

FILED**MAY 20 1977****CLERK SUPREME COURT**

IN THE COURT OF APPEALS OF IOWA

HAROLD W. BEAN,

)

Appellant,

)

Filed May 20, 1977

v.

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HOOK'S RADIATOR & AIR CONDITIONING,)
INC., now known as HOOK'S INC.,)

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2-57218

Appellee.

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Appeal from Black Hawk District Court - Carroll E. Engelkes
and George C. Heath, Judges.

Appeal from order dismissing plaintiff's personal injury
claim on motion for summary judgment. Modified and affirmed.

William S. Smith, Zellhoefer, Smith & Randall, of Waterloo,
for appellant.

W. David Tyler, Swisher & Cohrt, of Waterloo, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and
Carter, JJ.

CARTER, J.

This is an appeal from an order dismissing plaintiff's personal injury claim on a motion for summary judgment. The motion was sustained on the ground that the court was without jurisdiction. On appeal the defendant-appellee urges, as an alternative ground for dismissing the case, that it was also properly dismissed under rule 215.1, Rules of Civil Procedure, and not subject to reinstatement. We believe the trial court properly sustained the motion for summary judgment and dismissed the case but believe that the dismissal should be on the merits rather than for want of jurisdiction. We accordingly remand for an amended order of dismissal.

I. We first consider the claimed application of rule 215.1, R.C.P. The record reflects that after the hearing on the motion for summary judgment and after the trial court had orally announced his ruling on same, but prior to record entry of said ruling and judgment, another judge entered an order dismissing the case pursuant to rule 215.1. No application was made to rescind this order until more than eight months after its entry. Plaintiff then made application to reinstate the case which was granted by the court. The ruling sustaining the motion for summary judgment was then entered of record and the case dismissed pursuant to that ruling.

Defendant argues that because the six month period for filing applications to reinstate cases dismissed pursuant to rule 215.1 dismissals had expired the court was without jurisdiction to act on the application. In view of the holding in *Kiertzner v. Ehrp*, 218 N.W.2d 587 (Iowa 1974) we do not deem the six month period to be jurisdictional and conclude that the case was properly reinstated.

II. With respect to the validity of the order sustaining defendant's motion for summary judgment we view the issue somewhat differently than did the trial court. The trial court held that it was without jurisdiction to enforce plaintiff's personal injury claim against the defendant corporation which was not in existence at the time of the occurrence upon which the claim is based. We hold that the court had jurisdiction to act in the premises but that the subsequently organized corporate defendant is not liable for the plaintiff's claim. We base this holding on the proposition that the authorities upon which plaintiff relies to assert its claim directly against a successor business do not apply where, as in the present case, the former business is an individual proprietorship.

In Luedecke v. Des Moines Cabinet Co., 140 Iowa 223, 118 N.W. 456 (1908) and Gibson v. American Ry. Express Co., 195 Iowa 1126, 193 N.W. 274 (1923) it was held that where one corporation transfers all of its assets to another corporation, not in the ordinary course of business, creditors of the transferring corporation may maintain a direct action against the transferee corporation. We believe the reasons supporting application of this rule to corporations are inapposite to transfers by individuals. The ability of the owners of corporations to permanently convert these artificial entities into insolvent shells or to terminate their legal existence entirely poses a threat to corporate creditors not faced by creditors of an individual proprietorship. In the proprietorship form of business organization the continuing personal liability of the owner coupled with the fact that it is more difficult for an individual to manage his affairs so as to remain "judgment proof" presents additional security for creditors.

This is particularly true in the present case where the owner of the proprietorship is now (together with his wife) the owner of the stock of the corporation to which the assets of the former business were transferred.

We believe that such remedies, if any, as the law may give creditors with respect to transfer of assets by debtors who are natural persons should ordinarily be confined to transfers in fraud of creditors under existing case law. Under that body of law it is the rule in this state, subject to a few exceptions not applicable here, that a creditor must first recover a judgment against the primary obligor. Chapter 630.16, The Code; *Bristow v. Lange*, 221 Iowa 904, 913-14 (1936); *Cooper v. Erickson*, 213 Iowa 448, 450-52 (1931); *Federal Reserve Bank v. Geannoulis*, 203 Iowa 1385, 1388-90 (1927); *Crary v. Kurtz*, 132 Iowa 105, 111-12 (1906); *Goode v. Garrity*, 75 Iowa 713, 715-16 (1888); *Buchanan v. Marsh*, 17 Iowa 494, 496 (1864); *see*, 36 Iowa L.Rev. 104, 106-11 (1950); 37 Am.Jur.2d *Fraudulent Conveyances* § 175. We accordingly hold that plaintiff may not proceed directly against this defendant on the instant tort claim.

We modify the trial court's judgment so as to indicate that the dismissal of plaintiff's claim is on the merits. As so modified the judgment is affirmed.

SNELL, J., and OXBERGER, J., concur; ALLBEE, C.J., and DONIELSON, J., concur specially.

ALLBEE, C.J. (specially concurring)

Because I disagree with the majority's handling of the rule 215.1 issue, I must specially concur. Rule 215.1 provides for the mandatory dismissal of cases by operation of law if plaintiff has not formally sought a continuance. *Baty v. City of West Des Moines*, 259 Iowa 1017, 147 N.W.2d 204 (1966). If an action has been so dismissed, the rule allows plaintiff six months to seek reinstatement. Rule 215.1, Rules of Civil Procedure. In this case, Bean waited nine months following the order of dismissal to seek reinstatement. Unlike the majority, I believe the passing of the six month time for reinstatement is a jurisdictional bar, consequently, the trial court lacked jurisdiction to reinstate the case.

Our Supreme Court has consistently held that the time limits of rule 215.1 are jurisdictional. *See Schimerowski v. Iowa Beef Packers, Inc.*, 196 N.W.2d 551 (Iowa 1972); *Baty v. City of West Des Moines*, *supra*; *Gammel v. Perry*, 256 Iowa 1129, 130 N.W.2d 550 (1964); *Kutrules v. Suchomel*, 258 Iowa 1206, 141 N.W.2d 593 (1966). *Kiertzner v. Ehrp*, 218 N.W.2d 587 (Iowa 1974), relied upon by the majority, does not hold the contrary. *Kiertzner* merely held that a rule 215.1 dismissal must be based upon proper notice by the clerk to have a jurisdictional base. *See also*, *Schmidt v. Abbott*, 261 Iowa 886, 156 N.W.2d 649 (1968). This result is not due to any idiosyncrasy of rule 215.1, but rather, because any court order entered without jurisdiction is void and may be successfully challenged years later. *See Rosenberg v. Jackson*, 247 N.W.2d 216 (Iowa 1976). Clearly *Kiertzner* did not overrule earlier precedent, indeed only last month our Supreme Court dismissed an appeal for want of jurisdiction due to a rule 215.1 violation. *See Barrett v. Horning*, ___ N.W.2d ___ (Iowa, April 20, 1977).

The effect of the majority's decision is profound. If the six month time limit for reinstatement is not a bar, what is it? Surely the legislature meant it as more than a suggestion to litigants and judges. The only interpretation which gives it any practical meaning is that the time of reinstatement is jurisdictional - it is the end of the lawsuit. To permit reinstatement after six months raises the spectre of long dead lawsuits being resurrected to the detriment of intervening creditors, purchasers, and title examiners who have relied upon the here-to-fore finality of a rule 215.1 dismissal.

The record before us compels the conclusion that trial court was without jurisdiction to reinstate this case.