IN THE SUPREME COURT OF NEVADA

Sup. Ct. No. 70837

Dist. Ct No.: A-15-714136-C

MICHAEL SARGEANT,
Appellant

vs.

HENDERSON TAXI,
Respondents

APPELLANT'S REPLY BRIEF

Leon Greenberg, NSB 8094
A Professional Corporation
2965 S. Jones Boulevard - Suite E-3
Las Vegas, Nevada 89146
Telephone (702) 383-6085
Fax: 702-385-1827
Attorney for Appellant

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NRAP RULE 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

This undersigned's client in this case, Appellant Michael Sargeant, is an individual and is not a corporation. Michael Sargeant is not using a pseudonym in this case. The only counsel appearing for Michael Sargeant in this case, and

expected to appear for him in the future in this case, are Dana Sniegocki and Leon Greenberg of Leon Greenberg Professional Corporation.

Dated: June 8, 2017

Respectfully submitted,
/s/ Leon Greenberg
Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellant

IN REPLY TO HENDERSON'S STATEMENT OF FACTS

The Order appealed found conduct by Appellant Michael Sargeant ("Sargeant") taking place after October 8, 2015 warranted an award of attorney's fees under NRS 18.010(2) to Respondent Henderson Taxi ("Henderson"). Henderson's lengthy, and inaccurate, statement of facts discussing events taking place prior to October 8, 2015 is irrelevant.

At page 7 of its brief Henderson asserts as a "fact" that Sargeant's opposition, filed with the district court on December 14, 2015 to Henderson's motion for summary judgment, set forth no "substantive reason why Henderson's motion should not be granted." This is untrue. Such opposition sought to deny the motion based upon Henderson's admission it owed Sargeant $107.23 in unpaid minimum wages and to enter judgment for Sargeant in such amount. AA 48, 73-78. It also incorporated the arguments made in Sargeant's separate motion seeking reconsideration of the district court's October 8, 2015 order that, if granted, would bar the granting of summary judgment to Henderson. AA 74, referencing AA 21-55, 82-87.

SUMMARY OF REPLY

Henderson asserts that Sargeant acted frivolously because the district court's order of October 8, 2015 was "very clear" in stating that the grievance resolution between Henderson and its employee's union acted as "a complete accord and satisfaction" of "any claims to minimum wage that Henderson's Taxi's cab drivers may have had." RAB 8. Assuming, *arguendo,* that such order was "very clear" on that point, it was silent on how that "satisfaction" was achieved for Sargeant who never received the $107.23 "satisfaction" Henderson admitted it owed Sargeant under that "accord." AA 48. Sargeant sought reconsideration of the October 8, 2015 order on the basis that the order erroneously applied an "accord and satisfaction" defense to his claim even though Henderson failed to provide to him, and other taxi drivers, the "satisfaction" required by the "accord and satisfaction" finding of such order. While the district court denied reconsideration, Sargeant's reconsideration request was based upon well established law and was not frivolous in light of the order's failure to address how the "satisfaction" of its "accord and satisfaction" finding was provided to

Sargeant.

ARGUMENT

I. SARGEANT DID NOT ACT FRIVOLOUSLY IN SEEKING RECONSIDERATION AS THE OCTOBER 8, 2015 ORDER'S "ACCORD AND SATISFACTION" FINDING WAS SUBJECT TO A WELL GROUNDED CLAIM OF ERROR SINCE SARGEANT RECEIVED NO SUCH "SATISFACTION"

A. It is undisputed that the October 8, 2015 order did not explain how Sargeant received the "satisfaction" Henderson was providing to him under the "accord and satisfaction" found by such order.

Henderson insists the October 8, 2015 order was "very clear" that an "accord and satisfaction" of Sargeant's minimum wage claims, and the putative class members' minimum wage claims, had occurred. Yet the October 8, 2015 order did not explain how Henderson's "accord and satisfaction" defense could prevail against the claims of Sargeant and over 300 other taxi drivers who never received the "satisfaction" portion (for Sargeant a payment of $107.23) of that "accord and satisfaction" finding. Nor did that order explain how Sargeant and those other "unpaid" taxi drivers did receive, or would receive, such "satisfaction."

B. Sargeant did not act frivolously or in a harassing manner by arguing the October 8, 2015 order's accord and satisfaction finding was erroneous in respect to Sargeant and the other Henderson taxi drivers who had not received such "satisfaction."

1. The district court's "accord and satisfaction" finding required that Sargeant receive the "satisfaction" that must accompany the "accord" reached over his minimum wage claims.

An "accord and satisfaction" is defined in Black's Law Dictionary, Ninth Ed., as: " An agreement substituting for an existing debt some alternative form of discharging that debt, coupled with the actual discharge of the debt by the substituted performance." As it further explains, citing 1 E.W. Chance, *Principles of Mercantile Law* 101 (P.W. French ed., 13 ed. 1950): "There must be not only agreement ('accord') but also consideration ('satisfaction'). Such an arrangement is really one of substituted performance."

Consistent with the foregoing definition, the precedents uniformly hold that an accord and satisfaction requires both an agreement to resolve the debt claimed (the "accord") and a fulfillment of that agreement (the "satisfaction"). *See*, *Nelson v. Food Lion Inc.*, 23 Va. Cir. 136, 138 (Cir. Ct. Va. 1991) (Finding an accord was agreed upon but no accord and satisfaction existed as the promised payment was not made); *Moers v. Moers*, 229 N.Y. 294, 300 (N.Y. Ct. App. 1920) ("A mere accord without a satisfaction is ineffective and does not supersede or discharge the

original contract or claim."); *Zogg v. Kern Oil & Gas Co.*, 94 W. Va. 17, 21 (W. Va. Sup. Ct., 1923) (Stating rule and citing authorities); *Gerhart Realty Co. v. Northern Assurance Co.*, 94 Mo. App. 356, 360 (Mo. Ct. App., 1902) (Defense of accord and satisfaction fails as "....an accord was proven but no satisfaction.") and other cases.

2. Sargeant's request that the district court reconsider its October 8, 2015 order because Sargeant never received the "satisfaction" of the "accord and satisfaction" found by that order was not frivolous or harassing.

The October 8, 2015 order found Henderson had established an accord and satisfaction defense in this case. Yet, as properly brought to the district court's attention through Sargeant's reconsideration motion, Henderson had not fully performed the "satisfaction" portion of that "accord and satisfaction" defense. That was because Sargeant and over 300 other Henderson taxi drivers never received any "satisfaction" payment. AA 26. The reconsideration sought would have required Henderson, if it was to maintain that "accord and satisfaction" defense against Sargeant and the other "unsatisfied" taxi drivers, to complete the "satisfaction" portion of that defense. *Id.*

Henderson, in its brief and in the order it drafted for the district court, insists that Sargeant's request for reconsideration was frivolous because it sought relief on an "unpleaded claim and certification of an unpleaded class." AA 228.

Neither the district court nor Henderson cite any authority supporting that conclusion. Such conclusion rests upon the assumption, discussed by Henderson at RAB 20, fn. 13, that Sargeant had to commence a new action (pleading) to enforce his right to a "satisfaction" under the "accord and satisfaction" found by the October 8, 2015 order. That assumption is not only unsupported, it is legally erroneous. *See, Moers*, 229 N.Y. at 299 ("There is no doubt that a mere accord without satisfaction is unenforceable...")

An accord and satisfaction is an affirmative defense to a legal claim that must be expressly pleaded and all of its elements proved by a defendant. *See*, N. R. C. P. Rule 8(c) and *Adelman v. Arthur*, 433 P.2d 841, 844-45 (Sup. Ct. Nev. 1967). Its "satisfaction" element requires actual performance not a promise of future performance. "An executory agreement for accord of a pending action without satisfaction made under it does not bar the prosecution of the action, and tender of performance is insufficient for that purpose." *Moers*, 229 N.Y. at 300. As *Moers* further explains, an accord and satisfaction differs from "[a] new executory agreement, whether performed or not, [that] may be accepted in satisfaction of a previous obligation or liability and if it is so accepted the remedy for breach thereof is upon the new and not the old agreement." *Id*.

The October 8, 2015 order held that the union grievance resolution established Henderson's accord and satisfaction affirmative defense. The order

did not find that the grievance resolution was a new agreement bestowing new rights upon Sargeant and the other Henderson taxi drivers. Sargeant's motion for reconsideration argued such "accord and satisfaction" holding was in error in respect to himself and the other Henderson taxi drivers who never received the "satisfaction" (payment) component of that "accord and satisfaction." He was not, by seeking reconsideration, making any "unpleaded" claim based upon a different legal right or a new contract.

Sargeant's motion for reconsideration of the October 8, 2015 order was well grounded in over 100 years of established law on how an accord and satisfaction operates. He reasonably and colorably claimed the order was in error because Henderson had not established the "satisfaction" element of its "accord and satisfaction" defense to his claim and the claims of over 300 of its taxi drivers. AA 24-30. He proposed the district court allow Henderson to receive, in full, that accord and satisfaction for such persons *nunc pro tunc* by providing such unpaid "satisfaction" to Sargeant and its other taxi drivers. AA 26. Alternatively, he asked the district court to hold that Henderson had failed in its "accord and satisfaction" defense in respect to the claims of Sargeant and the other "unsatisfied" taxi drivers and allow them to continue with their minimum wage claims. AA 28-29.

That Sargeant's arguments on reconsideration were rejected by the district

court does not render them frivolous. Those arguments were completely consistent with well established law on how an accord and satisfaction operates. Neither the district court's order, nor Henderson, offer any explanation of how they were not.

II. SARGEANT DID NOT ACT FRIVOLOUSLY IN OPPOSING SUMMARY JUDGMENT BASED UPON HIS FAILURE TO RECEIVE THE "SATISFACTION" REQUIRED BY THE OCTOBER 8, 2015 ORDER'S "ACCORD AND SATISFACTION" FINDING

Sargeant opposed summary judgment in favor of Henderson because he never received the "satisfaction" required under Henderson's "accord and satisfaction" defense, the same basis for his well grounded motion for reconsideration of the district court's October 8, 2015 order. AA 74, referencing AA 21-55, 82-87. Similarly, he made a reasonable claim that he should receive a judgment in his favor for the $107.23 Henderson conceded he was still owed as his "satisfaction" under that "accord and satisfaction." AA 48, 73-78. Neither Henderson nor the district court explain their insistence that such claims by Sargeant were frivolous. They were not.

III. HENDERSON MISSTATES THE APPLICABLE STANDARD FOR AWARDING FEES UNDER NRS 18.010(2)(b)

Henderson cites only one precedent, *Nelson v. Peckham Plaza Partnership,* 866 P.2d 1138, 1140 (Nev. Sup. Ct. 1994), in support of its claim the district court

"enjoys broad discretion whether to award fees in a case" and that it properly exercised such discretion in this case. RAB 17. *Nelson* is wholly inapplicable and Henderson's cites nothing that supports its proposed "broad discretion" standard. *Nelson* did not deal with an attorney fee award for frivolous or harassing conduct under NRS 18.010(b)(2) or any similar statute or rule. It awarded attorney's fees pursuant to the applicable provision of the parties' lease agreement. *Id.*

IV. THIS CASE INVOLVED NOVEL AND UNSETTLED ISSUES AND THE DISTRICT COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY FEES UNDER NRS 18.010(2)(b)

Henderson concedes that an award of fees under NRS 18.010(2)(b) is not warranted when a party is litigating "novel issues." RAB 24. It then insists that this case did not involve any "novel" issues and that even if it did those issues were fully resolved by the October 8, 2015 order. Neither assertion is correct or supported by the record.

The district court expressly and repeatedly rejected, and struck, Henderson's proposed findings that this case did *not* involve novel or unsettled issues. AA 227-228. It did involve novel and unsettled issues, as no Nevada Court has ever previously considered how, or when, minimum wages claims under Nevada's Constitution can be released or subject to an "accord and satisfaction," whether involving action by a labor union or otherwise. The Minimum Wage Amendment

to the Nevada Constitution had also been the law of Nevada for less than 10 years when the October 8, 2015 decision was issued.

Henderson ironically insists that the October 8, 2015 order left no novel or unsettled issues undecided in this case because, among other things, such order applied "long standing doctrines" involving the law of "accord and satisfaction." RAB 25. As discussed, it was precisely those "long standing doctrines" of "accord and satisfaction" that the October 8, 2015 order was ignoring, superceding, or otherwise extending in a new fashion. The district court's finding Henderson had established an "accord and satisfaction" defense for persons, such as Sargeant, who had never received any such "satisfaction" was, if not novel and in derogation of "long established doctrines," at least properly subject to Sargeant's good faith and non-frivolous argument for reconsideration.

CONCLUSION

Wherefore, for all the foregoing reasons, the Order appealed from should be reversed in its entirety.

Dated: June 8, 2017

Respectfully submitted,

/s/ Leon Greenberg

Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellant

Certificate of Compliance With N.R.A.P Rule 28.2

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point Times New Roman typeface in wordperfect.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 2193 words.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported

by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 8th day of June, 2017.

/s/ Leon Greenberg

Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on June 8, 2017, she served the within:

APPELLANT'S REPLY BRIEF

by Electronic Court filing to:

Anthony L. Hall, Esq.
R. Calder Huntington, Esq.
HOLLAND & HARD LLP
9555 Hillwood Drive, 2nd Fl.
Las Vegas, NV 89134

/s/ Sydney Saucier
Sydney Saucier