

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Public Service Commission,)

File No. 08-2011-CV-917

Petitioner,)

vs.)

Mitchell Feeds, Inc., and)

Western Surety Company,)

Respondents.)

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT OF DISMISSAL
OF INTERVENOR FARMERS'
COMPLAINT

Michael Aasen, Donald Ackerman,)

Sheldon Ackerson, Lana Anderson,)

d/b/a Northland Farms, B&D Farms, Inc.,)

Busch Farms, Inc., David Deslauriers,)

Scott Lazorenko, Manna Farms, Inc.,)

Nathan Neameyer, Steven Neameyer,)

Mitch Preskey, Paul Rohde, James Routledge,)

Bart Savelkoul, d/b/a Savelkoul Farms,)

Mike Schollmeyer, David Steeves,)

Robert Steeves, Paul Trout, Wurgler Farms,)

and Kelly Wurgler,)

and)

American Federal Bank,)

Intervenors.)



In the above-entitled litigation American Federal Bank, as an intervenor, has filed and served their motion for summary judgment of dismissal of the Farmers' Complaint; said motion supported by attached exhibits and supporting brief. Said motion offered by and through legal counsel for American Federal Bank, Attorney Tracy A. Kennedy.

RECEIVED & FILED

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Clk. of Crt. Burleigh Co.

In response thereto, the Intervenor Farmers, collectively by and through their co-legal counsel Attorneys Derrick Braaten and Lindsey Nieuwsma, have filed the Intervenor Farmers' resistance to said motion, together with supporting brief and supporting exhibits. In addition thereto, Mitchell Feeds, Inc., by and through its legal counsel Attorney David L. Johnson, filed its joinder to American Federal Bank's motion for summary judgment. Further, Plaintiff Public Service Commission, by and through Assistant Attorney General Illona Jeffcoat-Sacco has filed the resistance of said agency to the pending motion for summary judgment of dismissal of Farmers' complaint.

On July 9, 2012, hearing was held before this court with all parties appearing other than Mitchell Feeds Inc., by and through their respective legal counsel.

BACKGROUND

On April 14, 2011, the North Dakota Public Service Commission initiated this action seeking to be appointed the trustee of Defendant Mitchell Feeds' trust fund pursuant to N.D.C.C. Chapter 60-02.1. Mitchell Feeds is a roving grain buyer, who was licensed under N.D.C.C. Chapter 60-02-1. This Court found Mitchell Feeds insolvent and appointed the PSC trustee of the trust. Western Surety, Mitchell Feeds' surety, was also joined as a party.

In order to protect its first priority security interest in the inventory of Mitchell Feeds, American Federal intervened in the action and filed a claim with the PSC. In addition, Michael Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B&D Farms, Inc, Busch Farms, Inc., David Deslauriers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul,, dba Savelkoul Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms and Kelly Wurgler (collectively referred to as

"farmers") intervened in this action and filed claims with the PSC claiming that they sold sunflowers to Mitchell Feeds in 2008 and/or 2009 pursuant to contracts which had not been paid.

Just prior to the PSC initiating this action, on April 6, 2006, the Intervenor Farmers filed suit in Norman County, Minnesota, against Mitchell Feeds claiming breach of contract and replevy of the sunflowers held by Mitchell Feeds at its Hendrum, MN facility. American Federal intervened in that suit seeking judgment against Mitchell Feeds pursuant to the security agreement between America Federal and Mitchell Feeds. It also sought declaratory judgment that its first priority security interest was superior to any claim the Farmers made to the sunflowers.

American Federal motioned for summary judgment in the Minnesota case. The Farmers responded and simultaneously made a motion for declaratory judgment in this North Dakota action. The Farmers eventually moved to withdraw their Motion for Declaratory Judgment, which was granted April 30, 2012. In the meantime, a hearing was held on American Federal's Motion for Summary Judgment in the Minnesota case.

Farmers served their Complaint in Intervention seeking declaratory judgment in this action on April 6, 2012. That Complaint in Intervention is the subject matter of this Motion for Summary Judgment.

On May 2, 2012, judgment was entered in the Minnesota case granting American Federal's motion for summary judgment and declaring that American Federal's first priority security interest was superior to any of Farmers' claims to Mitchell Feeds' sunflower inventory and/or proceeds thereof located in Minnesota

MATERIAL UNDISPUTED FACTS

1. On April 14, 2011, the PSC initiated this action seeking to be appointed trustee of the trust fund under Section 60-02.1-29 of the North Dakota Century Code due to the insolvency of Mitchell Feeds, Inc., a roving grain buyer, licensed under Chapter 60-02.1 of the North Dakota Century Code.
2. On May 10, 2011, this Court established February 1, 2011, as the date of insolvency of Mitchell, appointed the PSC trustee of the trust fund, and joined Western Surety Company, Mitchell Feeds' surety, as a party.
3. Farmers intervened and submitted claims for unpaid grain contracts to the PSC.
4. American Federal Bank also intervened to protect its first priority lien in certain assets of Mitchell Feeds located in Minnesota.
5. On April 6, 2012, nearly one year after they intervened, the Farmers filed a Complaint seeking declaratory judgment.
6. American Federal answered the Farmers' Complaint on April 25, 2012. The PSC did not answer the Farmers' Complaint.
7. On April 6, 2011, eight days prior to initiation of this action, Farmers filed a suit in the State of Minnesota against Mitchell Feeds, Inc., and Mitchell Farms, Inc., (hereafter referred to as the "Minnesota case"). See Norman County, MN Case 54-DV-11-112. The Farmers sought two causes of action, breach of contract and replevin. They sought possession of the sunflowers located in Hendrum, MN and/or the proceeds thereof be returned to the Farmers.
8. American Federal intervened and filed a Complaint in Intervention in the Minnesota case seeking a determination that its first priority security interest in the sunflower inventory and/or proceeds thereof located in Norman County, Minnesota, was superior to any claim Farmers made.

9. American Federal made a motion for summary judgment in the Minnesota case, and on May 1, 2012, an Order Granting Summary Judgment and Judgment in Favor of Intervenor American Federal Bank was entered, with Judgment entered on May 2, 2012.

DECISION

This litigation initiated by the Public Service Commission, State of North Dakota, is the result of Section 60-02.1-29, N.D.C.C. Therein said Commission is mandated to apply to the District Court for a determination of insolvency of any roving grain buyer and to seek appointment by the Court of the Public Service Commission as trustee and to marshal all known assets of said insolvent grain buyer for and on behalf of the best interests of the receipt holders. Said trust fund assets described in Section 60-02-.1-30, N.D.C.C. This Court determined the effective date of insolvency of Mitchell as the 1st day of February, 2011, and subsequent to the Court's order of appointment of the Public Service Commission as trustee, the Intervenor Farmers have filed claims for unpaid grain contracts with the Public Service Commission. It is within the scope of authority of the Public Service Commission to receive said claims and determine the validity of the same, which has not been accomplished as the date hereof.

As set forth in the Intervenor Farmers' Complaint and prayer for relief, the same is entirely premised upon their status as beneficiaries of the statutory trust described above. As trustee of said trust, the Public Service commission has the exclusive standing to seek remedies for the marshaling of the assets of said trusts. Accordingly, the independent Intervenor Farmers, having asserted no other interest other than that of the statutory trust, are without standing before this Court to assert any individual right to the subject sunflowers or the proceeds from the sale thereof. Intervenor Farmers' claims, as set forth

in their Complaint herein, are an effort to cause this court to determine the priority of the various parties to the sunflowers or the proceeds thereof. It is the responsibility of the Public Service Commission as trustee of said statutory trust to identify with particularity any and all trust assets; and if title to same is contested, to present, as trustee, its claim for priority.

The issue of standing to assert a claim has been addressed by the Supreme Court of North Dakota in various settings. It is only when a party demonstrates that they have standing in any dispute before the Court that the trial court may decide the dispute on the merits of said litigation. Ackre v. Chapman & Chapman, P.C. , 2010 N.D. 167, 788 N.W.2d 344.

To establish appropriate standing before the trial court, a claimant must establish that they have suffered an injury or been threatened with such injury, and that the litigant is not asserting a claim shared by a large group of claimants but rather is asserting his own legal rights and interests.

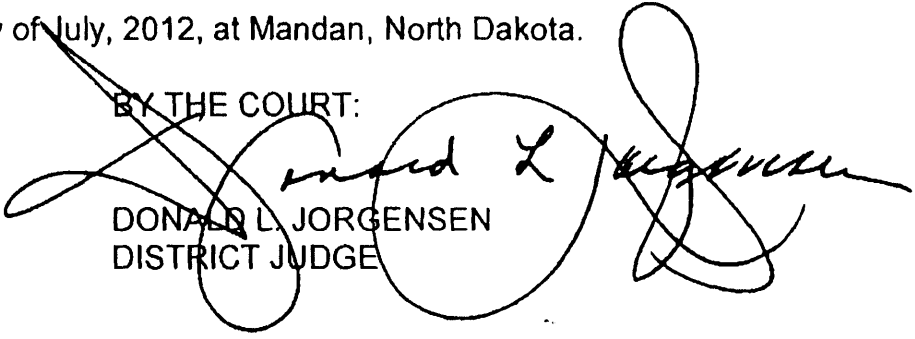
Herein, Intervenor Farmers have suffered an injury in that they have not been paid for their sunflowers. However, said Intervenor Farmers are the beneficiaries of a statutory trust of which the North Dakota Public Service Commission is the trustee; and, accordingly, the assertion of a claim against property for the benefit of said trust is exclusively that of the Public Service Commission and not the individual beneficiaries.

IT IS THEREFORE THE DETERMINATION OF THIS COURT that the Intervenor Farmers do not have standing before this Court to assert their claims individually against the insolvent roving grain buyer, but rather have the obligation to establish their claims by and through the trustee, North Dakota Public Service Commission, and as against the trust assets.

IT IS THEREFORE THE ORDER OF THE COURT that the motion of American Federal Bank for dismissal of the complaint of the Intervenor Farmers, and that upon lack of standing is herewith granted, and said Complaint is herewith dismissed without prejudice.

Dated this 27th day of July, 2012, at Mandan, North Dakota.

BY THE COURT:


DONALD L. JORGENSEN
DISTRICT JUDGE

STATE OF NORTH DAKOTA

DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Public Service Commission,

Petitioner,

vs.

Mitchell Feeds, Inc.

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Micheal Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B&D Farms, Inc., Busch Farms, Inc., David Deslauriers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul d/b/a Savelkoul Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms, Kelly Wurgler, and American Federal Bank

and

American Federal Bank,

Intervenors.

Civil No. 08-2011-CV-917

PSC Case No. GE-11-51

**AFFIDAVIT OF SERVICE
BY U.S. MAIL and
Courtesy Copy Email**

STATE OF NORTH DAKOTA)
)SS.
COUNTY OF GRAND FORKS)

KAREN SYRSTAD, being first duly sworn on oath deposes and says that she is a secretary in the office of Zimney Foster P.C., 3100 South Columbia Road, Ste. 200, PO Box 13417, Grand Forks, ND 58208-3417; that on the 9th day of August, 2012, she served:

1. NOTICE OF FILING ORDER (Order Granting Motion for Summary Judgment of Dismissal of Intervenor Farmers' Complaint)

by placing a true copy in a postage paid envelope addressed to each person named below, at the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States mail at Grand Forks, North Dakota. A courtesy copy of said document was also emailed to each person at their email addresses listed.

Illona A. Jeffcoat-Sacco
Special Assistant Attorney General
State Capitol – 12th Floor
600 East Boulevard Avenue, Dept 408
Bismarck, ND 58505-0480
ijs@nd.gov

David L. Johnson
McNair, Larson & Carlson, Ltd
51 Broad Way, Ste 600
PO Box 2189
Fargo, ND 58108
David.johnson@mlcfargolaw.com

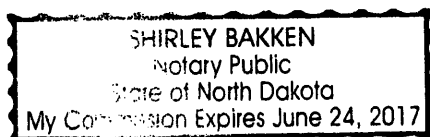
Derrick Braaten
Lindsey Nieuwsma
222 North 4th Street
Bismarck, ND 58501-4004
derrick@baumstarkbraaten.com
lindsey@baumstarkbraaten.com

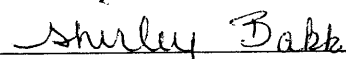
Sharon Sergeant, Claims Manager
Senior Claims Counsel, Claim Dept.
Western Surety Company
101 South Phillips Avenue
Sioux Falls, SD 57104-6703



KAREN SYRSTAD

Subscribed and sworn to before me this 9th day of August, 2012.





NOTARY PUBLIC