

IN THE DISTRICT COURT OF KEYA PAHA COUNTY, NEBRASKA

ORA MEYERS and ORVILLE MEYERS,
Plaintiffs,

vs.

**GARY STORTENBECK, whose true
name is GARY STORTENBECKER,**
Defendant.

Case No. CI00-4

**ORDER ON MOTION FOR
SUMMARY JUDGMENT**

DATE OF HEARING: June 11, 2002.
DATE OF RENDITION: August 7, 2002.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
TYPE OF HEARING: In chambers at District Courtroom, Brown County
Courthouse, Ainsworth, Nebraska, per § 24-734.
APPEARANCES:
For plaintiffs: Forrest F. Peetz.
For defendant: Eric A. Scott.
SUBJECT OF ORDER: Defendant's motion for summary judgment.
PROCEEDINGS: See journal entry filed following hearing.
FINDINGS: The court finds and concludes that:

1. The defendant moved for summary judgment, upon argument asserting four grounds: (a) the subject lease is insufficient as a contract on its face, (b) the lease lacks a sufficient description of the leased premises, (c) the lease constitutes an illegal attempt to sublease school land, and, (d) the contract is illusory. The authorities cited by the defendant do not support the defendant's contentions. For the reasons set forth below, the motion will be denied.

2. In *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (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.

3. The first two arguments depend upon each other. In *Johnson v. City of Lincoln*, 174 Neb. 837, 120 N.W.2d 297 (1963), the Supreme Court noted that the want of a sufficient description may render a lease inoperative. But the court observed that no particular form is required, and any description by which the identity of the leased property may be established is sufficient. Further, the court stated that where the parties have by their conduct located the property, it is no objection that it was not described in the lease.

4. In the present case, the lease does not contain specific “legal” descriptions of the subject land. However, the lease does identify the property by reference to names for various tracts. Such description may be sufficient and at least raises an issue of fact

whether the descriptions identified the leased property. Moreover, the evidence tends to show that the parties by their conduct located the property, specifically, that the defendant took possession and operated the property. The evidence does not establish that the defendant is entitled to summary judgment on these grounds.

5. The defendant asserts the lease constitutes an illegal attempt to sublease school land. Exhibit 9 would at least raise an issue of fact on that question. But it is not necessary to consider Exhibit 9. In *State v. Kidder*, 173 Neb. 130, 112 N.W.2d 759 (1962), the Supreme Court affirmed a summary judgment in favor of the state granting possession of school land to the state and its tenant as against a former tenant whose lease had been declared forfeited by the Board of Educational Lands and Funds. The former tenant, Pearl Kidder, was divorced from her husband, Milton Kidder, and the divorce decree assigned the school land lease to the husband. The board never approved the assignment. The Supreme Court described the effect of the divorce action:

In the divorce decree the trial court ordered that [Pearl] assign to [Milton] a school land lease which she had. This constituted part of the property settlement between the parties. The State was not a party to the divorce action, and is not bound by the judgment rendered therein. The decree in the divorce action, including the property settlement, *while binding on the parties to the action*, was in no manner binding on the State or the [board]. The [board] was not prevented from carrying out the statutory provisions relative to school lands, *leaving the parties to the divorce action such rights and remedies as they may have between themselves*. Whatever rights or remedies the parties have in the divorce action, if any, cannot defeat the statutory powers of the [board] in the leasing of school lands.

Id. at 134, 112 N.W.2d at ____ (emphasis supplied). Thus, *Kidder* clearly establishes that an assignment or sublease, while having no effect on the right of the State to enforce the statutory requirement of board approval, is enforceable between the parties themselves. In the present case, even if the agreement at issue constitutes a sublease requiring and lacking board approval, that does not affect its enforcement between the parties. The defendant has no standing to assert any claim for the board regarding absence of board approval of any assignment or sublease.

6. Finally, the defendant urges that the contract was illusory in that either of the plaintiffs could have terminated the grazing at any time for insufficient grass. The evidence seems to show that the property was retained for the entire term and that the parties' conduct mooted the provision of the contract that the defendant attacks. At the least, there appears to be an issue of fact sufficient to defeat the defendant's motion for summary judgment.

7. This court is not satisfied that the defendant has met his burden of proof 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. The defendant's motion must be denied. The matter shall be rescheduled for final pretrial conference. (The pretrial conference time is for the morning of September 13 rather than the usual afternoon time, because of a change in the court's schedule for that session date to accommodate the official court reporter's absence on that morning.)

ORDER: IT IS THEREFORE ORDERED that:

1. The defendant's motion for summary judgment is denied.
2. The pretrial conference is rescheduled for **Friday, September 13, 2002**, at **10:00 a.m.** at the District Judge's chambers, **Brown County Courthouse, Ainsworth, Nebraska**. All requirements of previous progression order for pretrial conference remain effective. The parties are reminded that all settlement negotiations should be exhausted prior to the pretrial conference.

3. This is an interlocutory order.

Signed in chambers at **Ainsworth, Nebraska**, on **August 7, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

If checked, the court clerk shall:

Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.

Note the decision on the trial docket as: [date of filing] **Signed "Order on Motion for Summary Judgment" entered; pretrial conference rescheduled for [date and time from order]**.
Done on _____, 20____ by _____.

BY THE COURT:

William B. Cassel
District Judge

Mailed to: