20130245
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 7, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT 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

On Appeal From Judgment After Bench Trial District Court
of the East Central Judicial District

REPLY BRIEF OF NORTHSTAR FOUNDERS LLC

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I. MDL DID NOT PERFORM.

A. There was no introduction to a source.

[1] The disputed provision in the contract between Northstar Founders, LLC ("Northstar"), and MDL Consulting Group, LLC ("MDL") is, at a minimum, ambiguous. It reasonably can be read to mean that the "party or entity" referenced in the second sentence of paragraph 3 is one of the "potential sources of Financing" referenced in the first. In that way, "party or entity" is shorthand for the "potential source" that actually provided "Financing."

[2] MDL's appeal hinges on the notion that such a construction is unreasonable. That position is untenable not only in light of the purpose and structure of the contract, but also for lack of definition. MDL's lawyer drafted the contract and defined several terms. But the disputed term – "party or entity" – was undefined. The court therefore interpreted the contract, gathering the intent of the parties from the entire instrument and not isolated clauses.

[3] That resulted in an ambiguity made clear by extrinsic evidence. That is, MDL must have introduced Northstar to a source that provided Financing. Since MDL made no such introduction, MDL's claim was properly dismissed.

[4] MDL devoted part of its reply to arguing extrinsic evidence, claiming that the evidence against it was "self-serving," and that MDL's post-contract, one-way email messages clarified the contract entered two years before. But that argument simply highlights why it was appropriate for the court to assess extrinsic evidence.

[5] The court was faced with contract language concerning which the parties advanced sharply divergent interpretations. The court saw some support for each party's position in the text – in other words, an ambiguity. The trial therefore focused heavily on

extrinsic evidence, from both parties, received without objection. The court was persuaded by the evidence favoring Northstar's interpretation, which resolved the ambiguity.

[6] While MDL has reargued some extrinsic evidence on appeal, it does not contend that the court's fact finding concerning that evidence was clear error. Nor could it credibly make that argument, given the evidence in the trial record and the deference afforded the court's fact findings.

[7] MDL's rearguing of extrinsic evidence highlights the assumption underlying both parties' trial presentations: Concerning whether finding a source of Financing was required, or whether finding another finder was enough, the text alone was not enough. Extrinsic evidence was required, and the losing party's predictable contrary claims on appeal ring hollow. The court rightly found an ambiguity concerning MDL's purported interpretation. The court's resolution of that ambiguity has gone unchallenged. The judgment, as it pertains to MDL, should stand.

B. The introduction to Oppenheimer was not a "first introduction."

[8] As an alternative ground to affirm the court's dismissal of MDL's claim, Northstar explained that (a) the introduction to PICO Holdings, Inc., came through Oppenheimer's broader efforts, not Peter Williams; (b) Northstar had been introduced to Oppenheimer before it was introduced to Williams; and (c) the introduction was therefore not a "first introduction."

[9] In response, MDL (needlessly) pointed out that Northstar has admitted it was "first introduced" to Williams by Andrew Zweig of MDL. Northstar has never contended otherwise, but the relevant "party or entity" was Oppenheimer, not Williams.

Also, MDL wrongly claimed that "it was undisputed that Northstar's 2007 interactions with . . . Oppenheimer were entirely separate from its 2008 interactions with the [company's] New York Investment Banking Group." MDL Reply ¶16. To the contrary, Oppenheimer's point man on Northstar's 2007 work was in the middle of the 2008 work by the New York office. N.S.App. 271. Although the court never reached the issue, even MDL's finding of a finder was not a "first introduction," an alternative ground on which to affirm its decision.

II. THE COURT HAD JURISDICTION OVER HAYDEN.

[10] The gist of the jurisdictional defense asserted by Hayden Capital USA, LLC, and Hayden Capital Corp. (together "Hayden") is plain from the first sentence of their reply, where they argue there was no jurisdiction because Northstar "demonstrably failed to state a cause of action for fraud." Hayden Reply ¶1. What Hayden means, of course, is that Northstar's tort claims failed. In other words, Hayden contends that because of the court's decision on the merits (dismissing Northstar's tort claims) it had no jurisdiction to decide the merits. If that became the law of this state, the courts would be powerless to decide tort claims that ultimately failed whenever jurisdiction was contested. That nonsensical argument should be rejected.

[11] Simply stated, Northstar presented facts by affidavit that established a *prima facie* case that Williams concealed his affiliation with Hayden to fraudulently induce Northstar to contract with Hayden. App. 35-43. While the court ultimately dismissed the resulting tort claims, it also found that Williams concealed his Hayden affiliation. App. 343. The court's decision that Northstar was not entitled to damages did not divest it of jurisdiction.

[12] Hayden's argument that tort-based jurisdiction exists under Rule 4 only when the defrauded party sues for damages, and not when the party seeks to rescind, cannot stand. The same tortious conduct exists. The same injury to a North Dakota citizen exists. The only difference is the injured party's election of remedy. Regardless of the remedy sought, the North Dakota courts have jurisdiction to provide redress to the citizens of this state.

[13] Hayden asserted that Northstar "failed to respond" to cases it cited finding that due process barred jurisdiction under particular facts. But those cases – Bolinske v. Herd, 2004 ND 217, 689 N.W.2d 397; Ensign v. Bank of Baker, 2004 ND 56, 676 N.W.2d 786; and Hust v. Northern Log, Inc., 297 N.W.2d 489 (N.D. 1980) – have no impact on this case. Those are run-of-the-mill contract cases (Hust also alleged a defect). They did not involve an out-of-state defendant concealing facts and offering false testimony in an effort to steal millions of dollars from a North Dakota citizen, as does this case. This case involves forum contacts of a nature and quality that are far more significant for jurisdictional purposes than the cases Hayden cited.

[14] In the end, having abandoned its jurisdictional objection at trial, Hayden passed on the opportunity to ask the court to make true fact findings on the nature and quality of its contacts with North Dakota. For example, Hayden argues that its contacts with North Dakota are insignificant because certain communications passed through MDL. But under the Rule 12 standard, the court had to infer all facts in Northstar's favor, thus viewing the "pass through" as insignificant, with Hayden using MDL to perpetrate a fraud. At trial, a jurisdictional objection would not have been hampered by

the *prima facie* standard, but since Hayden failed to try the facts, it cannot do so for the first time in front of this Court.

[15] Hayden offered virtually no opposition to the doctrine, fully supported by federal case law, that it cannot use its jurisdictional objection to "sandbag." Hayden's argument that the doctrine is "foreclosed" by Smith v. Smith, 459 N.W.2d 785 (N.D. 1990), which reversed an initial finding of jurisdiction after the defendant did not appear at trial, misapprehends the issue. A defendant who does not appear at trial is not "sandbagging," but acting consistently with a jurisdictional defense. Hayden, on the other hand, sought a situation where it could win, but could not lose.

[16] If Hayden had got what it asked for at trial, $4.8 million from Northstar and the PICO Defendants, this Court never would have heard of its abandoned jurisdictional objection. But with its (false) claims having been rejected, Hayden resurrected the jurisdictional objection on which it never asked the court to make a final ruling. A jurisdictional defense cannot be used in that fashion, and it should be summarily rejected here.

[17] Hayden claims that its initial objection to jurisdiction precludes it from having made a voluntary general appearance by suing the PICO Defendants. But the cases it relies upon (all from other jurisdictions) deal with situations where the third-party claims were asserted in responsive pleadings and were in the nature of defenses (i.e., the third-party claimant alleged that if it owed the plaintiff, then the third-party defendant should pay). See Juelich v. Yamazaki Mazak Optonics Corp., 670 N.W.2d 11, 16 (Minn. Ct. App. 2003) ("Because [the defendant's] third-party complaint was contingent on the original action, seeking relief 'in the event it is found liable'. . . there is no basis for

treating it differently from cross-claims or counterclaims."); Olin Corp. v. Fisons PLC, 47 F. Supp. 2d 151, 154-55 (D. Mass. 1999) (considering "cross-claims for indemnification" and determining there was no waiver under Fed. R. Civ. P. 12(b) when the claims were asserted "in the same pleading in which the defendant asserts a defense of lack of personal jurisdiction."); Proctor & Gamble Cellulose Co. v. Viskoza-Loznica, 33 F. Supp. 2d 644, 662 (W.D. Tenn. 1998) (under Rule 12(b) cross-claims or third-party complaints stating "other defenses or objections" that are "in the same pleading" as the answer are not waivers); Bayou Steel Corp. v. M/V Amstelvoorn, 809 F.2d 1147, 1149 (5th Cir. 1988) (same when "not otherwise waived in the course of the litigation," as Hayden did).

[18] This case presents a far different situation, where Hayden asserted standalone claims (not in the alternative) against the PICO Defendants, voluntarily hailing them into a forum of Hayden's choosing where they otherwise would not have been.[1] Moreover, Hayden's third-party summons and complaint was not in a responsive pleading, but in a separate and voluntary pleading, which is not materially different from a separate action. Voluntarily invoking the power of the court in that manner should be regarded as voluntarily submitting to its jurisdiction as well.

[19] If the rule were otherwise, Hayden would be unfairly allowed to orchestrate a situation where it could win but not lose. Hayden's claims against the PICO Defendants failed. And now Hayden seeks a ruling that those proceedings are "void," allowing Hayden another bite at the apple, turning the trial of the claims it commenced

[1] MDL's claim against the PICO Defendants was asserted well after Hayden's. Hayden also sued the PICO Defendants in New York federal court.

into an academic exercise, and unfairly subjecting the PICO Defendants to the civil equivalent of double jeopardy. The Court should not sanction such litigation tactics, and Hayden's third-party claims should be deemed a voluntary general appearance.

III. COLLATERAL ESTOPPEL.

[20] The collateral estoppel effect of an interlocutory order dismissing claims on the pleadings is a matter of first impression. In a case cited by Hayden involving res judicata, Westman v. Dessellier, 459 N.W.2d 545, 547 (N.D. 1990), the court stated that it was appropriate to "postpone[] decision . . . until the appeal . . . was concluded." In this case, that would have resulted in Northsar's tort claims proceeding to trial, as the New York federal court's decision was (and is) not yet appealable.

IV. NORTHSTAR DID NOT RECEIVE FINANCING.

[21] Hayden contends that Northstar received "Financing" because it "funneled PICO's money to newly formed subsidiaries." Hayden Reply ¶10. But the court specifically found the structure of the transaction was not an attempt to avoid a fee. App. 340. MDL argues there was "Financing" through the use of a complex chart, detailing a transaction not remotely equivalent to Northstar accepting cash. MDL Reply ¶20.

[22] The Hayden contract defines "Financing" as Northstar's sale of debt or equity securities or receipt of a loan (even then the fee is triggered only by the sale). App. 269, 271. The MDL contract defines "Financing" as Northstar's acceptance of money. Neither occurred. Northstar received only a 12.34% interest in PICO Northstar, LLC, and, as the court determined, at most was financed "to the extent of Northstar's ownership." App. 178, 340. But even that is not "Financing" under the contracts, as Northstar did not get a dime from which it could pay the fees. That is an alternative ground to affirm the judgment in favor of Northstar.

Dated: April 7, 2014

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for Northstar Founders, LLC, 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 1,989.

Dated: April 7, 2014

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STATE OF NORTH DAKOTA)
) ss
COUNTY OF CASS)

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

Andrea Nowak, being first duly sworn on oath, deposes and states that she is a resident of the City of West Fargo, North Dakota, of legal age, and not a party to the above entitled matter. On April 7, 2014, affiant served a true and correct copy of the following:

Reply Brief of Northstar Founders LLC

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To the best of affiant's knowledge, the address above given was the actual address of the party intended to be so served. The above documents were duly served in accordance with the provisions of the Rules of Civil Procedure.

Andrea Nowak

Subscribed and sworn to before me on April 7, 2014.

Notary Public

LORI JO DANIELSON
Notary Public
State of North Dakota
My Commission Expires Sept. 5, 2018

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