

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**FREDERICK C. STOECKER and
MADELINE STOECKER, husband and
wife,**

Plaintiffs,

vs.

**WILLIAM D. SAMMONS and NADINE
SAMMONS, husband and wife, et al.,**

Defendants.

Case No. CI98-47

**INTERLOCUTORY
SUMMARY JUDGMENT**

DATE OF HEARING: September 21, 2000.

DATE OF RENDITION: October 16, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

Richard E. Gee for plaintiffs with plaintiffs.

Frank E. Robak, pro se, and for defendants Andrew H. Robak, Jeffrey D. Robak, and Lizabeth A. Carpenter, without said defendants.

Mark A. Christensen for defendant William A. Robak without defendant.

No appearance for any other defendant.

SUBJECT OF ORDER: Motion for summary judgment of defendant William A. Robak.

PROCEEDINGS: Proceeding to be memorialized by attorney Gee.

FINDINGS: The court finds and concludes that:

1. The defendant William A. Robak seeks a summary judgment of dismissal of the plaintiff's second amended petition.

2. 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.

3. The plaintiffs' second amended petition seeks injunctive relief and damages. The undisputed evidence shows that this defendant has taken no active part in the management or control of the subject real estate, and had no prior knowledge of the controversy. The undisputed evidence further shows that the defendant William A. Sammons has executed and recorded a quitclaim deed of the subject property to the defendant William D. Sammons.

4. The evidence shows that the defendant William A. Robak, prior to the quitclaim deed, may have been the owner of an interest in the defendants' real estate through intestate succession. Said defendant constituted a necessary party to the action to the extent that the plaintiffs sought an injunction to run with the land. However, the applicable statute, NEB. REV. STAT. § 31-224 (Reissue 1998), limits the statutory duty to obstructions "caused by any of the acts of said owner or tenant, or with his [or her] knowledge or consent" The undisputed evidence shows that no act or omission of the particular defendant William A. Robak caused any obstruction, and that any such obstruction was not caused with his knowledge or consent. The defendant William A. Robak is entitled to summary judgment as to any issue of damages.

5. After commencement of this action as to said defendant, said defendant quitclaimed his ownership interest to another defendant. Although the affidavit does not expressly recite delivery of the quitclaim deed, recordation of a deed generally presumes delivery. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994). Whether or not a deed has been delivered is a mixed question of law and fact. *Id.* The element which controls the resolution of that question is the intention of the parties, especially the intention of the grantor. *Id.* The vital inquiry is whether the grantor intended a complete transfer – whether

the grantor parted with dominion over the instrument with the intention of relinquishing all dominion over it and of making it presently operative as a conveyance of the title to the land. *Id.* In the absence of any evidence to the contrary, the evidence adduced by defendant William A. Robak satisfies the required showing.

6. The transfer to defendant William D. Sammons is subject to the proceedings in this case. The judgment as to defendant William D. Sammons will bind the interest in the real estate quitclaimed by William A. Robak to William D. Sammons. Because there is no possibility of a personal judgment against William A. Robak on the state of this evidence, and the quitclaimed interest in the real estate will be subject to the ultimate judgment as between the plaintiffs and the defendants Sammons, there is no genuine issue of material fact as to defendant William A. Robak.

7. Because this summary judgment is by interlocutory order, it remains subject to revision at any time prior to entry of final judgment. This court expressly notes the absence of any express determination or direction pursuant to 2000 Neb. Laws, L.B. 921, § 10, as this summary judgment adjudicates the rights and liabilities of fewer than all of the parties and does not terminate the action.

8. 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. The motion must be granted and the second amended petition dismissed with prejudice as to the defendant William A. Robak for the reasons set forth above.

JUDGMENT:

IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The motion of William A. Robak for summary judgment is granted to the extent of the relief provided herein and is otherwise denied.

2. Interlocutory summary judgment is hereby entered in favor of the defendant William A. Robak and against the plaintiffs dismissing the plaintiffs' second amended petition with prejudice as to any claim of money damages against defendant William A. Robak.

3. Interlocutory summary judgment is hereby entered in favor of the defendant William A. Robak and against the plaintiffs as to any claim for injunctive relief against such defendant personally; however, such summary judgment does not preclude or affect any relief which may ultimately be granted

or denied as against the ownership interest in said real estate formerly held by defendant William A. Robak and quitclaimed by said defendant to defendant William D. Sammons.

4. The court declines to direct entry of a final judgment at this time pursuant to 2000 Neb. Laws, L.B. 921, § 10.

5. This summary judgment is interlocutory in character and remains subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of all parties.

Signed in chambers at O'Neill, Nebraska, on October 16, 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: Signed "Interlocutory Summary Judgment" entered.
Done on _____, 20__ by _____.

Mailed to:

BY THE COURT:

William B. Cassel, District Judge