20130245
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MARCH 24, 2014
STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

No. 20130245

Northstar Founders, LLC, f/k/a Northstar Agri Industries, LLC,

Plaintiff, Appellee and Cross-Appellant,

v.

Hayden Capital USA, LLC, Hayden Capital Corp., Irish Financial Group, Inc., MDL Consulting Group, LLC, Peter Williams, Stephen Hayden, Robert Liebig, and Andrew Zweig,

Defendants,

Hayden Capital USA, LLC, Irish Financial Group, Inc., MDL Consulting Group, LLC, Robert Liebig, and Andrew Zweig,

Third-Party Plaintiffs,

v.

PICO Northstar, LLC, and PICO Northstar Hallock, LLC,

Third-Party Defendants and Appellees,

Hayden Capital USA, LLC, Hayden Capital Corp., MDL Consulting Group, LLC, Peter Williams, Stephen Hayden, and Andrew Zweig,

Defendants, Appellants and Cross-Appellees.

Appeal from Memorandum Opinion and Order dated April 28, 2011, Order dated July 20, 2011, Memorandum Opinion and Order dated August 24, 2012, Memorandum Opinion and Order dated November 30, 2012, Order dated February 1, 2013, and Memorandum Opinion, Findings of Fact, Conclusions of Law and Order for Judgment dated April 25, 2013
Civil No. 09-2011-CV-00192
Cass County Courthouse, East Central Judicial District
The Honorable Steven L. Marquart, Presiding

REPLY BRIEF OF APPELLANTS

Ronald H. McLean (ND# 03260)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
Attorney for Defendants/Appellants Hayden Capital USA, LLC, Hayden Capital Corp., Peter Williams and Stephen Hayden

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph No.

CASES

North Dakota

Other Jurisdictions

STATUTES

RULES

OTHER AUTHORITIES

LAW AND ARGUMENT

I. THE DISTRICT COURT LACKED PERSONAL JURISDICTION OVER THE HAYDEN DEFENDANTS.

[1] The factual allegations in the affidavits submitted by Northstar in support of its motion to amend the Complaint demonstrably failed to state a cause of action for fraud. Since Northstar never stated a viable tort claim, the District Court's finding of personal jurisdiction pursuant to subsection (2)(C) of North Dakota's long arm statute was in error.

[2] Northstar claims that the Hayden Defendants – who moved to dismiss Northstar's claims for lack of personal jurisdiction on no less than three separate occasions (*see* Doc. 10; Doc. 427, pp. 18-21; Doc. 557), and sought certification for immediate appeal – nonetheless waived the defense by failing to assert it yet again at trial (Northstar's Brief ¶¶ 72-79). Northstar cites a pair of federal decisions which discuss the uncontroversial proposition that a party abandoning a jurisdictional objection may not seek to revive the objection on appeal (Northstar's Brief ¶¶ 74-76 (citing *City of New York v. Mickalas Pawn Shop, LLC*, 645 F.3d 114 (2d Cir. 2011); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313 (9th Cir. 1998)). Neither holds that a party who has fully litigated a jurisdictional objection in a pre-answer motion to dismiss – much less one who twice renewed that objection – must attempt to re-litigate that objection at trial or forfeit review. Northstar identifies no authority supporting such a radical proposition. Nor can it, as that proposition is foreclosed by cases like *Smith v. Smith*, 459 N.W.2d 785 (N.D. 1990), in which this Court reversed a finding of personal jurisdiction over a defendant who not only failed to argue the issue at trial, but failed to even appear at trial. *See id.* at 787-89; *see also Eggl v. Fleetguard, Inc.*, 583 N.W.2d 812 (N.D. 1998) ("judgment entered without personal or subject matter jurisdiction is void")).

[3] Northstar also incorrectly argues – without a single case in support of its position – that the Hayden Defendants entered a voluntary general appearance by asserting third-party claims against the PICO Defendants (Northstar's Brief ¶¶ 80-81). The key to determining whether a party has made a voluntary general appearance is "the absence of a previously made and properly preserved objection to the jurisdiction of the trial court." *Investors Title Ins. Co. v. Herzig*, 785 N.W.2d 863, 882 (N.D. 2010). It was not until August 2011 that Hayden USA asserted third party claims against PICO (s*ee* App. 62-79), months after the Court's determination that jurisdiction was appropriate, and after the Hayden Defendants objected to jurisdiction multiple times – by motion and through responsive pleadings. The Hayden Defendants' actions do not in any way amount to a voluntary general appearance under Rule 4(b)(4) sufficient to have waived the defense of lack of personal jurisdiction. *See Larson v. Dunn*, 474 N.W.2d 34, 39 (N.D. 1991) (to acquire personal jurisdiction, a non-resident must make "a voluntary general appearance and fail[] to assert the lack of personal jurisdiction.") (emphasis added); *State Bank of Burleigh Cty. Trust Co. v. Johnson*, 303 N.W.2d 520, 523-24 (N.D. 1981) (appearing without previously raising personal jurisdiction); *see also Juelich v. Yamazaki Mazak Optonics Corp.*, 670 N.W.2d 11, 16 (Minn. Ct. App. 2003) (third-party complaint did not waive defense of lack of personal jurisdiction); *Olin Corp. v. Fisons*, 47 F. Supp. 2d 151, 155 (D. Mass. 1999) (noting majority rule that "filing of a cross-claim or third-party claim … does not waive the jurisdictional defense.") (quoting *Proctor & Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F. Supp. 2d 644, 645-46 (W.D. Tenn. 1998)); *Bayou Steel Corp. v. MN Amstelvoom*, 809 F.2d 1147, 1149 (5th Cir. 1987) ("[T]he filing of a counterclaim, cross-

claim, or third-party demand does not operate as a waiver of an objection to jurisdiction ....").[1]

[4] Turning to the merits, Northstar contends that personal jurisdiction existed over the Hayden Defendants because Northstar's fraud claim "was well supported by affidavits, which set forth William's concealment of any affiliation he had with Hayden USA and thereby fraudulently induced Northstar to contract with the company" (Northstar's Brief, p. 25). Remarkably, Northstar fails to identify a single factual allegation from its affidavits to establish that Williams concealed his affiliation with Hayden USA, or that such concealment induced Northstar to enter into the Hayden USA Agreement (*see* Northstar's Brief, pp. 25-27). Northstar's affidavits contain only six paragraphs describing events occurring before the execution of the Hayden agreement. None contains any allegation of a misrepresentation or omission by Williams or any other person affiliated with the Hayden Defendants, nor any allegation that Northstar relied on any such misrepresentation or omission (Appellants' Brief, pp. 15-16; *see* App. 36-37). Rather than identify specific factual allegations, Northstar simply declares that the Hayden Defendants are wrong and moves on. Northstar's failure to even attempt to support its position with the record makes the bankruptcy of its position plain.

[5] Northstar argues that it was not required to allege damages in order to establish a prima facie cause of action in tort for fraudulent inducement (Northstar's Brief, p. 26). This argument confuses the tort of fraudulent inducement, which requires a showing

[1] To the extent Northstar suggests that the Hayden Defendants entered a voluntary general appearance by asserting a counterclaim against Northstar (*see* Northstar's Brief ¶ 77), that argument lacks merit as the Hayden Defendants did not assert their counterclaim – which was compulsory under N.D. R. Civ. P. 13(a) – until after the court had denied their motion to dismiss for lack of personal jurisdiction. *See* App. 62-79.

of actual damages, with the contract defense of the same name, which does not. In *Sonnesyn v. Akin*, this Court explained the difference:

> If one is actually defrauded by a false statement which induced him to enter into a contract.... He may either rescind the contract and recover any sums paid …, or he may affirm the contract, take such benefits as are obtainable under it, and recover damages for the injuries sustained by reason of the false statement. These alternative remedies … are not available in the same action; for one is based … upon a contract implied by law …; the other in tort for damages for the injury done by the false statement.

104 N.W. 1026, 1029 (1905) (citations and quotation omitted). Fraudulent inducement in the contract sense – the remedy for which is rescission – is not an independent cause of action, but rather an affirmative defense to an action for breach of contract. *See Sargent Cnty. Bank v. Wentworth*, 500 N.W.2d 862, 872-73 (N.D. 1993); *First Nat. Bank and Trust Co. of Williston v. Brakken*, 468 N.W.2d 633, 636 (N.D. 1991). Because it is not an independent cause of action, and, more importantly, because it is not a tort, a contractual claim for fraudulent inducement cannot form the basis for a finding of personal jurisdiction under subsection (2)(C). *See* N.D. R. Civ. P. 4(b)(2)(C) ("A court of this state may exercise personal jurisdiction over a person who acts … as to any *claim for relief* … under … the following circumstance[]: … committing a *tort* within this state causing *injury* to another person or property within this state.") (emphasis added). Thus, to exercise personal jurisdiction here based on Northstar's tort claim of fraudulent inducement, Northstar was required to allege "damages for the injury done by the false statement." *Sonnesyn*, 104 N.W. at 1029. As Northstar essentially concedes in its brief, it failed to do so.[2]

[2] Northstar does not argue that its factual allegations were sufficient to establish damages in tort. Northstar merely notes that it included allegations of damages in amended pleadings that it filed *after* the District Court had ruled on personal jurisdiction (*see* Northstar's Brief ¶ 86 [citing App. 60, 104-05]).

[6] Finally, Northstar fails to respond to the cases cited by the Hayden Defendants demonstrating that the exercise of personal jurisdiction pursuant to subsections (2)(A) and (2)(B) of North Dakota's long-arm statute does not comport with due process. This Court has routinely rejected claims of personal jurisdiction despite far greater contacts than are present here (Appellant's Brief ¶¶ 45-55). In the interests of due process, this Court should again reject such claims of personal jurisdiction here.

II. THE DISTRICT COURT'S DETERMINATION THAT PETER WILLIAMS ACTED ON BEHALF OF OPPENHEIMER IS CLEARLY ERRONEOUS.

[7] The District Court's conclusion that Williams – despite responding to a written request to engage only one of Hayden USA or Oppenheimer, and thereby obtaining a written finders agreement from Northstar for Hayden USA – cast aside the Hayden Agreement and instead made the PICO introduction on behalf of Oppenheimer is illogical and unsupported by the evidence at trial (Appellant's Brief ¶¶ 58-66).[3] Northstar does not attempt to explain how the court's decision makes any rational sense, but instead argues that the court was justified because "[e]very witness but Williams and his long-time friend, Hayden [a lawyer], who both stood to gain by the millions …, agreed that Williams acted on behalf of Oppenheimer" (Northstar's Brief ¶ 88).

[8] In making this argument, Northstar conveniently ignores that each of the witnesses to whom it refers – Juhnke, Persson, Liebig, Zweig, and Marshall Heinberg (on behalf of Oppenheimer) – also "stood to gain by the millions" by testifying that Williams acted for Oppenheimer. Juhnke and Persson, of course, stood to profit directly by such testimony since it would allow them to avoid paying a finder's fee to Hayden USA.

[3] Indeed, it is all the more illogical because Northstar refused to hire Oppenheimer when given the chance.

Liebig and Zweig, who had been threatened with fraud claims, had every reason to disavow their knowledge of Hayden USA's engagement as they stood to gain since money denied Hayden USA would be available to satisfy their claims. Finally, by his implausible testimony suggesting that an investment banker might make a $3 million introduction on behalf of a previously unknown client without a signed fee agreement in place, Marshall Heinberg stood to reap an immense profit for Oppenheimer by collecting the same fee. *See* N.S.App., pp. 279-90. Notably, Northstar overlooks the testimony of the only uninterested witness, Joel Horn, whom Northstar claimed must be lying as Horn's testimony supports the Hayden Defendants.

[9] In short, Williams' testimony that he acted on behalf of Hayden USA was no less credible because of his financial interest in the outcome of the litigation than was the contrary testimony of any other witness; and Mr. Hayden likes to believe his testimony should be found credible given his status as a lawyer. The fact remains that the District Court's ultimate conclusion that William's acted for Oppenheimer simply defies common sense. The District Court's decision should be reversed.

III. THE DISTRICT COURT'S DETERMINATION THAT NORTHSTAR RECEIVED A FINANCING WAS CORRECT.

[10] After trial, the District Court ruled that the introduction by Williams of PICO to Northstar resulted in a "financing" as that term is defined in the Hayden USA Agreement, despite the fact that Northstar funneled PICO's money to two newly formed subsidiaries. App. 338-41. The District Court's ruling was correct.

[11] The Hayden USA Agreement broadly defines "Financing" to encompass "Equity Financing" and "Debt Financing", "regardless of the form or structure" of the transactions that resulted in the financing, App. 269, regardless of whether the financing is

provided directly to Northstar or to one of its affiliates. *Id.* (defining "Company" to include Northstar and its "subsidiaries and affiliates").

[12] The trial evidence established that, regardless of the technical form of the transaction between Northstar and PICO, the end result was that the two entities jointly owned the canola plant, with each maintaining their ownership based upon their pro rata equity contribution (*i.e.* Northstar at 12% for $8.4 million in equity and PICO at 88% for $60.0 million in equity). As the District Court recognized, the structure employed was economically identical to a direct investment by PICO in Northstar. *See* App. 341.

[13] Northstar's argument that it did not obtain a financing hinges on a corporate sidestep, where Northstar and PICO formed a new corporate shells for the equity and debt financings. But as Williams testified to at trial, without any refutation by Northstar, this is a classic project finance structure and the very reason why the Hayden USA Agreement mandates a fee for any "Financing" "regardless of form or structure", why the Hayden USA Agreement defines the "Company" to include subsidiaries and affiliates, and why the Hayden USA Agreement did not limit the definition of Securities to just those Securities of the Company. Common sense makes the intention of the Hayden agreement clear. Were it otherwise, any company could avoid a finder's fee by a bit of corporate prestidigitation – rendering finder's agreements virtually unenforceable and deterring people from raising money for North Dakota companies.

[14] For the foregoing reasons, the District Court's finding that Northstar obtained a financing should be affirmed.

IV. THE DISTRICT COURT PROPERLY DISMISSED NORTHSTAR'S TORT CLAIMS PURSUANT TO THE DOCTRINE OF COLLATERAL ESTOPPEL.

[15] Northstar argues that the District Court erred in giving preclusive effect to the New York federal court's order dismissing Northstar's fraud claim because the federal court order was not immediately appealable and, therefore, was not a "final decision on the merits" (Northstar's Brief ¶¶ 96-98). Northstar is wrong.

[16] Issue preclusion, as was applied by the District Court in this case, forecloses the re-litigation "of particular issues of either fact or law which were, or by logical and necessary implication must have been, litigated and determined in the prior suit." *Ungar v. North Dakota State University*, 721 N.W.2d 16, at 21 (N.D. 2006). The doctrine is less "sweeping" than *res judicata*, or claim preclusion, which prohibits not only the re-litigation of the claims actually raised, but also any claims that "could have been raised" in prior litigation. *Id.*

[17] For issue preclusion or claim preclusion to apply, there must have been a final judgment on the merits in the prior action. "However, for purposes of issue preclusion (as distinguished from [claim preclusion]), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Restatement (Second) of Judgments* § 13 (1982). That an order may not be appealable – or even that the order is currently being appealed – does not render the decision non-final for purposes of issue preclusion. *Robinette v. Jones*, 476 F.3d 585, 589 (8th Cir. 2007); *In re Nagle*, 274 F.3d 481, 484-85 (8th Cir. 2001); *Westman v. Dessellier*, 459 N.W.2d 545, 547 (N.D. 1990) (pendency of appeal did not prevent issue preclusion because "decision was 'a firm and stable' one, the 'last word' of the rendering court, a final judgment.") (quoting *Restatement (Second) of Judgments* § 13, comment a (1982)). With

issue preclusion, finality means "little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Robinette*, 476 F.3d at 589 (quotation omitted); *see Westman*, 459 N.W.2d at 547 ("[A] judgment ordinarily is considered final if it not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court ….") (quotation omitted).

[18] Here, the federal court's decision was unquestionably final as to Northstar's fraud claim. The federal court thoroughly analyzed the merits of the claim and dismissed it, stating explicitly that the dismissal was "with prejudice and without leave to replead." App. 371-72 (emphasis added). This was neither "tentative, provisional, [n]or contingent," *Westman*, 459 N.W.2d at 547, and was "sufficiently firm to be accorded conclusive effect." *Restatement (Second) of Judgments* § 13 (1982). Accordingly, the District Court's application of collateral estoppel should be affirmed.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED NORTHSTAR'S REQUEST FOR ATTORNEY'S FEES PURSUANT TO N.D.C.C. § 28-26-31.

[19] Under N.D.C.C. § 28-26-31, a court may award attorney's fees where a party makes "allegations or denials" in a pleading which are "found to be untrue" and which were made "without reasonable cause and not in good faith." An award of attorney's fees pursuant to § 28-26-31 is "entirely within the district court's discretion" and will only be disturbed on appeal for abuse of that discretion, i.e. "acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned decision, or it misinterprets or misapplies the law."

Strand v. Cass County, 753 N.W.2d 872, 879 (N.D. 2008) (quoting *Dixon v. McKenzie County Grazing Assoc.*, 675 N.W.2d 414, 424 (N.D. 2004)).

[20] Here, the District Court properly denied Northstar's request for attorney's fees because it found that the Hayden Defendants' pleadings "were not made in bad faith." App. 361. Today a $168MM canola facility exists thanks to the efforts of the Hayden Defendants – as Northstar would have it, it should not only get its financing for free, but escape from the litigation expenses incurred ducking that fee as well. The District Court was unquestionably qualified and correct in determining that the Hayden Defendants' pleadings "were not made in bad faith." App. 361. Northstar argues that, because the District Court did not credit portions of the Hayden Defendants' testimony, Hayden USA must have acted in bad faith (Northstar's Brief ¶¶ 99-103). But the District Court, acting within its discretion, was not required to accept Northstar's leap in logic. The Court's determination that the Hayden Defendants did not act in bad faith was not "arbitrary, unreasonable, or unconscionable," nor was it irrational or the product of a misapplication of the law. In short, it was not an abuse of discretion, and it therefore should be affirmed.

CONCLUSION

[21] For the foregoing reasons, the order of the District Court finding personal jurisdiction over the Hayden Defendants should be reversed and the case dismissed. Alternatively, should this Court determine that the District Court's order on personal jurisdiction was correct, the District Court's order dismissing the Hayden Defendant's cross-claim for breach of contract should be reversed and the case remanded for further proceedings.

Dated this 24th day of March, 2014.

/s/ Ronald H. McLean
Ronald H. McLean (#03260)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
Attorney for Defendants/Appellants Hayden Capital USA, LLC, Hayden Capital Corp., Peter Williams and Stephen Hayden

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellants in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 2,992.

Ronald H. McLean (#03260)
SERKLAND LAW FIRM
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
Attorney for Defendants/Appellants Hayden Capital USA, LLC, Hayden Capital Corp., Peter Williams and Stephen Hayden

By: /s/ Ronald H. McLean
Ronald H. McLean

AFFIDAVIT OF SERVICE BY EMAIL

Northstar Founders, LLC, f/k/a Northstar Agri Industries, LLC
vs.
Hayden Capital USA, LLC, *et al.*
District Court Civil No. 09-2011-CV-00192
Supreme Court No. 20130245

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

The undersigned, being first duly sworn, deposes and says that she served the attached:

REPLY BRIEF OF APPELLANTS

on March 24, 2014, by email as follows, to-wit:

Todd Zimmerman
Benjamin J. Hasbrouck
Fredrikson & Byron, P.A.
51B Broadway, Suite 402
Fargo, ND 58102
TZimmerman@fredlaw.com
BHasbrouck@fredlaw.com

James K. Langdon
Shannon L. Bjorklund
Dorsey & Whitney, LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
Langdon.Jim@dorsey.com
Bjorklund.Shannon@dorsey.com

Sarah A. Herman
Ross Nilson
Dorsey & Whitney, LLP
3203 32nd Avenue South, Suite 103
Fargo, ND 58103
Herman.Sarah@dorsey.com
Nilson.Ross@dorsey.com

M. Ray Hartman, III
Shannon Sorrells
Cooley, LLP
4401 Eastgate Mall
San Diego, CA 92121-1909
rhartman@cooley.com
ssorrells@cooley.com

Robert J. Udland
Vogel Law Firm
218 NP Avenue
P.O. Box 1389
Fargo, ND 58107-1389
rudland@vogellaw.com

To the best of affiant's knowledge, the email addresses above given are the actual email addresses of the party intended to be so served. The above document was emailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

/s/ Katie Rudnick
Katie Rudnick

Subscribed and sworn to before me this 24th day of March, 2014.

/s/ Lacey A. Hruby
Lacey A. Hruby, Notary Public
Cass County, North Dakota
Commission Expires: 9-21-16