FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MAURINE RANDALL and CHARLES RANDALL,

Plaintiff-Appellees,

vs.

RANSON D. GILLESPIE d/b/a J R LOUNGE,

Defendant-Appellant.

Filed October 21, 1980

0-77
2-64099

Appeal from Polk District Court - A. B. Crouch, Judge.

Defendant appeals from trial court's order overruling his motion to set aside a default judgment alleging trial court abused its discretion in refusing to set aside the judgment. AFFIRMED.

Gerry M. Rinden of Klockau, McCarthy, Lousberg, Ellison & Rinden, Rock Island, Illinois, for defendant-appellant.

Gary R. Hassel of Des Moines, Iowa, for plaintiff-appellees.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, Ranson D. Gillespie, appeals from trial court's order overruling his motion to set aside a default judgment entered in plaintiffs' action to recover for personal injuries received at defendant's tavern. He alleges trial court abused its discretion in refusing to set aside the default judgment for $7,699.45. We affirm.

Plaintiffs filed suit against defendant on March 26, 1979, seeking damages for personal injuries received at defendant's tavern on November 4, 1978. Plaintiffs alleged that a bartender employed by defendant became intoxicated and abusive and then "forcibly . . . threw [plaintiff Maurine Randall] . . . out of the door." Defendant was served with Original Notice on March 27, 1979, but allegedly threw the papers away because he believed he had not been officially served since the person was not in uniform and did not appear to be an official of the court. Defendant filed no appearance, motion, or responsive pleading as required by Iowa R. Civ. P. 53. Upon plaintiffs' motion, trial court entered a default judgment on April 27, 1979. Defendant allegedly received notice of the default during the week of May 29, 1979. He then filed a motion to set aside the default judgment on June 25, 1979, alleging that his failure to appear and defend within the time required by law was a result of "mistake, inadvertance and excusable neglect." Trial court overruled defendant's motion and this appeal followed.

I. Scope of Review. Since this is an action at law, appellate review is on assigned error only. Iowa R. App. P. 4.

II. Propriety of Trial Court's Ruling on Motion to Set Aside Default Judgment. Defendant claims trial court abused its discretion in refusing to set aside the default judgment. He asserts 1) that he mistakenly believed he had not been served, 2) that he intended to defend, 3) that he had a meritorious defense, and 4) that plaintiff would not be prejudiced.

Trial court is vested with broad discretion in ruling on a motion to set aside a default judgment. Gateway Transportation Co. v. Phillips & Phillips Co., 261 N.W.2d 175, 177 (Iowa 1978). We will reverse on appeal only if trial court's discretion is abused. Id. "Generally, abuse will be found only where there is a lack of substantial evidence to support the trial court's ruling." Id.; Paige v. City of Chariton, 252 N.W.2d 433, 437 (Iowa 1977). "We view the evidence in the light most favorable to trial court's ruling and will uphold the ruling, even where the trial court made no findings of fact or based its

ruling on a different ground," Paige, 252 N.W.2d at 437, if any proper ground appears in the record. Williamson v. Casey, 220 N.W.2d 638, 639 (Iowa 1974).

Defendant has the burden to show good cause to set aside the default judgment. Good cause under Iowa R. Civ. P. 236 requires: 1) mistake; 2) inadvertance; 3) surprise; 4) excusable neglect; or 5) unavoidable casualty. Paige, 252 N.W.2d at 437. Defendant ". . . must show his failure to defend was not due to his negligence, want of ordinary care or attention, or to his carelessness or inattention." Id. He also ". . . must affirmatively show he intended to defend and took steps to do so. . ." but because of good cause, failed to do so. Id. Therefore, when a defendant shows ". . . [he] has acted promptly, and in good faith, intends to defend and shows a meritorious defense, and there has been no prejudice to the plaintiff and no delay of an expeditious trial, . . ." it is well within trial court's discretion to set aside the default judgment. Edgar v. Armored Carrier Corp., 256 Iowa 700, 707, 128 N.W.2d 922, 926 (1964). With these principles in mind we will address defendant's assertions.

A. Defendant first contends he mistakenly believed that he had not been served when a non-uniformed person gave him the original notice. Iowa R. Civ. P. 52, however, does not limit service of an original notice to sheriffs or bailiffs. Further, the Iowa cases have held that a party's misconstruction of a proper legal notice does not provide good cause. Williamson, 220 N.W.2d at 640. In addition, defendant knew by an earlier telephone call and letter from plaintiffs' counsel that he was likely to be involved in litigation with plaintiffs. We therefore find defendant's argument of mistaken belief to be without merit.

B. Defendant next claims he intended to defend this suit. In Paige, the motion to set aside the default judgment was brought within eighteen (18) days of the entry of the default judgment. 252 N.W.2d at 436. The court noted that "[i]t is significant defendants moved promptly to set aside the default." Id. at 437. Here, while entry of the default judgment was made on April 27, 1979, defendant did not bring his action to set aside the judgment until June 25, 1979, only two days before the sixty (60) day deadline set by Iowa R. Civ. P. 236. Although defendant claimed to receive no notice of the default judgment until May 29, 1979, when he was contacted by his insurance agent, under Iowa R. Civ. P. 233, failure of the clerk to give the required written notice does not invalidate the judgment. Further, defendant's one-month delay thereafter in initiating his action diminishes the significance of his claim that he intended to defend. We conclude defendant failed promptly to "affirmatively show" he intended to defend.

C. Defendant further asserts that the default judgment should be set aside because he had a meritorious defense. A prima facie showing of a meritorious defense is required under Iowa R. Civ. P. 236. Hannan v. Bowles Watchband Co., 180 N.W.2d 221, 224 (Iowa 1970). Even if we were to assume, however, that defendant has shown at least one meritorious defense, this alone is insufficient to sustain defendant's claim to set aside the default judgment. See Edgar, 256 Iowa at 707, 128 N.W.2d at 926.

D. Lastly, defendant contends plaintiffs would not be prejudiced because defendant's motion to set aside the default was filed within ninety (90) days after plaintiffs filed their petition. In resisting defendant's motion, plaintiffs cite medical expenses, loss of wages, and difficulties with credit ratings due to inability to pay medical expenses as bases for prejudice if the judgment is set aside and the matter set for trial. We note that plaintiffs correctly followed all of the required procedures in bringing their action against defendant, and that defendant, by his own choice, discarded the official papers carrying the court's seal. We do not believe that a reasonable person who already had received communications indicating the possibility of litigation would throw away and, thereby, ignore the original notice, even if served by a non-uniformed person. Defendant's decision not to investigate the meaning of the original notice cannot now serve to deny plaintiffs the judgment they pursued through correct procedures.

We conclude defendant failed to show good cause due to mistake to set aside the default judgment. He has not demonstrated that his failure to defend was not due to his own negligence, want of ordinary care or attention, or to his carelessness or inattention. In addition, his intent to defend was insufficiently demonstrated. A meritorious defense alone is insufficient to sustain defendant's claim that trial court abused its discretion in refusing to set aside the default judgment. Having found no abuse of discretion, we affirm trial court's judgment.

AFFIRMED.