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20060174

**IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA**

**FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT**

MAR 14 2007

STATE OF NORTH DAKOTA

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

PETITION FOR REHEARING

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

- ¶1 The Appellant designates the following issues for review:
1. Whether the Court failed to consider and recognize that the affidavits submitted by AGSCO/Capital Harvest include sales occurring outside of the 120-day period.
 2. Whether the Court committed error in allowing AGSCO/Capital Harvest to collect interest at the contract rate on the line of credit with Hardy Farm, Inc. under the agricultural supplier's lien even though the funds were on deposit with the Court.

II. STATEMENT OF THE CASE

¶2 The Plaintiff-Appellant, Stockman Bank of Montana (the "Bank"), brought this action against the Defendants-Appellees, AGSCO, Inc., ("AGSCO") and Capital Harvest, Inc. ("Capital Harvest"), in part, to determine the respective rights among the parties as to various jointly payable crop checks. Pursuant to the Orders of the District Court, the Bank deposited checks in the total amount of \$1,319,106.25 with the Clerk of the District Court.

¶3 On cross motions for summary judgment, the District Court found that North Dakota law was the proper law to be applied, that AGSCO/Capital Harvest had adequately complied with the supplier's lien requirement under North Dakota law, and granted partial summary judgment in favor of AGSCO/Capital Harvest. However, the Court also found that "the lien claimed by AGSCO/Capital Harvest may be limited to those items furnished within the 120-day period immediately preceding the filing of its lien and on produce from the North Dakota Lands." Additionally, the Court stated that additional facts were necessary to establish the amount of chemicals furnished within the 120-day period to North Dakota lands.

¶4 The parties to this appeal subsequently made cross-motions for summary judgment. The Bank asserted among other things that the North Dakota agricultural supplier's lien did not extend to crops grown in Montana and further asserted that certain

sales of chemicals AGSCO/Capital Harvest was seeking to recover were actually furnished prior to July 2, 2002. The District Court granted final summary judgment in favor of the AGSCO/Capital Harvest and Judgment was entered. On appeal, this Court affirmed in part, reversed in part and remanded, granting AGSCO/Capital Harvest finance charges on the late payments, affirming the limitation of AGSCO/Capital Harvest's lien to the 120-day period, stating "[t]he affidavits of Greg Breuer, Marc Geatz, and Craig Mehling submitted by AGSCO and Capital Harvest . . . are limited to supplies provided within the 120-day window." and granting AGSCO/Capital Harvest finance charges on the late payments.

III. STATEMENT OF FACTS

¶5 AGSCO sold Hardy Farm \$536,584.25 in agricultural chemicals and other products in 2002. (App. 716-71, 1102). AGSCO transferred \$500,000 of the Hardy Farm account receivables to Capital Harvest under the term financing arrangement. (App. 462-64, 470-73). AGSCO and Capital Harvest filed agricultural supplier's liens in North Dakota on October 30, 2002. (App. 24 at ¶ 32, 78 at ¶ XI, 110, 111). One hundred twenty days before October 30, 2002 was July 2, 2002. The AGSCO Billing Statements indicate that three invoices for chemicals sold to Hardy Farm were generated on July 2, 2002 in the total amount of \$69,772.05. (App. 1110-25). The actual date the farmer took delivery of the chemical is the date stated on the Product Movement Sheet. (App. 1110-25). Additionally, the AGSCO Billing Statements indicate that an invoice for a sale of chemical was generated on August 2, 2002, but the Product Movement Sheet indicates that the chemical was furnished to Hardy Farm on May 28, 2002, over a month prior to the July 2, 2002 cut off. (App. 1119, 1126). Mr. Hardy also testified that the chemicals on the Product Movement Sheet were spring chemicals that would have been used the first part of June. (App. 1090-97).

¶6 When Hardy Farm purchased chemical from AGSCO, sometimes it would place an order via the telephone or via a personal visit from Breuer to Hardy Farm's place of business. (App. 778). Sometimes, a representative of Hardy Farm would also visit the AGSCO branch warehouse in Fairview, Montana to place an order. (App. 773-74, 778). In the latter case, Breuer would enter the sale information directly into its computer and transmit it to corporate offices with no other written memorandum of the sale. (App. 779-84). However, in all other cases, Breuer would fill out a Product Movement Sheet. (App. 780-84, 867-936). The Product Movement Sheets state the date that the particular product was delivered to Hardy Farm. (App. 1107-09, 1112-13, 1117). Again, the only exception noted by Breuer in his affidavit would have been the Gem.

¶7 The Billing Statements, when there is a Product Movement Sheet associated with a particular order, list a customer PO number, which is a reference to the Product Movement Sheet. (App. 1115-16). In this case, the Billing Statements for the July 2, 2002 sale reference Product Movement Sheet Nos. 36238, 35990, and 35982. (App. 1116-17, 1120-25). Those Product Movement Sheets for the sales invoiced July 2, 2002 confirm that the product was actually delivered or set aside, and, therefore, sold, on June 24, 2002 and June 26, 2002. (App. 1116-18). Furthermore, the Billing Statements for the August 2, 2002 sale reference Product Movement Sheet No. 46550. (App. 1055). The Product Movement Sheets for the sale invoiced August 2, 2002 confirm that the product was actually delivered, and, therefore, sold on May 28, 2002. (App. 984).

IV. ARGUMENT

A. The Court Failed to Consider and Recognize That the Affidavits Submitted by AGSCO/Capital Harvest Include Sales Occurring Outside of the 120-day Period.

¶8 Any lien that AGSCO/Capital Harvest is entitled to is limited to supplies delivered to Hardy Farm from July 2, 2002 to the date of the filing of the lien. By Order, dated March 30, 2004, the District Court agreed that the AGSCO/Capital Harvest's

agricultural lien was limited to sales occurring on or after July 2, 2002. (App. 941). This Court affirmed the District Court on that issue. Stockman Bank of Montana v. AGCSO, Inc., 2007 ND 26, at ¶ 36. However, this Court failed to consider whether AGSCO/Capital Harvest's affidavits were indeed limited to sales occurring within the 120-day window and stated that "[t]he affidavits of Greg Breuer, Marc Geatz, and Craig Mehling submitted by AGSCO and Capital Harvest in support of the final summary judgment *are limited* to supplies produced within the 120-day window" which is a factually inaccurate statement. Id. (emphasis added). In reality, the Bank has previously briefed the issue and has shown through responsive depositions and affidavits that the AGSCO/Capital Harvest affidavits *are not limited* to sales occurring within the 120-day window.

¶9 In following the 120-day limitation, the supplier must file a proper lien statement within 120 days from the date the supplies are first furnished and thus, AGSCO is only entitled to a lien on supplies sold from July 2, 2002 to October 30, 2002. Although the North Dakota lien statements filed in this case state that the date the supplies were first furnished on July 2, 2002, sale of supplies to Hardy Farm, in fact, first occurred on April 23, 2002. In fact, it appears from the Breuer Deposition, Affidavit of Greg Breuer dated July 2, 2004, and the Billing Statements attached thereto, Hardy Farm purchased only approximately \$59,110.04 in net allowable agricultural products after July 2, 2002.¹ (App. 946-1078, 1100-26).

¶10 At his deposition Greg Breuer, AGSCO salesman, 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). Two of the four Product Movement Sheets were actually signed by representatives of Hardy Farm as

¹ This amount is determined by subtracting \$117,450.81 for sales consummated before July 2, 2002 but recorded on or after July 2, 2002, from the Judgment amount of \$176,560.85.

having been received. (App. 1119-22). When the delivery date on the Product Movement Sheets for each of the invoices identified below are examined, the product was delivered or “furnished” to Hardy Farm prior to the invoice date, even though the invoice created to memorialize the sale was dated after July 2, 2002 as follows:

<u>Invoice Number</u>	<u>Invoice Date</u>	<u>Invoice Amount</u>	<u>Product Movement Sheet Number</u>	<u>Product Movement Sheet Delivery Date</u>
109014	July 2, 2002	\$536.05	35990	June 24, 2002
109033	July 2, 2002	\$66,816.00	35982	June 24, 2002
109083	July 2, 2002	\$2,420.00	36238	June 26, 2002
115053	August 2, 2002	<u>\$47,678.76</u>	46550	May 28, 2002
Total		\$117,450.81		

¶11 AGSCO/Capital Harvest are claiming their lien includes invoices 109014, 109033, 109083, and 115053. as if those invoices were furnished within the 120 day timeframe. When one compares the Product Movement Sheets corresponding to the invoices for the same chemicals, the actual billing evidenced by the invoice is rarely generated the same day as the chemicals are furnished to the customer. In most instances, the invoices are not generated for several days and, on one occasion, several weeks. The chemicals sold to Hardy Farm evidenced by Product Movement Sheet 46550 was not invoiced until August 2, 2002, more than nine weeks after the chemicals were delivered to the farm. As such, all of the charges described above should be excluded from any lien as sales occurring outside the 120-day window.

¶12 Most of Breuer’s affidavit is spent discussing the Gem sale. (App. 949-55). Jim Hardy testified that the Gem was applied in late June and early July as part of the Hardy Farm fungicide control program for sugar beets. (App. 1090-97). He also states it was applied with a ground sprayer. His testimony is on the Hardy Farm chemical program is uncontroverted. Breuer sold the chemical. Jim Hardy applied it. Viewed in that light, Breuer’s testimony appears to be nothing more than a thinly veiled effort to rehabilitate

his previous testimony. It seems more likely that the chemicals were delivered at the time stated on the Product Movement Sheet for the Gem based on Jim Hardy's affidavit testimony and Breuer's deposition testimony. Breuer spends very little effort trying to rehabilitate his previous testimony on the other three sales where delivery occurred prior to July 2, 2002. Instead, he resorts to generalizations that contradict previous sworn deposition testimony, but would not rise to the level of evidence proving that the chemicals were furnished after July 1, 2002.

¶13 The date of delivery (not the invoice date) would also be the date of sale under Article 2 of the Uniform Commercial Code as adopted in North Dakota. Under § 41-02-06 a "sale" consists in the passing of title from the seller to the buyer for a price. N.D.C.C. § 41-02-06(1)(d) (1999). Title passes to the buyer at the time and place at which the seller completes the seller's performance with reference to the physical delivery of the goods. N.D.C.C. § 41-02-46(1) and (2) (1999). Since a sale was made at the time of delivery of the goods, the mailing of an invoice at a later date was nothing more than an accounting function confirming the previous sale. Hence, under the agricultural supplier's lien statute and Article 2 of the UCC, the goods would have been "furnished" at the time the chemicals were picked up at the plant or delivered to the farm.

¶14 Relying on the affidavits submitted by AGSCO/Capital Harvest, the District Court incorrectly allowed AGSCO/Capital Harvest to collect \$176,560.85, of which \$50,634.81 was clearly attributable to chemical products sold before July 2, 2002, as briefed on appeal. \$66,816.00 in Gem sales AGSCO/Capital Harvest claims occurred after July 1, 2002, in the Breuer affidavit. However, this claim is contradicted by Breuer's deposition testimony and the Hardy affidavit. A party should not be allowed to use affidavits to reform previous testimony or create genuine issues of material fact thereby avoiding summary judgment. When adjusted, the amount of charges within 120 days of the filing of the Capital Harvest agricultural supplier's lien is \$59,110.04.

¶15 In conclusion, the Court stated that the affidavits submitted by AGSCO/Capital Harvest are limited to products sold within the 120-day window without failing to consider the Bank's responsive argument. The Bank has clearly shown that the affidavits advanced on behalf of AGSCO/Capital Harvest are not limited to products sold between July 2, 2002 and October 30, 2002. Further, the Bank objected to the inclusion of the chemical sales identified above at both the District Court and Supreme Court levels.

B. The Court Committed Error in Allowing AGSCO/Capital Harvest to Collect Interest at the Contract Rate on the Line of Credit with Hardy Farm, Inc. Under the Agricultural Supplier's Lien Even Though the Funds Were on Deposit with the Court.

¶16 AGSCO/Capital Harvest is not entitled to collect prejudgment interest at the contract rate on its lien after the date of deposit with the Clerk of the District Court. North Dakota statutory scheme for agricultural supplier's liens does not specifically provide for prejudgment interest on an Agricultural Supplier's Lien. This Court in its decision said that although the agricultural supplier's lien is silent on the issue of interest, AGSCO/Capital Harvest is entitled to interest on its claim. However, North Dakota allows:

Every person who is entitled to recover damages certain or capable of being made certain by calculation, the right to recover which is vested in the person upon a particular day, also is entitled to recover interest thereon from that day, *except for such time as the debtor is prevented by law or by the act of the creditor from paying the debt.*

N.D.C.C. § 32-03-04 (emphasis added). In applying a California statute that is almost identical to the North Dakota statute, the 9th Circuit Court of Appeals held that there is no liability for interest when the payment has been prevented by a valid order of a court. Bank of China v. Wells Fargo Bank & Union Trust Co., 209 F.2d 467, 476 (9th Cir. 1953). Since the deposit in court was made properly made by leave of court and on notice to the claimants under Fed.R.Civ.P. 67 and the money could not be withdrawn except by order of the court, the 9th Circuit held that the interest ceased to run on the date of deposit. Id. Here, the crop proceeds were properly deposited with the Clerk of the

District Court. AGSCO/Capital Harvest should only be allowed interest at the contract rate after deposit of the funds with the Court. Because the amount owed on the line of credit could not be paid to AGSCO/Capital Harvest while the funds were on deposit, the Bank should not be penalized and the prejudgment interest payable AGSCO/Capital Harvest should be limited to the *actual* interest earned from the amount on deposit with the court.

V. CONCLUSION

¶17 For all of the foregoing reasons, the Bank respectfully requests that this Court grant this Petition for Rehearing, finding that it did not adequately consider the issues presented.

DATED this 14th day of March, 2007.

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