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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Gilbertson Partnership, Ltd., a North Dakota Limited Partnership, Plaintiff and Appellee, vs. Vernon J. Drabek a/k/a Vernon Drabek, William J. Fizer a/k/a Wm. J. Fizer, Alsie Mae Fizer, Harold R. Bennett, Wyman H. Meigs, Lucile S. Meigs, Lucile S. Colbert, Wyman Orlin Meigs, Theodore F. Loveridge, Faery R. Loveridge, C.H. Kopp, Blanche Kopp, Chester R. Cox, Earl Cox, Virginia Danielson, Royce Cox, Lois Vance, James Cox, Iva Inez Cox, and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon the property described in the Complaint, whether as heirs, devisees, legatees, or personal representatives of any of the above-named persons who may be deceased or under any other title or interest, Defendants, and Charyl W. Loveridge and Margaret A. Loveridge, Defendants, Third-Party Plaintiffs, and Appellants, vs. LeRoy Gilbertson, as Trustee of the Gilbertson Partnership Limited Irrevocable Trust, Third-Party Defendant and Appellee.	Supreme Court No 20160347 Divide Co. Civil No. 12-04-C-00038

APPELLANTS' REPLY BRIEF

Appeal from the Summary Judgment Order dated October 7, 2016
Case No. 12-04-C-00038
County of Divide, Northwest Judicial District
The Honorable Joshua B. Rustad

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph(s)

CASES

NORTH DAKOTA CENTURY CODE

OTHER AUTHORITIES

ARGUMENT

I. Gilbertson Lacked Title to the Disputed Minerals.

[¶1] Gilbertson fails to address its failed attempt to comply with N.D.C.C. Ch. 38-18.1 in its brief—the Dormant Mineral Act ("DMA"). By failing to address its failure, Gilbertson has conceded non-compliance with the DMA. And because Gilbertson failed to comply with the statutory notice procedure of the DMA, "title remains with the mineral interest owner." *Nelson v. McAlester Fuel Co*, 2017 ND 49, ¶ 8, 891 N.W.2.d 126. Gilbertson did not mail notice to Theodore Loveridge or Faery Loveridge; Gilbertson did not even include Faery Loveridge in the notice. App. 25-28. As a matter of North Dakota law, as previously set forth by the Appellants, and as more recently explained by the *McAlester Fuel* decision, title remained with Theodore and Faery, who then validly conveyed their interest to Charyl Loveridge and Margaret Loveridge ("Charyl and Margaret") in 1990.

[¶2] The DMA is strictly enforced. Indeed, in *McAlester Fuel* this Court determined that a surface owner that attempted to utilize N.D.C.C. Ch. 32-17 to quiet title in the "abandoned" mineral interests failed because the surface owner did not have title to the minerals as a matter of law. *McAlester Fuel*, 2017 ND 49 at ¶ 25. "Because of the nature of the abandoned mineral statutes, the surface owner must establish compliance with the statutory procedures in order to effect the reversion of the severed mineral interest to the surface owner." *Id.* at ¶ 17. If a surface owner does not become the owner of minerals because of a faulty attempt to claim minerals as abandoned, the surface owner does not possess anything. And certainly a surface owner does not possess the minerals for purposes

of attempting to comply with the Marketable Record Title Act ("MRTA"). If the surface owner does not own the minerals, and does not possess the minerals as a matter of law, the surface owner cannot rely on the MRTA to supplant the surface owner's failure to comply with the DMA. Gilbertson does not deny in its appellate brief that it failed to comply with the DMA. Its aspirations to mineral ownership come through the faulty logic that the MRTA is its salvation from DMA non-compliance.

[¶3] As to Faery Loveridge's interests that were never included in the Notice, Charyl and Margaret have maintained that Faery's interests were not subject to lapse from the beginning. *See* App. 62 at ¶ 27; App. 64 at ¶40; App. 2, at Docket No. 30 (Motion to Vacate), at ¶ 15; App. 4 at Docket No. 94 (Summary Judgment Motion), at ¶¶ 4, 17, 41 ("Even if the Court were to decide otherwise as it relates to Theodore Loveridge, the interest owned by Faery Loveridge certainly was not properly included when she was not named an owner [in the Notice], despite being a grantee on the recorded 1951 mineral deed"); App. 131-33. Faery was not on the Notice. Her interests were never subject to lapse and remained her property until deeded to Charyl and Margaret in 1990. In 2005, default judgment was entered against Charyl and Margaret, but twenty years has not passed from the 2005 recorded judgment.

II. Gilbertson Profited from its Mistakes.

[¶4] The bottom line as to the waste and alternative equitable unjust enrichment claims is Gilbertson received Charyl and Margaret's royalty payments and it should be returned. To hold against Charyl and Margaret on this point is to reward Gilbertson for its failure to comply with North Dakota law.

[¶5] The calculated amounts are not disputed by Gilbertson. The Court should reverse the district court's decision on either the waste or unjust enrichment claims.

III. Default Judgment Was Properly Vacated.

A. Section III of Gilbertson's Brief Should be Stricken

[¶6] Gilbertson argues for reversal of the district court's order vacating default judgment. This is improper because Gilbertson did not appeal from this order. Section III of the Gilbertson brief should be stricken and disregarded.

[¶7] On August 7, 2015, the district court issued an order vacating default judgment against the Loveridges. App. 46-57. The matter proceeded on the merits until a final and appealable judgment was entered on November 14, 2016. App. 106. Notice of entry of judgment was filed on October 14, 2016. App. 109. Charyl and Margaret appealed from the district court's Judgment denying their summary judgment. App. 111.

[¶8] No appeal was taken from the order vacating default judgment. App. 46-57. North Dakota Rules of Appellate Procedure Rule 4(a)(2) provides: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this subdivision, whichever period ends later." Gilbertson could have appealed the August 2015 order vacating default judgment. Gilbertson chose not to.

[¶9] This Court has held that "an appellee for whom a favorable judgment was rendered may attempt to save the judgment by arguing, without cross-appealing, any ground asserted in the proceedings below." *Kraft v. State Bd. of Nursing*, 2001 ND 131, ¶ 27 n. 1, 651 N.W.2d. 572. It is true that Gilbertson can make any argument that it raised in its summary judgment motion to preserve the district court's grant of summary judgment

on the merits of the case. But it is not correct that Gilbertson can argue for affirmance of summary judgment in its favor by arguing that the district court erred when it vacated a default judgment.

[¶10] Gilbertson did not argue in its summary judgment motion that summary judgment should be granted because vacating the default judgment should have been denied. Instead of appealing the order vacating judgment, Gilbertson attempts for the first time to wrap its disagreement with the district court's order vacating judgment into an affirmative weapon for affirmance of the district court's summary judgment in Gilbertson's favor without appealing from the order. If Gilbertson seeks reversal of the district court's order vacating default judgment, then it had to appeal from that order (or argue it at summary judgment to preserve the argument on appeal). It is improper for Gilbertson to argue this for the first time on appeal and to assert that it need not appeal from the order vacating judgment.

B. The District Court's Decision to Vacate Default Judgment Should be Affirmed.

[¶11] If the Court determines Section III of Gilbertson's Appellee Brief should be considered on the merits, the district court did not abuse its discretion in vacating the judgment. *See, e.g.*, *McAlester Fuel*, 2017 ND 49 at ¶¶ 8-9. Charyl and Margaret incorporate here their arguments advanced in their briefs in support of vacating default judgment. App. 2, at Docket No. 30; App. 3, at Docket No. 43.

[¶12] Rule 4(e)(2)(A) of the North Dakota Rules of Civil Procedures states in relevant part:

> Before service of the summons by publication is authorized, a complaint and affidavit must be filed with the clerk of court where the action is venued. . . . The affidavit must be executed by the plaintiff or the plaintiff's attorney and must state one or more of the following:
>
> > (A) that after diligent inquiry personal service of the summons cannot be made on the defendant in this state to the best knowledge, information, and belief of the affiant.

N.D.R.Civ.P. Rule 4(e)(2)(A). In *Spring Creek Ranch, LLC v. Svenburg*, 1999 ND 323, ¶ 18-19, the North Dakota Supreme Court noted the similarities between N.D.C.C. § 38-18.1-06(2) and N.D.R.Civ.P. 4(e)(2) and addressed the issue of what was considered a "reasonable" or "diligent" inquiry required prior to publishing notice under the circumstances. Gilbertson's "Affidavit of Publication" states nothing to the effect that a diligent inquiry was made. App. 2, at Docket No. 4.

[¶13] The Loveridges' address when the summons was mailed was reasonably ascertainable and could have been located by Gilbertson. North Dakota Rules of Civil Procedure Rule 4(e)(4) states:

> A copy of the summons and complaint, at any time after filing of the affidavit for publication and no later than 14 days after the first publication of the summons, must be deposited in a post office . . . and directed to the defendant to be served at the defendant's last reasonably ascertainable address.

The Loveridges' address was reasonably ascertainable by Gilbertson. Simple internet searches indicated the current address. App. 3, at Docket No. 36. A landman had no problem finding the Loveridges. App. 32-33.

[¶14] Gilbertson failed to identify the Loveridges' last reasonably ascertainable address. When service of process is obtained by publication, strict compliance with service

is required. *Bickel v. Jackson*, 530 N.W. 2d 318, 320 (N.D. 1995). In *Bickel*, the plaintiff's failure to comply with the mailing requirement under N.D.R.Civ.P 4(e)(4) resulted in voiding the attempted service by publication. *Id*. at 321. When Rule 4(e)(4) was amended in 1977 to require the mailing to be directed to the "defendant's last reasonably ascertainable post-office address," it replaced the rule allowing for the mailing to be dispensed if "the affidavit for publication states that the residence of the defendant is unknown." *Id*. Gilbertson's attorney at the time was following the pre-1977 rule when, rather than stating a diligent inquiry was made as required under the current rule, said "[t]hat the place of residence of all of the above-referenced Defendants . . . is not known to this affiant and the Plaintiff . . . ." App. 2, at Docket No. 4. Gilbertson stopped inquiring—in fact, made no inquiry—as to the whereabouts of the Loveridges when a post office box was found in a deed dated nearly fifteen years earlier. App. 21-22. Failure to comply with the rule resulted in the trial court lacking jurisdiction. *Bickel* 530 N.W. 2d at 321.

North Dakota Rules of Civil Procedure Rule 60(b)(4) states:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (4) the judgment is void. . . .

"[I]nsufficient service of process under Rule 60(b)(4) implicates personal jurisdiction *and* due process concerns. Generally, where service of process is insufficient, the court has no power to render judgment and the judgment is void." *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1299 (11th Cir. 2003) (emphasis added). "[R]elief from a void judgment

pursuant to Rule 60(b)(4) is not discretionary." *Baldwin v. Credit Based Asset Servicing and Securitization*, 516 F.3d 734, 737 (8th Cir. 2008). The Fifth Amendment requires, prior to taking property, "notice and an opportunity for a hearing be provided." *Id.* (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Notice "must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.*

[¶15] The judgment here is void because service was never effected or attempted at the correct address, which would have been easily identifiable had Gilbertson conducted a diligent inquiry. A party attempting service by publication must certify compliance with Rule 4(e)(2). Here, the summons and complaint were mailed to a post office box identified in a document recorded nearly fifteen years prior and a diligent inquiry as to the Loveridges' location would have resulted in proper service, which, in turn, would have afforded them the opportunity to defend the claims.

[¶16] For the reasons previously set forth by Charyl and Margaret in their prior briefings, the Court can affirm the district court's vacation of the judgment under N.D.R.Civ.P. Rule 60(b)(6) as well.

[¶17] The district court properly vacated the judgment because it lacked jurisdiction over the Loveridges because Gilbertson failed to comply with the requirements of service by publication. The judgment was also void because it was inconsistent with due process.

CONCLUSION

[¶18] The Court should reverse the district court's denial of summary judgment in favor of Charyl and Margaret Loveridge.

Dated this 10th day of April, 2017.

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AFFIDAVIT OF SERVICE

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

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 11 day of April, 2017, she electronically filed with the Clerk of the North Dakota Supreme Court *Appellants' Reply Brief* (with corrected title page) by emailing to supclerkofcourt@ndcourts.gov and served the same electronically by emailing to the following:

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Annette Kirschenheiter
Annette Kirschenheiter

Subscribed and sworn to before me this 11 day of April, 2017.

Linda M. Reis
Notary Public

LINDA M. REIS
Notary Public
State of North Dakota
My Commission Expires Mar. 25, 2018