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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

December 7, 2009

Jarick Products, Inc. d/b/a Dakota Gypsum, Plaintiff and Appellee, v. MID AM Group, LLC, Defendant, and D. Duane Peterson, Defendant and Appellant.	Supreme Court No. 20090290 Cass County No. 09-08-C-04126

APPEAL FROM THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE DOUGLAS R. HERMAN, PRESIDING

APPELLANT'S BRIEF

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[¶ 3]STATEMENT OF THE ISSUE

Whether the District Court erred in denying defendant D. Duane Peterson's Motion to Vacate Judgment under Rule 60(b) N.D.R.Civ.P.

[¶ 4]STATEMENT OF THE CASE

On August 4, 2008, the Defendants in this matter, MID AM Group, LLC, ("Mid Am") and D. Duane Peterson ("Peterson), as an individual, were personally served with the Summons and Complaint, whereby Plaintiff sought judgment against both Defendants. See Appendix to Appellant's Brief ("App.) App. at pp. 6-9; p. 16. Plaintiff subsequently filed the Application for Entry of Default Judgment along with supporting affidavits. App. at pp. 10-18. On October 1, 2008 Default Judgment was entered against both Defendants in the amount of $110,296.08. Transcript of Proceeding, from hearing dated June 29, 2009, ("T.) at p. 21; App. at p. 21.

[¶ 5]An Order to Show Cause hearing, for failing to comply with discovery requests and to show cause for failure to comply with a court order compelling responses to discovery requests, was held on April 6, 2009. Transcript of Proceeding, from Order to Show Cause hearing dated April 6, 2009, at pp. 3-4. At said Order to Show Cause hearing, Defendant D. Duane Peterson, individually, made his first appearance in the action and requested and was granted time to comply with the court order compelling discovery and to prepare and file a Motion to Vacate Judgment. Transcript from Order to Show Cause hearing dated April 6, 2006, at pp. 4-6.

[¶ 6]On May 7, 2009, Defendant D. Duane Peterson individually filed the Motion to Vacate Judgment along with the Affidavit of D. Duane Peterson and accompanying affidavits. App. at pp. 19-43. Plaintiff filed its Brief in Opposition to Defendant D.

Duane Peterson's Motion to Vacate Judgment on May 15, 2009. App. at pp. 44-108. A hearing was held on June 29, 2009, on the Motion to Vacate Judgment, along with other objections that had been filed by the parties concerning service issues and exemption claims, but with the Motion to Vacate Judgment being the primary purpose. T. at pp. 4-5. At the hearing, Defendant D. Duane Peterson testified, and his Affidavit dated April 22, 2009 along with its exhibits, filed in support of the Motion to Vacate Judgment, was accepted as part of the record from the hearing. T. at p. 6; at p. 26. Defendant Peterson's testimony was limited to explaining why he took no action after service of the Summons and Complaint. T. at pp. 7-8.

[¶ 7]The Court denied the Motion to Vacate Judgment after hearing testimony and arguments from counsel. T. at pp. 33-39. Notice of Entry of Amended Order along with the Amended Order on Defendant's Motion to Vacate Judgment, Plaintiff's Objection to Defendant's Claim of Exemptions and Defendant's Objection to Plaintiff Garnishee Summons and Lien dated July 30, 2009, was served by Plaintiff on August 5, 2009. App. at pp, 109-113. Defendant Peterson filed the Notice of Appeal on October 2, 2009. App. at p. 114.

[¶ 8]STATEMENT OF FACTS

Mid Am Group, LLC was formed during the latter part of 2004. Affidavit of D. Duane Peterson dated April 22, 2009, as incorporated into the hearing held June 29, 2009; App. at p. 29. The LLC had only the Defendant Peterson as its shareholder or member. App. at p. 29. Mr. Peterson at the time of the hearing on this matter, June of 2009, was 74 years old. T. at p. 10. Mid Am Group was formed to build a large

condominium complex called Village Homes at Harwood Groves, located at 3220 and 3230 11th St. S., Fargo, ND 58103. App. at p. 29.

[¶ 9]A contract was reached with Frame to Finish, Rod Sieg, ("Frame to Finish") as contractor on September 14, 2005, and Mid Am Group as owner. App. at pp. 29-30; pp. 34-39. In the contract, Frame to Finish was to provide all labor, equipment, fasteners, and direct onsite daily supervision; . . . and to complete all drywall work. App. at p. 30; p. 35. The contract was a labor contract only, and all materials were to be provided by Mid Am Group. App. at p. 30; p. 35. Said contract was signed by Rod Sieg as contractor dba Frame to Finish/BIDCOM on the last page, and then Owner: Mid Am Group, L.L.C., By Duane Peterson, President. App. at p. 30; p. 39. The important point is that Duane Peterson signed as president of Mid Am Group, not as an individual. App. at p. 39.

[¶ 10]Plaintiff, Jarick Products d/b/a Dakota Gypsum was hired by Frame to Finish to supply the materials for the project. App. at p. 30. Neither Mid Am Group or Duane Peterson individually had any dealings with Dakota Gypsum as far as reaching an agreement on prices, quantities, dates, times, etc. App. at p. 30. Mid Am Group was to set up an account with Dakota Gypsum for the purpose of providing the materials. App. at p. 30. Mid Am Group was to pay for the materials as work progressed. App. at p. 30. Mid Am Group agreed only to pay the bills. App. at p. 30. Most importantly, the agreement was with Mid Am Group, and not Duane Peterson individually. App. at p. 30.

[¶ 11]Occasionally Dakota Gypsum would call Mid Am Group's office and request payment. App. at p. 30. Duane Peterson never dealt with Dakota Gypsum as an individual. App. at p. 30. Dakota Gypsum knew this full well at the time of the

agreement and as the months progressed. App. at p. 30. Mid Am Group paid Dakota Gypsum by checks in the name of Mid Am Group, of which payments exceeded $301,000.00. App. at p. 30.

[¶ 12]First International Bank in Fargo provided the financing for the project. App. at p. 31. The project was to contain 50 units. App. at p. 31. Mid Am Group had 10 pre-sales when it obtained financing. App. at p. 31. Mid Am Group had collected $2,700,000.00 in pre-sales. App. at p. 31. Mid Am Group obtained approved credit for up to $8 million in increments of $5 million, $1.5 million, and $1.5 million from First International Bank. App. at p. 31. Mid Am Group had approved credit ready to pay for the materials and labor on the project. App. at p. 31. Construction started during the fall of 2005 and progressed through 2007. App. at p. 31. Dakota Gypsum was paid regularly along with many other subcontractors. App. at p. 31.

[¶ 13]Neither Mid Am Group or Duane Peterson individually intentionally deceived Dakota Gypsum when making purchases for materials. App. at p. 31. During the whole course of the project, First International Bank was providing financing and Mid Am Group was looking for investors, trying to raise funds. App. at p. 31. Due to all of the complexities on a project this large, Mid Am Group did not have a point when it felt it could not pay subcontractors for it was continually working towards a successful completion and trying to make sales. App. at p. 31.

[¶ 14]Eventually sales of the condominiums slowed and reached the point where First International Bank demanded payment. App. at p. 31. First International Bank finally cut off the project. App. at p. 31. Mid Am Group never got the occupancy permit because of the stalled construction. App. at p. 31. Mid Am Group was never a fully

funded project from the beginning and Dakota Gypsum with Frame to Finish knew this all along. App. at p. 31. This is very common practice with this large of a construction project in the region. App. at p. 31. Mid Am Group was from day one set up to construct only the condominium complex called Village Homes at Harwood Groves, never as a shell for individual dealings. App. at p. 32.

[¶ 15]The Summons and Complaint in this matter were personally served upon Mr. Peterson in August of 2008, at a time when he was getting a lot of paperwork served on him. T. at p. 10; App. at pp. 6-9; p. 16. Around that time there were twenty separate legal actions being taken against Mid Am. T. at p. 11. Mr. Peterson at the time was overwhelmed with legal documents; there was a stack of them. T. at p. 17. He at sometime realized that this particular action was the only one where anybody asked for an answer. T. at p 17. On October 1, 2008, the court entered a default judgment against Duane Peterson individually for the sum of $110,296.08, due to the lack of any appearance made by Mr. Peterson. App. at p. 2. During November of 2008, Mr. Peterson left for California and did not return until after Christmas. T. at p. 15. Upon being served with the Notice of Entry of Judgment, Mr. Peterson was mentally not prepared to do anything. T. at p. 21. He felt a lot of sadness, a lot of tears. T. at p. 21.

[¶ 16]On May 7, 2009, Mr. Peterson filed the Motion to Vacate Judgment. App. at pp. 19-43. By its lack of even addressing the facts or arguments concerning the meritorious defense of Defendant Peterson, that grounds did not exist to pierce the corporate veil and find him individually liable, plaintiff at the hearing on the motion conceded the point that Duane Peterson had a meritorious defense. See. T. at p. 29. At the hearing on June 29, 2009, the court denied the motion. T. at pp. 33-39. In its

determinations, the court emphasized strictly that it felt Mr. Peterson's disregard for the legal process overruled the possibility of bringing a meritorious defense. T. at pp. 33-34.

[¶ 17]Counsel for Mr. Peterson argued that a person disregarding the legal process who has no meritorious defense should not be successful under Rule 60(b) of the North Dakota Rules of Civil Procedure. T. at p. 33. Counsel further argued if the court focuses only upon a person's inactivity and no plausible explanation for that inactivity, and dismisses the possibility of a meritorious defense, under that rationale no case would ever be reopened. T. at. p. 33. The court stated:

> I see what you're saying. But, I'm just saying when we -- a Judgment had been entered, Notice of the Entry of Judgment was promptly served, that was promptly followed up with Interrogatories. They weren't answered, then Motion to Compel, not answered. Order to Show Cause hearing continued, and then he finally shows up. I think that appearance was not until he came back in early April, maybe April 9th, 10th, something in there. But, by that time, I mean it's crystal we've gone on – anybody who can read knows we've had for five or six months have been dealing with a personal Judgment. It just – it's a little bit of an a front (sic) to me that we carry on legal proceedings and we try to be it very carefully. We try to do things on the merits, and people just ignore them, and then come back and say, well, this is inadvertence. I'm trying to draw the line in my mind, and I can't, between inadvertence and just ignoring the legal process. T. at pp. 33-34.

Counsel for Mr. Peterson then pointed out that inadvertence was not the grounds upon which the Motion to Vacate was based, rather, it was the inequity, that it was completely wrong and unfair to allow a judgment to stand, when the facts were as they are. T. at p. 34. Counsel reiterated under case law the standard was relief was to be liberally construed, and doubt, if any, was to be resolved in favor of the moving party. T. at p. 34. The court again ignored the possibility of a meritorious defense. T. at pp. 33-34.

[¶ 18]STANDARD OF REVIEW

A motion under the subdivisions of Rule 60(b), except a motion under subdivision (iv)(judgment is void), are left to the court's discretion. First National Bank of Crosby v. Bjorgen, 389 N.W.2d 789 (N.D. 1986)(emphasis added). Such discretion shall not be disturbed on appeal unless the trial court abused that discretion. Id. An abuse of discretion is defined as an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id.

[¶ 19]LAW AND ARGUMENT

I. The District Court wrongfully ingored the long established liberal standard in deciding the motion to vacate judgment under Rule 60(b), and its actions were unreasonable and arbitrary, an abuse of discretion.

[¶20] Rule 60(b) states as follows:

> (b) **Mistakes-Inadvertence-Excusable Neglect-Newly discovered evidence-Fraud-Etc.** On motion and on such terms as are just, the court may relieve a party or a party's legal representative from a final judgment or order in any action or proceeding for the following reasons: (i) mistake, inadvertence, surprise, or excusable neglect; (ii) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (iii) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (iv) the judgment is void; (v) the judgment has been satisfied, released, or discharged, or a previous judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (vi) any other reason justifying relief from the operation of the judgment. . . .

N.D.R.Civ.P. 60(b)(emphasis added).

[¶ 21]While the trial court certainly has discretion to grant or deny N.D.R.Civ.P. 60(b) motion to vacate default judgment, range of discretion is limited by three important considerations. CUNA Mtg. v. Aafedt, 459 N.W.2d 801 (N.D. 1990). First,

N.D.R.Civ.P. 60(b) is remedial in nature and should be liberally construed and applied. Id. Second, decisions on merits are preferable to those by default. Id. Third, as consequence of first two considerations, where timely relief is sought from default judgment and movant has meritorious defense, doubt, if any, should be resolved in favor of motion to set aside judgment so cases may be decided on their merits. Id.

[¶ 22]Duane Peterson has stated that the default judgment entered on 10/1/08 should have been vacated because it had in essence pierced the corporate veil unfairly and inequitably. When considering the facts and circumstances of the events leading up to the issuance of the Summons and Complaint in this matter, it was no longer equitable that Duane Peterson be held individually responsible for the sum as stated in the judgment.

N.D.C.C. 10-32-29 (1) and (3) state as follows:

> 1. Subject to subsection 3, a member, governor, manager, or other agent of a limited liability company is not, merely on account of this status, personally liable for the acts, debts, liabilities, or obligations of the limited liability company.
>
> 3. The case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under North Dakota law also applies to limited liability companies.

[¶ 23]The corporate veil may be pierced when the legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime. Intercept Corp. v. Calima Financial LLC, 2007 ND 180, 741 N.W.2d 209 (N.D. 2007); citing Jablonsky v. Klemm, 377 N.W.2d 560, 563 (N.D. 1985). An element of injustice, inequity or fundamental unfairness must be present before a court may properly pierce the corporate veil. Jablonsky at 564. The burden of establishing the necessary elements for piercing

the corporate veil rests on the party asserting the claim. Id. Resolving the issue is heavily fact-specific and therefore, within the sound discretion of the district court. Id.

[¶ 24]The officers and directors of a corporation generally are not liable for the ordinary debts of a corporation. Axtmann v. Chillemi, 2007 ND 179, 740 N.W.2d 838 (N.D. 2007); citing Jablonsky, 377 N.W. 2d 560, 563. Organizing a corporation to avoid personal liability is a legitimate goal and is one of the primary advantages of doing business in the corporate form. Axtmann, 2007 ND 179. Piercing the corporate veil should be the exception to the rule. Id.(Crothers, Justice, concurring in part and dissenting in part). Allowing otherwise would set a dangerous precedent susceptible of stifling start-up ventures and exposing small business owners to personal liability well beyond the legislature's intention. Id.(Crothers, Justice).

[¶ 25]The following factors have been applied to determine whether to disregard a corporate entity and pierce the corporate veil:

> Insufficient capitalization for the purposes of the corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of the debtor corporation at the time of the transaction in question, siphoning of funds by the dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and the existence of the corporation as merely a facade for individual dealings.

Axtmann, 2007 ND 179; citing Jablonsky, at 563-64.

[¶ 26]Proof of fraud is not a necessary prerequisite for disregarding the corporate entity, but an element of injustice, inequity, or fundamental unfairness must be present before a court may properly pierce the corporate veil and that element of unfairness may be established by the showing of a number of the requisite factors for piercing the corporate veil. Axtmann, 2007 ND 179. The essence of the requirement for fairness is

that an individual cannot hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell. Id.

[¶ 27]This Court has also recognized that the attitude toward piercing the corporate veil is more flexible in tort than in contract, because the creditor has an element of choice inherent in a voluntary contractual relationship whereas the ordinary tort case forces the debtor-creditor relationship upon the creditor by the occurrence of an unexpected tort. Id. In tort cases, particular significance is placed on whether a corporation is undercapitalized, which involves an added public policy consideration of whether individuals may transfer a risk of loss to the public in the name of a corporation that is marginally financed. Id.

[¶ 28]The facts in this matter show a contractual relationship was created between Frame to Finish as the general contractor and Mid Am Group, LLC as the owner of the complex. Duane Peterson signed that contract as president of Mid Am Group, as an officer of that LLC. Nowhere was his signature or acceptance shown in an individual capacity. Frame to Finish then contracted with Dakota Gypsum to provide the materials for the sheet rocking project while Frame to Finish provided the labor. Dakota Gypsum was to be paid by Mid Am Group and set up an ongoing account with Mid Am Group. Payments of many thousands of dollars on the account were made by Mid Am Group as the work progressed over months. Dakota Gypsum at all times conducted its affairs with Mid Am Group, LLC.

[¶ 29]Fraud was non-existent in this case. All dealings by Mid Am Group were done in good faith. A huge line of credit had been established with First International Bank in Fargo to make payments on the project. Many, many payments were submitted

by Mid Am Group and accepted by Dakota Gypsum. Mid Am Group had collected $2,700,000.00 in pre-sales of 10 units when it obtained financing. Mid Am Group had approved credit ready to pay for the materials and labor on the project. Construction started during the fall of 2005 and progressed through 2007. Again, Dakota Gypsum was paid regularly along with many other subcontractors. Mid Am Group made provisions for the payment of its liabilities from the very beginning. Mid Am Group did not have a point when it felt it could not pay subcontractors and at which it continually and deceitfully made purchases, for it was continually working towards a successful completion, trying to make sales.

[¶ 30]Mid Am Group was never a fully funded project from the beginning and Dakota Gypsum with Frame to Finish knew this all along. This is very common practice with this large of a construction project in the region. Mid Am Group was from day one set up to construct only the condominium complex called Village Homes at Harwood Groves, never as a shell for individual dealings. The project was funded with the credit obtained from First International Bank, and from pre-sales. Dakota Gypsum under a contractual arrangement made its own decisions by taking the risk and advanced its own credit, knowing full well the whole project was dependent upon the units in the condominium complex being sold.

[¶ 31]Moreover, nowhere were funds taken in secret or in a shady manner from Mid Am Group to Duane Peterson. LLC records were in existence, up to date and legitimate. Duane Peterson rightfully formed the LLC utilizing the protection of the laws under the North Dakota statutes to avoid individual liability.

[¶ 32]The District Court misinterpreted the controlling case law to be used under Rule 60(b), and instead focused solely upon Mr. Peterson's inaction, and his failure of an explanation, in its denial of the motion. The District Court ignored the strong defense presented by Mr. Peterson, ignored that it was inequitable and unfair to have the default judgment be applied in the future, and unreasonably and arbitrarily used its own logic to base its decision upon.

[¶ 33]The facts show that Mr. Peterson had no legal counsel at the time of the service of the Summons and Complaint. He was deluged with legal paperwork at the time, being served with twenty separate legal actions. Mr. Peterson at the time was overwhelmed with legal documents; there was a stack of them. He at sometime realized that this particular action was the only one where anybody asked for an answer. Upon being served with the Notice of Entry of Judgment, Mr. Peterson was mentally not prepared to do anything. He felt a lot of sadness, a lot of tears.

[¶ 34]It is not so hard to imagine a lay person, unsophisticated in legal process, simply deciding it was too much, taking some time off, and then later regrouping and doing something about all of the legal problems. After a period of around 6-7 months, Mr. Peterson obtained legal counsel. That hardly amounts to untimely action. It was well within one year. It does not amount to complete disregard for the legal system. He needed some time off to decide what to do. It is absolutely wrong and unfair when it was clear that Mid Am was the operating entity here to allow this judgment to stand.

[¶ 35]As stated in CUNA Mtg. v. Aafedt, 459 N.W.2d 801 (N.D. 1990), first, N.D.R.Civ.P. 60(b) is remedial in nature and should be liberally construed and applied; second, decisions on merits are preferable to those by default; third, as consequence of

first two considerations, where timely relief is sought from default judgment and movant has meritorious defense, doubt, if any, should be resolved in favor of motion to set aside judgment so cases may be decided on their merits. The district court completely ignored these standards. The court did not use the remedial nature of Rule 60(b). It did not liberally construe and apply that provision. Here a strong meritorious defense was presented. The court did not allow this case to be decided on the merits and instead used a procedural determination not based on substance. Doubt, if any, should be resolved in favor of a motion to set aside judgment so cases may be decided on their merits. There was doubt presented here and the court ignored the legal precedent.

[¶ 36]CONCLUSION

Defendant Duane Peterson respectfully requests the court reverse the Amended Order on Defendant's Motion to Vacate Judgment, Plaintiff's Objection to Defendant's Claim of Exemptions and Defendant's Objection to Plaintiff Garnishee Summons and Lien, dated July 30, 2009.

Dated this 7th day of December, 2009.

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[¶ 37] CERTIFICATE OF SERVICE

A copy of this document and the Appendix to Brief of Appellant in pdf format were e-filed with the North Dakota Supreme Court and served upon Jon R. Brakke, Attorney at Law, Vogel Law Firm, on the 7th day of December, 2009. Specifically, this document and the Appendix to Brief of Appellant were electronically filed and served as follows:

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/s/ L. Patrick O'Day
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