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STATE OF NORTH DAKOTA

Supreme Court No. 20200260

State of North Dakota

In Supreme Court

Tesoro Great Plains Gathering & Marketing, LLC
f/k/a Great Northern Gathering & Marketing LLC,

Plaintiff/Appellant,

v.

Mountain Peak Builders, LLC,

Defendant/Respondent.

An appeal from the Summary Judgment Order of March 27, 2020,
the Attorneys' Fee Order of August 5, 2020,
and the Money Judgment entered on August 10, 2010
in Case No. 27-2015-CV-00222
in McKenzie County District Court
Judge Robin A. Schmidt

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. The District Court Committed Legal Error By Granting Summary Judgment To Foreclose A Pipeline Lien Where The Underlying Debt Was Already Paid, Making The Lien Moot.

[1] The district court erroneously granted Mountain Peak summary judgment on the foreclosure of its pipeline lien because the underlying judgment had been fully paid and thus there was nothing to foreclose. "A satisfaction of judgment on the record extinguishes the claim, and the controversy is deemed ended, leaving an appellate court with nothing to review." *Mr. G's Turtle Mountain Lodge, Inc. v. Roland Twp.*, 2002 ND 140, ¶ 5, 651 N.W.2d 625 (citing *DeCoteau v. Nodak Mut. Ins. Co.*, 2001 ND 182, ¶ 10, 636 N.W.2d 432). The parties arbitrated their contract dispute and the arbitration award was reduced to judgment. Index #409-11. Great Northern paid the full amount of the judgment, including interest, and Mountain Peak filed a satisfaction of judgment. App.086, ¶ 4. As a result, the breach of contract claim that formed the basis of the lien Mountain Peak sought was extinguished, making the need for a lien moot and foreclosure inappropriate.

[2] The district court's error in allowing foreclosure of a lien for a debt that was already paid is highlighted by the directive contained in N.D.C.C. § 35-24-18, which requires "[i]n all cases when judgment may be rendered in favor of any person to enforce a lien under the provisions of this chapter, the … pipeline … *must be ordered to be sold*." (emphasis added). Because the underlying judgment was paid and Mountain Peak's claim extinguished, the district court could not order that the pipeline be sold to satisfy a non-existent debt. The district court's ruling would create an absurd result

that the legislature did not intend and reinforces the error in granting foreclosure. This Court should hold that once the underlying judgment was satisfied, the potential lien was extinguished, as was any basis upon which a foreclosure could be based.

II. Payment Of The Lien Amount More Than 10 Days Before Trial Satisfied The Exception Under Section 35-24-19 That Precludes Fee Shifting.

[3] A claimant has only a narrow path to recover attorney's fees in a pipeline lien foreclosure action. The legislature provided pipeline owners the ability to avoid fees by paying the lien amount ten days before trial. *See* N.D.C.C. § 35-24-19. The statute expressly allows an owner to avoid all liability for the opposing party's fees by submitting payment to cover the lien amount only days before trial—well after written discovery, depositions, expert discovery, and even pretrial preparation has occurred. Section 35-24-19 reflects the American Rule that parties should be responsible for their own attorney fees and adds an incentive for the owner to resolve lien claims before trial, which is what happened here.

[4] Great Northern paid the maximum amount of its liability "at least ten days before trial." The lien claim was stayed in the district court and Mountain Peak concedes that "[t]here was no new trial date scheduled" at the time Great Northern paid the amount owed. Appellee Br. at ¶ 78. Thus, Great Northern paid "the maximum amount of the owner's liability" at least ten days before trial.

[5] To circumvent this reality, Mountain Peak complains that the lien amount was paid directly to Mountain Peak, rather than paid into court and then distributed to Mountain Peak. Money is paid into court for safe keeping while the district court determines the proper sum and proper party to receive the money. *See,*

e.g., Brown v. People, 3 Colo. 115, 118, 121-22 (1876) (considering legal significance of the phrase "pay money into court" and concluding "such payment, in its technical meaning is a defense"—"If he has no doubt of the plaintiff's right to receive the money, he may pay it to him. If he has any doubt of the right of the plaintiff to receive it, he may pay it into court, and discharge himself from all responsibility"); *Nat'l Docks & N.J. Junction Connecting Ry. Co. v. United N.J. R.R. & Canal Co.*, 28 A. 673 (N.J. Ch. 1894) (purpose of paying money into court is to put the money into the custody of the court for safekeeping and ultimate payment of the proper sum to the person entitled to it).

[6] Because Section 35-24-19 involves payment before trial, the lien amount under normal circumstances would be unknown and payment into court would be necessary for the court to hold the money while the proper sum and proper party to receive the money were determined. Here, those issues were determined while Mountain Peak's lien foreclosure claim was stayed. Once the arbitration concluded, there was no reason for Great Northern to pay the lien amount into court for safekeeping when the sum and the party to receive the money were known. The law does not require such unproductive and unnecessary actions. *See, e.g., McLear v. Balmat*, 194 A.D. 827 (N.Y. App. Div. 1921) (finding error for trial court to determine that company's option to purchase mineral rights was not exercised because earnest money was not paid into court, as courts are "not bound by stringent rules so that it must deny equity and justice on technical grounds" and "equity does not expect or require that vain and unnecessary things be done"); *Schafer v. Olson*, 139 N.W. 983, 988 (N.D. 1912) ("The law does not require any such vain and unnecessary formality.")

[7] Great Northern's payment of the lien amount to Mountain Peak before there was a trial to foreclose the pipeline lien satisfies Section 35-24-19. Mountain Peak chose to accept the payment and executed a satisfaction of judgment. It could have—but did not—refuse the payment. Mountain Peak's satisfaction of the judgment more than ten days before trial precluded an award of attorney fees under Section 35-24-19. The district court had no legal basis upon which to award fees and should be reversed.

III. Mountain Peak Improperly Conflates The Arbitration Of Contract Claims With A Lien Enforcement Action.

[8] If this Court determines that Mountain Peak was entitled to a fee award, then the plain language of Section 35-24-19 precludes awarding fees that were incurred before the foreclosure action was commenced or for fees incurred in arbitration. Section 35-24-19, titled *Allowance of Reasonable Attorney's Fee in Foreclosure*, reads in part: "In any *action* brought to *enforce a lien* prescribed by this chapter, the party for whom judgment is rendered is entitled to recover a reasonable attorney's fee …." N.D.C.C. § 35-24-19 (emphasis added). The district court erroneously concluded that the arbitration of contract claims was an "action" under the statute and compounded that error by awarding Mountain Peak attorneys' fees for work done two years before Mountain Peak even asserted a pipeline lien claim.

a. Because an arbitration is not an "action" Mountain Peak is not entitled to fees incurred during the arbitration.

[9] Section 35-24-19 requires an action to enforce (i.e. foreclose) a pipeline lien before a party can possibly recover attorney fees. The term "action" in Section 35-24-19 is limited to actions "brought to enforce a lien." *Oil & Gas Transfer LLC v. Karr*,

929 F.3d 949, 951 (8th Cir. 2019). The word "action" means "a lawsuit brought in a court." *VanKlootwyk v. Baptist Home, Inc.*, 2003 ND 112, ¶ 16, 665 N.W.2d. 679. The parties here agreed to stay the district court action, dismiss all claims but Mountain Peak's lien foreclosure claim, and then arbitrate the competing breach of contract claims.[1] App.078, ¶ 2.

[10] The arbitration was not an action to enforce the lien. *See Minot Town & Country v. Fireman's Fund Ins. Co.*, 1998 ND 215, ¶ 8, 587 N.W.2d 189 (noting arbitration is a procedure "in lieu of judicial proceedings"); *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 288 (1984) ("Arbitration is not a 'judicial proceeding' …."). The statutory definition of "action" further supports this position: "An action is an ordinary proceeding in a court of justice." N.D.C.C. § 32-01-02. Because the arbitration was not an "action," Section 35-24-19 did not apply, and Mountain Peak could not recover fees incurred for the arbitration.

[11] Mountain Peak attempts to avoid this conclusion by arguing there was an agreement that Mountain Peak would be entitled to collect attorney's fees if it was successful in the arbitration. *See* Appellee Br. at ¶ 53. This is not true. The agreement to arbitrate states that each party may *seek* an award of fees if determined to be the prevailing party, however "[t]he parties reserve all arguments and defenses regarding the validity and enforceability of the lien, and the availability and the amount of interest, fees, and costs that can be awarded in connection with the Lien Claim under applicable

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[1] Mountain Peak incorrectly asserts that two claims were left in the district court—its lien claim and a declaratory judgment of no lien. *See* Appellee Br. at ¶ 42. Mountain Peak's lien claim was the only claim left to be tried.

law." App.079. After the arbitration, Great Northern challenged the validity and enforceability of the lien, as well as Mountain Peak's right to seek fees. The district court failed to exclude fees incurred by Mountain Peak in the arbitration, which was an error that must be reversed.

b. Mountain Peak cannot recover fees incurred before it asserted a pipeline lien foreclosure claim.

[12] Mountain Peak did not bring an action to enforce its lien until it amended the complaint on January 17, 2017. App.053-65. Section 35-24-19 prevented the district court from awarding fees until there was an action to enforce a lien claim. Without citing any legal authority, Mountain Peak contends that the relation back doctrine contained in N.D. R. Civ. P. 15(c)(1)(B) permitted the district court to award fees for two years of litigation that occurred before Mountain Peak brought a foreclosure action. Appellee Br. at ¶ 104.

[13] The relation back doctrine applies to prevent amendments to claims from being barred by the statute of limitations. It does not allow a party to collect attorney's fees for work done years before a fee-shifting claim was asserted in the lawsuit. *See Wayne-Juntunen Fertilizer Co. v. Lassonde*, 456 N.W.2d 519, 525–26 (N.D. 1990); *In re Olson,* 2015 ND 209, ¶ 10, 868 N.W.2d 851 (relation back important because statute of limitations under N.D.C.C. 10–19.1–110.1(2)(a) barred claims in proposed amendment). The relation back doctrine set out in N.D. R. Civ. P. 15(c)(1)(B) does not allow a district court to award fees incurred before a fee-shifting claim is asserted. The district court erred when it awarded legal fees incurred prior to January 17, 2017 and this Court should reverse that award.

IV. The District Court Erred By Awarding Fees That Were Not Billed Or Paid By Mountain Peak.

[14] Mountain Peak cites two cases to support its argument that unbilled and unpaid fees can be part of a lodestar attorney fee award. Neither case supports fee shifting for unbilled and unpaid fees in a pipeline lien action. In *Rath v. Rath*, 2016 ND 46, 876 N.W.2d 474, the court reviewed a fee request against the husband who filed a frivolous motion, even though the wife was being represented pro bono or at a reduced rate through legal aid. *Rath*, ¶ 28. "[T]he district court is considered an expert in deciding a reasonable amount of attorney fees. We have also said, *in the context of awarding attorney fees in a divorce case*, that an attorney fees award may be 'appropriate even in cases when the party is represented by a pro bono attorney.'" *Id.* (emphasis added). The award of unbilled or unpaid fees as a sanction in a divorce matter does not support allowing an award of unpaid fees in a pipeline lien action between two sophisticated businesses in which tens of millions of dollars was in dispute.

[15] Mountain Peak's citation to a contingency case—*City of Bismarck v. Thom*, 261 N.W.2d 640 (N.D. 1977)—also does not support the district court's award. In *Thom*, the court "conclude[d] that a reasonable fee in certain instances may be in excess of what a one-third contingency fee would produce, or it may be less. It is the reasonableness of the fee, and not the arrangement the attorney and his client may have agreed upon, which is controlling…." 261 N.W.2d at 645-46. This holding was limited to eminent domain cases and said nothing to support the argument that a party in a pipeline lien claim may recover fees that it was not billed and did not pay.

[16] North Dakota law did not allow the district court's award of fees that

Mountain Peak was never billed and did not pay. This was a commercial dispute between two businesses about millions of dollars. Allowing a party who prevailed in such a proceeding to impose unbilled and unpaid fees on the opposing party creates an opportunity for abuse. Public policy does not support the district court's award and this Court should reverse.

V. Great Northern Did Not Waive Arguments About The Applicability Of Section 35-24-19 And Its Exception Of Attorney Fees.

[17] Mountain Peak argues that Great Northern did not "properly raise or adequately develop" the argument that Section 35-24-19 precluded fee shifting. *See* Appellee Br. at ¶ 62. The record shows otherwise. Both parties raised the application of Section 35-24-19 in their summary judgment briefing—Great Northern in its opposition and Mountain Peak in its reply.

[18] In its summary judgment opposition brief, Great Northern addressed the application of Section 35-24-19 and argued that payment of the lien amount more than ten days before trial prevented an award of attorney fees. Index #425, ¶ 8. In its reply, Mountain Peak argued that Section 35-24-19 did not bar it from seeking fees. Index #430, ¶¶ 4, 21, 22. The record rejects Mountain Peak's suggestion that Great Northern did not argue that Section 35-24-19 prevented the district court from awarding fees.

[19] While contained in the briefing, the district court's summary judgment order did not address the application of the paid-before-trial exception. The district court acknowledged Section 35-24-19 but did not address the arguments about the application of the statute. *See* App.086-87, ¶ 5. This lack of analysis by the district court

does not mean that the issue was not raised. Nonetheless, Mountain Peak made a motion under N.D. R. Civ. P. 54(e) and 59(j) and asked the district court to amend its summary judgment ruling to add an award of attorneys' fees. In connection with that motion, both parties again raised arguments about Section 35-24-19. *See* Index # 483, ¶¶ 1-2, 28, 32-34; Index # 494, ¶¶ 31, 58. Mountain Peak's waiver argument fails.

CONCLUSION

[20] The district court incorrectly awarded fees under Section 35-24-19 because the statute only applies to actions to foreclose a lien, but the lien here no longer existed after Great Northern paid the underlying debt. Even if the section applied, fees could not be awarded because Great Northern paid the lien amount more than ten days before trial. The district court also erred by awarding attorneys' fees that exceeded the reasonable and customary local hourly rates and for work unrelated to the lien foreclosure claim. The district court again erred by awarding fees for the arbitration of contract claims, for work done years before the lien foreclosure claim was asserted, and for time not billed or paid.

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Reply Brief complies with the page limitations contained in Rule 32(a)(8)(A) of the North Dakota Rules of Civil Appellate Procedure.

I further certify that Appellant's Reply Brief, including all footnotes and endnotes, is 12 pages in length.

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I hereby certify that on March 2, 2021, I caused the following document:

1. Appellant's Reply Brief

to be electronically filed with the Clerk of Supreme Court through the North Dakota Supreme Court E-Filing Portal and that an electronic copy of the same was sent to the following:

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