

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

**MYRA J. BOJE,**  
Plaintiff,

vs.

**GALEN R. SHERMAN,**  
Defendant.

Case No. CI99-66

**SUMMARY JUDGMENT**

**DATE OF HEARING:** April 21, 2000.

**DATE OF RENDITION:** April 24, 2000

**DATE OF ENTRY:** Date of filing by court clerk.

**APPEARANCES:**

For plaintiff: W. Gerald O’Kief.

For defendant: Eric A. Scott.

**SUBJECT OF ORDER:** (1) plaintiff’s motion for summary judgment, and,  
(2) defendant’s motion for summary judgment.

**FINDINGS:** The court finds and concludes that:

1. The decision in *Derr v. Columbus Convention Center, Inc.*, 258 Neb. 537, \_\_\_ N.W.2d \_\_\_ (2000), restates the oft-repeated principles that control this decision:

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.

b. The court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

d. A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion.

2. The evidence, viewed in the light most favorably to the defendant, shows that:

a. Monies were paid by the plaintiff to the defendant. The amounts paid were admitted by both parties. Similarly, the amounts of the credits applicable were admitted by both parties.

b. The monies were not intended as gifts. Both parties testimony consistently shows that no intention existed on the part of the plaintiff to make a gift to the defendant of these amounts.

c. No present value or consideration was provided to the plaintiff at the time of payment. Although the defendant testified that the monies were paid in such a manner as to allow the plaintiff to claim an income tax deduction, no evidence exists that the deduction was in fact claimed and the evidence shows that the plaintiff would not have legitimately been entitled to any such deduction.

d. Thus, because the monies were not gifts and the plaintiff received no legal consideration for such amounts, such advancements constituted loans from the plaintiff to the defendant as a matter of law. It makes no difference to the decision whether the obligation to repay was express, as the plaintiff testified, or implied in law, as would be consistent with the defendant's testimony. See, e.g., *Daubmann v. CBS Real Estate Co.*, 254 Neb. 904, 580 N.W.2d 552 (1998); *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997).

e. The defendant's theory of an oral trust is untenable. The directions upon which the defendant relies were those of the plaintiff's deceased husband. The evidence shows without dispute that the plaintiff's husband died before either of the payments by the plaintiff. The evidence shows that the monies were solely owned and controlled by the plaintiff at the time of the payments. The plaintiff's deceased husband had no ownership or control over those monies after the date of his death. The defendant's testimony clearly shows that he relied only on the wishes of the plaintiff's late husband, and that there was nothing in the nature of a trust relationship established by anything stated or requested by the plaintiff at the time of, or in the discussions immediately prior to, the advancement of the monies.

f. No express time for repayment was specified. Although the plaintiff testified as a particular date, her testimony admits that any agreement as to date depended on extraneous facts which

she did not know and which do not appear anywhere in the depositions. Consequently, the law implies payment due upon demand. The date of any demand does not appear anywhere in the pleadings or the depositions. The filing of the petition constitutes a demand as a matter of law. The amounts involved were clearly liquidated. There was no genuine dispute regarding the legal obligation. Interest at the legal rate is applicable from the date of filing of the petition.

3. The plaintiff's motion should be sustained, and summary judgment entered in favor of the plaintiff as set forth below.

4. The defendant's motion should be denied.

5. To the extent that any party has requested attorneys' fees, there is no possible basis in law for such request other than NEB. REV. STAT. § 25-824 *et seq.* (Reissue 1995). The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous. *Blecha v. Blecha*, 257 Neb. 543, \_\_\_ N.W.2d \_\_\_ (1999). All requests for attorneys' fees should be denied.

**ORDER:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The plaintiff's motion for summary judgment is granted and summary judgment is hereby entered in favor of the plaintiff, Myra J. Boje, and against the defendant, Galen R. Sherman, for:

a. \$13,000.00;

b. Prejudgment interest on \$13,000.00 at the rate of 12% per annum from August 13, 1999, to the date of entry of judgment; and,

c. Costs taxed in the amount of \$236.42.

2. The total judgment shall bear interest from date of entry of judgment at the rate of 7.197% per annum until paid.

3. The defendant's motion for summary judgment is denied.

4. All requests for attorneys' fees are denied.

Signed in chambers at O'Neill, Nebraska, on April 24, 2000.  
DEEMED ENTERED as of the date of filing by the court clerk.

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 \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- Note the decision on the trial docket as: [date of filing] Signed "Summary Judgment" entered granting plaintiff's motion for summary judgment, denying defendant's motion for summary judgment, and entering judgment against defendant as provided therein.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel  
District Judge