

NO. A07-2117

State of Minnesota
In Court of Appeals

Metro Gold, Inc.,

Plaintiff/ Appellant,

vs.

Garrett Coin, and
the Estate of Rex Peterson,

Defendants/ Respondents.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
LEGAL ISSUES 1

**DID THE TRIAL COURT ERR IN ITS APPLICATION OF THE LAW
WHEN IT DENIED PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND FAILED TO AWARD PENALTIES, INTEREST OR
ATTORNEY FEES TO PLAINTIFF UNDER MINN. STAT. § 604.113?.**

.1
ARE APPELLANT'S ATTORNEYS FEES REASONABLE?1

REPLY STATEMENT AS TO THE CASE AND THE FACTS 1
ARGUMENTS OF APPELLANT 2
CONCLUSION 4

TABLE OF AUTHORITIES

MINNESOTA CASE LAW

Carolina Holdings Midwest, LLC. v. Capouls, 658 N.W.2d 236, 238 (Minn. App. 2003) . . . 3
Eischen Cabinet Company v. Hildenbrandt, 683 N.W.2d 813 (Minn. 2004) 3
Har-Ned Lumber Co. v. Amagineers, 436 N.W.2d 811 (Minn. App. 1989) 3

MINNESOTA STATUTES

Minnesota Statute § 604.113 1, 2
Minnesota Statute § 609.535 2

LEGAL ISSUES

I.

ISSUE #1: DID THE TRIAL COURT ERR IN ITS APPLICATION OF THE LAW WHEN IT DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND FAILED TO AWARD PENALTIES, INTEREST OR ATTORNEY FEES TO PLAINTIFF UNDER MINN. STAT. § 604.113?

ARGUMENT: YES, THE TRIAL COURT DID ERR, AND ITS DECISION SHOULD BE REVERSED ON APPEAL.

ISSUE #2: ARE APPELLANT'S ATTORNEYS FEES REASONABLE?

ARGUMENT: YES.

REPLY STATEMENT AS TO THE CASE AND FACTS

To restate, Appellant, Metro Gold, Inc., sold Respondent, Rex Peterson ("Respondent") who conducted business in the name of Garrett Coin, two boxes of gold, hereinafter the "Gold," for Two Hundred Thirty-Two Thousand One Hundred Ninety-Five and 92/100 Dollars (\$232,195.92). Appellant delivered the Gold to Respondent on March 28, 2006. Respondent signed a receipt acknowledging delivery of the Gold and gave Appellant a check for Two Hundred Thirty-Two Thousand One Hundred Ninety-Five and 50/100 Dollars (\$232,195.50). Respondent asked Appellant to not cash the check until Friday, March 31, 2006. Appellant had done business with Respondent in the past and, therefore, agreed to hold the check for three (3) days, until March 31, 2006.

March 31, 2006, the Respondent's check was deposited into Appellant's bank account. On or about April 3, 2006, the check was returned to Appellant for non-sufficient funds (NSF) in Respondent's account. Appellant's bank processed the check again on April 5, 2006, and it was returned a second time for NSF. Between April 5 and April 10, 2006, Appellant's representatives made several attempts to communicate with Respondent and collect the amount due without success. During that period of time, Appellant became aware that Respondent knew the bank account on which the check issued to Appellant was drawn did not, and would not, have sufficient funds to cover the Appellant's check.

On April 11, 2006, Appellant's attorney sent Respondent a letter via certified mail giving Respondent notice of the dishonored check, as required by Minn. Stat. §604.113, subd. 3. On April 18, 2006, Appellant pursued the underlying litigation seeking to recover \$232,195.50, plus interest, fees and penalties. Appellant applied for and was granted a preliminary attachment order from the Court.

When the preliminary attachment order was executed, "there were tens of thousands of coins around the home," including "five gallon buckets of coins, a room of file drawers full of coins, a dining room table with coins stacked up several inches high and random coins on the floor, kitchen counters and coffee tables." (Appellant's Appendix-page 25). The Respondent's nephew was "staying at [the] house with a gun because the security...was uncertain," and Respondent's family was "uncomfortable" with the responsibility for Respondent's assets at that point. (Appendix-page 24). The Respondent passed away on April 18, 2006, and Respondent's sister was subsequently appointed Personal Representative of Respondent's estate. Respondent died less than 30 days after the required Notice was mailed to him by certified mail.

The above was included and some parts were re-stated to emphasize a few key points. Respondent makes a number of unsubstantiated and/or inaccurate allegations and assertions in his Responsive Brief. As they are unlikely to be of substantial consequence, Appellant will not needlessly respond to them.

ARGUMENT

I.

DID THE TRIAL COURT ERR IN ITS APPLICATION OF THE LAW WHEN IT DENIED PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND FAILED TO AWARD PENALTIES, INTEREST OR ATTORNEY FEES TO PLAINTIFF UNDER MINN. STAT. § 604.113?

YES. The main arguments in support of Appellant's position are set forth in Appellant's initial Brief and Appendix.

Minn. Stat. § 604.113, subd. 1(b), provides that the issuer of a worthless check is "liable for...penalties, if the amount of the dishonored check is not paid within 30 days after the payee or holder has mailed notice of dishonor pursuant to section 609.535..." That statutory provision requires notice be sent "by certified mail, return receipt requested, or by regular mail..." Minn. Stat. § 609.535 subd. 3(3). Here, statutory notice was provided, as

required by the statute, sent by certified mail, as proven by the return of the acknowledgment (Appendix-page 16).

The statute does not require actual notice, it only requires that the process be followed. Respondent argues that his death precludes the award of penalties, and that the statute's failure to specifically address death or heirs or personal representations disallows the enforcement of the Statute. On what basis? There is no language in the statutory comments or the statutory history or elsewhere that indicate the legislature refused or did not intend to require penalties when a person writes a bad check and then dies within 30 days. The statute does not provide exceptions; none should be inferred.

To use the mechanic's lien statute's service requirements as a guide, pre-lien notice exists "where the certified mailing is properly directed to the intended recipient, even though not actually received by them. Due process requires only that notice be reasonably calculated to reach "the intended party. Eischen Cabinet Company v. Hildebrandt, 683 N.W.2d 813, 818 (Minn. App. 2004). "Service by certified mail...occurred even though [the] copy was returned to the sender undelivered." Id. In Har-Ned Lumber Co. v. Amagineers, Inc., service by certified mail was ruled complete when mailed, even if the notice was never received by the intended recipient. 436 N.W.2d 811, as cited in Eischen Cabinet, 683 N.W.2d at 818, and in Carolina Holdings Midwest, LLC v. Copouls, 658 N.W.2d 236, 240 (Minn. App. 2003).

As the notice of dishonor was properly sent to the proper address by certified mail, the statute, and the penalties it provides, are fully enforceable here.

ARGUMENT

II

ARE APPELLANT'S ATTORNEYS FEES REASONABLE?

YES. The attorney fees and costs requested by Appellant to be awarded are reasonable, under the subject test for reasonableness of such fees, and should be awarded to Appellant.

According to Respondent, Appellant "perpetrated a fraud upon the Court" (Respondent's Brief-page 10), Appellant engaged in "legal shenanigans" (Id.-page 11), and Appellant filed a

“spurious probate petition” (Id.). These are all very serious allegations. None of these allegations was made or confirmed by the Court. Each of these allegations is denied by Appellant. However, the Respondent’s inclusion of such false allegations does nothing but support Appellant’s request. Perhaps the Appellant’s fees could have been less under different circumstances

In Appellant’s initial Brief, the standard for and the facts in support of the award of fees under the subject statute are addressed. It is unnecessary to repeat that information here. Appellant’s request for prejudgment interest and attorney fees is a reasonable request and should be granted under the statute. While this Court has the authority to rule on this issue, any question on the reasonableness or necessity of the fees incurred can be remanded at your option.

CONCLUSION

Based upon the above, Appellant asserts that this Court must reverse the Trial Court’s determination, and grant Appellant its reasonable attorney fees, costs, disbursements and prejudgment interest.

Respectfully submitted,
HOWSE & THOMPSON, P.A.

Dated: March 10, 2008

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