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STATE OF NORTH DAKOTA

In the Supreme Court
State Of North Dakota

Supreme Court No. ~~20180013~~ 20180421

Grand Forks County Case No. ~~18-2017-CV-00020~~ 18-2015-CV-1513

Steven Nelson, individually, and in the right
of and for the benefit of J & S Nelson Farms, LLP,

Plaintiffs and Appellants,

v.

James Nelson, Brian Nelson, David Nelson, and
J & S Nelson Farms, LLP,

Defendants and Appellees.

APPEAL FROM FINAL JUDGMENT OF THE NORTH DAKOTA DISTRICT COURT, NORTHEAST CENTRAL JUDICIAL DISTRICT, GRAND FORKS COUNTY,

HONORABLE JOHN A. THELEN, PRESIDING

REPLY BRIEF OF APPELLANT STEVEN NELSON

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A. The defendants/appellees in their briefing do not even attempt to address the plaintiff/appellant Steven Nelson's argument that the District Court committed error by striking important claims from Steven's Complaint as a discovery sanction—where the plaintiff had disclosed and identified to the defendants literally all of more than 2,000 suspect transactions in which "general partner in control" James Nelson appeared to have improperly used J & S Nelson Partnership funds to pay for his personal expenses—where the defendants made no showing in the record of what more the plaintiff could possibly have done to explain these transactions—transactions which defendant James had conducted in the first place and of which James had exclusive primary knowledge.

[¶1] Strangely, the appellees do not even address in the "Appellees' Initial Brief" the central subject of plaintiff/appellant Steven Nelson's claims against the defendants/appellees, relative to the 2,100 instances in which the J&S Partnership improperly paid for defendant/appellees' personal expenses.

[¶2] It is a matter of record in this case that Steven had repeatedly provided to defense counsel in the instant case ***in his discovery responses*** – *and even in the prior RICO case in 2014* – with detailed recitations of "***hundreds [even thousands] of instances in which [Steven Nelson said] James (Nelson) took money from the partnership for his personal use***".[1] See, also ¶¶13-21and¶¶24-29, of the Initial Brief in the instant appeal.

[¶3] As of October 31, 2016, Steven Nelson had presented to the defendants ***specific references to some 2,100 specific partnership transactions*** – each broken out by subject category of expense, date of expense, and payee of expense. See [**Doc.171**].

[¶4] Furthermore, it is a matter of district court record that the improper payment transactions on the part of defendant James were connected—***one-by-one***—by Steven

[1] *Steven Nelson v. James Nelson, et. al.*, Civil No.14-4854(D.Minn.)

Nelson as putative "business expenses" claimed by the J&S Partnership—on the actual tax returns of the partnership—In both an unsuccessful summary judgment motion filed by Steven on April 28, 2017 [**Docs.Nos.249-267**and**269-279**] and in documentary evidence which was admitted as exhibits [**Docs.Nos.491-508**] at trial. James had a duty to inform Steve:

> The relationship of partners is fiduciary and partners are held to high standards of integrity in their dealings with each other. *Id.* at 413, n.10, *Prince v. Sonnesyn,* 222 Minn. 528, 535, 25 N.W.2d 468, 472 (1946), *Kitzman v. Postier & Kruger Co., Inc.,* 204 Minn. 343, 346, 283 N.W. 542, 543 (1939). ***Parties in a fiduciary relationship must disclose material facts to each other***. *Klein v. First Edina Nat'l Bank,* 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972). ***Where a fiduciary relationship exists, silence may constitute fraud***. *Toombs v. Daniels,* 361 N.W.2d 801, 809 (Minn. 1985). (emphasis added).

[¶5] Brian Nelson's testimony at trial is telling relative to the failure to disclose partnership facts to Steve:

> Q: You don't feel that by being part of the accounting, the tax preparation, the financial planning, he wouldn't have looked to you as someone who would know these things?
> A: I did know him. He never asked.
> Q: So as long as he didn't ask, it's all fair?
> A: Yeah.
>
> Trial Tr. at 877.

[¶6] Put simply, the District Court committed error by refusing to order a true accounting by the defendant James and the other defendants in this case, and by denying Steven Nelson's Motion for an Accounting. See, the authorities set forth in appellant's Initial Brief at ¶¶ 7-9.

[¶7] The burden was always on defendant James to sustain proof of the accuracy of the J&S Partnership financial records. See, *Plymouth Grain Terminals, LLC v. Lansing*

Grain Co., LLC, 2013 U.S. Dist. LEXIS 179185, at **27-28 (E.D. Wash. Dec. 20, 2013)[“***The partner controlling the records has the burden of proof of the account's accuracy***.”].

[¶8] It was in this setting that the District Court ignored the foundational fact that Steven Nelson had specifically identified more than 2,000 partnership transactions which were ***improper—intrinsically improper because they all were transactions which involved James using partnership funds to pay for his personal expenses***. [2]

[¶9] Importantly, beyond defense counsel’s rote litany of demands that Steven Nelson further “explain” in detail how defendant James’s $1,171,658.45 in payments [**Doc.223**] from the J&S Partnership to himself were improper – ***neither the defendants, nor the Court, ever provided their own explanations on the record of how such additional “explanations” were necessary, proper, or even possible***.

[¶10] In such a setting, wherein a district sanctioned a plaintiff for being unable to accomplish “the impossible” in the plaintiff’s discovery responses, the North Dakota Supreme Court ***reversed*** a district court’s dismissal of a plaintiff’s complaint under Rule 37 of the North Dakota Rules of Civil Procedure, citing the United States Supreme Court’s decision in *Societe Internationale v. Rogers*, 357 U.S. 197, 209-210 (1958). *Erling v. Haman*, 144 N.W.2d 215, 216 (N.D. 1966). [“(the) ***failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner***." 357 U.S. at 212. (*emphasis added*).

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[2] *Carlson v. Carlson*, 2011 ND 168, ¶¶27-30; 802 N.W.2d 436, 445-446 (N.D. 2011); *Red River Wings, Inc. v. Hoot, Inc*., 2008 ND 117, ¶26, 751 N.W.2d 206 (quoting *Svihl v. Gress*, 216 N.W.2d 110 (N.D.1974)); see also *Akerlind v. Buck*, 2003 ND 169, ¶26, 671 N.W.2d 256 (N.D. 2003).

[¶11] The District Court committed error in its operative sanctions Order in this case. See, the District Court's March 30, 2017 "Order Granting Defendant's' Motion for Sanctions" [**Doc.247at¶¶8-10**] in which the Court ordered "stricken from plaintiff's Complaint", "(a)ll claims for damages connected to defendants' interrogatory #7, and defendants' request for production of documents #4". *Id.* at ¶10. *Perius v. Nodak Mutual Insurance Co.*, 2012 ND 54, ¶34; and *Societe Internationale*, 357 U.S. 197, 207 (1958).

[¶12] However, regardless of whether discovery sanctions have been imposed by district courts under Rule 37 of the North Dakota Rules of Civil Procedure, or pursuant to a court's "inherent power to sanction", as the Supreme Court explained in *Bachmeier v. Wallwork Truck Centers*, 507 N.W.2d 527, 533 (N.D.1993), " dismissal of a claim should not be imposed if an alternative, less drastic, sanction is available and is equally effective", and "the same rationale applies when the court exercises its inherent power, and therefore the trial court has a duty to impose the least restrictive sanction available under the circumstances", (w)e prefer that disputes be settled on the merits**."**

[¶13] Finally, as argued in appellant Steven Nelson's "Initial Brief", "when a trial court strikes a party's pleadings . . . . for abuse of the discovery process, the court adjudicates the party's claims without regard to their merits but based instead upon the parties' conduct of discovery . . . '(t)here are constitutional limitations upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'" *Transamerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991), citing *Societe Internationale v. Rogers*, 357 U.S. 197, 209-210 (1958). See, also, ¶56 of the appellant's "Initial Brief".

B. The District Court's error in allowing payments of amounts due and in calculating the value of Steven's interest while refusing to accept the gift tax valuation on calculation of the Fair Market Value of the partnership as a going concern was not "harmless error".

[¶14] In this case, the Court has judicially expelled[3] Steven from the partnership using the rationale that it was not reasonably practicable to carry on the business of the partnership with Steven as a partner.[**Doc.71**]. Because both the original partnership agreement and the restated partnership agreement are silent and do not set forth the rights of the partners in determining the value and terms of a judicially expelled partner's interest the Court is required to apply the statutory framework of Minnesota law. *See* [**Doc.469_470,**¶9]. Minnesota law is clear—when a partnership agreement is silent as to the duties and obligations of the parties a court looks to statue:

> … to the extent that a partnership agreement is silent, Minnesota law governs a partnership. Minn. Stat. § 323A.0103(a).
>
> *Solum v. Tollefsrud*, No. 2011 WL 6306637, 4, A11-216, 2011 Minn. App. Unpub. LEXIS 1088, at 9 (Dec. 19, 2011).

[¶15] A partners right to recover his capital account is absolute and the statute of limitations does not begin to run until the dissolution of the partners interest. *Broderick v. Beaupre*, 40 Minn. 379, 380-81, 42 N.W. 83, 84 (1889).

> The construction and application of a statute of limitations, including the law governing the accrual of a cause of action, is a question of law and is reviewed de novo. *Antone*, 720 N.W.2d at 334; *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883 (Minn. 2006).

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[3] Steve asserts that the District Court did not have the authority to disassociate himSteven from the partnership by judicial determination under the facts of this case because Steven did not engage in "conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner". *See* M.S.A.§323A.0601(5)(iii).

MacRae v. Grp. Health Plan, Inc., 753 N.W.2d 711, 716 (Minn. 2008)

[¶16] Finally, the Statute of Limitations does not begin to run until the act of dissolution which in this case is the expulsion:

> Under *Broderick*, the statute of limitations on respondent's right to recover his interest in the partnership did not begin to run until dissolution of the partnership in this action.
>
> *Smith v. Graner (Estate of Smith)*, No. A09-1949, 2010 Minn. App. Unpub. LEXIS 717, at *17 (July 20, 2010).

[¶17] Paragraph 9 in both the original Partnership Agreement and the Restated Partnership Agreement is titled DISSOLUTION BECAUSE OF THE RETIREMENT, DEATH, DISABILITY, INCOMPETENCY OR WITHDRAWAL OF PARTNER and these agreements are strictly limited to providing the method and terms for valuation and payment of a partner's interest upon the retirement, death, disability, incompetency, or withdrawal of a partner. See [Doc.469_470,¶9].

[¶18] If a partner's dissociation does not result in dissolution of the partnership under M.S.A.§323A.0801, then M.S.A.§323A.0701 dictates the means and method of purchasing the dissociated partner's interest by the partnership. M.S.A.§323A.0701(a). Therefore, the District Court erred as a matter of law by disregarding M.S.A.§323A.0701 and instead applying the terms set forth in the Restated Partnership Agreement to the remaining amount due Steven for his interest in the partnership. [Doc.576,¶130-131] and Judgment [Doc.593,597,603].

[¶19] As stated in the appellant's "Initial Brief" [at ¶¶60-80], it was error – ***and it was prejudicial and reversible error and not harmless error***—for the District Court to refuse to admit defendant/appellee James Nelson's Gift Tax Return[**Doc. 472**]into evidence at

the bench trial below, and to refuse to apply the aggregate valuation[4]of the J&S Partnership in that gift tax return to the valuation of Steven's one-sixth (1/6) share[5]of that partnership.

[¶20] The James Nelson Gift Tax Return assigned a **$3,440,346.00** aggregate valuation to the J&S Partnership. See, ¶¶71-76 appellant's "Initial Brief".

[¶21] The District Court assigned an aggregate value of **$1,175,943.00** [¶78 appellant's "Initial Brief"], while disregarding entirely the valuation of the J&S Partnership set forth in the James Nelson Gift Tax Return.

[¶22] Given this substantial difference in the valuation of the J&S Partnership, in no way could the District Court's failure to admit and utilize the James Nelson Gift Tax to determine the value of the partnership be considered to be "harmless error".

Dated this 14th day of June, 2019,

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[4] Appellees misinterpret the valuation of J & S as represented in the Gift Tax Return.
[5] As stated in the "Initial Brief" at ¶76 under the J&S Partnership Agreement Steven's ownership interest was three-sixth's (3/6).

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CERTIFICATE OF SERVICE

I hereby certify that on June 14th, 2019, the following documents:

1. **REPLY BRIEF OF THE APPELLANT; AND**
2. **APPENDIX**

was filed electronically with the Clerk of Court through the ELECTRONIC FILING PORTAL OF THE NORTH DAKOTA SUPREME COUIRT, with like service of the above listed documents to the following:

Kip Kaler (kip@kaler-doeling.com) Patrick Sinner (patrick@kaler-doeling.com)

Dated this 14th day of June, 2019,

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