

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

CHRIS KNOX,
Plaintiff,

vs.

DUANE WITTE d/b/a PARASAL MFG,
Defendant.

Case No. 10685

**SUMMARY JUDGMENT
AND ORDER**

DATE OF HEARING: (1) April 9, 1999, and, (2) April 23, 1999.

DATE OF DECISION: May 13, 1999.

APPEARANCES:

For plaintiff: (1) Robert D. Coupland with plaintiff; (2) Robert D. Coupland without plaintiff.

For defendant: (1) W. Gerald O’Kief and Eric A. Scott without defendant; (2) W. Gerald O’Kief without defendant.

SUBJECT OF ORDER: plaintiff’s motion to deem the plaintiff’s requests for admission admitted, and, plaintiff’s motion for summary judgment.

FINDINGS: The court finds and concludes that:

1. The court first considers the plaintiff’s motion to deem requests for admission as admitted.
 - a. The plaintiff asserts that the answers failed to comply with the applicable discovery rule in that they were signed only by the defendant’s then-attorney-of-record and not by the defendant personally.
 - b. Neb. Ct. R. of Discovery 36(a) (rev. 1996) (emphasis supplied) states that “[t]he matter is admitted unless . . . within such longer time as the court may allow, the party to whom the request is directed serves . . . a written answer or objection addressed to the matter, signed by the party *or by his or her attorney . . .*” Cf. Neb. Ct. R. of Discovery 33(a) (rev. 1996) (interrogatory “answers are to be signed by the person making them, and the objections signed by the attorney making them”).
 - c. Clearly, the rule permits the answers to requests for admission to be signed by a party’s attorney, and consequently, cannot constitute grounds for deeming a matter as admitted. The motion to deem answers admitted must be denied.

2. Because the plaintiff's motion to deem admitted is not meritorious, the request for expenses of the motion including attorney's fees must also be denied.

3. The motion to deem admitted borders on the irrelevant because the answers submitted on the defendant's behalf admitted all of the requests except the last request, and because the admitted request no. 6 makes the last request superfluous. Nevertheless, in the interest of complete relief, the motion should be denied for the reasons noted above.

4. The court next considers the plaintiff's motion for summary judgment. The applicable principles of law are well-known:

a. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Parker v. Lancaster Cty. School Dist. No. 001*, 256 Neb. 406, ___ N.W.2d ___ (1999).

b. The court views the evidence in a light most favorable to the party against whom the judgment is sought and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

c. On a motion for summary judgment, the question is not how a factual issue is to be decided but whether any real issue of material fact exists. *Id.*

d. Where reasonable minds may differ as to whether an inference supporting an ultimate conclusion can be drawn, summary judgment should not be granted. *Id.*

5. Viewed in the light most favorable to the defendant, there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the plaintiff is entitled to judgment as a matter of law.

6. The only issue seriously contested by the defendant is the matter of prejudgment interest. At the motion hearing, the defendant asserted that the plaintiff failed to comply with NEB. REV. STAT. § 45-103.02(1) and is thereby precluded from recovering prejudgment interest. The defendant had overlooked the 1994 amendment to § 45-103.02, which added subdivision (2) thereof providing that "interest as provided in section 45-104 shall accrue on the unpaid balance of liquidated claims from the date

the cause of action arose until the rendition of judgment.” NEB. REV. STAT. § 45-103.02(2) (Reissue 1998) (omitting inapplicable exceptions for marital dissolution or separation actions and actions involving the state, its political subdivisions, or their respective employees). The defendant’s brief now apparently concedes the amendment, but asserts that the claim was unliquidated.

7. Section 45-104 authorizes interest at 12% per annum “on settlement of the account from the day the balance shall be agreed upon” or “upon money received to the use of another and retained without the owner’s consent, express or implied, from the receipt thereof” or “on money . . . due and withheld by unreasonable delay of payment.” NEB. REV. STAT. § 45-104 (Reissue 1998).

8. The undisputed evidence shows that the obligation became liquidated as to both liability and amount on July 13, 1995, when the defendant agreed to reinforce the floor, replace the trailer, or refund the money. At that point, the trailer was in the defendant’s possession and totally out of the plaintiff’s control. The liability could have been discharged by timely reinforcement of the original trailer floor, by replacement of the trailer, or by refund of the money. The evidence shows that the defendant resold the original trailer, making the first option impossible. The evidence totally fails to show any tender of a replacement trailer, and consequently, the defendant is deemed in law to have abandoned that option. The only remaining option was to refund the purchase price.

9. The amount of the refund and the duty to refund have been fixed since July 13, 1995, and the plaintiff is entitled to prejudgment interest under § 45-104 from that date.

10. Because the claim is liquidated under § 45-104, § 45-103.02(2) requires prejudgment interest from the date the cause of action arose.

11. By interlocutory order rendered on February 5, 1999, and entered on February 10, 1999, the court allowed provided for the plaintiff’s expenses on a motion to compel in the amount of \$200.00 to be taxed as part of the final judgment. The court adheres to the findings and determinations made therein, and taxes such costs as part of the final judgment.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The motion to deem requests admitted, with requested expenses, is denied.
2. The plaintiff’s motion for summary judgment is granted.

3. Summary judgment is hereby entered in favor of the plaintiff, Chris Knox, and against the defendant, Duane Witte d/b/a Parasal MFG, in the amount of:

a. \$5,695.00; plus,

b. \$2,621.26, representing prejudgment interest at 12% per annum from July 13, 1995, to date of judgment; plus,

c. costs taxed to defendant in the amounts of:

(1) \$74.32 for filing fees and sheriff's fees, and,

(2) \$200.00 for expenses taxed as costs on the motion to compel.

4. This judgment shall bear interest from the date of judgment at 5.727% per annum until paid.

5. Judgment is entered denying all other requested attorney's fees.

Entered: May 13, 1999.

If checked, the Court Clerk shall:

: Mail a copy of this order to all counsel of record and to any pro se parties.

Done on _____, 19__ by _____.

: Enter judgment on the judgment record.

Done on _____, 19__ by _____.

: Mail postcard/notice required by § 25-1301.01 within 3 days.

Done on _____, 19__ by _____.

: Note the decision on the trial docket as: 5/13/99 Signed "Summary Judgment and Order" entered.

Done on _____, 19__ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge