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20070301

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

SUPREME COURT NO. 20070301

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

DEC 13 2007

DARREL GUSTAFSON

STATE OF NORTH DAKOTA

Plaintiff and Appellee

v.

RAYMOND A. POITRA; LINUS F. POITRA;
UNITED STATES OF AMERICA; AND ALL
PERSONS UNKNOWN, CLAIMING ANY ESTATE
OR INTEREST IN, OR LIEN OR ENCUMBRANCE
UPON, THE REAL ESTATE DESCRIBED IN
THE COMPLAINT

Defendants

RAYMOND A. POITRA

Defendant and Appellant *pro se*

BRIEF ON APPEAL

FOR DEFENDANT/APPELLANT, *pro se*

Raymond A. Poitra
P.O. Box 240
Belcourt, North Dakota 58316

December 12, 2007

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20070301

Darrel Gustafson,

Plaintiff and Appellee

v.

Raymond A. Poitra; Linus F. Poitra;
United States of America; and all
Persons Unknown, claiming any Estate
or Interest in, or Lien or Encumbrance
Upon, the Real Estate Described in
the Complaint,

Defendants

Raymond A. Poitra,

Defendant and Appellant *pro se*.

BRIEF ON APPEAL

COMES NOW Raymond Poitra, Defendant and Appellant *pro se*, hereinafter Appellant and files this Brief on Appeal, under N. D. R. App. P. 4, from the default judgment entered in this action.

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NORTH DAKOTA RULES OF CIVIL PROCEDURE

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STATE DISTRICT COURT CASES

Darrel Gustafson v. Raymond A. Poitra; Linus F. Poitra; United States of America; and all Persons Unknown, claiming any Estate or Interest in, or Lien or Encumbrance Upon, the Real Estate Described in the Complaint.
Civil No. 40-06-C0134 5

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Const. N.D., Art. VI, § 2, N.D.C.C. §§ 27-02-04, 27-02-05, and 28-31-09.

STATEMENT OF THE ISSUES

QUESTION I:

Can Appellee file an action in State District Court when the statute of limitations has not been toll in a foreclosure action?

ANSWER:

No.

QUESTION II:

Can Appellee file an action in State District Court when the overlying debt encumbering the real estate has been discharged in a bankruptcy proceeding in U.S. Bankruptcy Court?

ANSWER:

No.

QUESTION III:

Does a State district Court have jurisdiction to hear an action on a foreclosure action when the overlying debt has been discharged in a bankruptcy proceeding in U.S. Bankruptcy Court?

ANSWER:

No.

QUESTION IV:

Must a Court provide a defendant due process with a notice of a hearing date prior to issuing a default judgment when Defendant has made a special appearance with a motion for dismissal and submitted evidence that the Court lacks subject matter jurisdiction?

Yes.

STATEMENT OF THE CASE/FACTS

Appellant owned controlling interest in Tomahawk Enterprises, Inc., a North Dakota corporation. Appellant made a loan from the Security State Bank on December 18, 1993, with the Small Business Administration (SBA) guaranteeing the loan. See Security Agreement Exhibit in the Appendix, p. 1. See also Schedule D Exhibit in the Appendix, p. 20. The SBA took a lien on the real estate at issue in this action. See Security Agreement Exhibit in the Appendix pp. 1-13. See Schedule A - Real Property Exhibit in the Appendix 19.

Appellant made the last payment to SBA February 1995, and then Appellant defaulted on the secured loan with SBA. Appellant made no more payments after February 1995. On November 7, 1996, Appellant filed bankruptcy on behalf of himself and Tomahawk Enterprises, Inc. Appellant's (Raymond A. Poitra. [Redacted]) file bankruptcy proceedings under bankruptcy case number 96-31441 wah. See U.S. Bankruptcy Court Exhibit in the Appendix, p 15 Appellant filed bankruptcy proceedings for Tomahawk Enterprises, Inc., EIN 45-0411257, under bankruptcy case number 96-31440 wah. See U.S. Bankruptcy Court Exhibit in the Appendix, p. 16.

SBA was a named creditor in the bankruptcy proceedings. See bankruptcy case number 96-31440 wah, Schedule D, page 3 of 4 Exhibit in the Appendix, p. 20. After both bankruptcy proceedings, case number 96-31441 wah and 96-31440 wah, were concluded, the SBA issued an IRS Form 1009-C Corrected, dated January 21, 2005, for the year ending 2004, discharging the SBA debt and lien in the Security Agreement from the loan with the Security State Bank; on the real estate at issue in this action. The SBA IRS Form 1009-C Corrected, dated January 21, 2005, has the SBA EIN of 53-0215587, for the loan number 61175130. The security agreement also

has loan number 61175130. See IRS Form 1009-C Corrected Exhibit in the Appendix, p. 14, and See Security Agreement Exhibit in the Appendix, pp. 1-13.. These forms were provided to the State District Court for Rolette County, with a motion to dismiss this action.

Plaintiff/Appellee had actual knowledge of the bankruptcy proceedings for both Appellant and Tomahawk Enterprises, Inc., as Plaintiff/Appellee was a named creditor in the bankruptcy proceedings. See bankruptcy case number 96-31440 wah, Schedule F, page 2 of 3 Exhibit in the Appendix, p. 21.

Plaintiff/Appellee purportedly purchased a second mortgage from the SBA and filed a foreclosure action in Darrel Gustafson v. Raymond A. Poitra; Linus F. Poitra; United States of America; and all Persons Unknown, claiming any Estate or Interest in, or Lien or Encumbrance Upon, the Real Estate Described in the Complaint, Civil No. 40-06-C0134, on October 2, 2006. Plaintiff/Appellee failed to provide Appellant with a notice of the foreclosure hearing. The District Court failed to provide Appellant of the notice for the foreclosure hearing. It appears that the District Court issued a default judgment *ex parte*, favoring Plaintiff/Appellee. Appellant filed a stay of execution on the default judgment to prevent the sale of the real estate at issue in this action. The trial court denied Appellant's motion for a stay of execution, and Plaintiff/Appellee then held a sheriff's auction sale of the real estate on November 16, 2007. See Certified District Court Exhibit in Appendix, pp. 22-27.

Appellant filed this appeal seeking reversal of the District Court order and judgment on the basis the District Court erred as the District Court lacked subject matter jurisdiction, and failed to ensure or provide Appellant with due process. Appellant seeks to have the sale of said real estate voided or vacated and title to said real estate returned to Appellant.

LEGAL ARGUMENT

ISSUE/QUESTION I.

Plaintiff/Appellee filed this action on October 2, 2006. Appellant made the last payment to SBA February 1995. Appellant defaulted on the security agreement with SBA after the payment in February 1995. SBA's right to enforce the lien arose when Plaintiff/Appellee failed to make the following payment on the loan after Plaintiff/Appellee made the February 1995 payment. Plaintiff/Appellee failed to toll the 10 year statute of limitations on mortgages found at N.D.C.C. 28-01-15. A legal action for the enforcement of a lien on real estate accrues when the right to that remedy arises. Paine v. Dodds, 103 NW 931 (1905). In this instance, SBA's right to enforcement arose immediately after Appellant stopped making payment in February 1995 according to the Security Agreement, which reads in part, "The Indebtedness shall immediately become due and payable, without notice or demand," See Security Agreement Exhibit in the Appendix, pp. 1-13.

When a statute of limitations is not tolled, the court lacks subject matter jurisdiction to hear the case. A judgment entered without personal or subject matter jurisdiction is void. McKenzie County Social Service Bd. v. C.G., 2001 ND 151 (N.D. 2001). And most recently the North Dakota Supreme Court held that a judgment entered without subject matter jurisdiction is void. Jane Roe v. John Doe, 649 N.W.2d 566 (ND 2002).

ISSUE/QUESTION II.

SBA discharged Plaintiff/Appellee's debt and lien in the Security Agreement with the Security State Bank; with the IRS Form 1009-C Corrected, dated January 21, 2005. See IRS

Form 1009-C Corrected Exhibit in the Appendix. p. 14. In this instance, SBA was the mortgagee, and discharged the lien on the real estate at issue pursuant to N.D.C.C. § 35-01-27. However SBA did not file any notices of the lien discharge with Rolette County Register of Deeds, as SBA utilized SBA issued IRS Form 1009-C Corrected, dated January 21, 2005, which is the proper form for SBA as a federal agency. Englert v. Dale, 142 NW 169 (1913). See IRS Form 1009-C Corrected Exhibit in the Appendix. p. 14.

ISSUE/QUESTION III.

United States bankruptcy laws and bankruptcy court proceedings pre-empt state laws and state court proceedings. Sherwood Partners, Inc. v. Lycos, Inc., 394 F.3d 1198 (9th Cir. 2005). Here the Stated District Court lacked jurisdiction because of federal preemption under the U.S. Bankruptcy Court proceedings. When a court lacks personal and subject matter jurisdiction, and the judge or court knowingly issues orders, all of its orders are void based on the fact that there was no personal or subject matter jurisdiction. The judge commits unlawful activity under a Code of Judicial Conduct, and the unlawful activity is a violation of the penalized party's due process rights. Johnson v. Zerbst, 304 U.S. 458 (1938).

“The law is well settled that a **void** order or judgment is **void** even before reversal.”

Valley v. Northern Fire & Marine Ins. Co., 254 U.S. 348 (1920).

Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply **VOID, AND THIS EVEN PRIOR TO REVERSAL.**

Old Wayne Mut. I. Assoc. v. MsDonough, 204 U.S. 8 (1850). [emphasis added].

QUESTION IV.

Appellant in this action provided the Court with evidence that the lien on the SBA mortgage was discharged in the U.S. Bankruptcy Court, and that SBA had in fact discharged the lien vis-a-vis the IRS Form 1009-C Corrected, dated January 21, 2005. See IRS Form 1009-C Corrected Exhibit in the Appendix, p.14. Appellant's action in providing the Court and Plaintiff/Appellee this information constituted an appearance and the trial Court erred by granting a *ex parte* default judgment. The trial court abuses its discretion when it grants a motion for default judgment after it has denied defendant's motion for dismissal thereby denying defendant an opportunity to file a responsive pleading. Filler v. Bragg, 559 N.W.2d 225 (N.D. 1997). "A formal written document is not required to constitute an appearance under this rule [N.D.R.Civ.P. 55]." Federal Land Bank v. Lillehaugen, 370 N.W.2d 517 (N.D. 1985). Finally, "The North Dakota Supreme Court has given the term 'appearance' a broad interpretation in the context of this rule [N.D.R.Civ.P. 55], which requires that notice be given before a default judgment may be entered against a party who has appeared in the action. Wallwork Lease & Rental Co. v. Schermerhorn, 398 N.W.2d 127 (N.D. 1986).

CONCLUSION

The reasons argued and stated above, Appellant filed this appeal seeking reversal of the District Court order and judgment on the basis the District Court erred as the District Court lacked subject matter jurisdiction, and failed to ensure or provide Appellant with due process. Appellant seeks to have the sale of said real estate voided or vacated and title to said real estate returned to Appellant.

DATED December 12, 2007.

FOR DEFENDANT/APPELLANT, *pro se*

A handwritten signature in cursive script, appearing to read "Raymond A. Poitra", is written above a horizontal line.

Raymond A. Poitra

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STATE OF NORTH DAKOTA

Defendants

Raymond A. Poitra,

Defendant and Appellant *pro se*.

CERTIFICATE OF SERVICE

The undersigned certifies that the Brief and Appendix on appeal in this action was sent by certified mail to the following on December 13, 2007.

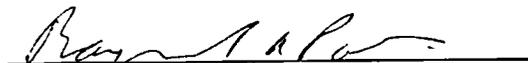
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DATED December 13, 2007.


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