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MARCH 19, 2021
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

PLS Services, LLC,
Plaintiff/Appellant,

v.

Valueplus Consulting, LLC,
Defendant/Appellee

and

Clear Creek Retirement Plan LLC; John Wesley Johnson P.S. Defined Benefit Plan; 2011-12 Opportunity Fund 6-1, LLC; and all persons unknown claiming any estate or interest in, or lien or encumbrance upon, the real estate described in the Complaint; Robert L. Doremus and Shannon M. Doremus DBA Sound Investments Company; Dale John Huysman and Anita Ruth Huysman; and Rusty Fields;

Defendants.

Supreme Court No. 20200270

Court File No. 53-2019-CV-01120

REPLY BRIEF OF APPELLANT PLS SERVICES, LLC

Appeal from the following orders and judgment entered in the District Court for the Northwest Judicial District, Civil No. 53-2019-CV-01120, Hon. Paul Jacobsen presiding:

1. January 10, 2020 Order Granting Defendant ValuePlus Consulting, LLC's Motion for Partial Summary Judgment (Doc ID# 77);

2. May 21, 2020 Order Granting Defendant ValuePlus Consulting, LLC's Motion for an Award of Attorney's Fees (Doc ID# 140);

3. May 21, 2020 Order Denying Plaintiff PLS Services, LLC's Motion to Amend/Correct Order Granting Summary Judgment (Doc ID# 141);

4. Judgment entered May 27, 2020 (Doc ID# 148); and

5. Amended Judgment September 23, 2020 (Doc ID# 189).

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I. ARGUMENT IN REPLY

A. The Court Erred By Ignoring PLS's Rule 56(f) Request And Thereby Denying PLS a Fair Opportunity to Conduct Discovery.

[¶1] The outcome of this case depends on ValuePlus's status as a Good Faith Purchaser without notice, actual or constructive, of PLS's interest in the Subject Property. Under North Dakota law, this is a question of fact. *Fredericks v. Fredericks*, 2016 ND 234, ¶ 23, 888 N.W.2d 177 ("Whether a party acted in good faith is a question of fact."). Beyond that, it is a question of fact on which no discovery was allowed, despite PLS's timely and procedurally proper requests under Rule 56(f), N.D.R.Civ.P., and despite ValuePlus moving for summary judgment only 23 days after it filed its Answer in this case.

[¶2] In its principal brief, PLS cited *Aho v. Maragos*, 1998 ND 107, 579 N.W.2d 165, in which this Court held: "In this case, the heirs moved for summary judgment six weeks after Maragos served his answer. The hearing was held 20 days later." 1998 ND 107, ¶ 8, 579 N.W.2d 165 (emphasis added). "When presented with this accelerated time frame, we believe the district court abused its discretion in failing to allow Maragos additional time to conduct discovery to oppose the motion for summary judgment." *Id.*

[¶3] PLS also cited *Johnson Farms v. McEnroe*, in which this Court concluded: "the trial court erred in failing to allow Johnson Farms further time for discovery before ruling on the summary judgment motion." 568 N.W.2d 920, ¶ 30 (N.D. 1970). In both *Aho* and *Johnson Farms*, the district court either ignored or disregarded a Rule 56(f) request for discovery, just as the district court did in this case. App 172.

[¶4] In its Appellee Brief, ValuePlus wholly ignores the *Aho* and *Johnson Farms* cases, which are directly on point and controlling in this case. Instead, ValuePlus argues that PLS was not deprived of an opportunity for discovery because it could have conducted

sufficient discovery during the 23 days following service of ValuePlus's Answer, during the pendency of the summary judgment motion itself, or even after PLS's claims against ValuePlus were dismissed by the district court. *See* Appellee Br. ¶ 17–18. ValuePlus cites no legal authority for this position because none exists. This case involves many claims against many parties, most of whom are located in Washington State. *See* App. 1–2. Conducting discovery in this case would obviously require counsel to work together to coordinate schedules and availability of parties and witnesses. To suggest that this all could have happened in 23 days, and without prior notice that a summary judgment motion was soon to be filed, is simply unrealistic, as this Court recognized in the *Aho* and *Johnson Farms* decisions.

[¶5] ValuePlus's argument that PLS should have conducted discovery during the pendency of the summary judgment motion—and even after the summary judgment motion was granted—also lacks any authority. Once a summary judgment motion is made, Rule 56(f) does not require or even contemplate that the nonmoving party must move ahead with discovery during the pendency of the summary judgment motion to demonstrate diligence in seeking discovery. In fact, the plain language of Rule 56(f) states the opposite: that discovery and depositions may be undertaken after the court orders a continuance following a Rule 56(f) request. *See* Rule 56(f)(2), N.D.R.Civ.P (. . . "the court may: (2) order a continuance to enable declarations to be obtained, depositions to be taken, or other discovery to be undertaken . . .) (emphasis added)."

[¶6] PLS fully complied with the requirements of Rule 56(f) after ValuePlus filed its motion for summary judgment and did all it could to obtain an opportunity to conduct discovery, including making a motion to reconsider, which was denied. App. 210.

Nothing in Rule 56(f) suggests that a party must initiate discovery during the pendency of a summary judgment motion to preserve its rights under Rule 56(f) or that not doing so would amount to a lack of diligence in pursuing discovery. There is no authority for ValuePlus's position on this point—in its Brief or elsewhere.

[¶7] ValuePlus's assertion that PLS dithered for months or years in asserting its claim is also demonstrably false. The time line is clear in the record on appeal: PLS sought to intervene in the 2017 Foreclosure Action in October 2018. ValuePlus opposed PLS's intervention, and the district court agreed, denying PLS's motion and noting that the 2017 Foreclosure Action would not impact "senior mortgages, which PLS claims it has over the interest of ValuePlus." App. 76. ValuePlus obtained a judgment of foreclosure on the Subject Property on March 27, 2019. App. 101. The district court entered its order confirming the sale of the Subject Property on June 18, 2019. Dkt. #310 (Case No. 53-2017-CV-00898). PLS brought the present action shortly after on July 31, 2019. App. 13.

[¶8] In other words, PLS was not a party to any civil action giving rise to a right to obtain discovery under the North Dakota Rules of Civil Procedure until July 31, 2019, when it commenced the present action. ValuePlus filed its Answer on September 16, 2019 (App. 44) and filed a motion for partial summary judgment just 23 days later on October 9, 2019. Dkt. # 21.

[¶9] ValuePlus also fails to cite any authority for its argument that PLS could or should have conducted discovery after the court ordered the dismissal of all PLS's claims against ValuePlus. Again, no such authority exists, and the very idea of it is contradicted by the Court's rulings in *Aho*, *Johnson Farms*, and elsewhere. "[T]he purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature

grant of summary judgment and the rule generally has been applied to achieve that objective." *Choice Fin. Grp. v. Schellpfeffer*, 2006 ND 87, ¶ 10, 712 N.W.2d 855. "Rule 56(f) is intended to safeguard against judges swinging the summary judgment axe too hastily." *Id.* at ¶ 7 (internal quotations omitted). ValuePlus would have the district court swing the axe first, and only then permit the headless litigant to conduct discovery. This is not how Rule 56(f) works. This Court has stated, "We will apply the rule to prevent a 'rush to summary judgment' when a party has been denied a fair opportunity to conduct discovery." *Id.* at ¶ 7. The question in this case is whether PLS was afforded a fair opportunity to conduct discovery. When ValuePlus must resort to arguing that PLS should have conducted discovery after all its claims against ValuePlus were dismissed by the district court, I think this Court can confidently answer that question "No." The summary judgment must therefore be reversed, and the case remanded for discovery and trial on the disputed issues of material fact.

B. The District Court Erred By Resolving Issues of Fact About ValuePlus's Knowledge and Status as a Good Faith Purchaser Against PLS Despite Competent Admissible Evidence to the Contrary.

[¶10] In the portion of its Brief addressing its purported status as a Good Faith Purchaser, ValuePlus has three bold subheadings: **A. No actual knowledge; B. No constructive notice; and C. No duty to inquire**.

[¶11] Each of these headings have two very important things in common: First, they are all questions of fact under North Dakota law. *See Fredericks*, 2016 ND 234, ¶ 23, 888 N.W.2d 177 ("Whether a party acted in good faith is a question of fact."). Second, they are all findings of fact contained in the district court's order granting summary judgment

made only 23 days after ValuePlus filed its Answer on which no fact discovery was permitted. App. 184, 187, 188–89, 198.

[¶12] This Court "has repeatedly held that summary judgment is inappropriate if the court must draw inferences and make findings on disputed facts to support the judgment." *Farmers Union Oil Co. of Garrison v. Smetana*, 2009 ND 74, ¶ 10, 764 N.W.2d 665. "The district court may not weigh the evidence, determine credibility, or attempt to discern the truth of the matter when ruling on a motion for summary judgment." *Id.*

[¶13] Nevertheless, the district court's order goes to great lengths weighing evidence, discerning truth, and making determinations as to the reasonableness of various inferences, stating: "PLS Services has not presented anything more than deductive conclusions based on unreasonable inferences. These affidavits, along with PLS Services' failure to contradict the same with reasonable inferences or competent admissible evidence, demonstrate why there are no material facts in dispute regarding Valueplus' lack of actual knowledge." App. 188–89 (emphasis in original).

[¶14] In its Brief—just as it did when drafting the proposed order granting summary judgment for the Court's signature—ValuePlus skillfully portrays PLS's evidence not as "disputed issues of fact," but instead as "unreasonable inferences." However, neither the district court's order nor PLS's brief provides any explanation as to why the evidence submitted by PLS, or the conclusions it reaches, are unreasonable. PLS's evidence—even on the limited record it was able to obtain without any discovery—is more than sufficient to withstand summary judgment and is more than enough for the trier of fact to find in its favor.

[¶15] ValuePlus asserts that it had no notice—whether actual or constructive—of PLS's interest in the Subject Property. However, PLS provided competent, admissible evidence (and ValuePlus has admitted) that ValuePlus executed a Purchase Agreement with Clear Creek Retirement Plan, LLC—the owner of the Subject Property—for the purchase of the Subject Property. App. 151. The Purchase Agreement also contains the same error in the legal description as the PLS Mortgages because it, too, fails to reference "Rearrangement #3." App. 151. However, it was the intention of ValuePlus that the Purchase Agreement would cover the Subject Property. App. 145.

[¶16] As part of the Purchase Agreement, ValuePlus was to receive a mortgage on the Subject Property in the amount of $225,000.00 to secure Clear Creek's performance of its obligations under the Purchase Agreement. App. 159.

[¶17] ValuePlus admits that on July 12, 2012 (two days after the PLS Mortgages were recorded), ValuePlus received a mortgage from Clear Creek Retirement Plan, LLC pursuant to the Purchase Agreement. App. 129, 159. The mortgage contained the same errant legal description as that contained in the PLS Mortgages and the Purchase Agreement. App. 134. That mortgage was dated July 12, 2012, and recorded September 26, 2012, as Document No. 744509, between Clear Creek Retirement Plan, LLC, as borrower, and ValuePlus Consulting, LLC as lender to secure a loan of $225,000.00 ("ValuePlus Notice Mortgage"). App. 129.

[¶18] **Crucially**, ValuePlus admits that it had Clear Creek Retirement Plan, LLC handle the recording of the ValuePlus Notice Mortgage. App 143. This fact is so important because Clear Creek—ValuePlus's agent for purposes of recording the ValuePlus Notice

Mortgage—recorded the ValuePlus Notice Mortgage in the same errant tract index in which the PLS Mortgages had been filed.

[¶19] Under North Dakota law:

> The beneficiary of any interest in any real estate conveyance has a duty to protect his interest against the subsequent purchasers by making certain that the instrument conveying his interest is properly recorded, because he is the only person that by exercising some diligence can discover errors in the recording which a subsequent purchaser even by the exercise of the greatest diligence could not possibly do.

Hanson v. Zoller, 187 N.W.2d 47, 57–58 (N.D. 1971) (emphasis added). "A person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself." *Sundance Oil and Gas, LLC v. Hess Corp.*, 2017 ND 269, ¶ 13, 903 N.W.2d 712.

[¶20] The North Dakota Supreme Court "has 'consistently held that a purchaser who fails to make the requisite inquiry cannot claim the protection of a good-faith purchaser status' under N.D.C.C. § 47–19–41." *Id.* (quoting *Swanson*, 2011 ND 74, ¶ 10, 796 N.W.2d 614). "Rather, a person who fails to make the proper inquiry will be charged with constructive notice of all facts that such inquiry would have revealed." *Id.* "Every person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself." N.D.C.C. § 1-01-25.

[¶21] When ValuePlus caused the ValuePlus Notice Mortgage to be recorded in September 2012, it had a duty to protect its interest by making sure its Mortgage was properly recorded. ValuePlus has sworn under oath that it had Clear Creek handle the recording of the ValuePlus Notice Mortgage. App. 143. Even a cursory review of the tract

index would have disclosed that the tract index into which the ValuePlus Notice Mortgage was filed did not match up with the Subject Property. App. 110. Clear Creek's own deed to the Subject Property did not even appear in the tract index. App. 110. This was enough to put Clear Creek—and ValuePlus who had Clear Creek handle the recording on its behalf—on notice that there were problems with the tract index and with title to the Subject Property. Had ValuePlus conducted any inquiry whatsoever, it would have easily learned of the error in the legal description, the errant tract index, and the PLS Mortgages. ValuePlus failed to make that inquiry and is therefore charged with constructive notice of all facts that such inquiry would have revealed. *Sundance*, 2017 ND 269, ¶ 13, 903 N.W.2d 712.

[¶22] **Even more crucially**, aside from the duty of inquiry that arose from Clear Creek's recording of the ValuePlus Notice Mortgage into the errant tract index, ValuePlus also had actual knowledge of the PLS Mortgages through its agent Clear Creek because Clear Creek was a party to the PLS Mortgages that were executed only two weeks before the ValuePlus Notice Mortgage was recorded. To the extent ValuePlus argues that it is not chargeable with Clear Creek's actual knowledge about the PLS Mortgages, this Court ruled in *Fredericks*, 2016 ND 234, ¶ 26, 888 N.W.2d 177, that a principal is chargeable with the knowledge of its representative when the principal fails to personally examine real estate records, which deprived the principal of its status as a Good Faith Purchaser.

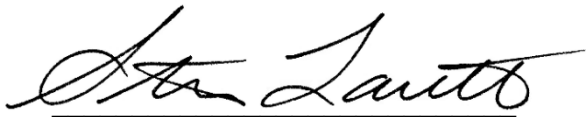
[¶23] Based on the foregoing, even on the limited record PLS was able to obtain with no discovery, PLS has presented competent, admissible evidence from which the trier of fact could conclude that ValuePlus had notice—either by actual knowledge or through constructive notice arising from its duty of inquiry—of PLS's interest in the Subject

Property. The summary judgment should be reversed and the case remanded for discovery and trial.

II. CONCLUSION

[¶24] For the reasons stated above, Appellant PLS Services, LLC respectfully requests that this Court reverse the district court's grant of summary judgment, remand the matter back to the district court for discovery and a trial on the merits, and reverse the district court's award of attorney's fees.

Dated this 19th day of March, 2021.



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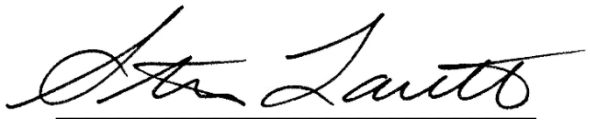
CERTIFICATE OF COMPLIANCE ON WORD COUNT

[¶25] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(8)(A); the page count is 12.

Dated this 19th day of March, 2021.



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CERTIFICATE OF WORD PROCESSING PROGRAM

[¶26] The word-processing program is Microsoft Office Word 365.

Dated this 19th day of March, 2021.

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CERTIFICATE OF SERVICE

[¶27] I hereby certify that true and correct copies of the Reply Brief of Appellant PLS Services, LLC and Appellant's Appendix were, on the 19th day of March, 2021, served electronically on the following:

- Defendant/Appellee Valueplus Consulting, LLC, through its attorney of record Trevor A. Hunter – *thunter@crowleyfleck.com*;

- Robert L. Doremus and Shannon M. Doremus DBA Sound Investments Company, through their attorney of record Nicholas C. Grant – *ngrant@ndlaw.com*;

- Dale John Huysman and Anita Ruth Huysman through their attorney of record Jack E. Zuger – *jez@pearce-durick.com*;

I hereby further certify that paper copies of the Brief of Appellant PLS Services, LLC and Appellant's Appendix were, on the 19th day of March, 2021, served by mail on the following:

- Clear Creek Retirement Plan LLC
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