NO. A07-0377

State of Minnesota
In Court of Appeals

Superior Construction Services, Inc.,
a Minnesota Corporation

Appellant,

vs.

Latoria Belton, LaTonya T. Harris,
Town & Country Credit Corporation, a foreign
corporation, John Doe, Mary Roe
and ABC Corporation,

Respondents.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES

I. Can the District Court make a finding that Appellant had abandoned its project in a Summary Judgment motion, when there is substantial evidence, and substantial inferences to be drawn from the record, that it had no intention to abandon the project?

The District Court held in the affirmative.

II. Did the District Court abuse its discretion by refusing to consider evidence, offered at the hearing, that had been previously provided to the Respondent through discovery, and when there was ample time to continue with discovery, and ample time for Respondent to review and respond to the additional evidence?

The District Court held in the negative.

STATEMENT OF THE CASE

Appellant Superior Construction Services, Inc., ("Appellant") initiated this lawsuit against LaToria Belton and LaTonya Harris, along with Town and Country Credit Corporation, ("Respondent") by the filing of a Summons and Complaint alleging claims for a Mechanic's Lien, Breach of Contract, Unjust Enrichment and a lien pursuant to Article I, Section 12 of the Minnesota State Constitution (A.01 - A. 14).

Because Belton and Harris failed to respond, Appellant sought and received a Default Judgment against them on its claims for Breach of Contract and Unjust Enrichment, and had that judgment declared to be a lien against the property pursuant to Article I, Section 12. (A. 15 - A. 19).

The balance of this litigation concerns the dispute between Appellant and Respondent over the priority of Appellant's Mechanic's lien, which was filed and recorded on June 22, 2005. (A.20 - A. 22). Respondent's Answer alleged that Appellant had abandoned its work, and, that the mortgage Respondent had filed on December 16, 2004 had priority over Appellant's Mechanic's Lien. (A. 24)

Because Respondent did not interpose an Answer in a timely fashion, Appellant prepared and filed a Motion for Entry of Default Judgment. (A. 65). On the day prior to the Default hearing, Respondent's counsel contacted Appellant's counsel and requested a postponement of the hearing, so that Respondent could prepare and serve an Answer. The matter was re-set for January 23, 2006. Two weeks prior to that date, Respondent sent a

Notice of Motion and Motion for Summary Judgment, along with supporting affidavits. (A. 139) Following the hearing, the District Court granted Appellant's motion for Entry of Default Judgment against Ms. Belton.(A.15 - A. 19). It deferred a decision on the parties' Cross Motions for Summary Judgment pending further discovery.(Id.)

The matter came before the District Court on September 28, 2006, on the parties' Cross Motions for Summary Judgment. The District Court granted Summary Judgment in favor of Respondent, finding as a matter of law and fact that Appellant had abandoned its work. (A. 28 - A. 37). It is that judgment from which Appellant takes this appeal.

INTRODUCTION

This appeal arises out of litigation to determine the priority of Appellant's mechanic's lien, *vis a vis* Respondent's mortgage. Appellant's mechanic's lien relates back to the first date of work, which Appellant alleges to be May 24, 2002. Respondent's mortgage was filed on January 28, 2005. Respondent contends that Appellant abandoned the project, and later resumed work. If that is the case, Appellant's first date of work would not be valid, until after Respondent's mortgage was filed. The parties argued their positions at a Summary Judgment motion, and Appellant appeals from that Judgment.

STATEMENT OF FACTS

In and around May 2002, Defendants Belton/Harris suffered water damage to their home located at 6108 - 73rd Avenue North, Brooklyn Park, MN, legally described as

follows, to-wit:

> Lot 25, Block 1, Forest View, according to the plat thereof on file and of record in the office of the Registrar of Titles in and for Hennepin County, Minnesota
>
> (hereinafter referred to as "the Subject Property").

(A. 20 - A. 22) Defendants retained Appellant to provide restoration services to the structure. On May 24, 2002, Appellant's estimator met with Defendant Latoria Belton at the Subject Property and provided said Defendant with an estimate for Appellant's services and a Work Authorization containing Appellant's pre-lien notice. (A. 38)

Appellant's first date of work on the project occurred on May 24, 2002 and the last date of work was June 15, 2005. (A.20) There was an interruption in the project, due to a breakdown in communication between Appellant and Defendants Belton/Harris. Appellant, after a change in its Project manager, attempted to re-establish communications with Ms. Belton in November of 2004. (A. 45, A. 47, - A. 48) Contrary to the assertion in the District Court's Memorandum, these efforts began *prior* to the filing of Respondent's mortgage. (*See*: A. 36)

Beginning on November 18, 2004, Grant Heino assumed responsibility for the project, and attempted to contact Defendant Belton.(A. 48) On that same date, he reached Ms. Belton, and scheduled a meeting at the Subject Property, to discuss the work remaining on the project. (Id.) Ms. Belton did not appear at that meeting, but Mr. Heino spoke with another woman, apparently Ms. Belton's daughter, who stated Ms. Belton would contact him after

returning from the hospital.(Id.) During a telephone call with Ms. Belton that occurred on February 9, 2005, Mr. Heino set up another meeting with Ms. Belton. That meeting was postponed to February 24, 2005, but at that time the parties met, and agreed that Appellant would continue to work on the project, and complete the job. (A. 74 - A. 76) Appellant then obtained Defendant Belton's consent to complete the work on the project. (A. 75, A. 77, A. 42- 43)

On March 10, 2005, Defendant Belton and Appellant signed a Letter of Transmittal that authorized Appellant to complete the agreed remaining work on the project. (A. 49) The Letter states "As a result of our meeting at your project site on February 24, 2005, Superior Constructions Services, Inc., per your request will complete the items discussed to finish your project, i.e. heat registers, cabinets, counter-tops, etc. You have authorised Superior Construction Services, Inc. to perform this work with approval to enter your site." (Id.)

Appellant subsequently completed the work remaining on the project. Ms. Belton signed a Statement of Completion on June 24, 2005, certifying that the work was complete, and referencing specifically the May, 2002 first date of work. The items completed in 2005 consisted of work on heat registers, cabinets and counter tops. (A. 49) All of the work completed by Appellant in 2005 was within the original scope of work on the project and was a continuation of the same project initiated in 2002. (A. 52, A. 49, A. 50) The record contains no evidence Appellant considered any work after February 24, 2005 to be a separate job. To complete the project, Appellant was required to return to the Subject Property on two

separate days and spend 8.25 hours labor time and incur $360.41 in materials costs. (A. 52)

Appellant has confirmed with Defendants' insurance adjuster that Defendants were paid in full for the work performed by Appellant. Despite the insurance payment, Defendants have failed to remit any payment whatsoever toward Appellant's invoice and have admitted that they had spent the insurance proceeds. (A. 52) They have made no complaints pertaining to the quality of the work, or its completeness.

Respondent is involved in this litigation based upon its mortgage filed for record against the Subject Property. The mortgage was filed on January 28, 2005 as document 4071232, (A. 62 - A. 64) Respondent's mortgage was filed after Appellant's first date of work on the Subject Property. (A. 20) Respondent has claimed that its mortgage is superior to Appellant's mechanic's lien, based upon its belief that Appellant had "abandoned" the Belton project, and that the applicable first date of work would include only work after the project resumed. (A. 24)

In the course of discovery, Appellant attempted to take the deposition of Latoria Belton. Appellant served her with a Subpoena and Notice of Taking of Deposition on April 19, 2006 in order to compel her attendance, so that she could be questioned about the contents of her affidavit, and the history of the project on the Subject Property. (A. 120 - 122, A. 123, A. 124 -134). She failed to appear at the deposition, and failed to contact counsel for Appellant or Respondent to offer any reason for missing the Deposition.(A. 124 - 134)

Respondent also served Appellant with Discovery requests. Appellant served its Answers to those requests. In its answers, Appellant identified its President Randall J. Hedden, Grant Heino, its project manager, and Jon Hutton, its job coordinator. The Answers detailed the knowledge of each of these witnesses.(A. 39 - 46)

This matter was heard on the parties' Cross Motions for Summary Judgment on September 28, 2006. At the time of the hearing, Appellant offered two affidavits in support of its motion - and in opposition to Respondent's. These affidavits contained statements from Appellant's employees, each of whom had been identified in its responses to Respondent's discovery requests.(A. 40 - 42) Although Respondent had all of the information, or access to the information through discovery, the court refused to consider these affidavits, based on its belief that they were not timely offered. (A. 30 - 31)

ARGUMENT

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

On review of summary judgment, the court of appeals must determine "whether there are any genuine issues of material fact, and whether the trial court erred in its application of the law." *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). In its review of the District Court's factual conclusions, the Court of Appeals must determine whether the District Court viewed the evidence in the light most favorable to the party against whom

summary judgment was granted, and whether it resolved any doubts of the existence of a material fact in favor of the non-moving party. *Id.*

In a mechanic's lien foreclosure priority case, the question of abandonment is a mixed question of fact and law. *Langford Tool & Drill Co., v. Phenix Composites, LLC.*, 668 N.W.2d 438, 442 (Minn. Ct. App. 2003). When reviewing mixed questions of law and fact, the court of appeals will "correct erroneous applications of law, but accord the trial court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard." *Id.*, *citing: Rehn v. Fischley,* 557 N.W.2d 328, 333 (Minn. 1997).

In this matter, the District Court found that Appellant abandoned the Belton project as a matter of law and fact. (A. 33) The court reached its conclusion based upon an incorrect application of the law relating to abandonment. For example, the court cited *Langford Tool* to support its conclusion that Appellant's intent to abandon could be inferred from its physical actions. (A. 35) *Langford Tool,* however, was an appellate decision based on factual findings after a trial, not an appeal from summary judgment. The facts in this case were only presented to the District Court in a Summary Judgment Motion, at which the Court should not have made credibility determinations, and should have drawn reasonable inferences in favor of Appellant.

In fact, the District court drew no reasonable inferences in favor of Appellant, it adopted Respondent's facts and inferences wholesale, without having the opportunity to see the witnesses, and make credibility after a full scale trial on the merits. Although *Langford*

Tool correctly cites the law, the District Court incorrectly applied it to a Motion for Summary Judgment. Its decision must therefore be reversed.

The District Court also erred in its failure to consider the facts in the light most favorable to Appellant. In this case, a fair reading of the evidence allows the conclusion that Appellant did not abandon the project. The court based its conclusion that Appellant abandoned the project primarily on the length of time during which there was no progress on the project. Given that there is no other evidence that would support a conclusion that Appellant abandoned the project, and much to contradict it, the judgment must be reversed.

II. BECAUSE THE FACTS OF THIS CASE DO NOT ESTABLISH THAT APPELLANT ABANDONED THE BELTON PROJECT, THE DISTRICT COURT MUST BE REVERSED.

Minnesota Stat. §514.01 provides a party contributing improvements to real estate with a lien against the improved parcel. The lien holder must establish that it has provided pre-lien notice, that it has filed a lien statement with the County Recorder or Registrar within 120 days of the last date of work and served a copy of the lien statement upon the owner by certified mail, return receipt requested. *Minn. Stat. §514.01.* An action to foreclose the lien must be commenced within one year of the last date of visible improvement. *Id.* The action is commenced by first filing the complaint with the District Court, followed by service upon the owners, along with the filing of a Notice of *Lis Pendens* against the involved real estate parcel. *Id.*

Once filed, a mechanic's lien relates back to the first date of visible progress on the project. *Minn. Stat. §514.05.* This gives the lien priority over any mortgage or other encumbrance filed after the first date of work. *See: Carlson - Grefe Const. Inc. v. Rosemount Condo. Partnership, et. al.*, 474 N.W.2d 405, 408 (Minn. Ct. App. 1991). If, however, the project has been abandoned, the lien will relate back only to the portion of the project completed after the project was re-initiated, not the original date of the start of construction. *Langford Tool & Drill, Co., v. Phenix Biocomposites, LLC,* 668 N.W.2d 438, 443 (Minn. Ct. App. 2003).

A. The District Applied an Incorrect Legal Standard to Determine that Appellant Abandoned the Project.

Nationwide, there are two general rules governing the determination of whether a project has been abandoned. The first is the "Kansas rule," which requires only the cessation of work for the court to conclude that the project has been abandoned. *See: Chicago Lumber Co. v. Merrimack River Sav. Bank,* 52 Kan. 410, 34 P. 1045, 1045-46 (1893). The second is the "Oregon rule," which requires the contractor's subjective intent to abandon a project, in addition to the cessation of labor. *See: Tri-Center Bldg. Ctr., Inc., v. Wagner*, 274 Or.581, 548 P.2d 961, 64 (1976).

The Minnesota Supreme Court has not clearly adopted one stance or the other, holding instead that because the intent to abandon can be inferred from physical actions, "under both rules, the actual termination of work can trigger an abandonment." *Langford Tool & Drill,*

686 N.W.2d at 444. The *Langford* court held that the contractor's cessation of work constituted abandonment, despite its argument that it lacked the intent to abandon the project. *Id.* at 444. The decision in *Langford,* however, was made following a trial on the issue. *Id. at 442.*[1] At the trial, the court had the chance to review *all* of the evidence pertinent to the claim, including what occurred during the period in which no work was performed.

The District Court in this matter, heard the parties' arguments over Summary Judgment motions, with no such opportunity to see and evaluate all of the evidence. The District Court, in fact, *ignored* any evidence contradicting its theory, and ignored all of the evidence provided with Appellant's materials for the originally scheduled motion.

B. To Make a Finding that the Project was Abandoned, the court must determine that Appellant Intended to Abandon it.

In other contexts, considered by the court, a "finding of abandonment depends upon the intentions of the parties and can be made only after a careful consideration of all the facts and circumstances involved. *Rognrud v. Zubert,* 282 Minn. 430, 165 N.W.2d 244, 250 (Minn. 1969). A construction project can be held to be one continuous project, even if it is the subject of several contracts which themselves divide the project into separate improvements. *Witcher Constr. Co. v. Estes II Ltd. Partnership,* 465 N.W.2d 404, 406.(Minn. Ct. App. 1995) "Contracting separately for different stages of a construction project does not, by itself, divide the project into separate improvements." *Id.*

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[1]The parties in *Langford* argued Summary Judgment Motions, but over a separate issue, unrelated to the abandonment issue. *Langford Tool & Drill, 668 N.W.2d at 442.*

In the present matter, the District Court determined that Appellant abandoned the project based primarily upon the length of time during which the project did not proceed. *See e.g.:* (A. 34 - 35). The District Court's memorandum cites the gap in the project. It points out other factors, including the fact that the job was incomplete after January 2003, and that Respondent had no actual or constructive knowledge of Appellant's claims. Those other factors, however, relate not to the issue of abandonment, but to Respondent's status as a "*bona fide* purchaser." *See: Langford Tool & Drill,* 668 N.W.2d at 444. The District Court's memorandum again states at p. 7, that no work was performed between January 2003 and March 2005. (A. 36)

The District Court also accepted Defendant Belton's testimony, that she received no bill from Appellant, and that she attempted without success to contact Appellant, so she "assumed that Appellant had abandoned the project." In a *non-sequitur*, the District Court then states that "even if the Oregon Rule (requiring the intent to abandon, in addition to the cessation of work), there is no genuine issue of fact that Appellant abandoned the project. (A. 36) The District Court cited no direct evidence of Appellant's intention to abandon the project, and cited only the length of the work interruption as indirect evidence of its intentions.

The District Court approached this case procedurally as a Summary Judgment motion. Accordingly, it must view all the evidence in the light most favorable to the non-moving party; here, the Appellant. It failed to do so, and must be reversed.

C. The District Court's Factual Determinations are Contradicted by the Record.

Although the District Court was required to view the evidence in the light most favorable to Appellant, and draw all reasonable inferences in favor of Appellant, it is clear that it accepted all evidence from Respondent, and drew all inferences in favor of Respondent.

The Court noted the lack of a final invoice on the project. It is a reasonable inference that Appellant sent no final invoice to Ms. Belton, because the project was still in progress, and not completed. It is also clear that although Ms. Belton claims that she assumed the project was abandoned, she took no steps to hire another contractor, or otherwise complete the project. A reasonable inference from these facts is that Ms. Belton did not, in fact consider the project abandoned. Indeed, she sent no notice or correspondence to Appellant, and in fact, retained all of the insurance money for the restoration work. Ms. Belton had assigned those funds to Appellant. (A. 38)

It is also clear that the District Court considered the Belton affidavit in a vacuum. Appellant tried to add context to the bare allegations in the affidavit, by cross examining her in a properly noted deposition, to which she was subpoenaed. Ms. Belton failed to appear at the deposition, preventing Defendant from eliciting any further information or admissions.(A. 120 - 122, A. 123, A. 124 -134) Had the District Court considered these facts, and the reasonable inferences, it would have determined that a fact question existed, and allowed the matter to proceed to trial.

In addition to the problems with the Belton affidavit, and the reasonable inferences to be drawn therefrom, the District Court also ignored other evidence, which was in the trial court record. The evidence apparently not considered by includes the Affidavit of Randall J. Hedden, and the Letter of Transmittal signed by Latoria Belton. In addition, Ms. Belton signed a statement of completion, indicating that the work on the project was satisfactory. These were submitted to the court in advance of the December, 2005 hearing. Appellant has also prepared its Answers to Interrogatories. Each of these documents, submitted in connection with the Summary Judgment motion contain information that contradicts Ms. Belton's affidavit testimony, and the factual determinations made by the District Court.

In his affidavit, Randall Hedden describes the meeting with Ms. Belton in which the parties agreed that Appellant would continue and complete the project. The Letter of Transmittal, signed by Ms. Belton on March 10, 2005, specifically refers to the continuation of the project, and clearly relates to a single project. Nothing in the Letter of Transmittal, or any other document, contains any reference to beginning a "new" project, or any indication that either party considered the project abandoned, at any point.

It is clear that the District Court failed to consider the entire record in this matter. It focused solely on the length of time during which no work was performed, and Ms. Belton's conclusory affidavit, submitted without the benefit of cross examination. The District Court abused its discretion by ignoring a substantial portion of the record which contradicts its factual conclusion. It incorrectly applied the *Langford Tool & Drill* case, which upheld a

finding of abandonment *after trial*, not in a Summary Judgment motion, with an incomplete record. Accordingly, the decision of the District Court should be reversed.

Additional Evidence Not Considered by the Court

Below, Appellant will argue that the District Court should have considered additional evidence offered by Appellant at the Motion Hearing. Appellant believes the evidence discussed above is sufficient to warrant reversal of the Order for Summary Judgment. Should the Court of Appeals agree that the District Court should have considered the additional evidence, this section will discuss how that evidence applies to the case, and requires reversal of the District Court decision.

The Affidavit of Grant Heino contains a detailed recitation of the facts and circumstances regarding the work on the Subject Property. Mr. Heino's Affidavit states that far from abandoning the project, Appellant took steps, even prior to the filing of Respondent's mortgage, to complete the project. Mr. Heino relates concerns by Appellant's President about completing the project. Mr. Heino was tasked to review the job, and ensure its completion. He became involved in the project in November, 2004, and contacted Ms. Belton. In the affidavit, Mr. Heino also refers to his notes, which had been provided to Respondent's counsel in the course of discovery. (A. 140 - 144).

The Affidavit of Jon Hutton further contradicts the facts relied upon by the District Court. Working under the supervision of Mr. Heino, Mr. Hutton took control of the Belton project, and eventually met with Ms. Belton, and determined the scope of the work that

remained. The only delay from that point forward was due to difficulty in obtaining fabricated kitchen cabinetry. Upon completion of the project, in June of 2005, Ms. Belton signed a statement of completion. (A. 145 - 148)

Both of the Affidavits also take issue with statements made in Ms. Belton's affidavit. Of note, both men state that Ms. Belton never mentioned any problem with unreturned phone calls, and never stated that she considered Appellant to have abandoned the project. Of course, it is also clear that Ms. Belton never hired a replacement contractor, or otherwise made any attempt to complete the project. (A. 140 - 148)

It is clear based upon the contents of these affidavits that there are at the very least fact questions for trial. Both men specifically dispute any notion that Appellant "abandoned" the project. Indeed, following the change in personnel assigned to the project, Mr. Heino contacted Ms. Belton immediately. This is clearly contrary to the District Court's comment suggesting that Appellant only initiated contact after Respondent had filed its mortgage.[2] The Affidavit from Ms. Belton, prepared by Respondent's attorney, is contradicted by Messrs. Heino and Hutton. It makes little sense to believe that she considered the project abandoned by Appellant, when she made no attempt to find any other contractor. There are a host of facts in the record that contradict Ms. Belton, and support Appellant's position. Appellant should be allowed a trial on this matter.

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[2]In addition to its clear factual error, the District Court points to no evidence suggesting that Appellant knew that Respondent had filed a mortgage. Because the District Court relied on this factor, this is sufficient in itself for a reversal.

III. THE DISTRICT COURT ERRED BY FAILING TO CONSIDER ADDITIONAL EVIDENCE OFFERED BY APPELLANT.

Whether a court should suppress [expert] testimony for an attorney's failure to make a timely disclosure turns on whether that failure is inexcusable and the degree to which the opposing party is prejudiced by the late disclosure. *Dennie v. Metrop. Med. Ctr.*, 387 N.W.2d 401, 405 (Minn. 1986). Before drastic sanctions are imposed, it should appear that the violation of the rule has, or will result in prejudice to the party asserting a violation. *Gebhard v. Niedswiecki*, 265 Minn. 471, 122 N.W.2d 110, 115 (1963). When the late disclosure does not appear to have impeded the trial, or unfairly prejudiced the complaining party, the trial court's decision to allow the evidence is justified. *McCarthy Well Co., v. St. Peter Creamery, Inc.*, 410 N.W.2d 312, 317 (Minn. 1987). As the *Gebhard* court noted:

> [t]he object of sanctions should be to prevent the party who fails to comply with the rule from profiting by his own violation. In cases where there is an honest mistake and the harm can be undone, it may frequently occur that a continuance, or some other remedy would be adequate, but where the violation is willful and the party guilty of the violation seeks to take advantage of it at a time when the harm cannot be undone, the suppression of the evidence may very well be the proper and only remedy.

Gebhard, 122 N.W.2d at 115

Thorson v. Zollinger Dental, P.A, 728 N.W.2d 261 (Minn. Ct. App. 2007) serves as a good example of a case in which the District Court rightfully dismissed one (of several) claims made by a party as a sanction for failure to comply with the Rules of Civil Procedure. In *Thorson*, the Defendant included as an affirmative defense the claim that service of

process was improper. *Thorson,* 728 N.W.2d at 262. Despite discovery requests, and reasonable follow up from the Plaintiff's attorney, Defendant failed to respond to Plaintiff's requests to explain why such service was insufficient. *Id.* It was not until the Statute of Limitations had expired that Defendant responded, stating that the person on whom the Summons and Complaint were served was not an authorized agent. *Id.* At 263. Because this information was not provided until *after* the Statute of Limitations expired, the District Court struck the affirmative defense of insufficient service of process. This decision was affirmed by the Court of Appeals. *Thorson,* 728 N.W.2d at 267.

This case lacks the prejudice experienced by the Plaintiff in *Thorson*. As noted above, none of the material in the affidavits submitted at the hearing contained significant information of which Respondent was unaware. Further, whereas the prejudice is *Thorson* was extreme - the case would otherwise be dismissed as a matter of law based upon the Statute of Limitations - that is not so in this case. Plenty of time remained before discovery would conclude. Respondent could have been given additional time to review the proffered information, and prepare its response accordingly.

In this matter, the District Court refused to accept two affidavits offered at the hearing. As an initial matter, it should be noted that this matter was originally set for a combined motion for Entry of Default Judgment and Summary Judgment, noticed by Appellant. Only two weeks prior to the re-set hearing, Respondent sent a Notice of Motion and Motion for its own Summary Judgment motion, in violation of *Minn. R. Gen. Prac. 115*.03, which

requires 28 days notice of a dispositive motion. The matter was postponed after that hearing, so the parties could conduct discovery, including the deposition of Ms. Belton. The matter was re-set for September 28, 2006, but no Notice of Motion was provided.

Respondent, however, experienced no prejudice as a result of the late filing. First, when the affidavits were offered, Appellant's counsel agreed that Respondent could have additional time to review, and respond to the evidence contained in those affidavits. Second, it is important to note that this case was still in the midst of discovery, and discovery was not to be cut off for one month after the date of the September 28, 2006 hearing.(A. 136) Finally, the affidavits were from two individuals, both of whom were identified in Appellant's written discovery responses to Respondent. Respondent could have noted and taken the deposition of both of those individuals, and had a full opportunity to question them.

Further, the notes attached to Mr. Heino's Affidavit were provided to Respondent in discovery, and used in the deposition of Appellant's President, Randall Hedden. Any facts that were first presented to the court and Respondent could have easily been identified prior to the hearing. Everything in the affidavits was referred to in Appellant's discovery, and there was no unfair surprise or advantage that could not be remedied by less severe sanctions. Despite this, the court imposed the overly harsh sanction of excluding both affidavits. When coupled with the lack of a Notice of Motion, as required under *Minn. R. Gen. Prac 115.03*, it was an abuse of discretion to refuse to consider this evidence.

CONCLUSION

The District Court in a Summary Judgment motion is required to adopt the correct legal standard, and to view all the facts in the light most favorable to the non-moving party. It is required to draw all reasonable inferences from those facts in favor of the non-moving party. In this matter, it is apparent that the District Court ignored substantial portions of the record, and viewed the evidence it considered in the light most favorable to Respondent. Further, it failed to draw reasonable inferences which would lead to the conclusion that Appellant did not, in fact, abandon the Belton project. Finally, the District Court abused its discretion by refusing to consider the affidavits offered at the hearing, when less severe sanctions were available. For these reasons, Appellant respectfully requests that the Order of the District Court be reversed.

Respectfully submitted,

May 29, 2007

SKELLY & CAPISTRANT, P.A.

By_____

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