

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL
DISTRICT

STATE OF NORTH DAKOTA EX REL.
WAYNE STENEHJEM,
ATTORNEY GENERAL,

Plaintiff,

-vs-

STEVE MITCHELL, doing business as
FM MECHANICAL,

Defendant.

Civil No. 09-2021-CV-01954

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER FOR JUDGMENT**

[¶1] This matter came before the Court on the State's Motions for Summary Judgment filed on July 21, 2021. Index ## 7-11. Defendant Steve Mitchell was served with the State's Motion for Summary Judgment by mail on July 21, 2021. Index # 11. More than 33 days have passed since Defendant was served with the State's Motion for Summary Judgment, and Defendant is now in default and has failed to dispute the facts and allegations set forth therein.

[¶2] WHEREFORE, the Court, having reviewed the State's Motion for Summary Judgment together with all supporting documents filed therewith and all other documents filed in this matter, and the Court being duly advised on the premises of this action, makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

June 11, 2021
[¶3] On ~~April 18, 2019~~, the State initiated this action by service of the Summons and Complaint on Defendant. Index # 4.

[¶4] Under N.D.R.Civ.P. 12(a)(1)(A), “a defendant must serve an answer within 21 days after being served with the summons and complaint.” N.D.R.Civ.P. 12(a)(1)(A). Under N.D.R.Civ.P. 8(b)(6), an allegation is admitted if it is not denied where a responsive pleading is required. N.D.R.Civ.P. 8(b)(6).

[¶5] Defendant has failed to answer the Complaint or otherwise appear in this action.

[¶6] Therefore, Defendant Mitchell admits the entirety of the State’s Complaint, including the following specific facts that the Court now finds:

On May 8, 2020, pursuant to N.D.C.C. § 51-15-06, Defendant executed an Assurance of Voluntary Compliance that was accepted by the State on May 18, 2020. Ex. 1, pp. 6 – 8. The Assurance of Voluntary Compliance was entered into between the parties to resolve violations of N.D.C.C. §§ 43-07-02(1) and 51-15-02, the contractor licensing and consumer protection statutes. *Id.* at ¶¶ 3 – 6, 8 – 9. The State alleged that Defendant had engaged in contracting without a licensing and Defendant acknowledged that he had done so. *Id.* at ¶¶ 3, 9.

To resolve his violations of N.D.C.C. §§ 43-07-02 and 51-15-02, Defendant agreed that he was permanently enjoined from contracting without a license and that he could not obtain a contractor’s license before he had fully refunded \$8,528.50 to North Dakota consumer Ali Abdi.¹ *Id.* at ¶¶ 10, 12. Defendant agreed that he was subject to a civil penalty of \$1,000.00 – as well as any other remedies provided by law – for a violation of the Assurance of Voluntary Compliance. *Id.* at ¶ 13. Finally, Defendant agreed that he was responsible for the State’s fees and costs should it be determined that he violated the terms of the Assurance of Voluntary Compliance. *Id.* at ¶ 14.

On May 18, 2020, the Assurance of Voluntary Compliance was filed

¹ A judgment amount awarded to Mr. Abdi against Defendant in Case No. 09-2019-SC-00765.

with and accepted by the Burleigh County District Court in Case No. 08-2020-CV-01682. The Notice of Approval was served on Defendant on June 5, 2020.

As of the date of this Complaint, the \$8,258.50 judgment in favor of Mr. Abdi remains wholly unsatisfied.

On or about September 24, 202⁰~~1~~, Defendant, doing business as FM Mechanical, contracted with consumer Kayleanne Brooks of Fargo, ND to install a furnace for a total contract price of 13,000.00, though Ms. Brooks ultimately paid Defendant \$5,400.00. Ms. Brooks noted to the State that Defendant's workmanship was "poor." Defendant was not competent to contract (or even bid) a job above four thousand dollars because he did not hold a North Dakota contractor's license and was not in compliance with N.D.C.C. § 43-07-02(1).

On or about May 9, 2021, Defendant, doing business as FM Mechanical, contracted with consumer Scott Green of Fargo, ND to install a furnace for a total contract price of \$4,200.00. The \$4,200.00 was the total of \$3,750.00, to install the furnace itself, and \$450.00, to install a "dust cleaner" on the furnace. Mr. Green informed the Attorney General's Consumer Protection & Antitrust Division that he was not satisfied with Defendant's workmanship, or the time Defendant took to complete the work. Though the dust cleaner was ultimately not installed, Defendant was not competent to contract (or even bid) a job above four thousand dollars because he did not hold a North Dakota contractor's license and was not in compliance with N.D.C.C. § 43-07-02(1).

Upon information and belief, Defendant has engaged in the business or acted in the capacity of a contractor where the cost, value, or price of the job exceeds the sum of four thousand dollars without a license and, indeed, at a time when Defendant would be unable to obtain a contractor license under the terms of the Assurance of Voluntary Compliance he entered into with the State.

Compl., Index # 2, ¶¶ 10-13, 17-19.

II. CONCLUSIONS OF LAW

[¶7] The State of North Dakota brought this action on the relation of Wayne Stenehjem, Attorney General of the State of North Dakota, in the public interest

pursuant to N.D.C.C. ch. 51-15. The State of North Dakota ex rel. Wayne Stenehjem, Attorney General, has authority to act in this matter pursuant to N.D.C.C. ch. 51-15.

[¶8] The Court has subject matter jurisdiction pursuant to N.D.C.C. § 51-15-07.

[¶9] The Court has personal jurisdiction over Defendant.

[¶10] Under N.D.C.C. §§ 51-15-07, 51-15-10, and 51-15-11 this Court has jurisdiction to enter appropriate orders.

[¶11] The venue of this action in Cass County is proper under N.D.C.C. § 28-04-05 and § 28-04-03 because all or part of the cause of action arose in Cass County.

[¶12] The standard for summary judgment is well-established:

“Summary judgment is appropriate when ‘there is no dispute as to either the material facts or the inferences to be drawn from the undisputed facts, or whenever only a question of law is involved.’” Rooks v. Robb, 2015 ND 274, ¶ 10, 871 N.W.2d 468 (quoting First Nat'l Bank v. Clark, 332 N.W.2d 264, 267 (N.D. 1983)). Under Rule 56, N.D.R.Civ.P., the movant bears the burden of showing no genuine issue of material fact exists. Rooks, at ¶ 10. The party resisting the motion for summary judgment is given all favorable inferences which may reasonably be drawn from the evidence. Id. A party resisting summary judgment cannot only rely on the pleadings, but must present competent admissible evidence raising an issue of material fact. Swenson v. Raumin, 1998 ND 150, ¶ 9, 583 N.W.2d 102. A non-moving party cannot rely on speculation. Beckler v. Bismarck Pub. Sch. Dist., 2006 ND 58, ¶ 7, 711 N.W.2d 172.

City of Glen Ullin v. Schirado, 2021 ND 72, ¶ 10.

[¶13] When a reasonable person can draw but one conclusion from the evidence, a question of fact becomes a matter of law for the court to decide. Stockman Bank of Montana v. AGSCO, Inc., 2007 ND 26, ¶ 9, 728 N.W.2d 142, 147; also,

Grinnell Mut. Reinsurance Co. v. Ctr. Mut. Ins. Co., 2003 ND 50, ¶ 9, 658 N.W.2d 363, 369. “Although actions involving state of mind, such as fraud, are not usually suited for disposition by summary judgment, if a ... [party] fails to support his opposition to a summary judgment motion with sufficient facts to show that there is a genuine issue for trial, then, even in these cases, summary judgment is appropriate.” Dahl v. Messmer, 2006 ND 166, ¶ 8, 719 N.W.2d 341, 344 (quoting Kary v. Prudential Ins. Co. of Am., 541 N.W.2d 703, 706 (N.D. 1996)).

[¶14] Consumer fraud must be proved by a preponderance of the evidence. State ex rel. Spaeth v. Eddy Furniture Co., 386 N.W.2d 901, 902-03 (N.D. 1986). In civil actions, “preponderance of the evidence” is the “greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability.” Black’s Law Dictionary 1182 (6th ed. 1990); also, Rooks v. N. Dakota Workers' Comp. Bureau, 506 N.W.2d 78, 80 (N.D. 1993).

[¶15] Under N.D.R.Ct. 3.2(c), because Defendant failed to submit a response to the State’s motion for summary judgment, the Court may deem his failure an admission that the State’s motion is meritorious. N.D.R.Ct. 3.2(c).

[¶16] There is no material issue of fact preventing an entry of summary judgment as a matter of law because the material facts of the Complaint are undisputed, and Defendant failed to present competent admissible evidence to raise a genuine issue of material fact. Schirado, 2021 ND at ¶ 10.

[¶17] Defendant is or was engaged in the advertisement, solicitation, and sale of “merchandise,” as that term is defined in N.D.C.C. § 51-15-01, in the State of

North Dakota, including services as a “contractor” within the meaning of N.D.C.C. § 43-07-01(1).

[¶18] Defendant Mitchell violated N.D.C.C. § 43-07-02(1). N.D.C.C. § 43-07-02(1) provides:

43-07-02. License Required – Construction Fraud – Penalty.

1. A person may not engage in the business nor act in the capacity of a contractor within this state when the cost, value, or price per job exceeds the sum of four thousand dollars nor may that person maintain any claim, action, suit, or proceeding in any court of this state related to the person’s business or capacity as a contractor without first having a license as provided in this chapter.

N.D.C.C. § 43-07-02(1).

[¶19] About N.D.C.C. § 43-07-02(1), the Supreme Court has said:

The purpose of the statute is to protect consumers from fraudulent practices and to protect the public from unqualified or uninsured contractors. The licensing requirements allow the registrar to investigate and determine the license applicant’s fitness to act in the capacity of a contractor, including requesting information about the applicant’s criminal history. N.D.C.C. § 43-07-04(1). The licensing requirements also protect the public by ensuring a contractor has liability insurance and has secured workforce safety and insurance coverage.

Snider v. Dickinson Elks Bldg., LLC, 2018 ND 55, ¶ 13, 907 N.W.2d 397, 401.

[¶20] By failing to answer the Complaint and oppose the State’s motion for summary judgment, Defendant admits that, while intending consumer reliance, he solicited or contracted with North Dakota consumers above the statutory amount of four thousand dollars while unlicensed, including consumers Kayleanne Brooks and Scott Green. Supra, ¶ 6. Defendant admits that he contracted with additional consumers above the statutory amount while unlicensed. Id.

[¶21] Defendant Mitchell violated N.D.C.C. § 51-15-02. N.D.C.C. § 51-15-02

provides:

51-15-02. Unlawful practices – Fraud – Misrepresentation. The act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice.

N.D.C.C. § 51-15-02. Under N.D.C.C. § 43-07-14(3), violation of N.D.C.C. §§ 43-07-02 constitutes a violation of N.D.C.C. ch. 51-15.

[¶22] “It is well established that the Unlawful Sales Practices Act is remedial in nature and must be liberally construed to effectuate its purpose.” Staal v. Scherping Enterprises, Inc., 466 F. Supp. 3d 1030, 1034 (D.N.D. 2020) (citing State ex rel. Spaeth v. Eddy Furniture Co., 386 N.W.2d 901, 903 (N.D. 1986)). The purpose of the contracting licensing statute “is to protect consumers from fraudulent practices and to protect the public from unqualified or uninsured contractors.” Snider, 2018 ND at ¶ 13, 907 N.W.2d at 401.

[¶23] By failing to answer the Complaint and oppose the State’s motion for summary judgment: Defendant Mitchell admits that he violated N.D.C.C. § 51-15-02 by engaging in the business or acting in the capacity of a contractor without a license and by making false or misleading representations to customers, including implied or express false representations regarding his ability to engage in the business or act in the capacity of a contractor. Supra, ¶ 6.

[¶24] Under N.D.C.C. § 51-15-07, the Attorney General may seek and obtain “an injunction prohibiting [a] person from continuing [an] unlawful practice or

engaging in the [an] unlawful practice or doing any act in furtherance of the unlawful practice,” and the Court “may make an order or judgment as may be necessary to prevent the use or employment by a person of any unlawful practices ...” N.D.C.C. § 51-15-07. Pursuant to N.D.C.C. § 51-15-07, injunctive relief is necessary and appropriate in this case to prohibit Defendant from engaging in continued or future violations of N.D.C.C. § 51-15-02, and injunctive relief is justifiable under the circumstances of this case, particularly where Defendant Mitchell violated the terms of an Assurance of Voluntary Compliance approved by the court in Case No. 08-2020-CV-01682.

[¶25] Under N.D.C.C. § 51-15-07, the Court “may make an order or judgment ... to restore to any person in interest any money, or property that may have been acquired by means of any practice” unlawful under N.D.C.C. ch. 51-15. N.D.C.C. § 51-15-07. Defendant is liable to pay such restitution necessary to restore any loss suffered by persons because of his deceptive acts or practices, pursuant to N.D.C.C. § 51-15-07.

[¶26] Under N.D.C.C. § 51-15-10, the Court “shall award to the attorney general reasonable attorney’s fees, investigation fees, costs, and expenses of any investigation and action brought” under N.D.C.C. ch. 51-15. N.D.C.C. § 51-15-10. Defendant is liable to pay the Attorney General for the fees and costs incurred in investigating and prosecuting this matter, pursuant to N.D.C.C. § 51-15-10.

[¶27] Under N.D.C.C. § 51-15-11, the Court “may assess for the benefit of the state a civil penalty of not more than five thousand dollars for each violation” of

N.D.C.C. ch. 51-15. Civil penalties are appropriate in this case based on Defendant's conduct. N.D.C.C. § 51-15-11.

ORDER FOR JUDGMENT

[¶28] THEREFORE, IT IS HEREBY ORDERED pursuant to N.D.C.C. § 51-15-02 *et seq.*:

A. Defendant Steve Mitchell is adjudged in violation of the contractor law, N.D.C.C. § 43-07-02, for engaging in the business or acting in the capacity of a contractor in North Dakota without first having a license when the cost, value, or price per job exceeded the sum of four thousand dollars.

B. Defendant Steve Mitchell is adjudged in violation of the contractor law, N.D.C.C. § 51-15-02, for engaging in the business or acting in the capacity of a contractor in North Dakota in violation of the Assurance of Voluntary Compliance approved by the court in Case No. 08-2020-CV-01682.

C. Defendant Steve Mitchell is adjudged in violation of the consumer fraud law, N.D.C.C. § 51-15-02, for engaging in deceptive acts or practices, fraud, false pretenses, false promises, or misrepresentations, with the intent that others rely thereon in connection with the sale or advertisement of merchandise in the State of North Dakota.

D. Defendant Steve Mitchell, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, is permanently enjoined and restrained from directly or indirectly making false statements, false promises, or misrepresentations and the act,

use and employment of any deceptive acts or practices in connection with the advertisement or sale of merchandise, as defined by N.D.C.C. § 51-15-01(3), within the State of North Dakota.

E. Defendant Steve Mitchell, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, is permanently enjoined and restrained from engaging in deceptive acts or practices and from directly or indirectly making false statements, false promises, or misrepresentations in connection with the advertisement or sale of contracting and home improvements, repairs, or services, or any other merchandise, as defined by N.D.C.C. § 51-15-01(3).

F. Defendant Steve Mitchell, his agents, employees, representatives, assigns and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, is enjoined and restrained from the advertising or sale of contracting and home improvements, repairs, or services in accordance with Paragraph 28(G), *infra*.

G. Pursuant to N.D.C.C. § 51-15-07, Defendant Steve Mitchell, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, is permanently enjoined and restrained from engaging in sales of contracting and home improvements, repairs, or services, including construction work. Notwithstanding the permanent injunction, Defendant may engage in future contracting services if Defendant applies to the Attorney General and the Court to lift

the permanent injunction and the Court finds Defendant has fully complied with the following terms and conditions and otherwise is rehabilitated:

1. Five or more years have expired since the entry of judgment herein;
2. Defendant has paid in full restitution to all consumers that have paid Defendant advance payments for services not performed or merchandise not delivered in the State of North Dakota;
3. Defendant has paid all amounts owed to the State pursuant to entry of judgment herein;

If the Court thereafter finds, pursuant to an agreement between the Attorney General and Defendant, or after a hearing, that Defendant is sufficiently rehabilitated pursuant to the terms and conditions herein, Defendant, upon order of the Court, may engage in contracting provided he has obtained a Contractor License pursuant to N.D.C.C. ch. 43-07 and has complied with all contractor licensing requirements appropriate and necessary for the work to be undertaken by him.

“Pay in full” or “paid in full” mean that all amounts must be paid, and does not include any settlement, forgiveness, compromise, reduction, or discharge of any of the debts or refund obligations.

H. Plaintiff shall have Judgment against Defendant Steve Mitchell in the amount of \$3,000.00 for civil penalties, pursuant to N.D.C.C. § 51-15-11.

I. Plaintiff shall have Judgment against Defendant Steve Mitchell in the amount of \$982.00 for costs, expenses, and attorney’s fees pursuant to N.D.C.C.

§ 51-15-10, incurred by the Attorney General in the investigation and prosecution of this action.

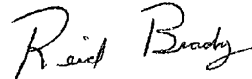
J. Defendant Steve Mitchell, pursuant to N.D.C.C. § 51-15-07, shall pay restitution to all North Dakota consumers, which have suffered any ascertainable loss, and to restore to any person in interest any moneys or property, real or personal, which has been acquired by Defendant by means of any practice declared to be unlawful under N.D.C.C. § 51-15-02.

K. Judgment entered shall be a Judgment for which execution may issue.

L. Interest shall accrue on this Judgment in accordance with the interest rate on judgment as provided by N.D.C.C. § 28-20-34.

Signed: 9/3/2021 1:08:44 PM

BY THE COURT:



District Court Judge

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL
DISTRICT

STATE OF NORTH DAKOTA EX REL.
WAYNE STENEHJEM,
ATTORNEY GENERAL,

Plaintiff,

-vs-

STEVE MITCHELL, doing business as
FM MECHANICAL,

Defendant.

Civil No. 09-2021-CV-01954

JUDGMENT

[¶1] This action came on before the Honorable Reid Brady, Judge of the Cass County District Court, Northeast Central Judicial District, on a Motion for Summary Judgment, filed by Plaintiff, the State of North Dakota, on the relation of Wayne Stenehjem, Attorney General, and served upon Defendant by mail on July 21, 2021. Defendant failed to respond in opposition to the State's Motion for Summary Judgment.

[¶2] The Court, having reviewed its file and records herein, including the Motion for Summary Judgment with supporting documents, and being fully advised in the premises, having made and entered its Findings of Fact, Conclusions of Law and Order for Summary Judgment; IT IS NOW ORDERED, ADJUDGED AND DECREED:

A. Defendant Steve Mitchell is adjudged in violation of the contractor law, N.D.C.C. § 43-07-02, for engaging in the business or acting in the capacity of a

contractor in North Dakota without first having a license when the cost, value, or price per job exceeded the sum of four thousand dollars.

B. Defendant Steve Mitchell is adjudged in violation of the contractor law, N.D.C.C. § 51-15-02, for engaging in the business or acting in the capacity of a contractor in North Dakota in violation of the Assurance of Voluntary Compliance approved by the court in Case No. 08-2020-CV-01682.

C. Defendant Steve Mitchell is adjudged in violation of the consumer fraud law, N.D.C.C. § 51-15-02, for engaging in deceptive acts or practices, fraud, false pretenses, false promises, or misrepresentations, with the intent that others rely thereon in connection with the sale or advertisement of merchandise in the State of North Dakota.

D. Defendant Steve Mitchell, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, is permanently enjoined and restrained from directly or indirectly making false statements, false promises, or misrepresentations and the act, use and employment of any deceptive acts or practices in connection with the advertisement or sale of merchandise, as defined by N.D.C.C. § 51-15-01(3), within the State of North Dakota.

E. Defendant Steve Mitchell, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, is permanently enjoined and restrained from engaging in deceptive acts or practices and from directly or indirectly making false statements,

false promises, or misrepresentations in connection with the advertisement or sale of contracting and home improvements, repairs, or services, or any other merchandise, as defined by N.D.C.C. § 51-15-01(3).

F. Defendant Steve Mitchell, his agents, employees, representatives, assigns and all other persons in active concert or participation with him, pursuant to N.D.C.C. § 51-15-07, is enjoined and restrained from the advertising or sale of contracting and home improvements, repairs, or services in accordance with Paragraph 28(G), *infra*.

G. Pursuant to N.D.C.C. § 51-15-07, Defendant Steve Mitchell, his agents, employees, representatives, assigns, and all other persons in active concert or participation with him, is permanently enjoined and restrained from engaging in sales of contracting and home improvements, repairs, or services, including construction work. Notwithstanding the permanent injunction, Defendant may engage in future contracting services if Defendant applies to the Attorney General and the Court to lift the permanent injunction and the Court finds Defendant has fully complied with the following terms and conditions and otherwise is rehabilitated:

1. Five or more years have expired since the entry of judgment herein;
2. Defendant has paid in full restitution to all consumers that have paid Defendant advance payments for services not performed or merchandise not delivered in the State of North Dakota;
3. Defendant has paid all amounts owed to the State pursuant to entry of judgment herein;

If the Court thereafter finds, pursuant to an agreement between the Attorney General and Defendant, or after a hearing, that Defendant is sufficiently rehabilitated pursuant to the terms and conditions herein, Defendant, upon order of the Court, may engage in contracting provided he has obtained a Contractor License pursuant to N.D.C.C. ch. 43-07 and has complied with all contractor licensing requirements appropriate and necessary for the work to be undertaken by him.

“Pay in full” or “paid in full” mean that all amounts must be paid, and does not include any settlement, forgiveness, compromise, reduction, or discharge of any of the debts or refund obligations.

H. Plaintiff shall have Judgment against Defendant Steve Mitchell in the amount of \$3,000.00 for civil penalties, pursuant to N.D.C.C. § 51-15-11.

I. Plaintiff shall have Judgment against Defendant Steve Mitchell in the amount of \$982.00 for costs, expenses, and attorney’s fees pursuant to N.D.C.C. § 51-15-10, incurred by the Attorney General in the investigation and prosecution of this action.

J. Defendant Steve Mitchell, pursuant to N.D.C.C. § 51-15-07, shall pay restitution to all North Dakota consumers, which have suffered any ascertainable loss, and to restore to any person in interest any moneys or property, real or personal, which has been acquired by Defendant by means of any practice declared to be unlawful under N.D.C.C. § 51-15-02.

K. Judgment entered shall be a Judgment for which execution may issue.

L. Interest shall accrue on this Judgment in accordance with the interest rate on judgment as provided by N.D.C.C. § 28-20-34.

CLERK OF DISTRICT COURT

Signed: 9/3/2021 2:40:43 PM

Paula Brusman, Deputy
