

STATE OF NORTH DAKOTA

IN DISTRICT COURT

WARD COUNTY

NORTHWEST JUDICIAL DISTRICT

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

Civil No. _____

Plaintiff,

COMPLAINT

-vs-

FREDERICKS CONTRACTING, LLC; and
MICHAEL FREDERICK, Individually;

Defendants.

CPAT No. 120159.002

1. Plaintiff State of North Dakota on the relation of Wayne Stenehjem Attorney General, by and through Assistant Attorney General Michael C. Thompson, Consumer Protection and Antitrust Division, brings this cause against Defendants Fredericks Contracting, LLC and Michael Frederick, individually, and upon information and belief alleges as follows:

I. INTRODUCTION

2. The State of North Dakota brings this action on the relation of Wayne Stenehjem, the Attorney General of the state of North Dakota, in the public interest pursuant to North Dakota Century Code (N.D.C.C.) ch. 51-15. This action seeks, under N.D.C.C. § 51-15-07, to restrain and enjoin violations of N.D.C.C. § 51-15-02 and to recover property loss suffered by consumers as a result of such violations. This action also seeks, under N.D.C.C. § 51-15-10, to recover costs, expenses, and attorney's fees incurred by the Attorney General in the investigation and prosecution of this action and, under N.D.C.C. § 51-15-11, to obtain civil penalties of not more than \$5,000 for each violation of N.D.C.C. § 51-15-02.

II. JURISDICTION AND VENUE

3. Under N.D.C.C. §§ 51-15-07, 51-15-10 and 51-15-11 the district court has jurisdiction to enter appropriate orders.

4. The venue of this action in Ward County is proper under N.D.C.C. §§ 28-04-03, 28-04-04, and 28-04-05 because the Defendant Michael Frederick resides in Ward County, Defendants Michael Frederick and Fredericks Contracting, LLC have transacted business in Ward County, and all or part of the cause of action arose in Ward County.

5. This court has personal jurisdiction over the Defendants. Defendant Michael Frederick is a North Dakota resident, residing in Minot, North Dakota. Defendant Fredericks Contracting, LLC is a North Dakota limited liability company that is registered with the Secretary of State as having its principal place of business in Minot, North Dakota. Defendants have conducted business in Ward County. Each of the Defendants, either acting directly or by an agent, did one or more of the following: transacted business in North Dakota; contracted to supply, or supplied, services, goods or other things in North Dakota; committed a tort within or outside North Dakota causing injury to another person or property within North Dakota; committed a tort within North Dakota causing an injury to another person or property within or outside North Dakota; engaged in any other activity within North Dakota; or violated North Dakota law.

III. DEFENDANTS

6. Defendant Fredericks Contracting, LLC is a North Dakota limited liability company and has been doing business in the State of North Dakota since May 3, 2010. Fredericks Contracting, LLC principal place of business is at 5110 Highway 2 E Lot C2, Minot, ND 58701. Fredericks Contracting, LLC has used the mailing address of PO Box 2235, Minot, ND 58702.

7. Defendant Michael Frederick ("Frederick") is an individual who is a resident of the State of North Dakota. Frederick is the sole owner, manager, principal, and officer of Fredericks Contracting, LLC. Frederick is making all decisions on behalf of Fredericks Contracting, LLC and is responsible for the daily operation of the business. Frederick is being named in this action in his personal capacity, based on his personal acts and practices and participation in acts and practices with others, which acts and practices are alleged to be in violation of N.D.C.C. § 51-15-02. Frederick is also named in this action in his representative capacity as an owner and officer of Fredericks Contracting, LLC. Individually or in concert with others, he has formulated, directed, controlled, or participated in the acts and practices set forth herein. Frederick's residential address is at 5110 Highway 2 E Lot C2, Minot, ND 58701. However, Frederick is currently residing at the Ward County Jail, 315 3rd St. SE, PO Box 907, Minot, ND 58702.

IV. NATURE OF DEFENDANTS' BUSINESS

8. The Defendants, at all relevant times hereto, were engaged in the business of soliciting and selling merchandise, as that term is defined in N.D.C.C. 51-15-01, in the State of North Dakota, namely soliciting and selling contracting services, including, but not limited to, contracting services to repair flood damaged homes. Defendants solicited and accepted payments from North Dakota consumers for materials and services when Defendants did not have a contractor's license as required by N.D.C.C. ch. 43-07.

9. Any acts of Defendants, as alleged herein, include the acts of one or more of its owners, employees, agents, representatives or others acting on its behalf.

V. DECEPTIVE ACTS OR PRACTICES ALLEGED

10. In connection with the sale or advertisement of contracting services, or

other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendants through written and oral representations made by Defendants, their agents, employees, or representatives, have made untrue, deceptive, and misleading representations, or have engaged in deceptive acts or practices, with the intent that others rely thereon, in violation of N.D.C.C. § 51-15-02.

11. Defendants have operated as a contractor in the state of North Dakota and have accepted payment for contracting services in excess of \$2,000 after Fredericks Contracting, LLC's contractor license had expired.

12. Defendants, in violation of N.D.C.C. § 51-15-02, expressly, impliedly, or by omission of a material fact, falsely represented to consumers that Defendants were properly licensed, as required by N.D.C.C. ch. 43-07, and were otherwise in compliance with or authorized by North Dakota law to provide services in North Dakota.

13. In connection with the sale or advertisement of contracting services, or other merchandise as defined by N.D.C.C. § 51-15-01(3), Defendants, have made promises and representations to consumers that are false and misleading, including promises regarding the purchase of materials and when the consumers' projects would be completed.

14. Plaintiff has received information alleging that Defendants have solicited and accepted advance payments to provide contracting services, including roof and patio repairs, in North Dakota, and have failed to provide all of the services and/or merchandise agreed upon.

15. The untrue, deceptive and misleading representations, and deceptive acts or practices by the Defendants include, but are not limited to, the following acts and practices listed in paragraphs 16 through 20 of this Complaint.

16. In April 2012, Defendants entered into a contract with Donna Depute (hereinafter "Depute"), 1325 27th St., SE #515, Minot, ND 58701 to build a new entry and patio for her flood damaged home. The contract was in the amount of \$6,100. Defendants solicited and accepted an advance payment in the amount \$5,100. Defendants have failed to provide any materials or perform any services. Depute contacted Defendants numerous times regarding when Defendants were going to begin working. However, Defendants would respond by making false promises, misrepresentations, and excuses in order to delay delivering the materials and providing the services agreed upon. Defendants owe restitution to Depute in the amount of \$5,100.

17. In April 2012, Defendants entered into a contract with Darwin and Christine Van Berkam (hereinafter "Van Berkams"), 9396 Hwy 50, PO Box 173, Powers Lake, ND 58773, to remodel their home, including, but not limited to, installing siding, showers, and windows. The contract was in the amount of \$16,500. Defendants solicited and accepted an advance payment in the amount \$12,000. Defendants have failed to provide any materials or perform any services. The Van Berkams have contacted Defendants numerous times regarding when Defendants were going to begin working. However, Defendants would respond by making false promises, misrepresentations, and excuses in order to delay delivering the materials and providing the services agreed upon. Defendants owe restitution to the Van Berkams in the amount of \$12,000.

18. In April 2012, Defendants entered into a contract with Jeanette Malnourie (hereinafter "Malnourie"), 1st NW #20, PO Box 425, Parshall, ND 58770 to repair her roof. The contract was in the amount of \$2,600. Defendants solicited and accepted an

advance payment in the amount \$1,100. Defendants have failed to provide all the materials ordered and perform all services agreed upon. Malnourie contacted Defendants numerous times regarding when Defendants were going to finish Malnourie's project. However, Defendants would respond by making false promises, misrepresentations, and excuses in order to delay delivering the materials and providing the services agreed upon. Defendants agreed to refund Malnourie \$600, but have failed to provide any restitution. Defendants owe restitution to Malnourie.

19. In September 2012, Defendants solicited Tyson Lynne, 411 Reserve St., PO Box 142, Plaza, ND 58771, ("Lynne") at his home and entered into a contract with Lynne to repair his roof. Defendants gave Lynne a business card which stated that Defendants were a licensed contractor. Defendants did not have a contractor's license in September 2012. The contract was in the amount of \$12,500. Defendants solicited and accepted an advance payment in the amount \$6,250. Defendants have failed to provide all the materials ordered and perform all services agreed upon. Lynne has contacted Defendants numerous times regarding when Defendants were going to finish his project. However, Defendants would respond by making false promises, misrepresentations, and excuses in order to delay delivering the materials and providing the services agreed upon. Defendants owe restitution to Lynne.

20. In July, 2012, Defendants solicited and accepted \$8,200 from Tim Wells ("Wells") of 217 5th St. NW, Minot, ND 58703 to repair his roof and install gutters. However, Defendants did not completely repair the roof, and it is still leaking. Additionally, Defendants did not install any gutters. Wells repeatedly requested that Defendants install his gutters. However, Defendants refused to install the gutters and

insisted Wells pay more than the agreed upon price. Defendants owe restitution to Wells.

21. Upon information and belief, there are likely other North Dakota consumers who have paid Defendants thousands of dollars in advance payments for contracting services and/or merchandise and Defendants have not completed their contracting projects.

22. After receiving consumer complaints and other information regarding Defendants' business activities, the Attorney General commenced an investigation into Defendants' business practices. On September 21, 2012 the Attorney General issued a Subpoena Duces Tecum and Subpoena to Appear ("Subpoena"). Defendants were served with the Subpoena on October 6, 2012 at the Ward County Jail in Minot, North Dakota. Defendants were required to appear and respond to the Attorney General's Subpoena on October 12, 2012 at 10:30 a.m. Defendants failed to appear on October 12, 2012 or contact the Attorney General to request an extension.

23. Defendants' actions constituting consumer fraud under N.D.C.C. §51-15-02 include, but are not limited to, the following:

- A. Making false and misleading representations to customers, including but not limited to, false representations regarding the existence, possession, price, location, delivery, and transportation of materials paid for by customers for Defendants to install;
- B. Making false and misleading representations to customers regarding when Defendants would begin, complete, or work on the projects paid for by Defendants' customers;

- C. Making false and misleading representations to customers regarding the quality of Defendants' work;
 - D. Making false and misleading representations to customers regarding the quality of the materials that Defendants would purchase;
 - E. Solicitation and acceptance of pre-payment for materials and services without performing the services or failing to deliver the materials or completing installations as promised to customers;
 - F. Solicitation and acceptance of pre-payment for materials and services without the intent to deliver the materials to the customer or perform the services;
 - G. Failing to deliver the customers' deposits to the supplier for the customers' materials;
 - H. Using the customers' deposits belonging to the customers for purposes other than purchasing their materials;
 - I. Using the customers' deposits belonging to the customers for personal expenses;
 - J. Misrepresenting to consumers, expressly, impliedly, or by omission of a material fact, that Defendants were properly licensed and in compliance with N.D.C.C. ch. 43-07, and were otherwise in compliance with or authorized by North Dakota law to provide services in North Dakota;
24. Defendants' actions constitute consumer fraud under N.D.C.C. § 51-15-

02.

VI. CONSUMER FRAUD LAW VIOLATIONS
(N.D.C.C. § 51-15-01, et seq.)

25. Plaintiff re-alleges paragraphs 1 through 24 of this Complaint

26. Defendants engaged in deceptive acts or practices in violation of N.D.C.C. § 51-15-02, for which North Dakota is entitled to relief, including injunctive relief, penalties, costs, expenses, and attorney fees.

27. The deceptive acts or practices alleged in paragraphs 1 through 24 of this Complaint constitute violations of N.D.C.C. § 51-15-02 for which the court may:

- A. Order injunctive relief as provided in N.D.C.C. § 51-15-07 or as otherwise provided by law;
- B. Order Defendants to pay to the State of North Dakota a civil penalty of up to \$5,000 for each violation as provided in N.D.C.C. § 51-15-11;
- C. Order Defendants to pay to the State of North Dakota the costs, expenses, and attorney's fees incurred by the Attorney General in the investigation and prosecution of this action as provided in N.D.C.C. § 51-15-10; and
- D. Order such relief as may be necessary to prevent the use or employment of deceptive acts or practices by Defendants or to restore any loss suffered by persons as a result of the deceptive acts or practices of Defendants as provided in N.D.C.C. § 51-15-07.

VII. PERSONAL LIABILITY/CONSPIRACY

28. North Dakota hereby realleges and incorporates by reference the allegations of paragraphs 1 through 27, as if fully restated herein.

29. Each of the Defendants knowingly entered into a deceptive scheme to

violate North Dakota law, established and executed a company policy consistent with that scheme, approved of the conduct which was in violation of the law, was in a position to exercise control over the business entities involved, personally derived benefit from the conduct of the business entities, recruited others to participate in the scheme and had a duty to monitor the conduct of the employees, agents and the like to prevent violation of the law.

30. Upon information and belief, Defendant Fredericks Contracting, LLC does not observe all limited liability company formalities.

31. By virtue of its repeated instances of consumer fraud and other violations of North Dakota law, Defendant Fredericks Contracting, LLC, which purports to be a business form which shields the individual persons comprising it from personal liability, has forfeited that protection and, therefore, the members, managers, and governors are personally liable, jointly and severally, for the actions and obligations thereof.

32. The Court should “pierce the corporate veil” and declare Defendant Michael Frederick is not entitled to protection from personal liability and rather is jointly and severally liable for all conduct and obligations of Defendant Fredericks Contracting, LLC and its agents and employees. Under N.D.C.C. § 10-32-29 “the case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under North Dakota law also applies to limited liability companies.”

33. Each of the Defendants is engaged in a combination of two or more persons who have agreed to act together to inflict a wrong or an injury upon another, or who have agreed to act together to commit a lawful act using unlawful means to inflict a wrong or injury upon another, namely violation of North Dakota law, *supra*. In so doing, Defendants have committed acts in pursuit of the agreement and the agreement has proximately caused damage to North Dakota and its consumers.

34. Each Defendant is liable for being a party to a conspiracy to violate North

Dakota law.

35. In addition to being liable for being a party to a conspiracy to violate North Dakota law, each Defendant is liable for his/its own misconduct and/or for directing others to commit a wrong. See *e.g. Zimprich v. North Dakota Harvestore Sys., Inc.*, 419 N.W.2d 912, 914 (N.D. 1988); *Rickbeil v. Grafton Deaconess Hosp.*, 23 N.W.2d 247, 257 (N.D. 1946)("The general rule with reference to this feature is considered and set out in the great series of volumes of jurisprudence familiar to the courts. In 52 Am. Jur. 440, this rule is stated, 'It is a conceded general rule that all persons or entities are liable for torts committed by them, or by their agents while acting within the scope of their duties.'").

36. Defendant Michael Frederick, who is a natural person, will additionally be subject to personal liability for corporate misconduct. See *Hilzendager v. Skwarok*, 335 N.W.2d 768 (N.D. 1983)(quoting *Schriock v. Schriock*, 128 N.W.2d 852, 866 (N.D. 1964)("... but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.' Fletcher, Private Corporations Sec. 41 (1963 rev. vol.).").

37. The crime/fraud exception to the protections of corporate form has long been recognized in North Dakota, "neither law nor equity will ever recognize the right of a corporate entity to become the receptacle or cover for fraud or wrong based on deception for the purpose of defeating the right of innocent parties." See *McFadden v. Jenkins*, 169 N.W. 151, 163 (N.D. 1918). See also *Danks v. Holland*, 246 N.W.2d 86 (N.D. 1976); *Family Center Drug v. North Dakota St. Bd. of Pharm.*, 181 N.W.2d 738, 745 (N.D. 1970). The foregoing illegal conduct of Defendant Michael Frederick presents an appropriate case for piercing the corporate veil and/or finding Defendant

Michael Frederick individually liable for his own actions.

VIII. REQUEST FOR RELIEF

38. WHEREFORE, PLAINTIFF PRAYS for judgment against the Defendants as follows:

A. That each of the Defendants be adjudged in violation of the consumer fraud law and N.D.C.C. § 51-15-02 for engaging in the deceptive acts and practices alleged in this Complaint.

B. That the Defendants, Fredericks Contracting, LLC and Michael Frederick, individually, their agents, employees, representatives, assigns, and all other persons in active concert or participation with them, pursuant to N.D.C.C. § 51-15-07, be permanently enjoined and restrained from engaging in deceptive acts or practices and from directly or indirectly making false statements, false promises, or misrepresentations with the intent that others rely thereon, in violation of N.D.C.C. § 51-15-02, while engaging in the sale or advertisement of any merchandise as defined by N.D.C.C. 51-15-01(3), within the State of North Dakota.

C. That the Defendants, Fredericks Contracting, LLC and Michael Frederick, individually, their agents, employees, representatives, assigns, and all other persons in active concert or participation with them, pursuant to N.D.C.C. § 51-15-07, be 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 services, or any other merchandise, as defined by N.D.C.C. § 51-15-01(3).

D. That under N.D.C.C. § 51-15-07, Defendants be permanently enjoined from having a contractor's license pursuant to N.D.C.C. 43-07 and from operating,

participating, or engaging in any contracting business, including, but not limited to, contracting to repair homes in North Dakota.

E. Alternatively, that under N.D.C.C. § 51-15-07, Defendants be enjoined and restrained from having a contractor's license pursuant to N.D.C.C. ch. 43-07 and from operating, participating, or engaging in any contracting business for five (5) years or until Defendants have paid all consumer restitution owed, whichever is longer; provided, however, the injunction is first lifted by the Court after the Attorney General agrees or the Court determines that all restitution owed to consumers has been paid.

F. Defendants, their agents, employees, representatives, assigns, and all other persons in active concert or participation with them, pursuant to N.D.C.C. § 51-15-07, be permanently enjoined and restrained from engaging in sales of contracting services, in the state of North Dakota unless Defendants have obtained a Contractor's License pursuant to N.D.C.C. ch. 43-07 and have complied with all contractor licensing requirements appropriate and necessary for the work to be undertaken by them.

G. That, pursuant to N.D.C.C. § 51-15-07, Defendants, their agents, employees, representatives, assigns, and all other persons in active concert or participation with them be permanently enjoined and restrained from soliciting or accepting from consumers advance payments or consumer deposits in connection with any sale of merchandise, as defined by N.D.C.C. § 51-15-01(3).

H. Alternatively, that, pursuant to N.D.C.C. § 51-15-07, Defendants, their agents, employees, representatives, assigns, and all other persons in active concert or participation with them be enjoined and restrained from soliciting or accepting from consumers advance payments or consumer deposits in connection with any sale of

merchandise, as defined by N.D.C.C. § 51-15-01(3), for five (5) years or until Defendants have paid all consumer restitution owed, whichever is longer; provided, however, the injunction is first lifted by the Court after the Attorney General agrees or the Court determines that all restitution owed to consumers has been paid.

I. That, pursuant to N.D.C.C. § 51-15-11, Defendants be assessed, jointly and severally, a civil penalty of \$5,000 for each violation of N.D.C.C. § 51-15-02.

J. That, pursuant to N.D.C.C. § 51-15-10, the Attorney General be awarded and the Defendants be ordered to pay, jointly and severally, all costs, expenses, and attorney's fees incurred by the Attorney General in the investigation and prosecution of this action.

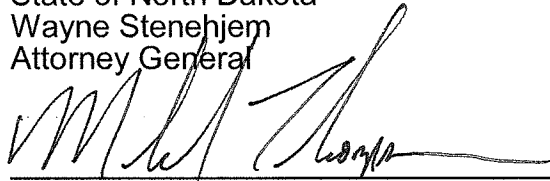
K. That the Defendants, pursuant to N.D.C.C. § 51-15-07, be ordered to pay, jointly and severally, restitution to all consumers, which have suffered any ascertainable loss, and to restore to any person in interest any moneys or property, real or personal, which may have been acquired by Defendants by means of any practice declared to be unlawful under N.D.C.C. § 51-15-02.

L. That Plaintiff be given such other and further relief as the nature of this case may require and this court may determine to be fair, just, and equitable.

Dated this 12th day of October, 2012.

State of North Dakota
Wayne Stenehjem
Attorney General

BY:



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