

**IN THE DISTRICT COURT OF BLAINE COUNTY, NEBRASKA**

**PURDUM STATE BANK,**

Plaintiff,

vs.

**KARL MARTEN,**

Defendant.

Case No. CI01-1

**SUMMARY JUDGMENT**

**DATE OF HEARING:** October 16, 2001.  
**DATE OF RENDITION:** November 16, 2001.  
**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).  
**TYPE OF HEARING:** In chambers, at District Courtroom, Brown County Courthouse, Ainsworth, Nebraska.  
**APPEARANCES:**  
For plaintiff: Michael S. Borders.  
For defendant: Rodney J. Palmer.  
**SUBJECT OF ORDER:** Plaintiff's motion for summary judgment.  
**PROCEEDINGS:** See journal entry rendered contemporaneously with hearing.  
**FINDINGS:** The court finds and concludes that:

1. This is an action on a promissory note. In his deposition, the defendant admits signing the note, receiving consideration, failure to make payments on principal or interest, and that he owes the money. The analysis has been complicated by the inclusion of surplus language in the petition, as will appear below.

2. In *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000), the Nebraska Supreme Court restated the familiar principles applicable to motions for summary judgment:

a. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

b. In considering a summary judgment motion, the court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

d. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

e. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

f. After the moving party makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

3. However, in the case of *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000), the Supreme Court explained that, in a suit on a promissory note where the defendant's answer raised affirmative defenses, the plaintiff was also required to produce evidence which demonstrated that there were no genuine issues of material fact regarding the maker's cognizable affirmative defenses and that plaintiff was entitled to judgment as a matter of law.

4. In this case, the defendant's answer raises three matters, none of which are addressed in the evidence adduced by the parties on the plaintiff's motion.

5. Two of these matters relate to paragraph 6 of the plaintiff's amended petition, which alleges the existence of a security agreement. However, that allegation constitutes mere surplusage. The amended petition states a cause of action for breach of contract upon a promissory note. The amended petition

totally fails to relate the allegations of paragraph 6 to any aspect of the cause of action. This situation demonstrates the desirability of compliance with § 25-804, which demands that the petition contain “a statement of the facts constituting the cause of action, in ordinary and *concise* language, and without repetition; . . .” NEB. REV. STAT. § 25-804 (Reissue 1995) (emphasis supplied). The allegation regarding the security agreement constitutes no part of the cause of action on the note. Any issues regarding contract formation or performance regarding the alleged security agreement are wholly extraneous to the issues in an action on a promissory note. Indeed, the defendant’s answer alleges that the security agreement was entered into separately from the promissory note, and thus cannot be considered as part of the same transaction.

6. Thus, the matter raised by paragraphs 2 and 3 of the answer relating to a security agreement does not constitute a *cognizable* affirmative defense to an action on a promissory note. Similarly, the matter raised by paragraph 5 of the answer, concerning the allegation of termination of any security interest by the passage of time, does not constitute a cognizable affirmative defense to this action on a promissory note. The plaintiff was not required to adduce evidence to negate an affirmative defense regarding these matters, as no affirmative defense was validly stated in the answer as to these matters.

7. Paragraph 4 of the answer requests immediate mediation under the Farm Mediation Act. NEB. REV. STAT. § 2-4801 *et seq* (Reissue 1997). It apparently responds to paragraph 8 of the amended petition, which alleges compliance with § 2-4807(1). That section requires a creditor of an agricultural loan to notify the borrower of the availability of mediation and certain information regarding the farm mediation service available.

8. This court finds no instance where the higher Nebraska appellate courts have considered the nature of the requirement of § 2-4807(1). This court concludes that it constitutes a procedural precedent to the commencement of suit, and is most analogous to the notice requirement for certain types of claims. *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997); *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990). Where the notice is a procedural precedent to commencement of a claim, noncompliance is a defense to the action. *Id.* Thus, the allegation of the amended petition regarding compliance was not a component of the plaintiff’s claim. Noncompliance would constitute an affirmative defense. Had the defendant affirmatively pleaded noncompliance, under

the rule of *City State Bank* the plaintiff would have had the burden of producing evidence addressing the issue on the plaintiff's motion for summary judgment. However, here, the defendant did not allege noncompliance. Instead, the defendant alleged a desire to enter into mediation. That allegation does not raise a claim of noncompliance with the notice requirement. Mediation under the act is a purely voluntary process. NEB. REV. STAT. § 2-4808 (Reissue 1997). Thus, the allegation of paragraph 4 does not raise a *cognizable* affirmative defense to the plaintiff's cause of action on a promissory note.

9. There is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and the plaintiff is entitled to judgment as a matter of law.

10. The plaintiff alleges in paragraph 5 of the amended petition that interest accrues at the rate of 10.5% per annum. The plaintiff is bound by the judicial admission of its pleading.

11. The plaintiff is entitled to judgment for the principal balance of the note of \$151,147.06, together with interest thereon at the rate of 10.5% per annum from March 22, 1999, to date of judgment (970 days) in the amount of \$42,176.24, and costs of suit.

12. The plaintiff's motion to compel is moot and should be denied for that reason.

**JUDGMENT:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The plaintiff's motion for summary judgment is granted.

2. Summary judgment is hereby entered in favor of plaintiff and against defendant in the amount of \$151,147.06, together with interest thereon at the rate of 10.5% per annum from March 22, 1999, to date of judgment (970 days) in the amount of \$42,176.24, and costs of suit taxed in the amount of \$85.00. The judgment shall bear interest at the contract rate of 10.5% per annum from date of judgment until paid.

3. The court clerk is directed endorse on the original note deposited by the plaintiff with the clerk as follows: "Merged in judgment entered in Case No. CI01-1, District Court of Blaine County, Nebraska, entitled 'Purdum State Bank, Plaintiff, vs. Karl Marten, Defendant,' entered on [date of filing of this judgment]." The court clerk is further directed to affix the said promissory note to an 8½ by 11 inch sheet of paper and file the same in the court file.

4. The plaintiff's motion to compel is denied as moot.

5. All requests for attorneys' fees, express or implied, are denied.

Signed in chambers at **Ainsworth**, Nebraska, on **November 16, 2001**;  
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Comply with paragraph 3 of "Judgment" section.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] **Signed "Summary Judgment"**  
**entered.**  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

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William B. Cassel  
District Judge