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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROBERT FRAZIER,	)	
Plaintiff-Appellee,	)	Filed September 25, 1986
vs.	)	34
DAN WEBER, INC. and DAN WEBER, individually,	)	6-277 86-26
Defendants-Appellants.	)	

Appeal from the Iowa District Court for Marion County (2206) - Richard A. Strickler, Judge.

Defendants appeal from the order overruling their motion to set aside a default judgment asserting that good cause was shown sufficient to warrant the relief requested. **AFFIRMED.**

Roger A. Huddle of Weaver & Huddle, Wapello, Iowa, for defendants-appellants.

Dennis W. Emanuel of Webber, Gaumer & Emanuel, Ottumwa, Iowa, for plaintiff-appellee.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

HAYDEN, J.

Defendants, Dan Weber, Inc. and Dan Weber, sold plaintiff, Robert Frazier, an automobile that allegedly had its odometer rolled back. Based upon these allegations on July 1, 1985, the plaintiff filed a three-count petition against defendant in Monroe County Court. On July 9, 1985, defendants were personally served notice together with a copy of the petition. Within twenty days from this notice defendants failed to file a written notice, answer, or special appearance. The district court entered a default judgment on August 26, 1985. The judgment was supported by relevant affidavits and a copy of the odometer mileage statement.

Defendants filed their motion to set aside default judgment on September 27, 1985, which plaintiff resisted with motion and brief. In his motion defendant contends that shortly after receiving notice he took such notice to his counsel's office, Rodger Huddle of Weaver & Huddle in Wapello. Mr. Dan Weber then left town on business. Defendants state that individually and as a corporate entity they have several business ventures and employ different counsel. Defendants allege that confusion arose whether their counsel in Wapello or in Burlington was to handle this claim. As a result of this "confusion" absolutely no action was taken. No affidavit was filed from the Burlington firm to support these assertions.

The trial court overruled defendants' motion to set aside default, basing its decision on the reasons stated in plaintiff's resistance. In the resistance plaintiff contended that defendants failed to show good cause to set aside judgment and they failed to establish a meritorious defense to plaintiff's claim.

A proceeding on a motion to set aside default is at law. Flexsteel Industries, Inc. v. Morbern Industries, Ltd., 239 N.W.2d 593, 596 (Iowa 1976); Sher v. Burche, 353 N.W.2d 859, 862 (Iowa Ct. App. 1984). The trial court is vested with broad

discretion in ruling on such a motion and will be reversed on appeal only where discretion has been abused. Generally abuse will be found were the trial court's ruling is not supported by substantial evidence. Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977). Even in the situation where the trial court makes no findings of fact, we will uphold the ruling if any proper ground appears in the record. Hastings v. Espinosa, 340 N.W.2d 603, 608 (Iowa Ct. App. 1983).

Here the burden is upon defendants to show such "good cause" to set aside default, as will not only permit but require a finding of mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. Iowa R.C.P. 236. Good cause is more than an excuse, plea, apology, extenuation, or some justification for the resulting effect. Sher, 353 N.W.2d at 862. It does not exist without a claimed defense asserted in good faith or at least prima facie showing of a meritorious defense. Flexsteel, 239 N.W.2d at 601. Defendants must show that the failure to defend was not due to their negligence, failure to exercise ordinary care, carelessness or inattention. They must show that they fully intended to defend the action, but the intention was not fulfilled because of some misunderstanding, accident, mistake or excusable neglect. Paige, 252 N.W.2d at 437.

In the present case Dan Weber shortly after receiving the notice and petition took them to his attorney in Wapello. From the filing of the petition to the judgment of default more than seven weeks passed. During this period nothing was done. There is no evidence that Dan Weber called either his Wapello or Burlington attorneys, or that the attorneys called defendants. Further, there was no showing of correspondence between the two firms. In fact in their brief defendants admit that no one acted because the Wapello firm was confused as to who should handle the claim.

Regarding attorney-client error, we recognize the following:

> In general, the distinction between client error and attorney error is relevant in determining whether a default judgment should be overturned. It would not seem to be the sole factor, however; rather, it is part of the overall situation which might include prompt attention to the default, existence of a meritorious defense, appellate court's reliance on trial court's discretion and the policy of trial on the merits.

Wharff v. Iowa Methodist Hospital, 219 N.W.2d 18, 24 (Iowa 1974); Matter of Estate of Bearbower, 376 N.W.2d 922, 924 (Iowa Ct. App. 1985). A party may rely on the diligence of counsel, who has been neglectful, where the party has not been neglectful and has given reasonable attention to the proceedings. 24 Am. Jur. POF.2d Judgments § 705 (1980) and 46 Am. Jur.2d Judgments § 724 (1969). In Newell v. Tweed, 241 Iowa 90, 40 N.W.2d 20 (1949), defendant placed notice of the case in her attorney's hands and called him several times thereafter in reference to the case. The court found the entry of the default was due to no negligence on defendant's part and her attorney's neglect did not bar a setting aside of the default order. Id. at 96, 40 N.W.2d at 24. The Supreme Court has held an attorney's negligence may be imputed to a client when by the exercise of care on the client's part, he would have avoided the consequences of the attorney's negligence. Handy v. Handy, 250 Iowa 879, 885-86, 96 N.W.2d 922, 927 (1954) (quoting Peterson v. Kuch, 110 Iowa 19, 21, 81 N.W. 160, 161 (1899)). See also Haynes v. Ruhoff, 261 Iowa 1279, 1284, 157 N.W.2d 914, 917 (1968).

Here Dan Weber did not give reasonable attention to the proceedings. He failed to act as a reasonably prudent person would have in this same situation. See Haenichen v. Worthington, 9 Ariz. App. 83, 86-87, 449 P.2d 319, 323 (1969); Coombes v. Coombes, 91 Idaho 729, 732, 430 P.2d 95, 98 (1967); Booth v. Magee Carpet Co., 548 P.2d 1252, 1255 (Wyo. 1976). Dan Weber was negligent in that he failed in any way to keep apprised of these proceedings. At the very minimum

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he should have, at some point in the seven-week period, called either his counsel in Wapello or Burlington. No evidence was presented to show any correspondence was ever made. We conclude defendant acted unreasonably. We note the unexplained failure to act by defendant's counsel in Wapello, but do not reach any conclusion regarding such failure. We consider only defendant's actions, or lack thereof.

As pointed out earlier, attorney-client error is but one factor for us to consider in our determination. The trial court's discretion is broad and its decision will be reversed only where the ruling is not supported by substantial evidence. Here the district court did not find any "good cause" to set aside the default judgment. The record on appeal is sparse. Defendants filed no affidavits and prepared no transcript for appeal. The only material in support of defendant's assertions are the motion to set aside default, defendants' answer and the statement of additional evidence and proceedings filed on January 22, 1986. From this record we find no evidence of a "good cause" for setting aside the motion for default. Defendants' pleadings offer nothing more than an excuse for their failure to appear. After a careful review of the record, we conclude the district court's order is supported by substantial evidence and therefore affirm.

In conclusion, we refer to the following:

> Defaults occurring through negligence or carelessness on the part of the judgment defendant or his attorney will not, of course, be set aside, for the law rewards the diligent, and not the careless. Moreover, one who, through carelessness or inattention to duty, brings misfortune upon himself, will not, as a rule, be heard to complain.

Mishler v. Stouwie, 301 N.W.2d 744, 748 (Iowa 1981); Windus v. Great Plains Gas, 255 Iowa 587, 595, 122 N.W.2d 901, 906 (1963); Barto v. Sioux City Electric Co., 119 Iowa 179, 183, 93 N.W. 268, 270 (1903). Defendant, through his inatten-

tiveness, brought misfortune upon himself and we consider such failure insufficient to warrant setting aside the default judgment.

AFFIRMED.