

In the Supreme Court State of North Dakota

No. 20170453

Jacob Greer, d/b/a Greer Farm,

Plaintiff-Appellant,

v.

Global Industries, Inc., Nebraska Engineering Co., a Division of Global Industries,
Inc., Advanced Ag Construction Incorporation,

Defendants-Appellees.

Appeal from the District Court's Memorandum Opinion and Order Granting Motion
for Summary Judgment dated August 31, 2017 (Doc. #103),
Order for Summary Judgment on Claims Alleged Against Global Industries, Inc.,
Nebraska Engineering Co. dated September 18, 2017 (Doc. #106),
and Judgment entered October 2, 2017 (Doc. #113)
Barnes County District Court, The Honorable Troy LeFevre Presiding,
Case No. 02-2014-CV-00220

REPLY BRIEF OF APPELLANT

Ronald H. McLean (#03260)
Kasey D. McNary (#06590)
SERKLAND LAW FIRM
10 Roberts Street | PO Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
kmcnary@serklandlaw.com
ATTORNEYS FOR APPELLANT
Jacob Greer, d/b/a Greer Farm

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I. CLARIFICATION OF FACTUAL RECORD

[¶1] The District Court made a factual finding that “Greer entered into a Project Contract with Advanced Ag . . . for the purchase of a NECO model D24360 grain dryer” on December 5, 2011. (App. 17). Now, Global takes the position that Greer executed the Project Contract on December 5, 2011. Appellee’s Br., ¶ 51. The undisputed, sworn testimony of Greer clearly demonstrates he did not execute the Project Contract until December 30, 2011. The effective date of the Project Contract must also then be December 30, 2011.

[¶2] Greer contacted NECO around December 12, 2011 to purchase a grain dryer. (Doc. #68) (Deposition Transcript of Jacob Greer dated June 23, 2016 (“Greer Dep. I”), 77:11-78:3; 115:4-116:13). Greer later learned Advanced Ag was a dealer of NECO grain dryers. Id. at 123:3-21; (Doc. #82) (Affidavit of Jacob Greer (“Greer Aff.”), ¶ 6). Greer first contacted Advanced Ag, at the earliest, a few days after he spoke with NECO directly. Greer Dep. I, 124:13-16. This was the first time Greer ever spoke with anyone affiliated with Advanced Ag.

[¶3] On December 27, 2011, Greer met with Joe Beech (“Beech”) of Advanced Ag. Id. at 125:13-16. This meeting too occurred after Greer’s phone conversations with the NECO representative. On December 30, 2011, Greer met with Beech and Chad Peda (“Peda”) of Advanced Ag to pay for the NECO grain dryer he wanted to purchase from NECO. Id. at 126:25-127:7. Greer entered into the Project Contract for purchase of a “NECO Model D24360 Continuous-Flow Grain Dryer” on December 30, 2011. Greer Aff., ¶ 8; (Doc. #84). He wrote a check for \$237,075 the same day. (Doc. #71). Greer signed the

Project Contract on December 30, 2011, and a representative of Advanced Ag also signed the Project Contract that day. Greer Dep. I, 66:10-17; Greer Aff., ¶ 8.

[¶4] There is no evidence to support that Greer signed the Project Contract on December 5, 2011. Greer had not spoken with nor met any representatives of Advanced Ag by December 5, 2011. The only evidence is that Greer signed the Project Contract on December 30, 2011. Greer Dep. I, 66:10-17; Greer Aff., ¶ 8.

[¶5] It can easily be determined from the record that the December 5, 2011 date on the Project Contract was mistakenly not changed, and that it was a placeholder used by Advanced Ag for price quotes. (Doc. #4); (Doc. #84). The record contains what appears to be a price quote from Advanced Ag with no specific customer identified, no address or other contact information for a customer, and no signature line for a specific customer. Id. The Project Contract signed by Chad Peda on behalf of Advanced Ag has the correct date, December 30, 2011, on which Greer executed and entered the Project Contract with Advanced Ag. (Doc. #5). This version also contains a notation at the bottom indicating “\$237,075 Down Payment – Received 12/30/11, check #5900.” Id. These exhibits support Greer’s unrefuted, sworn testimony that he did not execute the Project Contract with Advanced Ag until December 30, 2011, the same day he wrote and delivered the check to Advanced Ag. Greer Dep. I, 126:25-127:7; Greer Aff., ¶ 8; (Doc. #84); (Doc. #71). The District Court erred in making a factual finding that Greer entered the Project Contract on December 5, 2011.

II. LEGAL ARGUMENT

A. **THERE WAS SUFFICIENT EVIDENCE TO DEMONSTRATE NECO LED GREER TO BELIEVE ADVANCED AG WAS AN AGENT PRIOR TO WHEN GREER ENTERED THE CONTRACT WITH ADVANCED AG.**

[¶6] The District Court failed to consider whether representations made by NECO directly to Greer, before Greer entered into the Project Contract, when “reasonably interpreted” caused Greer to believe Advanced Ag had authority to act for NECO. Lagerquist v. Stergo, 2008 ND 138, ¶ 14, 752 N.W.2d 168. The District Court erred in finding “there [was] no evidence to support a claim that Advanced Ag was acting with apparent or ostensible authority.” (App. 19). The evidence is of sufficient caliber or quantity to allow a rational fact finder to find Greer proved agency by clear and convincing evidence, and the District Court erred in granting summary judgment. Smith v. Land O’Lakes, Inc., 1998 ND 219, ¶ 12, 587 N.W.2d 173.

[¶7] Global argues Greer failed to present evidence sufficient to show by clear and convincing evidence that Advanced Ag was Global’s agent. While the district courts are to “consider the substantive evidentiary standard of proof when ruling on a motion for summary judgment” the party bearing the burden is not required to prove his or her entire case at the summary judgment stage. Heart River Partners v. Goetzfried, 2005 ND 149, ¶ 9, 703 N.W.2d 330. The district court is to consider only “whether the trier of fact ‘could reasonably find either that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not.’” Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986)). And the district court is still to view the evidence in the light most favorable to the party opposing the motion and give the opposing party the benefit of all favorable inferences which can be drawn from the record. Arndt v.

Maki, 2012 ND 55, ¶ 10, 813 N.W.2d 564. In deciding a motion for summary judgment, the district court may not “weigh the evidence, determine credibility, or attempt to discern the truth of the matter.” Northern Oil & Gas, Inc. v. Creighton, 2013 ND 73, ¶ 11, 830 N.W.2d 556.

[¶8] Greer spoke with a NECO representative directly in early to mid-December 2011 with the express purpose of wanting to buy a NECO grain dryer. Greer Dep. I, 77:11-78:3; 115:4-116:13. The NECO representative told Greer he must purchase a grain dryer through one of NECO’s dealers. Id. at 77:11-78:3; Greer Aff., ¶¶ 3-4. The representative told Greer: “We protect our dealers.” Greer Dep. I, 117:19-118:4. Greer also asked the NECO representative about becoming a dealer of NECO grain dryers and the NECO representative responded: “We have good dealers.” Id. at 121:5-8. The NECO representative spoke in the plural which led Greer to reasonably believe any one of NECO’s many dealers were agents for NECO. Greer Aff., ¶ 5.

[¶9] After speaking directly with a NECO representative, Greer understood from the conversations the only way he could purchase a NECO grain dryer was through one of NECO’s many dealers. Greer Dep. I, 77:11-78:3; Greer Aff. ¶ 5. Greer understood NECO and its dealers were one in the same. Id. He believed any NECO dealer was also an agent for NECO. Greer Aff., ¶ 5.

[¶10] Greer then learned Advanced Ag was a dealer of NECO grain dryers. Greer Dep. I, 123:3-21; Greer Aff., ¶ 6. Greer first contacted Advanced Ag after he had already spoken with NECO directly. Greer Dep. I, 124:13-16. A few weeks later Greer met with a representative of Advanced Ag. Id. at 125:13-16. The unrefuted evidence is that this meeting occurred after Greer’s phone conversations with the NECO representative.

[¶11] On December 30, 2011, Greer met two representatives of Advanced Ag to pay for the NECO grain dryer he wanted to purchase from NECO. Id. at 126:25-127:7. The unrefuted, sworn testimony of Greer is that he also entered into the Project Contract that same day. Greer Dep. I, 66:14-15; Greer Aff., ¶ 8. A representative of Advanced Ag also signed the Project Contract that day. Greer Dep. I, 66:10-17; Greer Aff., ¶ 8. While the date at the top of the Project Contract is December 5, 2011, the uncontroverted evidence presented to the District Court was that Greer did not speak with anyone affiliated with Advanced Ag until after his phone conversations with NECO, and that Greer did not enter into a contract with Advanced Ag prior to December 30, 2011.

[¶12] The fact finder should be permitted to weigh the evidence of Greer's direct conversations with the NECO representative, which occurred prior to Greer entering the Project Contract, to determine whether the evidence is sufficient to support by clear and convincing evidence that Global/NECO led Greer to believe that its dealers were also agents. The determination of whether an ostensible agency relationship existed invokes considerations of the perspectives and reasonable beliefs of the third person dealing with the alleged agent. N.D.C.C. § 3-01-03. Furthermore, agency is a question of fact which can only become questions of law for purposes of summary judgment if a reasonable person could reach only one conclusion from the facts. Iglehart v. Iglehart, 2003 ND 154, ¶ 9, 670 N.W.2d 343. A reasonable person could reach more than one conclusion about the alleged ostensible agency relationship between Global/NECO and Advanced Ag from the facts.

B. GREER'S UNREFUTED DEPOSITION TESTIMONY AND SWORN AFFIDAVIT CONSTITUTE COMPETENT AND ADMISSIBLE EVIDENCE UNDER N.D. R. CIV. P. 56.

[¶13] Global contends Greer is bound by the allegation in paragraph 8 of the Complaint that alleges he signed the Project Contract on December 5, 2011. Global argues Greer’s affidavit and deposition testimony, both sworn, are less credible than the allegation in the Complaint. Appellee’s Br., ¶ 51. The argument is contrary to N.D. R. Civ. P. 15(b) and the liberal allowance of amending pleadings to conform to the evidence. Freed v. Unruh, 1998 ND 34, ¶ 8, 575 N.W.2d 433.

[¶14] Greer’s affidavit was made on personal knowledge, sets out admissible facts, and contains matters to which Greer is competent to testify. N.D. R. Civ. P. 56(e)(1); (Doc. #82). The statements by the NECO representative are admissible under N.D. R. Evid. 801(d)(2). The affidavit is based upon Greer’s firsthand knowledge. Greer is competent to testify to the understanding he formed based upon his conversation with the NECO representative.

[¶15] Global’s argument that Greer’s deposition testimony is “self-serving” lacks credibility. Greer was deposed on June 23, 2016 more than four months before Global filed its motion for summary judgment. (App. 3). Global’s argument that Greer failed to present any “communication between Greer and Global prior to December 30, 2011” is disingenuous. Appellee’s Br., ¶ 58. Greer’s communications with Global/NECO prior to December 30, 2011 were all by telephone and cannot be produced. The law does not require agency be proved by written or documentary evidence.

C. GLOBAL’S ARGUMENT THAT IT NEVER RECEIVED ANY OF GREER’S MONEY FROM ADVANCED AG IS NOT RELEVANT.

[¶16] In trying to demonstrate Advanced Ag was not its agent, Global continually points out that it never received any of Greer’s money from Advanced Ag. Appellee’s Br., ¶¶ 7, 29, 54. This fact should not even be considered because Advanced Ag’s failure to

deliver Greer's money to Global forms the entire basis of Greer's claims. If Advanced Ag would have delivered Greer's money to Global then Greer would very likely have his grain dryer and this case would not exist.

III. CONCLUSION

[¶17] The District Court and Global seem to believe Greer made the wrong choice. Greer spoke with NECO, was told he had to buy a grain dryer from one of its dealers, and then was given the name of one dealer—Triple E. Greer got a quote from Triple E, but found another dealer, Advanced Ag, that offered him a better price. Apparently, if Greer had chosen to pay more for a grain dryer through Triple E—the dealer mentioned specifically by NECO—then there could be a finding of ostensible agency. (App. 19); Appellee's Br., ¶ 23. But because Greer made the wrong choice and went with the dealer that offered the better price, there can be no liability against Global as principal.

[¶18] Appellant, Jacob Greer, hereby respectfully asks this Court to reverse and remand the District Court's summary judgment dismissal of the claims asserted against Global Industries, Inc. and Nebraska Engineering Co., a division of Global Industries, Inc. He also respectfully asks the Court to determine the District Court did not abuse its discretion in granting certification under N.D. R. Civ. P. 54(b).

Dated this 17th day of May, 2018.

/s/ Kasey D. McNary
Ronald H. McLean (#03260)
Kasey D. McNary (#06590)
SERKLAND LAW FIRM
10 Roberts Street | PO Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
kmcnary@serklandlaw.com
ATTORNEYS FOR APPELLANT
Jacob Greer, d/b/a Greer Farm

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Respondent in the above matter, and as the author of the above brief, hereby certifies, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals **1,997**.

Ronald H. McLean (#03260)
Kasey D. McNary (#06590)
SERKLAND LAW FIRM
10 Roberts Street | PO Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
kmcnary@serklandlaw.com
ATTORNEYS FOR APPELLANT
Jacob Greer, d/b/a Greer Farm

By: /s/ Kasey D. McNary
Kasey D. McNary

ACKNOWLEDGEMENT OF SERVICE BY ELECTRONIC MEANS

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Defendants-Appellees.

I hereby certify that on May 17, 2018, the following document(s):

REPLY BRIEF OF APPELLANT

were served by electronic means as follows, to-wit:

NILLES LAW FIRM
Mark R. Hanson
mhanson@nilleslaw.com

The email address above given is the actual email address of the party intended to be so served. The above documents were sent in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Dated this 17th day of May, 2018.

/s/ Kasey D. McNary
Ronald H. McLean (#03260)
Kasey D. McNary (#06590)
SERKLAND LAW FIRM
10 Roberts Street | PO Box 6017
Fargo, ND 58108-6017
Telephone: (701) 232-8957
rmclean@serklandlaw.com
kmcnary@serklandlaw.com
ATTORNEYS FOR APPELLANT
Jacob Greer, d/b/a Greer Farm