

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

TERESA G. HENDERSON,
Plaintiff,

vs.

FARMERS STATE BANK,
Defendant,

and

**MIDWEST BANK N.A., Creighton, Knox
County, Nebraska, fna AMERICAN
NATIONAL BANK; CAROL HOLBERT
and MELISSA L. REGAN, co-personal
representatives of the Estate of Marsha
Scarberry; DON GROSS; and GARY
HAMMER,**

Third-Party Defendants.

Case No. CI00-133

JUDGMENT

DATE OF HEARING: February 11, 2002.

DATE OF RENDITION: March 1, 2002.

DATE OF ENTRY: Court clerk's file-stamp date, per § 25-1301(3).

APPEARANCES:

For plaintiff: John Thomas without plaintiff.

For defendant: Forrest F. Peetz without any officer of defendant.

For third-party defendants: No appearances.

SUBJECT OF JUDGMENT: (1) stipulation for settlement (filed 2002/02/04); (2) plaintiff's dismissal with prejudice (filed 2002/02/04); (3) defendant's motion (filed 2002/02/05) for approval of stipulation and entry of judgment; (4) defendant's motion (filed 2002/02/05) for requirement of security for costs; (5) plaintiff's verbal motion of approval of settlement stipulation; and, (6) plaintiff's verbal renewed motion to reconsider taxing expenses.

PROCEEDINGS: See journal entry entered on February 12, 2002.

FINDINGS:

The court finds and concludes:

1. This action concerns an alleged forged endorsement of a check. The parties have entered into a written stipulation for settlement that specifies payment into court and disbursement of certain sums and dismissals with prejudice, but is silent on the issue of costs.

2. By interlocutory order, the court previously taxed costs against plaintiff following the defendant's successful motion to transfer upon a claim of improper venue. The plaintiff again raises this issue, as she did previously on a motion to reconsider. This court remains committed to its prior determination, and for the parties' convenience, restates some of the prior determinations.

3. The plaintiff argued that the defendant was a resident of the Knox County under § 25-403.02(1) declaring a corporation to be "a resident of any county in which it has a registered office or other office or *is doing business.*" NEB. REV. STAT. § 25-403.02(1) (Reissue 1995) (emphasis supplied).

4. The plaintiff presented evidence showing that some of the defendant's depositors reside in Knox County, that some of the defendant's borrowers reside or have business operations located in Knox County, and that the defendant has taken security documents from borrowers concerning Knox County real estate and caused such documents to be recorded in Knox County. The plaintiff asserts that such constitutes "doing business" within the meaning of § 25-403.02(1).

5. There is no evidence that the defendant has a registered or other office anywhere other than Ewing, Holt County, Nebraska. Although the evidence is not absolutely clear on this point, it appears that the chartered location of the defendant is Ewing, Nebraska, which is located in Holt County.

6. This court agrees that taking deposits constitutes part of "doing business" by a bank. Section 8-157 requires that "the general business of every bank shall be transacted at the place of business specified in its charter." NEB. REV. STAT. § 8-157(1) (Reissue 1997). Thus, § 8-157 requires a bank to accept deposits at the location specified in its charter. There is no evidence that the bank has taken deposits at any location other than its chartered location in Ewing, Holt County, Nebraska. That constitutes the location of the bank's business of taking deposits. The residence of the depositor is immaterial.

7. Making loans also constitutes part of a bank's actions in "doing business." A bank is authorized to conduct a loan closing at a location other than the place of business specified in the charter. NEB. REV. STAT. § 8-157(9) (Reissue 1997). However, the evidence does not establish that this was

done either in Knox County generally or in Knox County as to the specific transactions noted by the plaintiff in the offered evidence. The acknowledgments on deposition exhibits 5 and 6 show that the respective instruments were executed in Holt County. E13, at deposition exhibits 5 and 6. That evidence strongly suggests that the loan closing as to the transaction or transactions involved therein occurred in Holt County. The bank's business of making a loan is done where the loan is made, not where the borrower resides or where the security is located. The bank's address on the security documents and the recitation of venue of the acknowledgments are all consistent with the bank's claim that it does business in Holt County.

8. The recording of a security document in the county where the security is located does not constitute "doing business" in that county. A bank is in the business of receiving deposits and making loans. That "business" occurs where the bank conducts it, which is generally required to be the chartered location. Virtually every business participates in transactions in places other than the location where business is conducted. For example, corporations are required to file state income tax returns with the Department of Revenue in Lincoln. That act does not constitute "doing business" in Lancaster County within the meaning of § 25-403.02(1). In other words, incidental transactions which are purely ancillary to the conduct of business do not constitute "doing business" within the meaning of that section. The recording of a security document falls into that category and does not, of itself, constitute "doing business."

9. Section 25-403.02(1) defines a corporation's residence for purposes of specifying the locations where the Legislature has determined that it is fair and appropriate to require a corporation to defend itself. The plaintiff's construction stretches that definition beyond the breaking point, and would render § 25-403.01 essentially meaningless.

10. The plaintiff also maintained that § 25-403.01 authorized venue in Knox County under clause (2) permitting actions "in the county where the cause of action arose" or clause (3) permitting actions "in the county where the transaction or some part of the transaction occurred out of which the cause of action arose" NEB. REV. STAT. § 25-403.01 (Reissue 1995).

11. The cause of action arose upon payment of the check. That occurred where the defendant bank paid the check. The evidence fails to show that such payment occurred anywhere other than at the bank's office at Ewing, Holt County, Nebraska. Clause (2) clearly afforded no basis for the action to be brought in Knox County.

12. The clause (3) issue requires closer analysis. The plaintiff contends that at least part of the transaction occurred in Knox County where the alleged forger received money on the check from an intermediary bank. That intermediary bank sent the check through regular banking channels where it was subsequently paid by the defendant drawee bank upon presentation at its bank office in Ewing.

13. Under statutes according controlling effect to the place of the transaction, venue is not fixed at places where preliminary or incidental effects occurred, or where acts of inducement may have taken place. 92A C.J.S. *Venue* § 77 (2000). The act must be one of the facts which under the substantive law constitutes the cause of action. *Id.*

14. The liability of a payor bank to the true payee of a check arises from U.C.C. § 3-420, which classifies such payment as a conversion. NEB. U.C.C. § 3-420 (Reissue 1992). See also *Maddux v. First Westroads Bank*, 199 Neb. 81, 256 N.W.2d 647 (1977) (under original Article 3, payee or true owner of check cashed bearing forged endorsement may recover from drawee bank which paid check); 9 C.J.S. *Banks and Banking* § 420b (1996) (instrument is converted if bank makes payment on instrument bearing forged endorsement).

15. Conversion is the unauthorized and wrongful dominion over personal property owned by another, which is exerted as a denial of or inconsistent with the owner's rights in the property or is asserted in derogation, exclusion, or defiance of another's ownership or title in personal property. *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991). A conversion of a check bearing a forged endorsement by the drawee bank cannot occur until the check is paid by the drawee bank. Thus, the facts which under the substantive law of conversion constitute that cause of action occurred in Holt County where the defendant bank paid the check allegedly bearing the forged endorsement. Thus, the "transaction" within the meaning of clause (3) of § 25-403.01 occurred entirely within Holt County.

16. This court's original ruling on the motion was correct and this court adheres to the same.

17. The plaintiff did not resist the admission in evidence of the affidavit of defendant's counsel regarding expenses of the transfer. "It seems obvious that if an attorney seeks a fee for his or her client, that attorney should introduce at least an affidavit showing a list of the services rendered, *the time spent*, and the charges made." *Boamah-Wiafe v. Rashleigh*, 9 Neb. App. 503, 514, 614 N.W.2d 778, ____ (2000) (emphasis supplied). The affidavit (Exhibit 11) lists the services and the charges, but does not

specifically list the time spent. However, the plaintiff did not object upon that ground or otherwise claim that the affidavit is insufficient. Accordingly, the court does not determine the issue on that ground.

18. This court now considers the effect of the stipulation for dismissal which is silent on the issue of costs. It has long been held that the right to costs is dependent upon statutory provisions, there being no right thereto at common law. *City of Hastings v. Mills*, 50 Neb. 842, 70 N.W. 381 (1897). Statutes authorizing allowance of costs are strictly construed. *Branson v. Branson*, 84 Neb. 288, 121 N.W. 109 (1909).

19. The following statutes may have application in this case.

a. NEB. REV. STAT. § 25-403.01 (Reissue 1995): “The court in the county to which the action is transferred, in its discretion, may order the plaintiff or the plaintiff’s attorney to pay to the defendant all reasonable expenses, including attorney’s fees, incurred by the defendant because of the improper venue or in proceedings to transfer the action.”

b. NEB. REV. STAT. § 25-1707 (Reissue 1995): “Unless otherwise provided by statute, the costs of motions, continuances, amendments, and the like, shall be taxed and paid as the court in its discretion may direct.”

c. NEB. REV. STAT. § 25-1708 (Reissue 1995): “Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property.”

d. NEB. REV. STAT. § 25-1710 (Reissue 1995): “Costs shall be allowed of course to any defendant upon a judgment in his favor in the actions mentioned in section 25-1708.”

e. NEB. REV. STAT. § 25-1711 (Reissue 1995): “In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable. . . .”

20. There is very little case law in Nebraska addressing costs, and none that this court found on the specific point. See, e.g., *Ehlers v. Campbell*, 159 Neb. 328, 66 N.W.2d 585 (1954). “Although there is authority to the contrary, the rule in some jurisdictions is that the plaintiff is not entitled to costs on the settlement of a cause of action by the agreement of the parties in the absence of any agreement as to costs.” 20 C.J.S. *Costs* § 33 (1990). The discussion under that section states:

“According to other authorities, where a cause of action is extinguished by agreement between the parties, whether by payment, settlement, release, or otherwise, no agreement being made as to costs, plaintiff cannot recover costs, it being presumed that each party will bear his own costs.” *Id.* The section also states: “In the absence of any agreement as to costs, defendant is not entitled to recover any costs on a settlement of the cause of action.” *Id.* But the section then goes on to provide: “However, it also is held that defendant is entitled to costs on a settlement, and that where defendant pleads payment, or some other method of extinguishment of a cause of action, and is successful, he will be entitled to costs.” *Id.*

21. This case possesses characteristics of a judgment favorable to plaintiff and of a judgment favorable to defendant. While the plaintiff is dismissing her cause of action, she is doing so in consideration of payment of approximately \$27,870 of a \$30,000 claim. Under these circumstances, the court concludes that neither § 25-1708 nor § 25-1710 applies on its terms, and that neither party is entitled to costs as a matter of right.

22. Because the stipulation was silent on the issue of costs, this court believes that the most sensible rule is the one presuming as a matter of law that each party should bear his or her own costs. Applying a contrary rule would allow a party to enter into a settlement agreement and then “spring” an additional issue on the adversary later. The parties could easily have agreed to disposition of costs or at least specifically left open the issue of costs in the settlement agreement. Public policy favors complete and final settlement of disputes. The presumption that each party will bear his or her own costs where the settlement agreement is silent most faithfully implements that policy objective.

23. The court further concludes that, even if this court’s interpretations of the costs statutes are incorrect, the court should exercise its discretion under § 25-403.01 not to impose expenses including attorneys’ fees upon the plaintiff on the transfer from Knox County to Holt County.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The stipulation for settlement is generally approved.
2. Judgment is granted dismissing the plaintiff’s operative petition with prejudice to future action.
3. Judgment is granted dismissing the defendant Farmers State Bank’s operative third-party petition against all third-party defendants with prejudice to future action.

4. Judgment is granted dismissing the operative counterclaim of third-party defendant Midwest Bank, N.A., Creighton, Knox County, Nebraska, formerly known as American National Bank, against the plaintiff with prejudice to future action.

5. Judgment is granted dismissing the operative cross-petitions of third-party defendant Midwest Bank, N.A., Creighton, Knox County, Nebraska, formerly known as American National Bank, against all other third party defendants with prejudice to future action.

6. Each party shall bear his, her, or its own respective costs and attorneys' fees.

7. The interlocutory order taxing costs of transfer of venue to plaintiff is vacated.

8. The defendant Farmers State Bank's motion for security is granted to the extent that the court clerk is directed to withhold \$1,500.00 from the proceeds held by the clerk as security for payment of costs by plaintiff on appeal, and is otherwise denied.

9. The court clerk is directed to disburse the settlement proceeds of \$27,870.53, less the security deposit of \$1,500.00, or \$26,370.53, to the plaintiff in care of the plaintiff's attorney of record. Unless otherwise determined upon appeal, the plaintiff shall be entitled to disbursement of the remaining sum of \$1,500.00 upon expiration of time for appeal.

10. All other claims or motions of all parties are granted to the extent consistent with the above-stated relief and are denied to the extent inconsistent with such relief. This constitutes a final judgment.

Signed in chambers at **Ainsworth**, Nebraska, on **March 1, 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 "Judgment" entered**
Done on _____, 20____ by _____.
 - Mail postcard/notice required by § 25-1301.01 within 3 days (**All petitions, counter-claims, and cross-petitions dismissed with prejudice; settlement stipulation approved; each party to pay own costs and attorneys' fees.**)
Done on _____, 20____ by _____.
- 9** Enter judgment on the judgment record.
Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to: