

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**JAMES WIDTFELDT, individually;
INNKEEPER MOTEL, INC., a Nebraska
corporation; and TOWNHOUSE INN,
INC., a Nebraska corporation,**
Plaintiffs,

vs.

DIANE BUTTS,
Defendant.

Case No. CI99-141

ORDER ON DEMURRER

DATE OF HEARING: July 27, 2000.
DATE OF RENDITION: September 13, 2000.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
APPEARANCES:
For plaintiffs: James Widtfeldt, pro se, and for corporations.
For defendant: Thurman Gay without defendant.
SUBJECT OF HEARING: Demurrer to third amended petition.
FINDINGS: The court finds and concludes that:

1. The purported claim for declaratory judgment is improper. *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998). To that extent, the causes of action are misjoined, and the defect cannot be cured. The demurrer should be sustained as to the purported declaratory judgment cause of action without leave to amend.

2. A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, ___ N.W.2d ___ (2000). Two or more claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories, either of liability or damages, and not separate causes of action. *Id.* Whether more than one cause of action is stated depends mainly upon (1) whether more than one primary right or subject of controversy is presented, (2) whether recovery on one ground would bar recovery on the other, (3) whether the same evidence would support the different counts, and (4) whether separate causes of action could be maintained for separate relief. *Id.*

3. The plaintiffs purport to state a first cause of action with two theories of recovery. The court concludes that plaintiff actually tries to assert two causes of action, which are not separately stated and numbered, and to include in each extraneous material relating to the other cause of action.

4. The quality of the plaintiffs' pleading efforts to date cast considerable doubt regarding the plaintiffs' ability to cure the defects by amendment. Nevertheless, the court concludes that decision is to be made, at least at this point, upon an objective, rather than a subjective, standard. The demurrer to the first cause of action should be sustained with leave to amend. The plaintiffs are cautioned that this may be the final opportunity to state their cause or causes of action.

5. Although the court sustains the defendant's demurrer to the declaratory judgment cause of action without leave to amend, the court defers dismissal of the same. Consequently, this order is interlocutory in character and does not constitute a final order.

ORDER: IT IS ORDERED that:

1. The demurrer is sustained as to the second cause of action for a declaratory judgment without leave to amend.

2. The demurrer is sustained as to the improperly joined first cause of action, with leave to amend. The plaintiff is allowed 20 days from the date of entry to file a fourth amended petition. The defendant is allowed 10 days thereafter to plead or 20 days to answer.

Signed in chambers at Ainsworth, Nebraska, on September 13, 2000.
DEEMED ENTERED upon 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 _____.
- Note the decision on the trial docket as: [date of filing] Signed "Order on Demurrer" entered.
Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel, District Judge