

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

**FEDERAL DEPOSIT INSURANCE CORPORATION, in its corporate capacity, substituted for FARMERS STATE BANK, Sargent, Nebraska, a corporation,**

Plaintiff,

vs.

**ELDON SLANGAL,**

Defendant.

Case No. 2398

**ORDER DENYING APPLICATION WITH LEAVE TO AMEND**

**DATE OF HEARING:** No hearing held.  
**DATE OF RENDITION:** January 23, 2002.  
**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).  
**SUBJECT OF ORDER:** Defendant's "Application for Court to Impanel Jury in Compliance with NEB. REV. STAT. Section 25-10,102, 1943."

**MEMORANDUM:**

1. This matter was assigned to the undersigned judge by order of the district judge regularly assigned to matters arising in the Southern Division of the Eighth Judicial District. See Rule 8-1. The court has examined the defendant's application and the file in this case.

2. The defendant seeks relief under NEB. REV. STAT. § 25-10,102 (Reissue 1995), which states: "If the property has been delivered to the plaintiff, and he suffers a voluntary or involuntary dismissal, or if he otherwise fails to prosecute his action to final judgment, the court shall, on application of the defendant or his attorney, impanel a jury to inquire into the right of property and right of possession of the defendant to the property taken. . . ."

3. The court file in this case shows that a replevin action was initiated by Farmers State Bank seeking delivery of certain personalty, request for delivery was made, an answer and counterclaim filed on

behalf of defendant, orders for delivery issued to Custer County and Rock County, and undertakings made pursuant to appraisal. The property was delivered to plaintiff.

4. Thereafter, a motion to substitute the Federal Deposit Insurance Corporation (FDIC) as plaintiff was granted without objection. Following the substitution, the FDIC filed a petition for removal of the action in the United States District Court for the District of Nebraska, and served notice of removal upon the clerk of this court and the counsel for the participating parties.

5. From that point forward to the filing of the present application, no further filings appear in this court's file regarding any subsequent proceedings.

6. Paragraphs 9 and 10 of the defendant's present application seem to consider the petition for removal as a document addressed to this court, and assert that this court never held any hearing on the petition for removal and never entered any order or judgment granting the removal. That is the flaw in the defendant's application as framed.

7. Removal to federal district court is controlled by federal law. See 28 U.S.C. § 1441 *et seq.*

8. The petition for removal was properly addressed to the federal district court, not to this court. The purpose of filing the notice of removal and the accompanying copy of the petition for removal with the clerk of this court is to notify this court of the exercise of the federal removal authority and federal judicial power.

9. The party removing accomplishes removal of the case from state court to federal court under the federal removal statute by filing the notice of removal (in 1985, the petition for removal) with the appropriate federal court, promptly filing a copy of the notice with the clerk of the state court, and promptly giving written notice of removal to all adverse parties. *Farm Credit Bank of St. Paul v. Ziebarth*, 485 N.W.2d 788 (N.D. 1992), *cert. denied*, 113 S.Ct. 501, 121 L.Ed.2d 437, *rehearing denied*, 113 S.Ct. 1069, 122 L.Ed.2d 373. Once these three requirements are met, the state court jurisdiction ends and the state court shall proceed no further unless and until the case is remanded by the federal court. *Id.* By the very act of filing the copy of the removal petition, the party deprived the state court of jurisdiction over the case, and, under 28 U.S.C. § 1446, the state court could proceed no further. *Cotton v.*

*Federal Land Bank of Columbia*, 153 Ga. App. 298, 265 S.E.2d 59, *aff'd*, 246 Ga. 188, 269 S.E.2d 422 (1980).

10. The records of this court naturally do not show the disposition of the cause after removal, except that nothing appears in this court's records to suggest that the cause was ever remanded to state court by the federal district court.

11. The defendant's application does not explicitly allege any disposition in the federal district court. Of course, if the federal court ultimately entered a final judgment in the removed action, the defendant's application under § 25-10,102 could have no possible legal merit.

12. On the other hand, if the substituted plaintiff "suffer[ed] a voluntary or involuntary dismissal, or if he otherwise fail[ed] to prosecute [its] action to final judgment," there is some possibility of legal merit to the application.

13. Even under those circumstances, the case law arising under the federal removal statutes suggests to this court that jurisdiction would not necessarily spring back to life in the state court in the absence of specific remand. See *Styers v. Pico, Inc.*, 236 Ga. 258, 223 S.E.2d 656 (1976). But the defendant is entitled to the opportunity to amend his application regarding allegations of disposition of the removed action in the federal district court. If the proper allegations of an amended application show a colorable claim of jurisdiction in this court, the court may be required to hold a hearing on the matter. The present application fails to state such colorable claim by failing to allege any facts regarding disposition of the removed action by the federal district court.

14. In the ordinary case, § 25-10,102 assumes that the existence of voluntary or involuntary dismissal or other failure to prosecute to final judgment would appear upon the face of the records of this court. And in the absence of removal to federal court, such would ordinarily be the case; i.e., the applicability of § 25-10,102 would be determined by this court's own records without necessity of recourse to extraneous information. But where the case has been removed to federal court and no order of remand from the federal court appears in this court's file, § 25-10,102 cannot be applied without resort to that other information.

15. The application should be denied with leave to file an amended application within 30 days.

16. Upon failure to timely file a complying amended application, the court would then enter a final order denying the application.

**ORDER:** IT IS THEREFORE ORDERED that:

1. The application is denied with leave to file an amended application within 30 days after the date of entry of this order.

2. This order is interlocutory in character and does not constitute a final order.

Signed in chambers at **Ainsworth**, Nebraska, on **January 23, 2002**;  
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 \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] **Signed "Order Denying Application With Leave to Amend" entered**.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- 9 Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

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William B. Cassel  
District Judge

Mailed to: