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THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. JEFFREY LAKE DEVELOPMENT, INC., A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

810 N.W.2d 144

Filed December 2, 2011. No. S-10-1196.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
2. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Daniel E. Klaus and Donald L. Dunn, of Rembolt Ludtke, L.L.P., and Michael C. Klein, of Anderson, Klein, Swan & Brewster, for appellant.

Steve Windrum for appellees.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

HEAVICAN, C.J.

INTRODUCTION

The Central Nebraska Public Power & Irrigation District (Central) filed this action against Jeffrey Lake Development, Inc., and other sublessees (collectively JLDI) to quiet title to land owned by Central and leased by JLDI. JLDI sought to dismiss the action. The district court sustained the various motions to dismiss. Central appeals, and JLDI cross-appeals. We reverse, and remand for further proceedings.

FACTUAL BACKGROUND

This is the third time in approximately 10 years that these parties have appeared before this court on issues regarding a 1980 lease agreement.[1] In addition, the Nebraska Court of Appeals decided another case involving this lease in 1997.[2]

Since 1944, Central and JLDI have entered into a series of leases concerning portions of lakefront property surrounding Jeffrey Lake, which is owned by Central. JLDI is a nonprofit association that was created to manage property leased from Central. At issue is the lease entered into by the parties in 1980. That lease had a primary term of 31 years, but provided for an automatic annual extension unless JLDI breached the lease or the parties agreed to modify it. Like other leases between these parties, this lease did not provide for the payment of cash rent to Central.

In approximately 1994, Central's board of directors determined that rent should be charged for the land surrounding Jeffrey Lake and passed a resolution to that effect. JLDI sued, contending that Central could not modify the leases. The Lincoln County District Court granted summary judgment to JLDI. Central appealed, and the Court of Appeals reversed, concluding that fact issues remained.[3]

On remand, and after a trial, the district court held for JLDI. This court affirmed, concluding, as relevant, that there was consideration for the leases and that public policy was not violated by the lack of cash rent.[4]

Having lost its battle to charge rent under the existing leases, Central decided to terminate the leases. As such, it filed a declaratory judgment action in the Phelps County District Court seeking interpretation of the parties' rights under the lease agreement. However, the district court in that case

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[1] *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 267 Neb. 997, 679 N.W.2d 235 (2004); *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 262 Neb. 515, 633 N.W.2d 102 (2001).

[2] *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 5 Neb. App. 974, 568 N.W.2d 585 (1997).

[3] *Id.*

[4] *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, *supra* note 1.

declined to decide the action, concluding that it was not justiciable, because Central had indicated that it "'wishe[d]'" to terminate the lease, not that it had actually done so. This court affirmed.[5]

In response, Central sent notices to JLDI terminating the lease and subleases. Central then filed declaratory judgment and quiet title actions against JLDI on July 6, 2010, this time in Lincoln County District Court. Subsequently, in response, JLDI filed motions to dismiss, arguing that Central's complaint failed to state a claim. A hearing was held in October on the motions to dismiss, and on November 12, the district court, without comment, sustained the motions and overruled JLDI's motion for attorney fees.

Though none are in the record, Central subsequently filed three additional motions: a motion for new trial, a motion for specific conclusions of fact and law, and a motion to alter or amend the judgment. A hearing was held on those motions on November 22, 2010. On November 29, those motions were also denied. Central appeals, and JLDI cross-appeals.

ASSIGNMENTS OF ERROR

On appeal, Central assigns that the district court erred in dismissing its complaint. On cross-appeal, JLDI assigns that the district court erred in denying its motion for attorney fees.

STANDARD OF REVIEW

[1,2] An appellate court reviews a district court's order granting a motion to dismiss de novo. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.[6] To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, accepted as true, to state a claim for relief that is plausible on its face.[7]

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[5] *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra* note 1, 267 Neb. at 1003, 679 N.W.2d at 241.

[6] See *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[7] *Id.*

In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[8]

ANALYSIS

Motions to Dismiss.

On appeal, Central assigns that the district court erred in dismissing its complaint for failing to state a claim. Central argues that its complaint states a cause of action for declaratory judgment and to quiet title.

We conclude that the district court erred in granting JLDI's motions to dismiss. In this case, Central alleged that it had terminated the leases in question. That allegation, along with the remainder of the allegations in Central's complaint, taken as true, are plausible and, thus, were sufficient to suggest that Central had presented a justiciable controversy. This conclusion is reinforced by our decision in *Central Neb. Pub. Power v. Jeffrey Lake Dev.*,[9] which suggests that the issue in Central's complaint was its phrasing with regard to termination of the leases.

Nor do we find merit to JLDI's contention that the motions to dismiss should have been granted because of the doctrines of judicial estoppel, collateral estoppel, and res judicata. We have said that a complaint is subject to dismissal for failure to state a claim when its allegations indicate the existence of an affirmative defense that will bar the award of any remedy.[10] For that to occur, the applicability of the defense has to be clearly indicated and must appear on the face of the pleading to be used as the basis for the motion.[11]

Even if we assume, without deciding, that the affirmative defenses raised on appeal appear on the face of Central's complaint, Central would be entitled to ask for leave to amend

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[8] *Id.*

[9] *Central Neb. Pub. Power v. Jeffrey Lake Dev., supra* note 1.

[10] *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

[11] *Id.*

its complaint to remedy any defect—but that would require Central to have been properly notified that JLDI was asserting an affirmative defense. But the motions to dismiss filed in this case were all generic in form and simply indicated that Central's complaint should be dismissed because it failed to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) and, thus, provided no such notice.

We noted in *Weeder v. Central Comm. College*[12] that "while the Nebraska Rules of Pleading in Civil Actions . . . have a liberal pleading requirement for both causes of action and affirmative defenses, the touchstone is whether fair notice was provided." It cannot be said that these generic motions provided fair notice to Central of the affirmative defenses that JLDI planned to rely upon.

For these reasons, we conclude that the district court erred in dismissing Central's complaint for failure to state a claim. We therefore reverse the decision of the district court and remand the cause for further proceedings.

JLDI's Cross-Appeal.

In its cross-appeal, JLDI assigns that the district court erred in denying its motion for attorney fees. Because we conclude that the district court erred in granting JLDI's motions to dismiss, we need not reach JLDI's cross-appeal.

CONCLUSION

The decision of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

WRIGHT, J., not participating in the decision.

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[12] *Weeder v. Central Comm. College*, 269 Neb. 114, 125-26, 691 N.W.2d 508, 517 (2005).