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JULY 27, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

PHI Financial Services, Inc. Plaintiff, Appellee, and Cross-Appellant, vs. Johnston Law Office, P.C., Defendant, Appellant, and Cross-Appellee, and Choice Financial Group, Defendant, Appellee, and Cross-Appellant.	)	Supreme Court No. 20150008 Grand Forks County District Court No. 18-2012-CV-00577

APPEAL FROM THAT ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT AND ESTABLISHING SECURITY INTEREST PRIORITY FILED AUGUST 19, 2013 (DOC. ID#232)

HONORABLE THOMAS E. MERRICK, JUDGE OF THE DISTRICT COURT FOR GRAND FORKS COUNTY, PRESIDING.

REPLY BRIEF OF DEFENDANT, APPELLEE, AND CROSS-APPELLANT CHOICE FINANCIAL GROUP, INC.

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¶2 **I. LAW AND ARGUMENT**

¶3 **A. Choice Financial Properly Brought Its Claim Under the Jurisdiction of this Court.**

¶4 Choice Financial Group ("Choice") did not appeal from the August 19, 2013 order denying its motion for summary judgment within sixty days of that order. As this court has stated, "An order denying summary judgment is interlocutory and is not appealable." Vinje v. Sabot, 477 N.W.2d 198, 199 (N.D. 1991) (*citations omitted*). When there are claims remaining for determination by the district court, "an appeal will not normally be considered for jurisdictional reasons." Barth v. Schmidt, 472 N.W.2d 473, 474 (N.D.1991), *quoting* Sargent County Bank v. Wentworth, 434 N.W.2d 562 (N.D.1989).

¶5 Johnston Law Office claims that Choice is barred from participating in this appeal "under the auspice of an unfavorable interlocutory pretrial ruling." Brief, ¶ 17. In support of its position, it cites Ortiz v. Jordan, 562 U.S. 180, 131 S. Ct. 884, 891, 178 L. Ed. 2d 703 (2011) and quotes the court stating that a party may not appeal an order denying summary judgment after a full trial on the merits. *Id.*

¶6 Ortiz is inapposite and does not bar this court from hearing Choice's appeal. As the U.S. Supreme Court noted, orders denying summary judgment do not ordinarily "qualify as 'final decisions' subject to appeal." Ortiz v. Jordan, 562 U.S. 180 at 188. However, in the Ortiz case the subject of the summary judgment was a claim of qualified immunity, which is treated differently from *all other* orders for summary judgment: "Because a plea of qualified immunity can spare an official not only from liability but from trial, we have

recognized a limited exception to the categorization of summary-judgment denials as nonappealable orders." *Id., citing* Mitchell v. Forsyth, 472 U.S. 511, 525-526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Choice is not appealing from a denial of a claim of qualified immunity and Johnston Law Office's reliance on the cited cases is wholly unsupported.

¶7 Additionally, Johnston Law Office erroneously relies upon EEOC v. Southwestern Bell Tel., L.P., 550 F.3d 704, 708 (8th Cir. 2008) for the proposition that an appeal from a denial of a motion for summary judgment may not be heard after a trial on the merits. In Southwestern Bell, there wasn't a peripheral issue such as the crop proceeds in this case. The Southwestern Bell parties were all *necessarily* participating at trial and the matter that had been determined by summary judgment was of the kind that was subsumed by the full trial on the merits. Johnston Law Office erroneously claims that Choice "chose not to participate in the trial and failed to preserve an argument." Brief, ¶ 17. Rather, the denial of Choice's motion for summary judgment took Choice's *only* issue out of play until final judgment and its participation at trial would have been pointless.

¶8 **B. Had Choice Appealed from the Order for Summary Judgment, this Court Would Have Dismissed that Appeal.**

¶9 The Order filed August 19, 2013, as Doc. ID# 232 was not a final judgment, and didn't dispose of the other issues in this case. Before this court may consider the merits of an appeal, it must determine whether it has jurisdiction. Holbach v. City of Minot, 2012 ND 117, ¶ 5, 817 N.W.2d 340. If there is no statutory basis for an appeal, this court must take notice of the lack of jurisdiction and dismiss the appeal. Holbach, at ¶ 5; City of Grand Forks v. Riemers, 2008 ND 153, ¶ 5, 755 N.W.2d 99. Only those judgments and decrees that are

a final judgment of the rights of the parties, and certain orders specifically enumerated by statute, are appealable. City of Mandan v. Strata Corp., 2012 ND 173, ¶ 5, 819 N.W.2d 557.

¶10 A judgment that does not adjudicate all claims of all of the parties is interlocutory and nonappealable unless the lower court expressly certifies that the judgment is final under N.D.R.Civ.P. 54(b). Frontier Enters., LLP v. DW Enters., LLP, 2004 ND 131, ¶ 3, 682 N.W.2d 746. "Upon requesting Rule 54(b) certification, the burden is upon the proponent to establish prejudice or hardship which will result if certification is denied."Capps v. Weflen, 2013 ND 16, P7, 826 N.W.2d 605, 608, *quoting* Pifer v. McDermott, 2012 ND 90, ¶ 8, 816 N.W.2d 88. In turning back an appeal from a denial of a motion for summary judgment, this court noted that the " district court must 'weigh the competing equities involved and take into account judicial administrative interests in making its determination whether or not to certify under the Rule." Capps v. Weflen, 2013 ND 16 at P7 (*internal citations omitted*). Further, it opined that "A N.D.R.Civ.P. 54(b) certification 'should not be routinely granted and is reserved for cases involving unusual circumstances where failure to allow an immediate appeal would create a demonstrated prejudice or hardship.'" *Id.*, *quoting* Pifer v. McDermott, 2012 ND 90 at P8. When an appeal with a Rule 54(b) certification comes before it, this court will "determine 'whether the case presents an 'infrequent harsh case' warranting the extraordinary remedy of an otherwise interlocutory appeal.'" *Id* (*citation omitted*). Research does not reveal case law finding that a dispute between lenders over lien priority in crops presents the infrequent harsh case.

¶11 Choice is certain that the district court would not have granted to it a N.D.R.Civ.P. 54(b) certification; Choice is even *more* certain that *this* court would have dismissed its

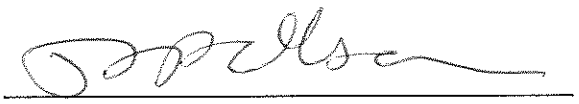
appeal had the district court issued such certification. *See, e.g.,* Capps v. Weflen, 2013 ND 16, 826 N.W.2d 605.

¶12 **II. CONCLUSION**

¶13 Choice has properly and timely appealed the denial of its motion for summary judgment. For all of the reasons set out above, Choice respectfully requests that this Court reverse the district court and find that it has a first priority lien in the SURE payment of $328,168.00.

Dated this 27th day of July, 2015.

OLSON & BURNS P.C.



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¶14 **CERTIFICATE OF SERVICE**

I, Richard P. Olson, attorney for Defendant, Appellee and Cross-Appellant Choice Financial Group, do hereby certify that on the 27th day of July, 2015, a copy of the REPLY BRIEF OF DEFENDANT, APPELLEE, AND CROSS-APPELLANT CHOICE FINANCIAL GROUP, INC. was served on the following by electronic mail transmission, per N.D. Sup.Ct. Admin. Order 14(D):

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¶15 **CERTIFICATE OF COMPLIANCE**

I, Richard P. Olson, attorney for Defendant, Appellee, and Cross-Appellant Choice Financial Group, Inc., do hereby certify that the above Reply Brief complies with all type-volume limitations as set forth in the North Dakota Rules of Appellate Procedure.

I further certify that the attached Reply Brief contains fewer than 2,000 words, and was prepared using WordPerfect 10.0, Times New Roman font, size 12.

Dated this 27th day of July, 2015.

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