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Case No. 20130325

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STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

Tharaldson Ethanol Plant I, LLC and
Tharaldson Financial Group, Inc.,
Plaintiffs / Appellants,

vs.

VEI Global, Inc. f/k/a Valley Engineering, Inc.,
Defendant / Appellee,

and

VEI Global, Inc. f/k/a Valley Engineering, Inc.,
Third-Party Plaintiff,

vs.

Dougherty Funding, LLC,
Third-Party Defendant.

Appeal from an order granting Defendant / Appellee's Motion for Partial Summary Judgment, an order granting Rule 54(b) certification, and a Judgment entered on July 22, 2013, an Amended and Final Judgment entered on September 27, 2013, and an Amended Judgment entered on October 2, 2013

In the District Court for East Central Judicial District,
Cass County, The Honorable Wickham Corwin, presiding

APPELLANTS' REPLY BRIEF

MATTHEW T. COLLINS (N.D. #07295)
NATHAN R. SELLERS, admitted *pro hac vice*
Fabyanske, Westra, Hart & Thomson, P.A.
800 LaSalle Avenue South, Suite 1900
Minneapolis, MN 55402
Tel: (612) 359-7600
Fax: (612) 338-3857

Attorneys for Plaintiffs / Appellants Tharaldson Ethanol Plant I, LLC and Tharaldson Financial Group, Inc.

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INTRODUCTION

This case can be effectively resolved on a simple basis: VEI did not prove compelling, unusual, and out-of-the-ordinary circumstances to justify Rule 54(b) certification. Moreover, the district court did not delineate any such required circumstances when it ordered entry of a final judgment. Therefore, this Court should hold that Rule 54(b) certification was improvidently granted.[1]

On the merits—should this Court choose to reach them—the analysis is also straightforward. First, the district court made factual findings and, therefore, granting summary judgment was erroneous. Second, VEI failed to support its motion with evidence that the Plant achieved the production criteria required by Term C of the Note. Thus, the court's summary judgment order on the Note's final $150,000 was improper. Third, mutuality existed between TFG and VEI; hence, TFG had a setoff defense precluding an order for summary judgment. Finally, and most disturbing, the district court violated TFG's right to due process by denying TFG a meaningful opportunity to respond to VEI's claim for the Note's final $150,000. As a result, this Court should reverse the summary judgment order.

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[1] North Dakota Rule of Appellate Procedure 32(a)(7)(C) limits the parties' arguments on the appropriateness of N.D. R. Civ. P. 54(b) certification. On that issue, Tharaldson rests on its opening brief.

ARGUMENT

I. The district court made impermissible findings of fact.

A. The Settlement Agreement and Note were separate transactions.

The district court found that the Settlement Agreement and Note were separate transactions and "TFG has no interest" in the unadjudicated contract and negligence claims against VEI. (APP-107 to -108.) Those factual findings constitute error; on summary judgment, the district court may not draw inferences or make findings on disputed facts. *Farmers Union Oil Co. of Garrison v. Smetana*, 2009 ND 74, ¶ 10, 764 N.W.2d 665.

Arguing in support of the district court's findings, VEI repeatedly calls the Settlement Agreement and Note "completely separate transaction[s]." But VEI's assertions are belied by statements elsewhere in its brief:

- VEI concedes that the Note, like the Settlement Agreement, was "related to money owed for [VEI's] work on the [P]lant." (Appellee's Br. ¶ 7.) In other words, VEI admits that the Settlement Agreement and Note have the same origin.

- VEI also refers to the TFG-VEI-TEPI deal in the singular; e.g., "the transaction." (Id. ¶¶ 7, 40.) VEI thus recognizes that the Settlement Agreement and Note are not "completely separate."

Further, assuming *arguendo* that one could reasonably infer that the Settlement Agreement and Note were "completely separate transaction[s]," summary judgment was nevertheless improper because there is a contrary reasonable inference. Given that

(1) the Settlement Agreement and Note were executed at substantially the same time for the exact same amount;

(2) the Settlement Agreement expressly references the Note; and

(3) the Note—as VEI admits—was "related to money owed for [VEI's] work on the [P]lant,"

there is a reasonable inference that the Settlement Agreement and Note were part of a single transaction.

Viewing the evidence in the light most favorable to TEPI and TFG, more than one reasonable inference can be drawn from these facts. Accordingly, summary judgment was improper and should be reversed. *See N. Oil & Gas, Inc. v. Creighton*, 2013 ND 70, ¶ 23, 830 N.W.2d 556.

B. No sufficient evidence existed to support summary judgment on the final $150,000 under the Note.

Payment of the Note's final $150,000 was premised on the Plant achieving the production criteria stated in Term C of the Note. No evidence before the district court proved that Term C's production criteria was met. Therefore, the district court erred by entering summary judgment on the Note's final $150,000. *See Hoops v. Selid*, 379 N.W.2d 270, 272 (N.D. 1985) (explaining that "entry of summary judgment for a particular amount without sufficient evidence supporting that amount is erroneous").

Attempting to justify the judgment, VEI asserts that "[TEPI] and [TFG] conceded that the [P]lant reached its designed production rate in February 2010." (Appellee's Br. ¶ 72.) Without further analysis, VEI asserts that "[TEPI] conceded that Term C of the Note had been met." (Id. at ¶ 76.) VEI's argument is logically flawed.

A fundamental precept of deductive reasoning is the following: if "conceding X" equals "conceding Y," then X must equal Y. But VEI fails to prove the syllogism upon which it relies—namely, that the Plant achieving its "designed production rate" in February 2010 equates to the Plant achieving the 90-day production criteria in Term C. Put differently, VEI failed to show that reaching a nebulous "designed production rate" in one month is the same as the Plant "exceeding 30,821,918 gallons of . . . ethanol over a

90 day period." Unfortunately, the district court succumbed to the very logical fallacy upon which VEI now relies. (Appellants' Br. 20-21.)

VEI also wrongly argues that TEPI and TFG had ample time to "correct [their] mistake by deny[ing] the truth of what they had previously stated." (Appellee's Br. ¶ 77.) VEI's argument is a red herring.

There is nothing in the record that TEPI or TFG need to correct. Neither Ryan Thorpe's affidavit nor counsel's statement at oral argument was a "mistake." VEI simply misapprehends the import of TEPI's and TFG's alleged concessions; Thorpe's affidavit and counsel's "judicial admissions" do not support the conclusion that the Plant met the 90-day production criteria in Term C.

Because insufficient evidence exists in the record to support summary judgment on the Note's final $150,000, the district court erred as a matter of law.

II. The Assignment is a valid contract and TFG has a setoff defense that precludes summary judgment as a matter of law.

VEI cites no legal authority challenging the Assignment. Indeed, other than repeating the district court's observation that the Assignment "look[s] a little fishy," VEI does not question the Assignment or TFG's acquisition thereunder of claims against VEI. The only issue, thus, is whether the claims TFG acquired are mutual to VEI's claims against TFG, thereby creating a setoff defense.

VEI argues first that TFG failed in several manners to plead its setoff defense. (See Appellee's Br. ¶¶ 101, 110.) VEI is precluded from raising this argument because it was not raised before the district court. *See Morris v. Moller*, 2012 ND 74, ¶ 8, 815 N.W.2d 266; *Frison v. Ohlhauser*, 2012 ND 35, ¶ 7, 812 N.W.2d 445. In any event, TFG

clearly pleaded its setoff defense in its Answer to VEI's Counterclaim. (See APP-47 ¶ 55.)

Next, VEI argues that TFG's setoff defense fails because the parties' claims lack mutuality. Specifically, VEI asserts that "[t]he assignment destroyed any mutuality that might have existed." (Appellee's Br. ¶¶ 104.) VEI also waived this argument by not raising it below. Moreover, VEI misapplies the mutuality doctrine.

Legal claims are mutual when they are between the same person and in the same capacity. *See Collection Ctr., Inc. v. Bydal*, 2011 ND 63, ¶ 44, 795 N.W.2d 667. This somewhat esoteric standard means simply that mutuality exists when "the party seeking the setoff could file an independent action to obtain a judgment on the debt owed to him by the opposing party." *Lewis v. United Joint Venture*, 691 F.3d 835, 840 (6th Cir. 2012); *see also Braniff Airways, Inc. v. Exxon Co., USA*, 814 F.2d 1030, 1036 (5th Cir. 1987) (mutuality requires that "each party . . . own his claim in his own right severally, with the right to collect in his own name").

Here, under the Assignment, TFG has an identifiable, standalone claim against VEI for contract and tort claims arising from the Plant's design and construction. *See Bydal*, 2011 ND 63, ¶ 15 (recognizing the assignability of a cause of action). Rather than destroying mutuality, the Assignment **created** mutuality between TFG and VEI. *See In re U.S. Aeroteam, Inc.*, 327 B.R. 852, 864-65 (Bankr. S. D. Ohio 2005).[2]

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[2] *U.S. Aeroteam* does not support VEI's conclusion that "[w]hen an assignment to a third party is not absolute, mutuality is destroyed." (Appellee's Br. ¶ 106.) Indeed, the *U.S. Aeroteam* court noted that an "absolute assignment of a claim to a third party [may] destroy[ ] [mutuality]." 327 B.R. at 865 (citation omitted).

VEI's miscomprehension likely lies in the fact that an assignment might destroy mutuality between some parties while at the same time creating mutuality between other

(Footnote continued on next page.)

Therefore, summary judgment in this case was improper and should be reversed.

III. Summary judgment for the entire amount of the Note violated TFG's right to due process.

The final and critical issue is the district court's violation of TFG's constitutional right to due process when it entered summary judgment on the Note's final $150,000. VEI posits that TFG had notice of VEI's claim for the full amount of the Note "when VEI filed its reply brief in support of its motion for summary judgment." (Appellee's Br. ¶ 83.) VEI's statement concedes the issue. *See Dep't of Highway Safety & Motor Vehicles v. Dellacava*, 100 So. 3d 234, 236 (Fla. Dist. Ct. App. 2012) ("[Petitioner] was denied due process when the [district] court granted . . . relief on an issue raised for the first time in [respondent's] reply."); *see also Gullickson v. Kline*, 2004 ND 76, ¶ 12, 678 N.W.2d 138.

VEI argues nonetheless that "after VEI filed its reply brief," TFG "had a meaningful opportunity to oppose" the expanded scope of VEI's motion. (Appellee's Br. ¶ 84.) In particular, VEI asserts that TFG could have submitted additional affidavits, presented contradictory facts during the motion hearing, or submitted a supplemental brief but "chose not to do so." (Id.)

Tellingly, VEI cites no authority for its proposed courses of action. And, in fact, each is foreclosed by court rules and caselaw. The North Dakota Rules of Court do not permit a party to file a "sur-reply brief" or "sur-reply affidavits." *See* N.D. R. Ct. 3.2.

(Footnote continued from previous page.)

parties. Hence, an absolute assignment from A to C of A's causes of action against B would destroy mutuality between A and B, but create mutuality between B and C. A partial assignment would not accomplish the former, but could accomplish the latter.

Moreover, statements of counsel at oral argument are insufficient to resist summary judgment. *See Hummel v. Mid Dakota Clinic, P.C.*, 526 N.W.2d 704, 708 (N.D. 1995); *cf. Hanson v. Williams Cnty.*, 452 N.W.2d 313, 314 n.1 (N.D. 1990) (discussing counsel's unsworn statements at district court hearings).

VEI essentially proposes the following rule of law: a movant for summary judgment may expand the scope of its motion on reply simply by giving the nonmovant "notice" at the time the reply brief is filed; the burden then shifts to the nonmovant to find some way to present facts contradicting the motion's expanded scope. Such a rule is contrary to this Court's precedent. *See Benz Farm, LLP v. Cavendish Farms, Inc.*, 2011 ND 184, ¶ 9, 803 N.W.2d 818 ("The degree of response of the party opposing the motion for summary judgment is set by the scope of the motion."). Such a rule is also illogical, unjust, and inefficient. The nonmovant "should not have to incur the cost and effort of additional filings . . . because the movant[ ] deliberately, or more likely inadvertently, held back part of [its] case." *See Int'l-Matex Tank Terminals-Illinois v. Chem. Bank*, 1:08-CV-1200, 2009 WL 1651291, at *2 (W.D. Mich. June 11, 2009) (citation omitted).

Because the district court granted summary judgment based on issues raised for the first time in VEI's reply, TFG was denied due process of law.

CONCLUSION

TEPI and TFG respectfully request that this Court hold that Rule 54(b) certification was improvidently granted. Accordingly, this Court should dismiss the appeal.

If this Court reaches the merits of the appeal, TEPI and TFG respectfully request that this Court reverse the district court's order granting partial summary judgment.

Alternatively, TEPI and TFG request that this Court reverse the district court's order to the extent it exceeds the amount VEI sought in its motion.

Respectfully submitted January 23, 2014

MATTHEW T. COLLINS (N.D. ID# 07295)
NATHAN R. SELLERS, admitted *pro hac vice*
Fabyanske, Westra, Hart & Thomson, P.A.
800 LaSalle Avenue South, Suite 1900
Minneapolis, MN 55402
Phone: 612/359-7600 Fax: 612/338-3857

Attorneys for Plaintiffs / Appellants Tharaldson Ethanol Plant I, LLC and Tharaldson Financial Group, Inc.

20130325

State of Minnesota)
) SS.SS.
County of Hennepin)

Affidavit

Stephen M. West, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **January 23, 2014**, he prepared the **Appellants' Reply Brief,** case number **20130325**, and served 1 copy of same upon the following attorney(s) or responsible person(s) by **First Class Mail postage prepaid.**

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JAN 23 2014

STATE OF NORTH DAKOTA

Jeffrey W. Coleman
800 Washington Avenue North
Suite 620
Minneapolis, MN 55401

Fred Strege
321 Dakota Avenue
P.O. Box 38
Wahpeton, ND 58074

Subscribed and sworn to before me on
January 23, 2014

Signed _____

Notary Public _____

EDWIN R. MOTOH
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2015

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Fax (612) 337-8053 ■ www.bachmanprint.com
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Suite 109
Minneapolis, MN 55402