20140354 &
20140357
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 16, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No.'s 20140354 & 20140357
Cass County District Court No.'s 09-2013-CV-00502 & 09-2013-CV-00505

Prairie Supply, Inc.,

Plaintiff/Appellant,

v.

Apple Electric, Inc. and
Justin Neidviecky,

Defendants/Appellees.

BRIEF OF PLAINTIFF/APPELLANT

Appeal from the District Court's Memorandum, Findings of Fact, Conclusions of Law and Order for Judgment dated July 14, 2014, and Judgment dated September 22, 2014

Ann E. Miller (ND ID 06706)
Michael T. Andrews (ND ID 05516)
ANDERSON, BOTTRELL, SANDEN & THOMPSON
4132 30th Avenue SW, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
amiller@andersonbottrell.com
mandrews@andersonbottrell.com
(701) 235-3300
Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

[¶1] Whether the District Court erred as a matter of law when it concluded the agreements between Prairie Supply and Apple Electric were purchase agreements and not lease agreements.

[¶2] Alternatively, whether the District Court erred as a matter of law when it concluded Prairie Supply had not perfected or retained a security interest in the Thawzall heaters that were in Apple Electric's possession.

[¶3] Whether the District Court erred as a matter of law when it concluded Prairie Supply's repossession of the Thawzall heaters was done under inappropriate circumstances.

[¶4] Whether the District Court erred as a matter of law when it concluded Prairie Supply's repossession of the Thawzall heaters constituted conversion.

[¶5] Whether the District Court erred as a matter of law when it determined Prairie Supply had waived its right to repossess the Thawzall heaters.

[¶6] Whether the District Court erred as a matter of law when it awarded Apple Electric damages based on the value of the equipment at the time of the repossession, less the amount still owing thereon, plus interest from that time.

STATEMENT OF THE CASE

[¶7] This is an appeal from Memorandum, Findings of Fact, Conclusions of Law and Order for Judgment dated July 14, 2014, and Judgment dated September 25, 2014, of the East Central Judicial District Court, Cass County. Appellant's A. at 93. This action was originally commenced by Prairie Supply, Inc. ("Prairie Supply") as two small claim court actions against Apple Electric, Inc. and its owner, Justin Neidviecky (collectively, "Apple Electric"). Appellant's A. at 11, 14. Apple Electric removed the small claim actions to District Court and the claims were then consolidated pursuant to a stipulation by the parties. These actions arise out of two lease agreements whereby Prairie Supply rented two Thawzall ground heaters to Apple Electric. Appellant's A. at 11, 14. Prairie Supply's complaints alleged Apple Electric breached both lease agreements by defaulting on payments. Id. Apple Electric denied the allegations and interposed a Counterclaim in each action alleging Prairie Supply had converted the Thawzall heaters by repossessing the same. Appellant's A. at 17, 21. Prairie Supply denied the allegations set forth in the counterclaims. Appellant's A. at 25, 28.

[¶8] The case was tried to the District Court on May 7, 2014. Appellant's A. at 93. The District Court found the agreements between the parties were purchase agreements, not lease agreements; Prairie Supply's repossession of the heaters was wrongful and constituted conversion; Prairie Supply had waived its right to repossess the heaters; and that Apple Electric was entitled to damages representing the value of the equipment at the time of the repossession, less the amount still owing, plus interest, totaling $61,851.94, plus interest at the rate of 6% from July 1, 2012. Appellant's A. at 98-99. Prairie Supply moved the District Court to amend its findings, make additional findings, or in the alternative, a new trial. Appellant's A. at 100. The District Court denied Prairie Supply's Motion by way of a

Memorandum and Order dated September 18, 2014. Appellant's A. at 107. Judgment was then entered by the Clerk of Court on September 25, 2014. Appellant's A. at 112. Prairie Supply's Notice of Appeal followed on October 8, 2014. Appellant's A. at 114.

STATEMENT OF THE FACTS

[¶9] Prairie Supply is a supplier of construction equipment and materials with its principal place of business in Fargo, North Dakota. Tr. 143. Defendants Apple Electric, Inc. and its owner Justin Neidviecky entered into various contracts with Prairie Supply over a period of years. Tr. 132. On November 13, 2006, Apple Electric executed a Credit Application with Prairie Supply that contained a Continuing Personal Guaranty. Appellant's A. at 39. By signing the continuing personal guaranty, Neidviecky agreed that "[Neidviecky], jointly and severally . . . absolutely and unconditionally guaranty, ***without limitation as to amount***, the prompt payment when due of ***any and all indebtedness*** of [Apple Electric] to [Prairie Supply], ***now or hereafter owed*** by [Apple Electric]." Appellant's A. at 41 (emphasis added).

[¶10] The Agreements, Terms, and Conditions of the Credit Application stated, in pertinent:

> 5. ***Customer agrees to notify [Prairie Supply] in writing, of any error in the statement within 10 days after the date of the statement. If not so noticed, the statement shall be deemed to be correct and accepted as rendered.*** Customer shall pay in full in accordance with the terms of the particular purchase agreement, invoice, and/or other shipping or delivery document, with or without [Apple Electric's] signature.
>
> 8. If [Apple Electric] ***purchases*** equipment or material, [Apple Electric] agrees that ***title to all such equipment and materials shall not transfer to [Apple Electric] until the purchase price, together with all interest and other costs lawfully added to the purchase price, is paid in full.***
>
> 9. ***[Prairie Supply] shall have the sole discretion to apply any payment received from [Apple Electric] hereunder in any manner, which [Prairie Supply] deems proper.*** [Prairie Supply] may apply payments first to late payment charges, shipping charges, actual prejudgment and post judgment attorney's fees and costs, or any other applicable charge, in any order before applying the remainder of any such payments toward [Apple Electric's] principal account balance.

Id. (emphasis added).

[¶11] In November of 2011, Bruce Kringlie, owner of Prairie Supply, and Apple Electric entered into an oral agreement whereby Apple Electric agreed to rent a Mini Thawzall 2M ground heater (the "Mini") from Prairie Supply. Tr. 133. If Apple Electric remained current with payments, then at the end of the heating season the rental agreement would be reevaluated by Prairie Supply, and Apple Electric would be given the option to purchase the Mini. Tr. 133, 110. According to Prairie Supply's New Rental invoice dated December 7, 2011, the Mini was to be delivered to Apple Electric in Williston on November 16. Appellant's A. at 50.

[¶12] Shortly after executing the rental agreement for the Mini, Apple Electric entered into a written Rental Agreement for the rental of a Thawzall Model 6A ground heater (the "6A"). Appellant's A. at 31. The same conditions were placed on the 6A rental agreement; as long as Apple Electric stayed current with their rental payments, they would be given the option to purchase the 6A at the end of the rental term. Tr. 37. According to Prairie Supply's New Rental invoice for the 6A, the heater was delivered or picked up by Apple Electric on or around December 5, 2011. Appellant's A. at 51.

[¶13] The agreements, at all times, were rental agreements. The first invoice for each heater was titled "New Rental". See Appellant's A. at 50, 51. Each of the subsequent invoices sent to Apple Electric was titled "Rental Rebill". See Appellant's A. at 52-63. The invoices were Prairie Supply's rental invoices, not sale invoices. Tr. 39. The rental agreement refers to Defendants as "Lessee" and Prairie Supply as "Lessor". See Appellant's A. at 31. It is undeniably signed by Apple Electric's owner, Justin Neidviecky. Id. The emails between the parties referred to "rent" payments. Appellant's A. at 69. Prairie

Supply maintained title to the heaters, which would pass to Apple Electric only upon purchase. Tr. 21.

[¶14] Apple Electric testified that it re-rented the heaters it was renting from Prairie Supply for a profit. Tr. 151. The re-rental payments were how Apple Electric intended on paying Prairie Supply for its use of the heaters. Tr. 150. Despite having re-rental income, Neidviecky testified that he knew he was not up-to-date with payments owed to Prairie Supply. Tr. 170. He also testified that he knew Prairie Supply was contacting him to try to collect payment. Id. Emails between the parties not only demonstrate Prairie Supply's attempts to contact Apple Electric, but also demonstrate Prairie Supply's willingness to work with Apple Electric to try to make the option to purchase a viable option. Appellant's A. at 67-74; Tr. 112.

[¶15] While a formal sales agreement for the ground heaters had not been reached between the parties at any time, Prairie Supply invoices acknowledge an estimated purchase price of $24,000.00 for the Mini and $46,000.00 for the 6A. See Appellant's A. at 58, 60. Thus, just the purchase price of the two heaters, not including the sales tax nor the finance charges, totaled $70,000.00. Tr. 45. Apple Electric made a total of $57,059.44 in payments, albeit untimely. See Appellant's A. at 64. Prairie Supply extended an offer to Apple Electric to purchase the heaters for a lump sum of $44,383.00, which included unpaid rent to date, in May of 2012. Appellant's A. at 69. When Apple Electric failed to make the required payment, Prairie Supply deemed Apple Electric to be in default. Id. at 69-71.

[¶16] Based on Apple Electric's default, Prairie Supply took possession of the heaters in approximately June of 2012. Tr. 46. Prairie Supply notified Apple Electric of its intention to do so should Apple Electric fail to bring its balance current. Id.; Appellant's A. at 69. Prairie

Supply then brought two separate actions against Apple Electric for rent and finance charges due and owing under the lease agreements, totaling approximately $19,000.00. Tr. 118.

LAW AND ARGUMENT

A. Standard of Review

[¶17] In an appeal from a bench trial, the trial court's findings are reviewed under the clearly erroneous standard and its conclusions of law are fully reviewable. C & C Plumbing and Heating, LLP v. Williams County, 2014 ND 128, ¶ 5, 848 N.W.2d 709 (citations omitted). 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 viewing the evidence, this Court is left with a definite and firm conviction a mistake has been made. Id.; see also, Mahoney v. Mahoney, 516 N.W.2d 656, 662 (N.D. 1994) (an appellate court is not bound by a trial court's findings of fact when those findings are based on an erroneous conception of the law).

[¶18] Whether a determination is a finding of fact or a conclusion of law is decided by the reviewing court, and labels applied by trial court are not conclusive. Matter of Guardianship of Braaten, 502 N.W.2d 512, 517 (N.D. 1993). This Court considers whether events are undisputed; if only one inference can reasonably be drawn from undisputed facts, the determination of that inference is a "question of law", but if undisputed facts permit the drawing of different inferences, the drawing of one of those inferences is a "finding of fact". Nygaard v. Robinson, 341 N.W.2d 349, 353 (N.D. 1983).

[¶19] In Foley Equipment, Inc. v. Krause Plow Corp., this Court concluded the trial court's finding that Foley Equipment's termination of a dealership agreement was not in bad faith was one of law, and fully reviewable on appeal, where it was undisputed by the parties that Krause Plow Corp. was in default on its payments for three equipment purchases. 456 N.W.2d 121, 124 (N.D. 1990). Just as in Foley, facts regarding Apple Electric's default on its payments is undisputed; thus, whether Prairie Supply justly terminated the agreements with

Apple Electric and repossessed its property is a question of law, which is fully reviewable on appeal.

B. The District Court Erred in Concluding the Agreements Between the Parties were Purchase Agreements, Not Lease Agreements.

1. Evidence Showed the Agreements were Lease Agreements Pursuant to the Lease Provisions of the UCC.

[¶20] North Dakota Century Code § 41-02.1-03(1)(j) defines a "lease" as "a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease." Conversely, a "sale" "consists in the passing of title from the seller to the buyer for a price." N.D. Cent. Code § 41-02-06(1)(d). As the definitions of the terms in dispute made clear, the agreements at issue were lease agreements, not purchase agreements.

[¶21] The District Court made no findings with regards to the lease provisions of the UCC. Prairie Supply presented significant evidence at trial demonstrating that the agreements between the parties constituted leases. Such evidence included Plaintiff's Exhibit 2, the Rental Agreement, which described the Mini Thawzall as the "Equipment rented" and referred to the parties as "lessee" and "lessor". Appellant's A. at 31. Prairie Supply's invoices sent to Apple Electric were titled "New Rental" and subsequently "Rental Rebill" for both the Mini Thawzall and the Thawzall 6A. See Appellant's A. at 50-63. Emails between the parties regarding the ground heaters referred to the units as "rentals" and payment was referred to as "rent". See Appellant's A. at 47, 69. While there are numerous references in the evidence presented at trial that identify the agreements between the parties as rental agreements, the

District Court did not cite any evidence in the record that supported its finding that the agreements were purchase agreements. In fact, there was none.

[¶22] Courts have long been tasked with determining whether a transaction is a true lease or a sale with a retained security interest. See In re Hoskins, 266 N.R. 154 (Bankr. W.D. Mo. 2001) (court looked at whether lease could be terminated to determine whether the lease was disguised as a security agreement; determined to be a lease because lessee could not simply return property and walk away but instead remained liable for balance of remaining payments); In re Macklin, 236 B.R. 403 (Bankr. E.D. Ark. 1999) (most significant factor that determines whether transaction is true lease or a sale with retained security interest is whether the lessor has retained a meaningful residual interest in goods at end of lease term); In re Morris, 150 B.R. 466 (Bankr. E.D. Mo. 1992) ("rent-to-own" contract was true lease rather than sales contract as debtor had no absolute obligation to purchase, pay for or assume title to merchandise); Nat'l Can Servs. Corp. v. Gateway Aluminum Co., 683 F.Supp. 719 (E.D. Mo. 1988) (agreement was a lease because equipment was to be returned to owner at termination or expiration of the lease subject to an option to purchase, and the option to purchase at the expiration of the agreement was for the equipment's then fair market value); Carlson v. Tandy Computer Leasing, 803 F.2d 391 (8th Cir. 1986) (finding that agreement was pure lease and not security interest was sufficiently supported by "lease language" in agreement and the absence of absolute obligation in agreement of lessee to purchase rental property).

[¶23] Under North Dakota law, in determining whether an agreement is a "true lease" or a purchase agreement, the existence of option to purchase is not important. Instead, the amount of that option and its relationship to fair market value of the leased property is

important. In re Larson, 128 B.R. 257 (Bankr. D.N.D. 1990). As long as the purchase price of equipment at the expiration of the lease term is not "nominal", and instead bears resemblance to the fair market value of equipment, the agreement is considered a lease and not a purchase agreement. Id.

[¶24] Under North Dakota law, the agreements between the parties were true leases and not purchase agreements. The sale price offered to Apple Electric was not "nominal"; in order for Apple Electric to purchase the heaters outright at the end of the rental term, Apple Electric would to have paid $44,383.00. Appellant's A. 69. Testimony by Prairie Supply showed that the purchase price was determined by the fair market value at the time the offer was extended to Apple Electric. Tr. 45. Further, Apple Electric was not required to purchase the heaters at the end of the lease term, rather it was given the option to purchase the equipment rather than returning it to Prairie Supply. Thus, based on North Dakota law and the circumstances of this case, the District Court erred in determining the agreements between the parties were purchase agreements, not lease agreements.

2. Statute of Frauds Prohibits Finding the Agreements were Purchase Agreements.

[¶25] As the Court well knows, the Statute of Frauds requires that a contract for the sale of goods be in writing. Section 41-02-08 of the North Dakota Century Code states "a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . "

[¶26] While a purchase price for the heaters had not been established by Prairie Supply until the end of the lease term, the offer extended to Apple Electric of $70,000.00 for both

heaters is clearly higher than the minimum required to necessitate a written contract. Without such a writing, a contract for the sale of the heaters is not enforceable. Neither party has produced a written contract for the purchase of the heaters. In fact, no such contract exists. Based on the Statute of Frauds, even if there was an agreement between the parties regarding the sale of the heaters, said agreement cannot be enforced.

C. Alternatively, the Composite Document Rule Created a Security Interest in the Equipment.

[¶27] If this Court concludes that the District Court was correct in determining the agreements between the parties were purchase agreements, Prairie Supply maintained a security interest by way of the composite document rule. It is well-settled that a security agreement need not be a separate or single document, and a security agreement may consist of several different documents that collectively establish an intention to grant a security interest in the collateral identified in the documents. See In re Wyatt, 338 B.R. 76 (Bankr. W.D. Mo. 2006); In re Webber, 350 B.R. 344 (Bankr. S.D. Tex 2006); First Nat'l Bank and Trust Co. of Stillwater v. McKown, 1993 OK CIV APP 156, 867 P.2d 1342; In re Jojo's 10 Restaurant, LLC, 455 B.R. 321 (Bankr. D. Mass. 2011). A court may look to multiple documents to determine whether a valid and enforceable security agreement exists, by means of the doctrine of incorporation by reference or under a composite document doctrine. In re Bucala 464 B.R. 626 (Bankr. S.D. N.Y. 2012); Compass Bank v. Kone, 134 P.3d 500 (Colo. App. 2006); Helms v. Certified Packaging Corp., 551 F.3d 675 (7th Cir. 2008). Various papers signed by the debtor, such as a signed letter from the debtor describing the collateral, as well as papers not signed by the debtor thus may be considered together and in combination qualify as a security agreement. See 68A Am. Jur. 2d Secured Transactions § 167.

[¶28] The documents received in evidence by the District Court, most notably the title to the heaters which remained in Prairie Supply's possession, clearly evinced an agreement between the parties that the heaters remained the property of Prairie Supply until all rental payments were made. Further, the Credit Application also demonstrates Prairie Supply's intention to retain a security interest in all equipment sold until the purchase price is paid in full:

> If Customer purchases equipment or material, Customer agrees that title to all such equipment and material shall not transfer to Customer until the purchase price, together with all interest and other costs lawfully added to the purchase price, is paid in full.

Appellant's A. at 41. Prairie Supply retains a security interest in its equipment until paid. Tr. 65. As such, even if this Court determines the agreements between the parties were purchase agreements, Prairie Supply nonetheless retained a security interest in the heaters based on the intent of the parties as shown through the aforementioned documents.

D. The District Court Erred in Concluding Prairie Supply's Repossession of the Thawzall Heaters was Wrongful.

[¶29] Actions that constitute wrongful repossession of property are similar no matter whether the original agreement was a lease or a sale. While Prairie Supply at all times maintains the agreements with Apple Electric were leases, even if they were purchase agreements, Prairie Supply did not wrongfully repossess the Thawzall heaters under either the applicable lease or sale provisions of the UCC.

1. Repossession of Leased Equipment

[¶30] Remedies available to the lessor upon default by the lessee are defined by statute. If the lessee fails to make a payment when due, then, with respect to any goods involved, the

lessor may "[w]ithhold delivery of the goods and take possession of the goods previously delivered." N.D. Cent. Code § 41-02.1-71(1)(c). Further, § 41-02.1-73(2) gives lessor the right to takes possession of the goods in case of a default by the lessee. Said right can be exercised without judicial process if recovery can be done without breach of the peace. N.D. Cent. Code § 41-02.1-73(3). The remedies taken by Prairie Supply after default by Defendants were clearly allowed for and justified under the law.

2. Repossession of Collateral by a Secured Party

[¶31] The remedies available to a secured party are identical to those of a lessor. Section 41-09-106 of the North Dakota Century Code permits a secured party to take possession of the collateral after default if doing so does not breach the peace. See also Coleman v. Block, 562 F.Supp. 1353, 1364 (D.N.D. 1983) (secured creditor may upon debtor's default take possession of collateral without prior judicial action if that may be done without breach of the peace). Again, even if this Court upholds the District Court's determination that the agreements between the parties were purchase agreements and not lease agreements, the remedies taken by Prairie Supply after default by Apple were allowed for and justified by the law.

3. Repossession of the Heaters by Prairie Supply was Not Wrongful

[¶32] Apple Electric was undisputedly in default of the agreements with Prairie Supply. Regardless of whether the agreements were leases or purchase agreements, Prairie Supply had the right to repossess its property. Prairie Supply notified Apple Electric of its intent to take possession of the heaters if the account was not brought current. See Appellant's A. at 69. Testimony showed that Prairie Supply took possession of the heaters without breaching

the peace. See Tr. 158. Prairie Supply complied with state law when, upon default by Apple Electric, it took possession of its property without breach of the peace.

E. The District Court Erred in Concluding Prairie Supply's Repossession of the Thawzall Heaters was Conversion.

[¶33] Common law defines "conversion" as "the wrongful exercise of dominion over the personal property of another in a manner inconsistent with, or in defiance of, the owner's rights." Thimjon Farms P'ship v. First Int'l Bank & Trust, 2013 ND 160, ¶ 27, 837 N.W.2d 327. Absent an interest in the property allegedly converted that entitled the plaintiff to possession of the property, an action for conversion cannot lie. Id.

[¶34] The plaintiff in a conversion action has the burden of establishing title to the property in suit. Dearborn Truck Co. v. Nedreloe, 193 N.W. 311 (N.D. 1923). "If claimant cannot show possessory interest in property at time of alleged conversion, it cannot demonstrate that defendant's actions actually interfered with the property so as to constitute conversion." Meyer v. Norwest Bank Iowa, Nat. Ass'n, 112 F.3d 946 (8th Cir. 1997). Further, "[a] party seeking to recover for conversion must recover on strength of his own title without regard to weakness of that of his adversary and must show that he has either a general or special property interest in the thing converted and right to its possession at time of alleged conversion." Napoleon Livestock Auction, Inc. v. Rohrich, 406 N.W.2d 346 (N.D. 1987).

[¶35] Prairie Supply's Exhibits 8 and 9 show that title to the ground heaters never transferred from Prairie Supply to Apple Electric. See Appellant's A. at 37, 38. Testimony from Prairie Supply at trial supports this proposition:

> Q. [. . .] on a purchase title will transfer; is that right?
>
> A. When paid upon completion.
>
> Q. And title would transfer on any purchase as long as it's been paid?

A. Correct.

Tr. 21. Title to the heaters was never transferred to Apple Electric:

Q. (By Ms. Miller) All right. Exhibit 8, can you tell me what that is?

A. This is a certificate of origin or the title for the Mini Thawzall.

Q. Okay. And is this still in Prairie's possession?

A. Yes.

Q. And Exhibit 9, can you tell me what that is?

A. This is also a title for a Thawzall 6A.

Q. And it's still in Prairie's possession?

A. Yes.

Tr. 42.

[¶36] Apple Electric, at no point, had any possessory interest in the Mini or 6A and Apple Electric cannot meet their burden of establishing title to the ground heaters. At all times the Mini and 6A belonged to Prairie Supply; it is impossible for Prairie Supply to convert its own property. The District Court made no mention of the numerous North Dakota Supreme Court holdings cited by Prairie Supply for the proposition that there can be no claim of conversion where, as here, ownership/title never transferred. The District Court clearly erred when it found Prairie Supply converted the heaters.

F. Prairie Supply Did Not Waive its Right to Declare Apple Electric in Default of the Agreements.

[¶37] That late payments were accepted by Prairie Supply is of no legal relevance, yet the District Court appears to place enormous weight thereon. Prairie Supply cannot be estopped from declaring Apple Electric in default of their agreements because it had accepted late

payments in the past. Apple Electric did not dispute they were in default to Prairie Supply on their agreements, yet the District Court found to the contrary.

[¶38] Indeed, the Credit Application presented at trial contained a waiver provision. "Waiver by [Prairie Supply] of any terms or conditions of this agreement or waiver of any breach thereof shall not affect the validity or enforceability of the remaining provisions of this agreement." Appellant's A at 41. The District Court did not take the waiver provision into account when it determined Prairie Supply waived its right to declare Apple Electric in default of the agreements. Testimony showed that instead of waiving its right to declare Apple Electric in default, Prairie Supply instead tried to work with Apple Electric:

> Q. Were you working with Justin to try to figure out payment?
>
> A. Yes. Actually all along the entire period of these rentals we had given him ample opportunity to make an honest effort to stay current with us. And we went further than we normally do when contractors aren't paying within terms. So, you know, felt as if we were doing him a favor by keeping these machines in his possession. And again on rent again from him.
>
> So with him making income on our machines and not able to pay within our terms kind of questionable to me.
>
> Q. So you weren't wanting Mr. Neidviecky to fail?
>
> A. Absolutely not.
>
> Q. And you weren't trying to ruin his business?
>
> A. No.

Q. Okay. You were trying to help him?

A. Absolutely.

Tr. 112. The District Court clearly erred in determining that Prairie Supply's willingness to work with Apple Electric to stay current on the agreements constituted a waiver.

G. The District Court Erred in Awarding Apple Electric Damages based on Conversion.

[¶39] The damages awarded to Apple Electric by the District Court were excessive and not supported by law or the evidence presented at trial. It was undisputed that Apple Electric had possession of the heaters and that the heaters were then re-rented by Apple Electric for a profit. Tr. 151. The damages award does not take into account that the heaters were still owned by Prairie Supply as title had not transferred, thus the proper measure of damages cannot be based on conversion. Appellant's A. at 37, 38. The Court's damages award does not deduct for the fact that Apple Electric was undisputedly in default of their agreements and owed Prairie Supply money. The damages award by the Court was an enormous windfall for Apple Electric.

[¶40] If the District Court's award of damages is upheld, Apple Electric will have used Prairie Supply's equipment for 6 months absolutely free of charge. Such a determination cannot stand. Not only were the heaters in Apple Electric's possession, but Apple Electric was then re-renting the heaters. Tr. 151. Apple Electric claimed that the re-rental payments were intended to go to the rent owed to Prairie Supply, however, even with that re-rental income, Apple Electric was still not able to remain current on the monthly payments due to Prairie Supply. Tr. 150, 170. Prairie Supply rents heaters such as those at issue here at a 95 to 100% utilization rate. Tr. 110. With Apple Electric being in possession of the heaters while also being in default of the agreements, Prairie Supply was undoubtedly harmed.

[¶41] Finally, even if this Court determines the District Court correctly determined that Apple Electric was entitled to damages, and that those damages should be based on conversion, the evidence presented at trial shows Apple Electric made payments totaling $57,059.44, not $61,851.94 as awarded. Appellant's A. at 65.

CONCLUSION

[¶42] The District Court's July, 14, 2014 Memorandum, Findings of Fact, Conclusions of Law and Order for Judgment should be reversed, and the case remanded.

Dated this 16th day of January, 2015.

/s/ Ann E. Miller
Ann E. Miller (ND ID 06706)
Michael T. Andrews (ND ID 05516)
Anderson, Bottrell, Sanden & Thompson
4132 30th Avenue SW, Suite 100
P.O. Box 10247
Fargo, ND 58106-0247
(701) 235-3300
amiller@andersonbottrell.com
mandrews@andersonbottrell.com
Attorney for Plaintiff/Appellant

Word Count Approx. 4882

AEM f:/3894/15/p/a/appellant's brief

AFFIDAVIT OF SERVICE BY E-MAIL

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

The undersigned, being first sworn, says upon her oath that on January 16, 2015, she delivered via e-mail a true and correct copy of each of the following:

Brief of Plaintiff/Appellant
Appendix of Plaintiff/Appellant

A copy of the foregoing was securely e-mailed to the address(es) as follows:

Joel M. Fremstad
Fremstad Law Firm
joel@fremstadlaw.com

To the best of Affiant's knowledge, the e-mail addresses above given are the actual e-mail addresses of the parties intended to be so served and said parties have consented to service by e-mail.

Dated this 16th day of January, 2015.

Liza A. Gion

Subscribed and sworn to before me this 16th day of January, 2015.

JENNIFER A. ERNST
Notary Public
State of North Dakota
My Commission Expires Aug. 19, 2015

Notary Public