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SEPTEMBER 21, 2018
STATE OF NORTH DAKOTA

No. 20180241

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Heartland State Bank,

Plaintiff and Appellee,

v.

Jared A. Larson,

Defendant and Appellant,

and

U.S. Express, Inc., Dale Redinger, and State of North Dakota acting by and through the Department of Human Services' Child Support Division, and all other parties in possession,

Defendants.

Appeal from the Order granting motion to amend complaint, dated, December 27th, 2017; the Order granting motion for summary judgment, dated May 16th, 2018; the Order for Judgment dated May 16th, 2018; and the Judgment entered on May 16th, 2018; LaMoure County District Court,

Case No. 23-20170-CV-00014

The Honorable Daniel D. Narum, Presiding

BRIEF OF DEFENDANT AND APPELLANT

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II. STATEMENT OF THE CASE

[¶ 4] Heartland State Bank ("Heartland") brought a Complaint against Jared A. Larson ("Larson") on March 16, 2017. (App. p. 6, 41). The Complaint was a mortgage foreclosure action on certain agricultural real property owned by Larson in LaMoure County, North Dakota. (App. p. 6).

[¶ 5] Larson served Heartland with an Answer to the Complaint on April 11th, 2017. (App. p. 42, 44). (The other defendants are lienholders against the subject property. Only Larson served an answer to the Complaint. The other parties were held in default. (App. p. 62).)

[¶ 6] Heartland moved for summary judgment against Larson on June 22nd, 2017. (App. p. 45, 47). Oral arguments on Heartland's summary judgment motion were scheduled for September 7th, 2017. (App. p. 56, 57). The day before the scheduled hearing, however, Heartland filed a withdrawal of its motion. (App. p. 58, 59).

[¶ 7] Heartland moved to amend its Complaint on September 11th, 2017. (App. p. 60, 72). The district court granted Heartland's motion to amend its complaint. (App. p. 89).

[¶ 8] Heartland brought its amended Complaint against Larson on January 3rd, 2018. (App. p. 90, 122).

[¶ 9] Larson served Heartland with an Answer to the amended Complaint on January 17th, 2018. (App. p. 123, 126).

[¶ 10] Heartland moved for summary judgment against Larson on its amended Complaint on January 26th, 2018. (App. p. 127, 140). On May 16th, 2018, the district court entered a written order granting Heartland's motion for summary judgment, an order for judgment, and a judgment. (App. p. 150, 152, 155). Heartland noticed entry of the judgment on May 29th, 2018. (App. p. 158, 159). Larson timely perfected his appeal to this Court on June 12th, 2018. (App. p. 160).

III. STATEMENT OF THE FACTS

A. The Original Complaint And The Mortgage.

[¶ 11] In its original Complaint, Heartland alleged that Larson defaulted under the terms and conditions of three promissory notes and a mortgage because Larson had, among other things, failed, neglected, and refused to make the payments therein provided. (App. p. 8). The three promissory notes were numbered 77392, 77444, and 77886. (App. p. 7).

[¶ 12] Larson executed and delivered Promissory Note No. 77392 to Heartland on May 1st, 2014. Id. This was an operating loan for his farming operation. (App. p. 49). The principal amount of the note was $200,000.00. The maturity date was April 30th, 2015. Larson agreed to pay to Heartland or its order amounts advanced by Heartland from time to time under the terms of the note up to the maximum outstanding principal balance of $200,000.00 plus interest. He agreed to pay the note on demand, but that if no demand was made, he agreed to pay the note in a single installment of all unpaid principle and accrued

interest on the maturity date—April 30th, 2015. On May 11th, 2015, Heartland granted Larson a written extension of the note's maturity date to October 30th, 2015. Id. The written extension provided that except for the new maturity date, all other terms of the original obligation remained in effect. (App. p. 49, 50). On December 10th, 2015, Heartland granted Laron another written extension of the note's maturity date, this time to March 1st, 2016. (App. p. 50). The second written extension provided that except for the new maturity date, all other terms of the original obligation remained in effect. Id.

[¶ 13] Larson executed and delivered Promissory Note No. 77444 to Heartland on June 11th, 2014. (App. p. 7). This was an operating loan for his farming operation. (App. p. 51). The principal amount of the note was $70,000.00. The maturity date was April 30th, 2015. Larson agreed to pay to Heartland or its order amounts advanced by Heartland from time to time under the terms of the note up to the maximum outstanding principal balance of $70,000.00 plus interest. He agreed to pay the note on demand, but that if no demand was made, he agreed to pay the note in a single installment of all unpaid principle and accrued interest on the maturity date—April 30th, 2015. On May 11th, 2015, Heartland granted Larson a written extension of the note's maturity date to October 30th, 2015. The written extension provided that except for the new maturity date, all other terms of the original obligation remained in effect. On December 10th, 2015, Heartland granted Larson another written extension of the note's maturity date, this time to March 1st, 2016. The second written extension provided that except for the new maturity date, all other terms of the original obligation remained in effect. Id.

[¶ 14] Larson executed and delivered Promissory Note No. 77886 to Heartland on July 30th, 2015. (App. p. 7). The purpose of this loan was to pay off (refinance) ten loans that

Heartland made to him (none of those loans are the subject of this action). (App. p. 52). The principal amount of the note was $575,393.70. The maturity date was July 30th, 2020. Larson agreed to pay to Heartland or its order the principle sum of $575,393.70 plus interest on the unpaid principal balance until the note matures or the obligation is accelerated. He agreed to pay the note on demand, but that if no demand was made, he agreed to pay the note in 60 payments, consisting of 59 payments of $11,108.32 each beginning on August 30th, 2015, and on the 30th day of each month thereafter, and a single, final payment of the entire unpaid balance of principal and interest due on July 30th, 2020. Id.

[¶ 15] In its original Complaint, Heartland alleged that to secure payment of the above three notes, Larson executed and delivered to Heartland a mortgage (the "Mortgage") on agricultural real property located in LaMoure County, North Dakota. (App. p. 7, 9).

[¶ 16] The Mortgage contains a laundry list of events considered to be an "Event of Default" if any of them occur. (App. p. 24, 25, 73). The following is a partial list of the events:

> 15. DEFAULT. Mortgagor will be in default if any of the following events [known separately and collectively as an Event of Default] occur:
>
> [A.] Payments. Mortgagor fails to make a payment in full when due.
>
> . . . .
>
> [E.] Other Documents. A default occurs under the terms of any other document relating to the Secured Debts.
>
> . . . .
>
> [H.] Judgment. Mortgagor fails to satisfy or appeal any judgment against Mortgagor.
>
> . . . .

(App. p. 24, 73, 74) (emphasis added).

[¶ 17] In its original Complaint, the only "Event of Default" expressly alleged by Heartland was "A. Payments. Mortgagor fails to make a payment in full when due"; it

also requested enforcement of the strict acceleration provisions in the notes and Mortgage:

> 14. Default has occurred under the terms and conditions of the Notes and Mortgage in that Larson has, among other things, failed, neglected, and refused to make the payments therein provided and Heartland elects and declares the whole amount of the unpaid sums, and interest therein, to be due and owing.

(App. p. 8, 74).

[¶ 18] In the prayer for relief of the original Complaint, it was requested that a determination be made of the amount due on the notes and Mortgage and that it be decreed that there be valid lien on the property for the payment of that amount:

> [1.] Determining and adjudging the amount due to Plaintiff under the terms and conditions of the Notes and Mortgage, including principal, interest, and costs and disbursements of the action;
> [2.] That it be decreed, for the payment of the amount to be due and owing on the Notes and Mortgage, together with the costs and expenses of sale, that the Plaintiff has a valid and subsisting lien upon the premises;
> . . . .

(App. p. 10, 74).

B. <u>The Amended Complaint</u>.

[¶ 19] In its amended Complaint, Heartland again alleged that an "Event of Default" was "A. Payments. Mortgagor fails to make a payment in full when due," but it is no longer requesting enforcement of the strict acceleration provisions in the notes and Mortgage as it did in the original Complaint:

> 14. Default occurred under the terms and conditions of the Notes and Mortgage in that Larson, among other things, failed, neglected, and refused to make the payments as therein provided.

(App. p. 66, 92).

[¶ 20] In its amended Complaint, Heartland is now expressly alleging two additional "Event of Default." In paragraph 22 of its amended complaint, Heartland is alleging that

the two additional "Event of Default" are "E. Other Documents. A default occurs under the terms of any other document relating to the Secured Debts" and "H. Judgment. Mortgagor fails to satisfy or appeal any judgment against Mortgagor." In particular, Heartland expressly alleges that Larson has failed to satisfy a judgment that Heartland obtained against him in Stutsman County, North Dakota:

> Heartland is still the lawful owner and holder of the Mortgage and related documents referred to above. Larson has also defaulted under the Mortgage by allowing defaults under the terms of other documents related to the secured debt and his failure to satisfy the Judgment against him in the Stutsman County Action.

(App. p. 67, 93) (emphasis added).

[¶ 21] In Heartland's original Complaint, no mention was made whatsoever of the judgment in Stutsman County. (App. p. 6).

[¶ 22] In the prayer for relief of its amended Complaint, Heartland is no longer requesting that a determination be made of the amount due on the notes and Mortgage and is no longer requesting that it be decreed that there be a valid lien on the property for the payment of that amount as it did in the original Complaint. Heartland is now requesting that a determination be made of the amount due on the judgment entered against Larson in Stutsman County and that it be decreed that there be a valid lien on the property for the payment of that amount:

> [1.] Determining and adjudging the remaining amount due to Plaintiff under the Judgment entered against Larson in Stutsman County District Court, Case No. 47-2016-CV-00361, including costs and disbursements of the this action;
> [2.] That it be decreed, for the payment of the remaining amount to be due and owing on the Judgment, together with the costs and expenses of sale, that the Plaintiff has a valid and subsisting lien upon the premises;
> . . . .

(App. p. 69, 94).

[¶ 23] In amending its Complaint, Heartland has switched from the "amount due" on the notes and Mortgage to the "amount due" on the judgment entered against Larson in Stutsman County. As will be shown, it is undisputed that these amounts are not the same.

C. <u>The Pre-Foreclosure Notice</u>.

[¶ 24] In its original and amended Complaint, Heartland alleged that it served Larson with the pre-foreclosure notice in the manner required by law:

> Not less than 30 days and no more than 90 days prior to the commencement of this action, Heartland did serve, in the manner provided by law, a written notice of its intention to foreclose the Mortgage. The notice contained a description of the Property, the date and amount of the Mortgage, the amount due to bring the installments of principal and interest current as of a date specified, and a statement that if the amount due was not paid within thirty (30) days from the date of service of the notice proceedings would be commenced to foreclose the Mortgage.

(App. p. 9, 68, 93).

[¶ 25] The notice before foreclosure served on Larson stated that a default had occurred in the terms and conditions of the three notes secured by the Mortgage: Note No. 77392, Note No. 77444, and Note No. 77886. (App. p. 38, 39). It gave the amount due of each note: Note No. 77392: $212,845.39, Note No. 77444: $25,949.29, and Note No. 77886: $96,083.20. <u>Id</u>. The total owed, therefore, would be $334,877.87. The notice also stated that, "YOU ARE HEREBY FURTHER NOTIFIED that foreclosure of said mortgage will be commenced unless within thirty (30) days from the date of mailing of this notice the amount due as set forth above, with accrued interest, is paid, and proof of payment of all delinquent real estate taxes is provided." (App. p. 39). According to the notice, therefore, Larson would have had to pay Heartland the sum of $334,877.87 within the specified time period to prevent commencement of foreclosure of the Mortgage.

[¶ 26] The notice before foreclosure did not, however, allege that Larson was in default under the terms of any other document relating to the secured debts. (App. p. 38, 39). It did not allege that Larson had failed to satisfy or appeal any judgment against him. Id. In particular, it made no allegation whatsoever that Larson had failed to satisfy a judgment against him in Stutsman County. Id. It is uncontroverted that it did not state the amount due on the judgment as of the date (December 30th, 2016) of the notice before foreclosure. Id. It is undisputed that it did not state that Larson had to pay the amount due on the judgment within 30 days to prevent commencement of foreclosure of the Mortgage. Id.

[¶ 27] It is uncontroverted that Heartland's notice before foreclosure stated that Larson had 30 days to cure the amount in arrears on the three notes rather than giving him 30 days to cure the amount actually in arrearage as alleged by the amended Complaint: the amount due on the Stutsman County Judgment. (App. 39). It is undisputed that these two amounts are not the same. As shown in paragraph 25 above, the "amount due" on the three notes on the date (December 30th, 2016) of the notice of foreclosure was $334,877.87. About 5 months earlier, on July 27th, 2016, Heartland obtained a default judgment against Larson in the amount of $782,273.17 in Stutsman County District Court. (App. p. 66, 67, 92, 93). According to Heartland, about 13 months after the date of the notice of foreclosure, as a result of collection efforts, and adding in post-judgment interest, the balance owed on the judgment was $395,547.96 on January 26th, 2018. (App. p. 131, 139). This is more than the amount demanded in the notice before foreclosure. The two amounts, therefore, were never the same.

IV. STATEMENT OF THE STANDARD OF REVIEW

[¶ 28] The propriety of permitting an amendment to a pleading by leave of court, under Rule 15(a) of the North Dakota Rules of Civil Procedure, rests within the sound discretion of the trial court, and the trial court's decision will not be disturbed on appeal unless an abuse of discretion is shown. Perdue v. Knudson, 179 N.W. 2d 416, 419 (N.D. 1970). Under Rule 15(a)(2), once a party is not entitled to amend its pleading as a matter of course, it may, "amend its pleading only with the opposing party's written consent or the court's leave…," and, "[l]eave shall be freely given when justice so requires." N.D. R. CIV. P. 15(a)(2). The Court holds that when a proposed amendment would be futile, a district court does not abuse its discretion in denying a motion to amend a complaint. Johnson v. Hovland, 2011 ND 64, ¶ 8, 795 N.W. 2d 294. "Rule 15 was adopted from the federal rule, and we, thus, treat interpretations placed on the rule by federal courts as highly persuasive." Wayne-Juntunen Fertilizer Co. v Lassonde, 474 N.W. 2d 254, 255 (N.D. 1991). The U.S. Supreme Court holds that a court may deny leave to amend a complaint if it finds undue delay or bad faith on the part of the plaintiff, prejudice to the defendant, or futility of the amendment under the Federal Rules of Civil Procedure. Forman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed. 2d 222 (1962).

[¶ 29] The Court reviews the district court's decision to grant summary judgment de novo. Dunford v.Tryhus, 2008 ND 212 ¶ 5, 776 N.W. 2d 539. " 'Summary judgment is a procedural device for promptly disposing of a lawsuit or issues in a lawsuit without a trial if there are no genuine issues of material fact or inferences which can be reasonably drawn from undisputed facts, or if the only issues to be resolved are questions of law.' " Riverside Park Condos. Unit Owners Ass'n v. Lucas, 2005 ND 26, ¶ 8, 691 N.W. 2d 862

(quoting Zuger v. State, 2004 ND 16, ¶ 7, 673 N.W. 2d 615). A party seeking summary judgment has the initial burden of showing that no dispute exists as to either material facts or inferences to be drawn from the undisputed facts and that the movant is entitled to judgment as a matter of law. Perius v. Nodak Mutual Insurance Company, 2010 ND 80, ¶ 9, 782 N.W. 2d 355.

V. LAW AND ARGUMENT

A. Pre-Foreclosure Notice Requirements In North Dakota.

[¶ 30] In order to bring an action in a district court for foreclosure of a mortgage on real property in North Dakota, Heartland must comply with the statutory provisions of Chapter 32-19 of the North Dakota Century Code. N.D. CENT. CODE § 32-19-01; Federal Land Bank of St. Paul v. Waltz, 423 N.W. 2d 799, 801 (N.D. 1988). Section 32-19-20 requires service of a written notice on the title owner of record at least 30 days before the commencement of a real estate mortgage foreclosure action. Section 32-19-21 specifies the contents of the notice:

1. A description of the real estate.
2. The date and amount of the mortgage.
3. The amount due to bring the installments of principal and interest current as of a date specified, and the amount advanced by the mortgagee for taxes, insurance, and maintenance, separately itemized.
4. A statement that if the amount due is not paid within thirty days from the date of the mailing or service of the notice proceedings will be commenced to foreclosure the mortgage.

N.D. CENT. CODE § 32-19-21 (emphasis added). Section 32-19-28 permits a default to be cured:

> If the record title owner or the personal representative of the owner's estate, within thirty days from the service of notice before foreclosure, performs the conditions or complies with the provisions upon which default in the mortgage occurred, the mortgage must be reinstated and remain in full force and effect the same as though a default had not occurred in the mortgage.

N.D. CENT. CODE § 32-19-28.

[¶ 31] "[T]he [North Dakota] Legislature intended that there be strict compliance with the statutory provisions concerning foreclosure of a mortgage, including the provisions for notice before foreclosure. *Federal Land Bank of St. Paul v. Waltz*, 423 N.W. 2d 799 (N.D. 1988)." State Bank of Kenmare v. Lindberg, 436 N.W. 2d 12, 15 (N.D. 1989) (clarification and emphasis added). According to the Court in Lindberg, the "amount due" stated in the notice before foreclosure must be the amount actually in arrearage:

> Subsections 32-19-21(3) and (4), N.D.C.C., require the notice before foreclosure to separately state the "amount due for principal, interest, and taxes" and that "if the amount due is not paid within thirty days… proceedings will be commenced to foreclosure the mortgage." That language must be harmonized with the language of Section 32-19-28, N.D.C.C., giving the record title owner thirty days from the service of notice before foreclosure to "perform the conditions or comply with the provisions upon which default in the mortgage shall have occurred," and thereafter the "mortgage shall be reinstated and shall remain in full force and effect the same as though no default had occurred."
>
> . . . .
>
> In order to give meaning to all the provisions for notice before foreclosure, we believe the language of Sections 32-19-21 and 32-19-28, N.D.C.C., when read together, authorizes reinstatement of the mortgage by paying the amount actually in arrearage (i.e. the "amount due" under Section 32-19-21, N.D.C.C.) within thirty days after service of the notice before foreclosure. If the title owner pays the amount actually in arrearage, he will have performed the conditions or complied with the provisions upon which default in the mortgage shall have occurred within the meaning of Section 32-19-28, N.D.C.C., and the mortgage shall be reinstated.

Lindberg, 436 N.W. 2d at15 (emphasis added, quotation marks in the original).

[¶ 32] The Court's decision in Lindberg underscores the purpose of the notice before foreclosure requirement: to warn the debtor of the potential foreclosure so that he may make payment of the amount actually in arrears or cure the default and save the costs and trouble of a foreclosure:

> That interpretation ensures strict compliance with the provisions for foreclosure of a mortgage and recognizes that the purpose of a notice before foreclosure is to afford the record title owner an opportunity to be informed of the proposed foreclosure so that he can pay the amount due and avoid the cost, expense, and annoyance of foreclosure. *Nonweiler v. Rettinger*, 65 N.D. 436, 259 N.W. 500 (1936).

Lindberg, 436 N.W. 2d at 15.

B. Heartland's Proposed Amended Complaint Was Futile.

[¶ 33] As stated, the day before the scheduled hearing on Heartland's motion for summary judgment on its original Complaint, it filed a withdrawal of its motion. (App. p. 58, 59).

[¶ 34] Heartland claims that the reason for the withdrawal was that while preparing for the summary judgment hearing, Heartland's attorney learned of facts that necessitated amending the Complaint. (App. p. 62). In particular, Heartland claims that its attorney learned that the three promissory notes referenced in the original Complaint had already been subject to a legal action in Stutsman County District Court, North Dakota, and that Heartland had already obtained a default judgment against Larson on those three promissory notes in that action. (App. p. 86). Heartland claimed that it would be seeking an amendment of the Complaint to correct the factual allegations and correctly plead that it had already secured a judgment against Larson for his debt obligations under the three promissory notes. Id.

[¶ 35] On July 27th, 2016, Heartland did obtain a default judgment against Larson in the amount of $782,273.17 in Stutsman County District Court, North Dakota. (App. p. 92, 93). This is the legal action on the three promissory notes that Heartland's attorney is referring to.

[¶ 36] Larson opposed Heartland's motion to amend its Complaint, arguing that it was futile, made in bad faith, and would prejudice Larson in maintaining his affirmative defenses of waiver and estoppel on the merits. (App. 73). In particular, Larson argued that it was futile because of the statutory requirements for pre-foreclosure notices. (App. 76, 77, 78). In effect, Larson was arguing that by amending its Complaint, Heartland would, in effect, make its notice before foreclosure fatally defective.

[¶ 37] Heartland's notice before foreclosure is fatally defective because it is uncontroverted that it said Larson had 30 days to cure the amount in arrears on the three notes rather than giving him 30 days to cure the amount actually in arrearage as alleged by the proposed amended complaint: the amount due on the Stutsman County Judgment. It is undisputed that these two amounts are not the same. As shown in paragraph 25 above, the "amount due" on the three notes on the date (December 30th, 2016) of the notice of foreclosure was $334,877.87. As stated, about 5 months earlier, on July 27th, 2016, Heartland obtained a default judgment against Larson in the amount of $782,273.17 in Stutsman County District Court. As stated, according to Heartland, about 13 months after the date of the notice of foreclosure, as a result of collection efforts, and adding in post-judgment interest, the balance owed on the judgment was $395,547.96 on January 26th, 2018. This is more than the amount demanded in the notice before foreclosure. The two amounts, therefore, were never the same.

[¶ 38] Heartland has failed to strictly comply with the provisions for foreclosure of a mortgage because the notice before foreclosure did not state the amount actually in arrearage as alleged by the proposed amended Complaint: the amount due on the Stutsman County Judgment. One of the requirements of the contents of a notice before

foreclosure is that it state, "[t]he amount due to bring the installments of principle and interest current as of a date specified…." N.D. CENT. CODE § 32-19-21. Because of the amended Complaint, the amount due of installments of principle would be the amount due on the Stutsman County Judgment. The notice is legally insufficient because it did not contain the language required by North Dakota Century Code Section 39-19-21. By amending its complaint, Heartland would, in effect, make its notice before foreclosure fatally defective. The defect would void Heartland's foreclosure action.

[¶ 39] It was an abuse of discretion for the district court to grant Heartland's motion for leave to amend its Complaint because Heartland's legally insufficient notice before foreclosure made its proposed amended Complaint futile.

C. <u>The District Court Held, In Effect, That Larson Had Not Defaulted On The Mortgage</u>.

[¶ 40] In granting Heartland's motion for summary judgment on its amended Complaint, the district court held that the notice before foreclosure was legally valid as there were no installments of principal and interest owed by Larson because his debt obligations had already been reduced to a judgment in Stutsman County District Court:

> The Notice Before Foreclosure served by Heartland State Bank did comply with the requirements of N.D.C.C. Ch. 32-19 under the circumstances. At the time Heartland State Bank served the Notice Before Foreclosure upon Larson there were no installments of principal and interest due and owing by Larson because the debt obligations had already been reduced to a judgment entered in Stutsman County District Court, Case No. 47-2016-cv-00361, in the amount of $782,273.17, plus interest at the daily rate of $126.23 from and after July 13th, 2016 to the date of the entry of the Judgment.

(App. p. 151).

[¶ 41] The district court held, in effect, that Larson had <u>not</u> defaulted on the Mortgage as there were no installments of principal and interest due because his debt obligations had

already been reduced to a money judgment. As stated, one of the requirements of the contents of a notice before foreclosure is that it state, "[t]he amount due to bring the installments of principle and interest current as of a date specified…." N.D. CENT. CODE § 32-19-21. If Larson is not in default under the Mortgage, then this Court should reverse the district court's order granting Heartland Summary judgment on its amended Complaint and order that Larson be granted summary judgment against Heartland dismissing Heartland's amended Complaint. The district court's holding flies in the face of Heartland's new allegations in its amended Complaint that Larson defaulted on the Mortgage by allowing defaults under the terms of other documents related to the secured debt and his failure to satisfy the judgment against him in Stutsman County District Court. (App. p. 67, 93). As stated, in the prayer for relief of its amended Complaint, Heartland is no longer requesting as it did in its original Complaint that a determination be made of the amount due on the notes and Mortgage and is no longer requesting that it be decreed that there be a valid lien on the property for the payment of that amount. (App. p. 69, 94). Heartland is now requesting that a determination be made of the amount due on the judgment entered against Larson in Stutsman County and that it be decreed that there be a valid lien on the property for the payment of that amount. Id.

D. Heartland Failed Its Initial Burden Of Showing That It Was Entitled To Judgment As A Matter Of Law.

[¶ 42] In Larson's answer to Heartland's amended Complaint, Larson denied, "the implied allegation in Paragraph 23 of Plaintiff's Amended Complaint that Larson was served with a legally sufficient notice before foreclosure." (App. p. 124).

[¶ 43] As stated, Heartland moved for summary judgment against Larson on its amended Complaint on January 26th, 2018. (App. p. 127, 140). Larson opposed Heartland's

motion for summary judgment on its amended complaint, arguing that by amending its complaint, Heartland had, in effect, made its notice before foreclosure fatally defective. (App. p. 142).

[¶ 44] In Section V(B) above of this brief, Larson showed that Heartland, by amending its complaint, had, in effect, made its notice before foreclosure fatally defective because the notice before foreclosure did not state the amount actually in arrearage as alleged by the amended Complaint: the amount due on the Stutsman County Judgment. Heartland has failed to strictly comply with the provisions for foreclosure of a mortgage. The district court's holding that the notice before foreclosure was legally valid goes against the purpose of the notice before foreclosure requirement: to warn the debtor of the potential foreclosure so that he may make payment of the amount actually in arrears or cure the default and save the costs and trouble of a foreclosure. Lindberg, 436 N.W. 2d at 15. Heartland, therefore, failed its initial burden of showing that it was entitled to judgment as a matter of law.

E. Larson Was Entitled To Judgment Against Heartland As A Matter Of Law.

[¶ 45] Oral arguments on Heartland's summary judgment motion on its amended Complaint were held on April 5th, 2018. (App. p. 150). At the hearing, in addition to arguing why the district court should not grant the motion, Larson's attorney argued that the district court should grant summary judgment in favor of Larson against Heartland pursuant to Rule 56(c) of the North Dakota Rules of Civil Procedure:

> And, your Honor, I think that also according to Rule 56© of the Rules of Civil Procedure, the last sentence says "Summary judgment, when appropriate, may be rendered against the moving party." and, I know I didn't make my particular response in the form of a summary judgment motion, Your Honor, but I would argue that the court will - - would have the authority to grant summary judgment in favor of Mr. Larson and against the bank in this case. But the - - but I don't

> think it's - - there's no dispute that the Notice Before Foreclosure said he had 30 days to cure the amount in the three notes. It doesn't say that he had 30 days to cure the amount actually in arrears, as alleged by the Amended Complaint, which would be the amount on the - - due on the Stutsman County Judgment.

(Transcript of April 5th, 2018, hearing, p. 9, ll. 19-25, p. 10, ll. 1-7.)

[¶ 46] In Section V(B) above of this brief, Larson showed that Heartland, by amending its complaint, had, in effect, made its notice before foreclosure fatally defective because the notice before foreclosure did not state the amount actually in arrearage as alleged by the amended Complaint: the amount due on the Stutsman County Judgment. Heartland has failed to strictly comply with the provisions for foreclosure of a mortgage. Larson, therefore, was entitled to judgment against Heartland as a matter of law.

VI. CONCLUSION

[¶ 47] Larson respectfully requests that this Court reverse the district court's order granting Heartland's motion to amend its Complaint or in the alternative, reverse the district court's order granting Heartland summary judgment on its amended Complaint and order that Larson be granted summary judgment against Heartland dismissing Heartland's amended Complaint

Dated this 21st day of September, 2018.

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Jared A. Larson, et al.,

Defendant and Appellant.

Appeal from the Order granting motion to amend complaint, dated, December 27th, 2017; the Order granting motion for summary judgment, dated May 16th, 2018; the Order for Judgment dated May 16th, 2018; and the Judgment entered on May 16th, 2018; LaMoure County District Court,

Case No. 23-20170-CV-00014

The Honorable Daniel D. Narum, Presiding

ATTORNEY'S CERTIFICATE OF SERVICE BY U.S. MAIL

[¶ 1] I, James F. Lester, hereby declare that I am the attorney for Defendant and Appellant, Jared A. Larson, and that I served the following:

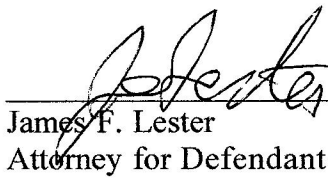
[A] BRIEF OF DEFENDANT AND APPELLANT
[B] APPENDIX TO BRIEF OF DEFENDANT AND APPELLANT

on September 22nd, 2018, by placing a true and correct copy thereof in an envelope addressed as follows, to wit:

Kasey D. McNary
Attorney at Law
P.O. Box 6017
Fargo, N.D. 58108-6017

and depositing the same with postage prepaid in the United States mail at Fargo, North Dakota. Under penalty of perjury, I declare that the foregoing is true and correct.

Dated this 22nd day of September, 2018.



James F. Lester
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STATE OF NORTH DAKOTA

No. 20180241

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Heartland State Bank,

Plaintiff and Appellee,

v.

Jared A. Larson,

Defendant and Appellant,

and

U.S. Express, Inc., Dale Redinger, and State of North Dakota acting by and through the Department of Human Services' Child Support Division, and all other parties in possession,

Defendants.

Appeal from the Order granting motion to amend complaint, dated, December 27th, 2017; the Order granting motion for summary judgment, dated May 16th, 2018; the Order for Judgment dated May 16th, 2018; and the Judgment entered on May 16th, 2018; LaMoure County District Court,

Case No. 23-20170-CV-00014

The Honorable Daniel D. Narum, Presiding

ATTORNEY'S CERTIFICATE OF SERVICE BY U.S. MAIL

[¶ 1] I, James F. Lester, hereby declare that I am the attorney for Defendant and Appellant, Jared A. Larson, and that I served the following:

[A] CORRECTED BRIEF OF DEFENDANT AND APPELLANT (COVER SHEET IS BEING CORRECTED)
[B] CORRECTED COVER SHEET OF APPENDIX TO BRIEF OF DEFENDANT AND APPELLANT

on September 26th, 2018, by placing a true and correct copy thereof in an envelope

addressed as follows, to wit:

Kasey D. McNary
Attorney at Law
P.O. Box 6017
Fargo, N.D. 58108-6017

and depositing the same with postage prepaid in the United States mail at Fargo, North Dakota. Under penalty of perjury, I declare that the foregoing is true and correct.

Dated this 26th day of September, 2018.

James F. Lester
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