

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

CASE NO. 20170066

Continental Resources, Inc.,)	
)	
Appellee,)	
)	
vs.)	APPELLANT’S REPLY BRIEF
)	
Counce Energy BC #1, LLC,)	
)	
Appellant.)	
)	
)	

APPEAL FROM THE ORDER ON PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT, DATED MARCH 10, 2015; ORDER DENYING DEFENDANT’S MOTION FOR LEAVE TO AMEND ANSWER AND COUNTERCLAIM TO ALLEGE EXEMPLARY DAMAGES, DATED MAY 5, 2015; ORDER, DATED JANUARY 13, 2016; ORDER, DATED MARCH 31, 2016; ORDER ON MOTION IN LIMINE, DATED SEPTEMBER 16, 2016; ORDER DENYING DEFENDANT’S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, DATED DECEMBER 22, 2016; AMENDED ORDER FOR JUDGMENT ON JURY VERDICT, DATED JANUARY 23, 2017; AND AMENDED JUDGMENT ON JURY VERDICT, DATED JANUARY 24, 2017, BY THE HONORABLE JUDGE DANN GREENWOOD, SOUTH WEST JUDICIAL DISTRICT COURT, BILLINGS COUNTY, NORTH DAKOTA, CASE NO. 04-2013-CV-00015

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LAW AND ARGUMENT

I. If the district court had jurisdiction over Continental’s contract claim, it also had jurisdiction over Counce’s contract defenses and counterclaims concerning the same subject matter.

[¶1] Continental argues N.D.C.C. Chapter 38-08 imposes an exhaustion of administrative remedies requirement only on the party *challenging* drilling costs, and authorizes a well operator to sue to collect unpaid drilling costs without going before the North Dakota Industrial Commission (“NDIC”). (Appellee’s Brief at ¶ 26). This interpretation, however, is not supported by the statutory language providing a narrow lien foreclosure remedy to operators and that “[i]n the event of *any dispute* as to such costs, the commission shall determine the proper costs.” *See* N.D.C.C. §§ 38-08-08(2), 38-08-10 (Emphasis added).

[¶2] Counce does not dispute the NDIC has jurisdiction concerning well cost disputes; however, that jurisdiction is not exclusive given the nature of the lien foreclosure remedy afforded operators. An operator’s lien foreclosure remedy specifically provides that “[t]he lien may be foreclosed as provided for with respect to foreclosure of a lien on chattels.” N.D.C.C. § 38-08-10. The foreclosure of chattel liens is governed by N.D.C.C. Chapter 32-20 to be maintained in district court with the burden of proof upon the lien claimant. *See* N.D.C.C. § 32-20-01, 32-20-04.1; *see also* N.D.C.C. 32-20-05 (requiring the lien foreclosure judgment to specify the amount due on the lien). Given the nature of the contract between the parties, the proper lien amount was necessarily the “reasonable actual” costs of drilling and operating the Burian well together with “a reasonable cost for supervision.” *See* N.D.C.C. § 38-08-08(2). The lien foreclosure claim required Continental to prove the “reasonable actual” costs of the Burian well, and the

district court had concurrent jurisdiction to adjudicate those costs together with Counce's defenses and compulsory counterclaims as required to be raised by the North Dakota Rules of Civil Procedure. *See* N.D.R.Civ.P. 12(b) (defenses); N.D.R.Civ.P. 13(a) (compulsory counterclaims).

[¶3] Continental's burden of proving the "reasonable actual" costs did not change when it withdrew its lien foreclosure claim and elected to pursue a breach of contract claim against Counce. Although Continental argues "reasonableness" is not an element of a contract claim (Appellee's Brief at ¶ 29), it is an essential term of the contract Continental claims was breached by Counce. (App. 090); N.D.C.C. § 38-08-08(2). In order to prevail on its breach of contract claim, Continental was required to prove: (1) the existence of a contract between Continental and Counce; (2) a breach of that contract by Counce's failure to perform a contractual duty; and (3) damages flowing from said breach. *See* WFND, LLC v. Fargo Marc, LLC, 2007 ND 67, ¶13, 730 N.W.2d 841.

[¶4] Continental and Counce are parties to a contract imposed by North Dakota law. Continental was required to prove the "reasonable actual" costs of drilling and operating the Burian well together with "a reasonable cost for supervision" in order to establish a breach of contract by Counce and the amount of damages (if any). In its Amended Complaint, Continental alleged that the parties had "entered into a valid and binding contract under which Continental agreed to charge Counce, and Counce agreed to pay, its share of *reasonable actual costs of drilling and operating the Burian 1-27H well, plus a reasonable charge for supervision.*" (App. 090 at ¶ 11) (Emphasis added). Without establishing what the "reasonable actual" costs actually were, Continental cannot show that Counce failed to pay that amount (i.e. the breach element) or that Continental

incurred any damages (i.e. the damages element). It was not Counce's burden to disprove those elements.

[¶5] As a result of the district court's jurisdictional finding that it retained subject-matter jurisdiction to adjudicate Continental's breach of contract claim (after withdrawing its lien foreclosure claim), the district court erred in concluding it lacked the same jurisdiction to address Counce's defenses and compulsory counterclaims regarding the same subject matter. As a result, Counce was precluded from defending against or otherwise responding to Continental's contract allegations at trial. Despite the undisputed contract between the parties under which Counce was obligated to reimburse Continental for the "reasonable actual" costs of drilling and operating the Burian well together with "a reasonable cost for supervision," Continental proved only the amount it *billed* Counce. Continental did not prove the amount it billed Counce was "reasonable actual" or that it was ever actually paid by Continental. Nor did Continental even attempt to prove what constitutes a "reasonable charge for supervision."

[¶6] The district court overlooked the fact that the claims/defenses of both parties equally concerned the "reasonable actual" drilling and operating costs of the Burian well, and Continental's contract claim should not have been tried to the exclusion of Counce's defenses and compulsory counterclaims regarding the same issue.

II. Exhaustion of administrative remedies is not a prerequisite to Counce's obligation as a defendant to defend in the forum chosen by Continental.

[¶7] In support of its position that only Counce's contract defenses and counterclaims are subject to exhaustion, Continental fails to cite a single authority in which a civil *defendant* is required to exhaust administrative remedies as a prerequisite to defending in

the forum chosen by the plaintiff. The cases relied upon by Continental require a *plaintiff* to exhaust administrative remedies prior to asserting claims in court. Nothing requires exhaustion by a defendant who is obligated to defend against a plaintiff's claims in the chosen forum.

[¶8] Nor do any of the cases cited by Continental suggest that a defendant must exit the forum chosen by the plaintiff and commence administrative proceedings in which the defendant would become the plaintiff with the burden of proof. Such burden shifting would be against the entire history of jurisprudence in the United States. Additionally, such a requirement would run contrary to judicial efficiency by requiring a defendant to commence a second action in another forum as a prerequisite to resolving a claim asserted by a plaintiff.

[¶9] In this case particularly, it makes no sense that Counce (as the defendant) is the only party subject to exhaustion given that Continental's lien foreclosure claim and subsequent breach of contract claim equally concern a determination of "reasonable actual" well costs (as discussed above). Continental was well aware the reason Counce refused to pay the disputed billings was because Continental would not, or could not, substantiate the alleged overages. Although Continental could have taken the matter before the NDIC, it elected to pursue collection efforts in district court. As the defendant, Counce was compelled by Rules 12(b) and 13(a) to raise its contract defenses and counterclaims and there is no requirement that Counce (and not Continental as the plaintiff) commence a separate administrative proceeding as a prerequisite to defending in the forum chosen by Continental.

III. The district court erred in dismissing Counce's contract defenses and counterclaims with prejudice for lack of subject-matter jurisdiction.

[¶10] Continental argues the district court's dismissal of Counce's contract defenses and counterclaims with prejudice for lack of subject-matter jurisdiction was appropriate. (Appellee's Brief at ¶¶ 32-48). First, Continental asserts Counce relinquished its contract defenses and counterclaims under theories of waiver and laches. (*Id.* at ¶¶ 34-38). However, Continental pre-empted Counce's threats to go before the NDIC by filing a lawsuit in district court and Counce raised its contract defenses/counterclaims in the plaintiff's chosen forum in its first responsive pleading. Counce promptly asserted its contractual defense that Continental's claimed billings are not the "reasonable actual" cost of drilling and operating the Burian well as required by the contract between the parties.

[¶11] Continental also argues that dismissal of Counce's contract defenses and counterclaims without prejudice would thwart Continental's private right of action under N.D.C.C. Chapter 38-08 and the exhaustion requirement. (Appellee's Brief at ¶¶ 39-44). However, Counce did not "sandbag" the court by raising the issue of exhaustion of administrative remedies after three years of litigation. It was Continental who sandbagged by raising the issue in its Answer to Counce's counterclaim and then taking no action to have the matter decided by the NDIC because it *chose* district court itself. Nor did Continental promptly move to dismiss Counce's defenses or counterclaims on that basis. It waited until three days before trial to mislead the court into the error of requiring the *defendant* to forego valid defenses and counterclaims. When Counce

attempted to alleviate that error, Continental again mislead the court into the error of dismissing those defenses and counterclaims *with prejudice*.

[¶12] Continental cites case law from other jurisdictions allegedly dismissing claims for failure to exhaust administrative remedies with prejudice. (Appellee’s Brief at ¶ 45). Again, however, none of the authorities relied upon by Continental concern a civil *defendant’s* obligation to exhaust administrative remedies prior to defending a case in the plaintiff’s chosen forum. Additionally, a court must dismiss for lack of subject-matter jurisdiction “*at any time*” and is not an adjudication on the merits. *See* N.D.R.Civ.P. 12(h)(3); Trottier v. Bird, 2001 ND 177, 635 N.W.2d 157. If a court lacks subject-matter jurisdiction, it is powerless to act and “[a]ny action beyond dismissing the claim for want of subject matter jurisdiction is a misapplication of the North Dakota Rules of Civil Procedure.” Trottier, 2001 ND 177, ¶ 8, 635 N.W.2d 157.

[¶13] Once the district court determined it lacked subject-matter jurisdiction over Counce’s defenses/counterclaim, Rule 12(h)(3) mandated a dismissal for lack of subject-matter jurisdiction without prejudice. Counce was not only permitted, but required, to raise its defenses and compulsory counterclaims in Continental’s chosen forum or lose them entirely. *See* N.D.R.Civ.P. 12(b), 13(a).

IV. The fraud alleged by Counce is a tort claim existing independent from its breach of contract claim, for which genuine questions of material fact exist.

[¶14] Although Continental takes the view of fraud existing only as a contract defense, North Dakota case law is blurred regarding “fraud” and “deceit” which are frequently treated as expressions of the same tortious conduct in the presence or absence of a contract. Regardless of the label, it is clear the tortious conduct described is actionable in

the presence of a contract where said conduct exists in addition to the breach of contract. See Erickson v. Brown, 2008 ND 57, 747 N.W.2d 34; Doe v. Southwest Grain, 309 F.Supp.2d 1119, 1122 (D.N.D. 2004); N.D.C.C. §§ 9-10-02, 9-10-03. Some additional conduct, such as the suggestion, or assertion of an untrue fact, or the suppression of a fact under certain circumstances is required. Id. In the instant case, Counce has adequately described such independent tortious conduct (whether labeled as “fraud” or “deceit”) in its opposition to Continental’s motion for summary judgment. (App. 004 at Docket # 101-169).

[¶15] As a result of the dismissal of its fraud claim in summary judgment, Counce was precluded from presenting evidence as to Continental’s misrepresentations separate from the evidence that would have been used to show a breach of contract. The alleged tortious conduct of Continental’s misrepresentations and suppression of the truth regarding the unlawful shifting of expenses from other Continental ventures to the Burian well exists separately and in addition to its breach of contract claim, and resulted in separate damages as an alternate claim for relief. Viewing the evidence in the light most favorable to Counce, genuine questions of material fact exist which preclude summary judgment that Continental’s conduct was not tortious.

V. Counce preserved its appeal of the jury verdict on its abuse of process claim.

[¶16] In its brief, Continental indicates the only tort claim appealed by Counce is fraud. (Appellee’s Brief at ¶ 9). However, Counce preserved its appeal of the jury verdict and judgment on its abuse of process claim as set forth by its principal brief. (Appellant’s Brief at ¶¶ 2, 8, 15, 31-34, 68).

CONCLUSION

[¶17] For the foregoing reasons, Counce respectfully requests this Court for the relief as set forth by *Appellant's Brief*, dated July 10, 2017.

Dated: August 25, 2017.

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CERTIFICATE OF SERVICE

[¶18] I hereby certify that a true and correct copy of the forgoing brief was electronically filed with the Clerk of the North Dakota Supreme Court on the 25th day of August, 2017, and emailed to the following: **Donald T. Campbell** (donald.campbell@stinson.com) and **Robin W. Forward** (rob.forward@stinson.com).

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