

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

DATE OF HEARING: No hearing held.
DATE OF RENDITION: February 26, 2002.
DATE OF ENTRY: Court clerk's file-stamp date, per § 25-1301(3).
SUBJECT OF ORDER: Defendant's (1) "Petition to Set Aside Substitution of Plaintiff," (2) "Motion for Extension of Time," and (3) "Application for Court to Impanel Jury in Compliance with NEB. REV. STAT. Section 25-10,102, 1943."

MEMORANDUM:

1. This matter has been 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.
2. The defendant previously filed an "Application for Court to Impanel Jury in Compliance with NEB. REV. STAT. Section 25-10,102, 1943." By order rendered January 23, 2002, this court denied the application with leave to file an amended application within a specified time.
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 appraisalment. 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 recent application, no further filings appear in this court's file regarding any subsequent proceedings.

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

7. 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.

8. 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).

9. In denying the prior application with leave to amend, this court observed that the records of the court do not show the disposition of the cause after removal, and expressly noted the absence of any order of remand to state court by the federal district court.

10. The defendant has not filed the amended application contemplated by this court's prior order, but has filed a "Petition to Set Aside Substitution of Plaintiff." In written argument to support the

motion, the defendant asserts that the original order allowing substitution was error, citing *Meyer v. Omaha Furniture & Carpet Co.*, 76 Neb. 405, 107 N.W. 767 (1906), and *Flanders v. Lyon & Healey*, 51 Neb. 102, 70 N.W. 524 (1897).

11. Before reaching the legal issues presented for review, it is the duty of a court to determine whether it has jurisdiction over the matter before it. *Tri-Par Investments v. Sousa*, 263 Neb. 209, ___ N.W.2d ___ (2002). Notwithstanding whether the parties raise the issue of jurisdiction, a court has a duty to raise and determine the issue of jurisdiction sua sponte. *Id.*

12. The petition to set aside substitution of plaintiff does not explicitly allege any disposition in the federal district court. Even assuming, without deciding, that the prior substitution of plaintiffs was error, it affords no basis for relief in the absence of a showing that this court has reacquired subject matter jurisdiction. Where jurisdiction has attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous, will not render the judgment void and subject to collateral attack. *Rehbein v. Clarke*, 257 Neb. 406, 598 N.W.2d 39 (1999). This court clearly had personal and subject matter jurisdiction at the time of the original proceeding before removal. Even if the substitution was error, it occurred and the proceeding was subsequently removed to federal court. This court does not reacquire subject matter jurisdiction in the absence of an express remand from the federal court, or, perhaps if the substituted plaintiff “suffer[ed] a voluntary or involuntary dismissal, or if [it] otherwise fail[ed] to prosecute [its] action to final judgment” Nothing filed to date suggests that either has occurred. Thus, there is nothing to show that this court has reacquired subject matter jurisdiction.

13. As to a disposition before judgment, 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). This file still fails to show any colorable claim of jurisdiction in this court.

14. The defendant also filed a motion for extension of the time previously allowed to file an amended application. However, no affidavit accompanied the motion to provide facts supporting an extension of time.

15. The defendant has failed to provide the necessary showing that this court has reacquired subject matter jurisdiction, and the defendant’s petition and motion should be denied because of the

absence of such jurisdiction. The defendant now having failed to file a sufficient amended application, the court will enter a final order denying the application because of the absence of subject matter jurisdiction.

ORDER: IT IS THEREFORE ORDERED that:

1. The “Application for Court to Impanel Jury in Compliance with NEB. REV. STAT. Section 25-10,102, 1943” and the “Petition to Set Aside Substitution of Plaintiff” are denied for lack of subject matter jurisdiction.

2. The “Motion for Extension of Time” is denied.

3. This order is final.

Signed in chambers at **Ainsworth**, Nebraska, on **February 26, 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” entered denying defendant’s application, petition, and motion.**
Done on _____, 20____ by _____.
- 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 _____.

William B. Cassel
District Judge

Mailed to: