## SUPREME COURT OF NEBRASKA

# First Nebraska Educators Credit Union v. U.S. Bancorp and U.S. Bank National Association, N.D.

293 Neb. 308 (2016) · No. No. S-15-617 · Decided April 8, 2016

### SUMMARY

The Nebraska Supreme Court affirmed dismissal of First Nebraska Educators Credit Union’s amended complaint alleging that U.S. Bank failed to provide notice of a foreclosure sale under Neb. Rev. Stat. § 76-1008. The court held that the credit union was not a party to the foreclosed trust deed and had not adequately filed a separate request for notice complying with the statute.

### CASE DETAILS

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| COURT | Supreme Court of Nebraska |
| WRITING FOR THE COURT | Heavican, C.J.; Wright, J.; Connolly, J.; Cassel, J.; Kelch, J. |
| JURISDICTION | Nebraska |
| DECIDED | April 8, 2016 |
| DOCKET | No. S-15-617 |
| DISPOSITION | affirmed |
| PROCEDURAL POSTURE | First Nebraska appealed the Sarpy County District Court's dismissal of its amended complaint for failure to state a claim. |
| STANDARD OF REVIEW | A grant of a motion to dismiss is reviewed de novo. The court accepts as true well-pled facts and reasonable inferences, but not legal conclusions, and determines whether the complaint states a plausible claim for relief. Statutory interpretation is reviewed independently as a question of law. |
| PRECEDENTIAL VALUE | Published Nebraska Supreme Court opinion; precedential. |
| PARTIES | First Nebraska Educators Credit Union v. U.S. Bancorp, U.S. Bank National Association, N.D. |

### TOPICS

motions to dismiss · pleadings · statutory interpretation · real estate · civil procedure

### PRACTICE AREAS

civil procedure real estate trusts commercial litigation

### QUESTIONS PRESENTED

1. Whether U.S. Bank was required under Neb. Rev. Stat. § 76-1008 to mail First Nebraska notice of the foreclosure sale.
2. Whether the notice request included in First Nebraska's own deed of trust adequately complied with § 76-1008(1) to trigger a statutory notice obligation.

### HOLDINGS

1. A person or institution that is not a party to the trust deed being foreclosed is not entitled to notice under § 76-1008(3); such a party must make a valid request under § 76-1008(1).
2. First Nebraska did not adequately request notice under § 76-1008(1) because its request failed to identify the senior trust deed with the information required by the statute, including the recording date and book-and-page or computer-system reference.
3. The amended complaint failed to state a claim because U.S. Bank had no statutory obligation to provide First Nebraska notice of the foreclosure sale.

### KEY QUOTATIONS

> *"A proper reading of the statute provides that unless the person or institution is a party to the trust deed at issue, that person or institution is not entitled to notice unless it is requested under § 76-1008(1)."* (315)

> *"Compliance with § 76-1008(1) triggers the requirement that notice be given; without such a request under subsection (1), U.S. Bank had no obligation to provide notice of sale to First Nebraska."* (316)

### FACTUAL BACKGROUND

U.S. Bank held a senior deed of trust on real property owned by Jack E. Cotton and Vickie L. Cotton. The Cottons later executed a note to First Nebraska secured by a junior deed of trust on the same property. After U.S. Bank's trustee recorded a notice of default and later conducted a foreclosure sale, First Nebraska alleged that it did not receive notice of the sale and that its junior lien was extinguished. First Nebraska sought $41,203.94 in damages.

### PROCEDURAL HISTORY

First Nebraska alleged that U.S. Bank failed to provide notice of a foreclosure sale under Neb. Rev. Stat. § 76-1008. The district court granted U.S. Bank's motion to dismiss, concluding that First Nebraska's request for notice did not comply with the statute. The Nebraska Supreme Court affirmed.

### DISPOSITION

affirmed

### CASES CITED

- SID No. 1 v. Adamy, 289 Neb. 913, 858 N.W.2d 168 (2015)
- Hauxwell v. Henning, 291 Neb. 1, 863 N.W.2d 798 (2015)
- First Nat. Bank of Omaha v. Davey, 285 Neb. 835, 830 N.W.2d 63 (2013)
- DMK Biodiesel v. McCoy, 290 Neb. 286, 859 N.W.2d 867 (2015)
- Stick v. City of Omaha, 289 Neb. 752, 857 N.W.2d 561 (2015)

## OPINION

PER CURIAM.

Nebraska Supreme Court Online Library www.nebraska.gov/apps-courts-epub/ 04/08/2016 09:05 AM CDT - 308 - Nebraska A dvance Sheets 293 Nebraska R eports FIRST NEB. ED. CREDIT UNION v. U.S. BANCORP Cite as 293 Neb. 308 First Nebraska Educators Credit Union, appellant, v. U.S. Bancorp and U.S. Bank National Association, N.D., appellees. ___ N.W.2d ___ Filed April 8, 2016.

No. S-15-617. 1. Motions to Dismiss: Appeal and Error. A district court's grant of a motion to dismiss is reviewed de novo. 2. ____: ____. When reviewing an order dismissing a complaint, the appel- late court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.

3. Motions to Dismiss: Pleadings. To prevail against a motion to dis- miss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.

In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. 4. Statutes: Appeal and Error. Statutory interpretation presents a ques- tion of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

5. Trusts: Deeds: Statutes: Appeal and Error. Because the Nebraska Trust Deeds Act made a change in common law, appellate courts strictly construe the statutes comprising the act. 6. Statutes: Appeal and Error. Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning. 7. Statutes. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. - 309 - Nebraska A dvance Sheets 293 Nebraska R eports FIRST NEB. ED.

CREDIT UNION v. U.S. BANCORP Cite as 293 Neb. 308 Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed. Justin A. Roberts, of Lustgarten & Roberts, P.C., L.L.O., for appellant. Patrick R. Turner, of Stinson, Leonard & Street, L.L.P., for appellees. Heavican, C.J., Wright, Connolly, Cassel, and K elch, JJ. Heavican, C.J. INTRODUCTION First Nebraska Educators Credit Union (First Nebraska) filed an amended complaint against U.S. Bancorp and U.S. Bank, National Association, N.D.

(U.S. Bank), alleging that U.S. Bank failed to provide it with notice of a foreclosure sale pursuant to Neb. Rev. Stat. § 76-1008 (Reissue 2009). First Nebraska sought damages in the amount of $41,203.94. The district court dismissed First Nebraska's amended com- plaint for the failure to state a claim.

First Nebraska appeals. We affirm. FACTUAL BACKGROUND Jack E. Cotton and Vickie L. Cotton owned real property located in Sarpy County, Nebraska. A deed of trust was filed by U.S. Bank on the Cottons' property on February 10, 2006.

On April 2, 2007, the Cottons executed and delivered a note to First Nebraska in the amount of $27,401.50, plus interest of 9.99 percent per year. As security for this note, the Cottons delivered a deed of trust to their same Sarpy County property. That deed was recorded on April 5.

Thus, U.S. Bank was the senior lienholder and First Nebraska's interest was junior to U.S. Bank's. The First Nebraska trust deed included the following language: - 310 - Nebraska A dvance Sheets 293 Nebraska R eports FIRST NEB. ED. CREDIT UNION v. U.S. BANCORP Cite as 293 Neb. 308 REQUEST FOR NOTICE OF DEFAULT AND FORECLOSURE UNDER SUPERIOR MORTGAGES OR DEEDS OF TRUST Request is hereby made that a copy of any notice of default and a copy of any notice of sale under the deed of trust filed for record... and recorded in Book..., Page..., or..., Records of Sarpy County, Nebraska, executed by... as Trustor, in which... is named as beneficiary and as Trustee, be mailed to First Nebraska Educators Credit Union at 10655 Bedford Avenue Omaha, NE 68134-3613 The ellipses represent blank spaces in the original document, and the underlined information was typed in a typeface differ- ent from the original.

On May 17, 2009, the trustee filed a notice of default on the 2006 deed of trust held by U.S. Bank. On September 21, the trustee executed a trust deed to grant and convey the real property to an investment company for the sum of $48,566. A deed of trust to this effect was filed with the register of deeds. That trust deed indicated that notice of sale had been provided as required by law.

First Nebraska filed suit, alleging that it did not receive notice of the sale and did not attend the sale. As such, First Nebraska was not able to bid on the property and its second lien interest was extinguished with the sale of the property.

First Nebraska sought damages in the amount of $41,203.94. U.S. Bank filed a motion to dismiss, which the district court granted. The court reasoned that the request given by First Nebraska for notice of sale did not comply with § 76-1008(1); thus, First Nebraska was not entitled to notice.

First Nebraska appeals. ASSIGNMENT OF ERROR First Nebraska assigns, restated and consolidated, that the district court erred in dismissing its amended complaint. - 311 - Nebraska A dvance Sheets 293 Nebraska R eports FIRST NEB. ED. CREDIT UNION v. U.S. BANCORP Cite as 293 Neb. 308 STANDARD OF REVIEW [1-3] A district court's grant of a motion to dismiss is reviewed de novo.1 When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plain- tiff's conclusion.2 To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.3 In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.4 [4] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an inde- pendent conclusion irrespective of the decision made by the court below.5 ANALYSIS The sole issue presented by this appeal is whether U.S. Bank was required to mail a notice of sale to First Nebraska under § 76-1008.

That section provides: (1) Any person desiring a copy of any notice of default and of any notice of sale under any trust deed may, at any time subsequent to the filing for record of the trust deed and prior to the filing for record of a notice of default 1 SID No. 1 v. Adamy, 289 Neb. 913, 858 N.W.2d 168 (2015). 2 Id. 3 Id. 4 Id. 5 Hauxwell v. Henning, 291 Neb. 1, 863 N.W.2d 798 (2015). - 312 - Nebraska A dvance Sheets 293 Nebraska R eports FIRST NEB. ED.

CREDIT UNION v. U.S. BANCORP Cite as 293 Neb. 308 thereunder, file for record in the office of the register of deeds of any county in which any part or parcel of the trust property is situated a duly acknowledged request for a copy of any such notice of default and notice of sale.

The request shall set forth the name and address of the person or persons requesting copies of such notices and shall identify the trust deed by stating the names of the original parties thereto, the date of filing for record thereof, and the book and page or computer system refer- ence where the same is recorded and shall be in substan- tially the following form: Request is hereby made that a copy of any notice of default and a copy of notice of sale under the trust deed filed for record..., 20..., and recorded in book..., page..., (or computer system reference.... ) Records of...

County, Nebraska, executed by... as trustor, in which... is named as beneficiary and... as trustee, be mailed to... (insert name)... at... (insert address).... Signature.... (2) Not later than ten days after recordation of such notice of default, the trustee or beneficiary or the attor- ney for the trustee or beneficiary shall mail, by reg- istered or certified mail with postage prepaid, a copy of such notice with the recording date shown thereon, addressed to each person whose name and address is set forth in a request therefor which has been recorded prior to the filing for record of the notice of default, directed to the address designated in such request.

At least twenty days before the date of sale, the trustee or the attorney for the trustee shall mail, by registered or certified mail with postage prepaid, a copy of the notice of the time and place of sale, addressed to each person whose name and address is set forth in a request therefor which has been recorded prior to the filing for record of 

 the notice of default, directed to the address designated in such request. (3) Each trust deed shall contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to each person who is a party thereto at the address of such person set forth therein, and a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as pro- vided in this section.

(4) If no address of the trustor is set forth in the trust deed and if no request for notice by such trustor has been recorded as provided in this section, a copy of the notice of default shall be published at least three times, once a week for three consecutive weeks, in a newspaper of gen- eral circulation in each county in which the trust property or some part thereof is situated, such publication to com- mence not later than ten days after the filing for record of the notice of default.

(5) No request for a copy of any notice filed for record pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to trust property or be deemed notice to any person that any person requesting copies of notice of default or of notice of sale has or claims any right, title, or interest in or lien or claim upon the trust property.

On appeal, First Nebraska contends that it complied with § 76-1008(3) when it included the request for notice of default language at the end of its trust deed and that this sub- stituted for any obligation it had under subsection (1).

First Nebraska relies on the following language in subsection (3) which states that “a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate  request therefor had been filed by each of such persons as provided in this section.”6 U.S. Bank disagrees, and argues that notice is required under § 76-1008(3) only to those parties to that particular trust deed.

It points to language in subsection (3) that pro- vides, “Each trust deed shall contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to each person who is a party thereto....”7 [5-7] This appeal requires us to interpret § 76-1008.

Because the Nebraska Trust Deeds Act made a change in common law, we strictly construe the statutes comprising the act.8 Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.9 A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as super- fluous or meaningless.10 The purpose of § 76-1008 is to set forth who is entitled to notice of default and sale and how that notice should be effected.

Subsection (1) provides that “any person” who desires notice of default or notice of sale may file for such notice using the language set forth in the statute. It is this language which was set forth, albeit incompletely, at the end of the trust deed between First Nebraska and the Cottons. Subsection (2) provides that no later than 10 days after a notice of default is recorded, persons seeking notice must be given that notice.

6 § 76-1008(3) (emphasis supplied). 7 Id. (emphasis supplied). 8 See First Nat. Bank of Omaha v. Davey, 285 Neb. 835, 830 N.W.2d 63 (2013). 9 DMK Biodiesel v. McCoy, 290 Neb. 286, 859 N.W.2d 867 (2015). 10 Stick v. City of Omaha, 289 Neb. 752, 857 N.W.2d 561 (2015).  As noted above, § 76-1008(3) is primarily at issue in this case.

It provides that “[e]ach trust deed shall contain a request that a copy of any notice of default and a copy of any notice of sale thereunder shall be mailed to each person who is a party thereto” and that these notices shall be mailed to “each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons.” From this language, we know that a trust deed must contain a request for notice, but that request is for notice “thereunder” and is to be sent to “each person who is a party thereto.” The problem with First Nebraska’s argument, then, is that while it was a party to its own trust deed and would be con- tractually entitled to notice in the event of default of that underlying trust deed, it was not a party to U.S. Bank’s trust deed and is not entitled to notice under that deed.

It is that deed which was foreclosed upon. A proper reading of the stat- ute provides that unless the person or institution is a party to the trust deed at issue, that person or institution is not entitled to notice unless it is requested under § 76-1008(1).

First Nebraska did not adequately request notice under § 76-1008(1). As noted, this court strictly construes the stat- utes comprising the act.11 While the language at the conclu- sion of First Nebraska’s trust deed with the Cottons purported to make a request for notice under subsection (1), it was ineffective, because the request failed to comply with the requirements of subsection (1) in a number of particulars.

Specifically, the request did not detail the precise information regarding the trust deed for which the requesting party sought notice, did not include the date the prior deed was recorded, and did not include the book and page (or reference) number of that deed. 11 First Nat. Bank of Omaha v. Davey, supra note 8. - 316 - Nebraska A dvance Sheets 293 Nebraska R eports FIRST NEB. ED.

CREDIT UNION v. U.S. BANCORP Cite as 293 Neb. 308 Compliance with § 76-1008(1) triggers the requirement that notice be given; without such a request under subsection (1), U.S. Bank had no obligation to provide notice of sale to First Nebraska.

First Nebraska's arguments to the contrary are with- out merit. CONCLUSION U.S. Bank was not required to serve notice of foreclosure sale upon First Nebraska. As such, the district court did not err in dismissing First Nebraska's amended complaint for the failure to state a claim.

The decision of the district court is affirmed. A ffirmed. Stacy, J., participating on briefs. Miller-Lerman, J., not participating.