

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

JAMES WIDTFELDT,
Plaintiff,

Case No. CI00-61

vs.

ORDER ON MOTIONS

**DIANE BUTTS a/k/a DIANE F. BUTTS
a/k/a DIANA F. BUTTS, NEBRASKA
DEPARTMENT OF LABOR, NEBRASKA
APPEAL TRIBUNAL, NEBRASKA
UNEMPLOYMENT INSURANCE, STATE
OF NEBRASKA, and COMMISSIONER
OF LABOR,**
Defendants.

DATE OF HEARING: May 4, 2000.
DATE OF RENDITION: May 10, 2000.
DATE OF ENTRY: Date of filing by court clerk.

APPEARANCES:
For plaintiff: Plaintiff pro se.
For defendants:
Butts: Thurman Gay without defendant.
Others: John H. Albin without defendants.

SUBJECT OF ORDER: (1) plaintiff's motion for continuance; (2) defendant Butts's motion to strike, [and] assess costs and attorne[y] fees; (3) plaintiff's application for sanctions; and, (4) other defendants' motion to strike or make more definite and certain.

PROCEEDINGS: At the hearing, these proceedings occurred:

The matter came on first upon the plaintiff's motion for continuance. Arguments of counsel were heard. The motion was denied.

The matter proceeded to hearing on the defendant Butts's motion to strike and to assess costs and attorney fees. No evidence was offered on behalf of the defendants. The plaintiff offered evidence by affidavit, to which the defendants objected. The objections were sustained and the plaintiff's offer was refused. On the court's own motion, without objection, judicial notice was taken of the prior proceedings

in Cases Nos. CI99-179 and CI00-17 in this court, and copies of the respective files and bills of exception were marked, offered, and received in evidence without objection for that purpose. Arguments of counsel were heard. The matter was taken under advisement.

The matter came on next upon the plaintiff's application for sanctions. The plaintiff attempted to withdraw the application to be revived on a later date. The court declined to allow such withdrawal upon reservation as an attempt to circumvent the court's denial of a continuance. Thereupon, the plaintiff unreservedly withdrew the application for sanctions in open court.

Finally, the matter came on upon the other defendants' motion to strike or make more definite and certain. Arguments of counsel were heard. The motion was taken under advisement.

FINDINGS:

The court finds and concludes that:

1. This is at least the third appearance of this matter in this court.
2. The defendant Butts seeks an order striking the plaintiff's petition as frivolous or made in bad faith. NEB. REV. STAT. § 25-824(1) (Reissue 1995).

(a) In *Nuss v. Alexander*, 257 Neb. 36, 595 N.W.2d 263 (1999), the Nebraska Supreme Court discussed the function of a motion to strike:

In Nebraska, pleading practice is controlled by statute. *Kramer v. Miskell*, *supra*, citing *Lammers Land & Cattle Co. v. Hans*, 213 Neb. 243, 328 N.W.2d 759 (1983). Nebraska's system of code pleading requires, inter alia, a statement of the facts constituting a party's cause of action in ordinary and concise language without repetition and a demand for the relief which the party requests. NEB. REV. STAT. § 25-804 (Reissue 1995). A petition need not state a cause of action or defense in any particular form as long as the petition states in a logical and legal manner the facts which constitute the cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute. "It is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action." *McCurry v. School Dist. of Valley*, 242 Neb. 504, 511, 496 N.W.2d 433, 438 (1993).

Two Nebraska statutes permit the filing of a motion to strike: § 25-833 and NEB. REV. STAT. § 25-913 (Reissue 1995). Section 25-833 provides that "redundant, scandalous or irrelevant matter" may be stricken from a pleading on a motion of the party prejudiced thereby. For purposes of § 25-833, we have defined "redundancy" as the needless repetition of material allegations or the inclusion of irrelevant matter. *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956). Irrelevant matter prohibited by § 25-833 is matter that has no bearing upon the subject

matter of the controversy, and it cannot affect the court's decision. *State ex rel. Beck v. Associates Discount Corp., supra*. Section 25-833 also provides that where a pleading's allegations are "so indefinite and uncertain that the precise nature of the charge or defense is not apparent," the court may order the pleading to be made more definite and certain by amendment. . . .

An additional statute, § 25-913, authorizes the filing of a motion to strike pleadings from the court's files. Motions to strike filed pursuant to § 25-913 are aimed at petitions filed in violation of a court's order or a rule of practice or procedure prescribed either by statute or by the court in which the petition is filed. *Kramer v. Miskell, supra; Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991). Motions to strike pursuant to § 25-913 may also be filed where a party declines to amend the petition or refuses to follow the court's orders. *Kramer v. Miskell, supra; Hecker v. Ravenna Bank, supra*.

Id. at 40-41, 257 N.W.2d at ____.

(b) The Supreme Court's discussion does not address the statutory basis upon which the defendant Butts filed her motion. Section 25-824(1) states that "[i]f a pleading is frivolous or made in bad faith, it may be stricken." NEB. REV. STAT. § 25-824(1) (Reissue 1995). Obviously, a petition is a pleading. NEB. REV. STAT. § 25-803(1) (Reissue 1995).

(c) This court can find no instance in which the Nebraska Supreme Court or Court of Appeals has considered a motion to strike a pleading under § 25-824(1) as frivolous or made in bad faith. Although *Nuss* and other similar decisions appear to preclude such course by omission, the plain language of the statute appears to authorize such relief. Unless and until a higher Nebraska court holds to the contrary, the court concludes that § 25-824(1) authorizes a motion to strike a petition as frivolous or made in bad faith. Of course, the question then becomes whether the plaintiff's petition is frivolous or made in bad faith.

3. The plaintiff's petition suffers from a lack of clarity. The court concludes that the plaintiff's petition attempts to collaterally attack the final order of the Nebraska Appeals Tribunal.

4. As noted above, judicial notice was taken of certain matters.

(a) The Nebraska Supreme Court recently reiterated that where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in a former proceeding involving one of the parties now before it, the court has the right to examine its own

records and take judicial notice of its own proceedings and judgments in the former action. *Holste v. Burlington Northern R.R. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999); *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996); *Baltensperger v. United States Dept. of Ag.*, 250 Neb. 216, 548 N.W.2d 733 (1996).

(b) The Supreme Court has also held that a court may take judicial notice of a document in a separate but related action concerning the same subject matter in the same court. *Holste v. Burlington Northern R.R. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999); *State Security Savings Co. v. Pelster*, 207 Neb. 158, 296 N.W.2d 702 (1980).

(c) The Nebraska Supreme Court has further held, “Papers requested to be noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. . . .” *In re Interest of C.K., L.K., and G.K.*, 240 Neb. 700, 709, 484 N.W.2d 68, 73 (1992) (quoting *In Interest of Adkins*, 298 N.W.2d 273 (Iowa 1980)).

5. The court has taken notice of its own proceedings and judgments in Cases Nos. CI99-179 and CI00-17. The proceedings in Case No. CI99-179 reveal:

(a) The defendant Butts sought employment security benefits regarding termination of employment by the plaintiff. A claims deputy allowed benefits without disqualification. The plaintiff appealed to the Nebraska Appeal Tribunal. NEB. REV. STAT. § 48-634 *et seq.* (Reissue 1998). The Nebraska Appeal Tribunal decided the matter adversely to the plaintiff by order filed on October 18, 1999.

(b) The plaintiff filed his petition to appeal the Nebraska Appeal Tribunal decision with this court on November 16, 1999. The clerk docketed the case as Case No. CI99-179. However, the plaintiff failed to cause any summons to be issued. Noting this jurisdictional defect, this court summarily dismissed the appeal for lack of subject matter jurisdiction on January 13, 2000, in recognition of the applicable legal principles.

(1) An appeal to the district court from the Nebraska Appeal Tribunal is generally governed by the Administrative Procedure Act. NEB. REV. STAT. § 48-638 (Reissue 1998).

(2) The Administrative Procedure Act, in § 84-917(2)(a), requires that “[s]ummons shall be served within 30 days of the filing of the petition in the manner provided for service of a summons in section 25-510.02.” NEB. REV. STAT. § 84-917(2)(a) (Reissue 1999).

(3) In *Concordia Teachers College v. Neb. Dept. of Labor*, 252 Neb. 504, 563 N.W.2d 345 (1997), the Supreme Court determined that the requirement that summons be served within 30 days of the filing of the petition constituted “a prerequisite to the exercise of the district court of its jurisdiction over the *subject matter* on an appeal from an adverse decision of an administrative agency.” *Id.* at 509, 563 N.W.2d at ___ (emphasis supplied).

(4) Although failure to obtain personal jurisdiction may be waived, the failure to perfect subject matter jurisdiction cannot be waived or cured.

(c) The plaintiff filed a motion for new trial, apparently oblivious to the rule that a motion for a new trial is restricted to a trial court, and where the district court acts in the capacity of an appellate court, such a motion is not a proper pleading and it does not stop the running of time for perfecting an appeal. This is true whether the district court is hearing appeals from the county court or from some other lower tribunal. *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993); *Booker v. Nebraska State Patrol*, 239 Neb. 687, 477 N.W.2d 805 (1991); *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). This court thereafter overruled the motion for new trial without comment.

(d) The plaintiff appealed from this court to the Nebraska Court of Appeals, which docketed the case as No. A-00-0198. The Court of Appeals summarily dismissed the appeal for lack of jurisdiction. 00 NCA No. 14 at iv (April 4, 2000).

(e) The presence or absence of a record of the evidentiary hearing before the Nebraska Appeal Tribunal did not affect the jurisdictional defect which defeated the plaintiff’s appeal in Case No. CI99-179. The plaintiff’s own failure to cause a summons to be issued resulted in the dismissal of the appeal.

6. Apparently undaunted by this setback, the plaintiff filed a second appeal, which was docketed by the clerk of this court as Case No. CI00-17. The proceedings in that case show:

(a) The plaintiff filed the petition on appeal on January 20, 2000. The plaintiff attempted to cure the obvious jurisdictional defect by claiming that the Nebraska Appeal Tribunal “fail[ed] to keep a record” and “hid” such failure from the plaintiff.

(1) The plaintiff again attached a copy of the decision of the Nebraska Appeal Tribunal entered on October 18, 1999, which clearly shows a file stamp and mailing of the decision on that date. The plaintiff has never alleged that he did not timely receive the appeal tribunal’s decision.

(2) The petition set forth no factual relationship between the plaintiff’s failure to perfect his appeal in Case No. CI99-179 by causing timely issuance and service of summons, and the tribunal’s “failure” to keep a record. Obviously, the plaintiff cannot set forth any such nexus, because the presence or absence of a record had absolutely no impact or effect upon the jurisdictional failure of the plaintiff’s first petition on appeal.

(b) The defendant Butts generally demurred to the second appeal petition, while the other defendants filed special appearances. Despite any advantage the plaintiff might have gained from the previous experience, he failed to have summonses served upon the Attorney General.

(c) By order entered on March 2, 2000, this court sustained the special appearances, dismissed the appeal for lack of jurisdiction, and determined that the demurrer was moot.

(1) Obviously, the petition was not filed within 30 days from the date of the *decision* of the Nebraska Appeal Tribunal. As discussed above, and as attached to the plaintiff’s second petition, the decision was entered on October 18, 1999.

(2) The “decision” from which the plaintiff purported to appeal was merely a certificate of a reporter that no bill of exceptions could be prepared concerning the October 12 telephone conference hearing conducted by the tribunal.

(a) Obviously, the certificate of a reporter is not a “decision” of the appeal tribunal.

(b) As discussed above, the problem regarding the tape recording bears no relationship to the jurisdictional defect which caused the plaintiff to lose his appeal.

(3) Because the plaintiff failed to file his petition on appeal in Case No. CI00-17 within 30 days of the date of the appeal tribunal's decision, this court did not acquire subject matter jurisdiction.

(d) Once again, the plaintiff appealed this court's decision to the Court of Appeals. The Court of Appeals docketed that case as No. A-00-0311. The Court of Appeals thereafter summarily dismissed the appeal for lack of jurisdiction. 00 NCA No. 17 at iii (April 25, 2000).

7. After the dismissal of No. CI00-17, the plaintiff filed the present case.

8. A claim before a tribunal, including an administrative agency, once decided and not appealed from, or if appealed and the appeal is dismissed, is *res judicata* and may not, as a general rule, be relitigated. *L.J. Vontz Const. Co., Inc. v. City of Alliance*, 243 Neb. 334, 500 N.W.2d 173 (1993).

9. Judgments rendered by administrative agencies acting in a quasi-judicial capacity are not subject to collateral attack if the agency had jurisdiction of the parties and the subject matter. *In re Water Appropriations D-887 and A-768*, 240 Neb. 337, 482 N.W.2d 11 (1992). These requirements were met in the administrative order which the plaintiff attacks.

(a) The Nebraska Appeal Tribunal clearly possessed subject matter jurisdiction. NEB. REV. STAT. § 48-633 *et seq.* (Reissue 1998).

(b) The appeal tribunal's written decision clearly shows that the plaintiff and counsel for defendant Butts appeared and participated in the tribunal's hearing on the merits. The tribunal had jurisdiction of the parties.

10. This rule is not limited to courts of general jurisdiction, but also applies to administrative boards and tribunals acting in a quasi-judicial capacity. *Schilke v. School Dist. No. 107*, 207 Neb. 448, 299 N.W.2d 527 (1980); *Richardson v. Board of Ed. of School Dist. No. 100*, 206 Neb. 18, 290 N.W.2d 803 (1980).

11. Unless void, the tribunal's determination is not subject to collateral attack. *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985).

12. Amidst considerable surplusage, the petition in this case alleges that “the appeals tribunal entered a void order under RRS 84-915.01, by reason of not having created a record”

13. The plaintiff relies upon § 84-915.01. Under that section, the record consists of:

- (a) Notices of all proceedings;
- (b) Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the agency pertaining to the contested case;
- (c) The record of the hearing before the agency, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the agency during the proceeding, and all proffers of proof and objections and rulings thereon; and
- (d) The final order.

NEB. REV. STAT. § 84-915.01 (Reissue 1999).

14. The plaintiff does not cite any statute, rule, or decision stating that the failure to comply with § 84-915.01 is jurisdictional. Any such failure undoubtedly constitutes error, probably mere error, perhaps even plain error, but is not jurisdictional. But it is unnecessary to consider that issue under the facts of this case.

15. Section 48-635 provides a special rule regarding the record of an appeal tribunal. That section states:

The manner in which disputed claims shall be presented and the conduct of hearings and appeals shall be in accordance with rules and regulations prescribed by the commissioner for determining the rights of the parties, whether or not such rules and regulations conform to common-law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with the disputed claims. *All testimony at any hearing upon a disputed claim shall be recorded, but need not be transcribed unless the disputed claim is further appealed.*

NEB. REV. STAT. § 48-635 (Reissue 1998) (emphasis supplied).

16. It is apparent from the plaintiff’s petition, including the certification which was incorporated therein, that the testimony was, in fact, recorded by the appeal tribunal. Thereafter, for some reason not apparent in the record, it became unsusceptible of being transcribed. On the particular facts of this case, that is of no consequence. Section 48-635 states that the recorded testimony need not be transcribed

unless the claim is further appealed. The initial appeal was dismissed for lack of subject matter jurisdiction because of the plaintiff's failure to properly perfect the appeal. In law, that is the same as no appeal. Consequently, the disputed claim was not, and can never be, "further appealed" within the meaning of § 48-635. Thus, no transcription was, or can ever be, required.

17. It is apparent that the plaintiff's claim in this case is totally without legal or factual merit. However, it is necessary to determine whether such claim is "frivolous or made in bad faith." NEB. REV. STAT. § 25-824 (Reissue 1995).

(a) In *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998), the Nebraska Supreme Court stated that for purposes of § 25-824, "frivolous" means an attempt to relitigate the same issues resolved in prior proceedings with the same parties, see *Cedars Corp. v. Sun Valley Dev. Co.*, 253 Neb. 999, 573 N.W.2d 467 (1998), or a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position, see *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 578 N.W.2d 418 (1998).

(b) Any doubt as to whether a legal position is frivolous should be resolved in favor of the party whose legal position is in question. *Id.*

(c) In *Prokop v. Cannon*, 7 Neb. App. 334, 583 N.W.2d 51 (1998), the Court of Appeals observed that attorneys and litigants should not be inhibited in pressing novel issues or in urging a position which can be supported by a good faith argument for an extension, modification, or reversal of existing law. *Shanks v. Johnson Abstract & Title*, 225 Neb. 649, 407 N.W.2d 743 (1987).

(d) The Court of Appeals also noted that *Shanks* also points out that the determination of whether a particular claim or defense is frivolous must depend upon the facts of a particular case.

18. The plaintiff clearly attempts to relitigate the same issues resolved in prior proceedings with the same parties. The plaintiff attempts to collaterally attack a valid administrative order that became final due to the plaintiff's own failure to properly appeal. This court has no hesitation in finding that the plaintiff's petition is frivolous and should be stricken.

19. It is equally clear that no amendment can resuscitate this case. The petition must be dismissed with prejudice.

20. Because the petition must be dismissed with prejudice, the motion to strike or to make more definite and certain of the other defendants is moot.

21. Paragraph (2) of § 25-824 requires that the court award, as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any party who has brought a civil action that alleges a claim which the court determines is frivolous. NEB. REV. STAT. § 25-824(2) (Reissue 1995). In addition, paragraph (4) of that section requires the court to assess attorney's fees and costs if, upon the motion of a party or the court itself, the court finds that a party brought an action that was frivolous. NEB. REV. STAT. § 25-824(4) (Reissue 1995).

22. It is not possible upon the present record to determine the appropriate amount of attorney's fees and costs. The matter must be set for further evidentiary hearing to determine the proper amount of such fees and costs to be taxed upon entry of a final judgment in this case. Consequently, this order is interlocutory in character and does not constitute a final order. *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

ORDER:

IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The defendant Butts's motion to strike is granted, and the plaintiff's petition is stricken.
2. The defendant Butts's motion to assess attorney's fees and costs is granted, and the amount of such attorney's fees and costs is deferred until after an evidentiary hearing to determine the proper amount thereof.
3. The other defendants' motion is moot.
4. This order is interlocutory in character and does not constitute a final order. The court does **not** enter judgment of dismissal in this order, because of the interlocutory character of the order.
5. The matter is set for evidentiary hearing upon the defendant Butts's motion for attorney's fees and costs to be held on **Thursday, May 18, 2000**, at **10:15 a.m.**, in the District Courtroom, Holt County Courthouse, O'Neill, Nebraska. The defendant shall be prepared to adduce evidence in support the amount of any such fees and costs.

Signed in chambers at O'Neill, Nebraska, on May 10, 2000.
DEEMED ENTERED upon filing by 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 _____.
- Note the decision on the trial docket as: [date of filing] Signed "Order on Motions" entered; evidentiary hearing set for [date and time from body of order].
Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge