harvest and giving them the benefit of all inferences that reasonably can be drawn from it, the record clearly establishes that Capital Harvest was acting in its own right and for its own benefit and not as agent for Capital Harvest when attempting to perfect an agricultural lien on the crops of Hardy Farm. Further, the loan by Capital Harvest, even if done as agent for

AGSCO, was clearly a violation of § 35-31-01 and results in a subordination of its agricultural lien in the amount of $500,000.00 to the crop mortgage of the Bank. N.D.C.C. § 35-31-01.

However, if the evidence is viewed in the light most favorable to the Bank and it is given the benefit of all inferences that reasonably can be drawn from the evidence, the District Court incorrectly determined that there were no genuine issues of material fact about the existence of an agency relationship between AGSCO and Capital Harvest. The relationship between AGSCO and Capital Harvest was an agency in name only. In fact, there was no evidence before the District Court to enable it to determine that an agency exists. The affidavit of Randy Brown is self-serving and sheds little or no light on the matter. (App. 89-100). He admits that Capital Harvest was created as "a product credit financing arm of AGSCO." but his statement contains few other hard facts that are of much use in helping the Court determine the existence of an agency relationship. (App. 91, at ¶ 5).

On the other hand, it is loaded with legal conclusions (i.e. Capital Harvest was acting as agent for AGSCO. Capital Harvest had the right as agent for AGSCO to file an agricultural supplier's lien. Capital is not a money lending entity. etc.). (App. 91, at ¶¶ 6, 7, 8, 9, 11). He also claims that the loan documents are misleading and tend to give one a false impression of the underlying transaction. (App. 95-6, at ¶ 12). As developed more fully in the Bank's first brief and this reply brief, not only are the affidavits of individuals offered in support of AGSCO/Capital Harvests' two motions for summary judgment self-serving, the discovery undertaken by the Bank in large part contradicts the factual assertions of AGSCO/Capital Harvest contained in those affidavits.

"Where the existence of an agency relationship is denied[.] the burden of proof is upon the party who affirms its existence. The burden of proof . . . in such cases is clear and specific – clear and convincing." Farmers Union Oil Co. v. Wood, 301 N.W.2d 129,

133-34 (N.D. 1980). Here, when viewing the evidence in the light most favorable to the Bank, AGSCO/Capital Harvest has clearly failed to meet its burden of proving an agency exists. Accordingly, the entry of summary judgment in favor of AGSCO/Capital Harvest was improper.

Although AGSCO and Capital Harvest assert that the Bank has failed to challenge the content of their evidence, nothing can be further from the truth. The Bank has offered the testimony of Jon Ramsey and Richard B. Dregseth, the men who came up with the concept for Capital Harvest and implemented it. (App. 487-540, 544-688). Their testimony establishes that AGSCO/Capital Harvest's lending and accounting practices are not consistent with an agency relationship as developed more fully in the Bank's first brief. Capital Harvest also admits that it "serves as a captive finance company for AGSCO, Inc. and AgSupplier.com. Providing financing to their customers to fund the purchase of available products and services, on approved credit." (App. 543, line 16). Further supporting the absence of an agency is the fact that the entire risk of loss on the loan to Hardy Farm was on Capital Harvest who was supposed to be the agent. (App. 589-93, 617-20).

B. The District Court Committed Reversible Error in Determining That the Agricultural Supplier's Lien of Capital Harvest was Entitled to the Priority of N.D.C.C. §35-31-03.

AGSCO/Capital Harvest argues that they never loaned Hardy Farm cash or a "sum of money" as that term is used in § 35-31-01, but merely made a credit sale on a line of credit, which does not fall within the statutory exception. N.D.C.C. § 35-31-01. Although a "loan of money" is defined elsewhere in the N.D.C.C., those statutes are not *in pari materia*, with the agricultural supplier's lien statutes and involve different considerations. For that reason, Cecil v. Allied Stores Corporation, 513 P.2d 704 (Mont. 1973) is inapplicable here. There is no indication that, when the Legislature used the words "money advanced or loaned for any purposes," it intended the exclusion to apply

strictly to loans of money, as opposed to credit sales of agricultural inputs.

Under AGSCO/Capital Harvest's interpretation, the only time this exclusion would come into effect would be when an agricultural supplier loaned a farmer cash to go out and purchase chemicals or other agricultural inputs which in reality has probably never happened or will ever happen. Banks and most agricultural suppliers are in the business of extending credit. Banks generally extend crop mortgages to agricultural producers on fall terms to purchase agricultural inputs. Agricultural suppliers extend credit in connection with the purchase of their own agricultural inputs on trade receivable basis. AGSCO/Capital Harvest's interpretation of the exclusion would effectively vitiate the 1997 amendment of § 35-31-01. N.D.C.C. § 35-31-01.

If this Court were to conclude that the statute is ambiguous. the court should look to extrinsic evidence in interpreting the statute. Phipps v. Department of Transp.. 2002 ND 112, ¶ 7, 646 N.W.2d 704; Singha v. State Bd. of Medical Examiners, 1998 ND 42, ¶ 17. 574 N.W.2d 838. The legislative history to Session Laws 1997, ch. 306, §3 (Senate Bill 2324) clearly evidences the legislature's intent to prevent transactions and practices such as those used by AGSCO/Capital Harvest in this case. In the examples cited before the legislature by trade groups advancing the 1997 amendment, agricultural suppliers were establishing lines of credit on which the farmer customers could make future supply purchases and then assigning it to a third party. (App. 254-57, 264-67).

In this instance, Capital Harvest set up a line of credit instead of AGSCO and advances on it were used to make payments on the Hardy Farm trade receivables of AGSCO. However. even if one were to conclude that Capital Harvest was acting as the agent for AGSCO. the legislative example would be identical to the present case. Therefore, AGSCO/Capital Harvest cannot use § 35-31-03 to secure a priority over the Bank's properly perfected security interest in the Hardy Farm crops and their proceeds because of the subordination effected by § 35-31-01. N.D.C.C. § 35-31-03; N.D.C.C. §

35-31-01.

C. <u>The District Court Committed Reversible Error in Determining That AGSCO/Capital Harvest Was Entitled to a Lien on Debt That Had Not Yet Matured.</u>

AGSCO/Capital Harvest is not entitled to an agricultural lien because the debt upon which the lien depends, did not mature until December 1, 2002, approximately one month <u>after</u> the lien was filed. AGSCO/Capital Harvest seeks to use the affidavit of Rick Dregseth to establish that payment for the purchases made by Hardy Farm was due in the month following each purchase. (Appellee's Br. 15 at ¶34). This is true for AGSCO trade receivables, but not the advances under the Capital Harvest line of credit. (App. 451, line18, 453, line 12; 561, line 4, 562, page1). The Approval Letter states that the maturity date on the loan from Capital Harvest is December 1, 2002. (App. 532-33). Although payments *could have* been made before December 1, 2002, none of the documents required a payment of principal or interest before that date. (App. 529-30, 532-33). Only after Hardy Farm exceeded its credit limit with Capital Harvest in late August of 2002 did the AGSCO statements show a monthly balance due. (App. 667, 743-55).

Again, Mr. Dregseth's deposition testimony contradicts his affidavit, a common practice in this case. In his deposition Mr. Dregseth explains the accounting practices of AGSCO and Capital Harvest. He testified that the account receivable on the books of AGSCO was satisfied by an advance from Capital Harvest on the Hardy Farm line of credit. (App. 557-63). Thus, no amounts were due before the Capital Harvest loan matured. The use of affidavits cannot be used to contradict previous sworn testimony without explanation. <u>Heart River Partners v. Goetzfried</u>, 2005 ND 149, ¶ 17, 703 N.W.2d 330. If the language cited by AGSCO/Capital Harvest in its brief applies only to payments made on the AGSCO account, it is misleading. However, if the language cited is being used to describe the payments due under the Capital Harvest line of credit, it is

contradicted by the documents evidencing the line of credit and the sworn testimony of Rick Dregseth and cannot be considered by the Court without explanation.

D. The District Court Committed Reversible Error in Determining That AGSCO/Capital Harvest Met the Agricultural Supplier's Lien Statutory Requirements.

Both lien statements are deficient in the description of the services furnished with respect to aerial application by Mehling Flying Services, a statutory requirement of N.D.C.C. § 35-31-02(4). (App. 110-11). The most obvious problem with the AGSCO/Capital Harvest lien filings claiming a lien for "agricultural chemicals" is that the term is not commonly understood to mean aerial application services. (App. 70-71). Because AGSCO/Capital Harvest failed to include a description and the value of certain services (aerial application) furnished, the Court should have disallowed the amount of the aerial application services in the final judgment.

E. The District Court Committed Reversible Error in Allowing AGSCO/Capital Harvest to Collect on an Agricultural Supplier's Lien for Sales Occurring Outside of the 120-day Period.

The District Court erred in applying the 120-day limitation to the facts of this case. As previously established in his deposition, Greg Breuer claimed that the date on the Product Movement Sheet was either the date the chemical product was delivered or the date the customer picked up the chemical product. (App. 1107-09). AGSCO/Capital Harvest attempts to show that Mr. Breuer overgeneralized when he explained the product movement sheets at his deposition. (Appellees' Br. 22 at ¶46). Mr. Breuer's affidavit clearly contradicts his earlier deposition testimony. The "revision" of his deposition testimony creates a sham issue of material fact. Wilson v. Westinghouse, 838 F.2d 286, 289 (8th Cir. 1988). In addition, Mr Breuer's affidavit testimony should not have been considered by the Court without explanation. . Heart River Partners v. Goetzfried, 2005 ND 149, ¶ 17, 703 N.W.2d 330. Accordingly, summary judgment for AGSCO/Capital Harvest was not proper as the conflict in testimony creates a genuine issue of material

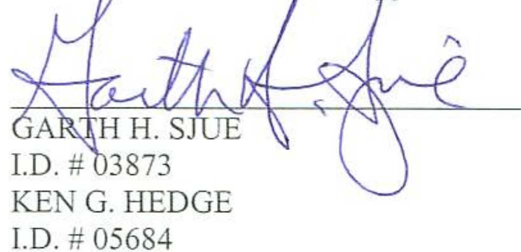
fact that goes to the finder of facts. Id.

III. CONCLUSION

For the foregoing reasons, the Bank respectfully requests that this Court reverse the judgment of the trial court and grant the Bank's motion for summary judgment. Alternately, if the Court concludes that there are genuine issues of material fact presented by specific issues presented in this case, the Bank respectfully requests this Court reverse the judgment of the trial court and remand this matter for a trial on all issues presented by the complaint as to the parties involved with this appeal.

DATED this 17th day of October, 2006.

CROWLEY, HAUGHEY, HANSON
TOOLE & DIETRICH, P.L.L.P.
111 East Broadway, P.O. Box 1206
Williston, ND 58802-1206
Telephone No. 701-572-2200
Attorneys for the Plaintiff-Appellant



GARTH H. SJUE
I.D. # 03873
KEN G. HEDGE
I.D. # 05684