20150025
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 29, 2015
STATE OF NORTH DAKOTA

-IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Titan Machinery, Inc., Plaintiff, Appellee, and Cross-Appellant, v. Patterson Enterprises, Inc., Defendant, Appellant, and Cross-Appellee.	Supreme Court No. 20150025 Cass County District Court No. 09-2012-CV-02183

APPEAL FROM: FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT (DKT. NO. 180); JUDGMENT (DKT. NO. 196); AND MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION TO AMEND FINDINGS AND MOTION TO MAKE ADDITIONAL FINDINGS AND MOTION FOR NEW TRIAL AND ORDER DENYING DEFENDANT'S MOTION TO MAKE ADDITIONAL FINDINGS (DKT. NO. 214)

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE PATTERSON ENTERPRISES, INC.

KENNELLY & O'KEEFFE, LTD.
SEAN T. FOSS (ND ID # 06422)
720 Main Avenue
P.O. Box 2105
Fargo, ND 58107-2105
Phone: (701) 235-8000
Fax: (701) 235-8023
sean@kennellylaw.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. The District Court Committed Reversible Error by Admitting Titan's Exhibit 1 into Evidence.

[¶1] In reviewing the arguments of Titan Machinery, Inc. ("Titan") regarding the admission of Exhibit 1, this Court should conclude Titan failed to establish a basis for its admission into evidence, or how its introduction did not violate the substantial rights of Patterson Enterprises, Inc. ("P.E.I.").

A. P.E.I. Did Not Waive Its Argument on Exhibit 1.

[¶2] Titan initially argues this Court should not consider the issue, because "[t]his argument was not raised in Patterson's motion for reconsideration . . . [and] the argument has been waived entirely. . . ." Appellee's Brief, ¶ 13. Titan does not and cannot argue P.E.I. failed to object to the introduction of Exhibit 1 at trial, because P.E.I. objected to its introduction twice. See, Tr. I, p. 158; Tr. I. 167-68. Titan simply argues P.E.I. waived its ability to appeal this issue by not raising it in its post-judgment motion.

[¶3] In support, Titan cites Alliance Pipeline L.P. v. Smith, 2013 ND 117, ¶ 20, 833 N.W.2d 464. In that case, Alliance filed a petition asking the district court to enter an order providing access to the Smiths' property. Id. at ¶¶ 1-5. At the petition hearing, the Smiths objected because they claimed "the Court lacked jurisdiction over the persons and the subject matter." Id. at ¶ 17. The district court granted the petition and entered an order providing Alliance with the requested access. Id. at ¶ 3. The Smiths filed a "Motion for Supplemental Findings or Reconsiderations," but they did not raise the jurisdictional issue in the motion Id.

at ¶¶ 8, 19. Instead, the Smiths' attorney indicated he had "not re-raised" the issue. Id. at ¶ 21. The district court denied the motion for reconsideration, and the Smith then appealed from the order denying the motion. Id. at ¶¶ 5, 8. In its decision, this Court stated: "To the extent the Smiths raise issues on appeal about N.D.R.Civ.P. 4(c), which involve personal jurisdictional arguments that may be waived and were not raised in their motion for reconsideration, we conclude those issues are not properly before us." Id. at ¶ 21.

[¶4] The distinctions between Alliance Pipeline and the present case are clear. First, the Smiths specifically indicated they were no longer raising the issue, and personal jurisdiction objections may be waived through appearance. Here, at no point did P.E.I. indicate it was no longer objecting to the admission of Exhibit 1. There is also not precedent providing where a party objects to the introduction of evidence at trial, the party waives the objection on appeal if it is not reiterated in any post-judgment motion.

[¶5] Finally, at no point in Alliance Pipeline did this Court suggest it was establishing new case law. The established case law makes clear this Court only reviews issues the district court has an opportunity to address. "It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." Spratt v. MDU Res. Grp., Inc., 2011 ND 94, ¶ 14, 797 N.W.2d 328 (internal quotation omitted). In this case, the district court had a full opportunity to rule correctly on the introduction of Exhibit 1.

B. Titan Did Not Provide All Information Underlying Exhibit 1 to P.E.I. before Trial.

[¶6] This Court should also recognize that, despite Titan's efforts to massage the record, the company did not provide all information underlying Exhibit 1 to P.E.I. before trial. Exhibit 1 was a summary of the total debt that Titan claimed was due, itemized according to the piece of equipment, rental period, and including entries for paid and unpaid amounts. The exhibit was disclosed to P.E.I.'s counsel after 9:00 p.m. on the night before trial. Tr. I, p. 158-59.

[¶7] Titan claims it provided P.E.I. with all of the information underlying Exhibit 1 "during its regular course of business" and "during discovery," because it provided P.E.I. with copies of its paid and unpaid invoices. Appellee's Brief, ¶ 15. Titan's claim is patently false, as the undisputed testimony of its credit manager, Scott Bauer, established Exhibit 1 was based off Titan's "business system," which included different information than the invoices.

[¶8] The author of Exhibit 1, Bauer, testified as follows:

> Q: Okay. So to be clear, your summary isn't actually based on the exhibits that have been introduced. It's based off of [Titan's] computer system?
> A: Correct.
> . . .
> Q: Okay. And my question was, since Exhibit 1 is supposed to be a summary of other information, what information can we look to in the record that would show us how those amounts were actually calculated if the invoices submitted don't show how payments have been applied?
> A: The Exhibit 1 just is the summary. It doesn't give the exact payments applied to each invoice. It is just a summary that references –

> Q: Okay. And to be clear, none of the invoices or materials in the record thus far show that application; correct?
> A: Correct.

Tr. II, p. 27-30. Titan cannot reasonably dispute that P.E.I. did not receive all information summarized in Exhibit 1 prior to trial.

C. The Introduction of Exhibit 1 Was Not Harmless Error.

[¶9] Finally, the introduction of Exhibit 1 was not harmless error. Titan claims the error was harmless because: (1) "Patterson does not allege any specific ground on which it believes the summary presented in Exhibit 1 is inaccurate"; and (2) the district court could have reached the same conclusion regarding the total debt based upon the testimony of salesman Don Hinricher and Bauer. Appellee's Brief, ¶¶ 16, 20-21.

[¶10] Throughout the trial and in its Appellant's Brief, P.E.I. identified multiple instances in which the itemized debts listed on Exhibit 1 were incorrect. See, e.g., Appellant's Brief, ¶¶ 21-29. More importantly, Titan's first argument completely misses the point. Rule 1006 allows a party the opportunity to review all information underlying a summary so the party may assess the accuracy of the summary and respond accordingly. By denying P.E.I. even the basic opportunity to review information from its "business system," Titan also denied P.E.I. the opportunity to present responsive evidence.

[¶11] Second, this Court should conclude the district court could not have reached the same conclusion regarding the total debt owed by P.E.I. without the introduction of Exhibit 1. Hinricher did not testify about the debt owed by P.E.I.

Bauer did testify about the total debt, but he did not testify about the amount owed for each piece of equipment. Bauer largely testified about how he created Exhibit 1 without identifying the specific debt due for the individual pieces of equipment underlying the claim. Therefore, Exhibit 1 was the sole competent evidence from which the district court could reasonably calculate the total damages allegedly suffered by Titan. Without Exhibit 1, the district court would have only had invoices that did not show the application of credits or payments made by P.E.I., despite the fact that such payments and credits were made.

II. Titan Was Not Authorized to Collect Finance Charges.

[¶12] This Court should conclude Titan was not authorized to collect finance charges under N.D.C.C. §§ 13-01-14 and 13-01-15. Titan wrongly argues the evidence established it did not intend to extend credit beyond thirty days and late payments from P.E.I. were unexpected, but P.E.I. will rely on its previous arguments on those issues. See Appellant's Brief, ¶ 53.

[¶13] Titan is also incorrect to argue the record establishes it sent the statements required by N.D.C.C. § 13-01-15 to P.E.I. Titan does not dispute that no monthly statements were actually introduced into evidence, but it claims Bauer's testimony provides a sufficient basis to establish the statements were provided. See Appellee's Brief, ¶ 28. Bauer testified Titan sends monthly statements to customers. Tr. I, p. 162-63. Bauer did not specifically testify monthly statements were sent to P.E.I., nor did he testify about the substance of the monthly statements generally sent by Titan. Id.

[¶14] Therefore, the record is devoid of any evidence that Titan provided a monthly statement to P.E.I. that contained the requirements of N.D.C.C. § 13-01-15(2). Without this evidence, the district court was clearly erroneous to find Titan could legally collect finance charges.

III. The District Court's Debt Calculation Was Not Clearly Erroneous to the Detriment of Titan.

[¶15] Finally, this Court should conclude the district court did not make any clearly erroneous findings of fact to the detriment of Titan.

A. Cat 815F Roller.

[¶16] Titan's Exhibit 1 claimed P.E.I. rented the 815F from March 17, 2011 to November 8, 2011 at a rate of $9,000 per month. See App. 36-37. Despite a rental period of less than eight months, which should total an obligation of $72,000, Titan claimed P.E.I. owed a total of $86,701.60. Id. The overbilling was explained by evidence Titan had double-billed.

[¶17] Titan's Exhibit 57 included two instances where Titan billed P.E.I. $9,000 two times for a single month: (1) May 13 to June 10, 2011, and June 10 to June 13, 2011; and (2) July 11 to August 1, 2011, and July 11 to August 1, 2011. App. 38, 40, 98-99. Thus, the evidence established Titan overbilled P.E.I. by at least $18,000 for the 815F. Titan did correct a single instance of double-billing, as its brief notes. See Appellee's Brief, ¶ 40. However, Titan failed to correct the second instance of double-billing, and the district court was correct to find Titan overstated its debt for the 815F by $9,000.

B. SD84 Roller.

[¶18] Titan argues the district court's finding on the SD84 was clearly erroneous, because P.E.I.'s employee logs indicate a "Big Smooth Drum Roller" was returned to Titan on September 23, 2011. Josh Patterson testified the SD84 roller was replaced by the Bomag roller, and the Bomag was delivered on July 28, 2011. Tr. IV, p. 425-26. See also App. 36 (Titan's Ex. 1, indicating Bomag was delivered on July 28, 2014). Therefore, the district court's finding is fully supported by Patterson's testimony and cannot be clearly erroneous.

C. Bomag Roller.

[¶19] Finally, this Court should refuse to consider Titan's argument regarding the Bomag roller, because it did not raise the argument before the district court. On appeal, Titan argues the district court erred because, while Titan provided a price quote to P.E.I. indicating a purchase price of $144,420, there is no evidence P.E.I. made an offer to purchase the equipment at the quoted price. Appellee's Brief, ¶ 46. Titan did not make this argument either at trial or in its post-judgment motion. See Dkt. 201. This Court does not address a new argument raised for the first time on appeal. Coughlin Constr. Co, Inc. v. Nu-Tec Indus., Inc., 2008 ND 163, ¶ 9, 755 N.W.2d 867.

[¶20] If this Court considers the argument, it should conclude evidence supports the district court's finding. Patterson was the sole witness with personal knowledge regarding negotiations over the Bomag. None of Titan's witnesses even testified about the Bomag in its case-in-chief. Patterson testified P.E.I. and

Titan agreed to a rent-to-purchase contract whereby P.E.I. would initially pay $4,000 per month in rent, but Titan would apply 100 percent of the rent towards the purchase price if P.E.I. purchased the roller within 12 months. Tr. IV, p. 426-27. Patterson testified the parties agreed P.E.I. would finance the purchase through Wells Fargo bank, with the first $144,240.00 in loan proceeds being applied to the purchase, and the remainder being applied to back rent on other pieces of equipment. Tr. IV, p. 432, 435.

[¶21] P.E.I. introduced several exhibits containing emails between Patterson and Titan about the Bomag. See Dkt.111-112. The emails include a Quotation from Titan stating a purchase price of $144,240, with an additional $27,500 being applied to back rent. See Dkt. 160. The district court's finding is supported by Patterson's testimony and the emails and therefore cannot be clearly erroneous.

Dated this 29th day of July, 2015.

KENNELLY O'KEEFFE, LTD

/s/SEAN T. FOSS

SEAN T. FOSS (ND ID #06422)
720 Main Avenue
P.O. Box 2105
Fargo, ND 58107-2105
Phone: (701) 235-8000
Fax: (701) 235-8023
Attorney for Appellant
sean@kennellylaw.com

20150025
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 29, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Titan Machinery, Inc., Plaintiff, Appellee and Cross-Appellant, v. Patterson Enterprises, Inc., Defendant, Appellant and Cross-Appellee,	Supreme Court No. 20150025 Cass County District Court No. 09-2012-CV-02183

CERTIFICATE OF SERVICE

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

Abby Hammes hereby certifies under N.D.R.Civ.P. 5(f), that on July 29, 2015 she served the attached:

(AMENDED) REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE PATTERSON ENTERPRISES, INC.

upon Jon R. Brakke, attorney for Appellee, by e-mail to the address:

jbrakke@vogellaw.com

Abby Hammes
ABBY HAMMES

Subscribed and sworn to before me this 29th day of July, 2015

JOANE W. WYFFELS
Notary Public
State of North Dakota
My Commission Expires May 31, 2018
(SEAL)

Joane W. Wyffels
JOANE W. WYFFELS, Notary Public
Cass County, North Dakota
My Commission Expires: 05/31/2018

20150025
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JULY 28, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Titan Machinery, Inc., Plaintiff, Appellee and Cross-Appellant, v. Patterson Enterprises, Inc., Defendant, Appellant and Cross-Appellee,	Supreme Court No. 20150025 Cass County District Court No. 09-2012-CV-02183

CERTIFICATE OF SERVICE

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

Abby Hammes hereby certifies under N.D.R.Civ.P. 5(f), that on July 28, 2015 she served the attached:

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE PATTERSON ENTERPRISES, INC.

upon Jon R. Brakke, attorney for Appellee, by e-mail to the address:

jbrakke@vogellaw.com

ABBY HAMMES

Subscribed and sworn to before me this 28th day of July, 2015

JOANE W. WYFFELS
Notary Public
State of North Dakota
My Commission Expires May 31, 2018

(SEAL)

JOANE W. WYFFELS, Notary Public
Cass County, North Dakota
My Commission Expires: 05/31/2018