

20090119

SUPREME COURT OF NORTH DAKOTA

GREAT PLAINS NATIONAL BANK,

Plaintiff-Appellee,

vs.

Sam Leppert and Laura Leppert,

Defendants-Appellants.

Anthony Heinze and J. Doe I-V,

Defendants.

SUPREME COURT NO. 20090119

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAY 26 2009

STATE OF NORTH DAKOTA

APPEAL FROM THE NORTH DAKOTA DISTRICT COURT
COUNTY OF BARNES SOUTHEAST JUDICIAL DISTRICT
HONORABLE MIKAL SIMONSON, DISTRICT JUDGE

APPELLANTS' BRIEF

AND

REQUEST FOR ORAL ARGUMENT

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

**WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN RULING
SUFFICIENT EVIDENCE WAS PRESENT IN THE COURT RECORD TO
CONCLUDE THAT GREAT PLAINS NATIONAL BANK WAS ENTITLED TO
SUMMARY JUDGMENT**

Authorities

N.D. Rules. App. P. 35

N.D. Rules of Evidence Rule 1002

N.D. U.C.C. Section 41-03-38

Federal U.C.C. Section 3-603

Title 12, U.S.C. Section 1831n(2)(A)

STATEMENT OF THE CASE

Nature of the case: Sam Leppert and Laura Leppert appeal from the Order Authorizing Delivery of Sam Leppert's farm equipment, machinery, livestock, and crops, entered on May 14, 2008, the Judgment entered on February 4, 2009, the Amended Judgment entered on February 13, 2009, granting Great Plains National Bank's Motion for Summary Judgment, and the Order entered on March 10, 2009, by Honorable Mikal Siminson, District Judge, Presiding, denying Sam Leppert's Motion to Alter or Amend Judgment and every ruling adverse to Sam Leppert and Laura Leppert during the progress and hearing of such cause.

Course of Proceedings and Disposition in the Trial Court:

On August 16, 2007, Great Plains National Bank filed its original Complaint against Sam Leppert alleging that he defaulted on five Promissory Notes that he executed and delivered to Great Plains National Bank. (Docket Entry No. 2).

On November 29, 2007, Sam Leppert filed his Answer to Great Plains National Bank's Complaint. (Docket Entry No. 15).

On December 4, 2007, a hearing was held before the District Court regarding Great Plains National Bank's motion for an Order granting immediate possession of Sam Leppert's farm equipment, machinery, livestock, and crops.

On May 14, 2008, the District Court entered its Order Authorizing Delivery of Sam Leppert's farm equipment, machinery, livestock, and crops, based upon a Bond filed by Great Plains National Bank. (Docket Entry No. 28).

On June 5, 2008, Great Plains National Bank filed its Amended Complaint against Sam Leppert, Laura Leppert and Andrew Anthony Heinze. (App. at 1-23).

On June 17, 2008, the District Court entered its Order authorizing the Amended Complaint. (Docket Entry No. 40).

On July 1, 2008, Sam Leppert filed his Notice of Removal to the United States District Court. (Docket Entry No. 42).

On July 9, 2008, Sam Leppert and Laura Leppert served their Answer to the Amended Complaint filed by Great Plains National Bank. (App. at 24-34).

On November 1, 2008, entered the Transcript of the Deposition of Jeanne M. Witt, (Docket Entry No. 47), and the Transcript of Deposition of Raymond Thielges, (Docket Entry No. 48).

On December 24, 2008, Sam Leppert served Great Plains National Bank his Request for Admissions, (App. at 35-39), his Request for Production of Documents, (App. at 40-44), and his Interrogatories. (App. at 45-51).

On January 9, 2009, Great Plains National Bank filed its Motion for Judgment, (App. at 52-53), a Memorandum of Law, (App. at 54-60), and a copy of the affidavit that was prepared for Jeanne Witt by Great Plains National Bank's attorney, Jonathan R. Fay, in support of its Motion for Summary Judgment. (App. at 61-62).

On January 16, 2009, Sam Leppert and Laura Leppert filed their Response to the Great National Bank's Motion for Judgment, (App. at 63-70), the Affidavit of Sam Leppert, (App. at 71-74), and Statement of Undisputed Material Facts. (App. at 75-78).

On January 30, 2009, a hearing was held regarding Great Plains National Bank's Motion for Summary Judgment. (App. at 106-122).

On February 4, 2009, the District Court entered Findings of Fact, Conclusion of Law and Order for Judgment. (App. at 79-84).

On February 4, 2009, the District Court entered a Judgment signed by the Clerk of the District Court. (App. at 85-87).

On February 13, 2009, the District Court entered an Amended Judgment signed by the Clerk of the District Court. (App. at 88-90).

On February 27, 2009, Sam Leppert filed his Motion to Alter or Amend Judgment, (App. at 91-92), and Brief in Support of Motion to Alter or Amend Judgment. (App. at 93-102).

On March 10, 2009, The District Court entered its Order denying Sam Leppert's Motion to Alter or Amend Judgment. (App. at 103).

On April 8, 2009, Sam Leppert and Laura Leppert filed their Notice of Appeal and paid the required docket fee. (App. at 104-105).

STATEMENT OF THE FACTS

On August 16, 2007, Great Plains National Bank filed its original Complaint against Sam Leppert alleging that he defaulted under the terms of the loans. Attached to the Complaint were "photocopies" of the alleged defaulted Promissory Notes. (Docket Entry No. 2). Sam Leppert filed his Answer to Great Plains National Bank's Complaint denying each allegation due to his "offer to pay" and the "refusal" on the part of Great Plains National Bank to validate the alleged debt, or show adequate assurance of the alleged debt, or show its the "Holder in Due Course" of its claims, the "original" five Promissory Notes. (Docket Entry No. 15).

On December 4, 2007, a hearing was held before the District Court regarding Great Plains National Bank's motion for an Order granting immediate possession of Sam Leppert's farm equipment, machinery, livestock and crops. On May 14, 2008, the District Court entered an Order made for it to sign by Jonathan R. Fay, attorney for Great Plains National Bank, Authorizing Delivery of Sam Leppert's farm equipment, machinery, livestock and crops, in lieu of the fact that Great Plains National Bank "never produced" any of the "original" five Promissory Notes, or the "original" Security Agreement or the "original" Financial Statement. (Docket Entry No. 28).

Based upon the fact that Great Plains National Bank did not enter any of the "original" five Promissory Notes or the "original" Security Agreement, or the "original" Financial Statement, into the District Court record at the December 4, 2007 hearing in support

its motion, and "did not" prove, as a matter of law, that it was the "Holder in Due Course", Sam Leppert decided to take the Deposition of Jeanne M. Witt and Raymond Thielges who are employed by Great Plains National Bank.

On April 16, 2008, Sam Leppert caused a Subpoena to served upon Jeanne M. Witt, Loan Officer, and Raymond Thielges, Branch Manager, for Great Plains National Bank, requiring them to bring the "original blue ink" Promissory Notes for Account Numbers 300010121, 300010122, 35000155, 300010114 and 300010167, any and all assignments of said Promissory Notes, and all internal accounting ledgers pertaining to said Promissory Notes.

On May 1, 2008, Sam Leppert took the Deposition of Jeanne M. Witt and Raymond Thielges at the Barnes County Courthouse, Valley City, North Dakota. Neither Jeanne M. Witt or Raymond Thielges brought with them any of the subpoenaed "original blue ink" Promissory Notes for the account numbers allegedly in default, or any and "all assignments" of said Promissory Notes, or any of the "accounting ledgers" pertaining to said Promissory Notes. Both Jeanne M. Witt and Raymond Thielges gave evasive answers to questions that were relevant to Sam Leppert's defense. Their attorney, Jonathan R. Fay, also objected to questions that were relevant to Sam Leppert's defense. (Docket Entry No. 47 and 48).

On December 24, 2008, Sam Leppert served Great Plains National Bank his Request for Admissions, (App. at 35-39), his Request for Production of Documents, (App. at 40-44), and his Interrogatories, (App. at 45-51). But, rather than responding to Sam Leppert's

discovery requests, on January 9, 2009, Great Plains National Bank filed its Motion for Judgment, seeking Summary Judgment, an Order "Quashing" Sam Leppert's discovery requests, and an Order discharging the replevin bond, (App. at 52-53), a Memorandum of Law, (App. at 54-60), and a "photocopy" of the affidavit that was prepared for Jeanne M. Witt by Great Plains National Bank's attorney, Jonathan R. Fay, in support of its Motion for Summary Judgment. (App. at 61-62).

On January 16, 2009, Sam Leppert and Laura Leppert filed their Response to Great National Bank's Motion for Summary Judgment, (App. at 63-70), the Affidavit of Sam Leppert, (App. at 71-74), and Statement of Undisputed Material Facts. (App. at 75-78).

On January 30, 2009, a hearing was held regarding Great Plains National Bank's Motion for Summary Judgment. Both parties stated their arguments and Sam Leppert entered his Request for Admissions, Request for Production of Documents and his Interrogatories. The District Court took the matter under advisement. (App. at 106-122).

On February 4, 2009, the District Court entered Findings of Fact, Conclusion of Law, and an Order for Judgment, that were prepared for the District Court to sign by Jonathan R. Fay, attorney for Great Plains National Bank. (App. at 79-84).

On February 4, 2009, the District Court entered a Judgment that was prepared by Jonathan R. Fay, attorney for Great Plains National Bank and was signed by the Clerk of the District Court. (App. at 85-87). The District Court totally disregarded all of Sam

Leppert's pleadings and un rebutted Affidavit. The District Court also disregarded the fact that Great Plains National Bank "never" entered any of the five "original" Promissory Notes, or the "original" Mortgage, or the "original" Security Agreement or the "original" Financial Statement.

On February 13, 2009, the District Court entered an Amended Judgment that was prepared for it by Jonathan R. Fay, attorney for Great Plains National Bank and was signed by the Clerk of the District Court. (App. at 88-90).

On February 27, 2009, Sam Leppert filed his Motion to Alter or Amend Judgment, (App. at 91-92), and Brief in Support of Motion to Alter or Amend Judgment. (App. at 93-102). The District Court entered an Order denying Sam Leppert's Motion to Alter or Amend Judgment on March 10, 2009. (App. at 103).

On April 8, 2009, Sam Leppert and Laura Leppert filed their Notice of Appeal and paid the required docket fee. (App. at 104-105).

ARGUMENT

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN RULING SUFFICIENT EVIDENCE WAS PRESENT IN THE COURT RECORD TO CONCLUDE THAT GREAT PLAINS NATIONAL BANK WAS ENTITLED TO SUMMARY JUDGMENT

A. Scope of Review

When the sufficiency of the evidence is challenged, this Court reviews sufficiency of the evidence claims for errors at law. N.D. Rules. App. P. 35.

B. Great Plains National Bank Did Not Prove Standing.

The District Court had knowledge of the fact that in order for Great Plains National Bank to prove "standing" in a foreclosure proceeding Great Plains National Bank was "required" to produce the five "original" signed Promissory Notes and the "original" signed Mortgage, the "original" Security Agreement and the "original" Financial Agreement. But, the District Court ignored those facts.

The District Court stated in its Judgment (App. at 85-87), that it had "jurisdiction" of the parties and "subject matter" to this action. But, the District Court record in this case "does not" reflect Great Plains National Bank entering the "original" five signed Promissory Notes or entering the "original" signed Mortgage associated with the alleged loans, or the "original" Security Agreement or the "original" Financial Statement being entered by Great Plains National Bank. How did the District Court obtain jurisdiction of the parties and subject matter to this action?

Pursuant to Section 41-03-38 of the North Dakota Uniform Commercial Code, entitled, Signature, a person is not liable on an Instrument unless the person signed the Instrument. Great Plains National Bank has not produced any of the Instruments, the five Promissory Notes, or the Mortgage or the Security Agreement or the Financial Agreement, in this case.

Pursuant to Rule 1002, of the North Dakota Rules of Evidence, entitled, Requirement of original: To prove the content of a writing, recording, or photograph, the original writing, recording photograph is required. The District Court Record does not reflect evidence of Great Plains National Bank entering the "original" Mortgage, or the "original" five Promissory Notes, or the "original" Security Agreement, or the "original" Financial Agreement, or Great Plains National Bank's "original" bookkeeping journal entries maintained by Great Plains National Bank's CPA or Auditor, for the term of the alleged loans as proof.

Pursuant to Federal U.C.C. Section 3-603, payment must be made to "Holder in Due Course" or discharge of the note does not occur placing the debtor in jeopardy as to being required to pay the note twice, once to the entity who bills and once to the holder of the note.

Great Plains National Bank never "proved standing" because it failed to prove it was the "Holder in Due Course" of the five Promissory Notes and Mortgage in this case, therefore, the District Court lacked subject matter jurisdiction to hear this case.

C. The Affidavit of Jeanne M. Witt Lacked Foundation.

Great Plains National Bank relied upon an affidavit that was prepared by Great Plains National Bank's attorney, Jonathan R. Fay, for Jeanne M. Witt to sign and used it in support of Great Plains National Bank's Motion for Summary Judgment. (App. at 61-62). Jeanne M. Witt made it known that she is an officer of Great Plains National Bank; that she reviewed the Complaint and Amended Complaint; that she had personal knowledge, "except" as to those cases that are based upon the Bank's files and records; that she "believed" such matters to be true; and that the subject loans remain unpaid.

But, Jeanne M. Witt did not attach any evidence to her affidavit that proved she is an "officer" of Great Plains National Bank; that proved she reviewed the Complaint and Amended Complaint; that proved she has personal knowledge; or that proved her "belief" the Bank's files and records were true; or any evidence of any bookkeeping journal entries certified by Great Plains National Bank's CPA or Auditor for the period covering the alleged loans.

D. Great Plains National Bank Did Not Produce Conclusive Evidence To Support The Allegations In Its Amended Complaint.

Great Plains National Bank alleged in its Amended Complaint (App. at 1-23), that for value received, Sam Leppert executed and delivered to Great Plains National Bank a Promissory Note (Loan No. 300010121) in the original amount of \$30,000.00; a Promissory Note (Loan No. 300010122) in the original amount of \$26,000.00; a Promissory Note (Loan No. 300010114) in the original amount of

\$15,000.00; a Promissory Note (Loan No. 35000155) in the original amount of \$31,000.00; a Promissory Note (Loan No. 300010167) in the original amount of \$65,000.00; and a Commercial Security Agreement and Financial Agreement.

But, there was no evidence of the "original" Commercial Security Agreement, or the "original" Financial Agreement, or any evidence of the "original" five Promissory Notes, or any evidence of the "original" Mortgage being entered by Great Plains National Bank into the District Court record. Most importantly, there was no evidence of any "original" bookkeeping journal entries certified by the CPA or Auditor for Great Plains National Bank for the period covering the alleged Loans. Had Great Plains National Bank produced its bookkeeping journal(s) regarding the five Promissory Notes, the bookkeeping journal(s) would have shown that Sam Leppert "was not indebted" to Great Plains National Bank.

The District Court record "does not" reflect any evidence of any consideration being given to Sam Leppert, regarding the alleged loans, or whether Great Plains National Bank risked any of its assets in the alleged loans to Sam Leppert, or evidence of any bookkeeping journal entries certified by the CPA or Auditor for the period covering the alleged loans, or evidence of any Call Reports for the period covering the alleged loans, or evidence of the account number from which the money came to fund the check given to Sam Leppert, or evidence of the deposit slip for the deposit of Sam Leppert's Promissory Notes associated with the alleged, or evidence of the order authorizing the withdrawal of funds from Sam Leppert's

Promissory Note deposit account(s), or evidence of the insurance policy on Sam Leppert's Promissory Notes associated with the alleged Loans, or evidence of who the actual "creditor" and "debtor" are in this case.

If Great Plains National Bank did make five loans of its money and if Great Plains National Bank carried an ongoing risk of loss to have made the loans, its bookkeeping journal entries would have certainly shown it. But, Great Plains National Bank has refused to produce its bookkeeping journal(s) in support of the allegations made in its Complaint. The bookkeeping journal(s) entries and whether its a "Holder in Due Course" of the five "original" Promissory Notes and the "original" Mortgage are key elements in this case which the District Court has totally ignored to the detriment of Sam Leppert and Laura Leppert.

E. Great Plains National Bank Is Required By Law To Follow Generally Accepted Accounting Principles (GAAP).

As a National Bank, Great Plains National Bank is presumed to follow the law. Great Plains National Bank knew that it is required by law, Title 12, U.S.C. Section 1831n(2)(A), to adhere to Generally Accepted Accounting Principals (GAAP). GAAP has a principal, called the *Matching Principle*. The principle works as follows: When a bank accepts cash, checks, negotiable instruments, promissory notes, or other similar instrument from a customer and deposits or records the instruments as an asset, the bank "must record an offsetting liability" that matches the asset

the bank accepted from the customer. The offsetting liability shows the "bank owes" the customer the money "it accepted" from the customer.

Great Plains National Bank is knowledgeable of the fact that its bookkeeping journal entries show that the "creditor" in this case is Sam Leppert and that the "debtor" is Great Plains National Bank. But, Great Plains National Bank does not want to produce its bookkeeping journal(s) regarding the alleged loans to Sam Leppert. Great Plains National Bank does not want it made known that when Sam Leppert first applied to Great Plains National Bank for the alleged loans, Great Plains National Bank "could not" loan its own assets, other depositors funds, or its own credit to Sam Leppert. Great Plains National Bank "needed" Sam Leppert's signed applications and Promissory Notes. Great Plains National Bank was aware of the fact that it risked "none of its assets" in the alleged loans to Sam Leppert.

Great Plains National Bank knew that it was using Sam Leppert's Promissory Notes to raise an "asset" in its bookkeeping entries to "itself" and used the face value of the Promissory Notes called "principal" which Great Plains National Bank loaned Sam Leppert and against which Great Plains National Bank charged interest. Consideration on the part of Great Plains National Bank was "non-existent." Had Great Plains National Bank produced its bookkeeping journal entries regarding the alleged loans in this case, those entries would have shown that Great Plains National

Bank owes Sam Leppert, \$170,000.00 plus interest and an additional amount of \$42,150.00 for farm equipment, machinery and livestock previously taken by the Great Plains National Bank.

Great Plains National Bank knew and was aware of the fact that Sam Leppert's Promissory Notes regarding this case were obtained by "fraud." Great Plains National Bank also knew and was aware of the fact that the Promissory Notes and Mortgage were "void" for lack of consideration.

CONCLUSION

Based upon all of the above facts, there was "not" sufficient evidence produced by Great Plains National Bank for the District Court to conclude that Great Plains National Bank was entitled to Summary Judgment, or entitled to a Delivery Order granting immediate possession of Sam Leppert's farm equipment, machinery, livestock and crops, or for the District Court to support its Judgment and Decree of Foreclosure on Sam Leppert and Laura Leppert's real estate.

Sam Leppert and Laura Leppert request that all the rulings of the District Court be overturned, that Great Plains National Bank's Complaint be dismissed with prejudice, as a matter of law, that all of Sam Leppert's farm equipment, machinery, and livestock that was seized be returned.

REQUEST FOR ORAL ARGUMENT

Sam Leppert and Laura Leppert respectfully request that they be heard in oral argument upon the submission of this case.

Respectfully submitted,



Sam Leppert
Defendant-Appellant



Laura Leppert
Defendant-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 26, 2009,
he served a true and correct copy of the foregoing Appellants'
Brief to the following address by U.S. first class mail, postage
prepaid:

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Sam Leppert