

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

KELLEY CALHOUN,
Plaintiff,

vs.

O'NEILL VETERINARY CLINIC, P.C., a
Nebraska professional corporation,
Defendant.

Case No. 20441

ORDER ON MOTIONS

DATE OF HEARING: September 16, 1999.

DATE OF DECISION: December 2, 1999.

APPEARANCES:

For plaintiff: David W. Jorgensen without plaintiff.

For defendant: Mark A. Christensen.

SUBJECT OF ORDER: (1) plaintiff's motion to set aside partial summary judgment; (2) defendant's motion in limine; (3) plaintiff's motion for partial summary judgment; and, (4) plaintiff's motion in limine.

FINDINGS: The court finds and concludes that:

MOTION TO SET ASIDE PARTIAL SUMMARY JUDGMENT

1. The plaintiff appealed from the court's partial summary judgment order entered on June 10, 1999. The Nebraska Court of Appeals dismissed the appeal for lack of jurisdiction. The plaintiff asks this court to set aside the prior order with the expectation that the court would reenter the same order at the commencement of trial. The plaintiff desires to avoid any possibility of a determination on appeal that the June 10 order was in fact a final order, thereby precluding consideration of appeal from the order on the merits.

2. The dismissal by the Court of Appeals, together with NEB. REV. STAT. § 25-705(6) (1998 Cum. Supp.), persuades this court that the plaintiff's concern is unfounded. However, to be

absolutely sure on the issue, this court will amend the prior order, within term, to explicitly state the interlocutory status of the prior order. See Eighth District Rule 8-2.

DEFENDANT'S MOTION IN LIMINE

3. This court is quite reluctant to grant motions in limine except where the matter is clearly prejudicial in a way that can not be effectively handled by an instruction to disregard.

4. The first paragraph of the defendant's motion, regarding the stricken claim for emotional distress, appears to meet this standard. However, it is possible that such matters might become relevant during trial on an issue of credibility or other such matter. The court has tailored the relief accordingly.

5. The court does not consider the matters in the second and third paragraphs of the motion inherently prejudicial. Timely requests for relief at trial will sufficiently protect the parties' rights. While the court, in the granting of partial summary judgment for defendant, limited the potential relief on the plaintiff's second cause of action, there is no evidence that absolutely no relief is possible. Consequently, the motion should be denied as to these two paragraphs.

6. The fourth paragraph of the motion, regarding any oral agreement to pay wages in September of 1993, also appears to meet the applicable standard. However, the relief has been limited for the same reason as discussed regarding the first paragraph of the motion.

MOTION FOR PARTIAL SUMMARY JUDGMENT

7. The principles of law applicable to summary judgment motions 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.*

8. The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to a judgment as a matter of law. *Doe v. Zedek*, 255 Neb. 963, ___ N.W.2d ___ (1999).

9. The court is not persuaded that summary judgment should be granted as to the first and second causes of action of the defendant's amended counterclaim. At the appropriate time, it may become apparent that a directed verdict should be granted. However, the court does not so conclude upon the present evidentiary record. The motion should be denied as to the first and second causes of action of the amended counterclaim.

10. The defendant concedes that the motion should be granted as to the third cause of action of the amended counterclaim. Such relief will be granted.

11. 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 the plaintiff is entitled to partial summary judgment as a matter of law on the third cause of action of the defendant's counterclaim.

PLAINTIFF'S MOTION IN LIMINE

12. The same considerations generally apply to the plaintiff's motion in limine as discussed above regarding the defendant's similar motion.

13. The court agrees that the second paragraph of the motion, regarding the third cause of action of defendant's amended counterclaim, should be sustained in the same fashion as the relief granted on the defendant's motion.

14. The court determines that the other matters may be properly and effectively handled at trial.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The plaintiff's motion to set aside partial summary judgment is granted to the extent that the order granting partial summary judgment (entered June 10, 1999) is modified within term to expressly provide that:

a. such order constitutes an interlocutory order, and,

b. to record that this court has *not* exercised its discretion under § 25-705(6) to direct the entry of a final judgment, and has *not* made any determination that there is no just reason for delay or any express direction for the entry of judgment.

2. Except as to the relief granted above, the motion to set aside partial summary judgment is denied.

3. The first and fourth paragraphs of the defendant's motion in limine are granted to the extent that:

a. The plaintiff, plaintiff's counsel, and any witness called by the plaintiff are prohibited from referring, directly or indirectly, to plaintiff's emotional distress, anxiety, mental illness, or depression, unless and until such matter has first been called to the attention of the court in the absence of the jury and the proper purpose for such reference shown to the court, and the court's permission for such reference obtained prior to any such reference; and,

b. The plaintiff, plaintiff's counsel, and any witness called by the plaintiff are prohibited from referring, directly or indirectly, to any oral agreement to pay wages in September of 1993, unless and until such matter has first been called to the attention of the court in the absence of the jury and the proper purpose for such reference shown to the court, and the court's permission for such reference obtained prior to any such reference.

4. Except to the extent of the relief granted above, the defendant's motion in limine is denied.

5. The plaintiff's motion for partial summary judgment is granted to the extent that partial summary judgment is entered in favor of the plaintiff and against the defendant on the third cause of action of the defendant's amended counterclaim, and in so doing, the court expressly provides that:

a. Such order constitutes an interlocutory order; and,

b. Specifically records that this court has *not* exercised its discretion under § 25-705(6) to direct the entry of a final judgment, and has *not* made any determination that there is no just reason for delay or any express direction for the entry of judgment.

6. Except to the extent of the relief granted above, the plaintiff's motion for partial summary judgment is denied.

7. The second paragraph of the plaintiff's motion in limine is granted to the extent that the defendant, defendant's counsel, and any witness called by the defendant are prohibited from referring, directly or indirectly, to any damages sustained as alleged in the defendant's third cause of action of the amended counterclaim, unless and until such matter has first been called to the attention of the court in the absence of the jury and the proper purpose for such reference shown to the court, and the court's permission for such reference obtained prior to any such reference.

8. Except to the extent of the relief granted above, the plaintiff's motion in limine is denied.

Entered: December 2, 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 _____.
- : Note the decision on the trial docket as: 12/2/99 Signed "Order on Motions" entered granting partial relief on plaintiff's motion to set aside partial summary judgment, defendant's motion in limine, plaintiff's motion for partial summary judgment, and plaintiff's motion in limine, and otherwise denying each of such motions.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge