

20090119

SUPREME COURT OF NORTH DAKOTA

CLERK NOV 12 2009
SUPREME COURT

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

NOV 09 2009

STATE OF NORTH DAKOTA

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

APPELLANTS' REPLY BRIEF
 AND
 REQUEST FOR ORAL ARGUMENT

Sam Leppert and Laura Leppert
 1827 106th Avenue SE
 Dazey, North Dakota 58429
 (701) 733-5562
 Defendants-Appellants
 Pro Se

JONATHAN R. FAY
 Suite 600 Dakota Center Building
 51 Broadway
 Fargo, North Dakota 58102
 (701) 293-9190
 Attorney for Plaintiff-Appellee

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.	ii
Argument.	1
Conclusion.	9
Request for Oral Argument	10
Certificate of Service.	10

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Bowen v. Needles Nat. Bank</u> 94 F. 925	7
<u>Farmers and Miners Bank v. Bluefield National Bank,</u> 11 F.2d 83, 271 U.S. 669	6
<u>Federal Intermediate Credit Bank of Omaha v. L'Herissson,</u> 33 F.2d 841, 847	6
<u>First Nat. Bank of Tallapoosa et. all v. Monroe,</u> 69 S.E. 1123, 1124	7
<u>Howard & Foster Co. v. Citizens' Nat. Bank of Union,</u> 130 S.E. 758, 759.	7
<u>Merchants Bank v. Baird,</u> 160 F. 642, 645	7
<u>National Bank of Commerce v. Atkinson,</u> 55 F. 465, 471. . . .	7
<u>Norton Grocery Co. v. People's Nat. Bank of Abingdon Va.,</u> 144 S.E. 501	6
<u>St. Louis Savings Bank v. Parmalee,</u> 94 F. 925, 95 U.S. 557 .	6
 <u>North Dakota Court Rules:</u>	
N.D. Rules. App. P. 35	3
N.D. Rules of Evidence Rule 1002	2
 <u>Other Authorities:</u>	
N.D. U.C.C. Section 41-03-38	2
Federal U.C.C. Section 3-603	2
Title 12, U.S.C. Section 24, Paragraph 75.	6
Title 12, U.S.C. Section 1831n (2)(A).	5

ARGUMENT

GREAT PLAINS NATIONAL BANK FAILED TO PRODUCE SUFFICIENT EVIDENCE THAT WOULD ENTITLE IT 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.

Great Plains National Bank stated in its Brief that it had standing in the District Court. That is a "FALSE" statement. In order for Great Plains National Bank to prove "STANDING" in the foreclosure proceeding before the Barnes County District Court, Great Plains National Bank was "REQUIRED" to produce the "ORIGINAL" five signed Promissory Notes, the "ORIGINAL" signed Mortgage, the "ORIGINAL" Security Agreement, and the "ORIGINAL" Financial Agreement. But, the District Court completely 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 "DOES NOT" reflect any of the "ORIGINAL" five signed Promissory Notes, or the "ORIGINAL" signed Mortgage, or the "ORIGINAL" Security Agreement, or the "ORIGINAL" Financial Statement, being entered by Great Plains National Bank to support its Complaint. How did the District Court lawfully obtain "JURISDICTION" of the parties and "SUBJECT MATTER" to this action "WITHOUT" those "REQUIRED" documents?

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.

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, or 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" entries maintained by Great Plains National Bank's CPA or Auditor, for the term of the alleged Loans as proof. Where are those "ORIGINAL" documents? Who has "POSSESSION" of those documents? Why can't they be PRODUCED?

Pursuant to Federal U.C.C. Section 3-603, payment "MUST" be made to the "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 Great Plains National Bank's Complaint and should have dismissed the Complaint, as a matter of law.

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

In support of Great Plains National Bank's Motion for Summary Judgment, it relied upon an affidavit that was "PREPARED" by its attorney, Jonathan R. Fay, for Jeanne M. Witt to sign. (App. at 61-62). Jeanne M. Witt testified 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 "MATTERS" 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 admissible 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 had "PERSONAL KNOWLEDGE", or that proved her "BELIEF" the Bank's files and records were true. Also, there was no evidence of any ""BOOKKEEPING"" entries certified by Great Plains National Bank's CPA, or Auditor, for the period covering the alleged Loans, that proved Great Plains National Bank gave anything that was theirs in equity that Sam Leppert would have to pay back.

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, where is the proof? There was "NO" evidence of any value being received, or 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, and there was "NO" evidence of any "ORIGINAL BOOKKEEPING" entries certified by the CPA or Auditor for Great Plains National Bank for the period covering the alleged Loans to support the allegations in its Amended Complaint.

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"" 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 "DEPOSIT SLIP" for the deposit of Sam Leppert's Promissory Notes associated with the alleged Loans, 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 foreclosure 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"" entries would have certainly shown it. Also, their ""BOOKKEEPING"" entries would have shown that Sam Leppert "WAS NOT INDEBTED" to Great Plains National Bank. But, Great Plains National Bank has "REFUSED" to produce its "BOOKKEEPING" entries in support of the allegations made in its Complaint when requested. (App. at 40-44).

The "BOOKKEEPING" entries, and whether Great Plains National Bank is a "HOLDER IN DUE COURSE" of the five "ORIGINAL" Promissory Notes, and the "ORIGINAL" Mortgage, are "KEY ELEMENTS" in this foreclosure case which the District Court 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).

Great Plains National Bank is presumed to follow the law. Great Plains National Bank "KNEW" that it is "REQUIRED" by 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 "ACCEPTED" from the customer.

Great Plains National Bank is "KNOWLEDGEABLE" of the fact that its ""BOOKKEEPING"" entries will show that the "CREDITOR" in this foreclosure 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"" entries 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.

Pursuant to Title 12 U.S.C. Section 24, Paragraph 75, confers upon a bank the power to lend its money, "NOT ITS CREDIT." In the case of Norton Grocery Co. v. People's Nat. Bank of Abingdon Va., 144 S.E. 501, the Court held, "National banks may lend their money, but not their credit, and are not eleemosynary institutions. In the case of Federal Intermediate Credit Bank of Omaha v. L'Herisson, 33 F.2d 841, 847, "A national bank, even though solvent, cannot lend its credit to another." In the case of St. Louis Savings Bank v. Parmalee, 94 F. 925, 95 U.S. 557, the Court held, "Banking associations from the very nature of the business are prohibited from lending credit." In the case of Farmers and Miners Bank v. Bluefield National Bank, 11 F.2d 83, 271 U.S. 669, the court held, "A national bank has no power to lend its credit by

becoming surety, indorser, or guarantor for another." See also First Nat. Bank of Tallapoosa et. all v. Monroe, 69 S.E. 1123, 1124, and Merchants Bank v. Baird, 160 F. 642, 645. In the case of Bowen v. Needles Nat. Bank 94 F. 925, the court held, "A national bank has no power to lend its credit to any person or corporation." In the case of National Bank of Commerce v. Atkinson, 55 F. 465, 471, the Court held, "There is no doubt but what the law is that a national bank cannot loan its credit or become an accommodation indorser." See also Howard & Foster Co. v. Citizens' Nat. Bank of Union, 130 S.E. 758, 759.

Great Plains National Bank "DID KNOW" that it "NEEDED" Sam Leppert's signed applications and Promissory Notes. Great Plains National Bank "DID KNOW" that it risked "NONE OF ITS ASSETS" in the alleged Loans to Sam Leppert, but "NEVER" made Sam Leppert aware of those facts.

Great Plains National Bank "DID KNOW" 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", but "NEVER" made Sam Leppert aware of those fact. Had Great Plains National Bank produced its "BOOKKEEPING" entries when requested 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.

(App. at 40-43).

Great Plains National Bank "DID KNOW" 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. Simply put, "THERE IS NO UNITED STATES LAW THAT ALLOWS GREAT PLAINS NATIONAL BANK TO LEND ITS CREDIT."

F. THE ATTORNEY FOR GREAT PLAINS NATIONAL BANK ONLY REPRESENTS THE BANK.

The attorney for Great Plains National Bank, Jonathan R. Fay, has gone out of his way to convince this Court that Sam and Laura Leppert have concocted nonsensical arguments, but has not produced one scintilla of evidence to support his arguments. This Court is aware of the fact that he only "REPRESENTS" Great Plains National Bank, that statements made by him "ARE NOT FACTS" before this Court or the Barnes County District Court, and that statements made by him are to only "ENLIGHTEN" the Court as to what the case is about.

This Court is asked to take judicial notice of the entire Barnes County District Court record, to include the proceedings held before the Court. This Court will find that Jonathan R. Fay has been acting as "COUNSEL" and a "WITNESS" for Great Plains National Bank. This Court will also find that he has "REFUSED" to respond in good faith, when requested, to Sam Leppert's Request for

Admissions, (App. at 35-39), Sam Leppert's Request for Production of Documents, (App. at 40-44), and Sam Leppert's Interrogatories, (App. at 45-51). This Court will further find upon reading the Depositions of Jeanne M. Witt and Raymond Thielges, taken by Sam Leppert, that attorney, Jonathan R. Fay, objected to questions that were relevant to Sam Leppert's defense. (Docket Entry No. 47 and 48). Also, this Court is asked to "IGNORE" all references to the Chapter 12 Bankruptcy case contained in Great Plains National Bank's Appendix, for the reason, the Bankruptcy "WAS NOT" before the District Court.

CONCLUSION

Based upon all of the above facts, there was "NOT" sufficient evidence presented 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.

Accordingly, Sam Leppert and Laura Leppert pray that this Court of Appeals will overturn the Judgment of the Barnes County District Court and remand this case to the Barnes County District Court with instructions to dismiss Great Plains National Bank's Motion for Summary Judgment and Complaint with prejudice, and to void its May 14, 2008, Order, Authorizing Delivery of Sam Leppert's farm equipment, machinery, livestock and crops.

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 November 9, 2009, he served a true and correct copy of the foregoing Appellants' Reply Brief to the following address by U.S. first class mail, postage prepaid:

JONATHAN R. FAY
Suite 600 Dakota Center Building
51 Broadway
Fargo, North Dakota 58102



Sam Leppert