
IN THE NEBRASKA COURT OF APPEALS

IVAN EICHER and DELORES EICHER, PATRICK SWEENEY and LOIS SWEENEY,
EMMETT GULLEY, STEVEN W. STARMAN, WILLIAM STREET, DAVID WELTON,
DON NOVACHICH, JERRY GILLS, RENEE RICHTER, LORI HILL
and JENNIFER FRANS GRIESS

Plaintiffs/Appellees,

vs.

MID AMERICA FINANCIAL INVESTMENT CORPORATION, SCOTT
W. BLOEMER, and ELENA [sic] HOLLINGSHEAD,

Defendants/Appellants.

APPEAL FROM THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA
Honorable Peter C. Bataillon

BRIEF OF APPELLANTS MID AMERICA FINANCIAL INVESTMENT
CORPORATION SCOTT W. BLOEMER, and ELENA [sic] HOLLINGSHEAD

PREPARED AND SUBMITTED BY:

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STATEMENT OF THE BASIS OF JURISDICTION

The Nebraska Supreme Court acquired jurisdiction by a timely appeal from the District Court's final order. See *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000); *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999).

The District Court of Douglas County entered a final order on October 5, 2004. Appellants timely filed a Notice of Appeal on October 19, 2004. (Notice of Appeal).

STATEMENT OF THE CASE

A. Nature of Case

This is the second appeal of real estate transactions with eleven (11) individuals in Douglas County, Nebraska.

B. Issues Tried in the Court Below

Following the first appeal, the Plaintiffs filed a Motion to Modify Order Dated June 16, 2003 seeking to modify the June 16, 2003 Order to state that the award of costs and attorney fees is based on the Defendants' violation of the Nebraska Consumer Protection Act, not the Nebraska Deceptive Trade Practices Act as stated in the June 16, 2003 Order.

C. How the Issues Were Decided

The District Court entered an Order dated October 5, 2004 that the "order awarding attorney fees of June 16, 2003, pursuant to the Nebraska Deceptive Trade Practice Act should have been pursuant to Nebraska Consumers Protection Act. As such, this Order Nunc Pro Tunc hereby corrects that Order so that the Order of June 16, 2003, is pursuant to the Nebraska Consumers Protection Act." (ST3).

D. Standard of Review

"When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling." *D.K. Buskirk & Sons v. State*, 252 Neb. 84, 560 N.W.2d 462 (1997).

“This court treats the determination of factual issues in such [an] action which was tried without a jury in the same manner as any other action at law; accordingly, the findings of the trial court have the effect of a verdict and will not be set aside unless clearly wrong.” *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 440 N.W.2d 187 (1989).

ASSIGNMENTS OF ERROR

I.

The trial court was without jurisdiction to entertain Plaintiffs’ Motion to Modify Order Dated June 16, 2003.

II.

To the extent the Plaintiffs’ Motion to Modify Order Dated June 16, 2003 was a request to modify the prior Order, it was untimely

III.

The trial court erred in entering an Order Nunc Pro Tunc purportedly correcting the Order of June 16, 2003.

IV.

The trial court erred in purportedly correcting the June 16, 2003 Order to award attorney fees pursuant to the Nebraska Consumers Protection Act instead of the Nebraska Deceptive Trade Practice Act.

PROPOSITIONS OF LAW

I.

A district court is divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected to an appellate court.

Sports Courts of Omaha, Ltd. v. Meginnis, 242 Neb. 768, 773, 497 N.W.2d 38, 42 (1993).

II.

The inherent power of a district court to vacate or modify its judgments or orders during term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within six months after the entry of the judgment or order.

Neb. Rev. Stat. § 25-2001 (1) (Reissue 2003).

III.

Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party and after such notice, if any, as the court orders. . . .

Neb. Rev. Stat. § 25-2001 (3) (Reissue 2003).

IV.

The office of an nunc pro tunc order is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.

Fay v. Dowding, Dowding & Dowding, 261 Neb. 216, 225-26, 623 N.W.2d 287, 295 (2001).

V.

Clerical errors may be corrected by an order nunc pro tunc, but judicial errors may not. Judicial errors may be corrected by modification or vacation of the judgment entered. . . .

Interstate Printing Co. v. Department of Revenue, 236 Neb. 110, 115, 459 N.W.2d 519, 523 (1990).

VI.

The office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended. An order nunc pro tunc cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it. Neither can it be employed where the fault in the original judgment is that it is wrong as a matter of law, nor can it be employed to allow the court to review and reverse its action with respect to what it formerly did or refused to do.

Continental Oil Co. v. Harris, 214 Neb. 422, 424, 333 N.W.2d 921, 923 (1983).

VII.

An order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to establish that the order is required to make the record reflect the truth.

Continental Oil Co. v. Harris, 214 Neb. At 425, 333 N.W.2d at 923.

STATEMENT OF FACTS

Following trial of the case and the trial court's ruling on each of the Plaintiff's claims, the Plaintiffs filed their Motion for Attorney's Fees. (ST224 in S-03-001257). The trial court thereafter entered an Order on June 16, 2003 awarding attorney's fees, pursuant to the Nebraska Deceptive Trade Practices Act, Neb. Rev. Stat. §87-303, of \$377,323.40 to the three groups of attorneys representing the Plaintiffs. (T43-44 in S-03-001257). The trial court used a lodestar multiplier to enhance the fees of Plaintiffs' attorneys. (T43-44 in S-03-001257). Court costs were also awarded. (T43 in S-03-001257).

On October 2, 2003 the trial court entered an Order overruling the parties' Motions for New Trial and ruled, as to Plaintiffs Third Cause of Action, Deceptive Trade Practices, that the Nebraska Deceptive Trade Practices Act does not provide for a private cause of action other than injunctive relief and the Plaintiffs did not provide adequate evidence in support of the injunctive relief. Accordingly, the trial court found against the Plaintiffs as to this cause of action. (T51-52; T55-56 in S-03-001257).

Following submission of the parties' initial briefs in the first appeal in this case, the Plaintiffs filed their Motion to Modify Order Dated June 16, 2003. (T12). Following hearing, the trial court entered an order ruling that "order awarding attorney fees of June 16, 2003, pursuant to the Nebraska Deceptive Trade Practice Act should have been pursuant to Nebraska Consumers Protection Act. As such, this Order Nunc Pro Tunc hereby corrects that Order so that the Order of June 16, 2003, is pursuant to the Nebraska Consumers Protection Act." (ST3).

ARGUMENT

I. Jurisdiction

"A district court is divested of subject matter jurisdiction over a particular case when an appeal of that case is perfected to an appellate court." [citations omitted]. *Sports Courts of Omaha, Ltd. v. Meginnis*, 242 Neb. 768, 773, 497 N.W.2d 38, 42 (1993). Under this principle, the trial court was without jurisdiction to rule on the plaintiff's request for attorney's fees after the defendant had appealed from the trial court's ruling on the underlying action. *WBE Co., Inc. v. Papio-Missouri River Natural Resources Dist*, 247 Neb. 522, 529 N.W.2d 21 (1995).

Similarly, the trial court properly refused to take action on the wife's claim under that Occupants and Claimants Act in a fraudulent conveyance action when appeal from the decree entered in the fraudulent conveyance action had already been taken, stating: "Once an appeal has been perfected to an appellate court, the district court has no jurisdiction to enter orders until the cause

is remanded.” [citation omitted]. *Lincoln Lumber Co. v. Elston*, 1 Neb. App. 741, 744, 511 N.W.2d 162, 165 (1993).

II. Power to Modify Order

Pursuant to Neb. Rev. Stat. § 25-2001 (1) (Reissue 2003): “The inherent power of a district court to vacate or modify its judgments or orders during term may also be exercised after the end of the term, upon the same grounds, upon a motion filed within six months after the entry of the judgment or order.” The Plaintiffs’ Motion to Modify order Dated June 16, 2003 requested that the trial court issue “an Order Nunc Pro Tunc modifying the Court’s order dated June 16, 2003 to state that its award of costs and attorney fees in the aforementioned matter is based on the Defendants’ violation of the Nebraska Consumer Protection Act (“NCPA”), not the Nebraska Deceptive Trade Practices Act (“NDTPA”) as stated in the order.” (T1).

To the extent the Plaintiffs were seeking a modification of the June 16, 2003 Order, their motion was untimely under Neb. Rev. Stat. § 25-2001 (1) since the term of the court had ended and more than six months had elapsed from the entry of the order. *Fourth Judicial District Rules Rule 4-1 C*. To the extent the trial court granted a modification of the prior June 16, 2003 Order, the trial court, because the motion was untimely, was in error in so doing.

III. Order Nunc Pro Tunc

Pursuant to Neb. Rev. Stat. § 25-2001 (3) (Reissue 2003): “Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court by an order nunc pro tunc at any time on the court's initiative or on the motion of any party and after such notice, if any, as the court orders. . . .”

The office of an nunc pro tunc order is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded.” [citations omitted]. “It is not the function of an

order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended. [citations omitted]. *Fay v. Dowding, Dowding & Dowding*, 261 Neb. 216, 225-26, 623 N.W.2d 287, 295 (2001).

In *Fay* the court ruled:

In its nunc pro tunc order, the review panel did not seek to correct the issuance of an order which did not accurately reflect the decision of the review panel. Instead, the review panel sought to substitute a reversal for an affirmance. As demonstrated in the above cases, an order nunc pro tunc cannot be used to change or reverse a judgment entered. The review panel could not change the action previously taken affirming the award of the single judge to reversing the award under the auspices of a nunc pro tunc order. Thus, the review panel exceeded its authority under § 48-180 in issuing its second order, and accordingly, we vacate the review panel's second order and consider the order of affirmance originally entered.

261 Neb. at 226, 623 N.W.2d at 295.

“Clerical errors may be corrected by an order nunc pro tunc, but judicial errors may not. [citation omitted]. Judicial errors may be corrected by modification or vacation of the judgment entered. . . .” *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 115, 459 N.W.2d 519, 523 (1990).

the office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded. It is not the function of an order nunc pro tunc to change or

revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended. An order nunc pro tunc cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it. Neither can it be employed where the fault in the original judgment is that it is wrong as a matter of law, nor can it be employed to allow the court to review and reverse its action with respect to what it formerly did or refused to do.

Continental Oil Co. v. Harris, 214 Neb. 422, 424, 333 N.W.2d 921, 923 (1983).

“An order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to establish that the order is required to make the record reflect the truth.” 214 Neb. at 425, 333 N.W.2d at 923.

With the foregoing in mind, in *Continental Oil Co.* :

The purported order nunc pro tunc changed the rights fixed by the so-called "administrative" order entered July 2, 1981, by, in effect, changing the minimum amount Conoco was required to bid by a sum equal to the taxes and special assessments outstanding. We have nothing before us which demonstrates that the trial court's order of July 2, 1981, whether correct or not, did anything other than to record what the trial judge intended to decree at that time. That being so, any error in that order is a judicial and not a clerical one. Such error cannot be corrected by an order nunc pro tunc.

214 Neb. at 425, 333 N.W.2d at 923.

As discussed in *Gunia v. Morton*, 174 Neb. 53, 120 N.W.2d 371 (1963):

The controversy here concerns the finding in the decree that the dirt fill and debris deposited upon the plaintiffs' land "varies in depth from one to eight feet and is in the amount of 3,500 cubic yards, more or less." The plaintiffs contend that the trial court actually found that the plaintiffs were to remove "all dirt and debris" from their property, and that the reference in the decree to the depth of the dirt fill and debris was a clerical error which was made in recording the judgment of the court.

A court of record has inherent authority to amend its records so as to make them conform to the facts. It is proper for a court to make an entry nunc pro tunc so that its records will speak the truth. [citation omitted]. Such an order is proper to correct the record of a judgment, but not to correct the judgment itself. Clerical errors may be corrected by an order nunc pro tunc but judicial errors may not. The proper function of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake has not been truly recorded. [citation omitted]. It is not the purpose of an order nunc pro tunc to correct, change, or modify action previously taken by the court.

174 Neb. at 56, 120 N.W.2d at 373.

In this case the trial court, in the October 5, 2004 Order, changed the statutory basis for its award of attorney's fees and costs in the June 16, 2003 Order. There is nothing in the record which demonstrates that the trial court's Order of June 16, 2003, whether correct or not, did anything other than to record what the trial judge intended to order at the time. As such, the trial court exceeded its authority, the October 5, 2004 Order should be vacated and the issue of attorney's fees and costs should be considered based on the Order of June 16, 2003.

CONCLUSION

The trial court was divested of subject matter jurisdiction when an appeal of the case was perfected on October 30, 2003. Nonetheless, Plaintiffs' to Modify order Dated June 16, 2003, to the extent the Plaintiffs were seeking a modification of the June 16, 2003 Order, was untimely under Neb. Rev. Stat. § 25-2001 (1) since the term of the court had ended and more than six months had elapsed from the entry of the order and the trial court, to the extent it granted a modification, was in error in so doing. Finally, to the extent that the trial court's October 5, 2004 Order was a nunc pro tunc order, the trial court exceeded its authority in entering it. Consequently, the October 5, 2004 should be vacated and the issue of attorney's fees and costs should be considered based on the Order of June 16, 2003.

Respectfully submitted,

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[sic] HOLLINGHEAD, Defendants/Appellants,

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AFFIDAVIT OF SERVICE

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

BETTY L. EGAN, being first duly sworn on oath, states as follows:

1. That she is one of the attorneys for the Defendants/Appellants Mid America Financial Investment Corporation, Scott W. Bloemer and Elena [sic] Hollingshead in the above-captioned matter.

2. That on January 6, 2005, she caused two copies of Brief of Appellants to be sent by regular mail to the following attorneys of record:

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FURTHER AFFIANT SAYETH NOT.

Betty L. Egan
Betty L Egan

SUBSCRIBED AND SWORN to before me this 6th day of January, 2005.



Julie Meinzer
Notary Public