

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

**Supreme Court No. 20130199
Dickey County District Court No. 11-2010-CV-00078**

**Forbes Equity Exchange, Inc.,
Plaintiff/Appellee,
Vs.
Keith Jensen,
Defendant/ Appellant.**

BRIEF OF APPELLEE FORBES EQUITY EXCHANGE, INC.

Appeal from the Judgment entered on May 3, 2013 in District Court, County
of Dickey, North Dakota, the Honorable John T. Paulson, Presiding.

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STATEMENT OF THE ISSUE

[1] Whether the Findings of Fact, Conclusions of Law, and Order for Judgment of the Court were clearly erroneous, based on evidence presented at trial.

STATEMENT OF THE CASE

[2] Plaintiff Forbes Equity Exchange (“FEE”), a North Dakota cooperative grain elevator, filed suit against Arden Sieh (“Sieh”), who operated a feed lot in South Dakota, and against Keith Jensen (“Jensen”) whose cattle were fed at the feed lot. FEE claimed \$166,015.18 worth of corn had been delivered to the feed lot without payment, that Sieh had given FEE checks totaling \$166,015.18 for the corn, which checks were dishonored, and that Jensen’s cattle consumed some of the corn FEE delivered.

[3] Jensen owned land on which Sieh operated a feed lot which serviced cattle of Jensen and of other cattle owners. The feed and care Sieh gave to Jensen’s cattle was paid partially by Sieh crediting Jensen for rent Sieh owed Jensen for the feed lot premises, and partially by Jensen checks to Sieh. Each year from 2003 through 2008 Jensen’s cattle consumed more feed than the rent credits plus payments. Over \$800,000 was due to Sieh from Jensen for cattle care from 2003 until Sieh closed his feed lot at the end of 2008.

[4] During pendency of this action, Sieh assigned to FEE all claims that Sieh had against Jensen regarding cattle care, in exchange for FEE withdrawing any claims it had against Sieh for the feed and bounced checks. FEE filed a Second Amended Complaint against Jensen, and thereafter FEE's primary cause of action was as assignee of the Sieh claims against Jensen. Sieh filed for voluntary Chapter 7 Bankruptcy on December 12, 2011. Sieh's bankruptcy petition listed contested claims of Jensen against Sieh as a potential liability, and Jensen submitted a bankruptcy claim against Sieh for \$3,561,398.09. Sieh was discharged of all bankruptcy debts and claims on April 13, 2012.

[5] A bench trial was held on November 29-30, 2012 before Judge Paulson. The Court ruled that FEE had proven that Jensen owed Sieh a net amount of \$803,501.48 for feed and care Sieh had provided for Jensen cattle, and, as the Sieh claim had been assigned to FEE, that Jensen owed FEE \$803,501.48. Costs were assessed at \$1908.13, and on May 3, 2013 judgment of \$805,409.61 was entered for FEE against Jensen. Jensen appealed.

STATEMENT OF FACTS

[6] Prior to 1998 Sieh's father had owned 2 ¼ sections of land in South Dakota, on which was a feed lot, pasture and crop land. Jensen bought the

land and in 1998 leased all the land, including the feed lot, to Sieh via a 5 year written lease. [1Tr. (Day 1 transcript) 155, lease is at App (Appendix filed by Jensen) 73-79] . Jensen is a cattle buyer and seller, who purchased cattle, usually from out of state, trucked them to the feed lot, and kept them at the feed lot for finishing or for sale. [1Tr. 156]. During the written lease term Sieh paid rent to Jensen partially by check, and partially by crediting Jensen for feed Sieh was providing Jensen cattle. [1Tr. 157]. Both Sieh [at 1Tr. 161] and Jensen's wife Joy Jensen [at 2Tr. 161] testified that as of March 2003, Jensen and Sieh were "even" with neither owing money to the other, and the trial court adopted that as Finding of Fact #3. [App 258. See also Memorandum Opinion, App 115]. "Therefore the key items of evidence were those that showed the obligations of Sieh and Jensen to each other from 2003 through 2009, when Sieh ceased his feed lot and vacated the Jensen land." [Finding of Fact #3, App 258].

[7] Cindy Lunders, an accountant who worked as bookkeeper for Sieh from 2002 to about end of 2008 [1Tr. 13], testified that the Sieh feed lot contained many separate pens. Each pen held the cattle of only one customer. Every day the amount of feed placed into each pen was recorded on feed sheets, which, together with vet bills, in and out and weigh tickets, were entered into Pro-Mini, software designed for feed lots. [1Tr. 14-17].

Billings to each customer were based on the tickets for cattle coming into and leaving the feed lot, the weigh tickets, the vet sheets, and the feed sheets. [1Tr. 20-23]. Lunders testified that if Sieh was notified that Jensen had sold cattle while the cattle were at the feed lot and had been fed by Sieh, and the buyer had agreed to pay for the cattle feed the entire time the cattle were in the feed lot, she “backed out” or reversed the charges on Jensen bills for the amount of feed Jensen had been charged for the sold cattle, and she applied those charges to the purchaser of the cattle. [1Tr. 24, 27].

[8] Lunders testified that she had been deposed on November 12, 2012, about three weeks before the trial, and that during that deposition counsel for Jensen showed her three boxes of documents (Exhibits #1,#2,#3) which she identified as the original daily feed sheets that Sieh used to compile the amount of feed consumed each day by cattle for each particular owner, and thus the amount the owner would be billed. [1Tr. 17-25]. Lunders also testified that at her deposition counsel for Jensen had shown her a bundle of original Sieh documents relating to cattle Jensen had brought to the feed barn in 2007 and 2008, which documents, and the billing summarizing the documents, were offered as Exhibit #4. [1Tr. 25-28]. Exhibit #4 was an example of Jensen selling cattle while they were at the Sieh feed lot, and

Lunders “backing out” from Jensen’s bill the feed for those cattle, because the buyer agreed to pay feed lot costs for them. [1Tr. 27-28].

[9] Lunders introduced, initially for identification purposes only, Exhibit #5 [App 9-10], prepared by her, which summarizes Sieh’s claims against Jensen from 2003 – 2009. [1Tr. 29]. In remarks to the court just before testimony began, counsel for Jensen admitted Jensen had a copy of Exhibit #5 for 18 months, and during a pretrial meeting about a month before trial was offered banker’s boxes full of original documents upon which the summary is based. [1Tr. 3]. Lunders also introduced Exhibits #6 through #57, each of which contained Sieh’s billings to Jensen, on a quarterly or other time period, together with the documents such as feed sheets, vet sheets, weigh and in and out tickets on which each of the billings were based. Lunders testified that she had prepared each of the Exhibits #6 through #57 from the original feed sheets and other documents, [1Tr. 30-63]. The information in each of Exhibits #6 through #57 was summarized in Exhibit #5, sometimes referred to as “Exhibit P-5.” [1Tr. 29-63]. The foundation for Exhibit #5 having been laid, it was received as a full exhibit, Doc ID #146. [1Tr. 77]. Exhibit #5 was referred to frequently during the trial, as it contains a summary of Sieh’s claim against Jensen. It consists of six columns:

[10] The first column consists of the dates Jensen was billed by Sieh (as per the individual invoices Exhibits #6 - #57), the dates Jensen paid Sieh or was credited by Sieh, and an explanation of charges or credits.

[11] The second column is entitled “Billing to KJ,” consists of the amount in each of the various billings Sieh provided to Jensen, and is based on the documents submitted as Exhibits #6 - #57.

[12] The third column is entitled “Payments Made by KJ,” and consists of money received from by Jensen, regardless of whether Jensen characterized the money as “payments” or as “loans”, and other credits in favor of Jensen.

[13] The fourth column is entitled “Rent Due to KJ,” and consists of credits in favor of Jensen for Sieh’s rental of Jensen’s 2 ¼ sections of land.

[14] The remaining columns “Yearly Total” and “Running Total” are mathematical summaries of the other columns.

[15] Although this action began as a claim by FEE against Sieh and Jensen for feed delivered by FEE, the assignment of Sieh’s claims against Jensen changed the focus of this matter to the relationship between Sieh and Jensen.

The trial in this matter began with FEE proceeding against Jensen in two counts. One count was based on the unjust enrichment of Jensen based on Jensen’s cattle consuming feed provided by FEE for which FEE had not been paid. ... FEE established it was impoverished in amount of \$166,015. .. However, Sieh was unable to quantify how much feed provided by FEE was consumed by the

Jensen cattle, and ... the Court dismissed FEE's unjust enrichment count...

FEE's second count, and the only one considered by the Court, was as assignee of all claims that Sieh had against Jensen. Thus, the only issue in the trial was the net amount that Jensen owed to FEE, as assignee of Sieh's claims against Jensen, for feed and other services Sieh had provided to Jensen cattle, less any allowable set offs for rent or other obligations that Sieh owed to Jensen. [The Issue At Trial, part of the Findings of Fact, etc. App 257].

[16] The trial court found that "Lunders testimony as to Exhibit #5 was credible," [Finding #7, App 260] and used that document as a starting point to determine what Jensen owed Sieh. The court recognized that any defense Jensen had to Sieh's claims would have to be one or more of the following: (1) the "Billings to KJ" on Exhibit 5 were too large; or (2) the total of the "Payments Made by KJ" column was too small; or (3) the total of the "Rent Due to KJ" column was too small. The court considered all the possibilities.

[17] On direct examination Jensen was asked about Exhibit P-5:

Q....taking a look ... it says "Payments made by KJ?"

A. Yes.

Q. Do you have any reason to – to disagree with those numbers.

A. No. [2Tr. 74]

On cross examination Jensen was asked about the "Payments made by KJ" column on Exhibit P-5:

Q. Do you think that you made more payments to him then (sic) –are what are shown on that statement?

A. No. ...

Q. ...then you figure all the payments that you made to Mr. Sieh are shown on ... P-5?

A. Right. ..[2Tr.112-113].

[18] Based on Jensen's testimony, the court found:

At trial Keith Jensen testified that he has no objection to the... column, payments made by Jensen. Further, Jensen made no credible claims against Sieh other than related to the feed lot rent. Therefore any defenses or offsets by Jensen to Sieh's claims against Jensen must contradict the first column of Exhibit #5, the bills from Sieh, or the ...rent credits. [Finding #5, App 259].

[19] When asked about the "Billings to KJ" column on Exhibit P-5, Jensen disagreed with some invoices, but failed to specify which ones.

Q. ...do you also disagree on the... amount that he billed to you?

A. Well, yeah, some of these ain't true, but....

Q. So just, can you point out specifically which of the billings on P-5 you think are not true.

A. I'd have to go over them, don't know.[2Tr. 113-114].

...

A. There's a lot of stuff in Arden's billing here that ain't true.

Q. Okay. Which is – specifically what stuff?

A. Well, I don't know what stuff, but it ain't. And maybe it was just over priced there, you see. I don't know what that was right now – don't know right now. I think the main thing if you get down to the bottom of the line, is always the main thing, that \$1,256,888.61." [2Tr 124-125].

Jensen did not provide documentation or credible testimony on what the

number \$1,256,888.61 is based. Due to Jensen's testimony, the court found:

...Jensen offered no evidence as to what should be the correct billing from Sieh to Jensen, and introduced no documentation to discredit the Exhibit P-5 summary, or any of the bills from Sieh to Jensen that Lunders introduced into evidence... [Finding #7, App 260].

The testimony, primary documents and summary submitted by Ms. Lunders established that Jensen owed Sieh the amounts on Exhibit #5. Insofar as Jensen agreed with the "Payments Made by KJ" column of Exhibit #5, and offered no specific evidence to contest the "Billing to KJ" column, the only defense Jensen could have had to the Sieh claims summarized in Exhibit #5 must pertain to the "Rent Due to KJ" column. [Finding #8, App 260].

[20] Jensen admitted that there were no writings, and no legal documents, such as a notice of termination of lease, between Jensen and Sieh regarding the feed lot rental status after the written lease expired in 2003. [2Tr. 87-88]. While reviewing the column on Exhibit P-5 that shows the annual rent of \$115,000 that Sieh was crediting Jensen, Jensen disagreed with the \$115,000 per year amount, but gave conflicting testimony as to what the correct rent credit should have been. On direct examination he referred to Exhibit D-11 which shows monthly rent should have been \$146,000 based on 8,000 head of cattle kept at the feed lot. [2Tr.64]. On cross examination Jensen said rent should have been "186-something. Q. So you're thinking he should have been crediting you with \$186,000 instead of the \$115,000? A. Right." [2Tr113]. Jensen did not explain how he arrived at \$186,000 as the correct rent.

[21] Sieh testified that after the written lease expired, and there was no oral or written agreement as to the new rent, the rental arrangement continued as before, with Sieh crediting Jensen \$115,000 per year for rent,

and deducting that amount from what Jensen owed Sieh for cattle care. [1Tr. 158-159]. The trial court found:

Jensen admitted he never gave Sieh any writing that Sieh was in default of any rental arrangement. Jensen also testified that he did not convey to Sieh in writing what new rental arrangement Jensen wanted after the written lease expired in 2003....Jensen failed to take any affirmative actions necessary to assert control over the cropland or feed lot, or, via eviction or via service of notice to quit as a prerequisite to eviction, to force Sieh to accept whatever rent Jensen wanted . Therefore, after 2003 Jensen treated Sieh as a tenant under the terms of the lease that expired in 2003. [Finding #11, App 261].

This court finds that ... the \$115,000 a year agreement is the contract between the parties from 2004 until 2008. [Memorandum Opinion App 121].

[22] The trial court found that Jensen either agreed with the amounts in the “Billings to KJ”, the “Payments Made by KJ” and the “Rent Due to KJ” column in Exhibit #5, or introduced no credible alternative amounts.

Therefore, Exhibit #5 was the starting point for computing what Jensen owed to Sieh, but the court gave Jensen opportunity to present any defenses or setoffs to that amount.

[23] Jensen filed a claim for \$3,561,398.09 against Sieh in Sieh’s Chapter 7 bankruptcy, for “money loaned, rent owed, insufficient funds on checks.” [Exhibit #63, 1Tr. 173, Finding #12, App 261]. That claim, together with all other claims, was discharged on April 13, 2012 in the Sieh bankruptcy.

[Exhibit #64, 1Tr. 174, App 114]. Although the bankruptcy claim by Jensen

did not detail the \$3,561,398.09 claim, at trial Jensen attempted to introduce Exhibit D-11, dated February 29, 2012, [App 123-132] which summarizes the Jensen claims against Sieh, and totals to the bankruptcy claim of \$3,561,398.09. Jensen was asked:

Q. And is it your testimony that this [referring to Exhibit D-11] is a -
- a summary of what is owed to you [from Sieh]?

A. Oh absolutely , yes. True and honest. [2Tr. 72].

There was an objection from FEE to introduction of D-11 as a full exhibit because the document contained summaries, and no foundation had been laid for it, and also because it had not disclosed in discovery [2Tr 54-55], but the trial court did not prevent questioning about it or based on it.

[2Tr.137]. The trial court advised Jensen the type of foundation needed for the document:

... [T]here's quite a bit of foundation as far as I'm concerned that's missing, which you have the right to develop...So I'll let you get to the foundation and of course I've already given you an outline of the things that are missing so it's probably pretty easy to develop that... That should have been established before hand but that doesn't say that you can't do it. ...[2Tr. 56-57]

[24] The trial court gave Jensen ample opportunity to provide testimony about the Jensen version of feedlot and crop land rent [2Tr. 61, 63-69]. The trial court gave Jensen opportunity to introduce and explain Check #14096 to Bill Richter and Check #15691 to Arden Sieh. [2Tr. 69]. The trial court permitted Jensen to testify as to checks from Mr. Sieh dated April 10, 2001

and February 5, 2002. [2Tr. 69], even though Jensen's wife had testified that Sieh and Jensen were "even" as of March 2003, so any claimed debts before 2003 were irrelevant. The court allowed discussions of a check drawn in 1997 [2Tr.70], prior to the 1998 written lease between the parties. The court allowed discussions of checks from Jensen to Sieh for \$40,000 on July 12, 2004, and for \$26,000 dated March 28, 2005. [2Tr. 71]. Jensen presented no more testimony or documents about D-11, and offered D-11 as a full exhibit. [2Tr.72]. The Register of Actions shows Exhibit D-11 was received as Doc ID#171.[App 7].

[25] After conclusion of testimony, Jensen moved to exclude Exhibit P-5, which summarizes the invoices from Sieh to Jensen, the Jensen payments and credits, and the rent credits due to Jensen. The court ruled:

The objection to P-5 is overruled...for a number of reasons. First of all, there's been no documentation ... that the ...supporting documents within the particular billing - - no testimony whatsoever that they are in error...There's been testimony that they were in error but no documentation. The figures are rather precise. They were paid in not precise manners as can be seen from P-5... [M]ost of the payments that were made... are all contained in D-13 [an accounting register from Jensen] and they all match P-5 and they were all items that came through with respect to Defense presentation. Furthermore, there's no indication... that any of those bills were ever really objected to at the time the bills were sent. ...I don't think that ... there's enough testimony, enough other documentation that's come from the defense side... no cross-examination with respect to the feed sheets ex cetera, that would indicate that they were improper other than Mr. Jensen's statements relative to them. So, P-5 stands. [2Tr 182]

[26] This matter was decided by the credibility of witnesses and on documents, or lack of same, presented at trial. The decision was not based on bankruptcy law or the effect of the Sieh bankruptcy discharge. Jensen was afforded full opportunity to present any and all claims he had against Sieh, to offset FEE's claim against Jensen, regardless of the discharge of Jensen's claims against Sieh in bankruptcy. Jensen testified that his offsetting claims against Sieh were contained in his bankruptcy claim. [2Tr.72]. The trial court gave Jensen the opportunity to lay a foundation to introduce his offsetting claims against Sieh "and of course I've [the judge] already given you an outline of the things that are missing so it's pretty easy to develop that that..." [2Tr.57].

During trial Jensen introduced no credible evidence of any claims against Sieh for "money loaned" or "insufficient funds on checks" after the year 2003, when the parties agreed they were "even." The rent that Sieh owed to Jensen was paid by Sieh crediting Jensen for \$115,000 per year, as per Exhibit #5. Therefore, there was no credible evidence that Sieh owed Jensen the Jensen bankruptcy claim of \$3,561,398.09, that could be used to setoff against Sieh's claims against Jensen... The Jensen claim against Sieh was discharged by Sieh's bankruptcy(Exhibit #64), but that is moot, because Jensen presented no credible claims at trial. [Finding #12-13, App 261-262]

[27] The Court explained how it computed its judgment amount:

The Court accepted all the claims by Sieh for cattle feeding and other services to Jensen from 2004 until the end of 2008, and deducted the amount of rent due to Jensen for the feedlot, the payments Jensen

made for the feeding, the check to Richter for corn feed, and the loans made to Sieh. The balance due to Sieh from Jensen is \$803,501.48. [Finding #14, App 262, see also Memorandum of Opinion App 122].

LAW AND ARGUMENT

A. Standard of Review

[28] ND Rules Civil Procedure 52(a)(6) provides:

Setting Aside the Findings. Findings of fact, including findings in juvenile matters, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

“Findings of fact are presumptively correct.” Brash v Gulleson 2013 ND

156, ¶10, 835 NW2d 798,802. The North Dakota Supreme Court recently

repeated its standard of review of findings of fact in a bench trial:

In an appeal from a bench trial, a district court's findings of fact are reviewed under the clearly erroneous standard of N.D.R.Civ.P. 52(a). *Fargo Foods, Inc., v. Bernabucci*, 1999 ND 120, ¶ 10, 596 N.W.2d 38. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the evidence, we are left with a definite and firm conviction a mistake has been made. *Moen v. Thomas*, 2001 ND 95, ¶ 19, 627 N.W.2d 146. In a bench trial, the district court determines credibility issues and we do not second-guess those credibility determinations. *Id.* at ¶ 20. Under the clearly erroneous standard of review, we do not reweigh the evidence or reassess the credibility of witnesses, and we will not retry a case or substitute our judgment for a district court's decision merely because we may have reached a different result. *Dvorak v. Dvorak*, 2006 ND 171, ¶ 11, 719 N.W.2d 362. A choice between two permissible views of the weight of the evidence is not clearly erroneous under that deferential standard of review. *Id.*

[29] Both parties were given ample time and opportunity at trial to present witnesses and documents including thousands of individual papers. The judgment of the trial court was based on its Findings of Fact [App 256-263]. These Findings were reasonable, based on the witnesses and evidence presented at trial. They cannot be overruled unless they were clearly erroneous.

B. The Trial Court Concluded, With Good Reason, That Jensen's Testimony Lacked Credibility.

[30] The trial court found the testimony and the evidence, or lack thereof, that Jensen presented at trial to be not credible:

During the trial Jensen introduced no credible evidence of any claims against Sieh for "money loaned" or "insufficient funds on checks" after the year 2003, when the parties agreed they were "even."....Jensen presented no credible claims [against Sieh] at trial. [Findings #12 & #13, App 261-262].

[31] There was good reason for the trial court to question Jensen's credibility. For example, both Sieh [in 1Tr.161] and Joy Jensen, Jensen's wife and bookkeeper [in 2Tr. 161] testified that in March, 2003, Sieh and Jensen were about "even" with neither owing money to the other. In his deposition (a portion of which was read at trial) Jensen had been asked: "[A] statement from Sieh to you appears to start at a zero balance in

2003...Do you agree that at least in the beginning of 2003 ... nobody owes anybody anything? A. That would be about right.” [2Tr. 116-117]. The Court also concluded Sieh and Jensen were “even” in 2003. [Finding #3 App 258, Finding #12 App 261]. Yet Jensen testified that when the written lease expired, in 2003, Sieh owed Jensen “quite a bit of money.” [2Tr. 86]. When asked how much Sieh owed him, Jensen answered “I’ll say maybe \$300,000.” [2Tr. 87]. The contradiction between Jensen’s testimony and other evidence, including his prior deposition, casts doubt on his credibility.

[32] Another reason the trial court had good cause to doubt Jensen’s credibility was the \$3, 561,398.09 claim that Jensen filed against Sieh in the Sieh bankruptcy. [Exhibit #63, Doc ID #156]. This amount is derived from Defendant’s Exhibit 11[App 123 et seq]. In Exhibit #D-11, \$2,224,005.64 of the claim was attributed to feedlot rent for the period 7/1/01 - 9/30/2010, and was calculated at \$.05 per head per day. Thus, Exhibit #11 shows that Jensen claimed Sieh owed rent based on \$.05 per head per day at the feed lot prior to October 1, 2003, during when the parties had a written lease for a fixed amount, and after end of 2008, when Sieh vacated the feed lot. The fact that Jensen was charging Sieh for rent based on number of cattle on the property during a time in which the parties had a written lease for a fixed

rent, and also during a time when Sieh was not occupying the property, is grounds for the Court to question Jensen's credibility.

[33] Yet another reason the trial court had good reason to doubt Jensen's credibility was Jensen's claim that \$2,647,481.51 was due for rent, consisting of \$2,224,005.64 for rent for the feed lot and \$423,475.87 for rent for adjacent crop land that was part of the 2 ¼ sections under the written lease. Any rent claims that were incurred prior to 2004 are invalid, because, as Joy Jensen conceded, and the Court found, the parties were "even" in 2003. [Finding #3, App 256]. Any claims for unpaid rent after the written lease expired in 2003 are also invalid. After hearing testimony from Sieh and Jensen [2Tr. 88,90], the Court found that "after 2003 Jensen treated Sieh as a tenant under the terms of the lease that expired in 2003." [Finding #11, App 261]. Sieh was obligated to pay \$115,000 per year rent after year 2003, the same as during the written lease. Sieh paid that amount by appropriately crediting Jensen \$115,000 year, as per Exhibit #5. Therefore Jensen's \$2,224,005.64 claim for feed lot rent had no basis, and assertion of such a large, but baseless claim, adversely affects his credibility.

[34] The written lease was for 2 ¼ sections of land, including the feed lot, pasture and crop land. [App 123 et seq]. Jensen's bankruptcy claim included \$423,475.87 rent due from the crop land portion of the 2 ¼ sections Sieh

leased from Jensen. Yet nothing was due to Jensen from Sieh for rent for the crop land, because Sieh had credited Jensen the agreed upon rent of \$115,000 per year for the full 2 ¼ sections, which included the crop land. The fact that Jensen claimed \$423,475.87 was due from Sieh for crop land rent, when nothing was due, is another reason for the trial court to question Jensen's credibility.

[35] The Jensen \$3,561,398.09 bankruptcy claim against Sieh included \$78,000 for missing feed bunks and \$300,000 for lack of upkeep in the feed lot. [See D-11, App 123]. Jensen offered no testimony as to who originally purchased the missing feed bunks, when they had been purchased, whether they were personal property still owned by the original purchaser, whether they had been affixed to the real estate, whether they were objects that naturally deteriorate over time, or how Jensen arrived at a \$78,000 value. Similarly, regarding the \$300,000 claim for lack of upkeep, Jensen offered no testimony or documents as to what specific items lacked proper care, whether wood fencing and other feed lot elements naturally deteriorate over time, how Jensen arrived at the \$300,000 loss of value, or to what extent was Sieh connected to any loss of value. Jensen submitting a claimed loss of \$78,000 for the feed bunks, and loss of \$300,000 for lack of upkeep without

documentation or evidence is yet another reason for the Court to doubt Jensen's credibility.

[36] Exhibit D#11[App 123] contains items included in Jensen's \$3,561,398.09 bankruptcy claim against Sieh. It also contains an "Estimate of Missing Cattle" that totals \$1,365,000 that was not part of the bankruptcy claim. There was no testimony or documentation from Jensen at trial to substantiate this claim for missing cattle. That unsubstantiated claim was yet another example of Jensen's propensity to assert exaggerated claims without basis, and thus his lack of credibility.

C. The Court Properly Credited Jensen For Any Valid Claims Jensen Had Against Sieh.

[37] The trial court's decision shows it was open to and considered Jensen's claims. Any and all valid claims or offsets that Jensen had against Sieh, such as the amount of the Jensen check to Richter for feed, and several payments from Jensen to Sieh that were made after Lunders had prepared Exhibit #5, were deducted by the Court from Sieh's \$872,987.88 claim against Jensen for the Court to find that FEE is entitled to judgment against Jensen in amount of \$803,501.48. [Finding #14 App 262].

D. Jensen Had No Valid Claims Against Sieh, Other Than Those For Which The Trial Court Credited Jensen In Arriving At Its Judgment.

[38] Any money transfers from Jensen to Sieh after 2003, including those that were included in Jensen's \$3,561,398.09 bankruptcy claim against Sieh, regardless of whether designated as payments or as loans, had been listed by Sieh in the "Payments Made by KJ" column on Exhibit #5, and thus Sieh had credited Jensen for those money transfers. For example, the Jensen Brief [at paragraph 14] cites a \$40,000 check dated July 12, 2004 from Jensen to Sieh that Jensen designated as a "loan." Exhibit #5, prepared by Lunders, shows Jensen was credited for \$40,000 on July 14, 2004. [App 9]. Indeed, that was the only payment made by Jensen in year 2004. The Jensen brief also refers to a 2005 "loan" from Jensen to Sieh for \$26,000. Exhibit #5 credited Jensen for the \$26,000 payment on March 28, 2005. [App 9]. Thus all payments from Jensen to Sieh, however designed by Jensen, were properly credited by Sieh to Jensen's account.

[39] Any claims of Jensen against Sieh that arose before April 1, 2003, were considered, but rejected by the trial court because Sieh and Jensen were "even" as of 2003. Any valid claims by Jensen for payments to or for Sieh that were not listed by Lunders in Exhibit #5 were credited to Jensen by the trial court to reduce the Exhibit #5 debt of Jensen to Sieh from \$872,967.88 to the judgment amount of \$803,501.48. There were no other

claims made by Jensen that were supported by documents or credible testimony.

[40] All of the claims against Sieh that Jensen brought to the attention of the trial court were examined by the court, and were rejected. The trial court found that Jensen had no credible claims against Sieh. Therefore the issue of whether the bankruptcy dismissal eliminated any offsetting claims that Jensen may have had against Sieh did not arise, because there were no claims. “The Jensen claim against Sieh was discharged by Sieh’s bankruptcy(Exhibit #64), but that is moot, because Jensen presented no credible claims at trial.” [Finding #13, App 262].

E. Jensen Has Not Contested The Court’s Finding That The Lease Terms Of The Parties Continued The Same After The 2003 Expiration Of The Written Lease.

[41] Based on the conduct of the parties after expiration of the written lease, and on the failure of Jensen to give Sieh any written notices of termination of lease or new lease terms [2Tr. 87-88], the trial court found “the arrangement of the parties was continued, one year at a time, until the end of 2008.” [Conclusions of Law App 262]. For more than a century, South Dakota has held that if parties to a lease continue the same course of

conduct after expiration of a written as they did during the lease, the lease continues on the same terms:

The original lease was in writing, and was for a definite term of one year; that at the end of the year the tenant held over and landlord accepted rent. This alone ... renewed the hiring on the same terms and for the same time.

Banbury v Shevin 4 S.D. 166, 56 NW 67 (SD, 1893).

[42] In concluding that the terms of the written lease between Sieh and Jensen were continued, in absence of credible evidence that both parties agreed otherwise, the trial court cited South Dakota Codified Law (“SDCL”)§43-32-14:

If a lessee of real property remains in possession thereof after the expiration of the hiring and the lessor accepts rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one year.

The trial court also cited SDCL §43-32-22.1:

In the case of farm tenants, occupying and cultivating agricultural land of 40 acres or more, under an oral lease, the tenancy shall continue for the following crop year upon the same terms and conditions as the original lease unless written notice for termination if given by either party to the other by September 1, whereupon tenancy shall terminate the March 1 following.

[43] Evictions in South Dakota pursuant to SDCL §21-16-1(4) or 1(6) [for nonpayment of rent or violation of lease terms] require service on the tenant of a written notice to quit. SDCL §21-16-2. Jensen admitted he never gave Sieh a written notice to quit possession, or a writing that Sieh was in default

of rental payments. [Finding #11, App 261]. When a South Dakota tenant holds over after the expiration of the term of his lease, the landlord has the option of treating the tenant as a trespasser, or as a tenant under the terms of the lease. Monks v Hess 53 S.D. 243, 220 NW 490 (1928). After 2003, Jensen did not treat Sieh as a trespasser, therefore by default Jensen treated Sieh as a tenant under the terms of the lease that expired in 2003. Regardless of what Jensen thought the rental arrangement should be after expiration of the written lease, he had the burden to take affirmative actions necessary to assert possession over the leased land, or to commence eviction in event Sieh failed to pay the rent that Jensen wanted. He failed to meet that burden.

F. The Bankruptcy Discharge Of Jensen’s Claims Against Sieh Will Affect This Action Brought By FEE Only If the Trial Court’s Findings of Fact Are Clearly Erroneous.

[44] The trial court found that “Jensen presented no credible claims [against Sieh] at trial.” [Finding of Fact #13 App 262]. The trial court concluded “[e]ven if there were any claims, such were discharged in the Sieh bankruptcy and are not applicable to FEE.” [App 263]. The issue of whether the bankruptcy discharge of Jensen’s claims against Sieh also eliminated any Jensen claims against Sieh from being offset against the judgment FEE obtained against Jensen, would become relevant only if there were any valid Jensen claims against Sieh that were not already included in the trial court’s

determination of damages. The trial court found as a matter of fact that Jensen had no claims against Sieh, and thus the bankruptcy discharge was not an essential element of the court's decision.

[45] Insofar as the determination that Jensen had no claims against Sieh was a finding of fact, that determination will be overruled only if it is "clearly erroneous." The trial court did not find Jensen's testimony to be credible. The trial court had good reason to suspect Jensen's credibility, as discussed in Paragraphs 30 – 36 above. Furthermore, Jensen failed to substantiate his "claims" against Sieh via explicit testimony or document submissions, even after being invited to do so by the trial court. Therefore, the legal impact of Sieh's bankruptcy discharge need be considered only if the Supreme Court determines the trial court's finding of fact that Jensen had no claims, other than those used by the trial court in arriving at its judgment amount, to be clearly erroneous.

G. Sieh Failed To Take Advantage Of His Opportunity At Trial To Assert A Setoff Claim.

[46] Jensen bore the burden of proof to assert setoffs to Sieh's claim against Jensen. He failed to meet that burden factually or legally. In his Brief, Jensen seems to argue in the abstract that if Jensen had a claim against Sieh, it could be set off against the cattle feeding claims that Sieh had

assigned to FEE, and it would not have been discharged in the Sieh bankruptcy.

[47] Such an argument is flawed because a claim in the abstract is meaningless. The trial before Judge Paulson was the sole forum for Jensen to assert any and all of his claims against Sieh that could offset the debts that Jensen owed to Sieh , which had been assigned to FEE. Jensen failed to present to the trial court, via a credible witness, with full documentation, instances of any claims Jensen had against Sieh, other than those the trial court incorporated into its judgment. Jensen has missed his opportunity to present his claims against Sieh to offset the action by FEE, and arguing that such a claim could theoretically exist will not revive that opportunity.

[48] In his Brief Jensen asserted: “At time of assignment [of Sieh’s claims to FEE] Sieh owed Jensen in excess of three million dollars for past due debts including bounced checks, missed rent payments, unpaid loans with interest, missing cattle and other financial obligations...” [Jensen Brief, ¶21]. The trial court invited Jensen to introduce documents and/or credible evidence to lay a foundation for Jensen’s assertion of a setoff in excess of \$3,000,000. [2Tr. 56-57]. The Court considered every offer of proof by Jensen that Sieh owed Jensen money, and found none credible.

H.Jensen Had Access To Relevant Primary Documents Prior To Trial.

[49] Ms. Lunders testified that she had been deposed about three weeks before the trial. At that deposition counsel for Jensen had shown her several boxes of original documents such as feed sheets from the Sieh feed lot. [1Tr. 17]. There were introduced in the trial as Exhibits #1-#3. [1Tr. 25]. At the deposition she had also been shown a bundle of documents, assembled by counsel for Jensen, from a typical transaction in which Jensen had brought cattle to the feed lot, and sold them while they were at the feed lot. This bundle was introduced as Trial Exhibit #4. [1Tr. 25-27]. In oral arguments prior to trial, counsel for Jensen stated that he had possession of primary documents “after the continuance” [a meeting between counsel to review documents held about one month before trial] and in reviewing them had assembled the documents introduced as Exhibit #4.[1Tr. 9]. At trial, as Lunders was introducing into evidence the bundles of documents which became Exhibits #6 - #57, Jensen had the opportunity to examine whether the numbers on the primary documents totaled the invoices sent to Jensen, and question her about any invoices with insufficient primary backup. Similarly during cross examination of Ms. Lunders, Jensen could have inquired whether there was adequate documentation for each of the invoices Lunders offered as evidence. He failed to do so.

I. The Bankruptcy Law Analysis Of The Trial Court Was Unnecessary To The Judgment Of The Court But Was Not An Error.

[50] This action was by FEE against Jensen based on claims assigned to FEE by Sieh. [App 64]. To prevail in this action, FEE had the burden at trial to establish that Sieh had a valid claim against Jensen. After FEE presented evidence to the court to prove the Sieh claims, Jensen had the right to interpose defenses or setoffs against Sieh. The trial court recognized this right of Jensen, gave Jensen ample opportunity to assert defenses, and, in fact, accepted several of Jensen's set offs to reduce the amount of the claim that Sieh assigned to FEE. Jensen failed to produce other credible evidence of setoffs.

[51] An analysis of the effect of the Sieh bankruptcy discharge in this matter, while an interesting legal issue, was unnecessary for the trial court and is unnecessary for this appeal. The trial court addressed the issue, but, it appears, more from a sense of completeness, wanting to address all issues, than from relevance to the decision. Sieh and Jensen had ceased doing business with each other before the March 24, 2011 assignment to FEE of the Sieh claims [App 64-65] and long before Sieh filed for bankruptcy on December 12, 2011. [App 256]. Therefore, any claims Jensen had against

Sieh would have matured, if not as of the assignment date, then certainly as of the bankruptcy discharge date.

[52] Jensen had a substantial incentive to assert claims against Sieh within this case at bar, FEE's action against Jensen, because, if proven, Jensen's claims would have reduced FEE's judgment against Jensen. Had Jensen proven his claims against Sieh within the Sieh bankruptcy, in which Jensen was one of a number of unsecured creditors in essentially a no-asset bankruptcy, Jensen would very likely have received nothing. Therefore Jensen had a large financial incentive to assemble and introduce his most convincing documents and testimony regarding claims against Sieh, within the FEE lawsuit at hand. The fact that Jensen failed to introduce any credible claims against Sieh, even when it would have been a great financial benefit for Jensen to assert such claims, shows there were none. The trial court did not hold that FEE was insulated from Jensen's offsetting claims against Sieh. The trial court accepted that the assignment from Sieh to FEE carried with it any baggage of claims that Jensen may have had against Sieh.

Although the trial court mentioned the theory of triangular setoff, that was not a grounds for its decision. Jensen was given full opportunity to present any defenses. No credible defenses were presented. The mention of the

bankruptcy discharge in the court's Findings of Fact, Conclusions of Law, and Order for Judgment, while unnecessary, was not erroneous.

CONCLUSION

[53] Cindy Lunders and Arden Sieh testified and produced extensive, detailed documents that Sieh fed Jensen's cattle from 2003 through 2008 at the Sieh feed lot and that after all credits to Jensen for payments and rent, Jensen owed Sieh \$872,967.88. It was not disputed that Sieh assigned to FEE this claim against Jensen. At trial, Jensen failed to refute any of the cattle feed and care invoices that Ms. Lunders introduced. Jensen's defense consisted of exaggerated and unsubstantiated claims that regardless of what amount Jensen owed Sieh, Sieh owed Jensen much more.

[54] Jensen had submitted a \$3,561,398.09 claim in the Sieh bankruptcy, and testified this was the basis of his defense against the Sieh cattle care claim of \$872,967.88. However, aside from several items which were applied by the trial court to reduce the Sieh claim to \$803,501.48, Jensen failed to introduce any credible evidence or any documentation for his \$3,561,398.09 claim. The trial court found the testimony of Lunders to be credible, and that of Jensen to be not credible, with good reason. This matter was decided on findings of fact which were not clearly erroneous. The trial court's decision must be affirmed.

Dated this 1st day of October, 2013. /s/ Rudra Tamm
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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellee Forbes Equity Exchange Inc., and the author of the above brief, hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 7,250 words from the “Statement of the Issue” to the end of the “Conclusion”. The word count was via Word software.

Dated this 1st day of October, 2013. /s/ Rudra Tamm

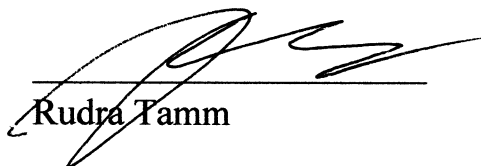
**IN THE SUPREME COURT
STATE OF NORTH DAKOTA
Supreme Court No. 20130199
Dickey County District Court No. 11-2010-CV-00078**

**Forbes Equity Exchange, Inc.,
Plaintiff/Appellee,
Vs.
Keith Jensen,
Defendant/ Appellant.**

AFFIDAVIT OF SERVICE FOR APPELLEE

State of North Dakota, County of Buleigh

Rudra Tamm, being duly sworn, deposes and says that he is of legal age, a resident of Burleigh County, not a party to nor interest in this action; that he served the attached **BRIEF OF APPELLEE** , by electronic mail only on October 2, 2013 on Ryan McCamy at rmccamy@nilleslaw.com. To the best of Affiant's knowledge, the email address above is the actual electronic mail address of counsel for Appellant Keith Jensen. The above document is emailed in accordance with the provisions of the N.D.R. Civ. P.


Rudra Tamm

Subscribed and sworn to before me on October 2, 2013.


, Notary public

