

20090085

FILED IN THE COURT SEP 01 2009

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

Edward J Tarnavsky,
Plaintiff, Appellant

McKenzie County 27-08-C-071
NDSC 20090085

vs.

Ron Rankin, Sheriff of McKenzie
County, personally and in his
professional capacity, Defendant,
Appellee

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

SEP 01 2009

STATE OF NORTH DAKOTA

APPEAL FROM THE ORDER GRANTING
SUMMARY JUDGMENT OF DISMISSAL WITH PREJUDICE

MCKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
HONORABLE DAVID A NELSON, PRESIDING

PETITION FOR REHEARING

Edward J Tarnavsky, pro se Appellant
12951 8th St NW
Grassy Butte ND 58634
701-863-6834

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STATEMENT OF THE ISSUE

1. Has the Supreme Court failed to recognize the salient fact that discovery was not complete and that this fact precludes Summary Judgment with Prejudice?
2. Does the principle of Res Judicata and Collateral Estoppel apply to the Supreme Courts current decision in this case as related to the decision to reverse and remand in NDSC 20050457?
3. Has the Plaintiff/ Appellant's civil rights to equal protection under the law been violated?

STATEMENT OF THE FACTS

The North Dakota Supreme Court issued a decision in the case cited Tarnavsky v Rankin, 20090085, on August 18, 2009.

In that decision the Court Affirmed the district court decision that granted Summary Judgment with Prejudice (as a matter of law) in favor of Sheriff Rankin on the basis that the Plaintiff's exhibits presented by affidavit are not competent or admissible.

The Sheriff has conceded in his Appellee Brief and at oral argument that the Sheriff Deed that he issued was without authority and therefore void.

Argument

The Supreme Court has concluded that some of the evidence presented to the trial court was incompetent and inadmissible. For the trial court to render the Plaintiff's exhibits, submitted by affidavit, incompetent and inadmissible it would have to ruled so on a motion by the defendant. The defendant made no such motion or objection regarding the exhibits presented to the district court. The Supreme Court has a long standing policy of not considering issues that were not properly raised in the district court. All exhibits in the court record were submitted in an affidavit as per NDRCvP 34. Specifically the record reflects affidavits at entry no 14, 17, 29, and 43

To that effect, the only proper issue before this Court concerns whether or not the Sheriff had the authority to transfer the proceeds from the two sales in the manner which he did, since neither sale was confirmed by Order of the district court. It is this lack of demonstrated authority that makes the transfers unauthorized which constitutes

theft. The Sheriff's failure to account (NDCC 28-22-12), reserve and deliver to the owner the absolute exemptions, a stated duty of the Sheriff, constitutes the intent to deprive.

This matter is complicated by the district courts evidentiary rulings wherein there was objection made to the Plaintiffs Interrogatories and to the Plaintiff's NDRCvP 36 Request for Admissions. On those issues, the district court did rule in favor of the defendant, thus frustrating the Plaintiff from effective discovery. In this case the court facilitated the stonewalling of the defendant and those rulings are an abuse of discretion. The district court did condition its Protective Order regarding the Request for Admissions with a promise to review on further discovery (appendix p 16). The district court then ruled in favor of the defendant, as a matter of law, by granting the defendants Motion for Summary Judgment with Prejudice.

In the Answer submitted by the Sheriff, all affirmative defenses were conditioned on the completion of discovery (appendix p 118 article XIV). With the district court denying all of the Plaintiff's motions to compel discovery, discovery was never completed, therefore the Sheriff had submitted no affirmative defenses and the district court was in error when it granted the Sheriff's Motion for Summary Judgment with Prejudice. The Supreme Court furthers this error by affirming the district courts decision.

NDCC chapter 28-23-13 requires that judicial sales be confirmed by the court. In this case only a proposed Order confirming Sale appears on the court docket for the case cited as Union Bank v Ed Tarnavsky, and Morris and Vonne Tarnavsky. This docket was submitted by affidavit to the trial court with the proper attention being drawn to it.

The Sheriff is acting under the authority of the court to conduct the judicial sales. It is critical that he make timely report to the court so that review can begin. It is clear from the record that the Sheriff Report of sale of the real property was submitted after the writ of execution had expired, and therefore the court could make no timely Confirmation of that sale, and for the purposes of this proceeding still has not.

The Sheriff admits in his Affidavit (appendix p124, para 3) that he did receive Affidavits of Exemptions for the respective sales. It is plain from his sheriff reports that he ignored those affidavits. The Sheriff has no authority, whatsoever, to decide matters of absolute exemptions. The Sheriff can only be authorized to disregard the absolute exemptions by order of the court and then only when an objection is made by either party. The Statement made at the time of the June 5 sale, by Ed Tarnavsky, clearly indicated that there was no objection from the Union Bank regarding either the Assignment of Rents and Leases made April 19, 2007 or the affidavit of exemptions. Without objection from the parties with regard to the claimed exemptions it was the Sheriff's duty under NDCC 28-22-12 to itemize, and reserve those exemptions and to deliver them to the owner. It was the Sheriff's duty under NDCC 28-21-06.1 to liquidate the personal property first. The statement made at the June 5 sale merely described the location of the assignment available for liquidation and its value, which exceeded the high bid received.

The Sheriff also admits that he was uncertain of the ownership of the personal property that he sold at the August 3 sale(appendix p 124, para 5, Affidavit of Ron Rankin). The Sheriff does not contest the fact that he never made a proper inventory or appraisal of the personal property or whether there was any value that was not exempt by personal exemptions or the security interest of the Union Bank. Since the Union Bank

has not satisfied the Judgment against Ed Tarnavsky, the logical inference of this situation is that the Sheriff, by selling the personal property on August 3, 2007, has in fact defrauded Ed's secured creditor. This issue of the Union Bank's superior claim was properly raised by the Affidavit of Exemption #9 (Defendants appendix page 55) and in the affidavit of Ed Tarnavsky on August 5, 2007 (appendix p 54, Exhibit #8 and by the amended Affidavit of Exemptions dated July20, 2007, Defendants Exhibit J, Affidavit of Scott Porsberg). Certainly without inventory or appraisal, no items of personal property could be identified as exempt from sale. With the unsettled Judgment from the Union Bank, it is clear that all of Ed's personal property was exempt from sale, as there was no equity in the personal property available for the inferior judgment.

The complaint served on the Sheriff alleged three counts of theft, as defined by NDCC 12.1-23-02.1, the two exemptions from the sales and the surplus that the Sheriff claims he "gave" to the Clerk of Court. The Sheriff's Affidavit is not specific as to when this gift was made, so it is impossible without further discovery to pursue this allegation.

The statutes, NDCC 32-19-10 and NDCC 32-19-11 regulate a surplus from a foreclosure sale of over \$1000.00 requires that this surplus be deposited into court. No such deposit exists and no ferret will ever find this deposit. Furthermore, since the district court never approved the sale, the logical inference is that the Sheriff was not allowed to "give" \$1006.09 to the Clerk of Court.

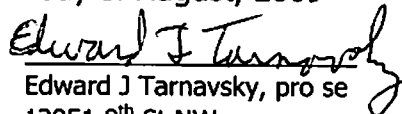
Attorney Greg Hennessey had argued in the NDSC appeal 20050457 (appendix pp 34-36) the specifics of the NDCC 28-21-07, time of return. The Supreme Court did agree with his argument by reversing and remanding in its Judgment 2006 ND 124. Now the Supreme Court has raised the issue of whether there is a 60 day or 90 day time of

return and also infers the question of what the authority of the Sheriff is when the time of return expires or when the district court fails to approve the sale. The Plaintiff submits that since there was no valid levy filed with the Execution #9, that the 60 day time of return applies, and that the August 3 sale was well beyond the expiry of that execution. The 60 day time of return expired on July 29; the Amended Affidavit of Exemptions was filed on July 20 which left only nine days to complete inventory and appraisal and to select the exemptions. The levy was in fact invalid because of the objection to the amount of judgment remaining that was raised in the affidavit. The court never ruled on this objection. There was no motion to the district court for an Order to extend the time of return to allow due process consideration of the objection to the amount to be collected or whether the district court had actual jurisdiction since an appeal of the case was being made on other matters..

There is no statute that exempts the judicial sale of personal property from court confirmation. The Appellee has stated in paragraph 15 of his brief that there was no confirmation of either sale.

The lack of clear and convincing evidence of authority (a factual matter that precludes summary judgment) to deprive Ed of his absolute exemptions, by the Sheriff, at the two sales of June and August 2007, is sufficient reason for the Supreme Court to reconsider its affirmation and to reverse and remand this matter back to the district court. Further reason to reverse and remand relates to the lack of an Affirmative Defense from the Sheriff, because discovery was not complete.

Respectfully submitted this 31st day of August, 2009


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McKenzie County 27-08-C-071

NDSC 20090085

Affidavit of Service
By Mail

I, Edward Tarnavsky, plaintiff/ appellant, being duly sworn on oath, deposes and says as follows:

I am of legal age and personally knowledgeable of the facts stated herein.

I have mailed a true and correct copy of the following documents filed in the above captioned action:

1: One unbound and seven bound copies of the Petition for Rehearing

That copies of the above documents were securely enclosed in an envelope with postage duly prepaid and addresses as follows:

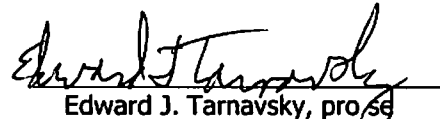
Ms. Penny Miller
Clerk of the Supreme Court
600 East Boulevard Ave, Dept 180
Bismarck ND 58505-0530

And I have mailed in the same fashion:

1: One bound copy of the Petition for Rehearing

To: Mr. Scott K Porsberg
116 North 2nd St
PO Box 460
Bismarck ND 58502-0460

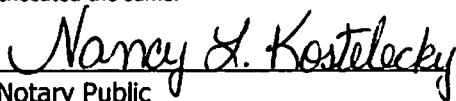
Dated this 31st day of August, 2009


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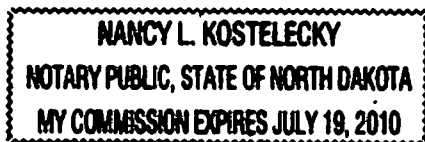
Subscribed and sworn to me this 31st day of August, 2009

STATE OF NORTH DAKOTA)
COUNTY OF ~~McKENZIE~~ Stark) :ss

On the 31st day of August, 2009, before
Me personally appeared Edward J. Tarnavsky
_____, known to me to be the person
who is described in, and who executed the within
instrument and acknowledged to me that he
executed the same.


Notary Public

My Commission expires July 19, 2010



This would not fit on the same page of the Affidavit of
Service By Mail - NDSC 20090085 McKenzie County 27-08-C-071
N.K.