

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

VINCENT OLSON,
Plaintiff,

vs.

OLSON INDUSTRIES, INC.,
Defendant.

Case No. CI99-28

SUMMARY JUDGMENT

DATE OF HEARING: September 23, 1999.

DATE OF DECISION: October 27, 1999.

APPEARANCES:

For plaintiff: David E. Copple without plaintiff.
For defendant: Terry R. Wittler with Ted Olson Jr., corporate representative.

SUBJECT OF ORDER: Defendant's motion for summary judgment.

FINDINGS: The court finds and concludes that:

1. 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.*
2. The plaintiff's petition states two causes of action, each of which is based upon a promissory note. Because of the dates of the respective notes, each cause would be barred on the face

of the petition except for the plaintiff's allegation that "[a]n in[-]kind payment of interest was made . . . in 1997."

3. The deposition testimony of Ted Olson Jr. expressly denies that any in-kind payments were made by the corporation to the plaintiff on any of the indebtedness of the corporation to the plaintiff. E12, 12:24-14:5. The deposition clearly shows the foundation for this testimony based upon the corporate positions held and authority exercised by the deponent. The plaintiff's deposition testimony fails to raise any issue of fact, as the plaintiff testified that he "just didn't know" about any repair work being done by defendant on a center pivot on land owned by the plaintiff. E11, 20:3-12.

4. This evidence was sufficient to show a prima facie case for summary judgment. *Kaiser v. Millard Lumber, Inc.*, 255 Neb. 943, 587 N.W.2d 875 (1999). At that point, the burden of producing evidence to show a genuine issue of material fact shifted to the plaintiff. *Id.*

a. To meet that burden, the plaintiff relies on paragraph 7 of Exhibit 15.

b. The defendant asserted a foundational objection to paragraph 7. At the time of the hearing, the court overruled the objection and received the exhibit. The court concludes that the objection was well-founded and should have been sustained. Accordingly, the court will disregard Exhibit 7.

(1) The Nebraska Supreme Court, in *Battle Creek State Bank v. Preusker*, 253 Neb. 502, 571 N.W.2d 294 (1997), stated:

Supporting and opposing affidavits (1) shall be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. *Young v. First United Bank of Bellevue*, 246 Neb. 43, 516 N.W.2d 256 (1994). Statements in affidavits as to opinion, belief, or conclusions of law are of no effect. *Id.*

The Preuskers' affidavits *did not provide facts to support their statements* that the bank had knowledge of the loans. However, the affidavit of the bank provided specific facts to indicate that it did not have knowledge as alleged by the Preuskers. Therefore, the statements of the Preuskers were mere opinions and were not based on personal knowledge.

Id. at 513-14, 571 N.W.2d at ____ (emphasis added).

(2) The affidavit must therefore state *facts* to show the foundation for the particular statements and the competence of the witness.

(3) Exhibit 15 fails to meet this standard. Paragraph 1 states, in part, that “[t]he information contained in this [a]ffidavit is based upon my personal knowledge.” This adds nothing and provides no foundational support. It is the mere legal conclusion of the witness.

(4) As to the first two sentences of paragraph 7 (repairs made; no bill made), there is simply no foundation to support these assertions. No factual statements appear in the affidavit showing that Theodore V. Olson Sr. had any connection to the matter, personally saw or heard anything related to it, or anything which might conceivably constitute foundation for the assertions. The affidavit simply provides nothing either directly stating or from which the court can reasonably infer that the affiant had personal knowledge of these two factual assertions.

(5) To an even greater degree, the affidavit fails to state foundation for the third sentence of paragraph 7 (defendant considered repairs in-kind payment).

c. Had the affidavit set forth foundation to support the first two sentences of paragraph 7, competing inferences might have arisen therefrom, and when viewed most favorably to the plaintiff, might have been sufficient to raise an inference of an intention to make a partial payment sufficient to defeat the motion for summary judgment.

d. However, without any supporting *facts* to show that the statements were made on personal knowledge, there simply is *no* evidence from which the court could conclude that the plaintiff met its burden of going forward.

5. Viewed in the light most favorable to the plaintiff, 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 defendant is entitled to judgment as a matter of law.

6. There is no certification of any costs incurred by the defendant on file.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The defendant’s motion for summary judgment is granted.
2. Summary judgment is hereby entered dismissing the plaintiff’s petition with prejudice to future action, at plaintiff’s cost.
3. Judgment is entered denying any requested attorney’s fees.

Entered: October 27, 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 _____.
- 9** 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: 10/27/99 Signed "Summary Judgment" entered.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge