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NOVEMBER 28, 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

REPLY BRIEF OF DEFENDANT AND APPELLANT

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I. LAW AND ARGUMENT

A. Statutory Provisions Concerning Foreclosure Of A Mortgage Must Be Strictly Complied With; Therefore, Any Defects In The Notice Before Foreclosure Are Fatally Defective If They Are Raised By The Debtor During The Pendency Of The Foreclosure Action.

[¶ 1] According to Heartland, this Court holds that the statutory provisions concerning notice before foreclosure of a mortgage do not have to be strictly complied with:

> Larson argued to the district court that HSB's failure to state the amount in arrears under the Stutsman County Judgment in the Notice Before Foreclosure rendered the action void. Under North Dakota law, a judgment is void if the district court lacked subject matter jurisdiction over the action or personal jurisdiction over the parties. First Western Bank & Trust v. Wickman, 527 N.W. 2d 278, 279 (N.D. 1995). "[S]trict compliance with the notice before foreclosure provisions is not a jurisdictional prerequisite to the district court's exercise of subject matter jurisdiction over the foreclosure action…." Northwestern Nat'l Life Ins. v. Delzer, 425 N.W. 2d 365, 368 (N.D. 1988). This Court has concluded that there is a "clear legislative intent that failure to strict comply with the notice provisions does not automatically void all subsequent proceedings as a matter of law." First Western Bank & Trust v. Wickman, 527 N.W. 2d 278, 280 (citing Delzer, 425 N.W.2d at 368).

(Brief of Appellee, ¶ 36 (quotation marks in the original).)

[¶ 2] Heartland's reliance on Wickman and Delzer is misplaced.

[¶ 3] This Court in Delzer and Wickman did hold that failure to strictly comply with the notice provisions does not automatically voids all subsequent proceedings as a matter of law, but it also held in both cases that the statutory provisions concerning foreclosure of a mortgage, including the notice before foreclosure requirements, must be strictly complied with, and that any defects in the notice are fatally defective if they are raised by the debtor during the pendency of the foreclosure action, which the defendants in Delzer and Wickman did not do. If they are not raised during the pendency of the foreclosure action, failure to strictly comply with the notice provisions does not rise to the level of

jurisdictional defects which render the judgment void as a matter law. Delzer, 425 N.W.2d at 367-368; Wickman, 527 N.W. 2d at 278, 280, 282 n.1.

[¶ 4] This Court in Wickman distinguished its holding from its holding in State Bank of Kenmare v. Lindberg, 436 N.W. 2d 12 (N.D. 1989). One difference between the two cases is that during the pendency of the foreclosure action, the debtor in Lindberg alleged that the notice before foreclosure was defective:

> Our holding does not contradict this Court's holding in State Bank of Kenmare v. Lindberg, 436 N.W. 2d 12 (ND 1989). In Lindberg, this Court held a creditor may not accelerate the entire mortgage debt until thirty days after the service of notice before foreclosure. The debtor may prevent foreclosure by payment of the amount actually in arrears, the installment, within the thirty-day period. Lindberg at 16.…Thus, a creditor may not demand more than the actual amount due at the time of notice (the installment due). In Lindberg, this Court specifically noted "the defect in the notice before foreclosure was raised during the pendency" of the foreclosure action. Lindberg at 16. Lindberg did not say the trial court's jurisdiction or the underlying debt was affected by the defective notice. As this Court held in Delzer, defect in the notice must be raised during the pendency of the original action. Delzer[, 425 N.W. 2d] at 368. In this case it was not, and in this proceeding Wickman [,the debtor,] argues the amount stated in the notice was the correct amount.

Wickman, 527 N.W.2d at 282 n. 1 (emphasis added, clarifications added, internal citation omitted).

[¶ 5] Unlike the debtors in Wickman and Delzer, who did not allege that the notice before foreclosure was defective during the pendency of the foreclosure action, Larson raised the issue of a defect in the notice during the pendency of the foreclosure action. This Court's decisions in Wickman and Lindberg underscore 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. Wickman, 527 N.W. 2d at 280, 282 n. 1; Lindberg,

436 N.W. 2d at 15. Larson showed in his "Brief of Defendant and Appellant" filed with this Court that Heartland's notice did not state the amount actually in arrears.

B. The Notice Before Foreclosure Must Contain The Amount Actually In Arrears, Not A Hypothetical Amount.

[¶ 6] According to Heartland, not only is there no requirement that the statutory provisions concerning notice before foreclosure of a mortgage be strictly complied with, the notice may contain a hypothetical amount in arrears:

> The Notice Before Foreclosure served by HSB contained a description of the real estate, the date and amount of the mortgage, and a statement that if the amounts were not paid within 30 days a foreclosure action would be commenced. (App. 38-39). The Notice Before Foreclosure also included amounts then in default under the Notes if the Stutsman County Judgment had not already been entered against Larson. Id.

(Brief of Appellee, ¶ 26 (emphasis added).)

[¶ 7] This Court holds, however, that the notice must contain the amount actually in arrears. Lindberg, 436 N.W.2d at 15 (holding that a debtor may prevent foreclosure by payment of the amount actually in arrears, the installment, within the thirty-day period after the service of notice before foreclosure); Wickman, 527 N.W.2d at 282 n. 1 ("Thus, a creditor may not demand more than the actual amount due at the time of notice (the installment due)").

[¶ 8] In fact, in Heartland's amended mortgage foreclosure complaint, it expressly alleges that the amount actually in arrears, the installment, is the amount due of the judgment in Stutsman County as of September 1st, 2017:

> 20. The Judgment remains unsatisfied.
>
> 21. That as of September 1st, 2017, Larson's outstanding obligation to Heartland for Note Nos. 77392, 77444, and 77886 is as follows:
>
> Judgment Amount as of July 27, 2016 $782,273.17

Plus Post Judgment Interest	$ 52,883.62
Less Post Judgment Payments	($ 46,822.48)
Total Amount Due As Of September 1st, 2017	$788,334.31

(App. p. 93, ¶¶ 20, 21).

C. Any Inconvenience That Heartland May Incur Is Self-Inflicted.

[¶ 9] Heartland argues that Larson, "is shewing the statutory language trying to invalidate the district court's judgment and force HSB to start the process over." (Brief of Appellee, ¶ 30.) Heartland is implying that it should not have to incur the inconvenience of starting over. However, because Heartland did not strictly comply with the statutory provisions concerning notice before foreclosure of a mortgage, it should be required to start to the process over. Heartland brought this on itself by amending its mortgage foreclosure complaint in order, "to correct the factual allegations and correctly plead that HSB secured a judgment against Larson [in Stutsman County District Court] for his debt obligation under the three promissory notes." (App. p. 86, ¶ 13 (clarification added).)

[¶ 10] Heartland argues that, "[i]f the Court were to accept Larson's position on appeal then the precedent would require a commercial or agricultural mortgagee that also has a collateral interest in personal property to always foreclosure against real property **before** foreclosing against the personal property collateral." (Brief of Appellee, ¶ 33 (emphasis in the original).) A commercial or agricultural mortgagee could simply avoid this by doing the opposite of what Heartland did: in the mortgage foreclosure complaint, do not allege that the event of default is an unsatisfied, personal property collateral foreclosure (repossession) judgment obtained against the mortgagor in another action, and do not

allege that the amount actually in arrears, the installment, is the amount due of the judgment.

Dated this 28th day of November, 2018.

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ATTORNEY'S CERTIFICATE OF SERVICE BY E-MAIL

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

[A] REPLY BRIEF OF DEFENDANT AND APPELLANT

on November 28th, 2018, by sending a true and correct copy of the same via e-mail transmission from the office of James F. Lester, Attorney at Law, to the following:

Kasey D. McNary
kmcnary@serklandlaw.com

Under penalty of perjury, I declare that the foregoing is true and correct.

Dated this 28th day of November, 2018.

By: /s/ James F. Lester
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