

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**APPLEGATE, INC., a Nebraska
corporation,**

Plaintiff,

vs.

**LARRY PRIBIL, whose true name is
LAWRENCE PRIBIL,**

Defendant.

Case No. CI00-38

**ORDER ON MOTION FOR
PARTIAL SUMMARY
JUDGMENT**

DATE OF HEARING: June 4, 2001.
DATE OF RENDITION: July 27, 2001.
DATE OF ENTRY: See file stamp date per § 25-1301(3).
TYPE OF HEARING: Open court.
APPEARANCES:
For plaintiff: Rodney W. Smith.
For defendant: George H. Moyer, Jr.
SUBJECT OF ORDER: Defendant's motion for partial summary judgment.
PROCEEDINGS: See journal entry rendered on or about June 4, 2001.
FINDINGS: The court finds and concludes that:

1. In *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, ___ N.W.2d ___ (2000), the Nebraska Supreme Court restated the familiar principles applicable to motions for summary judgment:

a. Summary judgment is proper 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. In considering a summary judgment motion, 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. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

d. 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.

e. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

f. After the moving party makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

2. The motion first raises an issue regarding the ownership of the leased cattle, and whether the plaintiff is the real party in interest and whether non-party owners are necessary parties. The presence of necessary parties is jurisdictional and cannot be waived, and if such persons are not made parties, then the district court has no jurisdiction to determine the controversy. *Langemeier v. Urwiler Oil & Fertilizer*, 259 Neb. 876, 613 N.W.2d 435 (2000). When the determination of a controversy cannot be had without the presence of other parties, the trial court must order them to be brought in. *Id.*

3. In that case, which was an action seeking specific performance of a real estate purchase agreement, the Supreme Court held that persons claiming title to the property which is the subject of the purchase agreement are indispensable parties. The Supreme Court focused on the equitable nature of the proceeding, and the necessity of the presence of all parties claiming an ownership interest in order to accomplish complete justice.

4. The present case arises at law for claimed breach of contract and not in equity. On motion for summary judgment, the court views the evidence in the light most favorable to the plaintiff. At trial, it may well be necessary for the plaintiff to meet a burden of proof to show that the plaintiff actually incurred

certain losses by paying or otherwise accounting to the actual owner for certain losses which would otherwise accrue to the particular owner. Otherwise, it may well be that the plaintiff may fail to meet its burden of proof to show any damages for any breach of contract between the plaintiff and defendant as to those particular cattle.

5. On motion for summary judgment however, the inferences favorable to plaintiff arising from the testimony of James Applegate are sufficient to raise a factual issue regarding whether the corporate plaintiff did actually incur the loss from any breach of the contract between plaintiff and defendant. Clearly, as to the cattle owned by the corporate plaintiff, the defendant's argument lacks merit.

6. As to cattle owned by others and leased by the corporate plaintiff to the defendant, it is possible for the plaintiff to make out a claim for its losses arising from the defendant's breach of the contract wherein plaintiff leased cows owned by others to the defendant. The favorable inferences are sufficient to survive a summary judgment motion. But submission of the issue at trial depends upon the specific evidence then adduced.

7. The motion next attacks the plaintiff's claim in paragraph 4.c. of the petition for cows returned open and not bred. The defendant correctly notes that the lease agreement does not expressly require the return of bred cows. The plaintiff relies on the lease provision requiring the defendant to "adequately care" for the cattle. The amended petition alleges that the care failed to conform to industry standards. However, the deposition testimony of James Applegate clearly relies upon Applegate's individual subjective opinion rather than any industry standard. That part of the defendant's motion should be sustained.

8. Viewed in the light most favorable to the plaintiff, there is an issue of fact whether returning two cows with pink eye breached the contract provision requiring the defendant to "adequately care" for the cattle. That portion of the motion must be denied.

9. The motion also attacks the plaintiff's computation of damages as alleged in paragraphs 5.d. and 5.e. of the petition. Although the court is inclined to agree with the defendant's view of the proper measure of damages, summary judgment is not the proper means of determining the issue. The plaintiff's cause of action for breach of contract requires facts showing a contract, breach by the defendant, proximate cause, and damages. Viewed in the light most favorable to the plaintiff, there is at least a factual

issue on all elements of the cause of action. Determination of the specific amount of damages is a jury function under proper instructions. As so instructed, it may well be true that these particular damages are relatively minimal. But the allegation of the measure of damages is not part of the statement of facts constituting the cause of action. The court concludes that summary judgment is not the proper means of addressing the determination of the proper measure of damages.

10. The testimony of James Applegate shows that no damages were actually incurred as to the allegations of paragraph 4.f. regarding timely removal of the bulls from the cow herd, and the defendant is entitled to judgment as a matter of law on that issue.

11. To the extent of the allegations asserted in paragraphs 4.c. and 4.f. of the petition, the defendant met his burden to show 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 defendant is entitled to judgment as a matter of law on those issues.

12. It appears the deadlines for completion of discovery and filing of pretrial motions have expired, and that there are no other pretrial motions pending for disposition. The case should be set for final pretrial conference.

ORDER: IT IS THEREFORE ORDERED that:

1. The defendant's motion for partial summary judgment is granted to the extent of the relief set forth herein and is otherwise denied.

2. Interlocutory summary judgment is granted in favor of the defendant and against the plaintiff regarding the claim asserted in paragraph 4.c. of the petition.

3. Interlocutory summary judgment is granted in favor of the defendant and against the plaintiff regarding the claim asserted in paragraph 4.f. of the petition.

4. This order is interlocutory in character and does not constitute a final judgment under NEB. REV. STAT. § 25-1315 (Cum. Supp. 2000).

5. The case is assigned for final pretrial conference on **Monday, August 27, 2001**, at **1:35 p.m.**, or as soon thereafter as the same may be heard. All other requirements of the progression order, as previously amended from time to time, remain fully effective.

Signed in chambers at Ainsworth, Nebraska, on July 27, 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.
Done on _____, 20____ by ____.
- 9 Enter judgment on the judgment record.
Done on _____, 20____ by ____.
- 9 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 "Order on Motion for Partial Summary Judgment" entered; pretrial conference set for [date, from body of order] at [time, from body of order].
Done on _____, 20____ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge