

IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

MARY ROSE NICOLAUS,

Plaintiff-Appellee,

vs.

ROBERT E. ALLEN aka ED ALLEN,

Defendant-Appellant.

Case No. CI01-8

JUDGMENT ON APPEAL

DATE OF HEARING: April 13, 2001.
DATE OF RENDITION: April 15, 2001.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
TYPE OF HEARING: Oral arguments on appeal from county court.
APPEARANCES:
For plaintiff-appellee: Robert D. Coupland.
For defendant-appellant: Rodney J. Palmer.
SUBJECT OF JUDGMENT: Appeal from county court judgment.
PROCEEDINGS: See journal entry rendered April 13, 2001.
MEMORANDUM:

1. Mary Rose Nicolaus (Nicolaus), the plaintiff below, filed her petition with the county court against Robert E. Allen, also known as Ed Allen (Allen), claiming amounts owing on personal loans made upon verbal promises to repay. Allen denied that he received loans, and alleged that the funds were paid as operating expenses for a bar in Johnstown, Nebraska. Allen further asserted the statute of frauds as a defense to the plaintiff's petition. Allen counterclaimed for operating expenses of the bar that Allen alleged Nicolaus had agreed to pay and failed to pay, and for merchandise allegedly charged and not paid for by Nicolaus. The case was tried to the court without a jury. The county court entered judgment for Nicolaus on her petition for the principal sum prayed for in the petition, and dismissed Allen's counterclaim. Allen appeals.

2. Although Allen did not file a statement of errors in this court, he filed a statement of errors in the county court which was included in the transcript. This procedure, while not specifically

contemplated by County Court General Rule 52(I)G or Uniform District Court Rule 18, is sufficient to preserve those assignments of error. See *State v. Nelson*, 2 Neb. App. 289, 509 N.W.2d 232 (1993).

3. Allen's statement of errors sets forth seven assignments of error. This court addresses only those assignments necessary to dispose of the appeal. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not needed to adjudicate case and controversy before it).

4. In an appeal from the county court general civil docket, the district court acts as an intermediate court of appeals and not as a trial court. *In re Conservatorship of Mosel*, 234 Neb. 86, 449 N.W.2d 220 (1989). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. Patterson*, 7 Neb. App. 816, 585 N.W.2d 125 (1998).

5. In the bench trial of a law action, a trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless clearly erroneous. *General Fiberglass Supply, Inc. v. Roemer*, 256 Neb. 810, 594 N.W.2d 283 (1999). The appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.* In rendering judgment as the finder of fact in a bench trial, the trial court weighs the evidence in the same manner as does a jury. *Id.* Juries have the right to credit or reject the whole or any part of the testimony of a witness in the exercise of their judgments. *Id.* The credibility of a witness is a question for the trier of fact, and it is within its province to credit the whole of the witness's testimony, or any part of it, which seemed to it to be convincing, and reject as much of it as in its judgment is not entitled to credit. *Id.*

6. In his third assignment of error, Allen asserts that the county court erred in determining the existence of a joint venture. The petition filed by Nicolaus did not assert the existence of a joint venture. Nicolaus instead alleged money loaned upon a oral promise to repay at a specified time. The purpose of pleadings is to frame the issues upon which a cause is to be tried, and the issues in a given case will be limited to those which are pleaded. *Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998); *Buffalo County v. Kizzier*, 250 Neb. 180, 548 N.W.2d 757 (1996). A party will not be permitted to plead one

cause of action and upon trial rely upon proof establishing another. *Abdullah v. Nebraska Dep't of Corr. Servs.*, 246 Neb. 109, 517 N.W.2d 108 (1994). Relief cannot be granted upon proof of a cause substantially different from the case made in the pleadings. *Id.*

7. The plaintiff's petition alleged a breach of contract, which constitutes an action at law. The county court relied extensively on *Evertson v. Cannon*, 226 Neb. 370, 411 N.W.2d 612 (1987), which was an action in equity to impose a constructive trust. In that case the plaintiff's petition alleged the existence of a joint venture. In the present case the plaintiff did not allege the existence of a joint venture and, as to the plaintiff's claim in her petition, the trial court could not rely upon proof of a joint venture to grant relief upon a petition alleging breach of an express oral contract. The county court impliedly, if not explicitly, rejected the plaintiff's claim of an express oral contract for repayment of a loan on or before a certain date. The county court erred in granting relief upon a cause not pleaded in the petition. The judgment on the plaintiff's petition must be reversed. Because the findings show that the court did not find an express contract for repayment on or before a certain date, there is no need for a new trial and the cause should be remanded with directions to dismiss the plaintiff's petition with prejudice.

8. The resolution of the third assignment of error makes it unnecessary to discuss Allen's fourth and sixth assignments of error.

9. Allen's first two assignments of error assert generalized claims which are not sufficient to establish the existence of error. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 750 (2000) (generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered). No further discussion of those claims is required.

10. Allen's fifth and seventh assignments of error attack the county court's dismissal of his counterclaim. His seventh assignment asserts that the county court erred in failing to acknowledge the testimony of an unrelated, disinterested witness. The trial court is empowered, as the finder of fact in a bench trial, to determine credibility of witnesses, and as discussed above, to accept or reject in whole or in part the testimony of any witness. Allen's fifth assignment claims that the trial court erred in finding nothing owed on the counterclaim "even when the [p]laintiff admitted owing part of it under oath." T15. The county court was not bound to accept the testimony of the plaintiff. The county court's rejection of

the counterclaim was not clearly erroneous. The judgment of the county court dismissing the counterclaim should be affirmed.

11. On remand, the costs of appeal should be taxed to the plaintiff-appellee, and costs in the county court should be taxed to the party incurring such costs.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The judgment of the county court is **AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.**

2. The judgment of the county court dismissing the defendant-appellant’s counterclaim is affirmed.

3. The judgment of the county court in favor of the plaintiff-appellee on the plaintiff-appellee’s petition is reversed, and the cause is remanded to the county court with directions to dismiss the plaintiff’s petition with prejudice and to tax costs incurred in the county court to the party incurring such costs.

4. Costs on appeal are taxed to the plaintiff-appellee, and the county court on remand shall enter judgment against the plaintiff-appellee for such costs on appeal.

5. The mandate shall issue as provided by law.

Signed in chambers at Ainsworth, Nebraska, on April 15, 2001.
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 **and deliver a certified copy to county court.**
Done on _____, 20__ by ____.
- 9 Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days **stating judgment entered as “AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS”.**
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed “Judgment on Appeal” entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge

**THE FOLLOWING DOES NOT CONSTITUTE ANY PORTION OF THE ABOVE JUDGMENT OR ORDER
AND IS INCLUDED SOLELY FOR THE CONVENIENCE OF THE CLERK OF THE DISTRICT COURT:**

1. Assuming that the clerk of the district court places the file stamp and date upon this order (the “entry” defined by § 25-1301) on **Monday, April 16, 2001**, the last day for filing notice of appeal and depositing docket fee for appeal to the Nebraska Court of Appeals would be **Wednesday, May 16, 2001**. Obviously, if filed sooner or later, the last day for further appeal would change accordingly.
2. If further appeal is timely perfected, issuance of the mandate of this court would await the mandate of the higher appellate court.
3. If **no** further appeal is timely perfected, within 2 judicial days after expiration of time for appeal, § 25-2733(1) requires the clerk of the district court to issue the mandate and to transmit the mandate to the clerk of the county court together with a copy of the decision.
4. The clerk of the district court should be prepared to transmit the mandate on **Thursday, May 17, 2001**. Again, obviously, if this judgment is filed sooner or later than April 16, the date would change accordingly.
5. In anticipation, at the clerk’s earliest convenience, the clerk should prepare a draft mandate for review to assure that it is properly completed as to form. The form is provided in the form book. The space for the district court decision would be filled in as “**AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS**”.
6. The mandate should be prepared in **two** duplicate originals. Both copies would be properly dated as to date of issuance, signed by the clerk, and the district court seal affixed.
7. **One** of the duplicate originals would be filed in the district court file. It would, of course, be file-stamped and docketed.
8. The **other** would be transmitted to county court on the **same day** that it is **issued**. The clerk of the district court would physically hand carry it to the county court clerk for filing in that court. **Attached** to the county court copy should be a **copy of the above judgment or order**. That attached copy does not have to be specially certified. The judge realizes that, pursuant to the court’s instructions, the district court clerk will have already transmitted a certified copy of the judgment or order to the county court at the time of entry. But the statute (§ 25-2733(1)) specifically requires that a copy of the decision be attached to the mandate.