

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)**

SECURITY STATE BANK V. BOPP

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

SECURITY STATE BANK, APPELLEE,

v.

TIM BOPP ET AL., APPELLANTS.

Filed April 9, 2024. Nos. A-23-220, A-23-221.

Appeals from the District Court for Custer County: KARIN L. NOAKES, Judge. Affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellants.

Keith A. Harvat, of Houghton, Bradford & Whitted, P.C., L.L.O., and Jeffrey C. Jarecki,
of Jarecki, Sharp & Petersen, P.C., L.L.O., for appellee.

PIRTLE, Chief Judge, and RIEDMANN and WELCH, Judges.

PIRTLE, Chief Judge.

INTRODUCTION

Tim Bopp, Yvonne Bopp, 4-Jen Inc., and Phillip Kelly, in his capacity as the trustee of the Bopps' bankruptcy estate, appeal multiple orders of the district court for Custer County in their two consolidated lawsuits involving Security State Bank (SSB).

Because the Bopps, 4-Jen, and Kelly failed to produce a bill of exceptions in this matter, our review is limited to examining only the pleadings in conjunction with the judgments reviewed. For the reasons that follow, we affirm.

BACKGROUND

As stated above, there was no bill of exceptions produced in this matter. Moreover, the record before us lacks the relevant pleadings along with many motions and orders referenced by the parties. However, one of the cases on appeal, case No. CI 11-116, was previously before us in

Security State Bank v. Bopp, No. A-12-648, 2013 WL 2106736 (Neb. App. May 14, 2013). Because this opinion contains relevant background information, we will cite it when necessary to fill voids in the factual background. Otherwise, our recitation of facts relies heavily on the district court's December 19, 2023, order that dismissed both cases at issue.

From 2008 to 2010, the Bopps and their business, 4-Jen, secured several loans from SSB against their residence and other personal property. See *id.* Eventually the Bopps and 4-Jen defaulted on these loans. On August 22, 2011, SSB filed a petition in case No. CI 11-116 for replevin against the Bopps and 4-Jen seeking the return of personal property covered under the security agreements. See *id.* The Bopps and 4-Jen filed general denials of the petition and requested dismissal of the action. On October 11, 2011, the Bopps issued a quitclaim deed to SSB believing that it paid off their entire debt. See *id.*

On February 22, 2012, the Bopps filed a notice of Chapter 7 bankruptcy. Accordingly, Kelly was named as the trustee for the Bopps' bankruptcy estate.

On May 30, 2012, SSB filed motions for summary judgment against the Bopps and 4-Jen. *Security State Bank v. Bopp, supra.* On July 17, the district court granted SSB's motions for summary judgment. *Id.* The Bopps appealed that order, and we issued a memorandum web opinion in *Security State Bank v. Bopp, supra.* In that opinion, we reversed the grant of summary judgment as to the Bopps, but because 4-Jen did not join in the appeal, the summary judgment against 4-Jen was unaffected. See *id.*

On April 17, 2014, the Bopps filed an amended answer in case No. CI 11-116 and, for the first time, made counterclaims demanding the return of the property. On March 31, 2016, SSB moved to dismiss their remaining claims, which the court granted on May 24. On July 12, 2016, the Bopps filed an amended counterclaim which the district court summarized as alleging a "UCC claim (25-10,102), Accord and Satisfaction, Breach of Contract of Good Faith and Fair Dealing, Conversion/Breach of Contract/Commercial Reasonableness UCC 9-610, Deception – Nebraska Deceptive Trade Practices Act."

On December 14, 2016, Kelly sought to determine if he, in his capacity as trustee, was a real party in interest in case No. CI 11-116. While the record seems to indicate an order was issued on January 30, 2017, that substituted the Bopps for Kelly as the real party in interest in case No. CI 11-116, it appears that order was actually issued on July 11, 2017. Nevertheless, it is clear the district court dismissed the Bopps and 4-Jen from the action based on a finding that Kelly was the only real party in interest who could bring the claims.

On July 26, 2016, the Bopps filed a complaint against SSB in the county court for Custer County. On November 29, 2016, the Bopps' lawsuit was transferred to the district court as case No. CI 19-158. The district court's order summarized the allegations in case No. CI 19-158 as a "25-10,102 claim, Accord and Satisfaction, Breach of Contract (Good Faith and Fair Dealing), Conversion (Commercial Reasonableness), Deception." While there is no corresponding record, the Bopps claim this action sought return of property that SSB had sold to two individuals, Doug Prella and Tom Bailey. On August 29, 2019, the complaint in case No. CI 19-158 was amended to substitute Kelly as the real party in interest.

On March 22, 2021, case Nos. CI 11-116 and CI 19-158 were consolidated.

On August 29, 2022, the U.S. Bankruptcy Court for the District of Nebraska granted Kelly's motion for approval of abandonment of assets in the Bopps' bankruptcy case. As

summarized by the district court, this abandonment of assets applied to “any claims which the debtors may have, of any sort or description, related to the foreclosure activities of SSB, commenced by the bank in 2011 and continuing thereafter, including, but not limited to any and all claims made by Debtors in CI 11-116 and CI 19-158.”

Following the bankruptcy estate’s abandonment of the claims in case Nos. CI 11-116 and CI 19-158, the Bopps sought to resubstitute themselves as the real parties in interest in both matters. In that effort, on October 16, 2022, the Bopps, 4-Jen, and Kelly filed a motion for leave to amend in case Nos. CI 11-116 and CI 19-158. On October 19, SSB objected to the motion arguing that the Bopps did not have standing to pursue the claims in either case because the amended counterclaims in case No. CI 11-116 and the claims in case No. CI 19-158 were made when the Bopps’ bankruptcy estate possessed the rights to the claims. SSB went on to assert that the abandonment of the claims by the bankruptcy estate did not remedy the jurisdiction deficiency because the Bopps never listed their counterclaims and claims as assets in their bankruptcy filings. Without the Bopps listing these claims as assets, SSB contended that their rights to those claims did not revert to them upon the bankruptcy estate abandoning them. Based on this argument, SSB argued there were no parties with standing to pursue the claims and that the consolidated cases should be dismissed.

On December 9, 2022, the district court issued an order denying the Bopps, 4-Jen, and Kelly’s motion for leave to amend and dismissed case Nos. CI 11-116 and CI 16-158 with prejudice. On December 19, the Bopps, 4-Jen, and Kelly filed a motion to alter or amend the district court’s order. On February 16, 2023, the district court issued an order denying the motion to alter or amend.

On March 18, 2023, the Bopps, 4-Jen, and Kelly filed their notice of appeal and requested the bill of exceptions and transcripts in both cases. In their request for the bill of exceptions, they requested “that the bill of exceptions include only those proceedings which occurred after December 23, 2021, which is the date of the last and most recent request by the parties.” In response to receiving this request, the official court reporter for the Eighth Judicial District of the State of Nebraska filed a certification stating that no bill of exceptions was going to be produced because there was no proceeding held on December 23, 2021, and the parties failed to list specific hearing dates in their request. In the Bopps, 4-Jen, and Kelly’s request for the transcript, they only requested the production of six records. As such, only those six records were produced.

The Bopps, 4-Jen, and Kelly filed a more substantive amended request for a bill of exceptions and transcripts on March 27, 2023. However, the then-operative Neb. Ct. R. App. P. § 2-105(B)(2)(f) stated:

If appellant fails to file a request to prepare the bill of exceptions at the same time the notice of appeal is filed, the Clerk shall notify the parties of the failure. In such event, appellee shall have 10 days from the date of filing of the notice of appeal to file a request for a bill of exceptions. Thereafter, no request for a bill of exceptions may be filed without leave of the appellate court for good cause shown, which cause shall not be within a party’s reasonable control.

There is no record that the Bopps, 4-Jen, or Kelly sought leave of the appellate court when they filed their amended request for a bill of exceptions and transcripts. Without that approval, no additional bill of exceptions or transcripts were produced or filed.

ASSIGNMENTS OF ERROR

Restated and reordered, the Bopps, 4-Jen, and Kelly assign that the district court erred by: (1) failing to carry out the mandate of this court expressed in *Security State Bank v. Bopp*, No. A-12-648, 2013 WL 2106736 (Neb. App. May 14, 2013); (2) entering summary judgment against 4-Jen in 2012; (3) denying their motion to add Prelle and Bailey as parties in its October 5, 2016, order; (4) dismissing the Bopps' second, third, and fifth causes of action within their fourth amended complaint and amended counterclaims in its January 31, 2018, order; (5) overruling the Bopps' motion to vacate the summary judgment entered in 2012; (6) granting summary judgment against the Bopps in its June 17, 2020, order; (7) denying the Bopps' motion for summary judgment in its October 5, 2020, order; (8) reasserting and restating its prior determinations as to parties and claims in its October 11, 2021, order; and (9) dismissing Bailey as a party to the Bopps' action in its December 16, 2021, order.

The Bopps also assign the district court erred in its December 9, 2022, order by denying their motion for leave to amend and dismissing case Nos. CI 11-116 and CI 19-158.

STANDARD OF REVIEW

The responsibility for filing a bill of exceptions for appellate review rests with the appellant. *William P. v. Jamie P.*, 313 Neb. 378, 984 N.W.2d 285 (2023). When there is no bill of exceptions, we examine and consider only the pleadings in conjunction with the judgment reviewed. *Id.* If they are sufficient to support the judgment, it will be presumed on appeal that the evidence supports the trial court's orders and judgment. *Rosberg v. Rosberg*, 25 Neb. App. 856, 916 N.W.2d 62 (2018).

ANALYSIS

While our review is limited to the parties' pleadings and the district court's judgments, the pleadings are not in the record before us and the only relevant judgment in the record is the December 9, 2022, denial of the Bopps, 4-Jen, and Kelly's motion to amend their pleadings. Neb. Ct. R. App. P. § 2-104(A)(1) requires the pleadings to be included in the appellate transcript. That rule provides as follows:

Upon filing the notice of appeal with the clerk of the court from which the appeal is taken, the appellant shall also file with that court a request directing the clerk to prepare a transcript. The request shall designate the pleading or document to be included in the transcript by listing the name of the pleading or document and its date of filing.

Section 2-104(A)(2) continues:

The transcript shall contain the following: . . . (a) The judgment, decree, or final order sought to be reversed, vacated, or modified, and the lower court's memorandum opinion, if any; (b) The pleadings upon which the case was tried, as designated by the appellant in the request. In the absence of specification or lack of request by appellant, these shall

include: . . . in civil cases, a copy of the last amended petition or complaint and last amended answer.

In *Stevens v. Stevens*, 228 Neb. 84, 421 N.W.2d 429 (1988), the Nebraska Supreme Court found that an appellate court cannot consider a judgment entered by the trial court on a pleading not included in the transcript. In that case, the appellant failed to include in the transcript a copy of the responsive pleading that had been filed by the appellee in the lower court. *Id.* The court affirmed the decision of the trial court after finding that it could not provide any relief to appellant without having all of the pleadings upon which the case was tried. *Id.*

Without the pleadings in case Nos. CI 11-116 and CI 19-158, the court's prior orders, and any evidence considered in those orders, we are unable to effectively review the Bopps and 4-Jen's assignments of error. We will specifically mention that this is also true of the Bopps, 4-Jen, and Kelly's tenth assignment of error although the record contains the relevant motion, objection, and judgment.

The tenth assignment of error concerns the district court's denial of the Bopps, 4-Jen, and Kelly's motion to resubstitute the Bopps and 4-Jen as the real parties in interest in both cases. Despite having the relevant motion and judgment, the record still lacks the August 29, 2019, amended complaint that substituted Kelly as the real party in interest in case No. CI 19-158 and the January 30, 2017, order which substituted Kelly as the real party in interest in case No. CI 11-116. Without those records, we are unable to effectively review the assignment of error. It is incumbent upon an appellant to present a record which supports the errors assigned. See *Sanwick v. Jenson*, 244 Neb. 607, 508 N.W.2d 267 (1993). Because we are unable to effectively review all the assigned errors, we must affirm the district court's decisions.

CONCLUSION

We conclude that the district court did not err in dismissing the Bopps, 4-Jen, and Kelly's claims in case Nos. CI 11-116 and CI 19-158.

AFFIRMED.