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SANDRA K. NIEVEEN, APPELLANT, V. TAX 106,
A NEBRASKA GENERAL PARTNERSHIP,
ET AL., APPELLEES.

___ N.W.2d ___

Filed May 13, 2022. No. S-21-364.

1. **Constitutional Law: Statutes.** The constitutionality of statutes and statutory interpretation present questions of law.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo by an appellate court, accepting the factual allegations in the complaint as true and drawing all reasonable inferences of law and fact in favor of the nonmoving party.
3. **Actions: Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviewing a dismissal on the pleadings is not obliged to accept as true legal conclusions couched as factual allegations or threadbare recitals of the elements of a cause of action supported by mere conclusory statements.
4. **Equity: Quiet Title.** A quiet title action sounds in equity.
5. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial

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judge heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Lancaster County: Kevin R. McManaman, Judge. Affirmed.

Mark T. Bestul, Jennifer Gaughan, and Caitlin Cedfeldt, of Legal Aid of Nebraska, for appellant.

Christian R. Blunk, of Harris & Associates, P.C., L.L.O., for appellees TAX 106 and Vintage Management, LLC.

Patrick F. Condon, Lancaster County Attorney, and Eric Synowicki for appellees Lancaster County and Rachel Garver.

Douglas J. Peterson, Attorney General, and James A. Campbell, Solicitor General, for appellee Attorney General.

Heavican, C.J., Miller-Lerman, Cassel, Funke, Papik, and Freudenberg, JJ., and O’Gorman, District Judge.

Papik, J.

After Sandra K. Nieveen failed to pay her real property taxes, the Lancaster County treasurer sold a tax certificate for the property to a private party. Over 3 years later, when Nieveen had still not paid the relevant property taxes, the tax certificate holder applied for and obtained a tax deed to the property. Nieveen later filed a lawsuit in which she argued that she should be declared the owner of the property for various reasons. The district court denied Nieveen relief, finding that she did not qualify for an extended redemption period under Neb. Rev. Stat. § 77-1827 (Reissue 2018) and that the tax certificate sale process did not violate her constitutional rights under the U.S.

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and Nebraska Constitutions. Nieveen now appeals, but we find no error on the part of the district court and, thus, affirm.

BACKGROUND

Tax Certificate Sale and Deed Transfer.

Nebraska utilizes tax certificate sales as one method of recouping delinquent property taxes. See, Neb. Rev. Stat. § 77-1801 et seq. (Reissue 2018); *Continental Resources v. Fair*, ante p. 184, 971 N.W.2d 313 (2022) (discussing statutes governing tax certificate sale process). Nieveen did not pay her 2013 property taxes. As a result, the Lancaster County treasurer, pursuant to Nebraska's tax certificate sale statutes, sold a tax certificate for Nieveen's property to TAX 106 on March 2, 2015.

Three years after purchasing the tax certificate, TAX 106 began to take the procedural steps required by statute to request a tax deed from the Lancaster County treasurer for Nieveen's property. See § 77-1837. On March 2, 2018, TAX 106 sent a notice by certified mail to Nieveen of its intention to apply for a tax deed to the property in 3 months' time if she did not redeem the property by paying the taxes, interest, and fees. See § 77-1831.

TAX 106 assigned its interest in the tax certificate to Vintage Management, LLC (Vintage). In June 2018, after Nieveen failed to redeem the property within the time period set forth in TAX 106's notice, Vintage applied for and received a tax deed to Nieveen's property from the Lancaster County treasurer.

Nieveen's Quiet Title Action.

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Nearly a year after the issuance of the tax deed to Vintage, Nieveen filed this lawsuit in which she sought to quiet title to the property in her name. The defendants included Lancaster County and the Lancaster County treasurer (collectively Lancaster County), as well as Vintage. Nieveen alleged that TAX 106 obtained the tax certificate by paying \$2,390.48 for delinquent property taxes in 2013 and 2014 and that it paid an additional \$1,405.90 in property taxes for 2015. Nieveen also alleged that at the time Lancaster County issued the tax deed, her property was assessed at \$61,900, and that there was no deed of trust securing a mortgage on the property.

Nieveen alleged that the issuance of the tax deed had violated her rights under the U.S. and Nebraska Constitutions. Relevant to this appeal, Nieveen alleged that the issuance of the tax deed had violated her rights under the Due Process Clauses of the U.S. and Nebraska Constitutions, the Takings Clauses of the U.S. and Nebraska Constitutions, and the Excessive Fines Clauses of the U.S. and Nebraska Constitutions. She also alleged that she had a statutory right to a 5-year redemption period under § 77-1827 because she had a mental disorder at the time of the tax certificate sale.

Lancaster County and Vintage filed motions to dismiss in which they contended that Nieveen's complaint failed to state a claim upon which relief could be granted. The district court granted the motions to dismiss as to Nieveen's constitutional claims.

After the dismissal of Nieveen's constitutional claims, her sole remaining claim was that title should be quieted in her name because she was entitled to an

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extended redemption period under § 77-1827. The district court granted summary judgment to Lancaster County on this claim, because Lancaster County did not claim an interest in the property at issue. The district court overruled Vintage's motion for summary judgment on that claim, finding that there remained genuine questions of material fact to be determined at trial.

Trial Evidence.

At trial, Nieveen offered evidence in support of her claim that she had a "mental disorder" for purposes of § 77-1827 at the time of the tax certificate sale. Nieveen testified that she had been diagnosed with "major depressive disorder, recurrent, severe," and generalized anxiety disorder.

Nieveen testified that she had dealt with depression and anxiety for 30 years, but that her condition had improved in 2018 after she started taking a new medication. She asserted that she would have been suffering from symptoms of depression and anxiety in 2015 because it "was no different than any other year" prior to beginning her new course of medication in 2018.

Nieveen testified that she experienced "good days" and "bad days" with respect to her depression and anxiety. Before she found an effective medication, she had more bad days than good days. On a bad day, Nieveen testified that she would stay at her house and sleep or watch television. During bad days, she would not pay bills or pick up her mail. She testified that her mail would "build up" to such an extent that postal workers would "bundle it up and throw it on [her] back porch or . . . take it back to the post office" and warn

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her that if she did not start “picking up” her mail, they would no longer deliver to her house. Nieveen claimed to still have some mail from 2015 that she had not yet gone through.

Nieveen testified that there was no reason aside from her mental health that would have prevented her from responding to the sale of the tax certificate for her property in March 2015. She also testified, however, that sometimes she failed to pay bills because she did not have the money to pay and that when she did not have the money, she would ignore the bills. When asked by her counsel why she failed to pay certain bills, Nieveen initially responded that she “[j]ust didn’t want to deal with the situation.” When her counsel followed up to ask if she failed to pay because of symptoms of her depression and anxiety, Nieveen responded that it was “because [of] depression, anxiety, I didn’t want to deal with life in general. So, looking at my bills was depressing, and making me anxious. I just didn’t want to deal with it, and I didn’t deal with it.”

Nieveen acknowledged that several years prior to trial, she had received a notice from the city that she needed to make certain repairs to her house and remove a couch from its front porch. She admitted that she promptly responded to those notices and, with the help of her brother-in-law, did what the city required. She also acknowledged that in 2008, she received a notice that she had failed to pay her property taxes, but that her daughter paid the taxes and, as a result, the situation did not escalate as it did with respect to the tax certificate sale at issue in this case.

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Nieveen admitted that she understood she had to pay her bills and that there were consequences if she failed to do so. She also admitted that between 2010 and 2016, neither a guardian, conservator, nor a power of attorney managed her affairs.

Nieveen's daughter also testified at trial. Her daughter testified that she had no reason to doubt Nieveen's diagnoses and that she had observed Nieveen to be "[v]ery withdrawn" and to sleep a lot. Nieveen's daughter corroborated Nieveen's testimony that she failed to pay taxes and other bills when due. When asked why Nieveen did not pay her bills, Nieveen's daughter responded, "I'd say [it is a] combination of money and just like—I don't—denial of just life, in general of the way life works"

Nieveen also offered and the district court received deposition testimony of Sabrina Hellbusch. Hellbusch is a licensed advanced practice registered nurse in Nebraska and is board certified in mental health. Nieveen has been a patient of Hellbusch since November 2018. Hellbusch confirmed that she had diagnosed Nieveen with "major depressive disorder, recurrent, severe," and generalized anxiety disorder. Hellbusch testified that Nieveen's mental disorder was "severe enough that it could cause a person to neglect an important activity and could cause a person to miss important deadlines." She also testified that, in her opinion, Nieveen's symptoms were sufficiently severe that they explained why her responsibilities have not always been met. Hellbusch admitted that she was only able to give opinions concerning Nieveen's condition from 2018 forward and thus could not give an opinion concerning Nieveen's condition in 2015.

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In addition to evidence concerning Nieveen's mental health, Nieveen offered evidence regarding an attempt to redeem the property in May 2019. Nieveen and her daughter testified that her daughter supplied Nieveen with a blank check and that Nieveen went to the Lancaster County treasurer's office to tender payment for the unpaid taxes. They testified that the treasurer's office refused to accept the payment.

Vintage did not present any live testimony at trial. It did offer and the district court received an affidavit of Dr. Bruce Gutnik. Dr. Gutnik has practiced medicine in psychiatry and neurology for more than 46 years. Gutnik stated in his affidavit that he had reviewed Nieveen's medical records and prescription records and concluded there was "no evidence" that at the time of the tax certificate sale "Nieveen was unable to manage her own affairs or understand her then current condition." He also stated that "[t]here was no evidence that she could not understand her legal rights or protect her rights."

District Court Order.

Following trial, the district court issued a written order finding that Nieveen was not entitled to the extended redemption period under § 77-1827 and dismissing the case. After summarizing the evidence, the district court explained that the relevant question was whether Nieveen suffered a mental disorder at the time of the tax certificate sale in March 2015. The district court concluded that this court set forth the definition of "mental disorder" when we said the following:

[A] person with a mental disorder . . . is one who suffers from a condition of

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mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action[,] and . . . a mental disorder . . . is an incapacity which disqualifies one from acting for the protection of one's rights.

Wisner v. Vandelay Investments, 300 Neb. 825, 861, 916 N.W.2d 698, 726 (2018), quoting *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011) (internal quotation marks omitted).

The district court determined that Nieveen had failed to carry her burden to establish a mental disorder. The district court stated that although it was clear that Nieveen suffered from depression and anxiety, “without something more,” it could not find that her condition was such that she was entitled to the extended redemption period set forth in § 77-1827.

Nieveen appealed and filed a notice pursuant to Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) that her appeal challenged the constitutionality of Nebraska statutes. We moved the case to our docket. The Attorney General filed a brief on appeal defending the constitutionality of the challenged statutes.

ASSIGNMENTS OF ERROR

Nieveen assigns, renumbered and restated, that the district court erred by (1) finding she did not suffer from a mental disorder under § 77-1827 at the time of the tax certificate sale, (2) dismissing her claim that the issuance of the tax deed violated her rights under the Due Process Clauses of the U.S. and Nebraska Constitutions, (3) dismissing her claim that the issuance of the tax deed violated her rights under the

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Takings Clauses of the U.S. and Nebraska Constitutions, and (4) dismissing her claim that the issuance of the tax deed violated her rights under the Excessive Fines Clauses of the U.S. and Nebraska Constitutions.

STANDARD OF REVIEW

[1] The constitutionality of statutes and statutory interpretation present questions of law. *HBI, L.L.C. v. Barnette*, 305 Neb. 457, 941 N.W.2d 158 (2020).

[2, 3] A district court's grant of a motion to dismiss on the pleadings is reviewed de novo by an appellate court, accepting the factual allegations in the complaint as true and drawing all reasonable inferences of law and fact in favor of the nonmoving party. *SID No. 67 of Sarpy Cty. v. State*, 309 Neb. 600, 961 N.W.2d 796 (2021). However, an appellate court reviewing a dismissal on the pleadings is not obliged to accept as true legal conclusions couched as factual allegations or threadbare recitals of the elements of a cause of action supported by mere conclusory statements. *Id.*

[4, 5] A quiet title action sounds in equity. *Wisner v. Vandelay Investments*, 300 Neb. 825, 916 N.W.2d 698 (2018). On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

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ANALYSIS

Extended Redemption Period.

Nieveen first argues that the district court erred by finding that she was not entitled to the 5-year extended redemption period under § 77-1827. Nieveen contends that if she was entitled to the extended redemption period, title to the property should be quieted in her name, because she attempted to redeem the property in May 2019 by paying the unpaid taxes. We will thus consider whether the district court erred in its determination that Nieveen was not entitled to the extended redemption period.

Section 77-1827 provides that “[t]he real property of persons with . . . a mental disorder so sold, or any interest they may have in real property sold for taxes, may be redeemed at any time within five years after such sale.” We have held that an owner of property is entitled to the 5-year redemption period set forth in § 77-1827 if the owner has a mental disorder at the time of the sale of the tax certificate. See *Wisner, supra*. Accordingly, the relevant question in this case is whether Nieveen had a mental disorder for purposes of § 77-1827 in March 2015.

Nieveen’s appellate briefs appeared to accept that the governing definition of mental disorder under § 77-1827 was the definition applied by the district court and set forth in *Wisner*. That definition, quoted in the background section above, requires a party seeking the extended redemption period to establish that he or she has a mental health condition, but it also requires that he or she establish that the condition prevented the person from understanding his or her legal rights or taking action to protect those

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rights. See *Wisner, supra*. At oral argument, Nieveen seemed to at least implicitly back away from the *Wisner* formulation, arguing that Nieveen's diagnoses alone should entitle her to the extended redemption period. To the extent Nieveen has invited us to retreat from the definition of mental disorder adopted in *Wisner*, we decline.

Our adherence to the definition of mental disorder set forth in *Wisner* is informed by the history of § 77-1827 and our interpretation of similar language in a similar statute. The language of § 77-1827 has not always used the term "mental disorder." See § 77-1827 (Reissue 1981). Legislation enacted in 1986 removed the term "insane" and replaced it with "mental disorder." See 1986 Neb. Laws, L.B. 1177, § 34. In the context of another statute providing for a tolling of the statute of limitations if a person was "insane," Neb. Rev. Stat. § 25-213 (Reissue 1985), we said that "the word insane means such condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or instituting legal action" and that insanity, for purposes of that statute, "results in an incapacity which disqualifies one from acting for the protection of one's rights." *Sacchi v. Blodig*, 215 Neb. 817, 821, 822, 341 N.W.2d 326, 330 (1983) (emphasis omitted). The same legislation that changed the terminology of § 77-1827 removed that statute's reference to the word "insane" and replaced it with "mental disorder." 1986 Neb. Laws, L.B. 1177, § 5. After that amendment, the Nebraska Court of Appeals held that despite this change, the statute should have the same meaning. See *Vergara v. Lopez-Vasquez*, 1 Neb. App. 1141, 510 N.W.2d 550 (1993). The Court of Appeals relied on language from this court directing that "[a] mere

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change of phraseology” will not change the operation of a statute “unless the intent to make such change is clear and unmistakable.” *Id.* at 1146–47, 510 N.W.2d at 553, quoting *Shames v. State*, 192 Neb. 614, 223 N.W.2d 481 (1974) (internal quotation marks omitted). In *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011), we affirmed the Court of Appeals’ interpretation of § 25-213.

All of this history brings us to *Wisner v. Vandelay*, 300 Neb. 825, 916 N.W.2d 698 (2018), where we held that the same definition that was once used for “insane” and was later extended to “mental disorder” for purposes of § 25-213 should also be used for “mental disorder” for purposes of § 77-1827. Given the similarities between the two statutes and between the respective amendments to the statutes in 1986, we are not convinced that holding was erroneous. Furthermore, in the time since our decision in *Wisner*, despite making other changes to the tax certificate sale process, see 2019 Neb. Laws, L.B. 463, §§ 1 through 8 and 10 (amending §§ 77-1802, 77-1831 through 77-1835, 77-1837, and 77-187.01 (Cum. Supp. 2020); repealing § 77-1824.01 (Cum. Supp. 2020)), the Legislature has not amended § 77-1827. As we often say, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court’s determination of the Legislature’s intent. *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017). Accordingly, we will analyze Nieveen’s claim that she had a mental disorder for purposes of § 77-1827 under the definition adopted in *Wisner*.

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Under the *Wisner* definition, Nieveen was required to prove that she had a condition of mental derangement which prevented her either from understanding her legal rights or from taking action to protect her legal rights. We do not believe Nieveen proved that her condition was such that she was incapable of understanding her legal rights. Nieveen acknowledged in testimony that she knew she had to pay her bills and that there were consequences if she did not.

We likewise are not persuaded that Nieveen proved that her mental condition in March 2015 prevented her from taking action to protect her legal rights. Although Nieveen testified that her mental health was the only thing that would have prevented her from responding to the sale of the tax certificate in March 2015, there was also evidence of other possible reasons. Nieveen testified that sometimes she failed to pay bills because she lacked money. Nieveen's daughter also testified that Nieveen failed to pay bills because of a combination of lacking money and a "denial . . . of the way life works." Other evidence also suggested that despite her depression and anxiety, Nieveen was capable of protecting her legal rights. Such capacity is indicated by her testimony that several years prior to trial, she promptly responded to a notice from the city about the condition of her house and, with the help of her brother-in-law, took corrective action. Furthermore, Nieveen admitted that her affairs were not managed by a guardian, conservator, or power of attorney.

We also note that Nieveen acknowledged that even prior to starting a more effective medication in 2018, she had "good days" and "bad days" with respect to her

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depression and anxiety. All of Nieveen's testimony focused on her claimed inability to tend to responsibilities during "bad days." Nieveen provided no testimony, however, that would have established what she was experiencing in March 2015 when the tax certificate was sold. Hellbusch, Nieveen's expert witness, could not give an opinion as to Nieveen's condition in March 2015. On the other hand, Gutnick, Vintage's expert witness, stated in his affidavit that based on his review of her medical records, he saw no evidence that she was unable to protect her rights at that time.

After reviewing this evidence de novo, we find that the district court did not err in determining that Nieveen did not have a mental disorder for purposes of § 77-1827 and thus was not entitled to the extended redemption period provided for in that statute. While we have no reason to question that Nieveen suffered from depression and anxiety in 2015, we do not believe she proved that those conditions prevented her from understanding her legal rights or taking action to protect them. Our decision should not be understood as a conclusion that depression and anxiety could never constitute a mental disorder under § 77-1827.

Procedural Due Process.

Nieveen next argues that the district court erred by dismissing her claim that the issuance of the tax deed violated her rights to procedural due process guaranteed by the 14th Amendment to the U.S. Constitution and article I, § 3, of the Nebraska Constitution.

The 14th Amendment's Due Process Clause provides that States shall not "deprive any person of

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life, liberty, or property, without due process of law.” The language in the Nebraska Constitution is similar. It says, “No person shall be deprived of life, liberty, or property, without due process of law . . .” Neb. Const. art. I, § 3. We have interpreted our state constitutional provision “coextensive[ly]” with that of the 14th Amendment. *Keller v. City of Fremont*, 280 Neb. 788, 791, 790 N.W.2d 711, 713 (2010).

Nieveen alleged in her operative complaint that her rights to procedural due process were violated in two ways. First, she asserted that she was provided inadequate notice because, pursuant to § 77-1831, she received notice of her right to redeem only 3 months prior to Vintage’s filing an application for the tax deed. Second, she asserted that she was denied her right to procedural due process because there was no process in place to claim a right to the extended redemption period under § 77-1827.

We can quickly conclude that the district court did not err by dismissing Nieveen’s claim she was entitled to more advance notice of Vintage’s intent to apply for a tax deed to her property. We very recently rejected essentially the same argument in *Continental Resources v. Fair*, ante p. 184, 971 N.W.2d 313 (2022). In that case, we held that due process did not require the delinquent taxpayer to receive notice at the time of the tax certificate sale and that it was sufficient the delinquent taxpayer received actual notice that a tax certificate had been sold, that he had 3 months to redeem the property, and that if the property owner failed to do so, the tax certificate holder would apply for a tax deed. *Id.* Under the reasoning of *Continental Resources*, Nieveen cannot show that she was constitutionally entitled to earlier notice.

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As for Nieveen's claim that she was denied procedural due process because there was no process in place to claim a right to the extended redemption period under § 77-1827, it too encounters an immediate hurdle. As the district court observed in dismissing this claim, Nieveen brought this lawsuit to invalidate the tax deed on the basis of the extended redemption period and thus it cannot be said that there was *no process* by which Nieveen could claim a right to the extended redemption period. No doubt aware of this difficulty, Nieveen argues on appeal that due process required that she be provided with a hearing in which she could claim a right to the extended redemption period *prior to* the issuance of the tax deed.

We are not persuaded that the district court erred by dismissing this aspect of Nieveen's procedural due process claim. First, it is not clear that Nieveen was constitutionally entitled to an opportunity for a hearing prior to the issuance of the tax deed. Procedural due process is flexible and calls for such protections as the particular situation demands. *Manning v. Dakota Cty. Sch. Dist.*, 279 Neb. 740, 782 N.W.2d 1 (2010). And although sometimes government entities must provide an opportunity for a hearing before a party is deprived of an interest protected by the Due Process Clause, that is not always the case. See *id.*

Nieveen has not offered any reasons why it was imperative that an opportunity for a predeprivation hearing be provided here, and it would seem that at least some of the relevant factors tilt in the opposite direction. In order to determine whether an opportunity for predeprivation process is required,

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courts consider the “competing interests at stake, along with the promptness and adequacy of later proceedings.” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53, 114 S. Ct. 492, 126 L. Ed. 2d 490 (1993). The competing interests can be analyzed through the three-part inquiry set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), which requires a balancing of the private interest affected by official action, the risk of an erroneous deprivation through the procedures used, and the government’s interest. See *James Daniel Good Real Property*, *supra*. Here, although Nieveen obviously has a great interest in her property, her operative complaint acknowledged that even after the issuance of the tax deed, she continued to reside there. Further, Nieveen can hardly argue that the process she ultimately received—a full-blown trial before a district court judge with the power to invalidate the tax deed issued to Vintage and quiet title in her name—was somehow inadequate.

In the end, we find it unnecessary to determine whether Nieveen was constitutionally entitled to the opportunity for a hearing on the applicability of § 77-1827’s extended redemption period prior to the issuance of the tax deed. We reach this conclusion because Nieveen had such an opportunity. Nieveen’s operative complaint alleges that she received notice that the tax certificate holder was applying for a tax deed on March 2, 2018, but Lancaster County did not issue a deed to Vintage until June 22. Nieveen could have filed a lawsuit prior to June 22 seeking to enjoin Lancaster County from issuing the tax deed on the grounds that she was entitled to § 77-1827’s extended redemption period.

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In other words, Nieveen was not denied a hearing prior to the issuance of the tax deed; she failed to avail herself of the opportunity for such a hearing. As we have previously held, the requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it; if a person has access to the courts for protection of his or her rights, it cannot be said that such person was deprived of property without due process of law. *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999). Whether there should be an additional administrative process—permitting a delinquent property owner, before the issuance of a tax deed, to claim the extended right to redeem under § 77-1827—is a matter properly addressed to the Legislature.

We find that the district court did not err in dismissing Nieveen’s procedural due process claims.

Takings.

Nieveen also challenges the district court’s dismissal of her claim that the issuance of the tax deed violated the Takings Clauses of the U.S. and Nebraska Constitutions. In support of these claims, Nieveen alleged in her operative complaint that by issuing the tax deed to Vintage, Lancaster County effectuated a taking of her property for a private purpose. Alternatively, Nieveen alleged in her operative complaint that even if the issuance of the tax deed was for a public purpose, she was entitled to just compensation because her equity in the real property exceeded her tax debt. Again, however, we recently rejected identical arguments in *Continental Resources v. Fair*, ante p. 184, 971 N.W.2d 313 (2022).

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In light of that decision, Nieveen cannot show the district court erred by dismissing her claims under the Takings Clauses.

Excessive Fines.

Finally, Nieveen argues that the district court erred by dismissing her claims based on the Excessive Fines Clauses of the U.S. and Nebraska Constitutions. Nieveen alleged that because the issuance of the tax deed resulted in her losing equity in her property well above her tax debt, it is an excessive fine. In *Continental Resources, supra*, we rejected an identical argument that the issuance of a tax deed violated the Excessive Fines Clause of the U.S. Constitution. And although no claim was made under the Excessive Fines Clause of the Nebraska Constitution in *Continental Resources*, Nieveen has not made an argument that we should ascribe a different meaning to that provision than its essentially identical federal counterpart. Accordingly, we find that the district court did not err in dismissing Nieveen's claim under the Excessive Fines Clauses.

CONCLUSION

We find that the district court did not err when it determined that Nieveen was not entitled to the extended redemption period under § 77-1827 or when it dismissed Nieveen's constitutional claims. Accordingly, we affirm.

Affirmed.

Stacy, J., not participating.

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**IN THE DISTRICT COURT OF LANCASTER
COUNTY, NEBRASKA**

SANDRA K. NIEVEEN,
Plaintiff,

Case No. CI 19-1433

ORDER

TAX 106, a Nebraska
general partnership,
VINTAGE
MANAGEMENT, LLC, a
Nebraska limited liability
company, RACHEL
GARVER, Lancaster
County Treasurer, in her
official capacity,
LANCASTER COUNTY, a
political subdivision in the
State of Nebraska, and
DOUGLAS J. PETERSON,
Attorney General of the
State of Nebraska, in his
official capacity

Defendants.

This matter is before the Court on the Motion to Dismiss filed by the Defendants Rachel Garver and Lancaster County Treasurer. On July 30, 2019, the Court heard argument and received evidence. Sara Rips and Caitlin Cedfeldt appeared for the Plaintiff Sandra K. Nieveen. Douglas Cyr appeared for the

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Defendants Rachel Garver and Lancaster County. Christian Blunk appeared for the Defendants TAX 106 and Vintage Management, LLC. Phoebe Gydesen appeared for the Defendant Douglas Peterson. Being fully advised, the Court sustains in part and overrules in part the Motion to Dismiss.

1. BACKGROUND

In the Amended Complaint, the Plaintiff claims to be the lawful owner of residential real property in Lancaster County, Nebraska. Am. Compl. at ¶¶ 7–8. She did not pay the 2013 and 2014 property taxes, so the county treasurer conducted a tax sale. *Id.* at ¶¶ 14,15. On March 2, 2015, the Defendant TAX 106 (“Tax 106”) bought a tax certificate for \$2,390.48. *Id.* at ¶ 15. On September 19, 2016, Tax 106 paid \$1,405.90 of delinquent property taxes for the 2015 tax year. *Id.* at ¶ 16.

On March 2, 2018, Tax 106 sent a notice to the Plaintiff by certified mail stating that Tax 106 would apply for a tax deed. *Id.* at ¶¶ 18,20. On June 22, 2018, Tax 106’s successor in interest, Defendant Vintage Management, LLC (“Vintage Management”), applied for a tax deed. *Id.* at ¶¶ 3, 9. The same day, the county treasurer issued a tax deed to Vintage Management. *Id.* at ¶ 22. The deed was recorded a couple of weeks later. *Id.* at ¶ 22.

The assessed value of the Plaintiffs property for tax purposes was \$61,900. *Id.* at ¶ 23. Her property was not encumbered by a mortgage or deed of trust. *Id.* at ¶ 8. The Plaintiff therefore alleges that Vintage Management received property with \$61,900 in exchange for paying \$3,796.38 of delinquent taxes. *Id.* at ¶ 26.

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The Plaintiff also alleges that she was diagnosed with major depressive disorder and generalized anxiety disorder. *Id.* at ¶ 12. Because she had a mental disorder, the Plaintiff claims that she has the right to redeem her property within 5 years of the tax sale. *Id.* at ¶ 13.

The Amended Complaint alleges 10 Causes of Action against Tax 106, Vintage Management, Lancaster County, and Rachel Garver. The Plaintiff sues Garver (the Lancaster County Treasurer) in her official capacity. Am. Compl. ¶ 4. The Amended Complaint prays for a variety of relief, including a declaration that the Plaintiff has 5 years to redeem the property, an order quieting title in the Plaintiff, and a declaration that the statutes under which the tax deed was issued are unconstitutional.

On June 18, 2019, the Defendants Lancaster County and Rachel Garver (collectively the “County Defendants”) moved to dismiss the Amended Complaint for lack of subject matter jurisdiction and failure to state a claim. See Neb. Ct. R. Pldg. §§ 6-1112(b)(1), (6).

II. STANDARD

To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts that, if true, state a claim to relief that is plausible on its face. *Tryon v. City of N. Platte*, 295 Neb. 706, 890 N.W.2d 784 (2017). Even if the plaintiff does not allege specific facts showing a required element, the factual allegations are nonetheless plausible if they suggest that the required element exists and raise a reasonable expectation that discovery will reveal evidence of the element. *Id.*

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Courts presume that a statute is constitutional and resolve all reasonable doubts in favor of its constitutionality. *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012). The person attacking a statute's validity has the burden of showing that it is unconstitutional. *Id.* Courts also presume that the Legislature acted within its constitutional power even though, in practice, its laws cause some inequality. *Id.*

III. STATUTORY OVERVIEW

A. Taxes on real property.

In Nebraska, local governments may levy taxes on real estate. Neb. Rev. Stat. § 77-3442. Political subdivisions with the power to levy include school districts, community colleges, natural resource districts, cities, and counties. *Id.* Their maximum levies are set at a certain sum per \$100 of taxable valuation, which makes the assessed value of real property of interest to owners. *Id.*

Real property is assessed as of January 1 each year. Neb. Rev. Stat. § 77-1301. Starting in January 2014, county assessors in counties with a population of at least 150,000 must provide notice of the preliminary valuation by January 15. *Id.* The assessors in such counties must complete the assessment by March 25. *Id.*

The county board of equalization must send a notice of the assessed value to the record owner. Neb. Rev. Stat. § 77-1507(1). The owner may protest the evaluation with the county board of equalization. *Id.* If the owner is dissatisfied with the county board's decision, he or she may appeal to the Tax Equalization Review Commission. *Id.*

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B. Collecting delinquent taxes.

Taxes that are not paid become liens on the real estate and may be sold to third parties in exchange for something known as a tax certificate or tax sale certificate. Neb. Rev. Stat. § 771801 et seq.; Neb. Rev. Stat. § 77-1901 et seq.; *Wisner v. Vandelay Invs., L.L.C.*, 300 Neb. 825, 916 N.W.2d 698 (2018). This certificate represents the transfer of the government's lien to the purchaser. *Wisner, supra*. The Court pauses to note that tax certificates issued between January 2010 and December 2016 are governed by the statutes in effect on December 31, 2009 regarding all matters relating to tax deed proceedings. Neb. Rev. Stat. § 77-1837.01(2).

Nebraska gives the holder of a tax certificate two ways to convert the certificate into a deed for the burdened property. *Adair Asset Mgmt., L.L. C. v. Terry's Legacy, LLC*, 293 Neb. 32, 875 N.W.2d 421 (2016). Under the "tax deed" method in chapter 77, article 18, the certificate holder can apply for a tax deed from the county treasurer. *Id.* Under the "judicial foreclosure" method in chapter 77, article 19, the certificate holder can foreclose the tax lien in court and obtain a sheriff's deed. *Id.* Although both article 18 and article 19 involve the recovery of delinquent property taxes, they are separate and distinct methods which are neither comparable nor fungible. *Id.*

Here, the Plaintiff alleges that Tax 106 and Vintage Management chose the tax deed method. Under article 18, the owner of the burdened real property can redeem the property any time before the treasurer delivers a tax deed to the holder of the tax certificate. Neb. Rev. Stat. § 77-1824. An owner

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redeems the property by paying the county treasurer the sum stated in the tax certificate, plus interest and any subsequent taxes paid by the purchaser. *Id.* The county treasurer cannot issue a tax deed until the expiration of three years from the date of the tax sale. Neb. Rev. Stat. § 77-1837. The certificate holder must serve notice on the owner at least three months before the holder applies for a tax deed. Neb. Rev. Stat. § 77-1831.

A tax deed vests in the grantee title to the property. Neb. Rev. Stat. § 77-1838. An owner loses the power to redeem after the treasurer delivers the tax deed. *Wisner, supra.* But if the certificate holder fails to apply for a tax deed within 3 years and 6 months after the tax sale, then the certificate ceases to be valid and the tax lien is discharged. *Id.*

Generally, then, an owner has between three years and three and a half years to redeem the burdened property. But there is a longer redemption period for owners with mental disorders under Neb. Rev. Stat. § 77-1827: “The real property of persons with mental retardation or a mental disorder so sold, or any interest they may have in real property sold for taxes, may be redeemed at any time within five years after such sale.” The 5-year redemption applies if the owner had a mental disorder when the property was sold. *Wisner, supra.* A person with a mental disorder in this context is one who “suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action.” *Id.*, 300 Neb. at 861, 916 N.W.2d at 726 (citation omitted).

C. Challenging a tax deed.

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After the treasurer issues a tax deed to the certificate holder, the owner may recover the property by proving that the tax deed is void or voidable. *Wisner, supra*. A tax deed may be void or voidable if the owner had a mental disorder and the treasurer issued the deed less than 5 years after the sale. See *id.*

To successfully challenge a tax deed, the owner must satisfy the conditions in both Neb. Rev. Stat. §§ 77-1843 and 77-1844. *Wisner, supra*. Section 77-1843 states the conditions precedent to *defeat* title under a tax deed. *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007). Section 77-1844 states the conditions precedent to *question* title. *Id.* That is, § 77-1844 is a matter of standing. *Wisner, supra*.

Section 77-1844 imposes two requirements for a plaintiff to have standing to challenge a tax deed:

No person shall be permitted to question the title acquired by a treasurer's deed without first ***showing*** that [1] he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and [2] that ***all taxes due upon the property had been paid*** by such person or the persons under whom he claims title as aforesaid. (emphasis added)

Notably, plaintiffs do not have to allege that they paid the taxes before filing suit. Section 77-1844 requires a “showing,” which is made by evidence and not the pleadings alone. *Ottaco Acceptance, supra*. Nor do plaintiffs have to show that they actually paid the

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taxes. *Wisner, supra*. A tender to the treasurer is enough. *Id.* Section 78-1844 only requires a party to show that it paid or tendered payment before or during the trial, or before final judgment. *Id.*

Section 77-1843 states four alternative grounds under which an owner may defeat title acquired under a tax deed:

the person claiming the title adverse to the title conveyed by such deed shall be required ***to prove***, in order to defeat the title, either (1) that the real property was not subject to taxation for the years or year named in the deed; (2) that the taxes had been paid before the sale; (3) that the ***property has been redeemed*** from the sale ..., and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state; or (4) that there had been an entire omission to list or assess the property, or to levy the taxes, or to sell the property. (emphasis added).

The Plaintiff seeks to invalidate Vintage Management's tax deed under the third ground.

III. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

In 25 pages of written argument, the County Defendants devote three sentences to subject matter jurisdiction. Those sentences are: "On the face of the Amended Complaint, both Garver and Lancaster County are entitled to sovereign immunity. 'It is well-settled law in Nebraska that sovereign immunity deprives a trial court of subject matter jurisdiction.'

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Therefore, Garver and Lancaster County’s sovereign immunity deprives this Court of jurisdiction.” Brief for County Defendants at 3 (citation omitted).

The Court understands the County Defendants’ argument to be that they are completely immune from suit because they are a political subdivision and an officer of a political subdivision sued in her official capacity. While the Defendants might enjoy sovereign immunity from certain claims or theories of relief, they are not categorically immune from suit. The takings clauses of the federal and state constitutions, for example, expressly require the government to pay just compensation in some circumstances. U.S. Const, amend. V; Neb. Const, art. I, § 21; see also *Project Extra Mile v. Neb. Liquor Control Comm’n*, 283 Neb. 379, 810 N.W.2d 149 (2012) (“state sovereign immunity does not bar actions to restrain state officials or to compel them to perform an act they are legally required to do unless the prospective relief would require them to expend public funds”). Considering the issue raised by the County Defendants, the Court overrules their motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(1).

IV. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

A. Redemption (First Cause of Action).

The Plaintiff’s First Cause of Action in her Amended Complaint asks the Court to declare that she has redeemed her property within the 5-year period for persons with mental disorders. Am. Compl. ¶¶ 28–29. The Plaintiff alleges that she is “prepared to tender all taxes that are past due and owing to the

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Defendant Lancaster County Treasurer, and shall tender such taxes prior to trial.” *Id.* at ¶ 27.

The County Defendants argue that the Plaintiff fails to state a claim for relief because she does not allege that she already tendered payment to the treasurer. But § 77-1843 states that a plaintiff must “prove” that she redeemed the property. Like the word “showing” in § 77-1844, the word “prove” in § 77-1843 implies an evidentiary finding, not a pleading requirement. See Black’s Law Dictionary 1480 (11th ed. 2019).

The Court concludes that the Plaintiff does not have to plead that she tendered payment to the treasurer. The Court therefore overrules the County Defendants’ motion to dismiss the First Cause of Action. That is not to say, however, that the Plaintiff does not have to *prove* that she tendered payment within the 5-year redemption period. That issue is not before the Court on the present motion to dismiss. The Plaintiff alleges that the treasurer sold the taxes on her home in March 2015, which means that she has until March 2020 to redeem the property (accepting as true her allegation that she had a mental disorder). So time remains for the Plaintiff to tender payment to the treasurer, if she has not done so already.

B. Unjust enrichment (Second Cause of Action).

The Court sustains the County Defendants’ motion to dismiss the Plaintiff’s Second Cause of Action for unjust enrichment. The purpose of an unjust enrichment claim is to force a defendant to disgorge a benefit that he or she has unjustifiably obtained at the plaintiff’s expense. *Bloedorn Lumber Co. v. Nielson*,

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300 Neb. 722, 915 N.W.2d 786 (2018). The Amended Complaint alleges that Vintage Management (not the County Defendants) was unjustly enriched by receiving a property worth \$61,900 in exchange for paying about \$3,800 of taxes. Am. Compl. ¶ 35. The Plaintiff does not claim that the County Defendants were unjustly enriched by the payment of delinquent taxes.

C. Taking for a public purpose without just compensation (Fourth, Fifth, and Ninth Causes of Action).

Several claims in the Amended Complaint concern the takings clauses of the federal and state constitutions. The Fourth Cause of Action alleges that the County Defendants had “no public purpose for selling the right to a tax deed on private home equity when that equity is larger in amount than the tax liens, interest, and other statutory costs at issue.” Am. Compl. ¶ 46. The Fifth Cause of Action alleges that the County Defendants did not justly compensate the Plaintiff for the equity in her home. The Ninth Cause of Action asserts a derivative claim that the statutes in article 18, chapter 77 of the Nebraska Revised Statutes “result in an unlawful taking under the constitutions of the United States and State of Nebraska and therefore violate Article I, § 25 of the Nebraska Constitution.” *Id.* at ¶ 68.

The Fifth Amendment to the U.S. Constitution states that “private property [shall not] be taken for public use, without just compensation.” Similarly, Neb. Const. art. I, § 21 states that the “property of no person shall be taken or damaged for public use without just compensation therefor.” The takings clause in Nebraska’s constitution is “coterminous”

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with federal law. *Whipps Land & Cattle Co. v. Level 3 Comms., LLC*, 265 Neb. 472, 482, 658 N.W.2d 258, 267 (2003).

Taxes take property. *Frye v. Haas*, 182 Neb. 73, 152 N.W.2d 121 (1967) (“Taxation takes property.”). But the takings clause generally does not apply to taxes. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 283 (1985) (“the proposition that all taxes are subject to scrutiny under the eminent domain clause receives not a whisper of current support”). Consistent with this rule, courts have held that the takings clause is not relevant when the government sells property to satisfy back taxes:

- *Speed v. Mills*, 919 F. Supp. 2d 122 (D.D.C. 2013) (“[While the tax sale deprived [the owner] of title to a portion of property that was lawfully his, it cannot be considered a ‘taking’ under the Fifth Amendment. The sale took place pursuant to the [government’s] taxing power, not its power of eminent domain, its regulatory power, or any other power enabling it to take or encumber private property for a public purpose.”).
- *In re Murphy*, 331 B.R. 107 (Bankr. S.D.N.Y. 2005) (“A tax sale is not a taking for a public purpose because such sale is pursuant to the state’s taxing power and not its power of eminent domain.”).
- *In re Golden*, 190 B.R. 52 (Bankr. W.D. Penn. 1995) (“In a tax sale context, the takings clause is not dispositive nor the appropriate basis for starting an inquiry.”).
- *Industrial Bank of Wash. v. Sheve*, 307 F. Supp. 98 (D.D.C. 1969) (“A tax sale is not a government taking

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for which just compensation must be paid under the Constitution after judicial proceedings.”).

- *Dommel Props., LLC v. Jonestown Bank & Trust Co.*, No. 1:11-cv-2316, 2013 WL 1149265, 2013 U.S. Dist. LEXIS 37343 (M.D. Penn. March 19, 2013) (“A tax sale, however, is not a taking for a public purpose pursuant to a state’s power of eminent domain, but is instead an exercise of the state’s taxing power.”).

- *Epice Corp. v. Land Reutilization Auth.*, No. 4:07CV00206, 2010 WL 3270114, 2010 U.S. Dist. LEXIS 83867 (E.D. Mo. Aug. 17, 2010) (“the foreclosure of a tax lien involves the taxing power, not the eminent domain of the government”).

- *Fitzgerald v. Neves., Inc.*, 550 P.2d 52 (Wash. App. 1976) (“We are hard pressed to find that the ‘taking’ was for a public *use* as opposed to the general purpose of enforcing payment of justly imposed taxes.”).

- *Richardson v. Brunner*, 356 S.W.2d 252 (Ky. 1962) (stating that a takings claim based on a tax sale is “obviously fallacious” because the “sale is nothing more than a step in the foreclosure of a lien imposed under the taxing power”).

- See also *Chesney v. Gresham*, 134 Cal Rptr. 238 (Cal. App. 1976) (“In exercising its sovereign power as owner of the property free and clear of any interest in the taxpayer, the state may sell the property for whatever amount it will bring on the open market to the highest bidder, even if that amount exceeds the amount of the tax liability, or sell the entirety of the property where the sale of only a parcel of it would satisfy the tax obligations.”).

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One federal district court extended this categorical exclusion to a claim that the government “took” the difference between the value of the owners’ land and the outstanding taxes. See *Balthazar v. Mari Limited*, 301 F. Supp. 103 (N.D. Ill. 1969), *aff’d* 396 U.S. 114 (1969). Under the Illinois statutes in *Balthazar*, a tax purchaser received a certificate and, if the owner did not redeem, later received a tax deed from the government. The recipient of a tax deed did not have to pay the owner for the difference between the market value of the property and the amount of back taxes and other encumbrances.

The *Balthazar* court rejected the owners’ argument that the government had deprived them of “just compensation” under the takings clause: “These cases are inapplicable. Rather than taking private property for a public purpose, Illinois is here collecting taxes which are admittedly overdue.” *Id.* at 105, n.6. The court noted that an owner could cash out their equity before the government issued a tax deed by selling the property subject to the tax lien and retaining the surplus. Further, the legislature was the appropriate forum to remedy any unfairness in the law: “Unfortunately, the Illinois system severely penalizes all real estate owners who fail to redeem. The total forfeiture seems extremely harsh when overdue taxes amount to only two or three percent of the property’s value. But oppressive statutes must be tempered by the legislature, not the courts.” *Id.* at 106.

But there are some cases suggesting that the takings clause could apply if a statute gives owners the right to recover their equity. These cases arise from a pair of nineteenth century U.S. Supreme Court

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decisions. In *United States v. Taylor*, the federal government sold a parcel of land for \$3,000 to satisfy a \$37 assessment. 104 U.S. 216 (1881). The owner of the parcel applied for the “residue” of the proceeds under the Revenue Act of 1861. Section 36 of the Act provided that the federal tax collector could sell property to satisfy back taxes but “the surplus of the proceeds of the sale, after satisfying the tax, costs, charges, and commissions, shall be paid to the owner of the property.” *Id.* at 218. In *Taylor*, the government argued that Congress had effectively repealed Section 36. The Court concluded that Congress had not.

Three years later, the Court reached a similar result when the federal government (rather than a private party) bought the property. In *United States v. Lawton*, the federal government sold land to satisfy back taxes of \$170.50. 110 U.S. 146 (1884). The federal government itself bought the land with a bid of \$1,100. The owner of the parcel applied for the surplus proceeds of the sale.

The U.S. Supreme Court began its opinion with this sentence: “We think that this case is governed by the rulings of this court in *United States v. Taylor*.” *Lawton, supra*, 110 U.S. at 149. This opening suggests that the Court’s decision in *Lawton* would be based on statutory interpretation, as was its decision in *Taylor*. But the Court went further in *Lawton* and suggested that denying the owner’s claim for the surplus had a constitutional dimension:

The present case differs from the *Taylor* case only in this, that the land was in this case bought in by the tax commissioners for the United States, and no money was paid on the sale.... The land in the present case

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having been “struck off for,” and “bid in” for, the United States at the sum of \$1,100, we are of opinion that the surplus of that sum, beyond the \$170.50 tax, penalty, interest and costs, must be regarded as being in the treasury of the United States, under the provisions of section 36 of the act of 1861 If a third person had bid \$1,099 in this case, there would have been a surplus of \$928.50 paid into the treasury, and held for the owner. It can make no difference that the United States acquired the property by bidding \$1 more. ***To withhold the surplus from the owner would be to violate the Fifth Amendment to the Constitution and to deprive him of his property without due process of law, or to take his property for public use without just compensation.***

Id. at 149–50 (emphasis added).

The Court revisited the matter a final time in *Nelson v. City of New York*, 352 U.S. 103 (1956). There, a city foreclosed a lien for unpaid water charges on two parcels of land owned by trustees. The city sold one parcel for \$7,000 to satisfy delinquent charges of \$65. The city kept all the proceeds. The city itself took title to the second parcel (assessed at \$46,000) to satisfy delinquent charges of \$814.50. The trustees later offered to pay the delinquent charges and, when the city refused, sued to recover the surplus.

The trustees argued that the city had taken their property without just compensation, citing *Lawton*. But the Court responded that *Taylor* had also

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“require[d] that the surplus be paid to the owner, and there the problem was treated as purely one of statutory construction without constitutional overtones.” *Id.* at 110. At any rate, the trustees could have, in fact, recovered the surplus under state law but forfeited that right by not timely responding to the foreclosure proceedings. The trustees argued that the result was “harsh,” but the Court explained that “relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed.” *Id.* at 111.

One may read *Nelson* as clarifying that *Taylor* and *Lawton* are best understood as statutory interpretation cases. Nevertheless, in reliance on *Lawton*, several lower courts have since considered whether state law created a property interest in the surplus that was protected by the takings clause.

No court, however, has held that not paying the owner for his or her equity violates the takings clause. This is because unlike the Revenue Act of 1861, the statutes and constitutions of most states do not create a property right to the surplus. For example, in *Ritter v. Ross*, a county foreclosed a tax lien of \$84.43 and sold the property for more than \$17,000. 558 N.W.2d 909 (Wis. App. 1996). The county kept all the proceeds from the sale.

The owners in *Ritter* argued that the county had taken their property without just compensation. But the court explained that the plaintiffs had a takings claim only if they had a property interest in the excess proceeds of the sale, which they did not under Wisconsin law:

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Cases considering constitutional challenges to state tax foreclosure sales generally conclude that a taxpayer has a recognizable interest in the excess proceeds from such a sale only if the state constitution or tax statutes create such an interest....

Thus, when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process requirements. We have not been referred to any applicable provision of the Wisconsin Constitution, and we see nothing in chapter 75 either directing or relating in any way to distribution of surplus funds after a tax sale. *Id.* at 485 (citations omitted).

Because Wisconsin law did not create a property interest in the surplus, the county had not unconstitutionally taken the surplus.

A federal district court reached a similar conclusion in *Reinmiller v. Marion County*, No. CV-05-1926, 2006 WL 2987707, 2006 U.S. Dist. LEXIS 75597 (D. Or. Oct. 16, 2006). There, a county in Oregon sold property at a public auction to satisfy a tax debt of less than \$15,000. The property sold for \$167,000. The county retained all the proceeds.

The law is well-settled that the States have a very wide discretion in the laying of their taxes. Overall, cases considering constitutional challenges to state tax

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foreclosure sales conclude that a taxpayer has a recognizable interest in the excess proceeds from such a sale only if the state constitution or tax statutes create such an interest. Here, Oregon law is clear that the former owner is not entitled to any proceeds from a tax lien foreclosure sale.

Id., 2006 U.S. Dist. LEXIS at * at 8-9 (cleaned up).

The court suggested that the “appropriate forum to raise these concerns is the state legislature.” *Id.* at *12.

The closest any court has come to recognizing a takings claim in this context is *Coleman v. District of Columbia*, 70 F. Supp. 3d 58 (D.D.C. 2014). There, consistent with the cases above, the court said that a takings claim might exist if a statute or constitutional provision created a property right to the surplus. The plaintiff in *Coleman* alleged that he had a property interest in the surplus “based on principles of D.C. law and decisions of the D.C. Court of Appeals.” *Id.* at 81. Because the District of Columbia did not dispute this allegation, the court accepted it as true for purposes of ruling on the District’s motion to dismiss.

Here, the Plaintiff alleges that home equity is obviously “property.” Am. Compl. ¶ 42. The Court is not so sure. Depending on the debt load, an owner might use real property as collateral for a loan representing the difference between the preexisting debt and the property’s market value. Alternatively, an owner could sell the property and retain any difference between the sale price and the debts secured by the property. An owner might consider this potential source of cash as something apart from title

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to the real property. But the Court is inclined to say that the relevant “property” is the real property itself, not a hypothetical sum that an owner might have received via a sale or loan.

At any rate, the Court’s idea of “property” is not decisive. Even the handful of cases suggesting that a takings claim for the surplus is possible have required that such interest be recognized under state law. Unlike the Revenue Act of 1861, the statutes in article 18 do not give owners the right to be compensated for the surplus. In fact, the Plaintiff has not argued that any statute, constitutional provision, or case in Nebraska has recognized a property right to the difference in the fair market value of real property and the debt secured by the real property. The Court therefore sustains the County Defendants’ motion to dismiss the Fourth, Fifth, and Ninth Causes of Action for failure to state a claim.

D. Procedural due process (Third and Sixth Causes of Action).

The Plaintiff pleads two procedural due process claims. In the Third Cause of Action, she alleges that there is no process for persons with mental disorders to “claim” the extended redemption period. The Plaintiff asserts in her written argument that she was entitled to a hearing before the tax deed was issued. In the Sixth Cause of Action, she observes that a certificate holder must give the owner notice three months before applying for a tax deed. The Plaintiff argues that three months is too short as a matter of law.

The Plaintiff cites both the federal and state constitutions. The Fourteenth Amendment to the U.S.

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Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” Similarly, Neb. Const, art. I, § 3 states: “No person shall be deprived of life, liberty, or property, without due process of law” The Due Process Clause in the Nebraska Constitution is coextensive with the Due Process Clause in the Fourteenth Amendment. *In re Interest of Jordan B.*, 300 Neb. 355, 913 N.W.2d 477 (2018).

The Fourteenth Amendment protects individuals from the arbitrary deprivation of life, liberty, or property without due process of law. *Cain v. Custer Cnty. Bd. of Equalization*, 298 Neb. 834, 906 N.W.2d 285 (2018). Due process does not guarantee any particular form of state procedure. *Id.* Instead, due process requires reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights affected by it. *Id.*

These two elements—notice and an opportunity to be heard—have been established for a long time. See *Earle v. McVeigh*, 91 U.S. 503 (1875). But courts have also recognized for a long time that due process for tax collection is different. *Kentucky Railroad Tax Cases*, 115 U.S. 321 (1885) (“‘due process of law,’ as applied to [collecting taxes], does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals”). For taxation, “there are no categorical imperatives.” *Frye v. Haas*, 182 Neb. 73, 75, 152 N.W.2d 121, 124 (1967).

The Plaintiff does have an opportunity to be heard about whether she is entitled to a 5-year redemption period. She is exercising that opportunity in this

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lawsuit. An owner with a mental disorder can sue to invalidate a tax deed on the ground that the holder of the tax certificate obtained a tax deed before the 5-year right of redemption expired. See *Wisner v. Vandelay Invs., L.L.C.*, 300 Neb. 825, 916 N.W.2d 698 (2018).

The Plaintiff argues, however, that she was entitled to a hearing *before* the treasurer issued the tax deed. Property owners have the right to an opportunity to be heard when the government sells their property for back taxes. See *Jones v. Flowers*, 547 U.S. 220 (2006). But “for the assessment and collection of taxes, it is well established that postdeprivation procedures may satisfy the demands of due process.” *Leger v. Commissioner of Revenue*, 654 N.E.2d 927, 930 (Mass 1995) (citations omitted); see *Bomher v. Reagan*, 522 F.2d 1201 (9th Cir. 1975) (noting the “exception in tax matters to prior notice and hearing”), citing *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Phillips v. Commissioner*, 283 U.S. 589 (1931); see also *Chapman v. Zobelein*, 237 U.S. 135 (1915) (due process rights of owner whose land was sold for back taxes were satisfied by the opportunity to be heard about the original assessment).

In fact, the Nebraska Supreme Court has held that a hearing is *not* required before a county treasurer issues a tax deed to the certificate holder. In *Trainor v. Maverick Loan & Trust Co.*, the plaintiffs were the heirs of a deceased owner of land in Box Butte County. 80 Neb. 626, 114 N.W. 932 (1908). The taxes for 1902 were not paid and the defendant purchased the tax certificate. After the property was not redeemed, the defendant applied for and received a tax deed from the county treasurer. The plaintiffs later sued to cancel

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the tax deed, arguing that they had tendered the back taxes sometime before filing the lawsuit.

The Nebraska Supreme Court in *Trainor* held that the plaintiffs had received due process even though they did not have a pre-deprivation hearing:

Plaintiffs do not complain of any illegality in the tax for which the land was sold, nor of any irregularity in the sale, or of the proceedings leading up to the making of the tax deed. The complaint is that a sale of real estate made by the treasurer of the county, for delinquent taxes, in the absence of some proceeding in court is unconstitutional and void; that it is an attempt on the part of the legislature to deprive the plaintiffs of their property without due process of law. It has never been held that the state may not adopt summary or even stringent measures for the collection of taxes, so long as they are administrative in their character, and it was never held that such proceedings are open to the objection that they divest the citizen of his property without due process of law. While one is to be protected in his interests by the "law of the land," and to have the judgment of his peers in those cases in which it has immemorially existed, or in which it has been expressly given by law, there is no decision to be found that it is necessary for judicial action in every case for which the property of the citizen may be taken for the public use. On the contrary, a legislative act for that purpose, when clearly within the limits of legislative authority, is

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of itself of the law of the land. An act for levying taxes and providing the means of enforcement is within the unquestioned and unquestionable power of the legislature. Due process of law does not necessarily require a judicial hearing in matters of taxation. The existence of government depending on the prompt and regular collection of revenue must, as an object of primary importance, be insured in such a way as the wisdom of the legislature may prescribe.

Id., 80 Neb. at 627–28, 114 N.W. at 933 (cleaned up); see also *Outlook Irr. Dist. v. Pels*, 28 P.2d 996 (Wash. 1934) (“The only limitation appears to be that, *at some stage of the proceedings*, the owner shall have an opportunity to be heard.”).

Trainor is an old case and due process jurisprudence has changed since then. But more recent cases from other jurisdictions have reached the same conclusion. For example, in *Associated Financial Services v. Sorenson*, a mortgagee challenged a tax sale statute because it did not provide for a hearing or judicial review. 700 A.2d 107 (Conn. App. 1997). The Connecticut appellate court held that a pre-deprivation hearing was not required:

The procedural due process requirement for a hearing applies only where a governmental body or official has engaged, or should have engaged, in factfinding. In a tax sale pursuant to General Statutes § 12-157, the tax collector does not find facts, other than the fact of nonpayment of taxes. He merely follows the statutory procedure

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laid out for the sale of real property. The power to sell land for delinquent taxes is strictly construed; the tax collector must substantially, if not strictly, comply with all statutory provisions. Where a governmental official or body executes a ministerial duty, there is no need for a hearing. Indeed, in connection with the tax sale, the tax collector is vested with no discretion save for the authority, albeit “for any reason,” to “adjourn such sale from time to time ...” That, however, is merely incidental to the ministerial duty to conduct a fair sale in a responsible manner....

Id. at 111 (cleaned up).

If the taxing authorities misused their authority, then the mortgagee had a post-deprivation remedy of a common law action. *Id.*

The Maine Supreme Court also held that due process did not require a pre-deprivation hearing in *City of Auburn v. Mandarelli*, 320 A.2d 22 (Me. 1974). There, Maine law required the taxing authority to mail a notice of delinquency to the owner. If the owner did not pay the tax within 10 days, then the tax collector recorded a tax lien certificate. If the owner did not pay the tax within the next 18 months, then the lien was foreclosed without any kind of hearing.

The *Mandarelli* court repeated the principle that due process applies differently in the taxation context, where the “very existence of government necessitates that the tax collection process be not subject to the delays attendant upon formal judicial proceedings.” *Id.* at 29, citing *King v. Mullins*, 171 U.S. 404 (1898).

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Specifically, due process does not require a hearing before the government sells property to satisfy back taxes:

When an owner of real estate has allowed the taxes assessed thereon to remain unpaid and caused the tax collector, after due notice, to foreclose the tax lien mortgage in compliance with the statutory requirements, the Legislature has the constitutional power to cut off the interest of the delinquent owner upon his failure to redeem within the legislatively provided period of redemption.

The Legislature in carrying out its property tax program has a right to expect from all owners of real estate that they will perform their citizenship duties amongst which is the duty to pay taxes properly assessed on their property for a lawful purpose.

The statute itself gives warning to the taxpayer that if he does not pay his taxes he may lose his land.... The taxpayer has a duty to learn what is being done to enforce the payment of taxes against his property.

... [A] delinquent taxpayer should not be entitled to a hearing before foreclosure of his title, where he has not contested the amount of the tax through the available abatement process and where he is given a right of action for reimbursement and damages in the case of payment of any tax assessed for an improper purpose, and, we may add,

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where he may contest the tax title either in an independent action of his own or in defense of the complaint to establish the validity of the tax title.

Id. at 29 (cleaned up).

The Maine Supreme Court affirmed the validity of *Mandarelli* several decades later. See *McNaughton v. Kelsey*, 698 A.2d 1049 (Me. 1997).

The Court concludes that due process did not require the County Defendants to give the Plaintiff a hearing before issuing a tax deed. The Nebraska Supreme Court has never overruled *Trainor* and this Court cannot say that subsequent caselaw has impliedly done so. The Plaintiff does not cite any authority for her position that providing notice to an owner 3 months before the treasurer issues a tax deed is unconstitutional. The Court has found none. The Court therefore sustains the County Defendants' motion to dismiss the Third and Sixth Causes of Action.

E. Substantive due process (Seventh Cause of Action).

The Plaintiff's Seventh Cause of Action alleges that the statutes in article 18 of chapter 77 deprived her of substantive due process. She explains that article 18 allows a county treasurer to "take a home and all equity in the home, no matter how valuable the property or small the tax delinquency, and transfer ownership and equity above the amount of

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the delinquency, to a private third party.” Am. Compl. ¶ 61.

The Due Process Clause includes a substantive component, sometimes called “substantive due process,” which prohibits certain government action regardless of how fair the procedure is. *Daniels v. Williams*, 474 U.S. 327, 337 (1986). The touchstone of due process is protecting individuals from arbitrary government action, whether the fault lies in the denial of procedural fairness or the unjustified exercise of power. *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).

The Due Process Clause protects property but does not create it. *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998). Whether something is “property” depends on an independent source of law, like state law. *Id.* The Plaintiff argues that the difference between the fair market value of real estate and any outstanding debts or liens is obviously property. But she has not argued that Nebraska statutes or case law have recognized such a property interest. This Court has found no such authority. So it joins other courts which have rejected similar substantive due process claims. See *Sheehan v. County of Suffolk*, 490 N.E.2d 523 (N.Y. 1986); *City of Auburn v. Mandarelli*, 320 A.2d 22 (Me. 1974). The Court therefore sustains the County Defendants’ motion to dismiss the Seventh Cause of Action.

F. Excessive fines (Eighth Cause of Action).

The Plaintiff’s Eighth Cause of Action alleges that the County Defendants’ [sic] levied an excessive fine under the state and federal constitutions. She explains that the statutes in article 18 “allow the

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government to take and sell property to a private party, and transfer title and all equity in said property in excess of the amount owed for taxes, which is in essence a punishment for the offense of becoming delinquent in the payment of property taxes.” Am. Compl. ¶ 64.

The Eighth Amendment to the U.S. Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Similarly, Neb. Const, art. I, § 9 states in part: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” This section of Nebraska’s constitution “mirrors” and “does not require more than” the Eighth Amendment. *State v. Mata*, 275 Neb. 1, 33–34, 745 N.W.2d 229, 257 (2008).

The Excessive Fines Clause limits the “power of those entrusted with the criminal-law function of government.” *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019). It does not apply to civil cases in which the government “neither has prosecuted the action nor has any right to receive a share of the damages awarded.” *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989). The Excessive Fines Clause limits “only those fines directly imposed by, and payable to, the government.” *Id.* at 264. For example, the Nebraska Supreme Court held that requiring a criminal defendant to pay the cost of outpatient treatment as a condition of probation was not an excessive fine because the defendant was not paying the State. See *State v. Hynek*, 263 Neb. 310, 317, 640 N.W.2d 1, 7 (2002), citing *Browning-Ferris, supra*.

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The County Defendants argue that the Excessive Fine Clause does not apply here because the government did not receive the equity in the Plaintiff's home. The Court agrees. The Plaintiff alleges that Vintage Management, not the County Defendants, received title to the property. The Plaintiff does not allege that Tax 106 or Vintage Management paid the County Defendants for the difference between the fair market value of the property and the tax lien. The Court therefore sustains the County Defendants' motion to dismiss the Eighth Cause of Action.

G. Injunctive relief (Tenth Cause of Action).

The Plaintiff's ultimate claim, the Tenth Cause of Action, asks the Court to enjoin the County Defendants from issuing tax deeds. Am. Compl. ¶ 73. The Amended Complaint's Prayer for Relief also asks the Court to enjoin the County Defendants from "enforcing" the tax deed issued to Vintage Management.

The County Defendants argue that injunctive relief is barred by Neb. Rev. Stat. § 77-1727, which provides:

No injunction shall be granted by any court or judge in this state (1) to restrain the collection of any tax, or any part thereof, or (2) to restrain the sale of any property for the nonpayment of any such tax.

No person shall be permitted to recover by replevin, or other process, any property taken or restrained by the county treasurer for the nonpayment of any tax, except such tax or the part thereof enjoined in case of

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injunction, levied or assessed for illegal or unauthorized purpose.

No injunction shall be granted or recovery by replevin shall be permitted unless the person has first successfully argued before a court of competent jurisdiction that the tax levied or collected was levied or assessed for illegal or unauthorized purpose.

The Plaintiff responds that § 77-1727 does not bar injunctive relief here because she alleges that article 18 is unconstitutional under the Due Process Clause and the Excessive Fines Clause. Brief for Plaintiff at 19. The Court has concluded, however, that the Plaintiff has not stated claims for relief under such theories.

Further, the Nebraska Supreme Court rejected a similar argument in *Jones v. Department of Revenue*, 248 Neb. 158, 532 N.W.2d 636 (1995). There, the plaintiffs alleged that a statute requiring them to pay taxes before a protest was unconstitutional on its face and as applied to them. They sued to enjoin the State from collecting the tax until they had meaningful judicial review. The Nebraska Supreme Court held that § 77-1727 barred the plaintiffs' request for injunctive relief notwithstanding their constitutional claims:

Injunctive relief is available in Nebraska where a tax is void, that is, where the taxing body does not have jurisdiction or power to impose the tax. Thus, injunctive relief is available only where the tax is void or levied for an illegal or unauthorized purpose. The

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Joneses did not claim that the Department did not have power to impose the taxes, resulting in a void tax, or that the taxes were levied for an illegal or unauthorized purpose. Therefore, pursuant to § 77-1727, the district court did not have authority to grant injunctive relief.

Id. at 162–63, 532 N.W.2d at 640 (cleaned up).

So the Court sustains the County Defendants' motion to dismiss the Tenth Cause of Action for failure to state a claim.

V. CONCLUSION

The Court sustains the County Defendants' Motion to Dismiss the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Causes of Action for failure to state a claim. The Court overrules the Motion to Dismiss in all other respects.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Motion to Dismiss filed by Defendants Rachel Garver and Lancaster County is **OVERRULED IN PART** and **SUSTAINED IN PART**.

DATED this 4th day of December, 2019.

s/ Kevin R. McManaman _____
District Court Judge

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**Nebraska Appellate and
Supreme Courts Case Search
Official Nebraska Government Website
7/6/22, 2:28 PM**

Case Summary

Nieveen v. TAX 106

The Case ID is S 21-364

Appealed on 04/29/2021.

Filed on 05/06/2021.

Classification: Law - Non-advanced

Trial Court: Lancaster County District Court

Trial Case ID: CI19-1433

Trial Judge: Kevin R McManaman Original Court:
Lancaster County District Court

Register of Actions

S 06/28/2022 Disposition

Appellant's Application to Stay Mandate granted.
Appellant shall inform the Clerk of the Supreme
Court of the status of its Petition for a Writ of
Certiorari to the United States Supreme Court.

****CORRECTED ENTRY****

S 06/22/2022 Disposition

Motion of Appellant for rehearing overruled.

S 05/20/2022 Motion Appellant for Rehearing

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View Image Image ID N22140K80NSC

Filed By Sandra K Nieveen 2 Responses Filed

Submitted 06/03/2022 Disposed 06/22/2022

S 05/20/2022 Application Appellant Stay of Mandate

View Image Image ID N22140K7ZNSC

Filed By Sandra K Nieveen

Submitted 05/20/2022 Disposed 06/28/2022

S 05/13/2022 Disposition

View Image Image ID N22133K48NSC

Affirmed. Papik, Justice. Stacy, Justice, not participating. O’Gorman, District Judge, sitting.

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STATUTORY PROVISIONS

Below are excerpts of the relevant statutes in effect at the time of the foreclosure:

Neb. Rev. Stat. 77-1801. Real property taxes; collection by sale; when

Except for delinquent taxes on mobile homes, cabin trailers, manufactured homes, or similar property assessed and taxed as improvements to leased land, all real estate on which the taxes shall not have been paid in full, as provided by law, on or before the first Monday of March, after they become delinquent, shall be subject to sale on or after such date.

Neb. Rev. Stat. 77-1807(2)(a)–(c),(f)

(2)(a) This subsection applies beginning January 1, 2015.

(b) If a land bank gives an automatically accepted bid for real property pursuant to section 19-5217, the land bank shall be the purchaser and no public or private auction shall be held under sections 77-1801 to 77-1863.

(c) If no land bank has given an automatically accepted bid pursuant to section 19-5217, the person who offers to pay the amount of taxes, delinquent interest, and costs due on any real property shall be the purchaser.

(f) Any property remaining unsold upon completion of the public auction shall be sold at a private sale pursuant to section 77-1814.

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Neb. Rev. Stat. 77-1808. Real property taxes; delinquent tax sale; payment by purchaser; resale

The person purchasing any real property shall pay to the county treasurer the amount of taxes, interest, and cost thereon, which payment may be made in the same funds receivable by law in the payment of taxes. If any purchaser fails to so pay, then the real property shall at once again be offered as if no such sale had been made.

Neb. Rev. Stat. 77-1814. Real property taxes; private tax sale; issuance of certificates

After the sale is closed and the treasurer has made his or her return thereof to the county clerk as provided in section 77-1813, if any real property remains unsold for want of bidders therefor, the county treasurer is authorized and required to sell the same at private sale at his or her office to any person who will pay the amount of taxes, penalty, and costs thereof and to make out duplicate certificates of sale and deliver one to the purchaser and the other to the county clerk. Such certificate shall contain the additional statement that such real property has been offered at public sale but not sold for want of bidders and shall also contain the words "sold for taxes at private sale". The treasurer is further authorized and required to sell all real property in the county on which taxes remain unpaid and delinquent for any previous year or years.

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Neb. Rev. Stat. 77-1818. Real property taxes; certificate of purchase; lien of purchaser; subsequent taxes

The purchaser of any real property sold by the county treasurer for taxes shall be entitled to a certificate in writing, describing the real property so purchased, the sum paid, and the time when the purchaser will be entitled to a deed, which certificate shall be signed by the county treasurer in his or her official capacity and shall be presumptive evidence of the regularity of all prior proceedings. Each tax lien shall be shown on a single certificate. The purchaser acquires a perpetual lien of the tax on the real property, and if after the taxes become delinquent he or she subsequently pays any taxes levied on the property, whether levied for any year or years previous or subsequent to such sale, he or she shall have the same lien for them and may add them to the amount paid by him or her in the purchase.

Neb. Rev. Stat. 77-1824. Real property taxes; redemption from sale; when and how made

The owner or occupant of any real property sold for taxes or any person having a lien thereupon or interest therein may redeem the same. The right of redemption expires when the purchaser files an application for tax deed with the county treasurer. A redemption shall not be accepted by the county treasurer, or considered valid, unless received prior to the close of business on the day the application for the tax deed is received by the county treasurer. Redemption shall be accomplished by paying the county treasurer for the use of such purchaser or his or her heirs or assigns the sum mentioned in his or her certificate, with interest thereon at the rate

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specified in section 45-104.01, as such rate may from time to time be adjusted by the Legislature, from the date of purchase to date of redemption, together with all other taxes subsequently paid, whether for any year or years previous or subsequent to the sale, and interest thereon at the same rate from date of such payment to date of redemption. The amount due for redemption shall include the issuance fee charged pursuant to section 77-1823.

Neb. Rev. Stat. 77-1831. Real property taxes; issuance of treasurer's tax deed; notice given by purchaser; contents

Except as otherwise provided in this section, no purchaser at any sale for taxes or his or her assignees shall be entitled to a tax deed from the county treasurer for the real property so purchased unless such purchaser or assignee, at least three months before applying for the tax deed, serves or causes to be served a notice that states, after the expiration of at least three months from the date of service of such notice, the tax deed will be applied for. In the case of owner-occupied property, no purchaser at any sale for taxes or his or her assignees shall be entitled to a tax deed from the county treasurer for the real property so purchased unless such purchaser or assignee, at least three months and forty-five days before applying for the tax deed, serves or causes to be served a notice that states, after the expiration of at least three months and forty-five days from the date of service of such notice, the tax deed will be applied for.

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Neb. Rev. Stat. 77-1837. Real property taxes; issuance of treasurer's tax deed; when

At any time within nine months after the expiration of three years after the date of sale of any real estate for taxes or special assessments, if such real estate has not been redeemed, the county treasurer, on application, on production of the certificate of purchase, and upon compliance with sections 77-1801 to 77-1863, shall execute and deliver a deed of conveyance for the real estate described in such certificate as provided in this section. The failure of the county treasurer to issue the deed of conveyance if requested within the timeframe provided in this section shall not impair the validity of such deed if there has otherwise been compliance with sections 77-1801 to 77-1863.

Neb. Rev. Stat. 77-1838. Real property taxes; issuance of treasurer's tax deed; execution, acknowledgment, and recording; effect; lien for special assessments

The deed made by the county treasurer shall be under the official seal of office and acknowledged by the county treasurer before some officer authorized to take the acknowledgment of deeds. When so executed and acknowledged, it shall be recorded in the same manner as other conveyances of real estate. When recorded it shall vest in the grantee and his or her heirs and assigns the title of the property described in the deed, subject to any lien on real estate for special assessments levied by a sanitary and improvement district which special assessments have not been previously offered for sale by the county treasurer.

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IN THE DISTRICT COURT OF LANCASTER
COUNTY, NEBRASKA

SANDRA K. NIEVEEN,
Plaintiff,

Case No. CI 19-1433

v.

**AMENDED
COMPLAINT**

TAX 106, a Nebraska
general partnership,
VINTAGE
MANAGEMENT, LLC, a
Nebraska limited liability
company, RACHEL
GARVER, Lancaster
County Treasurer, in her
official capacity,
LANCASTER COUNTY,
a political subdivision in
the State of Nebraska,
and DOUGLAS J.
PETERSON, Attorney
General of the State of
Nebraska, in his official
capacity,

Defendants.

COMES NOW the Plaintiff, Sandra K. Nieveen, by
and through her attorneys, Legal Aid of Nebraska,
and for her cause of action against the Defendant
states and alleges as follows:

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FACTS

1. Plaintiff is a resident of Lincoln, Lancaster County, Nebraska.

2. Defendant TAX 106 is a general partnership existing under the laws of the State of Nebraska.

3. Defendant Vintage Management, LLC, is a limited liability company organized and existing under the laws of the State of Nebraska, and is the successor in interest to TAX 106, a general partnership.

4. Defendant Rachel Garver is the Treasurer of Lancaster County, Nebraska and is named in her official capacity only.

5. Defendant Lancaster County is a political subdivision in the State of Nebraska.

6. Defendant Douglas J. Peterson is the Attorney General for the State of Nebraska and is named in his official capacity only.

7. Plaintiff Sandra K. Nieveen is the lawful owner of real property, including a home, legally described as East Lawn Terrace, Block 11, Lot 19, Lancaster County, Nebraska, and commonly referred to as 3526 Garfield St, Lincoln, Nebraska.

8. Plaintiff currently resides in the home, has resided in the home for over the past twenty years, and has owned the home since 1977. There is no deed of trust securing a mortgage on the home.

9. On June 22, 2018, Defendant Vintage Management, LLC sought issuance of a tax deed from Defendant Lancaster County Treasurer using the

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procedure outlined in Neb. Rev. Stat. § 77-1801 et. seq.

10. At the time Defendant Vintage Management, LLC applied for the tax deed, Sandra K. Nieveen was seventy years old.

11. The Nebraska statutes concerning the collection of delinquent real property taxes by sale of real property provides a redemption period of three years, except in cases involving minors and those who have an intellectual disability or mental disorder. See Neb. Rev. Stat. § 77-1837, -1826, and -1827, emphasis added.

12. Plaintiff was at all relevant times diagnosed with major depressive disorder and generalized anxiety disorder. Plaintiff suffers from the symptoms of her disorders. The Social Security Administration and the American Psychiatric Association consider both of these disorders to be mental disorders.

13. Pursuant to Neb. Rev. Stat. § 77-1827, Plaintiff was at all relevant times affected by a mental disorder and as such is entitled to redeem the property at any time within five years of the tax sale.

14. As a result of Plaintiff's delinquency in paying her property taxes, the Defendant Lancaster County Treasurer conducted a tax sale pursuant to Neb. Rev. Stat. §§ 77-1801 et. seq.

15. On March 2, 2015, Defendant TAX 106, a general partnership and predecessor in interest to Defendant Vintage Management, LLC purchased a tax certificate issued by the Defendant Lancaster County Treasurer in the amount of \$2,390.48 for delinquent property taxes for 2013 and 2014.

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16. On September 19, 2016, Defendant TAX 106 paid the Defendant Lancaster County Treasurer an additional \$1,405.90 for delinquent property taxes for 2015.

17. Neither the Defendant Lancaster County Treasurer nor Defendant TAX 106 notified Plaintiff of the sale or any subsequent payment of her taxes until March 2, 2018.

18. On March 2, 2018, Defendant TAX 106 mailed a Notice to Plaintiff by certified mail.

19. Pursuant to Neb. Rev. Stat. § 45-104.01, the interest rate assessed on delinquent payments of taxes owed to Defendant Lancaster County and paid by Defendant TAX 106 accrued at a rate of 14% per annum.

20. Before receiving the notice that Defendant Vintage Management, LLC was applying for a tax deed, interest accrued at 14% per annum, and is included in the amount the Plaintiff would have to pay to redeem her property. Said interest accrued for approximately three years.

21. At all relevant times to this action, Plaintiff has occupied and resided in the real property at issue.

22. The Defendant Lancaster County Treasurer issued a tax deed to Defendant Vintage Management, LLC on June 22, 2018 and recorded said deed on July 5, 2018.

23. At the time the Defendant Lancaster County Treasurer issued the tax deed, the County assessed Plaintiff's property at \$61,900.

24. Pursuant to Neb. Rev. Stat. §§ 76-214, 77-1327(2), any grantee who wishes to record a deed to

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real property must complete and file a Real Estate Transfer Statement with the Register of Deeds.

25. Defendant Vintage Management, LLC prepared a Real Estate Transfer Statement (Form 521) prepared pursuant to the tax deed for Plaintiff's property. Defendant Vintage Management, LLC named the Lancaster County Treasurer the grantor and Vintage Management, LLC as the grantee. Defendant Vintage Management, LLC entered the total purchase price as \$133,000. Defendant Vintage Management, LLC's authorized representative and registered agent signed below a line that stated, "Under penalties of law, I declare that I have examined this statement and that it is, to the best of my knowledge and belief, true, complete, and correct, and that I am duly authorized to sign this statement."

26. Despite Defendant Vintage Management, LLC's sworn statement that the purchase price was \$133,000, it in fact received a title to property worth \$61,900 for which Defendant Vintage Management, LLC only paid \$3,796.38. Defendant Vintage Management, LLC would receive a profit of over \$58,000 if Plaintiff is not allowed to redeem the tax deed sale.

27. Plaintiff is prepared to tender all taxes that are past due and owing to the Defendant Lancaster County Treasurer, and shall tender such taxes prior to trial.

FIRST CAUSE OF ACTION

(Quiet Title on the Basis of Extended Redemption
Period)

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Plaintiff hereby incorporates paragraphs 1–27 of this Complaint into this Cause of Action and further states:

28. Plaintiff at all relevant times had a mental disorder entitling her to the five-year extended redemption period outlined in Neb. Rev. Stat. § 77-1827.

29. Plaintiff is entitled to an order of this Court determining that she has redeemed the property, that Plaintiff is the rightful owner of the property, and a decree entered identifying the Plaintiff as the rightful owner of the property.

SECOND CAUSE OF ACTION

(Unjust Enrichment)

Plaintiff hereby incorporates paragraphs 1–29 of this Complaint into this Cause of Action and further states:

30. In the alternative, if Plaintiff is not entitled to an order of this Court determining that she has redeemed the property and quieting title in her name pursuant to the five year extended redemption period outlined in Neb. Rev. Stat. § 77-1827, Plaintiff is entitled to damages from Defendants on the basis of unjust enrichment.

31. Defendant Vintage Management, LLC purchased a tax certificate from the Defendant Lancaster County Treasurer for \$3,796.38 for delinquent property taxes owed by Plaintiff, on May 2, 2015 and September 19, 2016.

32. The Defendant Lancaster County Treasurer issued a tax deed transferring Plaintiff's real property, which included her home, to Defendant

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Vintage Management, LLC on June 22, 2018 and recorded the deed on July 5, 2018.

33. Defendant Vintage Management, LLC received a title to property assessed at \$61,900 for which he only paid \$3,796.38, and would receive a profit of over \$58,000.

34. Plaintiff had no mortgage on the property and will be stripped of the equity in her home, and the Defendant Vintage Management, LLC stands to gain not only title to Plaintiff's real property, but a windfall of all the equity therein.

35. As a result of the actions of the Defendants, Defendant Vintage Management, LLC was unjustly enriched in the amount of at least \$58,000.

36. Plaintiff suffered damages in the amount of at least \$58,000.

THIRD CAUSE OF ACTION

(Violation of Procedural Due Process under the Fourteenth Amendment to the United States Constitution and Article I, § 3 of the Nebraska Constitution)

Plaintiff hereby incorporates paragraphs 1–36 of this Complaint into this Cause of Action and further states:

37. No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 3.

38. Neb. Rev. Stat. § 77-1827 provides an extended redemption period for individuals with a mental disorder but does not provide a process to claim this extended redemption period.

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FOURTH CAUSE OF ACTION

(Violation of the Fifth Amendment to the United States Constitution and Article I, § 21 of the Nebraska Constitution)

Plaintiff hereby incorporates paragraphs 1–38 of this Complaint into this Cause of Action and further states:

39. By directing takings of private property by county treasurers and counties without a public purpose, Neb. Rev. Stat. §§ 77-1801 et seq. violate the Fifth Amendment to the United States Constitution and Article I, § 21 of the Nebraska Constitution.

40. Neb. Rev. Stat. §§ 77-1801 et seq. direct the counties to conduct public auctions or “tax certificates” pertaining to private properties subject to property tax deficiencies. Through these auctions, the county sells the tax certificates to private purchasers. The certificates permit the certificate holders to apply for a tax deed subject to the property owner’s right to redeem. Upon the issuance of a tax deed, the property owner loses the right to redeem and the tax certificate purchaser receives title to the property. Upon the issuance of a tax deed, the tax certificate holder receives title to and all equity in the property, and the property owner loses their home and all its equity.

41. Nebraska law allows a county to take and sell to a purchaser of a tax certificate the right to obtain a deed to the property, even if the original property owner has equity in the property. Regardless of how much equity a property owner has in his or her property, or how small the tax deficiency the owner owes a county, Neb. Rev. Stat. §§ 77-1801 et seq. provide that the county will take and transfer the

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property and all the equity in it to a private purchaser for the amount of the tax deficiency.

42. Equity in a home is undeniably a property right that may not be taken in violation of the Fifth Amendment to the United States Constitution and Article I, § 21 of the Nebraska Constitution. Equity is a partial interest in real property and is subject to distribution like other forms of property. The government may not take a citizen's home equity in violation of the United States and Nebraska Constitutions.

43. Neb. Rev. Stat. §§ 77-1801 et seq. direct the taking and public transfer of private property to other private purchasers.

44. For over 200 years, it has been recognized by the Supreme Court of the United States that it is against all reason and justice to presume that the legislature has been entrusted with the power to enact a law that takes property from A and gives it to B. *Calder v. Bull*, 3 U.S. 386, 388 (1798).

45. The Fifth Amendment to the United States Constitution and Article I, § 21 of the Nebraska Constitution limits the power of the government to take property by prohibiting such a taking in the absence of a public purpose. When the government does take the property for a public purpose, the government takes title to the property and pays compensation to the property owner. When there is no public purpose, the Fifth Amendment and Nebraska Constitution prohibit such a taking.

46. The government has no public purpose for selling the right to a tax deed on private home equity when that equity is larger in amount than the tax

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liens, interest, and other statutory costs at issue. Nebraska law allows for the taking and transfer of amounts of equity that are above and beyond the amount of the public debt owed, thereby eviscerating any relationship between the public purpose for these sales, namely the recovery of property tax deficiencies, and the final amounts transferred to the purchasers. The constitutions of the United States and Nebraska preclude such exercises of government power.

47. For these reasons, Neb. Rev. Stat. §§ 77-1801 et seq. violate the Fifth Amendment to the United States Constitution and Article I, § 21 of the Nebraska Constitution facially and as applied.

48. Because Neb. Rev. Stat. §§ 77-1801 et seq. are unconstitutional, the tax sale and deed issued to the Defendant Vintage Management, LLC is void.

FIFTH CAUSE OF ACTION

(Claim for Just Compensation under the Fifth Amendment to the United States Constitution and Article I, § 21 the Nebraska Constitution)

Plaintiff hereby incorporates paragraphs 1–48 of this Complaint into this Cause of Action and further states:

49. The United States and Nebraska Constitutions provide that neither the States nor their political subdivisions shall take private property for public use without just compensation. U.S. Const. amend. V; Neb. Const. art. I, § 21.

50. Neb. Rev. Stat. §§ 77-1801 et seq. permit a taking of private property, including the original owner's equity in the real property, without any form of compensation.

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51. Such takings without compensation, even if found to have a public purpose, violate the Fifth Amendment and Nebraska Constitution. By permitting such seizures without requiring compensation, Neb. Rev. Stat. §§ 77-1801 et seq. authorize an unconstitutional action.

52. For the reasons stated, Neb. Rev. Stat. §§ 77-1801 et seq. violate the just compensation requirement of the Fifth Amendment of the United States Constitution and Article I, § 21 of the Nebraska Constitution facially and as applied.

53. Because Neb. Rev. State. §§ 77-1801 et seq. is unconstitutional, the tax sale and deed issued to Defendant Vintage Management, LLC is void.

SIXTH CAUSE OF ACTION

(Violation of Procedural Due Process under the Fourteenth Amendment to the United States Constitution and Article I, § 3 the Nebraska Constitution)

Plaintiff hereby incorporates paragraphs 1–53 of this Complaint into this Cause of Action and further states:

54. No person shall be deprived of life, liberty or property without due process of law. U.S. Const. amend. XIV; Neb. Const. art. I, § 3.

55. Neb. Rev. Stat. § 77-1831 requires the tax certificate holder to provide notice to the property owner of their right to redeem only 3 months prior to the date the tax certificate holder applies for a tax deed even though there is a minimum of three year redemption period.

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56. Because Neb. Rev. Stat. §§ 77-1801 et seq. is unconstitutional, the tax sale and deed issues to Defendant Vintage Management, LLC is void.

SEVENTH CAUSE OF ACTION

(Violation of Substantive Due Process under Article I, § 3 the Nebraska Constitution)

Plaintiff hereby incorporates paragraphs 1–56 of this Complaint into this Cause of Action and further states:

57. Article I, § 25 of the Nebraska Constitution creates the right to acquire, own, possess, enjoy and descent property.

58. Article I, § 3 of the Nebraska Constitution provides that no person shall be deprived of property without due process of law.

59. Nebraska's Due Process Clause offers not only procedural protections, but a substantive component that protects persons against the arbitrary exercise of governmental power. In other words, the substantive component bars certain governmental actions regardless of the fairness of the procedures used to implement them.

60. The Nebraska Constitution creates a protected right to own a home.

61. Neb. Rev. Stat. §§ 77-1801 et seq. permit a county treasurer to take a home and all equity in the home, no matter how valuable the property or small the tax delinquency, and transfer ownership and equity above the amount of the delinquency, to a private third party.

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62. Because Neb. Rev. Stat. §§ 77-1801 et seq. is unconstitutional, the tax sale and deed issued to Defendant Vintage Management, LLC is void.

EIGHTH CAUSE OF ACTION

(Violation of Excessive Fines under the Eighth Amendment to the United States Constitution and Article I, § 9 of the Nebraska Constitution)

Plaintiff hereby incorporates paragraphs 1–62 of this Complaint into this Cause of Action and further states:

63. The Eighth Amendment to the United States Constitution and Article I, § 9 of the Nebraska Constitution prohibit the government from imposing excessive fines.

64. Neb. Rev. Stat. §§ 77-1801 et seq. allow the government to take and sell property to a private party, and transfer title and all equity in said property in excess of the amount owed for taxes, which is in essence a punishment for the offense of becoming delinquent in the payment of property taxes.

65. For these reasons, from Neb. Rev. Stat. §§ 77-1801 et seq. violate the Eighth Amendment to the United States Constitution and Article I, § 9 of the Nebraska Constitution.

66. Because Neb. Rev. Stat. §§ 77-1801 et seq. are unconstitutional, the tax sale and deed issued to Defendant Vintage Management, LLC is void.

NINTH CAUSE OF ACTION

(Violation of Article I, § 25 of the Nebraska Constitution)

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Plaintiff hereby incorporates paragraphs 1–66 of this Complaint into this Cause of Action and further states:

67. Article I, § 25 of the Nebraska Constitution provides, “There shall be no discrimination between citizens of the United States with respect to the acquisition, ownership, possession, enjoyment or descent of property.”

68. Neb. Rev. Stat. §§ 77-1801 et seq. result in an unlawful taking under the constitutions of the United States and State of Nebraska and therefore violate Article I, § 25 of the Nebraska Constitution.

69. For these reasons, Neb. Rev. Stat. §§ 77-1801 et seq. violate Article I, § 25 of the Nebraska Constitution facially and as applied.

70. Because Neb. Rev. Stat. §§ 77-1801 et seq. is unconstitutional, the tax sale and deed issued to Defendant Vintage Management, LLC is void.

TENTH CAUSE OF ACTION

(Injunction)

Plaintiff hereby incorporates paragraphs 1–70 of this Complaint into this Cause of Action and further states:

71. Plaintiff will suffer immediate and irreparable harm if the Court does not enjoin Defendant Vintage Management, LLC from enforcing the tax sale of Plaintiff’s property and deed issued by the Defendant Lancaster County Treasurer and recorded on July 5, 2018.

72. Pursuant to Neb. Rev. Stat. §§ 25-1062 to -1080, Plaintiff moves this Court to enter a temporary

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and permanent injunction commanding Defendant Vintage Management, LLC to refrain from enforcing the tax deed sale.

73. Plaintiff seeks a temporary and permanent injunction prohibiting the use of Neb. Rev. Stat. §§ 77-1801 et. seq. as a means for Defendant Lancaster Counter to take and sell property, including all equity in a property owner's home, by issuing tax deeds.

WHEREFORE, Plaintiff respectfully requests that:

A. The Court find and declare that the Plaintiff is entitled to an extended redemption period pursuant to Neb. Rev. Stat. § 77-1827;

B. The Court enter an order on her First Cause of Action that the title to the property be quieted and confirmed in Plaintiff and against all persons, including the Defendant Vintage Management, LLC, claiming any interest in said property;

C. The Court find and declare the relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. that permit the taking and sale of Plaintiff's property, including all equity in her property, violates the Fifth Amendment to the United States Constitution, Article I, § 21 of the Nebraska Constitution facially and as applied, and declare relevant portions of the Neb. Rev. Stat. §§ 77-1801 et seq. causing such sale to be null and void;

D. The Court find and declare, in the alternative, that the Plaintiff is entitled to just compensation under the Fifth Amendment to the United States Constitution and Article I, § 21 of the Nebraska Constitution;

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E. The Court find and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. that deprive property owners of their property, including all equity therein, without providing adequate notice violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and Article I, § 3 of the Nebraska Constitution facially and as applied and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. causing such sale to be null and void;

F. The Court find and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. that deprive property owners of their property, included all equity therein, violates property owners substantive due process rights guaranteed by Article I, § 3 of the Nebraska Constitution facially and as applied and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. causing such sale to be null and void;

G. The Court declare, in the alternative, that taking and transferring Plaintiff's property and all equity therein for a relatively minor tax delinquency constitutes a violation of the rights against excessive punishment and fines under the Eighth Amendment to the United States Constitution and Article I, § 9 of the Nebraska Constitution and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. causing such sale to be null and void;

H. The Court find and declare that Defendants taking and sale of Plaintiff's property, including all equity in her property, violates Article I, § 25 of the Nebraska Constitution and declare relevant portions of Neb. Rev. Stat. §§ 77-1801 et seq. causing such sale to be null and void;

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I. The Court enter a temporary and permanent injunction enjoining Defendants Vintage Management, Lancaster County, Lancaster County Treasurer from enforcing the tax sale and tax deed issued by the Defendant Lancaster County Treasurer and recorded on July 5, 2018;

J. The Court enter a permit injunction prohibiting the use of Neb. Rev. Stat. §§ 77-1801 et seq. to take and sell property, including all equity in a property owner's home, by issuing tax deeds;

K. The Court enter an order voiding the sale and issuance of the tax deed to Plaintiff's home;

L. The Court enter an order, in the alternative, finding Defendant Vintage Management, LLC was unjustly enriched and order Defendants pay Plaintiff the value of equity the Plaintiff had in the property at the time the tax deed was issued after accounting for the amount owed pursuant to the tax certificate, or, in the alternative order that the property be placed in a constructive trust;

M. The Court award Plaintiff her costs, including reasonable attorney's fees, as provided by law; and

N. Other such relief as the Court deems necessary and proper.

DATED this 24th day of May, 2019.

SANDRA K. NIEVEEN,
Plaintiff

By: /s/ Sara E. Rips
Sara E. Rips #26091
Caitlin C. Cedfeldt #25469

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Attorneys for Plaintiff
LEGAL AID OF
NEBRASKA

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FILED
August 18, 2021
CLERK
NEBRASKA SUPREME
COURT
COURT OF APPEALS
IN THE NEBRASKA COURT OF APPEALS

SANDRA K. NIEVEEN, Appellant,	Case No. <u>A 21-364</u>
TAX 106, et al.	<u>NOTICE THAT CASE</u> <u>ON APPEAL</u> <u>INVOLVES</u> <u>CONSTITUTIONAL</u> <u>QUESTIONS</u>
Appellees.	

COMES NOW the Appellant in the above-captioned matter, Sandra K. Nieveen, by and through her attorney of record, Mark T. Bestul of Legal Aid of Nebraska, and pursuant to Nebraska Supreme Court Rule § 2-109(E) hereby gives notice that her appeal to the Nebraska Court of Appeals will present issues of Constitutionality of the underlying statutes under both the Constitution of the United States and the Constitution of the State of Nebraska.

DATED August 17, 2021.

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RESPECTFULLY SUBMITTED: Sandra K.
Nieveen, Appellant

By: /s/ Mark T. Bestul
MARK T. BESTUL, #22391
Legal Aid of Nebraska

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**Nebraska Appellate and
Supreme Courts Case Search
Official Nebraska Government Website
7/6/22, 2:28 PM**

Case Summary

Nieveen v. TAX 106

The Case ID is S 21-364

Appealed on 04/29/2021.

Filed on 05/06/2021.

Classification: Law - Non-advanced

Trial Court: Lancaster County District Court

Trial Case ID: CI19-1433

Trial Judge: Kevin R McManaman

Original Court: Lancaster County District Court

Register of Actions

S 09/07/2021 Disposition

By order of the Nebraska Supreme Court, case moved from Court of Appeals docket to Supreme Court docket.