

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

UNITED NEBRASKA BANK, O'NEILL,

Plaintiff-Appellee,

vs.

MICHAEL TROSHYNSKI,

Defendant-Appellant.

Case No. CI02-82

JUDGMENT ON APPEAL

DATE OF HEARING: (1) September 9, 2002, and,
(2) September 16, 2002.
DATE OF RENDITION: September 19, 2002.
DATE OF ENTRY: See court clerk's file-stamp date per § 25-1301(3).

APPEARANCES:

For appellant (defendant): (1) James Widtfeldt; (2) appearance waived.
For appellee (plaintiff): (1) Boyd W. Strobe; (2) appearance waived.

SUBJECT OF JUDGMENT: Appeal from county court judgment.

PROCEEDINGS: See journal entries rendered on September 9, 2002, and September 16, 2002, respectively.

MEMORANDUM:

1. United Nebraska Bank, O'Neill, ("bank") filed its petition with the county court against Michael Troshynski ("Troshynski") seeking a judgment upon a promissory note. The county court granted the bank's motion for summary judgment. Troshynski appeals.

2. Although Troshynski did not file a statement of errors in this court, he included assignments of errors in his notice of appeal filed in the county court and included in the transcript, and revised and restated assignments of errors in an amended notice of appeal filed in the county court and included in the (first) supplemental 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). All matters asserted in the first notice of appeal were again stated in the amended notice, and the original notice of appeal may for that purpose be disregarded.

3. The county court entered judgment on May 21, 2002. On May 22, the appellant filed a motion to alter or amend the judgment. See NEB. REV. STAT. § 25-1329 (Cum. Supp. 2000). That filing terminated the time for appeal from the judgment. NEB. REV. STAT. § 25-2729(6). The county court heard the motion to alter or amend on May 29, and that day announced its decision and requested the bank's counsel to prepare the written order. On that same date, the appellant filed his first notice of appeal and deposited docket fee. At that moment, this court did not acquire jurisdiction because the county court had not yet entered the order overruling the terminating motion. See NEB. REV. STAT. § 25-2729 (Cum. Supp. 2000). The amended notice of appeal was filed on June 7, also before the entry of the order on the terminating motion. This court still did not have jurisdiction. However, the (first) supplemental transcript shows that the order overruling the motion to alter or amend was subsequently entered by the county court on June 10, 2002. The notice of appeal and amended notice of appeal are considered in law to have been filed "on the date of and after the entry of the order." NEB. REV. STAT. § 25-2729(6) (Cum. Supp. 2000). Although this court did not have jurisdiction of the case when the appeal was filed, such jurisdiction has now been perfected.

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. Appellate review is limited to those errors specifically assigned in the appeal to the district court. *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997). Although an appellate court ordinarily considers only those errors assigned, the appellate court may, at its option, notice plain error. *Id.* Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.*

6. Troshynski's amended notice of appeal purports to assert four assignments of error "committed (sic)" by the appellee bank. That assertion demonstrates a fundamental misconception regarding the nature of review for error. A trial court can commit error. An appeal acts to provide redress for such error committed by the trial court. The appellate court reviews the determinations, actions, decisions, orders, and judgments of the trial court to determine whether the trial court erred. The *parties* do not exercise judicial power and cannot commit error subject to review by appeal. The parties may invite or induce the court or judge to err, but the appellate court reviews the acts or omissions of the trial court for error.

7. The other assignments of error in the amended notice of appeal intermingle irrelevancies and ambiguities with proper statements of error, making it difficult to determine the precise allegations of error asserted, particularly where the appellant elected not to submit any brief in accordance with the progression schedule ordered by this court. 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).

8. The assignment that the county court "wrongly did not allow the parties enough time to resolve the matter" does not sufficiently identify a specific act, ruling, or decision of the county court to review. It is possible that the assignment was intended to

assert that the county court erred in denying the appellant's motion for additional time to file an answer and counterclaim. As a general rule, the granting or withholding of permission to file a late pleading rests within the proper discretion of the trial court as a means of preventing delays and avoiding congestion of the trial docket. *W & K Farms v. Hi-Line Farms*, 226 Neb. 895, 416 N.W.2d 10 (1987).

9. The record shows that the appellee's petition was filed with the county court on January 29, and summons served on the appellant personally on January 31. The deadline for filing a written response would have been March 4. No response was timely filed. Although the file stamp is hard to read, it appears that the appellee's motion for default judgment was filed on Monday, March 18, although the certificate of service recites mailing on Friday, March 15. The appellant filed his motion for additional time on March 18 without any tender of a proposed answer. Although an order assigning the motions for hearing on April 4 appears in the record, the record fails to show that any hearing was held on April 4 or any reason why no hearing was held. On May 7, appellee filed its motion for summary judgment. The county court set hearing thereon for May 16. Prior to that date, the appellant made two offers in compromise pursuant to § 25-901, which were rejected by appellee. On May 16, the county court heard the motions. The court initially granted the motion for additional time, but after discovering that there was a motion for summary judgment and determining that the motion for summary judgment should be granted, reversed the granting of additional time to answer and denied the motion.

10. The offers in compromise could not affect the county court's ruling on the motion for additional time. Section 25-902 expressly states: "The making of an offer pursuant to the provisions contained in section 25-901 shall not be a cause for continuance of an action, or a postponement of a trial." NEB. REV. STAT. § 25-902 (Reissue 1995). The county court did not err in denying additional time for any reason relating to appellant's offers in compromise.

11. It is obvious to this court, as it was to the county court, that if the summary judgment was properly granted the appellant's motion for additional time would be moot. Section 25-1335 prescribes a prerequisite for a continuance of the summary judgment motion hearing, or additional time or other relief under the statute, namely, an affidavit stating a reasonable excuse or good cause for a party's inability to oppose a summary judgment motion. NEB. REV. STAT. § 25-1335 (Reissue 1995); *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989). Without the appropriate affidavit required by § 25-1335 a party is not entitled to a continuance or additional time to obtain affidavits or discovery to counteract an opposing party's motion for summary judgment. *Id.* The appellant did not submit any affidavit for continuance or additional time on the summary judgment motion. The county court did not err in denying additional time on the summary judgment motion. Further, the county court did not abuse its discretion in denying the motion for additional time to plead. The county court was never presented with any proposed pleading prior to entry of summary judgment, or even as late as the entry of order denying the motion to alter or amend judgment. The second supplemental transcript shows that the appellant finally submitted a proposed pleading on June 14. By that time, jurisdiction had vested in this court and the county court was without jurisdiction to act further. The county court cannot commit error by failing to pass upon an issue never presented to it. *Ways v. Shively*, 264 Neb. 250, ___ N.W.2d ___ (2002).

12. The appellant next assigns as error that the "court wrongly concluded it lacked the authority to" require that the bank "assign its claim against the estate of Evelyn Troshynski in return for, and to the same extent of, payment by [appellant] on the loan" The plaintiff's claim is based upon a promissory note signed by the appellant and by Evelyn Troshynski, now apparently deceased. The note clearly states, at the end of the paragraph entitled "GENERAL PROVISIONS," that "[t]he obligations under this Note are joint and several." The bank was clearly the owner and holder of the note.

13. For over 100 years, Nebraska law has authorized a plaintiff to include all or any of persons severally liable on the same note in the same action at the plaintiff's option. NEB. REV. STAT. § 25-320 (Cum. Supp. 2000); *Palmer v. McFarlane*, 73 Neb. 178, 102 N.W. 256 (1905). The law permitted the bank to choose to sue appellant, or the estate, or both. The "option of the plaintiff" plainly means that the plaintiff, and not the court, has the right to choose which maker or makers to sue. The bank chose to sue only the appellant. Whatever right the appellant may have, if any, to contribution from the estate of Evelyn Troshynski does not affect the plaintiff's right to enforce the note against either maker at the plaintiff's option. The county court was clearly correct in refusing the appellant's invitation to violate the plaintiff's right.

14. The next assignment is that "the [bank's] actions, in the Evelyn Troshynski Estate give the facts and the appearance of the [bank] attempting to use and actually using and abusing its position of creditor to favor unlawfully the children of Evelyn Troshynski by a previous marriage, over [the appellant]; . . ." This court cannot extract from this assertion anything resembling an assignment of error. The purpose of the rule requiring the appellant to file a statement of errors is to direct the reviewing court's attention to precisely what error was allegedly committed by the lower court and to advise the nonappealing party of the specific issues on appeal. *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995). A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000). If the appellant is attempting to raise the same issue discussed above, namely, the county court's enforcement of the plaintiff's right to choose which of severally-liable makers to include in the action, the assignment fails for the same reason discussed above. If that is not the claim, the assignment fails to specify the claimed error.

15. The next assignment is that "the orders of the [county court] herein, on May 16, 2002[,] and May 29, 2002, are against the law, the evidence and the facts, and the

county court can, could and should have ordered the [bank] to unconditionally assign all [the bank's] claims against the Estate of Evelyn Troshynski to [the appellant] in return for, and to the extent [the appellant] pays the loan herein; . . .” The first clause (“against the law, the evidence and the facts”) constitutes a vague and generalized assignment of error that cannot and will not be considered. The second clause merely restates the claim that this court previously rejected as set forth above. Restating the claim in different words fails to change the legal result.

16. The final assignment asserts that the county court “should have allowed the defendant to file an answer” This court set forth an extensive analysis above rejecting the appellant’s claim that the county court erred in denying appellant’s motion for additional time to file an answer. This merely restates the same claim, which still lacks merit for the same reasons.

17. The appellant failed to specifically assign error in the grant of summary judgment. For reasons set forth below, this court concludes that failing to address the issue because of appellant’s failure to specifically assign the error would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

18. 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. *Hogan v. Garden Cty.*, 264 Neb. 115, ___ N.W.2d ___ (2002). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.* As the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate such party’s entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party

opposing the motion. *Id.* If a genuine issue of fact exists, summary judgment may not properly be entered. *Id.* The question on such review is not how a factual issue is to be decided, but whether any real issue of genuine fact exists. *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999). A summary judgment is an extreme remedy because summary judgment may dispose of a crucial question or litigation and thereby deny a trial to the party against whom the motion for summary judgment is directed, and overruling a motion for summary judgment effectuates no real harm to the moving party. *City of Lincoln v. Nebraska Pub. Power Dist.*, 9 Neb. App. 465, 614 N.W.2d 359, *petition for further review overruled*, 260 Neb. xxv (2000).

19. In order to recover in an action for breach of contract, such as an action upon a promissory note, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty. *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996) (*Solar II*).

20. In *Pabst v. First American Distrib., Inc.*, 222 Neb. 591, 386 N.W.2d 422 (1986), an affirmative defense was raised by an answer filed the day after the summary judgment was submitted. The Supreme Court stated that such a filing is a nullity insofar as prior proceedings are concerned. The Supreme Court determined that the case was properly considered to be submitted on plaintiff's petition and defendants' general denial. In that case, the petition alleged that a copy of the note was attached and the signature of defendants was admitted. In an action on a promissory note in which defendants fail to plead affirmative defenses, such as lack of consideration or any other defense that would controvert the amount due, no issue of fact is presented for determination and plaintiff is entitled to summary judgment.

21. In the present case, there was no answer on file at the time of the hearing on the summary judgment motion, but as of that moment the county court had granted the motion for additional time to answer. Thus, while no affirmative defenses had been stated,

the appellant was not in default. This is essentially the same as the situation in *Pabst* where a general denial had been filed. However, in the present case, the appellee, as part of its evidence in support of the summary judgment motion, offered into evidence the appellant's answers to requests for admission. In response to the first request, seeking admission that the appellant signed the note, the appellant stated that he "signed the note only in his capacity as husband of Evelyn Troshynski, and not to bind his own separate estate." Exhibit 3. This court must consider what effect, if any, such statement has and whether it is sufficient to raise a genuine issue of fact preventing summary judgment on the issue.

22. In *Solar Motors v. First Nat. Bank of Chadron*, 4 Neb. App. 1, 537 N.W.2d 527 (1995) (*Solar I*), *aff'd*, 249 Neb. 758, 545 N.W.2d 714 (1996), the Court of Appeals observed that a note in the usual commercial form is a complete contract in itself, and its terms cannot be varied or contradicted by parol evidence. Of course, instruments made in reference to and as part of the same transaction are to be considered and construed together. *Solar II*, *supra*. This court has carefully examined the promissory note and the contemporaneous security agreement. Neither contains any statement, restriction, endorsement, limitation, etc., which would show that the appellant's signature capacity was limited in any way. The note and security agreement, construed together as a complete contract, cannot be varied or contradicted by parol evidence, and the appellant's gloss on the answer to request for admission constitutes only an invalid attempt to vary or contradict the unlimited signature capacity. The plain language of the "Multiple Parties" paragraph on page 4 of the security agreement specifically precludes such contradiction. This court concludes that the appellant's statement in the first answer to requests for admissions fails to raise any genuine issue of fact sufficient to prevent summary judgment. The appellant's evidence also fails to raise any genuine issue of fact. In his deposition the appellant admits signing the note without qualification. Exhibit 2, 32:6-25. For these reasons, the action of the county court in granting the summary judgment motion did not constitute plain error.

23. During oral arguments, this court questioned appellee's counsel whether the failure to produce the original promissory note at the summary judgment hearing constituted error. Upon consideration, this court can find no statute or rule requiring such production in the context of an action at law on a note. Although § 25-2140 provides a statutory basis for such requirement in a mortgage foreclosure action, even in such cases the Nebraska Supreme Court has stated that the possession and production of the note for cancellation is not an absolute requirement as a basis for a decree. *Commercial Fed. Sav. & L. Ass'n v. Grabenstein*, 231 Neb. 647, 437 N.W.2d 775 (1989). The absence of production of the original note does not constitute plain error in this case.

24. The judgment of the county court should be affirmed.

25. On remand, the costs of appeal should be taxed to the appellant.

JUDGMENT:

IT IS THEREFORE ADJUDGED that:

1. The judgment of the county court is AFFIRMED.
2. Costs on appeal are taxed to the appellant.
3. The mandate shall issue as provided by law.

Signed in chambers at Ainsworth, Nebraska, on September 19, 2002.
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 _____.
-  Enter judgment on the judgment record.
Done on _____, 20____ by _____.
-  Mail postcard/notice required by § 25-1301.01 within 3 days **stating “Judgment of county court AFFIRMED”**.
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, September 23, 2002**, the last day for filing notice of appeal and depositing docket fee for appeal to the Nebraska Court of Appeals would be **Wednesday, October 23, 2002**. 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, October 24, 2002**. Again, obviously, if this judgment is filed sooner or later than September 23, 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**”.
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.