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IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA

APR 14 2009  
STATE OF NORTH DAKOTA

Edward J Tarnavsky,  
Plaintiff, Appellant

vs.

Ron Rankin, Sheriff of McKenzie  
County, personally and in his  
professional capacity, Defendant,  
Appellee

McKenzie County 27-08-C-071  
NDSC 20090085

APPEAL FROM THE ORDER GRANTING  
SUMMARY JUDGMENT OF DISMISSAL WITH PREJUDICE

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MCKENZIE COUNTY DISTRICT COURT  
NORTHWEST JUDICIAL DISTRICT  
HONORABLE DAVID A NELSON, PRESIDING

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**BRIEF OF THE APPELLANT**

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## **STATEMENT OF THE CASE**

¶ 1 This is an appeal of a RICO (NDCC Chapter 12.1-06.1) complaint brought against the McKenzie County Sheriff, Ron Rankin for the predicate acts of transferring property and the moneys, without authority, from two judicial sales held in June and August of 2007. The court has awarded a summary judgment of dismissal, with prejudice, in favor of the Sheriff.

## **STANDARD OF REVIEW**

¶ 2 The standard of review for summary judgment is de novo, as all questions are questions of law. The standard of proof is a preponderance of the evidence.

¶ 3 “In an appeal from summary judgment, we review the evidence in the light most favorable to the party who opposed the motion and give that party the benefit of all favorable inferences which can be reasonably be drawn from the evidence. Bourgois v Montana Dakota Utilities, 466 NW 2 d 813-815 (ND 1991)” Lang v Barrios 472 NW 2 d 464 (ND 1991)

## **STATEMENT OF THE FACTS**

¶ 4 The defendant has provided exhibits A thru L, by affidavit under NDRCvP 34, of which there is no dispute.

¶ 5 The plaintiff has presented exhibits 1 thru 40, of which there is no dispute, by affidavit under NDRCvP 34.

¶ 6 At the Sheriff sale of June 5, 2007, Ed Tarnavsky presented to Sheriff Ron Rankin a written statement demanding payment of all absolute exemptions. This

statement is Plaintiff's Exhibit 1. [Appendix page 18] This statement noted that the value of the Assignment of Rents and Leases [App 19 ] made by Ed Tarnavsky on April 19, 2007 was more than the amount of the foreclosure judgment.

¶ 7 The Sheriff disregarded the demand for absolute exemptions.

¶ 8 The Sheriff disregarded the Assignment of Rents and Leases.

¶ 9 The district court did not review and confirm the sale of June 5, 2007 as required by law.

¶ 10 The Sheriff did file a Report of Sale with the court, which noted a surplus of more than \$1000, but cannot provide any receipt of its disposition. [App 85]

¶ 11 The Sheriff did transfer, without authority, the purchase money to the mortgage/judgment holder, The Union Bank, who did satisfy the mortgage contract, but the Sheriff did not apply the sale proceeds to the judgment. The judgment obtained by the Union Bank remains wholly unsatisfied, Plaintiff Exhibit 15. [App59] The Judgment obtained by the Union Bank is superior to all others.

¶ 12 On May 22, 2008, the Sheriff did accept redemption from Morris and Vonne Tarnavsky,[App 56] and on July 24, 2008 did issue a Sheriff Deed to Morris and Vonne Tarnavsky. This Sheriff Deed (Plaintiff Exhibit 29) did note that the court had confirmed the sale of June 5, 2007. [App 79]

¶ 13 Plaintiff Exhibit 29, an Affidavit of Ed Tarnavsky, notes the perjury of the Sheriff in his endorsement of the Sheriff Deed. This affidavit also notes that the sale was unconfirmed and therefore the redemption and Sheriff Deed were void.

¶ 14 On August 3, 2007, the Sheriff did conduct a judicial sale of Ed Tarnavsky's personal property. Morris Tarnavsky was the only bidder.

¶ 14 On August 3, 2007, the Sheriff did conduct a judicial sale of Ed Tarnavsky's personal property. Morris Tarnavsky was the only bidder.

¶ 15 The sale of personal property on August 3 was untimely and void ab initio as this sale was held 5 days after the Writ of Execution expired. [App 54]

¶ 16 The Sheriff did file with the court a report of sale dated July 5, 2007, [App 64] that indicated that the entire sale proceeds went to partially satisfy the inferior Judgment of Morris and Vonne Tarnavsky.

¶ 17 Prior to the sale, there was no appraisal or accurate inventory of the personal property.

¶ 18 The Sheriff did not honor the absolute exemptions of Ed Tarnavsky.

¶ 19 The district court has not reviewed and confirmed the sale of August 3, 2007.

¶ 20 On June 3, 2008, Ed Tarnavsky did personally serve Sheriff Ron Rankin and did make a backup service on his attorney Dennis Edward Johnson, McKenzie County States Attorney, with the summons and complaint in this matter. [App 7]

¶ 21 Ed served his NDRCvP 36 Request for Admissions.[App 101] The Sheriff moved for a protective order to prevent incrimination, which the court granted. [App 14] The court refused to grant the Plaintiff's Motion to Compel Discovery. [App 12]

## ARGUMENT

¶ 22 This is a case of first impression for this court. Normally the county Sheriff can be relied upon to conduct judicial sales according to the letter of the law. Likewise, the district court that ordered the sale can be relied upon to uphold the

sales from different courts. The Plaintiff, Ed Tarnavsky, has exercised his constitutional rights to have this matter redressed by the court by bringing this civil RICO claim against the Sheriff. Unfortunately, the politics of the Northwest District court system seem to have greater weight in this matter than does the Constitution of the State of North Dakota and the North Dakota Century Code. [App 63, 112, 113]

¶ 23 Discovery was started, by the service of a set 1 consisting of 17 Interrogatories. The Sheriff, in his answer to those Interrogatories, did admit that he was the Sheriff and that he had relied upon the advice and counsel of the McKenzie County State Attorney. As for the other 15 questions the Sheriff invoked Attorney-Client privilege. The Plaintiff made a motion to the court to compel discovery and the court refused. [App 12] The Plaintiff then served his Request for Admissions. [App 101] The Sheriff countered by requesting a protective order under NDRCvP 26 c, which the court granted. [App 14] Further discovery was dependent on the court to decide the Motion for Protective Order and to resolve the other discovery problems. It is a understatement to say that the Sheriff is stonewalling. The Supreme Courts holdings in Aho v Maragos 1998 ND 107, 579 NW 2d 165, [¶14] states:

The dispositive issue on appeal is whether the district court erred in not granting Maragos's request for additional time to conduct discovery to develop evidence in opposition to the motion for summary judgment. N.D.R.Civ. P.56(f) provides:

“(1)When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify, the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

A request for additional time for discovery under Rule 56(f) invokes

the trial court's discretion, and its decision will not be overturned on appeal absent an abuse of that discretion. *Perry Center, Inc. v. Heitkamp*, 1998 ND 78, ¶¶ 10-11; *Continental Casualty Co. v. Kinsey*, 513 N.W.2d 66, 69 (N.D. 1994). However, summary judgment under Rule 56 is only appropriate if the nonmoving party has had a full opportunity to conduct discovery to develop information essential to its position. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 257, 106 S.Ct. 2505, 2511 n.5, 2514, 91 L.Ed.2d 202, 213 n.5, 217 (1986); see also 11 Moore's Federal Practice § 56.10[8][a] (1998) ("The district courts have a duty under Rule 56(f) to ensure that the parties have been given a reasonable opportunity to make their record complete before ruling on a motion for summary judgment").

¶ 24 The above standard would indicate that the court was in violation of its duty described in NDRCvP 56 (f) by making its determination of summary judgment in favor of the defendant. The court had the option under NDRCvP 56(e) to render summary judgment against the moving party. It is noteworthy, that the moving party did not dispute the Plaintiff's assertion that he had met the required standard of proof to prevail, a preponderance of the evidence (NDCC 12.1-06.1-05, 9). The court in its rulings with regard to Ed's Motion to Compel Discovery (denied [App 14]) and the Sheriff's Motion for Protective Order (granted [App 16]) has prevented the plaintiff from completing discovery.

¶ 25 It is noteworthy that Judge Nelson has exercised (and perhaps abused) his discretion to rule on matters in this case which stem in part from his failure to observe his statutory duty under NDCC 28-23-08 and NDCC chapter 32-26 [App 63] with regard to the foreclosure sale of the case cited as 2006-C-090. The court docket 2006-C-090, Plaintiff's Exhibit 18, [App 65] clearly indicates closure of the case after Judge Nelson endorsed the Judgment of Foreclosure. The cross claim of torturous interference with a business relationship in that case, noted in Ed Tarnavsky's Affidavit of Exemptions #9, remains in limbo. [App 54]



¶ 26 It is uncertain whether the court gave any consideration to Ed's Request for Admissions, since in the interval between granting the Protective Order ( January 6, 2009) and the Motion for Summary Judgment ( February 3, 2009), default under NDRCvP 36 occurred. The items contained in the Request for Admission were essential to complete the issue of the extent of the racketeering activity.

¶ 27 Do the logical inferences contained in the Request for Admissions, assuming default, mandate reversal of the summary Judgment to favor the plaintiff?

¶ 28 The court has the duty with regard to these judicial sales, which the Plaintiff regards as theft, to review and confirm, or deny, the sale. The procedural safeguard of NDCC 28-23-13 has the effect of removing the liability from the Sheriff. Likewise, if the Sheriff had returned the executions without sale and wholly unsatisfied, his liability and this RICO action would not exist. The Supreme Courts holdings in Lang v Barrios 472 NW 2d 464 (ND 1991) (Plaintiff's Exhibit 28) [App 75] mandates this procedural safeguard to all execution sales. It is clear from the evidence available for review that the sheriff had no authority to sell Ed's Personal Property, because the sale was held five days after the Writ of Execution had expired. All of Ed's personal property was still subject to the unsatisfied Judgment of the Union Bank. It was the Sheriff who had the duty to apply the purchase money from the Real Estate to the Union Bank's judgment, when he transferred that money to The Union Bank, in the absence of the Order Confirming sale required by law. Since the Sheriff had not received any authority from the court for such a transfer, and since the Sheriff reserved no exemptions the definition of theft under NDCC 12.1-23-02 has been met.

¶ 29 NDCC 11-15-19 indicates that the Sheriff is liable for the two predicate acts complained of, transferring the property and the proceeds from the two sales of 2007 without authority. NDCC 12.1-23-02, 1 defines theft as:

"Knowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof;"

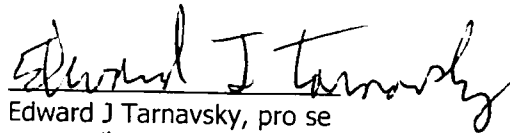
and NDCC 28-23-13 requires all judicial sales to be reviewed by the court for correctness of procedure; i.e.; matters of appraisal, and absolute exemption, an important duty noted in Lang, supra; citing Mees v Ereth, 466 NW 2d 135 (ND 1991), along with the accounting of any surplus and final distribution. An Order Confirming Sale is considered a final order under NDCC 28-27-02 and is appealable. ( see Tarnavsky v Tarnavsky Appellant brief 20050457, Plaintiff Exhibit 5, App 25) Without a final order the Appellant runs the risk of NDRAP 35 summary dismissal. On appeal the appellant has the opportunity to argue whether the sale is void or voidable or as decided by the Supreme Court, Tarnavsky v Tarnavsky 2006 ND 124, void ab initio. In this situation there were two judicial sales from two separate courts in the Northwest District and neither court reviewed the sale and issued the required orders. Without these orders the Sheriff was without authority to release the property and proceeds of the sales, and therefore has committed theft. It is these two predicate acts which give rise to this action being brought under RICO.

## CONCLUSION

¶ 30 The Supreme Court decision in Tarnavsky v Tarnavsky 2006 ND 124 mandated restitution.

¶ 31 The Plaintiff/Appellant Ed Tarnavsky respectfully requests that the Supreme Court reverse the decision of the district court and remand this matter back to the district court for further proceedings under NDCC 12.1-06.1-05,4 a-d for restitution and civil damages.

Respectfully submitted this 14<sup>th</sup> day of April, 2009



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