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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Interiors by France, Plaintiff and Appellant, vs. Mitzel Contractors, Inc. d/b/a Mitzel Homes, Mitzel Builders, Inc., Leeroy Mitzel, an individual, and Eddy Mitzel, an individual, Defendants and Appellees.	Supreme Court Case No.: 20180399 Morton County Case No. 30-2016-CV-00803

APPELLANT'S REPLY BRIEF

Appeal from *Memorandum Opinion and Order Regarding Motion by Interiors by France for Attorney's Fees*, entered August 27, 2018, and *Judgment*, entered August 29, 2018, by the District Court for the South Central Judicial District, County of Morton, the Hon. Judge James S. Hill presiding

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LAW AND ARGUMENT

I. Once this action was removed to district court, IBF was entitled to utilize all rights and privileges associated with a formal civil proceeding.

[¶1] On appeal, Mitzel Contractors, Mitzel Builders, and Leeroy Mitzel ("Defendants") argue it was somehow improper for IBF to "transform its lawsuit" by amending its complaint after this action was removed from the informal confines of small claims court and IBF was forced to formally litigate its claims. Appellees' Br. at ¶ 43. More specifically, the Defendants argue that although Mitzel Builders and Leeroy Mitzel removed the action to district court, where more rigorous procedural requirements and standards apply, IBF should not have been allowed to bring a veil piercing claim because the Small Claims Act cannot dispose of complex factual or legal issues or utilize the rights granted to it under the North Dakota Rules of Civil Procedure. Id.

[¶2] Despite the Defendants' arguments to the contrary, the removal provisions of N.D.C.C. 27-08.1-04 cannot be applied in a manner that would allow a defendant to remove an action to district court for formal adjudication but then restrict the plaintiff's ability to utilize the rights and privileges of the venue selected by the defendant to prosecute its claims. See Appellees' Br. at ¶¶ 43-44. Once a small claims action is removed to district court, it becomes a formal civil proceeding that is subject to all of the statutes and rules associated with formal civil proceedings. See Johnson v. State, 2005 ND 188, 705 N.W.2d 830 (if a proceeding is civil in nature, all rules and statues applicable in civil proceedings are available to the parties). Here, once the Defendants elected to remove the matter to district court, the matter was no longer a small claims action; instead, it became a formal civil action governed by the rules and statues applicable in formal civil proceedings. Because a defendant cannot choose to remand an action back to small claims court after

removal or selectively choose the rules and statutes of the venue most beneficial to the defendant, IBF's ability to prosecute its claims in district court cannot be limited or governed by the informal rules and regulations of the Small Claims Act after removal. See Bell v. Pro Tune Plus, 2013 ND 147, ¶ 3, 835 N.W.2d 858 ("Once the action is properly before the district court, the defendant does not have the option to choose whether or not to remand the case to small claims court. Just as the plaintiff's decision to proceed in small claims court is irrevocable, so is the defendant's decision to remove the action to district court."); cf. Danzl v. Heidinger, 2004 ND 74, ¶ 7, 677 N.W.2d 924 (court recognizing it would be "unfair" to subject a claim affidavit removed from small claims court to the "more rigorous procedural requirements" of formal civil proceedings).

[¶3] By removing IBF's small claims action to district court, the Defendants made a calculated decision to avail the parties of the rights and privileges associated with a civil proceeding. As a result, IBF was able to utilize the rules and procedures of the forum selected by the Defendants to conduct discovery and amend its pleadings based upon the information gleaned from that discovery. If the Defendants wanted to avoid these traditional aspects of the legal process, they should have litigated this action in small claims court where IBF's ability to prosecute its claims would have been governed by the Small Claims Act. Therefore, this Court should reject the Defendants' attempt to restrict IBF's ability to fully prosecute its claims in the forum selected by the Defendants.

II. By obtaining a judgment in its favor, IBF is a prevailing plaintiff under N.D.C.C. § 27-08.1-04.

[¶4] In order to determine whether a party is a prevailing party, this Court has held on numerous occasions that a "prevailing party is one 'in whose favor a judgment in rendered, regardless of the amount of damages awarded.'" Carpenter v. Rohrer, 2006 ND 111, ¶ 34,

714 N.W.2d 804 (quoting Black's Law Dictionary 1154 (8th ed. 2004)); see also N. Excavating Co., Inc. v. Sisters of Mary of Presentation Long Term Care, 2012 ND 78, ¶ 14, 815 N.W.2d 280 ("[I]n other words, the prevailing party is the one in whose favor the decision or verdict is rendered and the judgment entered.") (internal quotations marks and citations omitted); Lemer v. Campbell, 1999 ND 223, ¶ 9, 602 N.W.2d 686 (states the same).

[¶5] In the present case, after Leeroy Mitzel essentially admitted the entire complaint brought against him and his two companies and agreed to confess judgment in favor of IBF, IBF obtained a judgment for the full amount it was owed plus compounding interests. Based upon the well-established case law discussed above, because IBF obtained a judgment in its favor, it is a prevailing party with respect to the fee-shifting provisions of N.D.C.C. § 27-08.1-04. See N. Excavating Co., Inc., 2012 ND 78, ¶ 14, 815 N.W.2d 280.

[¶6] On appeal, the Defendants argue that the district court correctly held that IBF was not a prevailing plaintiff for purposes of satisfying the fee-shifting provision of N.D.C.C. § 27-08.1-04 because it did not obtain a judgment against the removing parties, which were Mitzel Builders and Leeroy Mitzel. Appellees' Br. at ¶ 22. Furthermore, because IBF "dismissed with prejudice its claims in the small claims affidavit," the Defendants argue that Mitzel Builders and Leeroy Mitzel were actually "the prevailing parties." Id. In making this argument however, the Defendants fail to provide any legal support for this assertion; instead, the Defendants rely solely on their own bald assertions and attempts to inject language into N.D.C.C. § 27-08.1-04 that simply doesn't exist. See e.g., id. at ¶ 21.

[¶7] Despite the Defendants' arguments to the contrary, the district court erred in holding that IBF was not a prevailing plaintiff because it did not obtain a judgment against

the "original removing parties." App. 216, at ¶ 34. According to this Court's well-established case law, because IBF successful prosecuted its claims in district court and obtained a judgment in its favor, IBF is a "prevailing plaintiff" under N.D.C.C. § 27-08.1-04 and is entitled to a mandatory award of attorney fees. Although the Defendants and the district court attempt to characterize Mitzel Builders and Leeroy Mitzel as prevailing parties, these attempts must fail in that the Defendants did not obtain any decision, verdict, or judgment in their favor; instead, IBF agreed to dismiss these parties after obtaining a confession of judgment in its favor to allow IBF to seek its attorney's fees under N.D.R. Civ. P. 54(e) and N.D.C.C. § 27-08.1-04. As a result of their failure to prevail on a single issue, Mitzel Builders and Leeroy Mitzel cannot be held to be prevailing parties. See Carpenter, 2006 ND 111, ¶ 34, 714 N.W.2d 804 ("A prevailing is one in whose favor a judgment is rendered, regardless of the amount of damages awarded).

III. IBF did not sue the wrong party.

[¶8] Throughout this entire matter, both the district court and Defendants have incorrectly suggested that IBF sued the "wrong party" in the small claims action. See e.g., Appellees' Br. at ¶¶ 8, 9, and 58; App. 208, at ¶¶ 17, 29, 30, 33, 34, 41, 42, and 45. In doing so, the district court and Defendants are imposing an accuracy or precision requirement that simply does not exist for pleadings in small claims court and overlooking how cases of mistaken identity are handled in civil proceedings, especially cases involving corporations that are fully owned and controlled by a single shareholder.

[¶9] In bringing its initial pro se small claims action against Mitzel Builders and Leeroy Mitzel, IBF sought full payment from Mitzel Builders and its sole owner and operator, Leeroy Mitzel. See App. 9. Once Mitzel Builders and Leeroy Mitzel removed the action

to district court, IBF was required to formalize its claim affidavit and name all the parties that were involved in and completely aware of the underlying dispute. As a result, when IBF amended its complaint to add Mitzel Builders, Mitzel Contractors, or Leeroy Mitzel, it was not adding "new parties" to the suit; instead, it was merely trying to ensure that all parties that had common knowledge of the dispute were properly named in the district court action.

[¶10] In light of the fact that the Defendants were practically indistinguishable throughout this entire litigation, except for when it was time to direct liability to the company that had been dissolved, this Court must determine whether privity exists between these defendants. See App. 23 (Leeroy Mitzel's Dep. Tr. at 95:2-4). In general, courts have held that privity exists if a person or entity is "so identified in interest with another that he represents the same legal right." Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D. 1992). When it comes to determining privity, such a determination is rooted in what is fundamentally fair. See id. (citations omitted). Here, Leeroy Mitzel was the sole shareholder of Mitzel Builder and Mitzel Contractors and was in complete control of not only its business affairs, but its legal affairs as well. See App. 23 (Leeroy Mitzel's Dep. Tr. at 45:11-14, 94:-12). Moreover, Leeroy Mitzel employed common legal counsel for himself and his companies. Because the Defendants were "so identified in interest," it is clear that they were all in privity with one another. See Hofsommer, at 384. As a result of this privity, it cannot be said that Mitzel Builders, Mitzel Contractors, and Leeroy Mitzel can be deemed separate and distinct parties so as to completely nullify the application of the fee-shifting provision of N.D.C.C. § 27-08.1-04.

CONCLUSION

[¶11] In sum, by removing IBF's small claims action to district court, the Defendants made a calculated decision to avail the parties of the rights and privileges associated with a civil proceeding. As a result, IBF was able to utilize the rules and procedures of the forum selected by the Defendants to fully prosecute its claims against the parties it believed were involved in the underlying dispute and prevail by obtaining a judgment in its favor. Although the Defendants now argue that this matter should be governed by the rules and procedures of the small claims court, this Court must reject these unsupported claims and apply the rules and procedures of formal civil proceedings as requested by the Defendants upon removal. Therefore, because IBF obtained a judgment in its favor, IBF is a "prevailing plaintiff" as used in N.D.C.C. § 27-08.1-04 and is entitled to the statute's mandatory award of attorney fees.

Dated: April 1, 2019.

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I hereby certify that on April 1, 2019, the following document:

1. Appellant's Reply Brief; and
2. Certificate of Service

were filed electronically by e-mail with the Clerk of the North Dakota Supreme Court at supclerkofcourt@ndcourts.gov and were served electronically on the following:

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Dated: April 1, 2019.

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