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STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF GRAND FORKS | NORTHEAST CENTRAL JUDICIAL DISTRICT

Public Service Commission, Petitioner, v. Grand Forks Bean Company, Inc., and Auto-Owners Insurance Company, Respondents, PSC Case No. GE-15-36	Civil No. 18-2015-CV-00240

POST-TRIAL BRIEF OF THE CLAIMANTS CURTIS AMUNDSON AND BETH NELSON, AS ASSIGNEE OF THE ESTATE OF BRAD NELSON

INTRODUCTION

The quantity of pinto beans delivered by the Claimants Curtis Amundson ("Amundson") and Beth Nelson, as assignee of the Estate of Brad Nelson ("Nelson") to Grand Forks Bean ("GFB") for which payment was not made is undisputed. With respect to treatment for those claims, the critical question is whether Amundson and Nelson are receipt holders and entitled to share in the statutory trust fund administered by the North Dakota Public Service Commission ("PSC"). Amundson and Nelson believe the vast preponderance of the evidence establishes the PSC correctly characterized them as receipt holders.

1. **Amundson and Nelson are Receipt Holders.**

a. Nelson Never Executed A Price-Later Marketing Contract with Grand Forks Bean.

In arguing that Nelson is a credit sale contract seller, it is believed the bonding company and Bremer Bank ("Bremer") will rely exclusively on the price-later marketing agreement supposedly signed by Brad Nelson, Ex. PSC-20b. That agreement was dated months after Brad Nelson's death. Thus, it is clear Brad Nelson did not sign the same. The bonding company and Bremer may argue the agreement was signed by an authorized representative of Nelson. There is absolutely no evidence in the record to support such a claim. For example, the bonding company and Bremer failed to submit any proof on the issue of who signed the agreement and/or what, if any, authority this individual had been given by Nelson. An agent can act only within the scope of his or her actual authority. Thus, the lack of evidence as to such authority is fatal to any claim by the bonding company and Bremer the price-later marketing agreement is binding on Nelson. Alerus Financial, N.A. v. Western State Bank, 750 N.W.2d 412 (N.D. 2008) (an agent may act only within the scope of his or her actual authority). The only exception to the above rule is if a principal intentionally or through want of care holds out an agent as having authority. A finding of ostensible authority is dependent on the conduct of the agent's principal. Transamerica Insurance Company v. Standard Oil Company (Indiana), 325 N.W.2d 210 (N.D. 1982). In that there was no testimony as to Nelson's representations concerning the alleged unnamed agent and/or reliance by GFB on the same, the bonding company and Bremer did not meet their burden of proof on any claim of ostensible authority.

It is conceivable the bonding company and Bremer may attempt to argue ratification by Nelson. There was no evidence Nelson elected to accept the benefits of a price-later

marketing agreement with GFB. Acceptance of benefits is critical to proof of a ratification claim. Farmers Union Company of Dickinson v. Wood, 301 N.W.2d 129 (N.D. 1980).

What the evidence did establish is that the Nelson beans were sold to GFB pursuant to a Dry Bean Contract dated October 16, 2012. Exhibit PSC-20(a). No party asserts that contract constitutes a credit sale agreement.

b. Amundson Did Not Elect to Sell His Beans Under a Price-Later Marketing Contract.

Amundson testified he signed a price-later marketing agreement with GFB only as a potential marketing tool. He did not agree the crop he was delivering would be marketed under that agreement. Rather, he instructed GFB to sell his crop immediately upon completion of delivery. Payment was to be made either the last day in December 2013 or the first day of January 2014. Amundson believed immediate sale was in his best interests. He anticipated that with the excellent 2013 bean crop, bean prices would go down (as they did). Thus, he did not want to wait to price his beans later.

The bonding company's attorney questioned Amundson about the notations on the copy of the Amundson price-later marketing agreement found in the files of GFB. Those notations were dated January and February of 2014 and concerned storage charges and the quantity of beans for which Amundson had been paid. The notations appear only on the copy of the agreement retained by GFB. They were placed on the contract after Amundson signed it and without his consent. There was no evidence as to who made the notations on the agreement and/or the purpose of the same. Since a contract may be modified only with the mutual consent of the parties thereto, the unilateral changes made by GFB have no legal

significance. North Dakota Century Code § 9-09-06 and Cargill, Inc. v. Kavanaugh, 228 N.W.2d 133 (N.D. 1975).

If GFB believed Amundson was a party to a price-later marketing agreement, it would have kept records as to the price he established for his beans. The lack of any evidence on pricing belies the existence of an operative price-later marketing agreement between Amundson and GFB.

c. Any Duty to Convert Scale Tickets did not Result in a Credit Sale Contract between Amundson, Nelson and GFB.

The bonding company and Bremer suggested during the course of the hearing that Amundson and Nelson had a duty to convert their scale tickets to warehouse receipts or sale contracts. If such a duty was breached, the breach was of no consequence. There is nothing in the statutes or commonlaw providing that if a grower fails to timely convert a scale ticket, the grower is deemed to have entered into a credit sale contract with the elevator. More importantly, the evidence was that Amundson and Nelson converted their scale tickets into written or oral contracts, the terms of which were sale at the conclusion of delivery of the crop.

d. Any Postings by GFB were Without Legal Significance.

At trial evidence was presented that GFB posted its premises with signs stating that absent the negotiation of different terms, crop sales would be on a delayed pricing basis. These postings controverted the express terms of the price-later marketing agreement forms used by GFB. Section 5 of that form required growers to designate which deliveries would be sold on a price later basis. See, for example, Section 5 of Exhibit PSC-20(b). Additionally, the testimony was that Amundson and Nelson never saw these postings. There

are no statutes or commonlaw that allows the bonding company or Bremer to argue the postings by GFB had any legal significance.

e. The Price-Later Marketing Agreement Form used by GFB did not comply with Statutory Requirements for a Credit Sales Contract.

North Dakota Century Code § 60-02-19.1 sets forth eight requirements, all of which a "... credit-sale contract must contain or provide ...". The price-later marketing agreements on which the bonding company and Bremer rely are deficient with respect to as many as five of those requirements.

By statute, a credit sale contract must set forth conditions for delivery of the involved crop. Thus the contract must specify the date for delivery. This information is in the form of credit-sale contract approved by the PSC (Exhibit PSC-2) but is missing from the unauthorized price-later marketing agreements utilized by GFB. Indeed, under those agreements GFB had the right to reject delivery if, in the opinion of GFB, its facility is full.

By statute, a credit sale contract must list the price of the crop. This information is missing from the agreements utilized by GFB.

By statute, a credit sale contract must set forth the quantity of crop it covers. The agreements utilized by GFB did not have a space where a quantity figure could be added. Indeed, Section 5 of each of the agreements states they do not apply to any crop absent later election by the grower. By this provision alone, it is obvious the price-later marketing agreements utilized by GFB were not contracts but rather agreements to agree.

By statute, a credit sale contract must state when payment will be made. The form approved by the PSC (Exhibit PSC - 2) required payment upon pricing of the involved crop. The unauthorized agreements used by GFB provided for payment on "request".

Last but not least, by statute, to be valid, a credit sale contract must be signed by both the elevator and the grower. As to all the growers but Amundson, none of the price-later marketing agreements were executed by the Claimants and as to Amundson, he did not market his beans under that contract.

Based on its pretrial brief, Bremer appears to believe this Court can ignore the requirements of N.D.C.C. § 60-02-19.1 in determining whether the form used by GFB was a valid credit sale contract. According to Bremer, other statutes define what constitutes a credit sale contract and N.D.C.C. § 60-02-19.1 has application only to the PSC's administrative review procedure. This assertion ignores the clear language of N.D.C.C. § 60-02-19.1 "... each credit-sale contract must contain or provide...". To have the meaning suggested by Bremer, the statute would need to be substantially reworded. As a practical matter, Bremer wants this Court to determine the statute is mere surplusage that can be wholly disregarded. This is contrary to the rules of statutory construction. Martin v. Stutsman County Social Services, 698 N.W.2d 278 (N.D. 2005) (a cardinal rule of statutory construction is to give meaning to each provision of a statute). Additionally, Bremer's argument flies in the face of the body of existing case law addressing the elements of a credit sale contract.

f. Neither the PSC nor Amundson and Nelson are Estopped from Asserting that Amundson and Nelson are Receipt Holders.

At trial, Bremer spent a great deal of time developing its argument that in at least one audit of GFB, the PSC failed to note the price-later marketing agreement form utilized by

GFB did not meet the statutory requirements for a credit sale contract.[1] Based on its pretrial brief, Bremer's argument is apparently that this error by the PSC inspection should estop the PSC from arguing any of the claimants are receipt holders. This position is fatally flawed.

Although, as a matter of law, estoppel can be asserted against a governmental entity, the same is strongly disfavored by the courts. City of Minot v. Johnston, 379 N.W.2d 275 (N.D. 1985).

Bremer does not claim it was aware of the mistake allegedly made by the PSC or that it relied upon the same. Rather, Bremer's estoppel argument is premised on GFB's supposed reliance on the mistake. As a matter of law, Bremer cannot raise a derivative or third-party estoppel claim. Brunsdale v. Bagge, 224 N.W.2d 384 (N.D. 1974). In that GFB did not object to the PSC's report GFB is deemed to have waived any estoppel argument available to it.

Even if Bremer is allowed to advance an estoppel claim that is personal to GFB, the evidence was clear that the PSC inspector did not consciously make any misrepresentations to GFB. This is a serious difficulty for Bremer in that estoppel must be based on a knowingly false representation or concealment of material facts. First International Bank & Trust v. Peterson, 776 N.W.2d 543 (N.D. 2009). Furthermore, there was no evidence GFB detrimentally relied on the inspector's conduct. Miller v. Walsh County Water Resource District, 819 N.W.2d 526 (N.D. 2012).

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[1] If Bremer felt the GFB's price-later marketing agreements met the requirements of North Dakota law for a credit sale contract, any alleged error by the PSC inspector would be irrelevant. The fact Bremer seeks to benefit from the alleged mistake is an acknowledgment by Bremer that the price-later marketing agreements used by GFB are not credit sale contracts.

If Bremer attempts to advance a claim of estoppel in its own right, the same also fails. There was no evidence of any communication to Bremer by the PSC either directly or through a third party. The failure of Bremer to show that the alleged misrepresentation by the PSC was conveyed to Bremer is fatal to any estoppel claim Bremer attempts to assert in its own right. Thimjon Farms Partnership v. First International Bank & Trust, 837 N.W.2d 3327 (N.D. 2013). Additionally, the evidence was clear that there was no detrimental reliance by Bremer on the actions or omissions of the PSC. Indeed, the testimony at trial documented that although Bremer was aware of how receipt holder status could impact on its collateral position, Bremer did not ask GFB to differentiate between crop delivered by receipt holders and crop subject to credit sales and Bremer never made any lending decisions with respect to this issue.

The final difficulty with the estoppel argument raised by Bremer is that even if the PSC was estopped, this would not bind Amundson and Nelson. Estoppel may be raised only against the party making the alleged false misrepresentations, not against an innocent third party. Erickson v. Brown, 813 N.W.2d 531 (N.D. 2012).

The evidence in this case supports a finding that Amundson and Nelson are receipt holders and entitled to share in the statutory trust fund administered by the PSC.

2. The Amounts Owed to the Claimants.

a. Date of Insolvency.

Once this Court resolves the receipt holder/credit contract seller dispute, the next issue is the amount owed to each Claimant. By statute, the value of each Claimant's crop is determined based on the market price of the same as of the date GFB became insolvent. The definition of insolvency is provided by statute. N.D.C.C. § 60-04-02. Insolvency exists

when there is a failure to pay for crop sold after demand is made. For crops in storage, an elevator is insolvent if there is a failure to either pay for or redeliver those crops.

The evidence established that as early as the middle of October 2013, a number of Claimants were demanding payment for beans they had delivered and sold to GFB. North Dakota Century Code § 60-04-02 does not provide that a separate date of insolvency is to be established for each Claimant. Rather, for purposes of the statute, insolvency exists when an elevator fails to pay for any crop it has purchased. The statute does not require a written demand for payment. The statute does not require that a claimant file suit. The statute does not require a claimant make a demand on the PSC. The statute only states a claimant make a demand for payment. This occurred in the middle of October 2013 when a number of Claimants made requests for payment to GFB. As of the middle of October 2013, it is undisputed the market price of beans was $38 per cwt. Exhibit PSC-20. Thus, $38 per cwt. is the value that should be utilized by this Court in determining the amounts due to all Claimants rather than the $23 per cwt. figure suggested by the PSC. N.D.C.C. § 60-04-09.

The PSC's $23 per cwt. figure is based on the market value of pinto beans on the date the first complaint was made to the PSC. Under the statute a demand for the PSC does not establish insolvency. Why the PSC focused on this date and ignored a number of possible earlier dates is unknown. As discussed above, the evidence is clear that by the middle of October 2013 Claimants were demanding payment from GFB. Alternatively, this Court can look to the written bean purchase contracts (Exhibits PSC – 20a and 21b) that required payment for the beans covered by the same on or before December 31, 2013. It is undisputed that, despite due demand, GFB failed to honor those contracts.

The bonding company and Bremer introduced evidence at trial that in late 2014 a number of Claimants sought to take redelivery of their beans. This is irrelevant to determination of the date of insolvency since GFB refused to agree to redelivery of the Claimants' beans. More importantly, no one asserts the Claimants had beans in storage at that late date. Under the statutory definition of insolvency, redelivery is relevant only as to beans in storage.

The bonding company and Bremer also spent significant time at trial inquiring about the fact that certain of the Claimants initial claims referenced a date of insolvency in 2014 and their amended claims used a 2013 date of insolvency. The reason for this is that when claims were first filed, discovery had not been completed. Counsel for Amundson and Nelson did not know that essentially all the signatures on the price-later marketing agreements were forged. Additionally, the information respecting the demands made on GFB for payment in October of 2013 was unknown. Once the facts were ascertained, Amundson and Nelson realized GFB was insolvent much earlier than originally thought.

b. Storage Charges Should Not be Subtracted in Determining the Amounts Due to Claimants.

The PSC seeks to deduct storage charges from the debts due to Amundson and Nelson. This is wholly unjustified. For the period in which the PSC attempts to assess storage charges, Amundson and Nelson did not have their beans on storage with GFB. Those beans were sold and Amundson and Nelson had repeatedly demanded that they be paid for the same. The fact GFB might have kept the beans dry, etc. is of no consequence. GFB retained possession of the beans only by virtue of its refusal to follow the express direction of Amundson and Nelson to sell and pay. During the period GFB held the beans,

the market price dropped from $38 per cwt. to $23 per cwt. Absent compensation for this drastic loss in value, no consideration should be given to the PSC's proposed deduction for storage.[2]

A further reason there is no justification for a storage charge is that the PSC did not pay anything to be allowed to maintain the beans at GFB and incurred no expenses related to that facility. In effect, the storage charge is simply a windfall either for the bonding company or Bremer.

c. Amundson Offset.

The number suggested by the PSC for the offset against Amundson's claim is wholly lacking in evidentiary support. Based on an invoice the PSC found in the records of GFB, the PSC believes Amundson's claim should be reduced by $51,312.15. The PSC representative testifying about the offset was unable to explain the same, how it was calculated, etc. Amundson provided clear testimony as to proper calculation of the offset - $45,093.80 for bean seed he purchased from GFB.

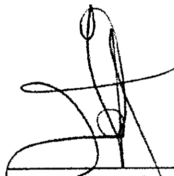
SUMMARY

Amundson and Nelson should be deemed receipt holders. Their claims should be determined based on a market price of $38 per cwt., together with interest accruing on the same from and after October 15, 2013. No storage charges should be deducted from their claims. Amundson's claim should be reduced by the sum of $45,093.80 representing the

[2] The fact Amundson and Nelson will receive distribution from the statutory trust fund is not adequate compensation for their loss. A price of $30 per cwt. will exhaust the statutory trust fund and the face amount of the bond. As noted, however, the loss in value of Amundson's and Nelson's position was not from $30 per cwt. to $23 per cwt., but from $38 per cwt. to $23 per cwt.

value of bean seed he purchased from GFB for which he did not pay. Amundson and Nelson should share on a pro rata basis with the other Claimants that are deemed to be receipt holders in the statutory trust fund administered by the PSC. That trust fund consists of the value of the crops held by GFB that were liquidated by the PSC, the amount of GFB's bond, and interest on the bond.

Dated: March 29, 2016.



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