

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

APPLEGATE, INC., a Nebraska corporation,

Plaintiff,

vs.

LARRY PRIBIL, whose true name is LAWRENCE PRIBIL,

Defendant.

Case No. CI98-10

ORDER DENYING MOTION

DATE OF HEARING: March 16, 2000.

DATE OF DECISION: Date of Filing by Court Clerk.

APPEARANCES:

For plaintiff: No appearance.

For defendant: George H. Moyer, Jr.

SUBJECT OF ORDER: Defendant's motion (filed 3/8/00).

FINDINGS: The court finds and concludes that:

1. The defendant "moves the court for an order striking (sic) the dismissal without prejudice and . . . to reconsider it's (sic) order entered February 29, 2000 and if the court approves a dismissal without prejudice, then for an order directing that such dismissal shall be on terms, and prescribing the terms."

2. The defendant served interrogatories on the plaintiff. The plaintiff failed to submit timely answers. After considerable forbearance, the defendant moved to compel answers.

3. The hearing on the motion to compel was held on December 16, 1999. Although the court directed the defendant's attorney to prepare a written journal, he failed to submit such written order. The court's trial docket notes dictated on December 16, 1999, and transcribed by the court clerk, record the following proceedings:

Telephonic hearing with John Jedlicka for plaintiff and George H. Moyer, Jr. for defendant on defendant's motion to compel. Arguments heard. Motion granted and plaintiff ordered to answer interrogatories within 7 days. Defendant's verbal motion for

continuance of pretrial conference granted without objection, and pretrial continued to February 25, 2000, at 1:15 p.m. Moyer to journalize.

4. Contrary to counsel's affidavit on the present motion (Exhibit 6), the defendant's attorney did not appear in person for the motion or travel to O'Neill. The motion was heard by telephone.

5. Although the motion to compel requested reasonable expenses for that motion, the court did not order any such relief. Because the hearing was held by telephone, there was no verbatim record. See Rule 8-4. Consequently, the court has no record to show whether such expenses were expressly waived during the hearing. It is certain that the matter of expenses on the motion to compel was never again raised by the defendant until after the dismissal without prejudice.

6. The plaintiff failed to obey the order compelling answers. After further forbearance, the defendant filed a motion for sanctions. The *only* relief requested was "an order pursuant to Rule 37(b), Discovery Rules for Civil Cases, striking out plaintiff's petition or dismissing the action."

7. A hearing was held, at which the defendant offered uncontroverted evidence of the course of events. The plaintiff offered no evidence. Arguments of counsel were heard. Without taking any action on the motion for sanctions, the court took the matter under advisement.

8. Subsequent to the hearing, the plaintiff dismissed this action without prejudice.

9. The court denied the motion for sanctions as moot. The present motion followed.

10. In the prior order denying the motion for sanctions as moot, the court recognized certain principles of law:

a. A plaintiff may dismiss an action without prejudice, as a matter of right, at any time before final submission of the case. NEB. REV. STAT. § 25-601 (Reissue 1995); *State v. Jacob*, 256 Neb. 492, 591 N.W.2d 541 (1999).

b. When the plaintiff files a dismissal it ends the litigation, the case is no longer pending, and any order thereafter would constitute a nullity. *Werner v. Werner*, 186 Neb. 558, 184 N.W.2d 646 (1971).

c. It does not appear that § 25-601 requires court action or approval for a voluntary dismissal to become effective. *Miller v. Harris*, 195 Neb. 75, 236 N.W.2d 828 (1975); *Duffy v. Cody*, 129 Neb. 737, 262 N.W. 828 (1935).

d. A trial court has no jurisdiction to make orders thereafter and if made, they are a nullity, as are subsequent pleadings. *Cotton v. Fruge*, 8 Neb. App. 484, 596 N.W.2d 32 (1999) (dismissal by operation of law under § 25-217).

11. The failure to insist upon an express ruling regarding the issue of reasonable expenses on the motion to compel must be deemed a waiver of such relief, if the relief was not expressly waived during the telephone hearing.

12. The *only* relief sought by the motion for sanctions was the striking or dismissal of the plaintiff's petition. By the voluntary dismissal, the plaintiff accomplished the sole and only relief sought by the defendant on his motion for sanctions. The matter of expenses was not requested by the motion. The defendant received no more and no less than what he requested in the motion for sanctions. The defendant's present request to strike the dismissal without prejudice seeks to undo the result sought by the defendant's previous motion. The defendant apparently takes the position that the court, on its own motion and without notice to the plaintiff, should have imposed a further sanction beyond that expressly requested by the defendant. The court does not agree.

13. The defendant's motion also requests the court to reconsider its order of denying the motion for sanctions. A motion to reconsider is not to be treated as a motion for new trial for purposes of being ruled upon by the trial court before an appellate court has jurisdiction. *Kinsey v. Colfer*, 258 Neb. 832, ___ N.W.2d ___ (2000). A motion for reconsideration does not toll the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment. *Id.* The court declines the invitation.

14. Regarding the final request of the motion, for dismissal on terms, the court concludes that the court now lacks jurisdiction to do so under the authority quoted above. Assuming, *arguendo*, that the court did have such power, the court determines the exercise of such power inappropriate under the particular circumstances present here as recited above.

ORDER: The defendant's motion (filed 3/8/00) is denied.

Signed in chambers at Ainsworth, Nebraska, on April 4, 2000.

DEEMED ENTERED upon filing by the court clerk.

If checked, the Court Clerk shall:

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

Done on _____, 20__ by ____.

9 Enter judgment on the judgment record.

Done on _____, 20__ by ____.

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

Done on _____, 20__ by ____.

1 Note the decision on the trial docket as: [date of filing] Signed "Order Denying Motion" entered.

Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel

District Judge